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Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction

GEOFFREY C. HEISEY*

INTRODUCTION

"WARNING WARNING NO OUTSIDE WHITE VISITORS ALLOWED BECAUSE OF YOUR FAILURE TO OBEY THE LAWS OF OUR TRIBE AS WELL AS THE LAWS OF YOUR OWN. THIS VILLAGE IS HEREBY CLOSED."[1]

For nearly twenty years, tribal courts and law-enforcement authorities have been in the unenviable position of lacking criminal jurisdiction over non-Indians who live on or visit Indian reservations. In *Oliphant v. Suquamish Indian Tribe*,[2] the Supreme Court negated tribal jurisdiction over non-Indian defendants who commit crimes in Indian country. Commentators in the area of Native- American law have attacked the decision,[3] but the attacks have fallen on the deaf ears of the Supreme Court. In fact, in the past twenty years, the Burger and Rehnquist Courts have charted a steady course away from the congressional policy of Indian self-determination in many areas of Indian law including criminal jurisdiction. This is somewhat of a historical role reversal for the Court, which has been instrumental in protecting the rights of Native Americans since Chief Justice Marshall penned his famous trilogy of Indian-law cases between 1823

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* J.D. Candidate, 1998, Indiana University School of Law-Bloomington; B.A., 1993, Indiana University. Special thanks to Professor Craig Bradley and extra special thanks to Professor David Williams who helped me put out all of the little "brush fires" in this paper, and whose Federal Indian Law class was the inspiration for this Comment.

1. Sign erected at the entrance to the Hopi village of Oraibi, Arizona, by the tribal leader Kikmongwi, Mina Lansa.

2. 435 U.S. 191 (1978).

3. *See generally* Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979) (arguing that the decision deprived American Indians of self-governing authority); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1995) (asserting that Chief Justice Rehnquist's decision limited tribal sovereignty); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole Is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993) (arguing that the decision is grounded on faulty assumptions); Paul S. Volk, Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction over Crimes by and Against Reservation Indians*, 20 NEW ENG. L. REV. 247 (1984-1985) (criticizing the Court's decision for weakening Indian sovereignty).

and 1832.[4] Historically, Congress has not treated Native Americans as favorably. Through policies of conquest, removal, assimilation, termination, and treaty abrogation, Congress until very recently has had a mostly adversarial relationship with the tribes.[5] However, beginning in 1934 and continuing to the present, Congress has promulgated a policy of tribal self-determination.[6] While commentators have advocated overruling *Oliphant*, they have largely ignored the congressional failure to rectify, through legislation, the injustice that the decision created. Critics continue to criticize the Court's decision and attack its legal arguments as myopic and contrived.[7] The *Oliphant* decision and other recent cases clearly indicate the Court's intent to undermine Congress's policy of self-determination for American Indians.[8]

The solution to the problems that *Oliphant* has created must therefore come from another source. It is time for Congress to exercise its plenary power over Indian affairs vested in it by the Constitution and confirmed by Chief Justice Marshall over a century and a half ago.[9] It is time for Congress to reverse the *Oliphant* holding and recognize this jurisdiction over offenses committed by non-Indians in Indian country. In Parts I and II of this Comment, I will attempt to briefly revisit the historical background crucial to the conclusion that Congress can and should change the law created by the *Oliphant* decision. In Part III, I will outline the numerous arguments criticizing the *Oliphant* decision. Finally, in Part IV, I will suggest a course of action Congress might follow in restoring criminal jurisdiction to the tribes.

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4. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

5. *See* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 49 (Rennard Strickland et al. eds., 1982).

6. *See id.* at 147, 180.

7. Peter Maxfield argues:

> The Court attempts to substantiate its finding[s] . . . with a long list of authorities that supposedly demonstrate that the Courts, the Congress, and the Executive have long assumed that Indian tribes lacked . . . [criminal] jurisdiction [over non-Indians]. . . . In fact, these authorities did not rely on solicitude for non-Indian rights, but rather indicate that the solicitude that the *Oliphant* Court used as the foundation for its finding *simply did not exist.*

Maxfield, *supra* note 3, at 440 (emphasis added).

8. *See generally* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (holding that the county may impose an ad valorem tax on reservation land owned by members); Duro v. Reina, 495 U.S. 676 (1990) (holding that an Indian tribe cannot exercise criminal jurisdiction over a defendant of diverse tribal affiliation); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that the state may impose severance taxes on oil and gas produced on the Indian reservation even though the tribe already taxed that production, thereby reducing the value of a lease on the reservation).

9. *See Worcester*, 31 U.S. (6 Pet.) at 561.

I. *OLIPHANT* AND ITS AFTERMATH

The *Oliphant* case arose from the enforcement of the Suquamish Indian Tribe's *Law and Order Code* against two non-Indian defendants, Mark David Oliphant and Daniel B. Belgarde.[10] Oliphant was arrested during an annual Suquamish celebration and charged with assaulting a tribal police officer and resisting arrest. Belgarde was arrested for a high-speed chase with tribal police that ended when Belgarde collided with a tribal patrol car. He was charged under the *Law and Order Code* with recklessly endangering another person and injuring tribal property. The two men applied for a writ of habeas corpus under the Indian Civil Rights Act of 1968[11] arguing that the tribal court did not have jurisdiction. The district court and the U.S. Court of Appeals for the Ninth Circuit both upheld tribal jurisdiction, but the Supreme Court held that Indian tribal courts have no criminal jurisdiction over non-Indians.[12] Unfortunately, the Supreme Court did not consider whether tribal police retain the authority to arrest non-Indians for offenses committed on Indian country. This issue remains uncertain. Assuming tribes have retained this power, tribal courts lack the requisite jurisdiction to punish the offenders who are arrested.

A. The Tripartite Division of Jurisdiction

On Indian country there is a tripartite division of criminal jurisdiction that has evolved during the long relationship between the Indian tribes and the United States. Federal, state, and tribal courts claim varying degrees of criminal jurisdiction based on different concepts of sovereignty.[13] By eliminating tribal criminal jurisdiction over non-Indians, *Oliphant* removed from the tripartite

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10. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978).

11. 25 U.S.C. §§ 1301-1303 (1994). Section 1303 states: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

12. *See Oliphant*, 435 U.S. at 194-95.

13. *See* Volk, *supra* note 3, at 250-53.

> The federal claim to jurisdiction over crimes committed by and against Indians on the reservations is based on: (1) constitutional treatymaking and commerce powers; (2) federal "trusteeship" over Indian lands; and (3) federal statutes conferring such criminal jurisdiction on federal courts.
>
> . . . .
>
> The two bases for state jurisdiction over offenses committed on Indian territory are premised on inherent sovereignty over state land and state citizens [pertaining to crimes involving non-Indians only], as well as federal grants of such jurisdiction in statutes such as Public Law 280 and its related acts [pertaining to interracial crimes involving non-Indian defendants].
>
> . . . .
>
> Tribal claims to jurisdiction over crimes occurring on Indian territory are based on early treaties, as well as case law recognizing inherent Indian sovereignty over Indian territory and people under the reservation system.

Id. (footnotes omitted). For more on Public Law 280, see *infra* notes 29-31 and accompanying text.

system the most practical and logical body for administering criminal justice on the reservations.[14]

The federal government is able, and is usually willing, to prosecute the major crimes enumerated in the Indian Major Crimes Act when they occur on Indian land.[15] However, despite having the authority to prosecute interracial minor crimes,[16] the federal court system is far too encumbered to prosecute the numerous minor crimes associated with life on the reservation. States, on the other hand, have quite limited authority on reservations,[17] and they are frequently unwilling to expend the money or resources necessary to exercise what little authority they have.[18] States receive little or no revenue from tribal sources and are reluctant to allocate scarce state funds to enforce tribal laws on the reservation. Additionally, state law-enforcement agencies are often too far removed from the reservations to be effective in preventing everyday crimes committed by non-Indians.[19] Therefore, due to the gaps left by federal and state courts in prosecuting non-Indian offenders, many minor crimes committed on the reservation by non-Indians go unpunished. These include offenses such as drunken or reckless driving, petty theft, simple assault, traffic offenses, vandalism, littering, and even parking violations.[20]

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14. *See* Stephen M. Johnson, Note, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of* Oliphant, 7 AM. INDIAN L. REV. 291, 292 (1979).

15. The Indian Major Crimes Act, 18 U.S.C. § 1153 (1994), reads:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

16. Title 18 U.S.C. § 1152 reads:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

17. *See* Volk, *supra* note 3, at 253.

