TRIBAL COURTS IN NEW YORK: Case Study of the Oneida Indian Nation

Tuesday, November 20, 2018

Program Materials

I. Program Introduction

II. Native American Courts from the Indian Nation Perspective

Faculty: Nation Representative Ray Halbritter, Michael R. Smith

Written Materials and Resources
**Full document also included in Part II program materials*

Federal Treaty

*1794 Treaty of Canandaigua (http://www.oneidaindiannation.com/wp-content/uploads/2017/09/TreatyWithTheOneidaEtc1794.pdf)

Oneida Indian Nation Ordinances, Codes, and Rules

*Ordinance for the Establishment of the Oneida Nation Court (Ordinance No. O-97-02) (http://www.oneidaindiannation.com/wp-content/uploads/2017/09/OneidaNationCourt.pdf)

Oneida Indian Nation Rules of Civil Procedure (http://www.oneidaindiannation.com/wp-content/uploads/2017/10/rulesofcivilprocedure-document.pdf)

Oneida Indian Nation Rules of Criminal Procedure (http://www.oneidaindiannation.com/wp-content/uploads/2017/10/rulesofcriminalprocedure-document.pdf)

Oneida Indian Nation Rules of Evidence (http://www.oneidaindiannation.com/wp-content/uploads/2017/09/rulesofevidence-document.pdf)

Oneida Indian Nation Rules of Debt Collection (http://www.oneidaindiannation.com/wp-content/uploads/2017/09/rulesofdebtcollection-document.pdf)

Oneida Indian Nation Penal Code (http://www.oneidaindiannation.com/wp-content/uploads/2017/09/penalcode-document.pdf)

Oneida Indian Nation Court Cases

**Shenendoah, et al., v. Halbritter*, *et al* (Case No. 00-001-Cl), Memorandum Decision, Hon. Stewart F. Hancock, Jr., January 8, 2001 (holding that all of plaintiffs' claims fell within one or more specific exclusions from the court's subject matter jurisdiction as established by ordinance).

*_Oneida Indian Nation v. Danielle Patterson_ (Case No. 01-012-CR), Memorandum Decision, Hon. Stewart Hancock, Jr., June 27, 2002 (holding that the court possessed discretionary authority to entertain a discretionary motion to dismiss in the interests of justice in a criminal case properly before the court).

Other

*Historical Timeline of the Oneida Indian Nation (http://www.oneidaindiannation.com/wp-content/uploads/2018/03/Historical-Timeline-2018.pdf)

III. Federal Indian Law and Tribal Court Jurisdiction

Faculty: Peter D. Carmen, Meghan Murphy Beakman

I. The Indian Civil Rights Act & Tribal Court Criminal Jurisdiction

A. As sovereign governments, Indian tribes retain the inherent authority to exercise jurisdiction over all crimes committed by Indians (members and non-members) against the person or property of another Indian in Indian country. *United States v. Wheeler*, 435 U.S. 313, 322, 328-29 (1978)(Indian tribes are separate sovereigns whose "right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."); *Oneida Indian Nation v. Preston R. Patterson* (Case Nos. CR9-003-CR, CR9-004-CR), Memorandum and Decision, Hon. Richard D. Simons, September 15, 2009 (the Oneida Indian Nation "is possessed of inherent self governing power" and as such "it possessed and retained the police power to regulate its internal affairs including the power to prosecute the members of the Nation for violation of its rules and ordinances.")

1. "Indian country" includes tribal reservations, Indian communities, and Indian allotments, including any right of ways running through these lands. 18 U.S.C § 1151.

2. Absent Congressional action, tribes have inherent exclusive jurisdiction over all crimes committed by an Indian in Indian country that are not included as major crimes in the federal Indian Major Crimes Act, 18 U.S.C. §§ 1153, 3243.

    a. For some tribes, Congress has altered this traditional jurisdictional structure by authorizing certain states to exercise either concurrent or exclusive jurisdiction over this category of crimes.

    b. In New York, Congress has granted state courts concurrent criminal jurisdiction over crimes in this category. *See* 25 U.S.C. § 232.

3. In cases where New York state concurrent criminal jurisdiction, New York state courts have recognized that New York state courts have recognized that jeopardy attaches to a criminal defendant who is prosecuted in tribal court; a defendant who is tried and acquitted in tribal court may not be prosecuted again by the state for the same crime. *See Hill v. Eppolito*, 5 A.D.3d 854, 772 N.Y.S.2d 634 (2004).

B. Absent Congressional action, Indian tribes are recognized as having criminal jurisdiction only over Indians, and not over non-Indians. *See Oliphant v. Suquamish*, 435 U.S. 191 (1978).

1. The *Oliphant* decision has been criticized, and many tribes continue to advocate for a Congressional "*Oliphant* fix" to recognize the authority of tribal sovereigns to prosecute non-Indian offenders who commit crimes in Indian country.

2. Congress responded to the criticism of *Oliphant* in part with the 2013 amendments to the Violence Against Women Act, which restored inherent tribal court jurisdiction over non-Indian domestic violence offenders in certain circumstances (*see* Part III below).

C. Tribal court criminal authority over Indians is governed by the Indian Civil Rights Act, 25 U.S.C. §§ 1301 – 1303 ("ICRA"), which provides protections to criminal defendants in tribal court identical to the protections afforded under the Bill of Rights. Under ICRA:

1. Unless exercising enhanced jurisdiction under the Tribal Law and Order Act (*see* Part II, below), tribal courts cannot "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000 or both." 25 U.S.C. § 1302(a)(7)(A).

    a. If a defendant is convicted of more than one criminal offense in a proceeding, the tribal court may impose up to one year of imprisonment for each offense, up to a maximum of nine years total imprisonment in a criminal proceeding. 25 U.S.C. § 1302(a)(7)(D).

2. Criminal defendants in tribal court are guaranteed the same procedural and substantive protections guaranteed under the U.S. Constitution, including the protections of the 4th, 5th, 6th, 8th, and 14th Amendments, and the protections again ex post facto laws and bills of attainder. 25 U.S.C. § 1302(a).

3. A criminal defendant aggrieved by a conviction in tribal court, including any alleged violation of the civil rights provisions of ICRA, has the right to file a federal habeas petition. 25 U.S.C. § 1303.

    a. With the exception of the right to habeas petition, ICRA does not create a separate private right of action against tribes or tribal officials for violations of § 1302. *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 58 (1978); *see also Shenandoah v. Halbritter,* 366 F.3d 89, 91–92 (2d Cir.2004), *cert. denied,* 125 S.Ct. 1824 (2005).

b. The Second Circuit has held that habeas relief under 25 U.S.C. § 1303 "address[es] more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and permanent banishment." *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708 (2d Cir. 1998)(citing *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 893-94, 897 (2d Cir.), *cert. denied*, 519 U.S. 1041, 117 S.Ct. 610, 136 L.Ed.2d 535 (1996));

II. Enhanced Criminal Jurisdiction Under the Tribal Law and Order Act

A. The Tribal Law and Order Act of 2010 (TLOA), codified at 25 U.S.C. § 1302(b), increased tribal court authority to impose criminal penalties of up to three years imprisonment and/or fine up to $15,000 for each offense.

1. If a person is convicted of more than one crime by a tribal court exercising enhanced jurisdiction, the tribal court may impose up to three years for each offense; the total tribal court sentence still cannot exceed a maximum of nine years total imprisonment for a criminal proceeding. 25 U.S.C. § 1302(a)(7)(D).

B. A tribal court implementing enhanced criminal sentencing under TLOA must ensure that the defendant has the right to heightened procedural protections, at least equivalent to the protections afforded under the Bill of Rights. 25 U.S.C. § 1302(c). Under TLOA, a tribe imposing an enhanced criminal sentences must:

1. Provide the defendant with the right to effective assistance of counsel at least equivalent to the right as guaranteed under the U.S. Constitution (25 U.S.C. § 1302(c)(1));

2. Ensure that an indigent defendant has access to legal counsel at the tribe's expense. The defense attorney must be licensed to practice law by a tribe, state, or federal government in a manner that ensures professional competence and responsibility. (25 U.S.C. § 1302(c)(2));

3. Require that tribal court judges be licensed to practice law in any U.S. jurisdiction, and that judges have sufficient legal training to oversee

criminal proceedings(25 U.S.C. § 1302(c)(3));

4. Prior to charging the defendant, make publicly available the tribe's written criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances)(25 U.S.C. § 1302(c)(4)); and

5. Maintain a record of the criminal proceeding, including an audio or video record of the criminal trial (25 U.S.C. § 1302(c)(4)).

c. For a tribal court to impose imprisonment for more than one year, the defendant must have been previously convicted of the same crime or a comparable offense in any U.S. jurisdiction or the crime charged must be one that would carry a potential sentence of more than one year if prosecuted in a state or federal court. 25 U.S.C. § 1302(c).

III. Special Domestic Violence Jurisdiction Under the Violence Against Women Act

A. In the 2013 reauthorization of the Violence Against Women Act (VAWA), Congress responded to concerns over the crisis of domestic violence in Indian country, and the failure of state and federal authorities to prosecute non-Indian domestic violence offenders, with amendments that restored inherent tribal court jurisdiction over non-Indian domestic violence offenders in certain circumstances. *See* Pub. L. No. 113-4, tit. IX, § 904, 127 Stat. 120 (2013)(codified at 25 U.S.C. § 1304).

B. Under 25 U.S.C. § 1304, a tribe may elect to exercise "special domestic violence criminal jurisdiction" over all persons, Indian and non-Indian, who commit domestic and dating violence offences within the tribe's jurisdiction. The tribe's jurisdiction over such offenses is concurrent with federal and/or state jurisdiction. 25 U.S.C. § 1304(a)(2).

1. Exception: tribes may not exercise special domestic violence jurisdiction over offenses where both the defendant and the victim are non-Indian, or in cases where the defendant lacks sufficient ties to the Indian tribe. 25 U.S.C. § 1304(a)(4).

a. If the defendant is non-Indian, the defendant must reside or be employed within the tribe's jurisdiction, or must be the spouse, intimate partner, or dating partner of a member of the tribe or of another Indian residing within the tribe's jurisdiction.

2. Tribes may exercise special domestic violence jurisdiction over offenses that are:

   a. Acts of domestic violence or dating violence that occur within the tribe's jurisdiction; and

   b. Criminal violations of protective orders where the violation occurs within the tribe's jurisdiction, provided that the protective order is enforceable by the tribe and is entitled to full faith and credit pursuant to the requirements set forth in 18 U.S.C. § 2265(b).

C. In addition to the protections provided under 25 U.S.C. § 1302, a tribe exercising special domestic violence jurisdiction under VAWA must also expressly ensure that the defendant has a right to trial by an impartial jury, drawn from a pool that reflects a fair cross section of the community, and which does not systematically exclude any distinctive group in the community, including non-Indians. 25 U.S.C. § 1304(d).

IV. The Indian Child Welfare Act

A. The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 - 1923, was enacted in 1978 to regulate proceedings involving the termination of parental rights, adoptions, and foster care placement involving any Indian child. Prior to the passage of ICWA, Indian children were removed from their families through state court proceedings at an astonishingly disproportionate rate as compared to non-Indian children.

   1. ICWA's Congressional findings stated that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions," and that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4), (5).

   2. Congress' state policy in enacting ICWA was to establish "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902.

B. ICWA applies to any child custody proceeding (proceedings involving the termination of parental rights, adoptions, and foster care placement) involving an "Indian child".

1. Under federal ICWA, an "Indian child" is defined as a minor, unmarried person under the age of 18 who is either (a) an enrolled member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4).

    a. In New York state, the definition of "Indian child" is expanded to include a child under the age of 18 who is the biological child of a member of an Indian tribe and is residing on or is domiciled within an Indian reservation, regardless of whether the child is a member or eligible to be a member. NY Social Services Law § 2(36). New York state court proceedings involving these children are subject to ICWA requirements.

2. A 2013 U.S. Supreme Court case, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), placed ICWA in the national spotlight, when the Court interpreted ICWA narrowly to hold that certain ICWA protections do not apply in cases where a biological father has never had legal or physical custody of the Indian child prior to initiation of the child custody proceeding.

C. ICWA provides for exclusive tribal court jurisdiction over child custody proceedings involving an Indian child where the child resides or is domiciled within the tribe's jurisdiction, except where federal law otherwise vests such jurisdiction in the state. 25 U.S.C. § 1911(a).

D. In a state court proceeding involving an Indian child who is not domiciled within the tribe's jurisdiction, the child's tribe or either parent may petition the state court to have the tribe's tribal court assume jurisdiction over the proceedings under ICWA. Absent good cause to the contrary, the state court must transfer the proceeding to the tribal court, unless the tribal court declines to assume jurisdiction over the proceeding. 25 U.S.C. § 1911(b).

E. If the tribal court does not assume jurisdiction over the proceeding involving the Indian child, the proceeding remains in state court, and is subject to myriad ICWA protections and requirements, including: notice requirements and the right of the Indian child's tribe to intervene as a party to the proceedings; the right of the parents to counsel at state expense; the family's right to social services and requirement that the state make active efforts to prevent family breakup; and adoptive and foster care placement preferences that promote preservation of tribal ties whenever possible. 25 U.S.C. §§ 1911 - 1923. The National Indian Child Welfare Association (NICWA) website is a good source of information for resources related to ICWA requirements and protections in cases where the child custody proceedings remain in state court (www.nicwa.org).

V. Tribal Court Civil Jurisdiction

A. Federal law generally recognizes that Indian nations and tribal courts have expansive inherent power and subject matter jurisdiction to resolve civil disputes involving tribal members within the tribe's jurisdiction. There is no general federal statute that limits tribal court civil jurisdiction over tribal members.

1. In New York, Congress has granted state courts concurrent criminal jurisdiction over civil disputes in this category. *See* 25 U.S.C. § 233

B. The question of whether a tribal court has adjudicative jurisdiction over non-Indians or nonmembers is complex and frequently litigated, and often turns in part on the legal status of the land at issue.

1. Within Indian country, the Supreme Court has stated that "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997)(suggesting that tribal court adjudicative jurisdiction over cases arising on tribal lands within Indian country is expansive).

2. With respect to tribal court jurisdiction over nonmembers on non-Indian fee land, the Court has set forth a test to determine whether jurisdiction exists:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565–66 (1981) (internal citations omitted).

C. Tribal courts must also consider whether they have personal jurisdiction over the defendant in a civil case. The Indian Civil Rights Act imposes a version of the federal Due Process Clause on tribal courts, which applies in civil as well as criminal proceedings. 25 U.S.C. § 1302(a)(8). Thus, personal jurisdiction analysis in tribal court is essentially identical to federal court analysis.

D. Tribal court exercise of adjudicatory jurisdiction over nonmembers raises issues of federal law reviewable in federal court. In order to raise a challenge to a tribe's adjudicative jurisdiction, a party must generally initially raise the challenge in tribal court, pursuant to a long line of federal cases requiring exhaustion of tribal court remedies. *See*, *e.g., Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians,* 471 U.S. 845, 856–57 (1985).

E. In New York, state court recognition of tribal court judgments and orders has historically been a complex issue. In 2015, an amendment to the New York Supreme Court Rules clarified the process through which tribal court judgments and orders are recognized by New York state courts, under the common law principle of comity. *See* 22 NYCRR § 202.71 ("Recognition of Tribal Court judgments, decrees and orders")

VI. Tribal Sovereign Immunity

A. Indian tribes are sovereign governments, and both the tribe and tribal officials possess immunity from lawsuits and court process in state, federal, and tribal court, except where Congress has authorized the suit or the tribe itself has waived immunity. The Supreme Court has consistently upheld the doctrine of tribal sovereign immunity. *See, e.g., Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024 (2014); *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Garcia v. Akwesasne Housing Auth.*, 268 F.3d. 76, 84 (2d Cir. 2001).

1. Tribes are not immune from lawsuits filed by the United States, but they are immune from lawsuits filed by the states.

B. Any Congressional abrogation of tribal sovereign immunity "cannot be implied but must be unequivocally expressed" in legislation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also C & L Enters. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001).

C. Indian tribes may waive their own immunity by tribal law or by contract as long as such waiver is "clear". *See Olka. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-510 (1991).

1. Example: the Oneida Indian Nation has enacted a tribal legislative waiver of sovereign immunity with respect to certain tort claims. *See* Oneida Indian Nation Amended Tort Claims Resolution Ordinance, No. O-18-01 (2018)(available at http://www.oneidaindiannation.com/wp-content/uploads/2018/04/Tort-Claims-Resolutions-Ordinance.pdf).

D. The most recent development in the area of tribal sovereign immunity has been the Supreme Court's 2017 decision in *Lewis v. Clarke,* 137 S. Ct. 1285 (2017). In this car accident case involving an on-duty tribal employee, the Court held that tribal employees can be sued in their individual (rather than official) capacities for torts they commit while acting within the scope of their employment, and that only official capacity suits are subject to sovereign immunity.

1. In reaching this decision, the Court drew on analogies to more familiar types of suits, including *Bivens* actions or § 1983 claims, making it clear that the Court was essentially seeking to level the playing field between state employees and tribal employees in terms of immunity from individual capacity suits.

2. The case did not reach the issue of official immunity defenses for tribal officials, such as absolute or qualified immunity, are still available to tribal officials in individual capacity suits. It seems likely that these defenses will be invoked more frequently post-*Lewis*.

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Written Materials and Resources (full documents included in Part III program materials)

Statues & Rules

Indian Civil Rights Act, 25 U.S.C. §§ 1301 – 1303

25 U.S.C. § 1304 ("Tribal jurisdiction over crimes of domestic violence")

Indian Child Welfare Act, 25 U.S.C. §§ 1901 -1923

25 U.S.C. § 232 ("Jurisdiction of New York State over offenses committed on reservations within State")

25 U.S.C. § 233 ("Jurisdiction of New York State courts in civil actions")

22 NYCRR § 202.71 ("Recognition of Tribal Court judgments, decrees and orders")

Oneida Indian Nation Ordinance

Oneida Indian Nation Amended Tort Claims Resolution Ordinance, No. O-18-01 (2018)(www.oneidaindiannation.com/wp-content/uploads/2018/04/Tort-Claims-Resolutions-Ordinance.pdf)

Cases

Oneida Indian Nation v. Preston R. Patterson (Case Nos. CR9-003-CR, CR9-004-CR), Memorandum and Decision, Hon. Richard D. Simons, September 15, 2009

Shenandoah v. Halbritter, 366 F.3d 89 (2d Cir.2004).

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

Shenandoah v. U.S. Dep't of Interior, 159 F.3d 708 (2d Cir. 1998)

Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 893-94, 897 (2d Cir.), *cert. denied*, 519 U.S. 1041, 117 S.Ct. 610, 136 L.Ed.2d 535 (1996)

Hill v. Eppolito, 5 A.D.3d 854, 772 N.Y.S.2d 634 (2004)

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

Montana v. United States, 450 U.S. 544 (1981)

Lewis v. Clarke, 137 S. Ct. 1285 (2017)

Other

U.S. Department of Justice Report on Enhanced Tribal-Court Sentencing Authority (2015)

IV. Interaction Between Tribal Courts and New York State Courts

Faculty: Hon. Robert G. Hurlbutt, Hon. Marcy L. Kahn, Hon. Mark A. Montour

OVERVIEW OF THE ONEIDA INDIAN NATION COURT SYSTEM

Full Text of Oneida Indian Nation Codes, Ordinances, and Regulations Available at www.oneidaindiannation.com/ordinances-regulations/

I. Background:

- Prior to May 5, 1997, no Nation Court system;
- All governmental powers – legislative, executive and judicial – vested in Men's Council, Clan Mothers and Oneida Nation Representative

II. Court Establishment Ordinance enacted May 5, 1997
Ordinance for the Establishment of the Oneida Nation Court (No. O-97-02), www.oneidaindiannation.com/wpcontent/uploads/2017/09/OneidaNationCourt.pdf

- Establishes Oneida Nation Court – the Trial Court, the Court of Appeals, and the Peacemakers Division
- Provides for the qualifications and appointment of a Chief Trial Judge who acts as Chief Judge, a Chief Appellate Judge, a Court Clerk and, as needed, Peacemakers
- Nation Court's guidelines for operation are based on traditional Oneida values of peaceful mediation and reconciliation

III. Jurisdiction – Oneida Nation Court

Territorial – extends to all lands possessed, occupied or held by the Nation in its sovereign capacity;

Criminal – extends to crimes or offenses by Nation members other Indian members committed within territorial jurisdiction;

Civil – all claims arising out of or pertaining to conduct, activities or undertakings within territorial jurisdictional;

Specific exceptions to Court's Jurisdiction –

- suits or claims against the Nation or any of its employees or representatives (*except* as provided in Oneida Indian Nation Amended Tort Claims Resolution Ordinance, No. O-18-01 (2018));
- political questions;
- membership in Nation – good standing in Nation community;
- domestic relations including juvenile and child neglect (*but see* Juvenile Justice Code enacted in November, 2000);

Appellate Jurisdiction

- appeals from Trial Court go to Chief Appellate Judge – appeals from Claims Commission go to Chief Trial Judge and decision on such appeal is final – no further appeal

IV. Rules of Civil Procedure

Oneida Indian Nation R**ules of Civil Procedure (**www.oneidaindiannation.com/wp-content/uploads/2017/10/rulesofcivilprocedure-document.pdf)

- Generally tracks scheme of New York CPLR – much shortened;
- Prescribes: rules for pleadings, service of process, motions, discovery, orders of attachment, injunctions, enforcement of

foreign judgments, comity and more; very comprehensive

- Rule 35 provides for comity of judgments, orders, and proceedings of other courts of competent jurisdiction, provided that such court provides reciprocal comity or recognition of Nation Court judgments, orders and proceedings; adoption of 22 NYCRR § 202.17 triggered the Nation Court's ability to provide reciprocal recognition of New York state court judgements and orders.

