Tribal Criminal Jurisdiction Over Indians Who Are Not Members of the Prosecuting Tribe

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by Dennis W. Arrow

In a controversial but apparently stable 1978 decision, the United States Supreme Court decided that Indian tribal courts lack inherent criminal jurisdiction (absent federal statute) to try or punish non-Indians for crimes committed on their reservations. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Later cases (and, for that matter, earlier ones as well) have imprecisely used the terms "non-Indian" and "nonmember" interchangeably, although the terms are manifestly not synonymous.

Subsequent to *Oliphant*, hereafter, both federal and tribal courts have struggled with this ambivalence in attempting to determine whether tribal courts had criminal jurisdiction over Indians who were members of other tribes, with the Ninth Circuit ultimately deciding that they did (in some cases), *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988), and the Eighth Circuit deciding that they did not. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988). The Supreme Court granted review in *Duro*; *Greywater* was not appealed.

Since many reservation populations are increasingly heterogeneous, and tribal courts are becoming both more numerous and more sophisticated, the issue is of great practical import to the maintenance of law and order in Indian country. Moreover, the issue involves significant practical import to the maintenance of law and order in Indian country. Moreover, the issue involves significant is-

**FACTS**

Albert Duro is a Cahuilla Indian and an enrolled member of the Torrez-Martinez Band of Mission Indians, a federally recognized Indian tribe. He has lived all but one year of his life outside of his tribal reservation. He was born in Riverside, Calif., and considers himself to be a resident of that state. From 1980 through 1983, he lived intermittently with his girlfriend, Debbie Lackey, in California, except for a six-week period during which they cohabited in Phoenix, Ariz.

Lackey is an enrolled member of the federally recognized Salt River Pima-Maricopa Indian Community ("the Salt River Community"). Their tribal reservation is in Arizona. She, too, was born in California and resided there during her childhood and part of her adult life.

Beginning about Feb. 1, 1984, Duro worked in Arizona for PlCopa Construction Company, which is owned by the Salt River Community. One month later, he began to reside with Lackey at her family home in Salt River Com-

**ISSUES**

The main issue before the Court is whether a tribal court may exercise inherent territorial criminal jurisdiction over a nonmember of the prosecuting tribe, when the defendant is a member of another federally recognized tribe and has substantial contacts with the prosecuting tribe, or whether the exercise of such jurisdiction is inconsistent with tribal status as such.

To resolve this issue, the Court must answer the following questions:

- Is a tribe's exercise of such jurisdiction specifically precluded by federal law?
- Has there been a shared historical presumption among Congress, the executive branch, and the lower federal courts that the tribes lack such jurisdiction?

Conversely, has there been a shared historical presumption that such jurisdiction does, in fact, inhere in tribal status?

Does subjecting to tribal criminal jurisdiction an Indian member of another federally recognized tribe, in circumstances in which a non-Indian would not be so subjected, constitute racial discrimination in violation of the "equal protection" component of the Indian Civil Rights Act of 1968, thereby warranting Duro's release pursuant to the habeas corpus provision of that Act?

Do policy considerations relating to the maintenance of law and order in Indian country mitigate in favor of the recognition of tribal territorial criminal jurisdiction over Indians who are not members of the prosecuting tribe?

**Albert Duro**

v.

**Edward Reina and the Hon. Relman R. Manuel, Sr.**

(Docket No. 88-6546)

*Argument Date: Nov. 29, 1989*

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community territory, and he continued to reside there until about June 15, 1984.

On June 3, he was arrested on alcohol and marijuana possession charges by tribal police, pled guilty in the Salt River Community Court, and was fined. On June 19, he was arrested in California by federal agents and charged with the murder of a 14-year-old boy, Phillip Fernando Brown, who was an enrolled member of the Gila River Indian Community, a third federally recognized tribe. The murder, it was alleged, was committed on or about June 15 within the territory of the Salt River Community, where Brown, the decedent, had also resided.

The federal indictment charged both murder and aiding and abetting murder, in violation of 18 U.S.C. § 2, 18 U.S.C. § 1111, and 18 U.S.C. § 1153, the Indian country Major Crimes Act. Simultaneously, Duro was charged in the Salt River Community Court with discharge of a firearm within the reservation, a misdemeanor under tribal law. Both charges related to the same event. Later, on motion of the United States, the federal indictment was dismissed without prejudice by the federal district court. On Sept. 19, the United States Marshal submitted Duro to the custody of the Salt River Community's Department of Public Safety, which incarcerated him within the reservation.