18. *See id.* at 279.

19. *See id.* at 273-74.

20. *See id.* at 274.

B. Consequences of the Tribal Courts' Lack of Criminal Jurisdiction over Non-Indians

The *Oliphant* decision is an affront to both tribes and tribal self-determination that leaves few options for controlling the conduct of non-Indians who live on or visit the reservation. It also decreases non-Indians' respect for tribal authority, and generally encourages lawlessness by non-Indians while they are in Indian country.[21] Furthermore, *Oliphant* leaves the tribes powerless to protect tribal property, interests, and members from the criminal conduct of non-Indians. In fact, crime statistics for all the reservations are compiled through the Native American Police Academy, but there is no incentive to keep statistics on crimes committed by non-Indians since tribal courts are powerless to punish these criminals.[22] The only statistics available on non-Indian crime would have to be collected from the few local jurisdictions that have arrangements with the tribes to prosecute non-Indian offenders who commit crimes on the reservation.[23] This lack of crime statistics results from the tribes' powerlessness and it shows the state of disarray in the current system. It is necessary for the tribes, as it is for any territorially based sovereign, to have the power to handle these problems through their tribal police and in their tribal court systems.[24] Ultimately, the Court's decision in *Oliphant* jeopardizes the relationship between Indians and non-Indians. Tribal powerlessness leads to frustration in coping with the rising problem of non-Indian crime on the reservation; consequently, tribes may react with anger, dislike, and mistreatment of non-Indians who reside on or visit the reservation. Conversely, non-Indians react to the tribes with what might be a fundamental lack of respect and even contempt for impotent tribal authorities.[25]

Because they lack criminal jurisdiction over non-Indians, tribes and tribal members are left with the four following alternatives.[26] The first is to remove or exclude non-Indian offenders from the reservations. The next is to employ self-help methods against non-Indian offenders. Some tribal entities have expressed the willingness to take the law into their own hands in an effort to stem the tide of non-Indian offenders.[27] Obviously this situation is repugnant to both the interests of the United States and the tribal judicial systems, and can be highly destructive to the local communities. Another alternative is to rely on federal authorities that are too understaffed to be truly effective in solving the minor-crime problems on the reservations. It is unrealistic to expect this alternative to have any real effect on the tribes' predicament in controlling the criminal

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21. *See id.*

22. *See* Telephone Interview with Craig Jones, Native American Police Academy (Mar. 1997).

23. *See id.*

24. *See* Dussias, *supra* note 3, at 5 & n.13.

25. *See* Johnson, *supra* note 14, at 293.

26. *See* Volk, *supra* note 3, at 275.

27. *See* Johnson, *supra* note 14, at 293.

conduct of non-Indians.[28] Finally, Public Law 280[29] gives the necessary federal consent to state assumption of criminal and civil jurisdiction over Indian territory, provided the tribe *consents* to such an assumption of jurisdiction.[30] However, both the states and the tribes have found Public Law 280 too draconian and have been unwilling to either assume or consent to an assumption of such jurisdiction.[31]

II. INDIAN-LAW BACKGROUND AND CONGRESSIONAL POLICY SWINGS

A proposed solution to a problem in Indian law must be cast against the basic framework governing the relationship between the tribes and the United States. It is therefore necessary to examine the Marshall trilogy, the Indian-law canons of construction, and congressional policy swings in the area of Indian affairs before fashioning such a solution. All that is required here is a modest illustration of congressional power over the tribes and the traditional judicial justifications of that power.

A. The Marshall Trilogy

The Marshall trilogy is a series of three Supreme Court cases decided between 1823 and 1832. These cases were the first Supreme Court cases to consider Indian-law issues, and they established the canons of Indian law that courts have followed for nearly 150 years.

1. *Johnson v. M'Intosh*

Since the birth of the United States, there has been concern over the scope of Indian title and sovereignty. Because the United States developed from colonialism and conquest, these concepts have been and will continue to be intertwined with the legitimacy of this nation despite the fact that the Constitution rejects the imperialist system from which these concepts emerged. Early on, the question remained as to the scope of Indian title and sovereignty in relation to that of the fledgling United States.

In 1823, Chief Justice Marshall was forced to reconcile these fundamental contradictions in *Johnson v. M'Intosh*.[32] Chief Justice Marshall looked to solve this problem through the principle of discovery. The theory he espoused was that discovery by a European sovereign gave that sovereign title against all other

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28. *See id.* at 300 ("[A] Department of Justice report had itself ascertained that [even before *Oliphant*] United States Attorneys had declined to prosecute 75 percent of the Indian cases presented to them.").

29. Act of Aug. 15, 1953, Pub. L. No. 83-280, sec. 2, 67 Stat. 588, 588 (codified as amended at 18 U.S.C. § 1162(a) (1994)).

30. *See* Volk, *supra* note 3, at 252; *see also* Johnson, *supra* note 14, at 312.

31. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 552-53 (1975).

32. 21 U.S. (8 Wheat.) 543 (1823).

European governments and that actual possession consummated such title.[33] This right, in turn, gave the discovering nation the sole right to acquire land from the natives and settle on it.[34] Implicit in this arrangement was the acknowledgment that the natives were sovereign with the right to possess and use the land as they saw fit, subject only to certain limits in alienating the land.[35]

Marshall then applied this theory to substantiate Great Britain's claims to the territories it acquired in the New World,[36] and emphasized that in the treaty ending the Revolutionary War, the rights of Great Britain attained by means of discovery were ceded to the United States through conquest.[37]

Finally, Marshall asserted that with discovery came both the exclusive right to extinguish the Indian right of occupancy by means of purchase or conquest and also the right to determine the degree of sovereignty held by the Indians.[38] In conclusion, Marshall proclaimed:

> The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the charter limits of the British colonies. . . . These claims have been maintained and established as far west as the river Mississippi, by the sword. . . . *It is not for the Courts of this country to question the validity of this title* . . . .[39]

For Marshall to hold otherwise would have raised doubts about the legitimacy of the United States' claim to the lands within its borders.

2. *Cherokee Nation v. Georgia*

Eight years after deciding *Johnson*, the Supreme Court was again called on to decide a case that would greatly influence the concept of tribal sovereignty in American jurisprudence. This time the issue was whether the Cherokees constituted a foreign state under the Constitution with standing to bring their case before the Supreme Court as a foreign state.[40] In holding they did not, Marshall focused on the relationship between the United States and the Indian tribes. He categorized the Indian tribes as "domestic dependent nations," and as a people "in a state of pupilage" whose relationship with the United States "resembles that of a ward to his guardian."[41] He based this decision on the language of the Constitution, particularly the Commerce Clause.[42] He reasoned

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33. *See id.* at 573.
34. *See id.*
35. *See id.* at 574.
36. *See id.* at 576.
37. *See id.* at 584.
38. *See id.* at 587.
39. *Id.* at 588-89 (emphasis added).
40. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 10 (1831).
41. *Id.* at 17.
42. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 392 (1993); *see also Cherokee Nation*, 30 U.S. (5 Pet.) at 18 ("[C]onsiderable aid is furnished by that clause in the eighth section of the third article, which empowers Congress to 'regulate commerce with foreign nations, and among the several states, and with the *Indian tribes*.'") (emphasis added).

that the language of the Commerce Clause served both to distinguish the tribes from both foreign nations and states,[43] and also to confirm the sovereign status of the tribes.[44]

To summarize, even though the Court held that the Cherokee had no standing to bring their case before the Supreme Court, Marshall still managed to establish that Indian tribes are domestic, dependent nations rather than foreign nations, confirm their sovereign status through the language of the Constitution, and impose a fiduciary duty on the United States to deal with the tribes as that of a guardian to a ward. The Indians, he wrote, "look to our government for protection; rely on its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."[45]

3. *Worcester v. Georgia*

Before dismissing *Cherokee Nation*, Marshall mused, "[I]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."[46] The following year such a case arose and Marshall had the opportunity to indulge the sympathies alluded to in *Cherokee Nation*. Just as in *Cherokee Nation*, the plaintiff prayed for relief against the State of Georgia, but this time the plaintiff was a United States citizen with standing to bring the case before the Supreme Court.[47] The issue before the Court was whether Georgia law applied on the Cherokee reservation.[48] In determining that state law did not apply to Indian affairs, Marshall picked up where he left off in *Johnson* with the principle of discovery, but expanded the relationship between the United States government and the tribes.