V. Rules of Criminal Procedure

Oneida Indian Nation Rules of Criminal Procedure
(www.oneidaindiannation.com/wp-content/uploads/2017/10/rulesofcriminalprocedure-document.pdf

- Very comprehensive – generally similar to New York Criminal Procedure Law;
- Rules for Commencement of Criminal Proceeding; criminal complaint; arrest and arraignment;

Rules for trial –

- trial is by Court without a jury – unless defendant makes written request for jury within two days after arraignment, pays $100 fee;
- jury is six members, one alternate;
- trial jurors are drawn from eligible list of Nation members prepared by Clerk of Court

Maximum Sentences –

- In general: felonies – not to exceed one year imprisonment and/or fine not to exceed $5,000 per offense;
- Enhanced sentencing authority: felonies – if the Court is exercising enhanced sentencing authority under the Tribal Law and Order Act of 2010, penalty may not exceed three years imprisonment and/or fine up to $15,000 per offense. Additional procedural protections for the defendant must be observed. *See* 25 U.S.C. § 1302(b); discussion at Part III of program materials, *infra*, § II.
- misdemeanors not to exceed six months imprisonment and/or a fine not to exceed $2500; violations – not to exceed three months and/or a fine not to exceed $1,000;

Alternative Sentences – Court has wide discretion to order alternative sentences, including house arrest, alcohol or drug education training program, restitution, probation;

Sentencing Policies – unique to Oneida Nation Rules of Criminal Procedure – emphasis on restitution – reconciliation of offender, victim and the Nation – restore offender to harmony with community by requiring him to right his wrongdoing

VI. Rules of Evidence
Oneida Indian Nation Rules of Evidence (http://www.oneidaindiannation.com/wp-content/uploads/2017/09/rulesofevidence-document.pdf)

- Detailed, comprehensive – codifies many rules established by New York case law;
- Rules cover, *e.g.*, relevance, judicial notice, presumptions, character evidence, habit and routine practice, opinions, expert testimony; hearsay; admissibility of writings, recordings and photographs

VII. Juvenile Justice Code (November 2, 2000)
Oneida Indian Nation Juvenile Justice Code (www.oneidaindiannation.com/wp-content/uploads/2017/09/juvenilejusticecode-document.pdf)

Jurisdiction – Nation Trial Court given exclusive jurisdiction over proceedings where a "child" residing within territorial jurisdiction of the Nation is alleged to be "juvenile defender"

- "Child" – any person under sixteen and not emancipated;
- "Juvenile Offender" – a child adjudged by the Court to have engaged in ungovernable behavior; have been habitually truant from school; have refused to obey reasonable rules of household;

Proceedings – non-criminal – do not result in conviction or criminal record

Adjudication Proceedings – verified petition and summons served on "child" alleged to be "juvenile offender" and parent/guardian or custodian

Hearings – public excluded - only persons having an interest in case admitted

Court's Determination –

- if petition supported by clear and convincing evidence, Court orders pre-disposition report and sets matter for disposition hearing;
- if Court finds allegation is not supported, petition dismissed –child discharged

Pre-Disposition Report – prepared by Probation Officer; contains specific plan for resolving problems presented in petition

Disposition Proceedings – purpose to determine how to resolve matter after child has been adjudicated a "juvenile offender".

Disposition Alternatives – permit child to remain with parent/guardian, custodian; place child in legal custody of a relative or other suitable person; or in an institution approved by the Nation; order child and, in Court's discretion, parent/guardian or custodian to pay restitution and place child on probation.

* * * * *

Written Materials and Resources (full documents included in Part IV program materials)

New York and Oneida Indian Nation Court Rules

Ordinance for the Establishment of the Oneida Nation Court (Ordinance No. O-97-02) (*included in Section II of program materials*)

22 NYCRR § 202.71 ("Recognition of Tribal Court judgments, decrees and orders")(as signed by the New York State Chief Administrative Judge)

Rule 35 of the Oneida Indian Nation Rules of Civil Procedure ("Comity")

Oneida Indian Nation Court Cases

Shenendoah, et al., v. Halbritter, *et al* (Case No. 00-001-Cl), Memorandum Decision, Hon. Stewart F. Hancock, Jr., January 8, 2001 (*included in Section II of program materials)*.

Oneida Indian Nation v. Danielle Patterson (Case No. 01-012-CR), Memorandum Decision, Hon. Stewart Hancock, Jr., June 27, 2002 (*included in Section II of program materials*).

Other

Map of New York Showing Native Territories, New York Counties, & New York Judicial Districts.

The Second New York Listening Conference Report, Co-Sponsored by the NY Federal-State-Tribal Courts & Indian Nations Forum, the New York State Judicial Institute, and the Western Community Policing Institute (Listening Conference dates Sept. 29 -30, 2016).

Submission of the New York Tribal Courts Committee, dated January 2013, in Response to the Advisory Committee on Civil Practice's June 14, 2012 Recommendation Regarding State Court Recognition of Tribal Court Judgments.

Memorandum from Hon. Marcy Kahn to Tribal Forum Participants, dated April 21, 2016, re: Doctrine of Comity Requirements.

Letter from Ida L. Traschen, First Assistant Counsel to the New York State Department of Motor Vehicles, dated July 21, 2015, to Hon. Marcy Kahn, regarding Recognition of Tribal Court Orders.

Letter from Hon. Marcy L. Kahn, Chair of the New York Tribal Courts Committee, dated December 9, 2014, to John McConnell, Esq., New York Office of Court Administration, regarding Supplemental Comments in Support of Proposed Court Rule § 202.71.

Letter from Hon. James C. Tormey, Administrative Judge for the Fifth Judicial District, dated September 25, 2014, to John W. McConnell, Esq., New York Office of Court Administration, regarding Proposed Adoption of New § 202.71.

Form: Petition Under CPLR Art. 4 and 22 NYCRR § 202.71 for Recognition of Tribal Court Judgment, Decree or Order.

Letter from Hon. Marcy L. Kahn, dated January 25, 2016, to Members of the St. Regis Mohawk Tribe Tribal Council, regarding Proposed New York State/St. Regis Mohawk Tribe Native Bail Reform Initiative.

New York State/St. Regis Mohawk Tribe Native Bail Reform Initiative, Case Flow Chart.

January 14, 2016 Status Report: Bombay Town Court/St. Regis Mohawk Tribe Pretrial Supervision Project.

Tribal Courts in New York: A Case Study of the Oneida Indian Nation

November 20, 2018

Program Materials:

Part II – Native American Courts from the Indian Nation Perspective

Faculty: Nation Representative Ray Halbritter, Michael R. Smith

Treaty With The Six Nations, 1794
Signed at Canandaigua

A Treaty between the United States of America, and the tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them, and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the united States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship are hereby established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the Untied States, who have the right to purchase.

ARTICLE III.

The land of the Seneca Nation is bounded as follows: Beginning on lake Ontario, at the northwest corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-y_ng-wong-yeh Creek, at Johnson's Landing Place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's Creek, which empties into the river Niagara, above for Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-y_ng-wong-yeh Creek to the river Niagara, above Fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara River, which the Seneca Nation ceded to the King of Great Britain at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the northeast

corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning on lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever to disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

The Seneca Nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far couth as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of traveling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nation; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the

whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the Untied States, or the Superintendent by him appointed, and by the Superintendent , or other person appointed by the President, to the principal chiefs of the Six nations, or of the nation to which the offender belongs; and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such Six Nation and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the Untied States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

ONEIDA INDIAN NATION

ESTABLISHMENT OF THE ONEIDA NATION COURT

Ordinance No. O-97-02

Pursuant to the authority vested in the Oneida Indian Nation by virtue of its sovereignty and inherent powers of self-government, the Nation hereby establishes the Oneida Nation Court. The Oneida Nation Court includes both a Trial Court with a Peacemakers division and a Court of Appeals.

ARTICLE 1 - DEFINITIONS

1. "Chief Judge" means the Judge appointed as the administrative supervisor of the Oneida Nation Court.

2. "Chief Appellate Judge" means the Chief Appellate Judge of the Court of Appeals.

3. "Chief Trial Judge" means the Chief Trial Judge of the Trial Court.

4. "Claims Commission" means the Oneida Indian Nation Claims Commission established by Oneida Indian Nation Ordinance No. O-94-02A.

5. "Court Clerk" means the Clerk of the Oneida Nation Court.

6. "Court of Appeals" means the Court of Appeals of the Oneida Nation Court.

7. "Judge" or "Judges" means the duly appointed and commissioned trial and appellate judges of the Oneida Nation Court.

8. "Nation" means the Oneida Indian Nation.

9. "Nation Representative(s)" means the Nation Representative(s) lawfully selected by the Nation.

10. "Ordinance" means this Ordinance establishing the Oneida Nation Court.

11. "Trial Court" means the Trial Court of the Oneida Nation Court.

ARTICLE 2 -TERRITORIAL JURISDICTION

The territorial jurisdiction of the Oneida Nation Court shall extend to all lands possessed, occupied or held by or for the Nation in its sovereign capacity.

ARTICLE 3 - CIVIL JURISDICTION

The Oneida Nation Court shall have civil subject matter jurisdiction over all civil suits, claims and causes of action arising out of or pertaining to conduct, activities or undertakings within the territorial jurisdiction of the Nation, except:

(1) Sovereign Immunity. The Oneida Nation Court shall not have subject matter jurisdiction over any suits, claims or causes of action as described in Article 10 of this Ordinance.

(2) Domestic Relations. The Oneida Nation Court shall not have subject matter jurisdiction over domestic relations, including juvenile and child neglect and abuse cases.

(3) Political Questions. The Oneida Nation Court shall not have subject matter jurisdiction over political questions relating to the Nation's government or its relations with other sovereigns.

(4) Membership and Good Standing in Nation. The Oneida Nation Court shall not have subject matter jurisdiction to determine the requirements of eligibility for membership in the Nation or the membership status or good standing of any individual. The written statement of the Clerk of the Nation, provided by a party or requested by the Court, shall be conclusive and incontrovertible evidence as to membership in the Nation, eligibility therefore or good standing thereof.

ARTICLE 4 - CRIMINAL JURISDICTION

The Oneida Nation Court shall have criminal jurisdiction over crimes or offenses committed by members of the Nation or members of other Indian nations within the territorial jurisdiction of the Nation.

ARTICLE 5 - APPELLATE JURISDICTION

All appeals shall be heard by an appellate Judge, except for appeals from the Claims Commission, which shall be heard by the Trial Court. The Court of Appeals shall not have jurisdiction to hear or decide any case except cases timely appealed from the Trial Court and over which the Trial Court properly exercised subject matter jurisdiction pursuant to this Ordinance. The Court of Appeals shall have jurisdiction to decide whether any case appealed

from the Trial Court was within that court's subject matter jurisdiction under this Ordinance. The Court of Appeals shall not have jurisdiction to hear or decide cases originating in the Claims Commission.

ARTICLE 6 - PERSONAL JURISDICTION

In matters over which it has civil subject matter jurisdiction, the Oneida Nation Court may exercise personal jurisdiction over persons properly served with process or consenting to jurisdiction.

ARTICLE 7 - JURY TRIALS

Jury trials shall be permitted only in criminal cases.

ARTICLE 8 - PEACEMAKING

Peacemaking shall be encouraged in all cases before the Oneida Nation Court and shall be governed by the Peacemaking Rules as are in effect from time to time.

ARTICLE 9 - SEPARATION OF POWERS

There shall be no encroachment on or interference with the judicial powers of the Oneida Nation Court by the Nation government.

ARTICLE 10 - SOVEREIGN IMMUNITY

The Oneida Nation Court shall not have jurisdiction over any suit, claim, or cause of action brought against the Oneida Indian Nation or any of its Nation Representative(s), Men's Council Members, Clan Mothers, officers, employees, or agents, in their official capacities, nor over the Nation Representative(s), the Men's Council or the Clan Mothers collectively, nor over any instrumentality, corporation, agency, organization, business or other Nation entity without the consent of the Nation, which consent shall be in writing and must specifically waive the Nation's sovereign immunity to be effective. Nothing contained in this Ordinance or in the Nation treaties, compacts, codes, ordinances, rules or regulations shall be construed as consent by the Nation or any of its Nation Representative(s), the Men's Council, the Clan Mothers or any of the Nation's officers, employees, agents, instrumentalities, corporations, agencies, organizations, businesses or other entities, to be sued or to limit the Nation's sovereign immunity in anyway or the sovereign immunity of its agents or officers.

ARTICLE 11 - LAW TO BE APPLIED

1. (a) The Oneida Nation Court shall apply, in the appropriate case, the provisions of applicable Nation treaties, compacts, codes, ordinances, rules, regulations

and the common law entered into or adopted by the Nation.

(b) In the absence of applicable law as provided in subsection (a), the Oneida Nation Court may apply, in the appropriate case, the written civil laws of other Indian nations, including written decisions of common or traditional law, which the Court finds to be compatible with the public policy and needs of the Nation.

(c) In the absence of applicable law as provided in subsection (b), the Oneida Nation Court may apply, in the appropriate case, the federal civil law of the United States, including federal common law, which the Court finds to be compatible with the public policy and needs of the Nation.

(d) In the absence of applicable law as provided in subsection (c), the Oneida Nation Court may apply, in the appropriate case, the civil laws of any state of the United States or other jurisdiction, including the common law thereof, which the Court finds to be compatible with the public policy and needs of the Nation.

2. No other Indian, federal, state or other law shall be applied pursuant to this section if such law is inconsistent with the treaties, compacts, codes, ordinances, rules, regulations or common law of the Nation or the public policy of the Nation.

3. The Oneida Nation Court shall have the authority to further develop through its decisions the Nation common law for the Court on any question of law.

4. In further developing the Nation's common law and in deciding the cases before it, the Oneida Nation Court shall strive to achieve stability, clarity, equity, commercial reasonableness and fidelity to any applicable Nation treaties, compacts, codes, ordinances, rules and regulations.

ARTICLE 12 - THE COURT

1. Judges and Peacemakers of the Oneida Nation Court.

(a) Judges of the Trial Court and the Court of Appeals shall be individuals who meet the qualifications set forth in this Ordinance and who shall be duly appointed and commissioned by the Nation Representative(s).

(b) The Judges of the Trial Court shall be persons qualified to practice law in a state of the United States who shall from time to time agree to serve as Judges of the Trial Court at a rate of pay to be set in advance of their appointment. A list of trial Judges shall be maintained by the Court Clerk.

(c) The Judges of the Court of Appeals shall be persons qualified to practice law in a state of the United States who shall from time to time agree to serve as Judges of the Court of Appeals at a rate of pay to be set in advance of their appointment. A list of appellate Judges shall be maintained by the Court Clerk.

(d) As trial or appellate cases are filed with the Court Clerk, the Court Clerk shall serially assign the case to one of the Judges in the order set forth on the appropriate list of judicial appointees. In the event the assigned Judge shall for any reason decline the case or be disqualified, the next available Judge on the list shall be assigned to hear the case. If none of the Judges is available to serve as judge in a particular case, the Court Clerk shall notify the Nation Representative(s) of the need to supplement the list.

(e) Subject to the limits of this Ordinance and the jurisdiction of the Oneida Nation Court, all Judges shall have, and are hereby granted, full judicial authority and independence and are empowered to exercise the full range of legal and equitable powers to decide the cases before them and shall enjoy the same range of immunities as those enjoyed by judges sitting in the courts of other sovereign governments.

(f) Each Judge appointed under this Ordinance shall, upon first accepting his or her appointment as a trial or appellate Judge pursuant to this Ordinance, take an oath to be administered by the Nation Representative(s) to carry out his or her duties as a Judge of the Oneida Nation Court with impartiality, honesty and fidelity to the objective of achieving substantial justice under the laws applicable to the cases assigned to him or her under this Ordinance.

(g) Peacemakers shall be persons with experience in peacemaking, arbitration or mediation. The Chief Judge of the Trial Court shall appoint a peacemaker in any matter deemed appropriate or where a party requests peacemaking.

2. Administration of Oneida Nation Court.

(a) A Chief Judge shall be appointed by the Nation Representative(s) from among the Judges of the Oneida Nation Court to serve a term of one year at a salary to be determined by the Nation Representative(s). The Chief Judge shall serve as the administrative supervisor of the Oneida Nation Court.

(b) A Chief Trial Judge shall be appointed by the Nation Representative(s) from among the Judges of the Trial Court. The Chief Trial Judge shall serve as administrative supervisor of the Trial Court.

(c) A Chief Appellate Judge shall be appointed by the Nation Representative(s)

from among the Judges of the Court of Appeals. The Chief Appellate Judge shall serve as administrative supervisor of the Court of Appeals.

(d) A Court Clerk shall be appointed by the Nation Representative(s) and will serve as the clerk of both the trial and appellate courts of the Oneida Nation Court.

(e) The Nation shall allocate such funds as are necessary to provide for the proper and efficient administration of the Oneida Nation Court, pay the annual salaries of the Chief Judge and the Court Clerk, and to pay the Judges from time to time. The Nation shall also annually allocate such funds as are necessary to create a contingent fund for the purpose of case administration and adjudication. The compensation of the Judges shall not be diminished during their term of appointment.

(f) The Chief Judge shall be authorized to propose Rules of the Oneida Nation Court and amendments thereto to the Nation as deemed necessary. The Chief Judge may also propose that codes and ordinances be adopted or amended by the Nation.

ARTICLE 13 - RECUSAL; REMOVAL

1. Recusal. A Judge shall recuse himself/herself from a case for any conflict of interest or appearance thereof.

2. Removal. A Judge may be removed from office by the Nation Representative(s) for cause. Cause is defined as:

(a) Failure to uphold the integrity of the Oneida Nation Court;

(b) Impropriety or the appearance thereof in his/her activities;

(c) Failure to perform the duties of his/her office impartially and diligently;

(d) Engaging in political activity inappropriate to his/her judicial office; or

(e) Breach of the Code of Judicial Conduct.

ARTICLE 14 - RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT

1. Professional Responsibility. The substantive rules of the American Bar Association Model Code of Professional Responsibility, as may be amended from time to time, are hereby adopted as and declared to be the Code of Professional Responsibility for attorneys appearing before the Oneida Nation Court to the extent applicable, except as such Code may be in conflict with Nation treaties, compacts, codes, ordinances, rules or regulations.

2. Amendment of Rules. The Chief Judge, with the approval of the Nation Representative(s), may amend the Code of Professional Responsibility.

3. Judicial Conduct. The American Bar Association Model Code of Judicial Conduct, as may be amended from time to time, is hereby adopted as and declared to be the Code of Judicial Conduct for the Oneida Nation Court, except as such Code may be in conflict with Nation treaties, compacts, codes, ordinances, rules or regulations, and provided, however, that Judges of the Oneida Nation Court, in the exercise of their judicial functions, shall not be prohibited from practicing law.

4. Amendment of Rules. The Chief Judge, with the approval of the Nation Representative(s), may amend the Code of Judicial Conduct.

ARTICLE 15 - BUDGETS AND FISCAL ACCOUNTABILITY

The Chief Judge shall, at the direction of the Nation Representative(s), develop an annual budget and submit it to the Nation for action. The Chief Judge shall account for all monies expended by the Oneida Nation Court in a manner to be determined by the Chief Financial Officer of the Nation. The Chief Judge shall follow the budgetary processes and procedures required by the Budget Director of the Nation.

ARTICLE 16 - ANNUAL REPORTS

The Chief Judge shall submit an annual report of the Oneida Nation Court to the Nation Representative(s) on a date to be specified by the Nation Representative(s).

ARTICLE 17 - BAILIFF

The Nation shall provide the services of an Oneida Indian Nation Police Officer to ensure that order is maintained in each proceeding of the Oneida Nation Court unless waived in a particular case by a presiding Judge.

ARTICLE 18 - COMITY

Comity may be given in the Oneida Nation Court to the judicial proceedings of any court of competent jurisdiction in which final judgments, orders or stays have been obtained, provided, however, that comity shall not be given to final judgments, orders and stays rendered by any court which declines or refuses to similarly recognize the final judgments, orders or stays of the Oneida Nation Court. Comity shall not be extended in any case which involves the treaty rights of Nation members, including matters related to taxation and hunting and fishing, nor may comity be extended to any final judgement, order, stay, subpoena or compulsory process the enforcement of which would infringe upon the sovereignty of the Nation.

Upon the granting of comity by the Oneida Nation Court to the final judgment, order or stay of a foreign court, the Nation shall honor and fulfill such final judgment, order or stay. The Nation shall be given notice and an opportunity to be heard on any motion for the extension of comity, and due regard shall be had by the Oneida Nation Court for the sovereign prerogatives of the Nation.

ARTICLE 19 - INTERPRETATION

1. Sovereign Immunity. The Nation does not by enacting this Ordinance waive in any respect its sovereign immunity, or that of its agents or officers, in any manner, under any law, for any purpose, or in any place.

2. No Right of Action. This Ordinance does not create any right, cause of action or benefit enforceable at law or in equity by any person against the Nation, its agencies, its officers or employees, or any other person.

3. Not Subject to Review. This Ordinance is not subject to review or modification in any state or federal court or by any authority outside the Nation.

ARTICLE 20 - EFFECTIVE DATE

This Ordinance is effective upon enactment.

Enacted this 5 day of May, 1997.

Ray Halbritter
Nation Representative(s)

ONEIDA NATION COURT

MAISIE SHENANDOAH, WILBUR HOMER, RAYMOND OBOMSAWIN, VICTORIA SHENANDOAH, DARCIE TARBELL, MCKENZIE WILLIAMS. LORNA JONES, GERALDA THOMPSON, LIZZA OBOMSAWIN, JOANNE SHENANDOAH, GERALD SHENANDOAH, MATTHEW JONES, DANIELLE PATTERSON, LINDA HILL, NEIL THOMAS, IRENE THOMAS, OTATDODAH HOMER and LEONARD BABCOCK, on behalf of themselves and all others similarly situated,

Case No.: 00-0001-CI

Plaintiffs,

vs.