Duro unsuccessfully moved for dismissal of the criminal charge in the tribal court on jurisdictional grounds. He subsequently sought habeas corpus in federal district court pursuant to the Indian Civil Rights Act of 1968, 25 U.S.C. § 1303. He maintained that Oliphant foreclosed tribal criminal jurisdiction over nonmember Indians, and, alternatively, that granting such jurisdiction over nonmember Indians while denying it in cases involving nonmember non-Indians would constitute racial discrimination in violation of the “equal protection” provision of that Act, 25 U.S.C. § 1302(8). The district court’s approval of Duro’s habeas corpus petition was reversed by the Ninth Circuit on appeal.

The respondents in this case, Edward Reina and the Hon. Relman R. Manuel, Sr., are, respectively, the Chief of Police and Chief Judge of the Salt River Community.

BACKGROUND AND SIGNIFICANCE

Federal law has historically recognized that Indian tribes are “unique aggregations” possessed of inherent sovereign powers to govern both their members and their territory. Yet the tribes are not wholly sovereign, being contained within the boundaries of the United States, recognized by federal law as a superior sovereign, “quasi-sovereign” seems to be the term most commonly used to describe the tribes’ political status.

As a result, tribal powers have generally been recognized to be susceptible of limitation in one of two ways. The first is ultimately a consequence of the supremacy clause of the United States Constitution, which makes federal statutes the supreme law of the land so long as they are themselves constitutional. Thus, tribal sovereignty may be abridged if such statutes expressly restrict tribal powers. The Indian Civil Rights Act of 1968, which forbids tribes from depriving any person within their jurisdiction of the equal protection of their laws (and provides a habeas corpus remedy in case of violation), is one such federal statute.

The second method for restricting tribal jurisdiction involves a federal common-law doctrine: Tribes are prohibited from exercising those sovereign powers that are inconsistent with their status as subordinate sovereigns (historically described in the case law as “domestic, dependent nations”). This doctrine has deep historical roots, tracing back to early nineteenth century case law that prohibited tribes—even absent federal statutory prohibitions—from conveying their land at will and making treaties with foreign nations. But the doctrine essentially lay dormant before being resuscitated by Oliphant in 1978.

The rediscovery of the “inconsistent with tribal status” doctrine—in an era of congressional policy favoring greater tribal autonomy and self-determination—has been subject to frequent and intense scholarly criticism. Some commentators have suggested, for example, that it invites courts to “discover” additional limitations on tribal sovereignty and jurisdiction left unimposed by Congress. Be that as it may, the doctrine seems firmly entrenched as an available principle.

In addition to its “inconsistent with tribal status” analysis, Oliphant proffered two independent justifications for precluding tribal criminal jurisdiction over non-Indians. At the analytical threshold, it examined the treaty relationship between the United States and the Suquamish Indian Tribe (whose criminal jurisdiction was there in issue) for evidence that the tribe had voluntarily relinquished such jurisdiction to the United States, ultimately concluding that the provisions of the relevant treaty were inconclusive. Oliphant, 435 U.S. at 207-08. (Albert Duro does not maintain that the “voluntary relinquishment” argument has any force with respect to the jurisdiction of the Salt River Community in the case now before the Court.)

Last, the Court in Oliphant concluded that an assumption of the nonexistence of tribal criminal jurisdiction over non-Indians was historically shared by Congress, the executive branch, and lower federal courts, and that this shariaJ assumption was of sufficient force to warrant rejection of such jurisdiction. Building on this rationale, Duro argues that an equally demonstrable shared assumption has existed with reference to tribal criminal jurisdiction over nonmember Indians, and adduces numerous treaties and early federal statutes in support of this proposition.

In response, Reina, on behalf of the Salt River Community, maintains that Oliphant’s “historically shared assumption” analysis is seriously flawed as an empirical matter. (See, e.g., Canby, The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation, 28 Ariz. L. Rev. 29, 36-37 (1986); Collins, Implied
Limitations on the Jurisdiction of Indian Tribes, 54 Wash. L. Rev. 479, 490-99 (1979); Note, Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders, 1979 Wis. L. Rev. 537, 540-51. Reina also argues that the historical evidence is, at best, inconclusive even as to tribal jurisdiction over non-Indians.