According to Marshall, when the King of England chartered the colonies, the charters conveyed title only to the land the Indians were willing to sell to the crown.[49] He then wrote: "[O]ur history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers . . . ."[50] Therefore, the United States government was in the position to further the relationship with the tribes in a sovereign-to-sovereign relationship, but the tribes' internal government was their own affair.[51] State law was necessarily preempted by this relationship.[52]

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43. *See* Frickey, *supra* note 42, at 392.

44. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 19 ("We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term 'foreign nations;' not we presume because a tribe may not be a nation, but because it is not foreign to the United States.").

45. *Id.* at 16.

46. *Id.* at 15.

47. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

48. *See id.* at 541.

49. *See id.* at 545-47.

50. *Id.* at 547.

51. *See* Frickey, *supra* note 42, at 396-97.

52. *See id.* at 397.

Furthermore, the role played by the federal government was outlined in the Constitution. Chief Justice Marshall concluded this by looking to the war power, the treaty power, and the Indian Commerce Clause which, when read together, enumerate the power to administer the relationship with the tribes.[53] In establishing Congress's plenary power over Indian affairs, he wrote: "The whole intercourse between the United States and [the Indians], is, by our constitution and laws, vested in the government of the United States."[54] This language and the rest of the Marshall trilogy was adopted and its place in Indian law firmly established in *United States v. Kagama*,[55] which confirmed the plenary power of Congress over Indian affairs, the domestic, dependent status of the tribes, and the guardian-ward relationship.[56]

B. Canons of Construction

In the ongoing relationship between the United States and the Indian tribes, several important canons of construction have developed for interpreting treaties with the tribes and statutes governing Indian affairs. For the most part, these canons have been effective, but a review of *Oliphant* will show that the more recent trend of the Supreme Court is to ignore them.

As early as *Worcester v. Georgia*, the Court addressed the issue of construing treaties with the Indians. Chief Justice Marshall read ambiguous treaty language in favor of the tribes, writing that it is not "reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish [the meaning of treaty language]."[57] Since the Indians could not be expected to understand terms of art in treaty writing, Marshall gave them the benefit of the doubt and read treaties as he thought the Indians would have understood them given the actual situation under which the treaties were signed.[58]

Since then, courts have generally "required that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as Indians would have understood them."[59] Furthermore, it is generally presumed that treaty rights cannot be abrogated unless Congress shows a "clear and plain" intent to do so.[60]

Statutes, agreements, and executive orders also have canons of construction favorable to the Indians. They are to be construed liberally to favor the

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53. *See Worcester*, 31 U.S. (6 Pet.) at 558-59.

54. *Id.* at 561.

55. 118 U.S. 375 (1886).

56. *See id.* at 383-84 ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

57. *Worcester*, 31 U.S. (6 Pet.) at 552.

58. *See id.* at 552-53 ("If the term would admit no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used.").

59. COHEN, *supra* note 5, at 222 (citations omitted).

60. *See id.* at 222-23.

establishment of Indians' rights.[61] Just as congressional action is required for treaty abrogation, Congress can only abrogate Indian rights by issuing a "clear and plain" statement of its intent.[62] The purpose of these canons is to protect the fiduciary relationship between the United States and the tribes,[63] and courts usually adhere to them. However, some courts, such as the *Oliphant* Court, abandon them completely and apply their own standards, to the detriment of tribal sovereignty.

C. Congressional Policy Swings

To understand Congress's historical relationship with the tribes, its use of congressional plenary power over the tribes, and the reasons commentators may be reluctant to look to Congress to reverse the *Oliphant* holding, it is necessary to briefly summarize congressional policy swings in the area of Indian affairs.

1. Treaties (1776-1871)

Since our country's inception, the United States government has approached the tribes as sovereign nations.[64] In dealing with the Indians, the United States engaged in a treaty-making process in order to settle disputes, accept cessions of land, end wars, prevent wars, and initiate and maintain trade agreements.[65] This policy continued until 1871 when the House of Representatives refused to appropriate funds for new treaty obligations. The Senate capitulated by calling an end to making any new treaties with the tribes.[66] This policy, which lasted for 100 years, clearly represented the belief that the tribes were to be approached in a sovereign-to-sovereign relationship.

2. Removal (1830-1850s)

In 1830 President Andrew Jackson signed into law the Indian Removal Act which allowed the President to remove Indian tribes living east of the Mississippi to lands west of the Mississippi.[67] By the terms of the Act, such removal was to be an exchange in which the President guaranteed that the new land was to belong to the tribes' heirs and successors forever.[68] Often such removal was done forcibly, such as the infamous "Trail of Tears" march imposed upon the

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61. *See id.* at 224.

62. *See id.*

63. *See id.* at 224-25.

64. *See* Worcester v. Georgia, 30 U.S. (6 Pet.) 515, 559 (1832) ("The Indian *nations* had always been considered as distinct, independent political communities, retaining their original natural rights . . . . The very term '*nation*,' so generally applied to them, means 'a people distinct from others.'") (emphasis added).

65. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 83 (3d ed. 1993).

66. *See id.* at 179.

67. *See* COHEN, *supra* note 5, at 81.

68. *See* Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

Cherokees when they were removed from Georgia to Oklahoma. To encourage voluntary relocation, government officials told the Indians that west of the Mississippi they would be free of state and federal interference for all time.[69]

3. Reservations (1850s-1887)

As non-Indians expanded westward, the federal government was again faced with Indian and non-Indian conflicts. In the mid-1850s, the United States established the reservation system.[70] This policy again displaced Indians by relocating them onto much smaller parcels of land than those originally promised to them. Congress only intended to sustain the reservations until the Indians could adapt to an agrarian existence. The reservation system arose because the Commissioner of Indian Affairs felt removal had failed in three major areas. First, moving the Indians around so much prevented them from becoming settled and "civilized." Also, the government had given the Indians too much land to promote farming and the concept of individually owned property. Finally, the Commissioner reported that the annuities which Congress provided to the tribes lead to indolence by the Indians and fraudulent behavior by non-Indians.[71] The goal of the reservation policy was to obtain Indian landholdings and, at the same time, provide a buffer zone between Indians and non-Indians while the government tried to incorporate the Indians into the non-Indian way of life.[72]

4. Assimilation (1887-1934)

As early as 1819 assimilationist policy was considered by some members of Congress to be a viable option for Indian affairs,[73] but it did not become full-blown U.S. policy until the Dawes Act of 1887 (more commonly known as the General Allotment Act).[74] The purpose of the allotment era was to turn the Indians into individual landowners by creating a system that first parceled out reservation land to individual tribal members and then sold off the surplus.[75] The goal of the allotment system was that the tribes would cease to exist and tribal members would be assimilated into non-Indian society.[76] Before the assimilationist policy was complete, the congressional climate changed again, and this led to the enactment of the Indian Reorganization Act of 1934, which

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69. *See* Johnson & Martinis, *supra* note 3, at 3 & n.6.

70. *See* COHEN, *supra* note 5, at 124.

71. *See id.* (citing COMMISSIONER OF INDIAN AFFAIRS, ANNUAL REPORT, S. EXEC. DOC. NO. 35-1, at 354 (1858)).

72. *See id.* at 125.

73. *See* Act of Mar. 3, 1819, ch. 85, § 1, 3 Stat. 516, 516 (codified as amended at 25 U.S.C. § 271 (1994)) (conferring power in the President to employ "capable" and "moral" instructors for Indians).

74. Act of Feb. 8, 1887, ch. 199, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358).

75. *See* John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503, 510-13 (1991).

76. *See* COHEN, *supra* note 5, at 130.

froze all allotments. Unfortunately, by the time of the enactment, the Indian tribes had already lost two-thirds of their landholdings as a result of the allotment process.[77]

5. Self-Determination (1934-Present)

The Indian Reorganization Act ushered in an era of self-determination for the tribes. Under the Indian Reorganization Act, tribes began to adopt constitutions patterned after the U.S. Constitution, enhanced their economic development, focused on education, and developed systems by which to govern themselves.[78] Self-determination both then and now is premised on the belief that the tribes are the "basic governmental units of Indian policy," and that assimilation is an affront to the Indians' civil rights.[79] The current state of congressional policy toward the Indians remains one of self-determination.

6. Termination (1953-1961)

A brief eight-year glitch in self-determination policy occurred in the 1950s. Congress set the termination policy by adopting House Concurrent Resolution 108 in 1953. Resolution 108 terminated specific tribes' status as wards of the government. It stemmed from Congress's increasing dissatisfaction with the Indian Reorganization Act, and led to the liquidation of a number of Indian tribes and reservations.[80] One hundred-nine tribes were terminated under Resolution 108,[81] before a public announcement in 1961 officially ended the termination policy.[82] Many of the terminated tribes have since been reconstituted,[83] and Congress is now advocating self-determination again as its official policy toward the tribes.