ARTHUR RAYMOND HALBRITTER and THE ONEIDA INDIAN NATION OF NEW YORK,

Defendants.

FILED
Oneida Nation Court

JAN 9 2001

Clerk of the Court

Barbara J. Olshansky, Esq.,
Center for Constitutional Rights
Attorney for Plaintiffs

Peter D. Carmen, Esq.
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ONEIDA NATION COURT
Hon. Stewart F. Hancock, Jr.
Chief Judge
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MEMORANDUM DECISION

Defendants Arthur Raymond Halbritter and the Oneida Indian Nation of New York have moved for an order dismissing the complaint. They assert several grounds for dismissal including the Oneida Indian Nation's sovereign immunity from suit, the lack of any private civil remedy under the Indian Civil Rights Act, the statute of limitations, plaintiffs' failure to pursue other available remedies before the Nation's government concerning their claims of loss of privileges and good standing and, with regard to the claims concerning housing, plaintiffs' failure to exhaust available remedies including their right under the Amended Health and Safety Ordinance, No. 0-94-01B, to appeal to the Oneida Nation Court from any decision to which they object.

It is unnecessary to discuss the foregoing grounds for dismissal since the motion may be completely and definitely determined on another independent ground urged for dismissal, *i.e.*, that the Oneida Nation Court lacks subject matter jurisdiction because the complaint involves matters which are expressly excluded from this Court's jurisdiction under Article 3, subsections

1, 3 and 4[1] and Article 10 of the Ordinance which established the Oneida Nation Court on May 5, 1997 (Ordinance No. 0-97-02 Establishment of the Oneida Nation Court).

Prior to May 5, 1997, the Oneida Nation's judicial power along with the other traditional branches of governmental authority which it possesses as an independent, sovereign Indian Nation were consolidated in a single governing entity. (*See e.g., Santa Clara Pueblo v. Martinez*, 438 U. S. 49, 58 [1977]) [referring to the Indian Civil Rights Act "which provides, *inter alia*, 'powers of self-government' shall include "all government powers possessed by an Indian Tribe, executive, legislative and judicial, and all offices, bodies and tribunals by and through which they are executed * * * '25 U.S.C. Sect. 1301 (2) "1]. By Ordinance No. 0-97-02, the Oneida Indian Nation created the Oneida Nation Court and vested part, but only part, of its judicial power in that Court. In the Ordinance, the Nation expressly excepted from its delegation of judicial power to the Oneida Nation Court (and thus reserved to itself in its single governing

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[1] ARTICLE 3 - CIVIL JURISDICTION

The Oneida Nation Court shall have civil subject matter jurisdiction over all civil suits, claims and causes of action arising out of or pertaining to conduct, activities or undertakings within the territorial jurisdiction of the Nation, except:

(1) Sovereign Immunity. The Oneida Nation Court shall not have subject matter jurisdiction over any suits, claims or causes of action as described in Article 10 of this Ordinance.

(2) * * *

(3) Political Questions. The Oneida Nation Court shall not have subject matter jurisdiction over political questions relating to the Nation's government or its relations with other sovereigns.

(4) Membership and Good Standing in Nation. The Oneida Nation Court shall not have subject matter jurisdiction to determine the requirements of eligibility for membership in the Nation or the membership status or good standing of any individual. The written statement of the Clerk of the Nation, provided by a party or requested by the Court, shall be conclusive and incontrovertible evidence as to membership in the Nation, eligibility therefore or good standing thereof.

entity) jurisdiction over three specifically defined categories of subject matter: 1) "suits, claims or causes of action as described in Article 10" of the Ordinance[2] ; 2) political questions relating to the Nation's government; and 3) matters pertaining to the requirements of eligibility for membership in the Nation or the membership status or good standing of any individual.

Reading the complaint in a way that is most favorable to plaintiffs' contentions, it is clear that every allegation falls within one or more of the specific exclusions from the Nation Court's subject matter jurisdiction.

First, underlying the entire complaint is a controversy involving the legitimacy of the Oneida Indian Nation government and the authority of defendant Halbritter as Representative of the Oneida Indian Nation in conjunction with the Men's Council and Clan Mothers to enact ordinances and take other actions in the name and on behalf of the Nation. The complaint recites a litany of allegedly unauthorized and illegal actions taken by defendant Halbritter together with the Men's Council and Clan Mothers – *e.g.*, wrongfully "convicting" plaintiffs of "treasonous" activities and sanctioning them by denying essential services, causing them to lose their voices as Nation citizens, terminating their distributions, suspending them from employment with the Nation, and enacting and implementing a program to improve housing which will assertedly cause some of them to be illegally evicted from their homes.

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[2] Article 10 specifically provides that the Nation Court "shall not have jurisdiction over any suit, claim, or causes of actions brought against the Oneida Indian Nation of any of its Nation Representative(s), Men's Council members, Clan Mothers, officers, employees, or agents, in their official capacities, nor over the Nation representative(s), the Men's Council or the Clan Mothers collectively, nor over the instrumentality, corporation, agency, organization, business or other Nation entity without the consent of the Nation, which consent shall be in writing and must specifically waive the Nation's sovereign immunity to be effective".

The legal authority for and hence the underlying validity of these actions depends on whether defendant Halbritter as Nation Representative together with the Men's Council and Clan Mothers properly constituted the leadership of the Nation with power to act on its behalf when the actions were taken; or whether, as the complaint alleges, defendant Halbritter, the Men's Council and the Clan Mothers were without authority because Halbritter had unlawfully continued in and expanded the role of Nation Representative and had unlawfully replaced the traditional Oneida government with the Men's Council and Clan Mothers. Whatever else may be said of these allegations[3], it is evident that they entail questions involving the government of the Nation which are inherently political in nature and are specifically excepted from this Court's subject matter jurisdiction under Article 3, subsection 3 (Political Questions).

Second, the complaint contains allegations, *inter alia*, that plaintiffs, or some of them, have been deprived of their distributions and other tribal benefits as Nation members including their eligibility to receive financial contributions from the Nation for the construction or purchase of homes on Nation land because eligibility is expressly limited to members "in good standing". These allegations involve "the requirements of eligibility for membership in the Nation or the membership status or good standing" of individuals as members and, as such, are excluded from

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[3] Ironically, if it were established, as plaintiffs allege, that defendant Halbritter, the Men's Council and the Clan Mothers did not properly constitute the Nation leadership and were not authorized to act on its behalf at the times mentioned in the complaint, the result would necessarily be the invalidation of the establishment of the Oneida Nation Court by Ordinance No. 0-97-02. The Oneida Nation Court – the tribunal from which plaintiffs seek relief – would not exist to grant relief even if it were assumed that the Establishment Ordinance had granted it subject matter jurisdiction over the matters in question.

this Court's jurisdiction under Article 3 subsection 4 (Membership and Good Standing in Nation).

Third, because the matter in question is a legal action against the Oneida Nation and Raymond Halbritter who acts as and assertedly holds the position of Nation Representative, this Court is also deprived of subject matter jurisdiction by the express provisions of Article 3, subsection 1 and Article 10 which read together except from this Court's jurisdiction any suit, claim or cause of action against the Nation or any of its representatives without the written consent of the Nation specifically waiving the Nation's sovereign immunity. It is undisputed that the Nation has not executed such a written consent.

Plaintiffs argue that defendant Halbritter is sued in his individual and not his official capacity and that, therefore, the exclusions from jurisdiction under Article 3, subsection 1 and Article 10 do not apply. The argument is not well founded. The very matters complained of are purportedly official actions taken in the name and on behalf of the Oneida Nation by defendant Halbritter in his role as Nation Representative in conjunction with the Men's Council and the Clan Mothers. Moreover, the relief sought – *e.g.*, a direction to defendants to reinstate the benefits and privileges of Oneida Nation citizenship to plaintiffs – contemplates official action by and on behalf of the Oneida Nation. If, as plaintiffs claim, Halbritter has no official authority or capacity and is sued solely as an individual, there would be no effective relief that could be granted against him.

Finally, there is no merit to plaintiffs' contention that the enactment of the Indian Civil Rights Act in some way has conferred subject matter jurisdiction on the Oneida Nation Court beyond the limited jurisdiction granted to it under Ordinance No. 0-97-02 (*See, e.g.*, *Takes Gun*

v. Crow Tribe, 448 F. Supp. 1222, 1224-1225 [D. Montana 1978] [holding that the fact that some ground for relief may exist under the ICRA does not confer subject matter jurisdiction on a tribal court beyond the limited jurisdiction with which it has been vested]; *See also, Brady v. Brady,* 27 Ind, L, Rep. 6125, 6126 [2000]; *Lane-Oreiro v. Lummi Indian Business Council*, 21 Ind. L. Rep. 6143, 6145 [1994]). The Oneida Nation had the power, in its discretion, to create a tribal court and to limit its jurisdiction as it saw fit. A holding that the ICRA has compelled the Oneida Nation Court to hear matters beyond its delegated authority would conflict with the Nation's recognized powers of self-government as a sovereign Indian Nation.

For these reasons, the complaint is dismissed without costs upon the ground that this Court lacks subject matter jurisdiction under the provisions of Ordinance No. 0-97-02.

In view of this decision, the matters pertaining to the withdrawal of individual plaintiffs are moot.

Dated: January 8, 2001

Stew F. Hancock

The Honorable Stewart F. Hancock, Jr., Presiding

ONEIDA INDIAN NATION
TRIAL COURT

ONEIDA INDIAN NATION

vs.

DANIELLE PATTERSON

Case No.: 01-012-CR

MEMORANDUM DECISION

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This decision concerns the several pre-trial motions brought by the defendant.

Motion To Dismiss Criminal Complaint In Its Entirety As Defectively Pleaded

Defendant argues that the Complaint, even when considered together with the Bill of Particulars, is defective because it does not contain non-hearsay allegations as required by NYCPL §70.10(1) and 100.40. The Nation Prosecutor properly points out that the criminal procedures in the Nation Court are governed by the Oneida Indian Nation Rules of Criminal Procedure, not the New York Criminal Procedure Law.

The Nation Rules of Criminal Procedure do not contain a requirement that a criminal complaint must contain non-hearsay allegations. On the contrary, the Nation Rules of Criminal Procedure specifically require that a prosecution "shall be commenced by filing a criminal complaint with the Court **by the Nation prosecutor**" Rule 201(1) (emphasis added). Moreover, Rule 202(a) provides that the "complaint is a written statement under oath of the essential facts" and Rule 202(b) requires that it be signed by the Nation Prosecutor.

The Complaint in this case was made under oath and signed by the Nation Prosecutor. It complies in all other respects with Rules 201 and 202. The defendant, it should be noted, has demanded and been furnished with a detailed Bill of Particulars setting forth the specifics of the allegations. It does not appear that any objection was made by defendant to the sufficiency of the information furnished in the Bill of Particulars. Defendant does not assert that she has not been fully apprised of the charges against her or that she has been otherwise prejudiced.

For these reasons, defendant's motion to dismiss the entire complaint as defectively pleaded is denied.

Motion To Dismiss Count One -- Criminal Contempt In The Second Degree In Violation Of Oneida Indian Nation Penal Code §696

Defendant argues that the Criminal Contempt count should be dismissed because the Nation Trial Court's Order of Inspection (which she is charged with willfully disobeying) is invalid in that it was issued *ex parte* and not on notice. There are two reasons why this argument must fail.

First, it is well settled that the claimed invalidity of a facially valid order issued by a court of competent jurisdiction is not a defense to a charge of criminal contempt for willful disobedience of the order. *See, e.g. Greco vs. Winney* 176 AD2d 407 (3rd Dept.1991). App. Dismissed 79 NY2d 822 (1991) (holding that a jurisdictionally valid order must be obeyed, no matter how erroneous it may seem to be*); Backo vs. Local 281* 308 Fed Supp 172, 176 (NDNY 1969) Aff'd. 4438 F2d 176 (2nd Circ. 1970) Cert. denied 404 U.S. 858 (1971) (holding that the "validity of an order issued by a court of competent jurisdiction is not open to collateral attack in a contempt proceeding based on disobedience of that order" *id.*)[1]

Second, in any event, the Order of Inspection was valid. It should be noted that the Order of Inspection pertains to a routine administrative inspection, required to be conducted, pursuant to Article 9 of the Amended Health and Safety Ordinance (No.: O-94-01B). An inspection under this Ordinance does not require consent of the property owner. The Ordinance contains no provision for an inspection warrant or notice. These inspection provisions were held valid by this Court. *See Application of Arthur F. Pierce, re: inspection 34 Territory Road* at pp 8-14 filed September 10, 2001. This decision was affirmed by the Oneida Nation Appellate Court. *See*

[1] The Nation Prosecutor and Defense Counsel have relied on decisions from state and federal courts and the Court notes that both the Oneida Indian Nation Rules of Criminal Procedure and the Oneida Indian Nation Penal Code are similar in many respects to the analogous New York State statutes.

Application of Arthur F. Pierce re: inspection 34 Territory Road - Appeal decision filed January 18, 2002.

Finally, the extensive record, including the video tape of the incident and the affidavit of Mr. Pierce describing what occurred at the scene and his prior efforts to attain entry for inspection, show that there is evidence from which a jury could conclude that the defendant fully understood the import of the Oneida Nation Court Order -- *i.e.*, that it authorized the inspection by Mr. Pierce and that the defendant was to permit the inspectors to proceed.

The motion to dismiss the first count is, therefore, denied.

Motion To Dismiss Count Two -- Resisting Arrest In Violation Of Oneida Nation Penal Code §661

Under Penal Code §661 the Crime of Resisting Arrest is committed when a person "intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest." Resisting Arrest is a crime requiring proof of **intent to prevent an authorized arrest.** *See People v. Stevenson* 31 NY2d 103, 111-112 (1972) and *People v. Saita* 79 AD2d 994 (2d Dept. 1981); *People v. McDaniel* 154 Misc. 2d 89, 92 (App. Term, 2d Dept. 1992).

In establishing the requisite intent, the prosecution need not prove that "the defendant was aware of the exact crime for which he was being arrested." *People v.* Caidor 187 AD2d 441, 442 (2d Dept. 1992). It is necessary, however, to establish that the defendant "was aware that he was being lawfully arrested *id.*" *See People v. Peacock* 68 NY2d 675, 676-677 (1996). Merely announcing to the person that he or she is being arrested is not enough. There must be something in what is said or in the circumstances surrounding the arrest from which the arrestee knows or has reason to know that he has committed or is committing a criminal offense authorizing the arrest. The arrestee's awareness that his actions constituted criminal conduct for

which an arrest is authorized must obviously exist before the arrest. Without such knowledge he could not be guilty of intending to prevent an authorized arrest.

In *People v. Caidor, supra,* whether the defendant knew he was being arrested for speeding or for disorderly conduct made no difference. He clearly knew before he was arrested that he had committed criminal conduct that would authorize an arrest. *Caidor* 187 AD2d 441-442. Similarly, in *People v. Stevenson, supra,* defendant, before the arrest, knew that he had violated traffic laws by parking illegally on 125th Street in New York City and causing a traffic jam.

Here, neither the arresting officers nor the inspectors advised defendant that she had committed the crime of criminal contempt or that she was committing or had committed an offense for which she could be lawfully arrested. Unlike the circumstances in *Caidor* and *Stevenson* where the defendants from their own conduct (in causing a traffic jam or in violating the speed limit) clearly knew or should have known that they had committed arrestable offenses, there is no suggestion in this case that the defendant knew, or should have known, that in attempting to prevent the inspectors from entering her home she was committing a crime.

The arresting officers, themselves, were unsure about what, if any, conduct of defendant gave them legal authority to place her under arrest. When the defendant asked what she was being arrested for, one of the arresting officers replied "unruly conduct, resisting arrest, whatever it has to be." Defendant was not arrested for either of the two crimes mentioned - "unruly conduct" or "resisting arrest"[2]

Without a showing that the defendant was aware that she was being arrested for criminal contempt of the Nation Court order or for some other criminal conduct for which an arrest was

authorized, there could be no intent to prevent the police from effecting a lawfully authorized arrest. Count Two, therefore, must be dismissed.

Motion To Dismiss Count Three -- Assault In The Second Degree In Violation Of Oneida Nation Penal Code §430

A person commits assault in the Second degree under Oneida Nation Penal Code §430 when he or she with "intent to prevent a police officer...from performing a lawful duty...causes physical injury to such...police officer". Physical injury is defined in the Nation Penal Code §103(15) as "impairment of physical condition or substantial pain".

For a conviction on Count Three, the prosecution would have to establish beyond a reasonable doubt: (1) that defendant intended to prevent Sergeant Gillette from performing a lawful duty; (2) that in so doing she caused an injury to Sergeant Gillette; and (3) that the injury caused by defendant met the definition of physical injury -- i.e. "impairment of physical condition or substantial pain". Penal Code §103(15). Based on the record, including the Bill of Particulars Sergeant Gillette's affidavit and the video tape, the Court concludes that there is sufficient evidence on each of the foregoing elements to warrant submission of Count Three to a jury and that it would be wrong to dismiss Count Three on motion in advance of trial. *See e.g. People vs. Sylvester* 254 AD2d 711, 712 (Fourth Dept. 1998). The cases relied on by defendant *(e.g., People v. Jimenez* 55 NY2d 895 [1982]; *People v. McDowell* 28 NY2d 373 [1971]; *Matter of David I.*, 258 AD2d 805, [3rd Dept. 1999] *People vs. Contantonio* 277 AD2d 498 [3rd Dept. 2000]; *Matter of Shawn B*, 152 AD2d 733 [2nd Dept.1989]; *People v. Morales*, 75 AD2d 745 [1st Dept.1980]) involved determinations made after a full development of the facts at trial concerning the nature and extent of the claimed physical injury.

[2] Basing the crime of resisting arrest on the acts of resisting the arrest would obviously pose a legal impossibility. The crime of resisting arrest cannot exist by itself. There must be a separate predicate crime for which the resisted arrest is authorized.

The Court finds no basis for dismissal of Count Three on the procedural ground that defendant was not arraigned on Count Three at the time she was arraigned on Counts One and Two. The defendant sought and received a Bill of Particulars on Count Three. Moreover, in challenging the legal sufficiency of Count Three on substantive grounds in this motion she has treated Count Three as part of the criminal complaint, thereby waiving any procedural objection. Finally, the defendant claims no prejudice from the claimed procedural irregularity.

For the foregoing reasons defendant's pre-trial motion to dismiss Count Three is denied.

Defendant's Motion To Dismiss The Complaint In The Interests Of Justice

Preliminarily, the Court must address the argument of the Nation Prosecutor that the Nation Court lacks the authority to entertain and decide the motion. The Court rejects this argument and holds that it has the authority in an appropriate case to dismiss a criminal prosecution in the interests of justice. For reasons to be explained hereafter, however, defendant's motion to dismiss on this ground is denied.

The authority to dismiss a criminal prosecution in the extraordinary case where the interests of justice, equity and fairness demand it is generally considered to be part of the authority granted to judges to act when necessary to prevent a manifest injustice.. A holding that the Nation Court has been deprived of this authority would seem contrary to the traditions of justice, fairness and equity which this Court believes are imbedded in the Nation's history and its laws. Moreover, such a holding would appear to conflict with the sense of the Oneida Nation Court Establishment Ordinance O-97-02 as reflected in Article 11 §4 which provides, in part, that "**in deciding the cases before it**, the Oneida Nation court shall **strive to achieve stability, clarity, equity.** "(emphasis added). It would also seem to curtail the authority intended to be extended to the Nation Court as shown in the Oneida Nation Court Establishment Ordinance O-

97-02 Article 12 §(1)(e) which mandates that "subject to the limits of this Ordinance and the jurisdiction of the Oneida Nation Court, **all Judges shall have, and are hereby granted, full judicial authority and independence and are empowered to exercise the full range of legal and equitable powers to decide the cases before them..."** (emphasis added).

The fact that the Oneida Nation Court Establishment Ordinance O-97-02, expressly excludes certain identified questions and claims from the subject matter jurisdiction of the Nation Court (*e.g.*, suits against the Oneida Nation or the Nation Representative[s] *See* Nation Establishment Ordinance Article 10) is not a basis for the inference that an unspecified type of motion was intended to be excluded. Moreover, the omission of an interests of justice motion from the Oneida Indian Nation Rules of Criminal Procedure does not suggest that the Nation Court was intended to be deprived of discretionary authority to entertain and grant such a motion in a proper case. Accordingly, the Nation Court entertains defendant's motion to dismiss the criminal complaint in the interests of justice.

No circumstance or fact warrants this extraordinary relief, however. This is not the rare and unusual case which cries out for fundamental justice beyond the confines of conventional considerations. *See e.g., People v. Scott* 284 AD2d 899 (4th Dept.2001). The motion is denied.

Motion To Suppress Statement Of Shana Nay McMinn Pursuant To Rule 210(B)(2)

Based solely on the contents of Ms. McMinn's statement -- which is the only evidence before the Court -- the motion to suppress Ms. McMinn's testimony concerning statements made to her by the defendant is denied. Nothing in Ms. McMinn's statement indicates that comments made by defendant were not entirely spontaneous or were made in response to custodial interrogation or were prompted by any conduct by Ms. McMinn calculated to illicit a response

e.g. People v. Damiano 87 NY2d 477, 486-487 (1995). The motion may be renewed at the trial if additional facts pertaining to custodial interrogation are developed. Questions pertaining to the admissibility of Ms. McMinn's testimony as to her observations of defendant and defendant's failure to assert an injury are reserved for rulings on whatever objections may be raised at trial if such testimony is offered.

Submit order.

