Class 2 – Oliphant v. Suquamish Indian Tribe

- Professor Matthew L.M. Fletcher
- Former Staff Attorney for Suquamish Tribe
Port Madison Reservation: Home of Suquamish Tribe
Chief Seattle

[Image of Chief Seattle]

[Image of a monument with the name "Seattle" and "Sealth"]
From an 1854 treaty negotiation:

How can you buy or sell the sky, the warmth of the land? The idea is strange to us.

If we do not own the freshness of the air and the sparkle of the water, how can you buy them?

Every part of this earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man.
Chief Seattle Days
Mark Oliphant Assaults Police Officer
... and Resists Arrest
Daniel Belgarde’s High-Speed Chase
... and Wrecking of Tribal Police Car
The Facts of Oliphant

- Mark Oliphant cited for disorderly conduct, then arrested for resisting arrest and assaulting an officer by Suquamish tribal police during Chief Seattle Days.
- Daniel Belgarde arrested by tribal police the next day after high-speed chase and ramming tribal police car.
- Both non-Indians.
- Both incidents arise in Port Madison Reservation ("Indian Country").
When you punch:

- A federal marshal, you punched the United States
- A county deputy, you punched the State of Washington
- A tribal officer, you punched the Suquamish Indian Tribe
When you crash into ...

- A U.S. Marshal’s car, you wrecked federal property
- A county sheriff’s office prowler, you wrecked state property
- A tribal police car, you wrecked tribal property
Basic Criminal Legal Theory

When you punch a police officer and/or destroy a police car, you are committing a crime against that sovereign:

- If the cop is a federal marshal or Bureau of Indian Affairs officer, you have punched the United States
- If the cop is a state officer, you have punched the State of Washington
- If the cop is a tribal officer, you have punched the Suquamish Tribe
Federal Courthouse in Seattle
Suquamish Tribal Longhouse
Basic Criminal Jurisdiction

Whichever sovereign’s law you violate controls criminal jurisdiction:

- If you violate federal law, the local United States Attorney’s Office brings an indictment against you in federal court
- If you violate state law, the local Kitsap County prosecutor brings an information against you in Kitsap County Superior Court
- If you violate tribal law, the tribal prosecutor brings a complaint against you in Suquamish Indian Provisional Court
Washington Justice System

- Washington Supreme Court
- Washington Court of Appeals (Division 2)
- Kitsap County Superior Court
Federal Justice System

United States Supreme Court

Ninth Circuit Court of Appeals

District Court for the Western District of Washington
Suquamish Justice System

- Suquamish Court of Appeals (Northwest Indian Court System)
- Suquamish Tribal Court (formerly Suquamish Indian Provisional Court)
Suquamish Prosecution

Case Captions:
Suquamish Indian Tribe v. Mark David Oliphant
Suquamish Indian Tribe v. Daniel B. Belgarde

Applicable Law:
Law and Order Code of the Suquamish Indian Tribe
Indian Civil Rights Act (aka Indian Bill of Rights) – 25 U.S.C. § 1302
Stay on Suquamish Prosecution
Wha?!?!? Oh, Habeas Corpus.
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.
Federal District Court Judge Morell Sharp

• Issues “stay” on tribal prosecution
• Asks parties to brief the authority of an Indian tribe to prosecute non-Indians
• Affirms tribal authority
Tribe courts

Trying of non-Indians upheld

By MARSHALL WILSON

Indians have won the right to arrest and try in their tribal courts non-Indians charged with crimes on Indian reservations.

United States District Court Judge Morel Sharp issued the precedent-setting ruling yesterday.

The case stemmed from a fight on August 19 on the Port Madison Indian Reservation in Kitsap County. Mark David Oliphant, a non-Indian living in the vicinity of Suquamish, was arrested by tribal officers and booked into the Kitsap County jail where the Suquamish Tribe had a contract to keep prisoners.

Oliphant was not charged with participating in the fight, but he was charged with assault and battery and resisting arrest.

OLIPHANT Sought a writ of habeas corpus to prevent the Indians from taking him to court. Tribal court action has been delayed pending yesterday's federal-court ruling. Philip P. Malone, Oliphant's attorney, told the federal court the Indians living on the Port Madison Reservation no longer constitute a distinct community.

Malone said a total of 50 Indians, with only 22 of them "voting" Indians, live on the reservation.

Malone argued that the federal government never has approved the present law and government program of the Suquamish tribe, and that the United States, not the tribe, had jurisdiction over the Oliphant matter.