III. ATTACKING *OLIPHANT*

In the 1978 *Oliphant* decision, the Supreme Court held that tribal courts have no jurisdiction over crimes committed on Indian country by non-Indians.[84] *Oliphant* is a bad decision, laced with unsupported conclusions and tainted by judicial activism. Beginning with Burger, and continued by Rehnquist, the Supreme Court has implemented an agenda against the sovereignty of the Indians whenever that sovereignty conflicts with the interests of non-Indians.[85] The result

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77. *See Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong. 16-18 (1934) [hereinafter *Hearings*] (prepared memorandum of John Collier).

78. *See* Johnson & Martinis, *supra* note 3, at 4-5 & nn.21-25.

79. COHEN, *supra* note 5, at 180-81.

80. *See id.* at 152, 173-74.

81. *See* Johnson & Martinis, *supra* note 3, at 4.

82. *See id.* at 4 n.20.

83. *See id.*

84. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

85. *See* Johnson & Martinis, *supra* note 3, at 1.

has been a drastic blow to Indian sovereignty, particularly in *Oliphant* where the Court unceremoniously eliminated the inherent territorial sovereignty of the Indians that had been in place since colonial times.

Historically, the only way to divest the tribes of their territorial sovereignty was for Congress to expressly take it.[86] The *Oliphant* Court found two new ways to divest tribes of their sovereign powers. The first is to find an "unspoken assumption" of Congress that the tribes have lost their sovereign power.[87] The second is to find that the tribes have implicitly lost their sovereign powers due to their status as domestic, dependent nations.[88] The following analysis shows that neither of these new theories is entirely sound or very well supported.

A. The "Unspoken Assumption" Theory

In *Oliphant* the Court implemented a new standard to determine the point at which tribal powers could be abrogated. Under the old canon, tribal powers could only be abrogated if Congress "clearly and plainly" stated its intent to do so.[89] The Court admitted that no treaty or statute expressly deprived tribes of criminal jurisdiction over non-Indians,[90] and, under the old canon, the tribe would retain this power. However, the Court reasoned that tribal powers of self-government remain intact unless the Court can find either an implicit congressional intention to take them away,[91] or that tribal courts had implicitly lost them due to their status as domestic, dependent nations.[92] The *Oliphant* Court found the latter to be true, a holding which contradicts all of the canons of Indian law discussed in Part II of this Comment. The authorities cited are not persuasive enough to conclude that the tribes lost criminal jurisdiction over non-Indians merely because of their dependent status.

The Court supported its reasoning by giving weight to an "unspoken assumption," manifested by congressional acts, that Congress took the tribes' jurisdiction over non-Indians away. The Court conjured this assumption up from congressional silence,[93] invalid statutes,[94] obscure opinions of the Attorney General[95] and Solicitor of the Department of the Interior,[96] a 1960 Senate report,[97] and suspect references to prior case law.[98] However, examination of these sources shows (1) that the "unspoken assumption" is more than likely a

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86. *See* COHEN, *supra* note 5, at 241-42.
87. *Oliphant*, 435 U.S. at 197, 203.
88. *See id.* at 206-10.
89. COHEN, *supra* note 5, at 224.
90. *See Oliphant*, 435 U.S. at 204.
91. *See* Johnson & Martinis, *supra* note 3, at 12.
92. *See Oliphant*, 435 U.S. at 203.
93. *See id.* at 206-10.
94. *See id.* at 201-02 (citing H.R. REP. NO. 23-474, at 18, 36 (1834)).
95. *See id.* at 199 (citing 7 Op. Att'y Gen. 174 (1855), and 2 Op. Att'y Gen. 693 (1834)).
96. *See id.* at 201 & n.11 (citing Criminal Jurisdiction of Indian Tribes over Non-Indians, 77 Interior Dec. 113 (1970)).
97. *See id.* at 204-06 (quoting S. REP. NO. 86-1686, at 2-3 (1960)).
98. *See id.* at 204 (citing *In re* Mayfield, 141 U.S. 107 (1891)); *id.* at 199-201 (citing *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720)).

manifestation of a preference of *Oliphant*'s author that such conflicts be resolved in favor of federal and state government[99] rather than tribal sovereignty, and (2) that imparting this same intent to Congress is tenuous at best.

The *Oliphant* court relied upon the Trade and Nonintercourse Acts[100] as one basis for finding this "unspoken assumption." Here the Court reasoned that federal jurisdiction given in the Acts was meant to preempt tribal jurisdiction over non-Indians.[101] The problem with this is that, in *Oliphant*, the Court's reason for denying criminal jurisdiction over non-Indians rested on the theory that the federal government must protect non-Indians from Indians.[102] However, the Trade and Nonintercourse Acts were actually enacted to protect the Indians from non-Indians, and restrict the contact between them.[103] There were six fundamental elements of the Trade and Nonintercourse program. The first was the protection of the Indians' right to their land by setting boundaries and restricting "whites" from entering the area. The second was to control land disposition by refusing to allow private individuals and local governments to acquire land from Indians without federal permission to do so. The third was to regulate Indian trade by refusing to allow certain "classes" from trading with them. The fourth was to regulate liquor flow into Indian country and then ban it altogether. The fifth element was to ensure punishment of interracial crime. Promotion of education among the Indians was the final element.[104] With these goals in mind it is more likely that Congress simply meant to ensure some forum would exist in which the Indians could file and prosecute grievances against non-Indian incursions, than it is that Congress intended to preempt the Indians' own jurisdiction. If the Court had applied the proper canon, this construction would have led it to the conclusion that the jurisdiction was meant to be concurrent.[105]

The Court also pointed to the Indian Major Crimes Act[106] as further proof of Congress's "unspoken assumption." In the opinion, Rehnquist wrote: "If tribal courts may try non-Indians . . . as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts exclusive jurisdiction to try members of their own tribe

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99. *See* Johnson & Martinis, *supra* note 3, at 2.

100. *See* Act of July 22, 1790, ch. 33, 1 Stat. 137. This statutory policy, without major change was carried forward in the Act of Mar. 1, 1793, ch. 19, 1 Stat. 329, the Act of May 19, 1796, ch. 30, 1 Stat. 469, the Act of Mar. 3, 1799, ch. 46, 1 Stat. 743, the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139, the Act of May 6, 1822, ch. 58, 3 Stat. 682, and the Act of June 30, 1834, ch. 161, 4 Stat. 729. The acts are now codified as amended at 18 U.S.C. §§ 1152, 1154, 1160, 1165 (1994), and at 25 U.S.C. §§ 177, 179-80, 193-94, 201, 229-30, 251, 263-64 (1994).

101. *See* Maxfield, *supra* note 3, at 419.

102. *See Oliphant*, 435 U.S. at 210 ("[T]he United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.").

103. *See* GETCHES ET AL., *supra* note 65, at 100 ("The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and providing justice to the Indians as the means of preventing hostility.").

104. *See id.* at 99-100.

105. *See* Maxfield, *supra* note 3, at 419.

106. 18 U.S.C. § 1153 (1994).

committing the exact same offenses."[107] According to the Court, laws giving federal courts exclusive jurisdiction over Indians and laws giving concurrent jurisdiction over non-Indians could not both have been passed simultaneously.[108] Nevertheless, the issue of exclusive jurisdiction is unsettled.[109] In *United States v. Wheeler*,[110] the Supreme Court mused as to whether the Indian Major Crimes Act deprives tribal courts of their power over the enumerated offenses,[111] but did not attempt to resolve the question. In *Oliphant*, the Court pointed out that the limitation on punishments and fines outlined in the Indian Civil Rights Act[112] makes the issue moot.[113] However, just because it would be impractical for the tribes to assert jurisdiction over these crimes due to the aforementioned limitations does not mean that such jurisdiction cannot exist.

The Court in *Oliphant* relied on two cases, one district court case and one Supreme Court case, as well as a dissenting opinion from a Supreme Court case to bolster its "unspoken assumption" theory. It is questionable whether these cases can be considered precedent which the Court must follow.