Dated: June 27, 2002

Stewart F. Hancock, Jr., Chief Judge

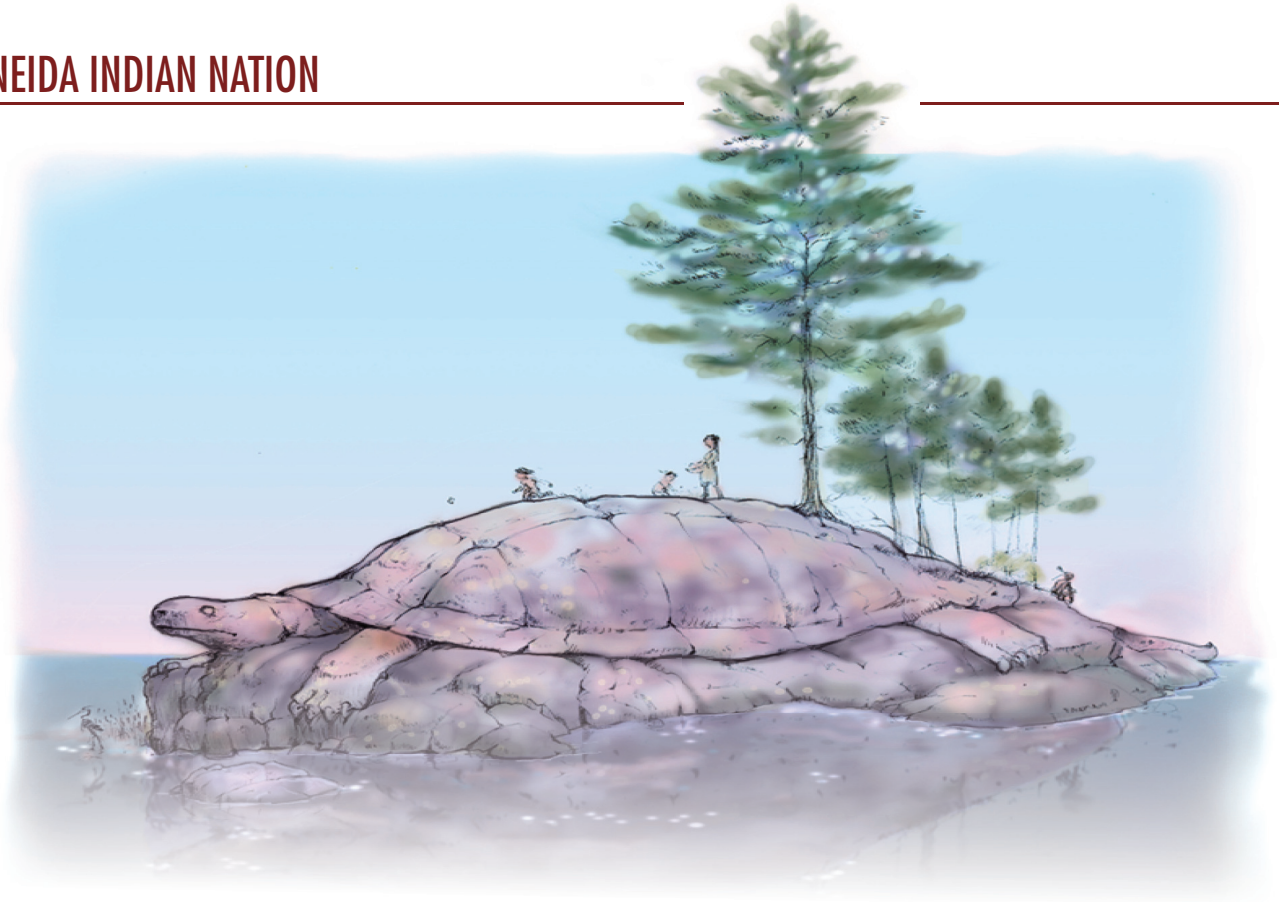
HISTORICAL TIMELINE

ONEIDA INDIAN NATION

ABOUT THE ONEIDA INDIAN NATION

The Oneida Indian Nation is an indigenous nation of Native American people whose sacred and sovereign homelands are located in Central New York. The Nation was a key ally of the United States during the Revolutionary War, and it has been a cultural and economic anchor for the region. Through the diversified business enterprises it has successfully built in recent decades, the Oneida Nation has become one of the largest employers in New York. It has also forged agreements with neighboring governments that have fortified the Nation's sovereignty in perpetuity.

Today, the Nation is focused on reinvesting its revenues in initiatives to help guarantee a prosperous and sustainable future for its current members and for future generations. The Nation's government makes sure its people can achieve their highest potential in education, have access to quality health care, and can secure their economic future. It is also dedicated to providing legal, administrative and educational services to help protect its people's sovereignty, homelands, culture and job opportunities.



BEFORE EUROPEAN CONTACT:

The Oneidas occupy some six million acres of land, stretching from the St. Lawrence River to the Susquehanna River, before the arrival of the Europeans. The Oneida Nation existed as a sovereign government with recognized borders long before the English colonies or the United States were formed. Oneida villages thrived in and around the present-day communities of Stockbridge, Oneida Castle, Canastota, Oriskany, the city of Oneida and elsewhere in what are now Oneida and Madison counties.

1613:

Oneida tradition has it that from the earliest contact with the Dutch, the Oneidas and other members of the Haudenosaunee Confederacy reached agreement on a treaty with the newcomers, recorded with a two-row wampum belt. The belt depicts two paths, one for the Oneidas and their Haudenosaunee brothers, and the other for the Europeans. One path depicts a birch bark canoe, representing the Indians, and the other depicts a ship, representing the newcomers from Europe. This was the first formal recognition by non-Indians that the people who already occupied North America were sovereign nations that possessed territorial rights when the Europeans began to share their land.

1763:

A proclamation by the British Crown establishes a policy of reserving to the king, the British Empire's central authority, power over land transactions with Indian nations. This was yet another recognition of the sovereign status of Indian nations and the Crown's desire for formal government-to-government relations.

1777:

The Oneida Indians, joined by the Tuscaroras, are the only members of the Haudenosaunee Confederacy to side with the colonists in the Revolutionary War. The Oneidas played a crucial role in the strategically important Battle of Oriskany, one of the bloodiest battles of the war. The Oneidas also fought alongside the colonists at the Battle of Saratoga and other key engagements. During the bitter winter of 1777-78, Oneida Chief Shenendoah organized a relief mission for Gen. George Washington's troops at Valley Forge, Pa., sending several Oneidas with bushels of corn to help feed the starving army.

THE ONEIDAS AT THE BATTLE OF ORISKANY BY DON TROIANI

1778:

James Duane, a federal treaty agent, writes to New York Governor George Clinton regarding a meeting with the Oneidas: "An Oneida Chief… declared the unalterable resolution of the Oneidas and Tuscaroras, at every hazard, to hold fast the Covenant Chain with the United States, and with them to be buried in the same grave; or to enjoy the fruits of victory and peace…" Oneidas also fought in a battle at Barren Hill, Pa.

1780-81:

The Oneidas and the colonists fight in battles at Klock's Field, near Canajoharie, and the present-day community of Johnstown. After the Johnstown battle, the Oneidas and colonists pursue the fleeing British army.

1783:

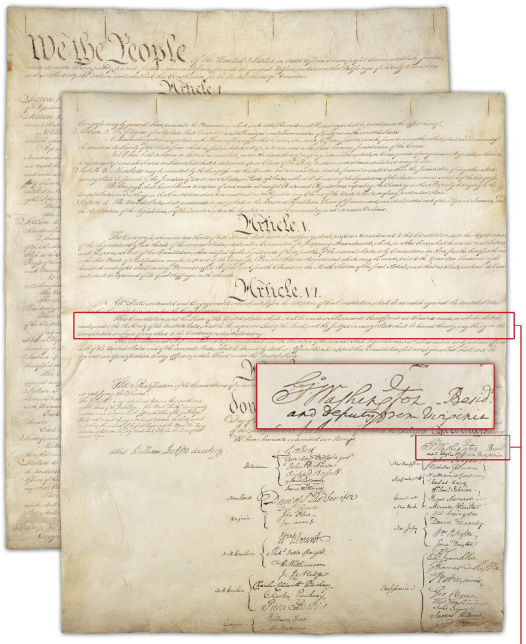
The new United States government, echoing British policy, prohibits anyone other than the federal government – including state governments – from buying or taking land from Indian nations "without the express authority and directions of the United States in Congress assembled." New York State (and many others) ignored this policy.

1784:

In recognition of the Oneidas' alliance during the Revolutionary War, the Nation is treated favorably in the Treaty of Fort Stanwix, which states, "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

1788:

Protesting after more lands were lost to the agents of Gov. George Clinton, Oneida sachem Good Peter says, "He did not say, 'I buy your Country.' Nor did we say, 'We sell it.'" The Oneidas had agreed to lease their lands, but New York State had given itself title.



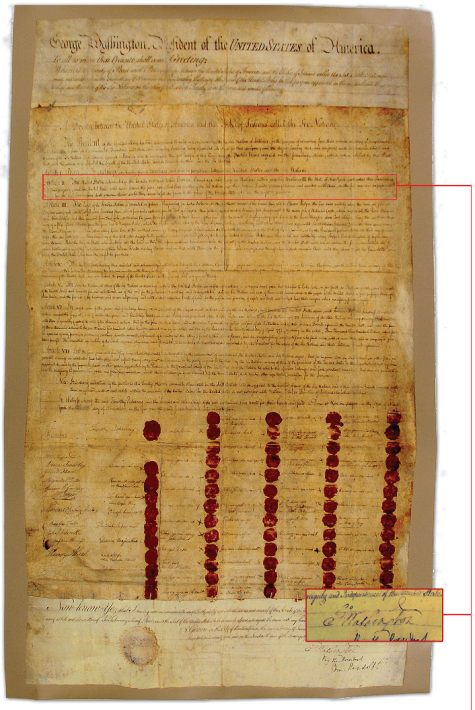
... and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; ...
- U.S. Constitution, 1787, Article VI
Signed by President George Washington and the other Founding Fathers

1789:

Congress approves the Treaty of Fort Harmar, which reaffirmed guarantees made in the Treaty of Fort Stanwix. The new U.S. Constitution is ratified; its provisions include bans against state governments entering into treaties and an assurance that treaties properly made with the federal government **"shall be the supreme Law of the Land."**

1790:

To strengthen its authority in dealing with Indian nations, Congress passes the Trade and Intercourse Act (ch. 33, 1 Stat. 137, codified at 25 USC, sec. 177), which prohibits purchases of Indian lands without federal participation and consent. The law, sometimes referred to as the Non-Intercourse Act, remains in effect today.



... The United State acknowledges the lands reserved to the Oneida, ... to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and unietd with them, in the free use and enjoyment thereof; ...
- U.S. Treaty With The Six Nation, 1794, Article II (Treaty of Canandigua)
Signed by President George Washington

1794:

The Treaty of Canandaigua, signed by President George Washington and the Oneidas, states, "The United States acknowledges the lands reserved to the Oneida… to be their property; and the United States will never claim the same, nor disturb them…" This, like other treaties, memorialized the legal right of the Oneida Nation to own, govern and control its lands.

1795-1846:

Some two dozen treaties imposed by New York State on the Oneidas deprive the Oneida Nation of all but a few hundred acres of its ancestral homeland. All but two of these treaties were enacted without the required participation or consent of the federal government. In a 1795 transaction that transferred 100,000 acres from the Nation to New York State, federal officials warned the State that the deal was illegal. The State went ahead with the transaction anyway.

1823:

Dispossessed of most of their land and under pressure to dissolve their traditional communities, many individual Oneidas "sell" Nation land and move to Wisconsin to form a separate government. Other individual Oneidas move to land they bought near London, Ontario, Canada, and form their own government there. The transactions between the State and individuals are illegal because the land belonged to the Nation, not to individuals.

1832:

The U.S. Supreme Court states that treaties between the federal government and Indian nations, including the Oneidas, are binding. In part, the Court said, "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial."

1849:

New York State passes an allotment act that makes it possible for communally held land to be divided and ownership of the resulting parcels to be granted to individual Indians. Much of this parceled land was lost to tax sales and mortgage foreclosures.

1909:

William Honyoust Rockwell, an Oneida chief, would later write about the day after Thanksgiving, 1909, when "seven big, burly sheriffs" evicted his aunt and uncle from their home on the Oneida Territory as part of a mortgage foreclosure. His aunt kept returning to the house, and the sheriffs ejected her each time. Their furniture was thrown out onto the highway, and even the horse owned by Rockwell's uncle was turned loose.

1919:

The federal government files suit in U.S. District Court (U.S. v. Boylan) to recover the last 32 acres of the approximately 300,000 acres that had been reserved to

the Oneidas in the Treaty of Canandaigua. The court ruled in favor of the Oneidas. A year later, the U.S. Court of Appeals for the Second Circuit affirmed the District Court's ruling.

1920:

Oneida Member Mary Winder writes to the Federal Indian Bureau, asking how much money the federal government owed the Oneida Nation for the loss of its homeland. She continued writing to the government for three decades, asking the government to live up to treaty guarantees to preserve the Oneidas' homeland.

1946:

Congress creates the Indian Claims Commission to adjudicate Indians' claims of unfair treatment regarding their lands. The commission was empowered to award monetary damages in cases where the U.S. government did not live up to its responsibilities, but it could not restore land to Indian nations.

1948:

Mary Winder writes to the Bureau of Indian Affairs, requesting payment for or return of the land illegally taken from the Oneidas by New York State.

1951:

The Oneida Nation files a claim with the Indian Claims Commission, covering all the land New York State had taken from the Oneidas between 1785 and 1846. The Commission ruled in favor of the Oneidas and said they were due compensation, but it lacked any authority to order the return of their land.

1970:

The Oneidas file suit in federal court to press for the return of Oneida reservation land. Because the Constitution grants state governments sovereign immunity from lawsuits, this first suit named Madison and Oneida counties as the defendants.

1974:

The U.S. Supreme Court rules that the Oneidas had the right to have their case heard in federal court and sent it back to the District Court for trial.

1978:

The Oneidas sue in federal court to challenge the transfer of some six million acres of land to New York State before the adoption of the Constitution in 1789 and before the Trade and Intercourse Act was passed in 1790. The federal district court ruled that, prior to ratification of the Constitution, the central government did not have the power to prevent states from making treaties with Indian nations. In 1988, the Second Circuit Court of Appeals upheld the district court's ruling.

1982:

The Oneidas withdraw their case from the Indian Claims Commission when it becomes clear that the commission was not empowered to return land.

1985:

The Oneidas' case against Madison and Oneida counties again goes before the U.S. Supreme Court, which ruled that the counties were liable for damages in the illegal land deals authored by New York State. The case was sent back to District Court to determine damages; the district court orders the counties, state and Oneida Nation to negotiate a settlement.

1985-98:

Negotiations with the State are sporadic at best; efforts to engage in serious, good faith talks are complicated by a change in New York administrations and differences among the three Oneida nations.

1987:

The Oneida Nation reacquires 42 acres of land near the city of Oneida – the first of its ancestral homeland to be reacquired.

1993:

Oneida Nation Representative Ray Halbritter and New York Gov. Mario Cuomo agree on a gaming compact Turning Stone Casino opens in the town of Verona becoming the first legal casino in New York.

1994:

The U.S. Supreme Court rules that New York State can collect taxes on gas and cigarette sales made on Indian land to non-Indians. The state sets an April 1, 1997, deadline for tribal nations to begin taxing their retail sales. Anti-tax demonstrations and violence erupt on some reservations and Gov. Pataki finally says in May 1997 that the state would stop seeking to collect taxes.

1998:

The U.S. Justice Department announces its intention to intervene in the land claim lawsuit to support the Oneidas' rights under the Treaty of Canandaigua and federal law. This intervention allows the Oneidas to bring the State in as a defendant in the lawsuit for the first time. In December, the three Oneida nations and the federal government file amended complaints, seeking to add the State, several large landowners and a defendant class of individual property owners as defendants. The amended complaints cover all the illegal transactions between the State and the Oneida Nation since 1790, involving about 250,000 acres of land.

1999:

In February, Ronald Riccio is appointed settlement master for the land claim negotiations. For the first time since the first suit was filed in 1970, all the parties engaged in serious negotiations.

2000:

In March Federal Judge Neal P. McCurn asks all parties to sign a "stipulation agreement," ensuring that further settlement talks would focus only on issues directly related to the land claim, so that negotiations could continue for another 60 days. The State of New York was the only party that refused to sign the agreement. In June negotiations under the court-appointed settlement master end.

In September of 2000 Judge McCurn rules on the amended complaint, adding New York State as a defendant for the first time in the history of the Oneida land claim. The judge also ruled that private property owners and non-government corporations will not be added as defendants. The U.S. Justice Department and the Oneida Indian Nation announced they would not appeal the judge's order.

2002:

In February New York Gov. George Pataki, Oneida Nation Representative Ray Halbritter and Oneida and Madison counties announce a deal they say could settle the land-claim case. But less than a week later, the Wisconsin Oneidas file suit against 20 property owners within the disputed area, demanding their land. Later, they add 40 more properties to the suit. A U.S. District Court judge rejects the Wisconsin Oneidas' suit in September and the Wisconsins appeal the next month.

2003:

A federal appeals court rejects arguments that the Oneida Indian Nation no longer exists, saying that the Nation does not have to pay taxes on some properties in the city of Sherrill.

2005:

In March, the U.S. Supreme Court, citing concerns about "jurisdictional checkerboarding," rules that the Oneidas are subject to federal, state and local taxation and regulation on Nation-owned land in the city of Sherrill that is not located on its reservation. However, the Court also notes that the proper way for the Nation to reassert its sovereignty over reacquired

lands is through the federal land-into-trust process, and specifically states that it is not overturning its 1985 decision with this ruling. Oneida and Madison counties move to foreclose on Nation land in April. The Nation applies to the federal government to place 17,000 acres in trust, which would protect the Nation's lands from state and local taxation. A decision from the Bureau of Indian Affairs is not expected until early 2007.

2006:

The Bureau of Indian Affairs holds two public hearings as part of the land-into-trust process, seeking input on the impact of placing the Nation's land into trust.

2006-07:

The Bureau of Indian Affairs holds public hearings on its Draft Environmental Impact Statement, which outlines various options ranging from putting all Nation-owned land into trust to taking no action.

2008:

In May of 2008 the Bureau of Indian Affairs announces its decision to take 13,004 acres of Nation-owned land into federal trust, thus protecting that land from most state and local regulations, including property taxes. The 13,004 acres include the Turning Stone Resort Casino complex, the resort's golf courses, four SavOn locations, 80 percent of the Nation's housing, most of its governmental operations, and about 9,700 acres of farmland. About 8,800 acres are located in Oneida County; the remainder are in Madison County. The trust lands represent less than 1 percent of the total acreage of the two counties.

Seven lawsuits protesting the BIA decision are filed between May and August. Plaintiffs include New York State and Oneida and Madison counties, who argue that federal trust land is unconstitutional in New York. The city of Oneida and the town of Verona and Vernon filed similar lawsuits.

In December of 2008 the Bureau of Indian Affairs takes 18 acres of land from the former U.S. Air Force operation in Verona into trust for the Oneida Nation.

2009:

U.S. District Court Judge Lawrence Kahn throws out key arguments in the anti-trust-land lawsuits filed by New York State and Oneida and Madison counties. Kahn rules that the federal government has the authority to take land into trust in New York State, that the transfer of 18 acres from the Air Force to the BIA for the benefit of the Oneida Nation was legal, and that Turning Stone is operating legally under federal law.

2010:

In March the federal court upheld the constitutionality of trust land in New York State, reaffirmed that the Oneida reservation was never disestablished, rejected challenges to the legality of gaming at Turning Stone, denied challenges to the DOI's transfer of the 18 acre "Verona test site" parcel into trust, and dropped all claims against Oneida Nation Representative Ray Halbritter.

On April 27, 2010, the U.S. Court of Appeals for the Second District ruled that the Oneida Indian Nation is "immune from the Counties' foreclosure actions." This decision reaffirmed the federal law that says that Indian nations can only be sued if they waive their immunity or Congress authorizes. This ruling reaffirmed the decision of U.S. District Court Judge David Hurd that Madison and Oneida counties could not seize Oneida lands for nonpayment of taxes. The Second Circuit court also stated that their 2004 ruling that the Oneida Reservation was never disestablished still stands and "remains the controlling law of this circuit."

2011:

A Federal court ruled in October, once and for all, that the Oneida Indian Nation reservation has not been disestablished, putting that issue to rest. The court also rejected the Madison and Oneida counties' attempts to impose unlawful penalties and interest. The only remaining issue is whether property taxes may be assessed on the Oneida reservation lands.

2012:

A ruling by the U.S. Second Circuit Court of appeals denied Madison and Oneida Counties' efforts to disestablish the Oneida Nation reservation. This Second Circuit Court of Appeals ruling falls in line with two previous U.S. Supreme Court rulings that the Oneida Nation reservation was never disestablished and that the Treaty of Canandaigua still remains valid in the eyes of the federal government. This ruling puts an end to more than a decade of litigation over the existence of the Oneida reservation.

2013:

On May 16, 2013, the Oneida Indian Nation, the State of New York and Madison and Oneida counties signed an historic agreement that officially ended all legal disputes between all the governments involved. This compact, forged through collaborative negotiation between the Nation, Gov. Andrew Cuomo and county leaders, was passed by the New York State legislature on June 22, 2013 and was soon ratified by federal courts, thus cementing it in perpetuity.

2014:

On August 21 the Oneida Indian Nation held a private Signing Ceremony in the Oneida Council House officially marking the transfer of more than 13,000 acres of ancestral Oneida homelands into federal trust. The transfer comes one year after the implementation of the Settlement Agreement between the Oneida Indian Nation and New York State and Oneida and Madison counties, ending all legal disputes between the governments.

2015:

The Oneida Indian Nation announced that construction had begun on two new state-of-the-art healthcare facilities that would introduce exciting new healthcare options to its Members, employees and the local community. Oneida Nation Health Services and the Bassett Oneida Health Center, both slated to open in early 2016, will be located in Dream Catcher Plaza on Genesee Street in Oneida.