Thomas P. Gier, assistant United States attorney, appearing on behalf of the superintendent of the Western Washington Tribal Agency, named as a respondent in the petition for a writ of habeas corpus, said the federal government does have jurisdiction but it is concurrent with tribal jurisdiction.

Gier said the termination of a reservation is a matter to be decided by Congress, which has taken no such action concerning Port Madison Reservation.

Barry Enstoff, attorney for the tribe, said "reservations are not ended just because someone thinks there are not enough Indians living there anymore."

ENSTOFF SAID the federal and state governments, by way of grants supporting the tribal courts and police departments, have shown they recognize the powers and rights of the tribe.

"The Suquamish Tribe is in existence," Judge Sharp said. "It has a government, constitution, bylaws, a law-and-order program and a court. It has always been so recognized by the Bureau of Indian Affairs, Congress and the Department of Interior."

Concurrent jurisdiction, with the tribe, does exist but the United States has not chosen to assert its jurisdiction except for violations of the Major Crimes Act, the judge said.

Both Indians and non-Indians are protected by the Civil Rights Act on the reservation, Judge Sharp added.

The tribal court, duly constituted, had the right to act in the Oliphant case, Judge Sharp said, and accorded him due process of law and deprived him of no civil rights. No date has been set for Oliphant's appearance before the tribal court.
Mark David OLIPHANT, Plaintiff-Appellant,

v.

Edward SCHLIE, Chief of Police of the City of Bremerton, et al., Defendant-Appellees.

No. 74–2154.

United States Court of Appeals, Ninth Circuit.

Ninth Circuit Panel Affirms (2-1)

Circuit Judge Ben Duniway (majority)

Circuit Judge Anthony Kennedy (dissenter)
Court rules tribe has jurisdiction in crime case involving non-Indian

SAN FRANCISCO — (AP) — The 9th United States Court of Appeals ruled yesterday that an Indian tribe has jurisdiction over non-Indians who commit crimes while on tribal land within a reservation.

The 3-10-1 decision upheld a United States District Court order which had denied Mark David Oliphant a writ of habeas corpus. The appeals court noted the case involves a question of Indian law which has been unresolved since it first arose a century ago.

OLIPHANT WAS arrested August 13, 1975, on the Port Madison Indian Reservation in Washington by Suquamish-tribal police. He was charged before the provisional court of the tribe with assaulting an officer and resisting arrest.

The tribal court ordered Oliphant jailed on $200 bail, but then released him on his own recognizance. Before trial he filed action in federal court asserting the tribal court can have no jurisdiction over a non-Indian.

Oliphant asserted Congress never had conferred such jurisdiction.

The appeals court said the proper approach was to determine what the original sovereign powers of the tribes were and then in what respects these powers have been limited.

“Antagonism between reservation Indians and the surrounding populations does persist,” said the decision. “History, broken promises, cultural differences and neglect all contribute to it. Reluctance on the part of the states to accord to the Indians rights guaranteed to them by treaties still exists.”

Judge Anthony Kennedy dissented, saying the jurisdiction the tribal court attempts to exercise is “novel and unusual, and certainly inconsistent with prior practice.”

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INDIAN JURISDICTION IN WEST IS DISPUTED

High Court to Hear Challenge of Two Caucasians to Penalties Levied on a Reservation

STAFF REPORT

SUQUAMISH, Wash., Aug. 9—At Feds Reeling in the Port Madison Indian Reservation, signs proclaim that a condition of entry is "admission to the legal jurisdiction of Suquamish Indian Tribe." The Suquamish say this includes police jurisdiction for Indians and non-Indians alike.

This claim is being disputed. Two Caucasians who were arrested, fined and fined by the Suquamish Tribal Court in 1974 have appealed their arrest to the United States Supreme Court. The Court is expected to hear the matter, known as the Oliphant case, this winter.

"A hot issue on every reservation in the country is to what extent Indians have jurisdiction over non-Indians," says Larry D. Travers, lawyer for the Suquamish.

Legal jurisdictional matters have surfaced only in the last 10 years nationally as aging tribal leaders have retired, he says. They have been encouraged to let the Bureau of Indian Affairs handle legal problems involving Indians and to give the state or county jurisdiction over non-Indians on reservations. But the result was confusion.