The first case the *Oliphant* Court relied on, *Ex parte Kenyon*,[114] arose in Arkansas in 1878. It concluded that tribal courts only had criminal jurisdiction over Indians.[115] *Kenyon*, however, involved an offense that had occurred *off* the reservation and in a different state. There was no issue in the case of tribal jurisdiction for offenses committed on the reservation, so any such reference in the case to that issue is pure dicta.[116] The Court also gave weight to a 1970 opinion from the Solicitor for the Department of the Interior that ostensibly affirmed the decision in *Kenyon*.[117] However, the *Oliphant* Court dismissed the fact that the opinion was withdrawn in 1974 but never replaced, simply stating that no reason was given for the withdrawal.[118] Apparently the Court concluded that since there was no reason given for the withdrawal, it could simply ignore it and follow the original opinion. There are two arguments against such a conclusion. First, the Solicitor is an executive body and a Solicitor's opinion does not speak for Congress in setting policy in the area of Indian affairs. Second, there is no reason to believe that an opinion that was withdrawn has any authoritative force whatsoever.

Ex parte Mayfield[119] is also cited in *Oliphant* for the principle that there is an "unspoken assumption" within the acts of Congress that tribes do not have criminal jurisdiction over non-Indians.[120] At first blush this appears to hold some

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107. *Oliphant*, 435 U.S. at 203.
108. *See* Maxfield, *supra* note 3, at 426.
109. *See* GETCHES ET AL., *supra* note 65, at 558.
110. 435 U.S. 313 (1978).
111. *See id.* at 325 n.22.
112. 25 U.S.C. § 1302(7) (1994).
113. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978).
114. 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720).
115. *See id.* at 355.
116. *See* Maxfield, *supra* note 3, at 433.
117. *See Oliphant*, 435 U.S. at 200-01.
118. *See id.* at 201.
119. 141 U.S. 107 (1891).
120. *See Oliphant*, 435 U.S. at 203-04.

merit, but further inspection reveals that such an assumption does not exist, even implicitly, in the *Mayfield* case. However, *Mayfield* did introduce some very important premises. First, it recognized that tribes *retain* exclusive jurisdiction in all civil and criminal cases arising in Indian country where tribal members are the only parties.[121] Secondly, it recognized that, under the Indian Country Crimes Act ("ICCA"),[122] the general federal laws prohibiting crimes and misdemeanors apply to Indian territory as elsewhere in the United States.[123] Some of the other language in *Mayfield*, read literally, seems to suggest that Congress vested the United States with exclusive jurisdiction over all interracial crime committed on the reservation regardless of the defendant's race.[124] The *Oliphant* Court seized upon this language to support its "unspoken assumption." However, there is an exception to the ICCA which states that where *any* Indian defendant has first been punished by the local law of the tribe for a minor crime, the federal government loses its jurisdiction over that defendant.[125] Since there is already an exception in the ICCA for crimes committed by an Indian against another Indian, the "any Indian" exception must apply to interracial crime. No court opinion fully discusses the application of this exception,[126] but the exception illustrates that tribes indeed have concurrent jurisdiction over interracial crime. Therefore, *Mayfield* must actually stand for the principle that the tribe and the United States hold concurrent jurisdiction over interracial crime, since the case addressed the question as to whether the United States had any jurisdiction at all. As a result, *Mayfield* does not stand for the implicit assumption that tribes do not have criminal jurisdiction over non-Indians, and the *Oliphant* Court cannot, by relying on *Mayfield*, make express that which was not even implicit in the opinion.

The *Oliphant* Court cited various other authorities in an attempt to support its holding.[127] Like the cases, however, these are no more convincing and are precarious building blocks in an already weak foundation. First, the Court was apparently persuaded by legislation that was never passed. It cited the Western Territory bill, which was drafted in 1834, as evidence of the implicit conclusion of Congress that tribes have no jurisdiction over non-Indians.[128] The Court's discussion of the bill shows most clearly the contradiction between the holding and reality. The opinion notes that in the bill Congress was careful not to recognize the tribes' right to criminal jurisdiction over non-Indians, and it quotes

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121. *See Mayfield*, 141 U.S. at 115.

122. Act of May 2, 1890, ch. 182, § 31, 26 Stat. 81, 96 (codified as amended at 18 U.S.C. § 1152 (1994)).

123. *See Mayfield*, 141 U.S. at 115.

124. *See id.* at 116.

> The general object of these statutes is to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties *on either side*.

Id. (emphasis added).

125. *See* 18 U.S.C. § 1152.

126. *See* COHEN, *supra* note 5, at 297.

127. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 201-05 (1978).

128. *See id.* at 202.

the drafters' intent to protect non-Indians who travel through Indian country.[129] However, buried in a footnote is the fact that this bill was tabled because Congress felt that overall the bill was too radical a shift in U.S.-Indian relations.[130] As the *Oliphant* footnote itself admits, the bill was submitted several times but never passed. Conveniently, the Court had no trouble taking the tabled bill as evidence of congressional intent, despite the fact Congress never passed it.

Next, on at least one occasion during the nineteenth century, the Attorney General of the United States opined that tribal criminal jurisdiction "is, *inter alia* inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation[s] and the dependence of the Indians on the United States."[131] The Court was quick to rely on this to support its holding in *Oliphant*. However, only a few years prior to the Attorney General's 1834 statement, Chief Justice Marshall, in the *Worcester* and *Cherokee Nation* opinions, saw no conflicts between the sovereignty of the United States and that of the Indian nations except where foreign nations tried to deal directly with the tribes, or where Congress expressly took the sovereignty from the Indians through its plenary power.[132] The Court in *Oliphant* itself conceded the fact that "Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians"[133] either by statute or treaty. Because Congress alone has plenary power over Indian affairs, and the Attorney General does not speak for Congress, it then follows that the weight accorded these opinions by the Court to support its "unspoken assumption" theory is misplaced.

Another authority cited by the *Oliphant* Court is a 1960 Senate report.[134] The report speaks of a belief, at the time, that tribal courts were without inherent jurisdiction to try non-Indians. The source of the belief was the Senate Judiciary Committee that was considering a bill prohibiting unauthorized entry upon Indian lands for the purpose of hunting and fishing.[135] At the very most, this report reflects the views of one Senate committee and one Department of the Interior official on the matter of criminal jurisdiction over non-Indians, and cannot be said to reflect the intent of the entire Congress.[136] Reliance on this report is therefore suspect and unconvincing. Considered as a whole, these sources fall short of signaling an "unspoken assumption" indicating congressional intent to take away the tribes' jurisdiction over non-Indians.

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129. *See id.* at 201.

130. *See id.* at 202 n.13.

131. *Id.* at 199 (characterizing the Attorney General's opinion as expressed in 2 Op. Att'y Gen. 693 (1834)).

132. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 547 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 40 (1831).

133. *Oliphant*, 435 U.S. at 204.

134. *See id.* at 204 (citing S. REP. NO. 86-1686, at 2-3 (1960)).

135. *See id.* at 205.

136. *See* Maxfield, *supra* note 3, at 408-09.

B. Implicit-Loss Theory

Despite the attention which the *Oliphant* Court gave to the "unspoken assumption" theory, the Court did not ultimately base its holding on it, although it afforded it considerable weight in the decision.[137] The Court clearly recognized that the authorities cited and the reasoning employed in its "unspoken assumption" theory were insufficient to divest the tribes of their criminal jurisdiction over non-Indians. Instead, the Court determined that the tribes lost their criminal jurisdiction over non-Indians due to their status as domestic, dependent nations.[138] For this conclusion, the Court looked to the Treaty of Point Elliott,[139] the Marshall trilogy,[140] *Fletcher v. Peck*,[141] and *Ex parte Crow Dog*.[142] However, while the construction the Court relied upon may have had some merit under congressional policy in place at the time of the Point Elliott Treaty or the Marshall trilogy, it failed to take into consideration the policy changes which have arisen since the Dawes and Indian Reorganization Acts.[143]

In *Oliphant* the Court pointed out that under the Treaty of Point Elliott, the Suquamish tribe acknowledged their dependence on the federal government.[144] Similarly, as described in Part II of this Comment, the Marshall trilogy stands for the premise that all tribes are domestic, dependent nations and that the relationship of the United States to the tribes is that of guardian to ward. The *Oliphant* Court reasoned that these two facts show that the Suquamish tribe, and tribes in general, are under the territorial sovereignty of the United States and that their exercise of sovereign power may not conflict with the overriding sovereignty of the United States.[145]

Congressional policy at the time of the Marshall trilogy considered the boundaries of Indian country to be a barrier which non-Indians could not breach without permission from the federal government.[146] Therefore the *Oliphant* Court was correct in one sense when it asserted that in their treaties with the United States, the tribes "were in all probability recognizing that the United States would arrest and try non-Indian *intruders* who came within their Reservation."[147] Such an intrusion was only a crime under federal law, not tribal law, and the treaty merely recognized this fact. It would therefore follow that during the time

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137. *See Oliphant*, 435 U.S. at 206 ("While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight.").