2016:

In June the new Oneida Indian Nation Health Services location opened in Dream Catcher Plaza with care continuing to be directed toward Oneida Nation Members and to more than 3,500 American Indian clients living in Central New York.

2017:

The Oneida Indian Nation placed another 4,200 acres of sacred homelands into federal trust. The Nation has now reclaimed nearly 18,000 acres of its land, putting more lands into sovereign Oneida control than at any time in nearly two centuries.

The Nation relocated its Language Program to the former Health Center on Territory Road and unveiled a new health care card designed to make accessing health care services quick and easy for Nation Elders. A new Nation Courthouse was completed, standing as a symbol of the Oneida's right to self-determination.

In February the Oneida Nation hosted a benefit concert bringing awareness to the Standing Rock Sioux Tribe's ongoing efforts as water protectors, raising funds to support their legal fees. Melissa Etheridge headlines to concert held at Turning Stone Resort.

In April the Nation was honored at the opening of the Museum of the American Revolution in Philadelphia, which includes prominent Oneida Nation exhibits and a film about the Nation's role in the founding of this country. Oneida Nation Representative Ray Halbritter spoke at the event along with former Vice President Joe Biden. The Nation became a founding donor to the Museum in 2012, helping to fund the construction.

In November the Oneida Nation launched a new brand of convenience store in Central new York - Maple Leaf Market. The first location opened in Sherrill.

2018:

The Oneida Indian Nation and the Smithsonian Institution's National Museum of the American Indian dedicated a new enhancement to the exhibit "Allies in War, Partners in Peace" located on the fourth floor of the Museum in Washington D.C. The new exhibit features an animated 8 minute film that highlights the Nation's history and role in the American Revolution.

In March the Oneida Nation celebrated the opening of Point Place Casino in Bridgeport, Madison County. Point Place is the Nation's third casino in Central New York.

Tribal Courts in New York: A Case Study of the Oneida Indian Nation

November 20, 2018

Program Materials:

Part III – Federal Indian Law and Tribal Court Jurisdiction

Faculty: Peter D. Carmen, Meghan Murphy Beakman

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1301

§ 1301. Definitions

Currentness

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

CREDIT(S)

(Pub.L. 90-284, Title II, § 201, Apr. 11, 1968, 82 Stat. 77; Pub.L. 101-511, Title VIII, § 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892.)

25 U.S.C.A. § 1301, 25 USCA § 1301
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1302

§ 1302. Constitutional rights

Effective: July 29, 2010

Currentness

(a) In general

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term “offense” means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

CREDIT(S)

(Pub.L. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77; Pub.L. 99-570, Title IV, § 4217, Oct. 27, 1986, 100 Stat. 3207-146; Pub.L. 111-211, Title II, § 234(a), July 29, 2010, 124 Stat. 2279.)

25 U.S.C.A. § 1302, 25 USCA § 1302
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1303

§ 1303. Habeas corpus

Currentness

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.

CREDIT(S)

(Pub.L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

25 U.S.C.A. § 1303, 25 USCA § 1303
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1304

§ 1304. Tribal jurisdiction over crimes of domestic violence

Effective: March 7, 2013

Currentness

(a) Definitions

In this section:

(1) Dating violence

The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) Domestic violence

The term “domestic violence” means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) Indian country

The term “Indian country” has the meaning given the term in section 1151 of Title 18.

(4) Participating tribe

The term “participating tribe” means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction

over the Indian country of that Indian tribe.

(5) Protection order

The term "protection order"--

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) Special domestic violence criminal jurisdiction

The term "special domestic violence criminal jurisdiction" means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) Spouse or intimate partner

The term "spouse or intimate partner" has the meaning given the term in section 2266 of Title 18.

(b) Nature of the criminal jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the

jurisdiction of the United States, of a State, or of both.

(3) Applicability

Nothing in this section--

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) Exceptions

(A) Victim and defendant are both non-Indians

(i) In general

A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) Definition of victim

In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

(B) Defendant lacks ties to the Indian tribe

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant--

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of--

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal conduct

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) Domestic violence and dating violence

An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

(2) Violations of protection orders

An act that--

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that--

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of Title 18.

(d) Rights of defendants

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant--

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;

(3) the right to a trial by an impartial jury that is drawn from sources that--

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to stay detention

(1) In general

A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay

A court shall grant a stay described in paragraph (1) if the court--

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(3) Notice

An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

(f) Grants to tribal governments

The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)--

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including--

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of Title 18, consistent with tribal law and custom.

(g) Supplement, not supplant

Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) Authorization of appropriations

There are authorized to be appropriated $5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

CREDIT(S)

(Pub.L. 90-284, Title II, § 204, as added Pub.L. 113-4, Title IX, § 904, Mar. 7, 2013, 127 Stat. 120.)

25 U.S.C.A. § 1304, 25 USCA § 1304
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)

25 U.S.C.A. § 1901

§ 1901. Congressional findings

Currentness

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

CREDIT(S)

(Pub.L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)

25 U.S.C.A. § 1902

§ 1902. Congressional declaration of policy

Currentness

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

CREDIT(S)

(Pub.L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

25 U.S.C.A. § 1902, 25 USCA § 1902
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)

25 U.S.C.A. § 1903

§ 1903. Definitions

Currentness

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) “child custody proceeding” shall mean and include--

(i) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;

(iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) “extended family member” shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

CREDIT(S)

(Pub.L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

25 U.S.C.A. § 1911

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

Currentness

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C.A. § 1912

§ 1912. Pending court proceedings

Currentness

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

CREDIT(S)

(Pub.L. 95-608, Title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

25 U.S.C.A. § 1912, 25 USCA § 1912
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

25 U.S.C.A. § 1913

§ 1913. Parental rights; voluntary termination

Currentness

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1914

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Currentness

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

CREDIT(S)

(Pub.L. 95-608, Title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

25 U.S.C.A. § 1914, 25 USCA § 1914
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1915

§ 1915. Placement of Indian children

Currentness

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

CREDIT(S)

(Pub.L. 95-608, Title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

25 U.S.C.A. § 1915, 25 USCA § 1915
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1916

§ 1916. Return of custody

Currentness

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

CREDIT(S)

(Pub.L. 95-608, Title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

25 U.S.C.A. § 1916, 25 USCA § 1916
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1917

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Currentness

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

CREDIT(S)

(Pub.L. 95-608, Title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

25 U.S.C.A. § 1917, 25 USCA § 1917
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1918

§ 1918. Reassumption of jurisdiction over child custody proceedings

Currentness

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

CREDIT(S)

(Pub.L. 95-608, Title I, § 108, Nov. 8, 1978, 92 Stat. 3074.)

25 U.S.C.A. § 1918, 25 USCA § 1918
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1919

§ 1919. Agreements between States and Indian tribes

Currentness

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

CREDIT(S)

(Pub.L. 95-608, Title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

25 U.S.C.A. § 1919, 25 USCA § 1919
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1920

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Currentness

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

CREDIT(S)

(Pub.L. 95-608, Title I, § 110, Nov. 8, 1978, 92 Stat. 3075.)

25 U.S.C.A. § 1920, 25 USCA § 1920
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

25 U.S.C.A. § 1921

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

Currentness

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

CREDIT(S)

(Pub.L. 95-608, Title I, § 111, Nov. 8, 1978, 92 Stat. 3075.)

25 U.S.C.A. § 1921, 25 USCA § 1921
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

25 U.S.C.A. § 1922

§ 1922. Emergency removal or placement of child; termination; appropriate action

Currentness

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

CREDIT(S)

(Pub.L. 95-608, Title I, § 112, Nov. 8, 1978, 92 Stat. 3075.)

25 U.S.C.A. § 1922, 25 USCA § 1922
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1923

§ 1923. Effective date

Currentness

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

CREDIT(S)

(Pub.L. 95-608, Title I, § 113, Nov. 8, 1978, 92 Stat. 3075.)

25 U.S.C.A. § 1923, 25 USCA § 1923
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

25 U.S.C.A. § 232

§ 232. Jurisdiction of New York State over offenses committed on reservations within State

Currentness

The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof,[1] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

CREDIT(S)

(July 2, 1948, c. 809, 62 Stat. 1224.)

Footnotes

1 So in original. The word “of” probably should be inserted here.

25 U.S.C.A. § 232, 25 USCA § 232
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

25 U.S.C.A. § 233

§ 233. Jurisdiction of New York State courts in civil actions

Currentness

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

CREDIT(S)

(Sept. 13, 1950, c. 947, § 1, 64 Stat. 845.)

25 U.S.C.A. § 233, 25 USCA § 233
Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-235. Title 26 current through P.L. 115-237.

End of Document

22 NYCRR 202.71

Section 202.71. Recognition of Tribal Court judgments, decrees and orders

Any person seeking recognition of a judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment, decree or order appended thereto in the County Clerk's office in any appropriate county of the state. If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York. This procedure shall not supplant or diminish other available procedures for the recognition of judgments, decrees and orders under the law.

Credits

Sec. filed through Court Notices in the June 24, 2015 Register.

Current with amendments included in the New York State Register, Volume XXL, Issue 36 dated September 5, 2018. Court rules under Title 22 may be more current.

22 NYCRR 202.71, 22 NY ADC 202.71

End of Document

ONEIDA INDIAN NATION
AMENDED TORT CLAIMS RESOLUTION ORDINANCE

Ordinance No. O-18-01

Pursuant to the authority vested in the Oneida Indian Nation by virtue of its sovereignty and inherent powers of self-government, the Nation hereby establishes the process through which a person may seek compensation for injury from the Nation. This Ordinance replaces Nation Ordinance 0-94-02B, which is hereby rescinded.

Article I – Definitions

1. "Compensation" means payment for past and future damages made to a petitioner by the Nation pursuant to the authority of this Ordinance.

2. "Damages" mean only medical expenses, lost earnings, property loss and other economic harms to the petitioner that are a direct consequence of an injury caused by the fault of the Nation. "Damages" do not include a non-economic injury.

3. "Medical Expenses" mean all necessary expenses incurred for: (i) medical, hospital, surgical, nursing, ambulance, x-ray, prescription drug and prosthetic services; (ii) medical supplies and equipment; (iii) psychiatric, physical and occupational therapy and rehabilitation; and (iv) any other professional health services.

4. "Lost Earnings" means loss of earnings from work which the person would have performed had he/she not been injured.

5. "Injury" includes any alteration or impairment of a temporary or permanent nature to a person or his or her property.

6. "Person" means any human being or group of human beings or any entity recognized as a person under the law of any jurisdiction. "Person" does not mean the Oneida Indian Nation, its enterprises, instrumentalities, or agents.

Article II – Standard for Compensation

The Nation will compensate a person for damages if the person demonstrates, pursuant to the procedures set forth in this Ordinance, that he or she, or a person he or she is authorized to represent, was injured due to the fault of the Nation or one of its agents acting within the scope of such agency. The Nation will pay for that amount of damage equal to the Nation's or its agents' equitable share of the relative fault of each person or entity, including the petitioner, in causing or contributing to the petitioner's injury. Awards will reasonably compensate for past and future damages caused by the fault of the Nation, but will in no event exceed Five Million and 00/100 Dollars ($5,000,000.00).

Article III – Petition for Compensation: Procedure in Oneida Indian Nation Trial Court

1. A person, directly or by counsel, may submit a petition for compensation under this Ordinance (a "petition") in writing to the Trial Court of the Oneida Indian Nation. The petition shall set forth the full name, address, and telephone number(s) of the petitioner, and shall include a detailed factual statement of the incident which is claimed to have caused injury, and of the claimed injury and damages. The petition shall state the total amount of damages claimed, together with a description of how damages were

calculated. The petition shall also contain a statement of the purported legal basis for the claim, including a statement describing the manner in which the petitioner claims that the conduct of the Nation or its agents caused the petitioner's alleged injury.

2. The petition shall further include or append the petitioner's supporting evidence for the claim, including:

(a) a sworn affidavit from the petitioner, which shall include a detailed statement of the relevant facts, a detailed statement concerning past and future lost earnings, and a detailed statement of all other sources of compensation regarding the claimed injuries, including insurance, third parties, and lawsuits;

(b) sworn affidavits from any witnesses;

(c) any photographs of any injured part of the claimant's body or property;

(d) a written list of the names of health care providers who, and hospitals which, have treated the claimant for the injury claimed, and all records from medical personnel who are treating or have treated the petitioner for the injury claimed, with a written report and prognosis prepared and signed by each physician that has treated or is treating the petitioner for the injury claimed;

(e) a written list of all health care providers, including doctors and hospitals, who have treated claimant during the preceding ten years; and a written summary that reasonably describes the conditions treated by each of these health care providers, the treatment provided, and the resolution if any, of each condition described;

(f) all records that substantiate lost income to the petitioner due to the injury claimed, including but not limited to income tax returns, if any, filed with any government in the last three (3) years;

(g) a signed release from the petitioner permitting release by third parties, including health care providers, to the Nation Legal Department of records or information related to the petitioner and/or his or her claim;

(h) all bills and receipts for which the petitioner seeks reimbursement; and

(i) and any other information available to the petitioner and necessary for the Court to evaluate the claim.

Upon request by the petitioner, and after providing the Nation with notice and an opportunity to submit its argument in opposition so such request, and/or to request a hearing on the issue, the Court may, for good cause shown, waive a requirement that the petitioner submit certain evidence under this Section. If the petitioner requests a waiver of any requirement under this Section, the Nation's time to respond to the petition under Section 4 of this Article shall not begin to run until the day after the date it receives notice of the Court's determination on the request.

3. Any submission of a petition for compensation shall be filed with the Clerk of the Court within one (1) year of the date of enactment of this Ordinance or of the date of the injury claimed, whichever is later.

4. Upon commencement of a proceeding under this Ordinance, the Clerk of the Court shall promptly provide a copy of the petition and evidence to the Nation by mailing or hand-delivering a copy to the person designated by the Nation to receive such petitions. The Nation shall have sixty (60) days to

submit a response to the petition, by filing such response with the Clerk of the Court, and providing a copy of the response and evidence to the petitioner by mail at the address set forth in the petition. The Nation's response may consist of either:

(a) an answer to the petition presenting the Nation's own arguments and evidence;

(b) a motion to dismiss the petition for:

(i) any grounds enumerated in Rule 7(b) of the Oneida Indian Nation Rules of Civil Procedure;

(ii) failure to provide any of the information or documents required under Sections 1, 2, or 5 of this Article;

(iii) failure to submit the petition within the time set forth in Section 3 of this Article; or

(iv) any other basis that would be available to a party in a civil action under the Oneida Indian Nation Rules of Civil Procedure.

The court may extend the time for the Nation to respond to the petition for good cause. If the Nation responds by making a dispositive motion(s) under subsection (b) of this Section, and such motion is not granted, the Nation's answer to the petition will be due twenty-one (21) days after disposition of the motion(s) by the Court, or at such other later date as the Court designates for good cause shown. Upon application by the petitioner or by its own initiative, the court may grant the petitioner leave to file a reply to the Nation's response in the interest of narrowing and defining issues in the claim or as justice may require.

5. Prior to filing its response under Section 4 of this Article, the Nation may conduct inquiry into the merits of the petitioner's claim, including by requesting additional documents or information from the petitioner, and by making inquiry to health care providers and other third parties pursuant to the release provided by the petitioner pursuant to Section 2(g) of Article III of this Ordinance. Within ten (10) days of the receipt of any such request or inquiry from the Nation, the petitioner shall furnish the requested documents or information; provided, however, that the petitioner may apply to the Court for relief from compliance with any request or inquiry claimed to be improper, unfairly prejudicial, or unduly burdensome, and that the Nation shall be provided with notice and an opportunity to submit its argument in opposition to any such application, and/or to request a hearing on the issue. Notwithstanding any other rule to the contrary, no other discovery or investigation shall be permitted by either party in a petition brought under this Ordinance, except by leave of Court for good cause shown.

6. (a) The Court may, in its discretion, rule on a petition based on the papers and evidence submitted by the parties, or it may hold an evidentiary hearing at which either party may testify and produce witnesses and any other relevant evidence. The court may hold an evidentiary hearing on its own initiative or upon the request of either party. Upon directing the conduct of an evidentiary hearing, the Court may order the parties to produce any documents or other evidence that it deems relevant to its determination of the petition. The nature and scope of the evidence received at any such hearing is within the Court's sole discretion.

(b) In the event of such a hearing, the Court will provide reasonable advance notice to both parties of the date and time of the hearing. Failure of the petitioner to appear at a duly noticed hearing without good cause shown shall be an independent ground upon which to deny compensation.

7. The Court shall issue a written decision with respect to each claim set forth in the petition, stating with specificity the amount of compensation, if any, it is awarding to the petitioner under this Ordinance, and setting forth how it calculated such award. The decision shall set forth the Court's findings of fact with respect to the claim and its determination of the proportionate share of fault, if any, of the Nation (or its agents), the petitioner, and any other person or entity. The Clerk of the Court shall promptly provide both parties with a copy of the decision.

8. (a) Every petition, response, written motion, and other paper filed under this Ordinance by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, and the attorney's address shall be stated on the first paper filed by that attorney in the action. A party who is not represented by an attorney shall sign their petition, motion, or other paper in that party's own name and state their address. The signature of an attorney or party to a paper constitutes a certificate by that person that (i) they have read the petition, motion, or other paper, (ii) to the best of their knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigating a petition. If a petition, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the filing party.

(b) An oral motion made by an attorney or party under this Ordinance constitutes a representation by that person that (i) to the best of their knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigating a petition.

(c) If a petition, motion, or other paper is signed or made in violation of this Section, the Court, upon motion or upon its own initiative, may impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the offending petition, motion, or other paper or making of the offending motion, including a reasonable attorney's fee.

9. A party aggrieved by a final decision of the Trial Court on a petition under this Ordinance may appeal such decision to the Oneida Indian Nation Appellate Court under the procedure set forth for appeals in Rule 48 of the Oneida Indian Nation Rules of Civil Procedure. The Appellate Court shall review the decision of the Trial Court to determine whether it was arbitrary and capricious, in that there is no rational basis for the decision; or, where the Trial Court conducted an evidentiary hearing, whether its decision is supported by substantial evidence. The decision of the Appellate Court shall be final, binding, and not subject to any further appeal, review, or modification in any court.

Article IV – Interpretation

1. The Nation does not by enacting this Ordinance waive in any respect its sovereign immunity, or that of its agents or officers, in any manner, under any law, for any purpose, nor in any place.

2. Except as specifically set forth herein, this Ordinance does not create any right, cause of action or benefit enforceable at law or in equity by any person against the Nation, its agencies, its officers or employees, or any other person.

3. This Ordinance is not subject to review, enforcement or modification in any state or federal court or by any authority outside the Nation.

4. Prior Ordinances Repealed. Prior Ordinances of the Nation and regulations of any Nation agency are superseded to the extent that they conflict with this Ordinance. Upon enactment of this Ordinance, Nation Ordinance 0-94-02B shall be repealed.

Article V – Effective Date

This Ordinance is effective upon enactment.

Enacted this 20th day of April, 2018.

Ray Halbritter
Nation Representative

Oneida Indian Nation
Trial Court

Re: Oneida Indian Nation
v. CR9-003-CR
Preston R. Patterson CR9-004-CR

Simons, J

Defendant Preston R. Patterson has been charged with one count of assault, second degree (Oneida Nation Penal Code sec 430[1]) and one count of resisting arrest. (Oneida Nation Penal Code sec 661).

The charges arise from an incident occurring on Oneida Nation property on March 28, 2009 during which defendant allegedly struck and injured Oneida Nation Police Officer Manfred Florian while Florian and his partner, Sergeant Charles Zawisza were attempting to arrest defendant for assaulting Nicole Hill. In the process of the officers subduing defendant, he struck and seriously injured Officer Florian and then attempted to escape while the officers were trying to take him into custody.

Defendant was charged with similar assault and resisting arrest offenses in federal court (a violation of US Code sec 111 (a) (1)), "assisting, resisting or impeding certain officers or employees". After hearing the evidence of the People, the District Court (Hurd, J.) dismissed the charges. Defendant now moves this Court to dismiss the Nation's charges on the grounds of that this prosecution places defendant twice in jeopardy in violation of the United States Constitution (Amd 5) and the New York State Constitution (art 1 sec 6) both of which prohibit a person being charged twice for the same offense. The Nation urges that pursuant to rules of dual sovereignty the Motion should be denied.

Manifestly the charges in the two courts are for the same offense and the Nation may not proceed unless it is a sovereign nation independent of the United States and the State of New York. If it is, then the prosecution may proceed because under the "dual sovereignty " doctrine the prosecution is not barred. As the United States Supreme Court stated in Heath v. Alabama(474 4582, 88) "when a defendant, in a single act, violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses". (See also United States v. Wheeler 435 US 313, 320).

The United States and the State of New York derive their powers from their respective constitutions. The Oneida Nation, however, is possessed of inherent self governing power. Prior to the arrival of Europeans, the Nation existed as a self governing political community. As such it possessed and retained the police power to regulate its internal affairs including the power to

prosecute the members of the Nation for violation of its rules and ordinances. (See United States v. Wheeler at 322-323; California v. Cabazon Band of Mission Indians 480 US 202 207). This police power is not a power delegated by the State of New York or the United States, but an inherent power of Oneida sovereignty which has never been relinquished or extinguished.

Accordingly, the violations of the Penal Code charged here are violations of Oneida Indian Sovereignty and may be prosecuted by the nation, the federal dismissal notwithstanding.

Defendant's Motion is denied.