As to tribal jurisdiction over nonmember Indians (such as Duro in this case), Reina takes seriously the potential force of the “historically shared assumption” argument, maintaining not only that no such assumption about a lack of tribal jurisdiction ever existed, but also that the authorities invoked by the Court in Oliphant, as well as extrinsic evidence, demonstrate that there was in fact a contrary assumption that tribal criminal jurisdiction exists over all Indians, without distinction. Reina’s position in regard to this potentially critical issue is supported by the United States as amicus curiae.

The parties next clash regarding Oliphant’s “inconsistent with tribal status” limitation on jurisdiction, which the Ninth Circuit below deemed to lie at the “core” of that decision. In this context, although both sides agree that Oliphant itself precludes tribal criminal jurisdiction over non-Indians only, they both look to post-Oliphant Supreme Court case law in an attempt to “clarify” that decision. As has been indicated, such decisions point in opposite directions concerning the breadth of Oliphant’s sweep.

Duro, for his part, invokes United States v. Wheeler, 435 U.S. 313, 326 (1978), in which Justice Stewart, writing for the Court, stated flatly that Oliphant held that tribes “cannot try nonmembers in tribal courts,” and to Justice Stevens’ dissent in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 171 (1982), in which he declared that “[i]n Oliphant, the Court held that tribes have no criminal jurisdiction over crimes committed by nonmembers within the reservations.”

Reina counters that, the comments of those justices notwithstanding, Oliphant did not so hold, since the tribal court defendants in that case were: non-Indians. Furthermore, the distinction between “non-Indians” and Indians who are “nonmembers” of a particular tribe was not at issue in either Wheeler or Merrion. Wheeler was a Navajo defendant in a Navajo court, and Merrion was a non-Indian challenging a tribal tax.

Moreover, Reina contends, other Supreme Court decisions have interpreted Oliphant as involving jurisdiction over non-Indians only. Washington v. Confederated Tribes of the Colville Indian Reservation, 47 U.S. 154, 153 (1980); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 853 (1985). Interestingly, the Court’s opinion in National Farmers was authored by Justice Stevens, whose dissent in Merrion interpreted Oliphant in precisely the opposite manner. Equally interesting is the fact that just as in Wheeler and Merrion, the nonmember/non-Indian distinction was at issue in neither Colville nor National Farmers.

The battle of dicta and dissents aside (the Ninth Circuit below had dismissed such interpretations of Oliphant as “casual references”), both parties turn their attention to the reasons why tribal criminal jurisdiction over nonmember Indians is or is not “inconsistent with tribal status.” Duro maintains that it is, noting the fundamental nature of the premise that “each sovereign governs only with the consent of the governed,” and that he, as a nonmember of the Salt River Community, is excluded from voting and holding elective office there.

He also takes note of Oliphant’s employment of the reasoning of Ex Parte Crow Dog, 109 U.S. 556, 571 (1883), in which tribal jurisdiction was found to be exclusive in cases involving crimes by Indians against fellow Indians in Indian country (a result later modified by federal statute). The Oliphant Court reasoned that the facts in Crow Dog (Indian defendants in non-tribal court), were “almost the inverse” of the facts in Oliphant (non-Indian defendants in tribal court). In both cases, Duro points out, the Court emphasized the divergence of Indian and non-Indian cultural and legal traditions.

Arguing that “[t]he cultural and legal diversity among the Indian tribes is in many instances as great as that between an Indian tribe and non-Indians” (quoting Comment, Jurisdiction Over Nonmember Indians on Reservations, 1980 Ariz. St. L.J. 727, 755), Duro concludes that he cannot receive a fair trial in Salt River Community Court.

Rejecting Duro’s fair trial claim, and its underlying “tribal diversity” premise, Reina points to Duro’s residence within Salt River Community territory and his other contacts with the tribe. Further developing these points, amicus Rosebud Sioux Tribe, et al., presents extensive documentation of the intermixing of members of different tribes, and the tradition of host-tribe criminal jurisdiction.