138. *See id.* at 207.

139. Treaty Between the United States and the Dwamish, Suquamish and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927.

140. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

141. 10 U.S. (6 Cranch) 87 (1810).

142. 109 U.S. 556 (1883).

143. *See supra* Part II.

144. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206-07 (1978).

145. *See id.* at 209.

146. *See* COHEN, *supra* note 5, at 112.

147. *Oliphant*, 435 U.S. at 207 (emphasis added).

of the Marshall trilogy the tribes had no jurisdiction over such non-Indian intruders since they were not permitted to be there in the first place under federal law. However, this fact is not enough to imply a loss of jurisdiction for crime committed by non-Indians who violate tribal law *and* to whom Congress has given permission to enter Indian country.

A major flaw in the Court's reasoning is that since the Dawes Act of 1887,[148] Congress has removed the barrier and expressly invited non-Indians to enter Indian country. The premise present in Marshall's day, which excluded non-Indians from having any contact with the Indians and therefore avoided subjecting non-Indians to tribal law, no longer exists. Furthermore, as discussed in the previous section, the tribes' criminal jurisdiction over non-Indians has never been expressly or implicitly taken away by Congress, and under *Worcester v. Georgia*, the tribes retain the right to control their affairs within their own borders.[149] Considering the changes in congressional policy and the fact that tribes maintain their sovereign powers unless Congress takes them away, their dependent status alone is insufficient to imply they have lost criminal jurisdiction over non-Indians.

At the very most, the tribes' dependent status inherently limits their ability to alienate land and form treaties with foreign powers and third parties.[150] Any action further diminishing tribes' internal sovereign power must be taken by Congress.[151] The *Oliphant* Court relied on language from *Fletcher v. Peck*[152] to undermine this fact and broaden the nature of the limitations on tribal sovereignty due to their dependent status.[153] The *Fletcher* language in essence says that Indians' sovereignty is limited to governing only themselves, which would preclude them from governing non-Indians.[154] The Court characterized this language as being part of a concurring opinion[155] when in fact Justice Johnson's view had no precedential value, because, although concurring in the result, Johnson dissented from the majority's reasoning.[156] Yet, the Court has chosen to follow the view of one justice over all other Supreme Court precedent in the area of Indian law.[157]

Finally, in support of its holding, the *Oliphant* Court relied on *Ex parte Crow Dog*,[158] which held that criminal jurisdiction over Indians was *exclusively* in the tribe. The Court's holding of exclusivity in *Crow Dog* was overturned when

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148. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (1994)).

149. *See* Frickey, *supra* note 42, at 396-97.

150. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

151. *See* COHEN, *supra* note 5, at 241-42.

152. 10 U.S. (6 Cranch) 87 (1810).

153. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (citing *Fletcher*, 10 U.S. (6 Cranch) 87).

154. *See id.* (citing *Fletcher*, 10 U.S. (6 Cranch) at 147 (Johnson, J., concurring in the result)).

155. *See id.*

156. *See Fletcher*, 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring in the result).

157. *See* Maxfield, *supra* note 3, at 438.

158. 109 U.S. 556 (1883).

Congress enacted the Indian Major Crimes Act.[159] The *Oliphant* Court relied on *Crow Dog* to find exclusivity in the tribes, using it to illustrate why Indians should not have criminal jurisdiction over non-Indians.[160] The reason, the Court wrote, is because the Indians sought to extend their law

> "over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land but by . . . a different race, according to the law of a social state of which they have an imperfect conception."[161]

This nineteenth-century depiction of the degree of alienation between Indians and non-Indians is unacceptable. While it is true that in the nineteenth century the boundary of Indian country represented a barrier dividing alien cultures which was not to be breached by non-Indians without the permission of the federal government,[162] in the twentieth century this barrier has ceased to exist. The boundary of Indian country in the twentieth century is respected as the physical limit of tribal sovereignty on the one hand and state sovereignty on the other.[163] If an Indian leaves the boundary of Indian country and by doing so places herself outside the limit of tribal authority, the tribe loses jurisdiction over her and the state gains jurisdiction. If she then commits a crime, the state exerts its authority and prosecutes her in state court. Likewise, there is no reason to believe that a non-Indian who leaves the confines of the state, enters Indian country, puts herself within the boundary of tribal authority, and commits a crime there should not be subject to the jurisdiction of the tribe. In fact, many non-Indians actually live in Indian country at the behest of Congress. In light of this fact, it is difficult to accept the *Oliphant* Court's argument that tribal culture is so alien to non-Indians that they must be shielded from tribal criminal jurisdiction. The tribes are territorial sovereigns, and as such, they must have the power to protect their territory and enforce their laws against *any* offender who violates those laws. Despite their dependent status, they have retained the power to manage their internal affairs,[164] and criminal jurisdiction over non-Indians is essential to managing those affairs. To deny this is to deny reality, yet that is precisely what the Supreme Court has done. With states unwilling and the federal government unable to enforce tribal laws for all crimes committed by non-Indians,[165] it is time for Congress to finally step in and recognize that tribes have retained criminal jurisdiction over non-Indians.

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159. Title 18, Crimes and Criminal Procedure, ch. 645, § 1153, 62 Stat. 683, 758 (1948) (codified as amended at 18 U.S.C. § 1153 (1994)).

160. *See Oliphant*, 435 U.S. at 210-11 (quoting *Crow Dog*, 109 U.S. at 571).

161. *Id.* (alteration and first and last omission in original; second omission added) (quoting *Crow Dog*, 109 U.S. at 571).

162. *See* COHEN, *supra* note 5, at 120.

163. *See id.* at 27.

164. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 553-54 (1832).

165. *See supra* text accompanying notes 11-13.

IV. LEGISLATING CRIMINAL JURISDICTION OVER NON-INDIANS

Concluding that the Court's outcome in *Oliphant* was wrong is not enough. The scathing admonitions leveled at the opinion and its resulting legal framework have bounced off the conscience of the current Court; it is clear that the Court will not be persuaded to change its position. In fact, recent decisions such as the 1990 decision in *Duro v. Reina*[166] have further chipped away at criminal jurisdiction and Indian sovereignty in general.[167] Fortunately, Congress came to its senses after the *Duro* case and immediately enacted legislation changing the law *Duro* established.[168] Some opine that the Court and Congress are on the verge of a power struggle in which the Court is attempting to usurp Congress's exclusive power over Indian affairs.[169] The traditional roles of Congress and the Court have truly been reversed, with Congress now in the role of protecting tribal sovereignty and the Court in the role of antagonist.

What can be done to solve the problems that are a direct result of the *Oliphant* decision? Since Congress has shown willingness to take steps to restore the criminal jurisdiction the Court has taken from the tribes in some instances,[170] perhaps it is time for Congress to put its plenary power to use and enact legislation recognizing the tribes' criminal jurisdiction over non-Indians. Congress could at least restore criminal jurisdiction over non-Indians for misdemeanors and give tribes a fighting chance to maintain law and order on the reservations.

Congress could do this in a two-pronged piece of legislation. The first prong would recognize the tribes' right to territorial criminal jurisdiction over non-Indians and nonmember Indians who commit crimes on the reservation. The first prong would also set the conditions under which such recognition would be granted. The second prong would establish the United States Court of Indian

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166. 495 U.S. 676 (1990) (holding that an Indian tribe cannot exercise criminal jurisdiction over a defendant of diverse tribal affiliation).

167. *See generally* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (holding that the county may impose an ad valorem tax on reservation land owned by tribal members); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding that the Yakima Nation does not have the authority to zone land in closed areas of the reservation owned in fee simple by non-Indians); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that the state may impose severance taxes on oil and gas produced on the reservation, and thereby reduce the value of a lease on the reservation, even though the tribe had already taxed that production).

168. *See* 25 U.S.C. §§ 1301-1303 (1994) (outlining the general constitutional rights of Indians).

169. *See* Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 771 (1993).

170. Congress's 1990 amendment of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, is one example.

Affairs[171] as the reviewing body for all criminal decisions handed down in tribal court where the defendant is a non-Indian. This would strengthen the constitutional footing of the 1990 legislation enacted in response to *Duro*, because that legislation would no longer subject only nonmember Indians to general tribal jurisdiction from which non-Indians are exempt.[172] It also would be a major boost for law-enforcement efforts on the reservations.