Richard D. Simons

September 14, 2009

366 F.3d 89
United States Court of Appeals,
Second Circuit.

Maisie SHENANDOAH, Elwood Falcon, Diane Shenandoah, Adah Shenandoah, Minor Child by and through her Mother Diane Shenandoah, Pete Shenandoah, Minor Child by and through his Mother Diane Shenandoah, Cameron Shenandoah, Minor Child by and through his Mother Diane Shenandoah, Danielle Patterson, Clairese Patterson, Minor Child by and through her Mother Danielle Patterson, Jolene Patterson, Minor Child by and through her Mother Danielle Patterson, Preston Patterson, Minor Child by and through his Mother Danielle Patterson, Victoria Shcenandoah–Halsey, Matthew Jones, Wesley Halsey, Minor Child by and through his Mother Victoria Schenandoa–Halsey, Vincent Halsey, Minor Child by and through his Mother Victoria Shenandoah–Halsey, Monica Antone–Watson, Martina Watson, Minor Child by and through her Mother Monica Antone–Watson, Kyle Watson, Minor Child by and through his Mother Monica Antone–Watson, Lawrence Thomas and Arnold Thomas, Petitioners–Appellants,
v.
Arthur Raymond HALBRITTER, Peter Carmen, Marilyn John, Dick Lynch, Paul Rinko, Stewart F. Hancock, Richard D. Simons, Arthur Pierce, Gary K. Gordon, "John Does", being all members of the Men's Council, "Jane Does" , being all members of the Clan Mothers, Jeff Jost, Jack McQueenie, Dan Caputo; Kevin Storm; Chris Manwaring; Gene Rifenburg; Larry Kutz; Officer Urtz; Frank Siminelli; Lori Billy; Corky Ryan; Kevin O'Neil; Bill Pendock; and Oneida Housing Corporation, Respondents–Appellees.

No. 03–7862.
|
Argued: March 2, 2004.
|
Decided: April 2, 2004.

Synopsis

Background: Residents of Indian reservation brought action seeking habeas corpus relief under Indian Civil Rights Act (ICRA), alleging that tribe's housing ordinance was used to retaliate against the residents for their resistance against tribal leadership. The United States District Court for the Northern District of New York, 275 F.Supp.2d 279, Mordue, J., dismissed. Residents appealed.

Holdings: The Court of Appeals, Van Graafeiland, Senior Circuit Judge, held that

[1] tribe's enforcement of housing ordinance did not constitute a sufficiently severe restraint on the residents' liberty to invoke federal court's habeas corpus jurisdiction, and

[2] housing ordinance was not a bill of attainder.

Affirmed.

West Headnotes (7)

[1] **Federal Courts**
Presumptions and burden of proof

A party seeking to invoke the subject matter jurisdiction of a court has the burden of demonstrating that there is subject matter jurisdiction in the case.

9 Cases that cite this headnote

[2] **Indians**
Statutory

Indian Civil Rights Act (ICRA) does not establish or imply a federal civil cause of action to remedy violations of ICRA. Civil Rights Act of 1968, § 201 et seq., as amended, 25 U.S.C.A. § 1301 et seq.

Cases that cite this headnote

[3] **Habeas Corpus**

Native Americans; tribal courts

Writ of habeas corpus is only remedy for enforcement of the substantive guarantees of the Indian Civil Rights Act (ICRA). Civil Rights Act of 1968, §§ 202, 203, as amended, 25 U.S.C.A. §§ 1302, 1303.

Cases that cite this headnote

[4] **Habeas Corpus**
Native Americans; tribal courts

A petitioner seeking a writ of habeas corpus as a remedy for a violation of rights guaranteed under the Indian Civil Rights Act (ICRA) must allege that defendants pose a severe actual or potential restraint on his or her liberty. Civil Rights Act of 1968, §§ 202, 203, as amended, 25 U.S.C.A. §§ 1302, 1303.

1 Cases that cite this headnote

[5] **Habeas Corpus**
Native Americans; tribal courts

Indian tribe's enforcement of housing ordinance, resulting in the destruction of some residents' homes, did not constitute a sufficiently severe restraint on the residents' liberty to invoke federal court's habeas corpus jurisdiction, pursuant to Indian Civil Rights Act (ICRA), even though one resident was imprisoned; destruction of homes was only an economic restraint, and the imprisonment was only tenuously connected to the ordinance inasmuch as resident was convicted for assault on a tribal officer. Civil Rights Act of 1968, §§ 202, 203, as amended, 25 U.S.C.A. §§ 1302, 1303.

1 Cases that cite this headnote

[6] **Habeas Corpus**
Necessity, Nature, and Sufficiency of Restraint or Detention

Federal habeas jurisdiction does not operate to remedy economic restraints.

2 Cases that cite this headnote

[7] **Constitutional Law**
Particular Issues and Applications
Indians
Tribal zoning, planning, and building regulations; housing authorities

Indian tribe's housing ordinance, on basis of which the homes of some residents were destroyed, was not an unconstitutional bill of attainder; ordinance applied to all residents of the territory at issue and did not single out any individuals.

2 Cases that cite this headnote

Attorneys and Law Firms

***90** Donald R. Daines, Esq., Hill Wallack, Princeton, NJ, for Petitioners–Appellants.

Michael R. Smith, Esq., Zuckerman Spaeder LLP, Washington, DC, Mackenzie Hughes, L.L.P., David M. Garber, Esq., Syracuse, NY, Zuckerman Spaeder, L.L.P., Elizabeth Taylor, Esq. (Argued), William W. Taylor, Esq., Michael R. Smith, Esq., David A. Reiser, Esq., Washington, D.C., for Respondents–Appellees.

Before: VAN GRAAFEILAND, LEVAL, and CALABRESI, Circuit Judges.

Opinion

VAN GRAAFEILAND, Senior Circuit Judge.

Petitioners appeal from the dismissal by the District Court for the Northern District of New York (Mordue, J.) of their habeas corpus petitions seeking relief against Arthur Raymond Halbritter, *et al.* under the Indian Civil Rights

Act (ICRA), 25 U.S.C. § 1301 *et seq.* Petitioners seek the only remedy available under the Act, a writ of habeas corpus, in an effort to prevent Respondents from enforcing an allegedly unlawful housing ordinance of the Oneida Indian Nation of New York. The District Court held that it did not have jurisdiction over this litigation. For the reasons that follow, we affirm.

Although there was an "ongoing intra-Oneida political dispute" as to whether Halbritter or Wilbur Homer was the Nation Representative of the Oneida Nation, *Homer v. Halbritter,* 158 F.R.D. 236, 237 (N.D.N.Y.1994), the Federal Government recognized Halbritter as the official representative of the Nation. *Shenandoah v. U.S. Dep't. of Interior,* 159 F.3d 708, 710 (2d Cir.1998). Petitioners assert, however, that Halbritter is using his power obtained through illegitimate means to suppress, harass, and intimidate various members of the Nation considered by Halbritter to be dissidents. Petitioners' first claim is that Halbritter, along with other named Respondents, ***91** enacted an illegal housing ordinance permitting the seizure and destruction of their homes without providing just compensation. Petitioners claim further that the housing ordinance is a bill of attainder which was enacted with the specific intent to punish them for exercising various protected rights.

The ordinance at issue, No. 00–23, requires the Oneida Nation's Commissioner of Public Safety to: (1) inspect all homes located on Territory Road, a portion of Oneida Nation lands known as the "32 acres," to ascertain compliance with the standards set forth in the National Building Code; (2) require rehabilitation of homes not in compliance if rehabilitation is possible; and (3) remove and/or demolish structures which cannot be repaired or rehabilitated.

The housing ordinance was upheld in September 2001 by Chief Judge Stewart F. Hancock Jr., of the Oneida Indian Nation Trial Court as valid under the ICRA and as a reasonable exercise of self-government. Judge Hancock's decision was affirmed by the Oneida Indian Nation Appellate Court in January 2002. Petitioners, who argued that the housing ordinance was an attempt to harass and intimidate them, resisted its implementation.

Petitioners' appeal focuses on the case of Danielle Patterson, who resided in a trailer on the "32 acres" with her three minor children. In November 2001, Ms. Patterson was arrested and then released after she resisted compliance with an inspection of her home.

Approximately a year later, on October 18, 2002, Patterson was arrested again and incarcerated for her failure to appear in court on criminal charges stemming from her 2001 altercation with tribal officers. She pled guilty to one count of criminal contempt for her failure to appear in court. Judge Richard Simons sentenced her to "time served" and released her immediately from custody. On October 23, 2002, Patterson's home was demolished.

Petitioners sought habeas relief under the ICRA, claiming that the Nation's enforcement of the housing ordinance violated numerous provisions of the Act. Respondents moved to dismiss the complaint for lack of subject matter jurisdiction and Petitioners cross-moved for preliminary injunctive relief. The District Court held that it was without power, based on a lack of subject matter jurisdiction, to hear the case under the ICRA. Additionally, the District Court held that the housing ordinance did not operate as an unlawful bill of attainder. Therefore, the District Court dismissed Petitioners' Complaint. For the reasons that follow, we affirm.

[1] [2] A party seeking to invoke the subject matter jurisdiction of a Court has the burden of demonstrating that there is subject matter jurisdiction in the case. *Scelsa v. City Univ. of New York,* 76 F.3d 37, 40 (2d Cir.1996). "Although Title I of ICRA lists a number of substantive rights afforded individuals that serve to restrict the power of tribal governments, Title I does not establish or imply a federal civil cause of action to remedy violations of § 1302." *Shenandoah,* 159 F.3d at 713 (citation omitted).

[3] [4] "Title I of the ICRA identifies explicitly only one federal court procedure for enforcement of the substantive guarantees of § 1302" *viz.* § 1303. *Id.* This section "makes available to any person '[t]he privilege of the writ of habeas corpus..., in a court of the United States, to test the legality of his detention by order of an Indian Tribe.' " *Id.* (quoting *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 882 (2d Cir.1996)). "Section 1303 was intended by Congress to have no ***92** broader reach than the cognate statutory provisions governing collateral review of state and federal action," *id.* at 714 (quoting *Poodry,* 85 F.3d at 901 (Jacobs, J., dissenting)) and Petitioners "must allege that respondents pose a 'severe actual or potential restraint on [petitioners'] liberty.' " *Id.* (quoting *Poodry,* 85 F.3d at 880).

Respondents claim that because Petitioners have failed to allege or submit evidence that they are or were in actual custody at the time the lawsuit was commenced, this Court lacks subject matter jurisdiction. Although that might be true when custody is the issue, Petitioners point out that the habeas relief they seek addresses more than just actual physical custody; it includes parole, probation, release on one's own recognizance pending sentencing at

trial, and in the case of tribal affairs, banishment.

[5] The question then becomes whether the actions taken against the Petitioners have resulted in the legal equivalent of a banishment, or otherwise qualify as a "severe actual or potential restraint on [their] liberty," which might provide habeas jurisdiction. *Poodry,* 85 F.3d at 880. We determine the majority in *Poodry,* in interpreting the court's jurisdiction to encompass banishment, was concerned about the unique severity of that punishment. *Id.* at 896.[1] In the instant case, Respondents' enforcement of their housing ordinance did not constitute a sufficiently severe restraint on liberty to invoke this Court's habeas corpus jurisdiction.

1 In *Poodry,* the majority recognized the logical inconsistency that would flow from being unable to remedy a permanent banishment from the tribe: "We believe that Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provision by permanently banishing, rather than imprisoning, members 'convicted' of the offense of treason." *Poodry,* 85 F.3d at 895.

[6] The gravamen of Petitioners' Complaint focuses on the destruction of their homes, which can be described more aptly as an economic restraint, rather than a restraint on liberty. As a general rule, federal habeas jurisdiction does not operate to remedy economic restraints. The imprisonment of Ms. Patterson for her alleged physical assault on Nation officers is too tenuously connected to the housing ordinance to provide habeas jurisdiction for an attempt to prevent the enforcement of that ordinance.

Because the only mechanism for federal enforcement of rights under ICRA is a federal habeas petition, and no detention has been established, the District Court properly dismissed Petitioners' claim for lack of subject matter jurisdiction. Even though the actions of the ruling members of the Nation may be partly inexcusable herein, we can only remedy those wrongs which invoke the jurisdiction of this Court. Unfortunately for Petitioners, Constitutional provisions limiting federal or state authority do not, *per se,* control the actions of the tribal governments complained of herein. *Poodry,* 85 F.3d at 881 n. 7.

[7] Petitioners fare no better by attempting to demonstrate that the housing ordinance is a bill of attainder. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without...the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Petitioners claim that the housing ordinance is designed to remove them from the Nation as punishment for their constant dissent. However, the terms of the Ordinance apply to all residents of the territory at issue, and cannot be said to single out any individuals. Petitioners have not shown that the housing ordinance is a bill of attainder.

***93** In holding as we do, we are not unmindful of the following warning of Alexander Hamilton quoted in *United States v. Brown,* 381 U.S. 437, 444, 85 S.Ct. 1707, 14 L.Ed.2d 484:

> "If [a] legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense."

If this danger exists in cases such as the instant one, and the presence of twenty or thirty Indian women engaged in prayer in the courtroom and adjoining hallway when this appeal was argued is some indication of its possible existence, Congress should consider giving this Court power to act.

The judgment of the District Court is hereby AFFIRMED.

All Citations

366 F.3d 89

98 S.Ct. 1011
Supreme Court of the United States

Mark David OLIPHANT and Daniel B. Belgarde, Petitioners,
v.
The SUQUAMISH INDIAN TRIBE et al.

No. 76-5729.
|
Argued Jan. 9, 1978.
|
Decided March 6, 1978.*

* Together with *Belgarde v. Suquamish Indian Tribe et al.*, on certiorari before judgment to the same court (see this Court's Rule 23(5)).

Synopsis
Criminal proceedings were brought in the Suquamish Indian Provisional Court against two non-Indian residents of the Port Madison Reservation. Both petitioners applied for a writ of habeas corpus to the United States District Court for the Western District of Washington, arguing that the tribal court does not have criminal jurisdiction over non-Indians. In separate proceedings, the District Court denied the petitions. The Court of Appeals for the Ninth Circuit, 544 F.2d 1007, affirmed in one case, and the other petitioner's appeal was pending before the Court of Appeals. Upon granting certiorari, the Supreme Court, Mr. Justice Rehnquist, held that 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.

Reversed.

Mr. Justice Marshall, with whom Mr. Chief Justice Burger joined, filed a dissenting opinion.

Order on remand, 573 F.2d 1137.

West Headnotes (8)

[1] **Indians**
Non-Indian Defendant

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.

95 Cases that cite this headnote

[2] **Indians**
Non-Indian Defendant

Neither the Indian Reorganization Act of 1934 nor the Indian Civil Rights Act of 1968 addresses, let alone "confirms," tribal criminal jurisdiction over non-Indians; the Indian Reorganization Act merely gives each Indian tribe the right to organize for its common welfare and to adopt an appropriate constitution and bylaws, and the Indian Civil Rights Act merely extends to a person within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution. Indian Reorganization Act, §§ 1 et seq., 16, 25 U.S.C.A. §§ 461 et seq., 476; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

25 Cases that cite this headnote

[3] **Indians**
Indian Civil Rights Laws
Indians
Non-Indian Defendant

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.

103 Cases that cite this headnote

[4] **Indians**
Non-Indian Defendant

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.

42 Cases that cite this headnote

[5] **Indians**
Non-Indian Defendant

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.

32 Cases that cite this headnote

[6] **Indians**
Non-Indian Defendant

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.

37 Cases that cite this headnote

[7] **Indians**
Construction and Operation
Indians
Purpose and Construction

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.

26 Cases that cite this headnote

[8] **Indians**
Non-Indian Defendant

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.

31 Cases that cite this headnote

****1012** *Syllabus*[*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d 499.

***191** 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. 1014-1022.

(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. 1015-1017.

(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. 1017-1019.

(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. Pp. 1019-1020.

(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. 1019-1022.

544 F.2d 1007 (*Oliphant* judgment), and *Belgarde* judgment, reversed.

Attorneys and Law Firms

Philip P. Malone, Poulsbo, Wash., for the petitioners.

Slade Gorton, Atty. Gen., Olympia, Wash., for the State of Washington, as amicus curiae, by special leave of Court.

***192** Barry D. Ernstoff, Seattle, Wash., for respondents.

H. Bartow Farr, III, for the United States, as amicus curiae, by special leave of Court.

Opinion

****1013** Mr. Justice REHNQUIST delivered the opinion of the Court.

Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages, each occupied by from a few dozen to over 100 Indians. These loosely related villages were aggregated into a series of Indian tribes, one of which, the Suquamish, has become the focal point of this litigation. By the 1855 Treaty of Point Elliott, 12 Stat. 927, the Suquamish Indian Tribe ***193** relinquished all rights that it might have had in the lands of the State of Washington and agreed to settle on a 7,276-acre reservation near Port Madison, Wash. Located on Puget Sound across from the city of Seattle, the Port Madison Reservation is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County.[1]

[1] According to the District Court's findings of fact "[The] Madison Indian Reservation consists of approximately 7276 acres of which approximately 63% thereof is owned in fee simple absolute by non-Indians and the remainder 37% is Indian-owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest." App. 75.
The Suquamish Indian Tribe, unlike many other Indian tribes, did not consent to non-Indian homesteading of unallotted or "surplus" lands within their reservation pursuant to 25 U.S.C. § 348 and 43 U.S.C. §§ 1195-1197. Instead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior. Congressional legislation has allowed such sales where the allotments were in heirship, fell to "incompetents," or were surrendered in lieu of other selections. The substantial non-Indian landholdings on the Reservation are also a result of the lifting of various trust restrictions, a factor which has enabled individual Indians to sell their allotments. See 25 U.S.C. §§ 349, 392.

The Suquamish Indians are governed by a tribal government which in 1973 adopted a Law and Order Code. The Code, which covers a variety of offenses from theft to rape, purports to extend the Tribe's criminal jurisdiction over both Indians and non-Indians.[2] Proceedings are held in the Suquamish ***194** Indian Provisional Court. Pursuant to the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. § 1302, defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings.[3] However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries.[4]

[2] Notices were placed in prominent places at the entrances to the Port Madison Reservation informing the public that entry onto the Reservation would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court.

[3] In *Talton v. Mayes*, 163 U.S. 376 16 S.Ct. 986, 41 L.Ed. 196 (1896), this Court held that the Bill of Rights

in the Federal Constitution does not apply to Indian tribal governments.

[4] The Indian Civil Rights Act of 1968 provides for "a trial by jury of not less than six persons," 25 U.S.C. § 1302(10), but the tribal court is not explicitly prohibited from excluding non-Indians from the jury even where a non-Indian is being tried. In 1977, the Suquamish Tribe amended its Law and Order Code to provide that only Suquamish tribal members shall serve as jurors in tribal court.

Both petitioners are non-Indian residents of the Port Madison Reservation. Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle. Belgarde posted bail and was released. Six days later he was arraigned and ****1014** charged under the tribal Code with "recklessly endangering another person" and injuring tribal property. Tribal court proceedings against both petitioners have been stayed pending a decision in this case.

[1] Both petitioners applied for a writ of habeas corpus to the United States District Court for the Western District of Washington. Petitioners argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians. In separate proceedings, the District Court disagreed ***195** with petitioners' argument and denied the petitions. On August 24, 1976, the Court of Appeals for the Ninth Circuit affirmed the denial of habeas corpus in the case of petitioner Oliphant. *Oliphant v. Schlie*, 544 F.2d 1007. Petitioner Belgarde's appeal is still pending before the Court of Appeals.[5] We granted certiorari, 431 U.S. 964, 97 S.Ct. 2919, 53 L.Ed.2d 1059, to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.

[5] Belgarde's petition for certiorari was granted while his appeal was still pending before the Court of Appeals for the Ninth Circuit. No further proceedings in that court have been held pending our decision.

I

[2] [3] Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision.[6] Instead, respondents ***196** urge that such jurisdiction flows automatically from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." Seizing on language in our opinions describing Indian tribes as "quasi-sovereign entities," see, *e. g., Morton v. Mancari*, 417 U.S. 535, 554, 94 S.Ct. 2474, 2484, 41 L.Ed.2d 290 (1974), the Court of Appeals agreed and held that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." According to the Court of Appeals, criminal jurisdiction over anyone committing an offense on the reservation is a "sine qua non" of such powers.

[6] Respondents do contend that Congress has "confirmed" the power of Indian tribes to try and to punish non-Indians through the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476, and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302. Neither Act, however, addresses, let alone "confirms," tribal criminal jurisdiction over non-Indians. The Indian Reorganization Act merely gives each Indian Tribe the right "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws." With certain specific additions not relevant here, the tribal council is to have such powers as are vested "by existing law." The Indian Civil Rights Act merely extends to "any person" within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution.

As respondents note, an early version of the Indian Civil Rights Act extended its guarantees only to "American Indians," rather than to "any person." The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 10 (1966). But this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to "confirm" respondents' argument that Indian tribes have inherent criminal jurisdiction over non-Indians. Instead, the modification merely demonstrates 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.

The Suquamish Indian Tribe does not stand alone today in

its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians.[7] Twelve other Indian ****1015** tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians. Like the Suquamish these tribes claim authority to try non-Indians not on the basis of congressional statute or treaty provision but by reason of their retained national sovereignty.

[7] Of the 127 courts currently operating on Indian reservations, 71 (including the Suquamish Indian Provisional Court) are tribal courts, established and functioning pursuant to tribal legislative powers; 30 are "CFR Courts" operating under the Code of Federal Regulations, 25 CFR § 11.1 *et seq.* (1977); 16 are traditional courts of the New Mexico pueblos; and 10 are conservation courts. The CFR Courts are the offspring of the Courts of Indian Offenses, first provided for in the Indian Department Appropriations Act of 1888, 25 Stat. 217, 233. See W. Hagan, Indian Police and Judges (1966). By regulations issued in 1935, the jurisdiction of CFR Courts is restricted to offenses committed by Indians within the reservation. 25 CFR § 11.2(a)(1977). The case before us is concerned only with the criminal jurisdiction of tribal courts.