Moreover, the Rosebud Sioux Tribe maintains, historical federal reservation policies further contributed to this phenomenon, whose existence is recognized by contemporary Indian policy, which, for example, provides federal services to all federally recognized Indians on any federal reservation. (Significantly, this policy is corroborated by the United States’ amicus brief in Duro, which affirms the primacy of the tribal interest in exercising criminal jurisdiction over nonmember Indians.) Modern tribal policies, the Rosebud Sioux Tribe contends, generally encourage nonmembers to participate in tribal social, cultural, and political activities, further diminishing the force of Duro’s “inter-tribal diversity” assertion.

Duro responds that the “significant contacts” te proffered by the Ninth Circuit in his case is impressionistic, unworkable, and unfair, and that his contacts with the Salt River Community were transitory and insignificant.

Reina further maintains that the presence of Indians with differing tribal affiliations on modern reservations adds force to the argument for maximum host-tribe jurisdiction, in the interest of ensuring efficient law-and-order main-
tenance in Indian country. Absent criminal jurisdiction over nonmember Indians, he contends, jurisdictional gaps will prevent not only efficient law enforcement, but, in many cases, any enforcement at all.

In Duro's case, for example, discharge of a firearm, a misdemeanor, is not subject to federal jurisdiction by virtue of the Major Crimes Act. Neither is there federal jurisdiction pursuant to the Indian Country Crimes Act or the Assimilative Crimes Act, because those Acts do not apply to crimes involving an Indian defendant and an Indian victim (irrespective of which tribes the defendant and victim are enrolled). And since Arizona has assumed no criminal jurisdiction pursuant to "Public Law 280," 18 U.S.C. § 1162, state criminal jurisdiction over Duro's alleged criminal act is equally foreclosed.

The parties' final disagreement relates to the "equal protection" limitation imposed on the exercise of tribal jurisdiction by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (8). Initially, it must be noted that the equal protection clause of the Fourteenth Amendment to the United States Constitution imposes no limitation on the exercise of tribal authority; since the tribes are neither the federal government nor states. "Tatton v. Mayes," 163 U.S. 376 (1896); "Barron v. Mayor and City Council of Baltimore," 32 U.S. (7 Pet.) 243 (1833). But Congress, acting pursuant to its "plenary power" in Indian affairs, has imposed the equal protection requirement by statute. Duro maintains that by subjecting an Indian nonmember to tribal criminal jurisdiction in circumstances in which a non-Indian nonmember would not be so subjected (because of Oliphant), the Salt River Community has engaged in an act of racial discrimination. Such discrimination, by virtue of Fourteenth Amendment equal protection principles (which Duro argues should be applied in like manner pursuant to the Indian Civil Rights Act's equal protection guarantee), must be justified by the challenged governmental entity pursuant to the "strict scrutiny" standard of judicial review. Duro maintains that this extraordinarily rigorous standard cannot be met in this case.

Reina denies that any racial classification is involved, pointing to a long line of Supreme Court case law describing the disparate treatment of Indian members of federally recognized tribes as being based on their status "as members of quasi-sovereign tribal entities," not race. See, e.g., "United States v. Antelope," 430 U.S. 641, 645-47 (1977); "Morton v. Mancari," 417 U.S. 535, 552-57 (1974). Thus, he insists, strict scrutiny is inapplicable, and the pursuit of tribal interests in efficiently maintaining order within tribal territory provides whatever justification is necessary to satisfy the applicable lower standard of judicial review.

If the Court rules that a tribal court may exercise criminal jurisdiction over an Indian who is a member of a different tribe, future cases might present the question of whether a tribe may exercise criminal jurisdiction over an individual who, although Indian as a matter of race, is not a member of any federally recognized tribe. Although such potential cases may cause the Court to consider how any jurisdictional "gaps" should best be filled, Duro itself does not directly present this issue.