This Part presents a potential framework for Congress to follow in enacting such legislation. The proposed statutory scheme is limited enough to meet the congressional concerns over protecting the rights of non-Indians, but effective enough to preserve the tribes' territorial jurisdiction over non-Indians and nonmember Indians, except in those areas where Congress has expressly taken it away. The primary aim of such legislation is to put the enforcement of misdemeanor and everyday crime back into the hands of the tribes.

A. Part I: Jurisdiction

As a model for the proposed legislation, I have adapted the language of the original Wheeler-Howard bill which Congress considered and modified before passing the Indian Reorganization Act of 1934. The following proposed statutes are all modeled on this language, but have been modified to meet the specific goals addressed by this Comment.

> § 1. It is hereby declared that the purpose of this statute is to conform the current state of tribal criminal jurisdiction to the policy of Congress that tribes have the right of local self-government on the Reservations. It is in the interest of the overriding sovereignty of the United States to prevent and deter a state of lawlessness in any territory within its borders. It is also declared that the appropriate backdrop of sovereignty for this statute shall not include the Dawes Act, 25 U.S.C. §§ 331 to 358, which is considered to be repealed for purposes of determining criminal jurisdiction.

Putting this general-purpose clause into the statute itself may seem extraneous, and emphasizing the repeal of the Dawes Act for purposes of this statute may seem strange,[173] but due to the Supreme Court's activism in the field of Indian law, any statute must have internal safeguards to prevent courts from interpreting it in a way Congress did not intend. The Supreme Court in recent cases[174] has

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171. *See Hearings*, *supra* note 77, at 2436. The committee notes from February 12, 1934, contain the original Wheeler-Howard bill in its entirety, and section IV proposes a Court of Indian Affairs, the model for a court later proposed in this Comment.

172. *See* Skibine, *supra* note 169, at 784.

173. Title 25 U.S.C. § 461 (1994), implicitly repeals the Dawes Act: "On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian." *Id.* However, the Supreme Court still invokes the Dawes Act as an "appropriate backdrop of sovereignty" when it suits its purposes. *See, e.g.*, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992). To avoid this, the statute must expressly forbid doing so.

174. *See County of Yakima*, 502 U.S. at 259. Justice Scalia found that § 6 of the Dawes Act is no longer on the books, but § 5 is still on the books. The subject in the case was taxation rather than criminal jurisdiction, but the implication is that the Court will use the provisions

invoked the Dawes Act to curb tribal sovereignty despite the fact that Congress suspended the Dawes Act when it enacted the Indian Reorganization Act in 1934.[175] For any statute to be effective the Court must be restrained from using provisions of the Dawes Act to limit tribal sovereignty. The "overriding sovereignty" clause is also necessary because the Court in *Oliphant* stated that any concerns of the overriding sovereignty of the United States could trump tribal sovereignty. Congress can defuse attempts by the Court to invoke this reasoning and limit the scope of the statute by addressing the overriding sovereignty of the United States in the statute.

> § 2. Congress hereby recognizes that tribal courts have retained their territorial jurisdiction over all non-Indians and nonmember Indians for all offenses committed on the Reservations, in violation of all local ordinances, and shall have the power to render and enforce judgments, and punish violations of such by fine not exceeding $5000, or imprisonment of not more than one year, or both.[176] Provided, however, that the tribal courts are bound by the Indian Civil Rights Act, practice judicial independence, and that non-Indians living on the Reservations are entitled to serve on tribal-court juries for cases where the defendant is a non-Indian.

By recognizing the tribes' right to territorial jurisdiction over non-Indians and nonmember Indians instead of granting it to them, Congress does two things. It defines the United States' relationship with the tribes and thus legitimizes such tribal criminal jurisdiction. Furthermore, it undermines the "unspoken assumption" argument from *Oliphant* by expressing a view to the contrary. Section 2 also puts limitations on the tribes in rendering and enforcing judgments. The "$5000, or imprisonment of not more than one year" language reaffirms limitations already imposed on the tribes by the Indian Civil Rights Act,[177] and ensures there will be no ambiguity on this point. Additionally, to ease the fears about subjecting non-Indians and nonmember Indians to a "foreign" criminal judicial system, Congress can condition the recognition of tribal criminal jurisdiction on certain enumerated protections. First, tribal courts must be bound by the Indian Civil Rights Act. The Act is a statutory bill of rights very similar to the Bill of Rights in the U.S. Constitution.[178] If non-Indians are going to receive the same protections in tribal courts as they would in federal courts, then there is one less argument against tribes exercising criminal jurisdiction over them.

Next is the requirement of judicial independence. This is necessary because, while most tribes have separate lawmaking and judicial bodies, some have a system in which they are a combined body. Those who write the laws are the

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of the Dawes Act to curb tribal sovereignty if allowed to go unchecked.

175. *See* COHEN, *supra* note 5, at 147-49.

176. *See* H.R. 7902, 73d Cong. § 4(d) (1934); *Hearings*, *supra* note 77, at 3.

177. Title 25 U.S.C. § 1302(7) states that no Indian tribe shall "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both."

178. The Indian Civil Rights Act contains all of the provisions in the Bill of Rights except those contained in the Second, Third, Ninth, and Tenth Amendments. It also includes a provision similar to the Sixteenth Amendment, an ex post facto provision, and habeas corpus. *See id.* §§ 1301-1341.

same people who interpret the laws,[179] and having such a requirement will eliminate separation-of-powers concerns. If those tribes with a combined system do not want to change their system, then they would more than likely be required to set up a separate court in which to prosecute non-Indian defendants, or the proposed Court of Indian Affairs could possibly be designed to take jurisdiction over these cases as a neutral and detached body. This is a compromise aimed at eroding opposition to the proposed legislation and eliminating any arguments against recognizing tribal criminal jurisdiction over non-Indians generally, because of tribes who operate under a combined legislative and judicial system.

Finally, opposition to legislation adopting the "subject to a foreign judicial system" argument is weakened if non-Indian residents of the reservations are entitled to sit on tribal-court juries for cases in which the defendant is a non-Indian. This final requirement eliminates any possible comparison between an Indian tribe and that of a foreign country exercising jurisdiction over a United States citizen. Considering the domestic, dependent status of the tribes, the latter comparison is a weak one anyway, especially in light of the provisions of the Indian Reorganization Act and Indian Civil Rights Act. The suggested statute puts this argument to rest once and for all. Furthermore, any residual fears by detractors on this front are likely to be put to rest by the creation of the Court of Indian Affairs as set forth in Part II of the proposed legislation.[180]

> § 3. Congress, in addition, recognizes that tribal courts have criminal jurisdiction over offenses committed on the Reservations by non-Indians against other non-Indians. *Provided that,* no person shall be punished for any offense for which prosecution has already begun in any state court in which the Reservation in question is located.[181]

The purpose of this section is to limit the *McBratney* rule which gave the states exclusive jurisdiction over all crime committed by non-Indians on the reservations against other non-Indians.[182] This provision makes the jurisdiction concurrent instead of exclusive in the state, but still gives states exclusivity if they prosecute first. This too is a compromise in that it expands the tribes' criminal jurisdiction, but does not entirely divest the state of its power to try these cases. It is a necessary compromise in order to ease the fear of opponents who would not favor such wholesale reversal of the *McBratney* rule. The addition of concurrent jurisdiction makes sense in light of the overall goal of combating lawlessness on the reservations committed by groups who go unpunished under the current system. It also makes sense considering that

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179. *See* Volk, *supra* note 3, at 256 (discussing "traditional tribal courts whose tribal governing body, acting as dispute resolver, enforces unwritten tribal rules and customs").

180. *See infra* notes 187-94 and accompanying text.

181. *See* H.R. 7902; *Hearings, supra* note 77.

182. United States v. McBratney, 104 U.S. 621 (1882).

tourism is becoming a major part of the growing economies of the tribes,[183] and the occurrence of non-Indian to non-Indian crime is bound to be on the rise.[184]

> § 4. The recognition of tribal criminal jurisdiction outlined in the preceding sections in no way diminishes, repeals, or abridges the criminal jurisdiction of the federal government as set forth in the Indian Major Crimes Act and the Indian Country Crimes Act, 18 U.S.C. §§ 1152 to 1153, or any other provision under the laws of the United States, nor does such recognition encompass the power to prosecute and try non-Indians and nonmember Indians for violating federal laws.