The effort by Indian tribal courts to exercise criminal ***197** jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint." H.R.Rep. No. 474, 23d Cong., 1st Sess., 91 (1834).

[4] It is therefore not surprising to find no specific discussion of the problem before us in the volumes of the United States Reports. But the problem did not lie entirely dormant for two centuries. A few tribes during the 19th century did have formal criminal systems. From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect. For example, the 1830 Treaty with the Choctaw Indian Tribe, which had one of the most sophisticated of tribal structures, guaranteed to the Tribe "the jurisdiction and government of all the persons and property that may be within their limits." Despite the broad terms of this governmental guarantee, however, the Choctaws at the conclusion of this treaty provision "express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations."[8] ****1016** Art. 4, 7 Stat. 333 (emphasis added). Such a ***198** request for affirmative congressional authority is inconsistent with respondents' belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty. Faced by attempts ***199** of the Choctaw Tribe to try non-Indian offenders in the early 1800's the United States Attorneys General also concluded that the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority. See 2 Op.Atty.Gen. 693 (1834); 7 Op.Atty.Gen. 174 (1855). According to the Attorney General in 1834, tribal criminal jurisdiction over non-Indians, is *inter alia*, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States.

[8] The history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress. The earliest treaties typically expressly provided that "any citizen of the United States, who shall do an injury to any Indian of the [tribal] nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States." See, *e. g.*, Treaty with the Shawnees, Art. III, 7 Stat. 26 (1786). While, as elaborated further below, these provisions were not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes, they would naturally have served an important function in the developing stage of United States-Indian relations by clarifying jurisdictional limits of the Indian tribes. The same treaties generally provided that "[i]f any citizen of the United States . . . shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please." See, *e. g.*, Treaty with the Choctaws, Art. IV, 7 Stat. 22 (1786). Far from representing a recognition of any inherent Indian criminal jurisdiction over non-Indians settling on tribal lands, these provisions were instead intended as a means of discouraging non-Indian settlements on Indian territory, in contravention of treaty provisions to the contrary. See 5 Annals of Cong. 903-904 (1796). Later treaties dropped this provision and provided instead that non-Indian settlers would be removed by the United States upon complaint being lodged by the

> tribe. See, *e. g.*, Treaty with the Sacs and Foxes, 7 Stat. 84 (1804).
>
> As the relationship between Indian tribes and the United States developed through the passage of time, specific provisions for the punishment of non-Indians by the United States, rather than by the tribes, slowly disappeared from the treaties. Thus, for example, none of the treaties signed by Washington Indians in the 1850's explicitly proscribed criminal prosecution and punishment of non-Indians by the Indian tribes. As discussed below, however, several of the treaty provisions can be read as recognizing that criminal jurisdiction over non-Indians would be in the United States rather than in the tribes. The disappearance of provisions explicitly providing for the punishment of non-Indians by the United States, rather than by the Indian tribes, coincides with and is at least partly explained by the extension of federal enclave law over non-Indians in the Trade and Intercourse Acts and the general recognition by Attorneys General and lower federal courts that Indians did not have jurisdiction to try non-Indians. See *infra*, at 1016-1017. When it was felt necessary to expressly spell out respective jurisdictions, later treaties still provided that criminal jurisdiction over non-Indians would be in the United States. See, *e. g.*, Treaty with the Utah-Tabeguache Band, Art. 6, 13 Stat. 674 (1863).
>
> Only one treaty signed by the United States has ever provided for any form of tribal criminal jurisdiction over non-Indians (other than in the illegal-settler context noted above). The first treaty signed by the United States with an Indian tribe, the 1778 Treaty with the Delawares, provided that neither party to the treaty could "proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries *of both parties*, as near as can be to the laws, customs and usages of the contracting parties and natural justice: *The mode of such tryals to be hereafter fixed by the wise men of the United States in Congress assembled*, with the assistance of . . . deputies of the Delaware nation . . . ." Treaty with the Delawares, Art. IV, 7 Stat. 14 (emphasis added). While providing for Delaware participation in the trial of non-Indians, this treaty section established that non-Indians could only be tried under the auspices of the United States and in a manner fixed by the Continental Congress.

At least one court has previously considered the power of Indian courts to try non-Indians and it also held against jurisdiction.[9] In *Ex parte Kenyon*, 14 Fed.Cas. page 353, No. 7,720 ***200** W.D.Ark.1878), Judge Isaac C. Parker, who as District Court Judge for the Western District of Arkansas was constantly exposed to the legal relationships between Indians and non-Indians,[10] held that to give an Indian tribal ****1017** court "jurisdiction of the person of an offender, such offender must be an Indian." *Id.*, at 355. The conclusion of Judge Parker was reaffirmed ***201** only recently in a 1970 opinion of the Solicitor of the Department of the Interior. See *Criminal Jurisdiction of Indian Tribes over Non-Indians*, 77 I.D. 113.[11]

9 According to Felix Cohen's Handbook of Federal Indian Law 148 (U.S. Dept. of the Interior 1941) "attempts of tribes to exercise jurisdiction over non-Indians . . . have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody."

10 Judge Parker sat as the judge of the United States District Court for the Western District of Arkansas from 1875 until 1896. By reason of the laws of Congress in effect at the time, that particular court not only handled the normal docket of federal cases arising in the Western District of Arkansas, but also had criminal jurisdiction over what was then called the "Indian Territory." This area varied in size during Parker's tenure; at one time it extended as far west as the eastern border of Colorado, and always included substantial parts of what would later become the State of Oklahoma. In the exercise of this jurisdiction over the Indian Territory, the Court in which he sat was necessarily in constant contact with individual Indians, the tribes of which they were members, and the white men who dealt with them and often preyed upon them.
>
> Judge Parker's views of the law were not always upheld by this Court. See 2 J. Wigmore, Evidence § 276, pp. 115-116, n. 3 (3d ed. 1940). A reading of Wigmore, however, indicates that he was as critical of the decisions of this Court there mentioned as this Court was of the evidentiary rulings of Judge Parker. Nothing in these long forgotten disputes detracts from the universal esteem in which the Indian tribes which were subject to the jurisdiction of his court held Judge Parker. One of his biographers, describing the judge's funeral, states that after the grave was filled "[t]he principal chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave." H. Croy, He Hanged Them High 222 (1952).
>
> It may be that Judge Parker's views as to the ultimate destiny of the Indian people are not in accord with current thinking on the subject, but we have observed in more than one of our cases that the views of the people on this issue as reflected in the judgments of Congress itself have changed from one era to the next. See *Kake Village v. Egan*, 369 U.S. 60, 71-74, 82 S.Ct. 562, 568-570, 7 L.Ed.2d 573 (1962). There cannot be the slightest doubt that Judge Parker was, by his own lights and by the lights of the time in which he lived, a judge who was thoroughly acquainted with and sympathetic to the Indians and Indian tribes which were subject to the jurisdiction of his court, as well as familiar with the

law which governed them. See generally Hell on the Border (1971, J. Gregory & R. Strickland, eds.).

[11] The 1970 opinion of the Solicitor was withdrawn in 1974 but has not been replaced. No reason was given for the withdrawal.

While Congress was concerned almost from its beginning with the special problems of law enforcement on the Indian reservations, it did not initially address itself to the problem of tribal jurisdiction over non-Indians. For the reasons previously stated, there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians because of the absence of formal tribal judicial systems. Instead, Congress' concern was with providing effective protection for the Indians "from the violences of the lawless part of our frontier inhabitants." Seventh Annual Address of President George Washington, 1 Messages and Papers of the Presidents, 1789-1897, pp. 181, 185 (J. Richardson, ed., 1897). Without such protection, it was felt that "all the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory." *Ibid.* Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, therefore, Congress assumed federal jurisdiction over offenses by non-Indians against Indians which "would be punishable by the laws of [the] state or district . . . if the offense had been committed against a citizen or white inhabitant thereof." In 1817, Congress went one step further and extended federal enclave law to the Indian country; the only exception was for "any offence committed by one Indian against another." 3 Stat. 383, now codified, as amended, 18 U.S.C. § 1152.

It was in 1834 that Congress was first directly faced with the prospect of Indians trying non-Indians. In the Western Territory bill,[12] Congress proposed to create an Indian territory beyond the western-directed destination of the settlers; ***202** the territory was to be governed by a confederation of Indian tribes and was expected ultimately to become a State of the Union. While the bill would have created a political territory with broad governing powers, Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area.[13] The reasons were quite practical:

[12] See H.R.Rep. No. 474, 23d Cong., 1st Sess., 36 (1834).

[13] The Western Territory bill, like the early Indian treaties, see n. 6, *supra*, did not extend the protection of the United States to non-Indians who *settled* without Government business in Indian territory. See Western Territory bill, § 6, in H.R.Rep. No. 474, *supra*, at 35; *id.*, at 18. This exception, like that in the early treaties, was presumably meant to discourage settlement on land that was reserved exclusively for the use of the various Indian tribes. Today, many reservations, including the Port Madison Reservation, have extensive non-Indian populations. The percentage of non-Indian residents grew as a direct and intended result of congressional policies in the late 19th and early 20th centuries promoting the assimilation of the Indians into the non-Indian culture. Respondents point to no statute, in comparison to the Western Territory bill, where Congress has intended to give Indian tribes jurisdiction today over non-Indians residing within reservations.
Even as drafted, many Congressmen felt that the bill was too radical a shift in United States-Indian relations and the bill was tabled. See 10 Cong.Deb. 4779 (1834). While the Western Territory bill was resubmitted several times in revised form, it was never passed. See generally R. Gittinger, The Formation of the State of Oklahoma (1939).

****1018** "Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection should be extended." H.R.Rep. No. 474, 23d Cong., 1st Sess., 18 (1834).
***203** Congress' concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians.

[5] This unspoken assumption was also evident in other congressional actions during the 19th century. In 1854, for example, Congress amended the Trade and Intercourse Act to proscribe the prosecution in federal court of an Indian who has already been tried in tribal court. § 3, 10 Stat. 270, now codified, as amended, 18 U.S.C. § 1152. No similar provision, such as would have been required by parallel logic if tribal courts had jurisdiction over non-Indians, was enacted barring retrial of non-Indians.

Similarly, in the Major Crimes Act of 1885, Congress placed under the jurisdiction of federal courts Indian offenders who commit certain specified major offenses. Act of Mar. 3, 1885, § 9, 23 Stat. 385, now codified, as amended, 18 U.S.C. § 1153. If tribal courts may try non-Indians, however, 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 committing the exact same offenses.[14]

[14] The Major Crimes Act provides that Indians committing any of the enumerated offenses "shall be subject to the same laws and penalties as all other persons committing any of the above offenses, *within the exclusive jurisdiction of the United States*." (Emphasis added.) While the question has never been directly addressed by this Court, Courts of Appeals have read this language to exclude tribal jurisdiction over the Indian offender. See, *e. g., Sam v. United States*, 385 F.2d 213, 214 (CA10 1967); *Felicia v. United States*, 495 F.2d 353, 354 (CA8 1974). We have no reason to decide today whether jurisdiction under the Major Crimes Act is exclusive.
The legislative history of the original version of the Major Crimes Act, which was introduced as a House amendment to the Indian Appropriation Act of 1855, creates some confusion on the question of exclusive jurisdiction. As originally worded, the amendment would have provided for trial in the United States courts "*and not otherwise*." Apparently at the suggestion of Congressman Budd, who believed that concurrent jurisdiction in the courts of the United States was sufficient, the words "and not otherwise" were deleted when the amendment was later reintroduced. See 16 Cong.Rec. 934-935 (1885). However, as finally accepted by the Senate and passed by both Houses, the amendment did provide that the Indian offender would be punished as any other offender, "within the exclusive jurisdiction of the United States." The issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of $500.

***204** In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In *In re Mayfield*, 141 U.S. 107, 115-116, 11 S.Ct. 939, 941, 35 L.Ed. 635 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in ****1019** raising themselves to our standard of civilization." The "general object" of the congressional statutes was to allow Indian nations criminal "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." *Ibid.* While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

In a 1960 Senate Report, that body expressly confirmed its ***205** assumption that Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.[15] In considering a statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing, the Senate Report noted:

[15] In 1977, a congressional Policy Review Commission, citing the lower court decisions in *Oliphant* and *Belgarde*, concluded that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians." 1 Final Report of the American Indian Policy Review Commission 114, 117, 152-154 (1977). However, the Commission's report does not deny that for almost 200 years before the lower courts decided *Oliphant* and *Belgarde*, the three branches of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians. As the Vice Chairman of the Commission, Congressman Lloyd Meeds, noted in dissent, "such jurisdiction has generally not been asserted and . . . the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." Final Report, *supra*, at 587.

"The problem confronting Indian tribes with sizable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to Federal property as exemplified by title 18, United States Code, section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforcible against Indians only; not against non-Indians.*

"*Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass* ***206** *charges.* Further, there are no Federal laws which can be invoked against trespassers.

"The committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property." S.Rep. No. 1686, 86th Cong., 2d Sess., 2-3 (1960) (emphasis added).

II

[6] 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. Cf. *Draper v. United States*, 164 U.S. 240, 245-247, 17 S.Ct. 107, 108-109, 41 L.Ed. 419 (1896); *Morris v. Hitchcock*, 194 U.S. 384, 391-393, 24 S.Ct. 712, 715, 48 L.Ed. 1030 (1904); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690, 85 S.Ct. 1242, 1245, 14 L.Ed.2d 165 (1965); *DeCoteau v. District County Court*, 420 U.S. 425, 444-445, 95 S.Ct. 1082, 1092-1093, 43 L.Ed.2d 300 (1965). "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop ****1020** for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them. *Ibid.*

[7] While in isolation the Treaty of Point Elliott, 12 Stat. 927 (1855), would appear to be silent as to tribal criminal jurisdiction over non-Indians, the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction.[16] In the Ninth Article, for example, the Suquamish ***207** "acknowledge their dependence on the government of the United States." As Mr. Chief Justice Marshall explained in *Worcester v. Georgia*, 6 Pet. 515, 551-552, 554, 8 L.Ed. 483 (1832), such an acknowledgment is not a mere abstract recognition of the United States' sovereignty. "The Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country." *Id.*, at 555. By acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation. Other provisions ***208** of the Treaty also point to the absence of tribal jurisdiction. Thus the Tribe "agree [s] not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Read in conjunction with 18 U.S.C. § 1152, which extends federal enclave law to non-Indian offenses on Indian reservations, this provision implies that the Suquamish are to promptly deliver up any non-Indian offender, rather than try and punish him themselves.[17]

16 When treaties with the Washington Tribes were first contemplated, the Commissioner of Indian Affairs sent instructions to the Commission to Hold Treaties with the Indian Tribes in Washington Territory and in the Blackfoot Country. Included with the instructions were copies of treaties previously negotiated with the Omaha Indians, 10 Stat. 1043 (1854), and with the Ottoe and Missouria Indians, 10 Stat. 1038 (1854), which the Commissioner "regarded as exhibiting provisions proper on the part of the Government and advantages to the Indians" and which he felt would "afford valuable suggestions." The criminal provisions of the Treaty of Point Elliott are clearly patterned after the criminal provisions in these "exemplary" treaties, in most respects copying the provisions verbatim. Like the Treaty of Point Elliott, the treaties with the Omahas and with the Ottoes and Missourias did not specifically address the issue of tribal criminal jurisdiction over non-Indians.
Sometime after the receipt of these instructions, the Washington treaty Commission itself prepared and discussed a draft treaty which specifically provided that "[i]njuries committed by whites towards them [are] not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished." For some unexplained reason, however, in negotiating a treaty with the Indians, the Commission went back to the language used in the two "exemplary" treaties sent by the Commissioner of Indian Affairs. Although respondents contend that the Commission returned to the original language because of tribal opposition to relinquishment of criminal jurisdiction over non-Indians, there is no evidence to support this view of the matter. Instead, it seems probable that the Commission preferred to use the language that had

been recommended by the Office of Indian Affairs. As discussed below, the language ultimately used, wherein the Tribe acknowledged its dependence on the United States and promised to be "friendly with all citizens thereof," could well have been understood as acknowledging exclusive federal criminal jurisdiction over non-Indians.

17 In interpreting Indian treaties and statutes, " '[d]oubtful 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.' " *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973), see *Kansas Indians*, 5 Wall. 737, 760, 18 L.Ed. 667 (1866); *United States v. Nice*, 241 U.S. 591, 599, 36 S.Ct. 696, 698, 60 L.Ed. 1192 (1916). But treaty and statutory provisions which are not clear on their face may "be clear from the surrounding circumstances and legislative history." Cf. *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975).

By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty ****1021** provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See *Cherokee Nation v. Georgia*, 5 Pet. 1, 15, 8 L.Ed. 25 (1831). But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers "*inconsistent with their status.*" *Oliphant v. Schlie*, 544 F.2d, at 1009 (emphasis added).

Indian reservations are "a part of the territory of the United ***209** States." *United States v. Rogers*, 4 How. 567, 571, 11 L.Ed. 1105 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." *Id.*, at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." *Johnson v. M'Intosh*, 8 Wheat. 543, 574, 5 L.Ed. 681 (1823).

We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States. In *Johnson v. M'Intosh*, *supra*, we noted that the Indian tribes' "power to dispose of the soil at their own will, to whomsoever they pleased," was inherently lost to the overriding sovereignty of the United States. And in *Cherokee Nation v. Georgia*, *supra*, the Chief Justice observed that since Indian tribes are "completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility." 5 Pet., at 17-18.

[8] Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: "[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves*." *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162 (1810) (emphasis added). Protection of territory within its ***210** external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R.Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

****1022** In *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883), the Court was faced with almost the inverse of the issue before us here-whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land. In concluding that criminal jurisdiction was exclusively in the tribe, it found particular guidance in the "nature and circumstances of the case." The United States was seeking to extend United States

"law, by argument and inference only, . . . 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 . . .; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of ***211** 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 . . . ." *Id.*, at 571, 3 S.Ct., at 406.

These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.

As previously noted, Congress extended the jurisdiction of federal courts, in the Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian Country. In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases. Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States.

In summary, respondents' position ignores that
"Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these." *United States v. Kagama*, 118 U.S. 375, 379, 6 S.Ct. 1109, 1111, 30 L.Ed. 228 (1886).

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many ***212** respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians.[18] But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent ****1023** jurisdiction to try and to punish non-Indians. The judgments below are therefore

[18] See 4 National American Indian Court Judges Assn., Justice and the American Indian 51-52 (1974); Hearings on S. 1 and S. 1400 (reform of the Federal Criminal Laws) before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 6469 *et seq.* (1973).

Reversed.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

Mr. Justice MARSHALL, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the court below that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed." *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (CA9 1976). In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent.

All Citations

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159 F.3d 708
United States Court of Appeals,
Second Circuit.

Maisie SHENANDOAH; Wilbur Homer; Raymond Obomsawin; Thelma Buss; and Melvin Phillips, individually and as Representatives of the Oneida Nation; Diane Shenandoah; Joanne Shenandoah; Victoria Halsey; Matthew Jones; Leonard Babcock; and Tammy Thomas,
Plaintiffs–Appellants,
v.
The UNITED STATES DEPARTMENT OF THE INTERIOR, Bruce Babbitt, as Secretary of the Interior of the United States; The Bureau of Indian Affairs; Ada Deer, as Assistant Secretary of the Interior for Indian Affairs; Franklin Keel, as Eastern Area Director, Bureau of Indian Affairs; Key Bank of New York; Arthur Raymond Halbritter; and Marilyn John,
Defendants–Appellees.

No. 97–6142.
|
Argued Feb. 2, 1998.
|
Decided Oct. 6, 1998.

Synopsis
Members of Oneida Indian Nation brought action against Department of the Interior, lease agreement signatory recognized by Department as Nation's representative, and others, alleging, in connection with construction of casino and hotel on Nation's property, violations of National Environmental Policy Act, Indian Long-Term Leasing Act, Indian Appropriation Act, Indian Civil Rights Act (ICRA), and Oneida Nation sovereignty, and demanding an accounting and return of proceeds and seeking writs of habeas corpus. The United States District Court for the Northern District of New York, Rosemary S. Pooler, J., 1997 WL 214947, dismissed action. Members appealed. The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that: (1) members failed to exhaust administrative remedies with respect to claims of violations of federal statutes and of Nation's sovereignty, and (2) members did not suffer severe actual or potential restraint on their liberty, as required for them to be eligible for habeas relief under ICRA.

Affirmed.

West Headnotes (7)

[1] **Indians**
Conditions Precedent; Exhaustion

Members of Oneida Indian Nation failed to exhaust administrative remedies within Department of the Interior before bringing action alleging violations of National Environmental Policy Act and other federal laws, and violations of Nation's sovereignty, in connection with Department's approval of lease of certain Nation land; although Department approved lease, it issued no decision on the critical issue underlying action, i.e., whether signatory to lease, who purportedly had been removed by Nation, remained the Nation's representative. 5 U.S.C.A. § 704; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

4 Cases that cite this headnote

[2] **Indians**
Federal courts

Issue of whether certain member of Oneida Indian Nation was Nation's representative for purposes of entering into agreement to lease Nation's land involved questions of tribal law and thus was not properly resolved by a federal court.

8 Cases that cite this headnote

[3] **Habeas Corpus**
Native Americans; tribal courts

Members of Oneida Nation did not suffer severe actual or potential restraint on their liberty, as required for them to be eligible for habeas relief under Indian Civil Rights Act (ICRA), when allegedly they were suspended or terminated

from employment positions, lost their "voices" within Nation's governing bodies, were denied health insurance, were denied admittance into Nation's health center, lost quarterly distributions paid to all Nation members, were banned from various businesses and recreational facilities, were stricken from Nation membership rolls, were prohibited from speaking with a few other Nation members, and were not sent Nation mailings. Civil Rights Act of 1968, § 203, as amended, 25 U.S.C.A. § 1303.