ARGUMENTS

For Albert Duro (Counsel of Record, John Trebon, Security Pacific- Arizona Bank Building, 121 E. Birch Avenue, Suite 506, Flagstaff, AZ 86001; telephone (602) 779-1713):
1. Oliphant and its progeny preclude tribal criminal jurisdiction over nonmember Indians.
2. Non-Indians and nonmember Indians have historically been treated similarly for purposes of criminal jurisdiction.
3. Since the Salt River Community precludes all nonmembers from voting or holding elective office in the Salt River Community, it should be precluded from exercising criminal jurisdiction over such persons.
4. Federal criminal statutes do not grant such jurisdiction to the tribes.
5. The "significant contacts" test proffered by the Ninth Circuit in this case is unworkable and unfair.
6. Subjecting Indian nonmembers to tribal criminal jurisdiction in circumstances in which non-Indians would not be so subjected constitutes racial discrimination prohibited by the equal protection provision of the Indian Civil Rights Act of 1968.

For Edward Reina, et al. (Counsel of Record, Richard B. Wilks and Melvin J. Mirkin, Shea & Wilks, 114 W. Adams, Suite 200, Phoenix, AZ 85003; telephone (602) 257-1126):
1. Oliphant precludes tribal criminal jurisdiction over non-Indians only, and the authorities cited by the Oliphant Court recognized such jurisdiction over Indians without distinction.
2. The Court's post-Oliphant decisions support the principle of inherent tribal sovereignty—the basis for the tribe's assertion of the jurisdiction in question.
3. Congress, the executive branch, and the lower federal courts have historically shared the presumption that tribes have the power to try and to punish nonmember Indians for crimes committed within the territory of the prosecuting tribe.
4. If the tribes are denied such jurisdiction, jurisdictional gaps will undermine the maintenance of law and order in Indian country; absent tribal criminal jurisdiction over Albert Duro, he will never be tried and punished for the offense charged.
5. The disparate treatment of Albert Duro vis-a-vis similarly situated non-Indian is based, not on race, but on his status as a member of a federally recognized Indian tribe; the Supreme Court has consistently recognized the validity of such disparate treatment in a long line of analogous equal protection cases.
AMICUS BRIEFS
In Support of Edward Rehia, et al.
The United States; the Salt River Project Agricultural Improvement and Power District; the Rosebud Sioux Tribe, et al.; Six American Indian Tribes (Three Affiliated Tribes of the Fort Berthold Reservation, et al.); and the Sac and Fox Nation, et al.

ARGUMENTS: JANUARY SESSION

Monday, January 8
1. Dept. of Treas v. FLRA (88-2123)
2. Georgia v. South Carolina (71 Orig.)

Tuesday, January 9
5. Board of Ed. Westside v. Mergens (88-1957) (Preview 172-174)
7. Stewart v. Abenc (88-2102)
8. United States v. Montana-Murillo (89-165)

Wednesday, January 10
9. Ft. Stewart Schools v. FLRA (89-65)
10. New York v. Harris (88-1000)
11. Whitmore v. Arkansas (88-71-16)
12. United States v. DAME (88-1951)

Monday, January 15
LEGAL HOLIDAY

Tuesday, January 16
1. U.S. Labor Dept. v. Triplett (88-1671)
   Comm. Legal Ethics v. Triplett (88-1600)
2. California v. American Stores (89-258)
3. Rutan v. Republican Party (88-1872)
   Frech v. Rutan (88-2074)

Wednesday, January 17
6. Adams Fruit Co. v. Barrett (89-2055)
7. Selvage v. Lynaugh (87-670)
8. Walton v. Arizona (88-7551)

ARGUMENTS: FEBRUARY SESSION

Monday, February 19
LEGAL HOLIDAY

Tuesday, February 20
1. United States v. Munoz-Flores (88-1942)
2. Cooter & Gell v. Hartmarx (89-275)

Wednesday, February 21
5. Venegas v. Mitchell (88-1725)
6. Horton v. California (88-1764)
7. OPM v. Richmond (88-19-14)
8. Lewis v. Jeffers (89-189)

Monday, February 26
1. Port Authority v. Feeney (89-386)
2. United States v. Kokinda (88-2031)
4. Eli Lilly v. Medtronic (89-215)

Tuesday, February 27
6. Pennsylvania v. Muniz (89-213)
7. Pension Benefit v. Lit Corp. (89-390)

Wednesday, February 28
9. Yellow Freight v. Donnelly (89-131)
10. United States v. RIOS (89-61)
11. Burnham v. Superior Court of California (89-14)
12. Taylor v. United States (88-7194)