Problems in Arrests

"A cop had to have a plot map and genealogical chart to know whether he could make an arrest or not," says Mr. Travers. "Now, young Indian leaders across the nation feel strongly about their rights as tribes and want to assume legal jurisdiction as a matter of practicality. But the matter of whether Indians have jurisdiction over non-Indians on the reservation has never been signed in court before this case," he continued.

"Consequently I have had an ejection of a man from over a dozen tribes who walked onto a friend-of-the-court brief to support the tribes' position."
Tribal Powers Challenged

By Cynthia Gorney
Special to The Washington Post

SUquamish, Wash.—It was not really much of a fight. It was late at night and there was a lot of liquor around and “altercation” is the word Mark Oliphant prefers. An altercation that ended when Oliphant, a non-Indian but nonetheless a lifetime resident of the Port Madison Reservation, was pulled away by a newly appointed officer of the Suquamish tribal police.

Nabbed by a tribal policeman, Oliphant still bristles at the memory. “Right on the little league ball field,” he said recently, thumping his table at the local bar, “where I hit my first home run.”

Oliphant was not cooperative. Oliphant was charged with resisting arrest and assault on a police officer and was locked up in jail for the next five days. And last month, wearing his best brown corduroy suit, Oliphant went to Washington to watch the Supreme Court hear the case that may have turned his late night altercation into a major test of the balance of power on America’s Indian reservations.

The issue starts off simple: Do the six Suquamish tribal police, whose headquarters is a cramped office on the main street of this tiny Puget Sound community, have the authority to arrest non-Indians on the reservation?

And once arrests are made, does the Suquamish tribal court, which is usually convened by turning an office table sideways and clearing away the coffee pot, have the authority to try non-Indians—who have no direct voice in the making of Suquamish law—and sentence them to jail?

Those two questions, presented to the nation’s highest court in an era of unprecedented controversy over Indian claims to land and its resources, contain a staggering array of legal implications—“so far reaching,” said a Tacoma city official, “that you don’t even want to contemplate it.”

If the Suquamish are granted criminal jurisdiction over non-Indians, the decision might well

See INDIANS, A1, Col. 1

Non-Indian Oliphant, Supreme Court petitioner.
OLIPHANT v. SUQUAMISH INDIAN TRIBE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76–5729. Argued January 9, 1978—Decided March 6, 1978*
Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. Pp. 195–212.

(a) From the earliest treaties with Indian tribes, it was assumed that the tribes, few of which maintained any semblance of a formal court system, did not have such jurisdiction absent a congressional statute or treaty provision to that effect, and at least one court held that such jurisdiction did not exist. Pp. 196–201.

(b) Congress’ actions during the 19th century reflected that body’s belief that Indian tribes do not have inherent criminal jurisdiction over non-Indians. Pp. 201–206.

(c) The presumption, commonly shared by Congress, the Executive Branch, and lower federal courts, that tribal courts have no power to try non-Indians, carries considerable weight. P. 206.

(d) By submitting to the overriding sovereignty of the United States, Indian tribes necessarily yield the power to try non-Indians except in a manner acceptable to Congress, a fact which seems to be recognized by the Treaty of Point Elliott, signed by the Suquamish Indian Tribe. Pp. 206–211.

544 F. 2d 1007 (Oliphant judgment), and Belgarde judgment, reversed.
Rehnquist, J., delivered the opinion of the Court, in which Stewart, White, Blackmun, Powell, and Stevens, JJ., joined. Marshall, J., filed a dissenting opinion, in which Burger, C. J., joined, post, p. 212. Brennan, J., took no part in the consideration or decision of the cases.
Attorneys

Philip P. Malone argued the cause and filed briefs for petitioners. Slade Gorton, Attorney General, argued the cause for the State of Washington as amicus curiae urging reversal. With him on the brief were Edward B. Mackie, Deputy Attorney General, and Timothy R. Malone, Assistant Attorney General.

Barry D. Ernstoff argued the cause for respondents. With him on the brief was Steven H. Chestnut. H. Bartow Farr III argued the cause for the United States as amicus curiae urging affirmance. On the brief were Solicitor General McCree, Assistant Attorneys General Days and Moorman, Louis F. Claiborne, and Miriam R. Eisenstein.
†William J. Janklow, Attorney General, and David L. Knudson and Tom D. Tobin, Special Assistant Attorneys General, filed a brief for the State of South Dakota et al. as amici curiae urging reversal, joined by the Attorneys General for their respective States as follows: Michael T. Greely of Montana, Paul L. Douglas of Nebraska, Robert F. List of Nevada, Toney Anaya of New Mexico, Allen I. Olson of North Dakota, James A. Redden of Oregon, and V. Frank Mendicino of Wyoming.