This final section expressly indicates that the status quo of federal jurisdiction shall remain unchanged. Federal law-enforcement agencies and federal courts will still handle all major crimes enumerated in the Indian Major Crimes Act, and therefore the provision ensures that the empowerment of the tribes over non-Indians and nonmember Indians will be limited to enforcing misdemeanors and local ordinances only. Even assuming that the provision recognizes concurrent jurisdiction, the constraints on imposing large fines or long prison terms found in section 2 make it unlikely that the tribes will assert jurisdiction over major crimes. Section 4 is also meant to allay separation-of-powers concerns by refusing to recognize tribal jurisdiction over violations of federal criminal law committed by non-Indians and nonmember Indians.[185] Through this language, Congress would avoid infringing on the power of Article III courts. Since tribal codes were not enacted by the U.S. Congress, and the violations therefore do not "arise under the laws of the United States," Congress would not be overstepping its constitutional authority if it recognized the right of tribal courts to enforce their own laws.[186]

B. Part II: The Court of Indian Affairs

In 1934, part of the original Wheeler-Howard bill, now known as the Indian Reorganization Act,[187] contained an additional provision that was never adopted. This provision established a Court of Indian Affairs. This was a court of review that was to take the place of federal district courts in matters arising from Indian affairs. It was to have broad civil[188] and criminal jurisdiction. Reviving the idea of creating such a court complements the proposed recognition of tribal criminal jurisdiction. With such a reviewing body in place, created under the auspices of the federal government, it is difficult to argue that non-Indians and nonmember

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183. *See* Henry S. Noyes, *A "Civil" Method of Law Enforcement on the Reservation: In Rem Forfeiture and Indian Law*, 20 AM. INDIAN L. REV. 307, 308 (1996). Much of the tourism is due to the growing Indian gaming craze that is sweeping many of the reservations.

184. As mentioned *supra* in the text accompanying note 22, such statistics have not been compiled and can only be found by contacting the few individual state jurisdictions that have actually made arrangements with the tribes to handle these cases.

185. *See* Skibine, *supra* note 169, at 803.

186. *See id.*

187. 25 U.S.C. §§ 462-466, 470-479 (1994).

188. A discussion of whether the court should have broad jurisdictional powers, including civil jurisdiction, is not beyond the range of possibility, but it is beyond the scope of this Comment.

Indians are being subjected to a foreign judicial system.[189] By adding this court of review to its recognition requirements, Congress would strike a balance acceptable to those who fear prejudice against non-Indians and nonmember Indians on the part of the tribal courts.

1. Establishing the Court

> § 1. There shall be a United States Court of Indian Affairs, which shall consist of a chief judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate. At no time shall the court consist of fewer than two Native-American judges.
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> § 2. (A) The authority of the court may be exercised either by the full court or one or more judges duly assigned by the court to sit in a particular locality or to hold a special term for a designated class of cases.[190] *Provided that* the assigned judges consist of no fewer than one Native American. (B) The issue of when the full court must rule in a specific matter is a determination which shall be made as an internal administrative function of the court.

The text in section 1 establishing the Court of Indian Affairs resembles the language of the original Wheeler-Howard bill,[191] but adds that there shall be no fewer than two Native-American judges sitting on the court at any time. Since this reviewing body will be interpreting tribal law, it is essential that it consist, at least partially, of Native Americans. The number set forth in the statute is a minimum number and it would be well within the scope of such a statute for the President to appoint more than two Native-American judges to the court. This construction is meant to minimize racial prejudice and its influence on the court's decisions.

2. Jurisdiction

> § 3. The Court of Indian Affairs shall have appellate jurisdiction over all criminal cases arising under the laws or ordinances of a chartered Indian community, in which a non-Indian or nonmember Indian is the defendant.
>
> § 4. All jurisdiction heretofore exercised by the United States district courts by reason of the fact that a case involves facts constituting any of the grounds to jurisdiction enumerated in the preceding section, is hereby terminated, reserving, however, to such district courts complete jurisdiction over all pending suits and over all proceedings ancillary and supplementary thereto.[192]
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> § 5. The Court of Indian Affairs may order the removal of any cause falling within its jurisdiction as set forth above, from any court of any state or any Indian community in which such cause may have been instituted.[193]

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189. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978). Remember that this argument was fundamental to the Court's reasoning in arriving at the holding.

190. *See* H.R. 7902, 73d Cong. § 2 (1934); *Hearings*, *supra* note 77, at 3.

191. *See* H.R. 7902.

192. *See id.* § 4.

193. *See id.* § 5.

> § 6. (A) The standard of review for an appeal to the Court of Indian Affairs shall be de novo in reviewing issues of law, and a reasonable basis standard shall apply to reviewing issues of fact. (B) In conducting an appeal, the reviewing court shall respect the spirit of tribal law against which the offense was committed, and such an appeal shall be governed by the traditional canons of Indian law.

Considering the limited purpose of this Comment, including more expansive jurisdiction in the Court of Indian Affairs under section 3 seems impractical. However, it is important to note that the original Wheeler-Howard bill proposed much more expansive jurisdiction both in criminal and civil cases.[194]

Section 4 divests the federal district courts of jurisdiction in "all criminal cases arising under the laws or ordinances of a chartered Indian community,"[195] and vests such jurisdiction in the Court of Indian Affairs. Putting the appellate decisions in the hands of one body leads to more impartial administration of justice and designates a reviewing body which is not associated with a local tribe as the sole body monitoring the decisions of tribal courts prosecuting non-Indians. It also ensures that the reviewing court is one which is familiar with tribal and federal Indian law.

Section 6 establishes the appellate standard of review over tribal-court decisions. Since review of most criminal cases is de novo on issues of law, the Court of Indian Affairs should be no different. This compromise would allay the fears of non-Indian defendants concerned that they would not receive a fair trial in tribal court, and would let such defendants know that the reviewing court's hands are not tied to a stringent standard on issues of law. Some tribes will undoubtedly be displeased by this standard and see it as an intrusion on tribal courts. However, Congress is unlikely to pass legislation recognizing criminal jurisdiction that does not provide for some protection of non-Indians' rights. The alternative is to continue to live with *Oliphant*, which is far more intrusive on the power of tribal courts.

3. Other Powers and Procedures

In establishing the rest of the court's powers, the statute needs to include sections in which to promulgate rules of procedure,[196] institute an en banc appeals process,[197] determine the rights of the accused in Court of Indian Affairs proceedings,[198] recognize the right to trial by jury and other constitutional rights,[199] enumerate the court's incidental powers,[200] and subject the court's decisions to review by the U.S. Courts of Appeal and the Supreme Court.[201] Title IV of the original Wheeler-Howard bill serves as an excellent model and many

194. *See id.* § 3.
195. *See id.*
196. *See id.* § 7.
197. *See id.* § 8.
198. *See id.* § 9.
199. *See id.* § 10.
200. *See id.* § 13.
201. *See id.* § 15.

of its provisions could be adopted wholesale for the purpose of establishing the rest of the court's structure, while some would need minor alterations to keep within the limited jurisdiction proposed above.[202]

CONCLUSION

For twenty years the tribes have lived with the *Oliphant* decision and its effects. Due to this decision, many non-Indians who commit everyday misdemeanor offenses on the reservations are often never prosecuted. The hands of the tribal police are tied, and together with the increasing reliance of tribal economies on tourism, which increases the number of non-Indians visiting the reservations, a state of lawlessness and self-help justice has resulted on many reservations.

The *Oliphant* decision has been attacked time and time again by scholars in the field of Indian law, but the Supreme Court has turned a blind eye to academia, choosing instead to advance its own agenda against tribal sovereignty. Recent cases such as *Yakima*,[203] *Duro*,[204] *Brendale*,[205] and *Cotton Petroleum*[206] make it clear that criticism alone is not going to deter the Court from following its current course.

It is time for Congress to use its traditional plenary power over Indian affairs to enact legislation that recognizes tribal rights to exercise criminal jurisdiction over non-Indians, protects tribal sovereignty, helps to remedy the current lawless behavior by non-Indians living on and visiting reservations, and finally puts an end to the *Oliphant* decision.

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202. Many of the provisions are constructed with civil and federal jurisdiction in mind, but the jurisdiction enumerated in section 3 of the legislation proposed in this Comment only contemplates limited criminal jurisdiction.

203. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

204. Duro v. Reina, 495 U.S. 676 (1990).

205. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

206. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).