Briefs of amici curiae were filed by C. Danny Clem for Kitsap County; by Michael Taylor and Daniel A. Raas for the Lummi Indian Tribe et al.; by David H. Getches and Ralph W. Johnson for the National American Indian Court Judges Assn.; and by George B. Christensen and Joseph S. Fontana for the National Tribal Chairmen’s Assn.
1. Indians ⇐ 38(2)

Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress.

2. Indians ⇐ 38(2)


3. Indians ⇐ 38(2)

Although an early version of the Indian Civil Rights Act extended its guarantees only to American Indians, rather than to any person, and although the purpose of a later modification was to extend the Act’s guarantees to “all persons who may be subject to jurisdiction of tribal governments whether Indians or non-Indians,” this change was not intended to give Indian tribes criminal jurisdiction over non-Indians; instead, the modification merely demonstrated Congress’ desire to extend the Act’s guarantees to non-Indians if and where they come under a tribe’s criminal or civil jurisdiction by either treaty provision or act of Congress. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

4. Indians ⇐ 38(2)

From the earliest treaties with Indian tribes, it was assumed that the tribes, few of which maintained any semblance of a formal court system, did not have inherent criminal jurisdiction to try and to punish non-Indians, absent a congressional statute or treaty provision to that effect.

5. Indians ⇐ 38(2)

Congressional actions during the 19th century reflected that body’s belief that Indian tribes do not have inherent criminal jurisdiction over non-Indians. 18 U.S.C.A. §§ 1152, 1153.

6. Indians ⇐ 38(2)

The presumption, commonly shared by Congress, the executive branch, and the lower federal courts, that Indian tribal courts have no power to try non-Indians carries considerable weight.

7. Indians ⇐ 3, 6

In interpreting Indian treaties and statutes, doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith; but treaty and statutory provisions which are not clear on their face may be clear from the surrounding circumstances and legislative history.

8. Indians ⇐ 38(2)

By submitting to the overriding sovereignty of United States, Indian tribes necessarily yield the power to try non-Indians except in a manner acceptable to Congress.
Associate Justice William Rehnquist
Associate Justice Thurgood Marshall
Police “Void”

White Oliphant case causes police “void”

The U.S. Supreme Court’s decision in the Oliphant case has caused a developing void in law enforcement on Indian reservations,” said Assistant Secretary for Indian Affairs Forrest Gerard to the Justice Department March 3.

The ruling denied Indian tribes jurisdiction over non-Indians on the reservations.

Gerard, writing to Benjamin Civiletti, deputy attorney general designate, said that tribes had become increasingly active in the area of criminal jurisdiction because no government — the state probably lacked the jurisdiction and the U.S. exercised little or none — was enforcing criminal laws on reservations.

Gerard said that federal action to correct the situation was needed and asked for a conference with his office to explore what might be done to provide this service.

National Indian reaction was typified by the Turtle Mountain North Dakota Tribe that said, through spokesman Richard Frederick, a tribal judge, that the Oliphant decision was unfair. Frederick, who is also vice president of the National Indian Court Judges Association, said, “I’m disappointed with it. For one thing, we’re not getting fair treatment. If we Indians commit a crime on state land, we’re tried in the state court. But if non-Indians commit a crime on Indian land, we can’t try them.”

Pat McLaughlin, chairman of the Standing Rock Sioux Tribe, said: “Indian law when it was set up was tribal law, not for persons. Anyone who came into that territory should be subject to that law. It wasn’t made just for certain persons. I don’t think it’s fair. If any non-Indian comes on the reservation, he’s not subject to anything.”

Herbert Andrews, vice president of the Salt River Pima-Maricopa Tribe, east of Scottsdale, Ariz., said he cannot send tribal police on investigations of crimes involving non-Indians.

On the Fort McDowell-Yavapai reservation, tribal president Clinton Patana said he anticipates an increase in game poaching and damage to the terrain from off-road vehicles.

On the Ahtanum reservation, Chairman Wilbert Carlisle said that the tribe could no longer provide police protection for all persons on the reservation because of the ruling.

The Phoenix Gazette editorialized that the “Supreme Court has added a new measure of confusion to the already bewildering situation on reservation law enforcement.”