10 Cases that cite this headnote

[4] **Federal Courts**
Jurisdiction

District court's conclusions regarding its subject matter jurisdiction are reviewed de novo.

Cases that cite this headnote

[5] **Indians**
Statutory

Indian Civil Rights Act (ICRA) does not establish or imply a federal cause of action to remedy violations of ICRA section listing substantive rights afforded to individuals that serve to restrict the power of tribal governments; rather, ICRA identifies explicitly only one federal court procedure for enforcement of such substantive guarantees, i.e., writ of habeas corpus to test legality of detention by order of tribe. Civil Rights Act of 1968, §§ 202, 203, as amended, 25 U.S.C.A. §§ 1302, 1303.

5 Cases that cite this headnote

[6] **Habeas Corpus**
Native Americans; tribal courts

Section of Indian Civil Rights Act (ICRA), making available writ of habeas corpus to test legality of detention by order of tribe, was intended by Congress to have no broader reach than the cognate statutory provisions governing collateral review of state and federal action; thus, person seeking such relief must allege a severe actual or potential restraint on their liberty. Civil Rights Act of 1968, § 203, as amended, 25 U.S.C.A. § 1303.

5 Cases that cite this headnote

[7] **Habeas Corpus**
Native Americans; tribal courts

Habeas relief contemplated by Indian Civil Rights Act (ICRA) addresses more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and permanent banishment. Civil Rights Act of 1968, § 203, as amended, 25 U.S.C.A. § 1303.

4 Cases that cite this headnote

Attorneys and Law Firms

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Mark J. Moretti, Phillips, Lytle, Hitchcock, Blaine & Huber, LLP, Rochester, New York, submitted for defendant-appellee Key Bank of New York.
BEFORE: KEARSE, WALKER, Circuit ***710** Judges, and WEINSTEIN, District Judge.[*]

[*] The Honorable Jack B. Weinstein, of the United States District Court for the Eastern District of New York, sitting by designation.

Opinion

John M. WALKER, Jr., Circuit Judge.

Plaintiffs-appellants Maisie Shenandoah, *et al.*, members of the Oneida Indian Nation ("Oneida Nation" or "Nation"), appeal from the April 14, 1997 judgment of the United States District Court for the Northern District of New York (Rosemary S. Pooler, *District Judge*). Plaintiffs' complaint alleged that defendants-appellees, including the United States and certain Nation members that the United States had recognized as leaders of the Nation, violated the National Environmental Policy Act of 1969, 42 U .S.C. §§ 4321, 4332(2)(C) ("NEPA"), the Indian Long–Term Leasing Act, 25 U.S.C. § 415, the Indian Appropriation Act of 1872, 25 U.S.C. § 81, the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1301 *et seq.*, and Oneida Nation sovereignty; demanded an accounting; and petitioned, pursuant to 25 U.S.C. § 1303, for writs of habeas corpus ("habeas claim"). The district court granted defendants' motion, pursuant to Fed.R.Civ.P. 19, to dismiss plaintiffs' non-habeas claims for a failure to join the Oneida Nation as an indispensable party to the suit. The district court also dismissed plaintiffs' habeas claim for lack of subject matter jurisdiction because plaintiffs failed to allege a sufficiently severe restraint on their liberty.

We agree with the district court that plaintiffs' habeas claim must fail because they have failed to allege a sufficiently severe restraint on their liberty. As to plaintiffs' seven other claims, dismissed by the district court for failure to join the Oneida Nation as an indispensable party, we affirm their dismissal on the alternative ground that plaintiffs failed to exhaust their administrative remedies at the Department of the Interior. The district court's judgment is affirmed.

Background

The following facts are taken from plaintiffs' amended complaint. Plaintiffs are individuals who are members of the Oneida Nation, some of whom claim to be the Nation's traditional leaders or official representatives. Defendant-appellee Arthur Raymond Halbritter is an Oneida Nation member whom the Department of the Interior came to recognize and still recognizes as the Oneida Nation representative. Defendant-appellee Marilyn John is an Oneida Nation member whom Halbritter named to one of the Nation's governing bodies. Defendants-appellees the United States Department of the Interior ("Department"), its Secretary Bruce Babbitt, the Bureau of Indian Affairs ("BIA"), Ada Deer, and Franklin Keel (collectively, the "federal defendants"), are responsible for various aspects of United States and Native American affairs.

In 1977, members of the Oneida Nation appointed Halbritter and two other Nation members as interim representatives of the Nation. On April 25, 1993, the Grand Council, consisting of representatives from all six Iroquois nations, including the Oneida Nation, purported to remove Halbritter from his position as interim Nation representative. The Department acknowledged the removal on August 10, 1993, but the next day stayed its acknowledgment pending BIA review. After requesting the Nation to conduct a referendum to select a representative, the Department agreed to Halbritter's proposal to submit "statement[s] of support" from Nation members. On February 4, 1994, the Department notified Halbritter that it would continue to recognize him as the Nation's permanent representative until such time as he resigned or was removed by the Nation in accordance with certain procedures. According to plaintiffs, on May 21, 1995 the Nation once again removed Halbritter from his position as Oneida representative. Although informed of Halbritter's alleged second removal, the Department had not acted upon that notification by the time of oral argument, and as of the time of this opinion, we have received no information to the contrary.

In 1992 and 1993, while the Nation's first effort to remove Halbritter was ongoing, Halbritter led a project to build a casino on Nation property. In 1994, Halbritter began ***711** the planning and construction of a hotel to accompany the casino, for which he secured a $25 million loan from defendant-appellee Key Bank of New York. On August 7, 1995, after his second alleged removal as Oneida leader, Halbritter-purportedly acting for the Nation—signed an ordinance creating the "Oneida Land Corporation" ("Corporation"), wholly owned by the Nation and possessed of authority to pledge Nation assets as collateral for the bank loan. Simultaneously, the Nation

leased the hotel site to the Corporation and the Corporation in turn pledged the lease as collateral for the Key Bank Loan. On August 21, 1995, despite a request by some Nation members that the Department "suspend any contractual or land negotiations, additional casino developments or expansion until" the issue of Nation leadership was resolved, BIA Acting Eastern Area Director Franklin Keel reviewed the ordinance, the lease, and the Key Bank loan agreement, and approved the lease. All of the documents necessary to the foregoing transaction were executed by Halbritter on behalf of the Oneida Nation.

On September 22, 1995, six of the plaintiffs, "on behalf of the Nation," appealed Keel's lease approval to the BIA. Following a brief stay by the BIA, on October 5, 1995 Assistant Secretary of the Interior for Indian Affairs Ada Deer, also a defendant-appellee, assumed jurisdiction of the appeal and rescinded the stay. On March 20, 1996, plaintiffs informed Deer that, in light of the lifting of the stay and the Department's apparent refusal to reconsider its recognition of Halbritter as Nation representative, federal court was the only proper forum to review Acting Director Keel's lease approval. The defendants expressed their disagreement and in July, August, and September 1996 the BIA received briefing on issues raised by the administrative appeal. As of the time of oral argument, that administrative appeal was still pending.

On February 13, 1996, plaintiffs filed this action. Their amended complaint asserts eight causes of action. Plaintiffs allege that the federal defendants: (1) failed to prepare an environmental impact statement for the hotel in violation of NEPA, 42 U.S.C. § 4332(2)(C); (2) approved the lease agreement without considering possible effects on the environment, in violation of the Indian Long–Term Leasing Act, 25 U.S.C. § 415; (3) failed to review the loan agreement with Key Bank in violation of the Indian Appropriation Act of 1872, 25 U.S.C. § 81; (4) continued to recognize Halbritter as Nation representative in violation of the Nation's sovereignty; and (5) injured the civil rights of Nation members by virtue of Halbritter's recognition as Nation representative, in violation of ICRA, 25 U.S.C. § 1302. With respect to defendant Halbritter, plaintiffs demand (6) an accounting of all Nation assets under his control; and (7) the return from Halbritter of all net proceeds of Nation businesses under his control. Finally, six plaintiffs on behalf of themselves and others similarly situated assert an eighth cause of action against Halbritter and John, seeking writs of habeas corpus pursuant to ICRA, 25 U.S.C. § 1303, for alleged deprivations of plaintiffs' liberty.

Defendants moved to dismiss the entire action, *inter alia*, for failure to join the Oneida Nation as an indispensable party pursuant to Fed.R.Civ.P. 19, failure to state a claim as to a number of the claims pursuant to Fed.R.Civ.P. 12(b)(6), failure to exhaust administrative remedies at the Department, and lack of subject matter jurisdiction over the habeas claim. The district court dismissed the first seven claims on the basis that plaintiffs failed to join the Oneida Nation as an indispensable party to the suit, and that joinder was precluded by the Nation's sovereign immunity. *See Shenandoah v. United States Dep't of the Interior*, No. 96–CV–258, 1997 WL 214947, at *6 (N.D.N.Y. April 14, 1997). The district court dismissed the eighth claim on the ground that the complaint failed to allege "sufficiently severe restraints on [plaintiffs'] liberties" to sustain a valid habeas claim within ICRA. *Id.* at *9. Plaintiffs now appeal.

Discussion

I. *Exhaustion of Administrative Remedies*

[1] The federal defendants contend that the complaint's first five claims are currently being litigated in a pending appeal before the ***712** Department of the Interior and therefore have not been exhausted.

According to plaintiffs, the following issues are before the BIA: (i) the authority of the signatories of the lease agreement to enter into the transaction; (ii) "the environmental impacts attendant to the activities contemplated by the transaction, [which] violated the statutory ... requirements imposed on the Department under 25 U.S.C. §§ 81 and 415(a)"; and (iii) the Department's alleged "violation of the sovereignty of the Oneida Nation." Appellant's Br. at 3. We also note that plaintiffs' notice of appeal to the BIA requested "[a]n evidentiary hearing on the issue of the authority of [ ] Halbritter to represent the Oneida Nation in any capacity" and that the BIA has stated that "[t]he essence of appellants' appeal ... is that Halbritter is not an authorized representative of the Nation, and therefore lacked authority to sign the ground lease indenture."

Plainly, the BIA's decision whether to continue to recognize Halbritter as Nation representative may directly affect plaintiffs' first five claims in the instant action, all of which are directed at the federal defendants. Should the

Department determine that Halbritter is not the Nation's representative, then Halbritter may not have had authority to execute the lease agreements and the Department may retract its approval of the lease. In that event, all of plaintiffs' first five claims, which arise from the Department's lease approval, would no longer exist.

Plaintiffs contend that, notwithstanding the pending administrative appeal, the Department has made a final determination as to their first five claims and they are therefore entitled to pursue those claims in federal court. Plaintiffs rely on 5 U.S.C. § 704, which provides that

> [a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

When the Assistant Secretary made the lease approval effective on October 5, 1995, plaintiffs contend, that approval became "operative and hence final" and, notwithstanding plaintiffs' administrative appeal, the Department's decision was administratively exhausted.[1] We disagree.

[1] Plaintiffs cite 25 C.F.R. § 2.6(a) for the same proposition. That section states: "No decision ... subject to appeal ... in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704, unless when an appeal is filed ... the decision be made effective immediately."

[2] Assuming that Keel's lease approval was a final agency decision because it was made operative pending appeal, an issue as to which we express no opinion, we must still conclude in this unusual case that plaintiffs have failed to exhaust their administrative remedies. Acting Director Keel issued *no* decision as to whether, in light of Halbritter's second purported removal, Halbritter remains the Oneida Nation's representative. This issue, raised by plaintiffs in the notice of appeal to the BIA, is the critical issue that underlies plaintiffs' complaint and must be resolved before the BIA can decide whether to affirm the lease approval. Moreover, in the absence of an initial determination by the Department, the issue of Oneida leadership, which involves questions of tribal law, is not properly resolved by a federal court. *See, e.g., Runs After v. United States,* 766 F.2d 347, 351–53 (8th Cir.1985) (asserting jurisdiction to review BIA's refusal to require new elections to tribal council but not to review legality of Tribal Council resolutions under tribal constitution); *Goodface v. Grassrope,* 708 F.2d 335, 338–39 (8th Cir.1983) (asserting jurisdiction to force BIA to recognize a tribal council but, where there was functioning tribal court recognized by both parties, declining to assert jurisdiction to determine merits of ***713** election dispute under tribal constitution). Indeed,

> the BIA has special expertise and extensive experience in dealing with Indian affairs. The interest of the BIA and its parent Department of Interior in administrative autonomy also supports requiring exhaustion of administrative remedies. Moreover ... the somewhat anomalous and complex relationship between the quasi-sovereign Indian tribes and the federal government also supports, in general, requiring appellants initially to seek an administrative solution through the BIA and the Department of Interior.

Runs After, 766 F.2d at 352.

The exhaustion doctrine "prevent[s] premature interference with agency processes," provides the agency "an opportunity to correct its own errors, [and] afford[s] the parties and the courts the benefit of its experience and expertise." *Weinberger v. Salfi,* 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); *see McCarthy v. Madigan,* 503 U.S. 140, 145, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). Exhaustion may also "[moot] a judicial controversy.... And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent

judicial consideration, especially in a complex or technical factual context" or where as here the underlying issues are particularly within the agency's expertise. *Id.* at 145, 112 S.Ct. 1081. All of these interests will be served by dismissing plaintiffs' first five claims on exhaustion grounds. The BIA's determination that Halbritter does not represent the Nation may well moot plaintiffs' claims. Even if the BIA ultimately reaffirms Halbritter's right to represent the Nation, federal courts will have the benefit of a full record and a determination by an agency with special expertise over the issue. In light of the fact that the Department has before it an appeal in which the issue of Nation leadership has been raised and must be determined, we think it appropriate to afford the Department an opportunity in the first instance to decide this threshold issue upon which plaintiffs' first five claims may turn.[2]

[2] Defendants-appellees claim that plaintiffs' NEPA, 25 U.S.C. § 415, and 25 U.S.C. § 81 claims are moot because (allegedly) the lease that the Department approved has been terminated, the loan has been fully repaid, and the hotel construction project to which the lease related has been completed. In light of plaintiffs' failure to exhaust administrative remedies before instituting the instant action, we do not consider the merits of this claim.

II. *Habeas Claim*

[3] [4] Six of the plaintiffs, on behalf of themselves and others similarly situated, claim that defendants Halbritter and John imposed severe restraints on their liberty in violation of ICRA, 25 U.S.C. § 1302, and appeal from the district court's dismissal of their petition for a writ of habeas corpus pursuant to 25 U.S.C. § 1303. The district court dismissed this claim for lack of subject matter jurisdiction on the basis that the deprivations of liberty alleged in plaintiffs' complaint were not of sufficient severity to fall within ICRA's habeas provision.[3] "We review the district court's conclusions regarding its subject matter jurisdiction *de novo*." *Plumbing Indus. Bd. v. E.W. Howell Co.*, 126 F.3d 61, 65 (2d Cir.1997).

[3] In light of its dismissal of the habeas claim, the district court did not decide whether to certify, pursuant to Fed.R.Civ.P. 23, the six plaintiffs' proposed class. *See Shenandoah*, 1997 WL 214947, at *9.

[5] [6] Although Title I of ICRA lists a number of substantive rights afforded to individuals that serve to restrict the power of tribal governments, *see* 25 U.S.C. § 1302, Title I does not establish or imply a federal civil cause of action to remedy violations of § 1302. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 884 (2d Cir.), *cert. denied*, 519 U.S. 1041, 117 S.Ct. 610, 136 L.Ed.2d 535 (1996). Rather, "Title I of the ICRA identifies explicitly only one federal court procedure for enforcement of the substantive guarantees of § 1302: § 1303 makes available to any person '[t]he privilege of the writ of habeas corpus ..., in a court of the United States, to test the legality of his detention by order of an Indian tribe.' " ***714** *Poodry*, 85 F.3d at 882 (quoting 25 U.S.C. § 1303). "[S]ection 1303 was intended by Congress to have no broader reach than the cognate statutory provisions governing collateral review of state and federal action," *id.* at 901 (Jacobs, J., dissenting); *accord id.* at 879–80 (majority opinion), and thus plaintiffs must allege that defendants posed a "severe actual or potential restraint on [their] liberty," *id.* at 880.

Plaintiffs' complaint alleges that one or more of the six plaintiffs were suspended or terminated from employment positions, lost their "voice[s]" within the Nation's governing bodies, lost health insurance, were denied admittance into the Nation's health center, lost quarterly distributions paid to all Nation members, were banned from various businesses and recreational facilities such as the casino, Turning Stone park, the gym, and the Bingo hall, were stricken from Nation membership rolls, were prohibited from speaking with a few other Nation members, and were not sent Nation mailings. The complaint also alleges that one member of Halbritter's governing Men's Council threw a large rock at one of the plaintiffs and grabbed that plaintiff through a car window.

[7] Although the alleged misconduct, if true, is serious, it is insufficient to bring plaintiffs within ICRA's habeas provision. Habeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and permanent banishment. *Poodry*, 85 F.3d at 893–94, 897 (collecting cases). The punishment that the petitioners faced in *Poodry*, however, was considerably more severe than the punishments alleged by plaintiffs. In *Poodry*, the petitioners were "convicted [ ] of treason," sentenced to "permanent banishment," and "stripped of ... Indian citizenship"; their names were "removed from the Tribal rolls"; and they "permanently [lost] any and all rights afforded [tribal] members." *Id.* at 876, 878 (quotation marks omitted). Although petitioners there were not actually ejected from the reservation, a divided panel held that these deprivations of liberty, including a sentence of "permanent banishment," were sufficiently severe to bring petitioners within ICRA's habeas provision. In

contrast, plaintiffs in the instant case have not alleged that they were banished from the Nation, deprived of tribal membership, convicted of any crime, or that defendants attempted in anyway to remove them from Oneida territory. Accordingly, we conclude that plaintiffs have not alleged a "severe actual or potential restraint on [their] liberty," *id.* at 880, and affirm the district court's dismissal of this claim.

IV. *State Claims Against Halbritter*

Plaintiffs' sixth and seventh claims demand from Halbritter an accounting of all Nation assets and the return of all net proceeds of Nation businesses under his control. To the extent that these claims depend upon the Department's resolution of the question of Oneida Nation leadership, they are not exhausted. *See, e.g.,* Amended Complaint ¶ 175 ("The Nation's removal of Halbritter ... demand[s] that the monies received by Halbritter in the form of net proceeds from the operation of Oneida Nation businesses be paid over to the Nation."). In any event, these claims arise under New York state, not federal, law. *See id.* at ¶¶ 3, 5. In light of our affirmance of the dismissal of all of plaintiffs' federal claims, we decline to exercise supplemental jurisdiction over these New York state law claims. *See* 28 U.S.C. § 1367(c)(3); *Castellano v. City of New York*, 142 F.3d 58, 74 (2d Cir.1998).

V. *Propriety of Dismissal Pursuant to Fed.R.Civ.P. 19*

Finally, because the issue could arise again in future proceedings in this case, we discuss the district court's ground for dismissal of the first seven claims. The district court held that plaintiffs failed to join the Oneida Nation as an indispensable party to the suit, and that joinder was precluded by the Nation's sovereign immunity. *See Shenandoah*, 1997 WL 214947, at *4 (citing *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547–48 (2d Cir.1991)). Assuming that the Nation is indispensable to the suit, it is not clear to us that the Nation is an absent party. The plaintiffs purport to represent (and thereby waive the immunity of) a sovereign ***715** Native American nation. The district court's observation that "if plaintiffs possessed authority to waive sovereign immunity, then they would also possess the power to themselves fashion the relief they seek from the district court," *Shenandoah*, 1997 WL 214947, at *6, disregards the possibility that Halbritter improperly usurped control over the Nation.

Because the issue of who represents the Oneida Nation after Halbritter's second purported removal has not been determined by the Department (and indeed, is the basis for dismissal for lack of administrative exhaustion), the district court prematurely determined that plaintiffs do not represent the Nation and therefore that the Nation is an absent party. Indeed, the district court's implicit finding that plaintiffs do not represent the Nation is inconsistent with the presumptive validity courts are to bestow a plaintiff's allegations at the pleading stage. Even had the Department determined that Halbritter represented the Nation notwithstanding his second purported removal, we are not certain that dismissing plaintiffs' complaint on Rule 19 grounds would be consistent with our duty to review such agency determinations. Although tribal law issues are "generally a matter for the other two branches of government to determine[,].... were the court to decline to review [a] sovereign immunity ruling, then the Department's recognition decisions would be unreviewable, contrary to the presumption in favor of judicial review of agency action." *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1498–99 (D.C.Cir.1997).

In sum, we question the district court's basis for dismissal of the first seven claims in the complaint, but in view of our dismissal of those claims on exhaustion grounds, need not definitively decide the issue.

Conclusion

For the reasons set forth above, the judgment of the district court is affirmed. Plaintiffs' first seven claims are dismissed for failure to exhaust administrative remedies at the Department, but without prejudice to reinstatement following exhaustion. Each party shall bear its own costs.

All Citations

159 F.3d 708, 29 Envtl. L. Rep. 20,249

85 F.3d 874
United States Court of Appeals,
Second Circuit.

Peter L. POODRY, David C. Peters, Susan LaFromboise, John A. Redeye, and Stonehorse Lone Goeman, Petitioners–Appellants,
v.
TONAWANDA BAND OF SENECA INDIANS; Bernard Parker, a/k/a Ganogehdaho; Kervin Jonathan, a/k/a Skongataigo; Emerson Webster, a/k/a Gauhnahgoi; Darren Jimerson, a/k/a Sohjeahnohous; Harley Gordon, a/k/a Gah–En–Keh; James Logan; and Darwin Hill, Respondents–Appellees.

No. 492, Docket 95–7490, 95–7492, 95–7498, 95–7502 and 95–7504.
|
Argued Nov. 30, 1995.
|
Decided May 16, 1996.

Synopsis
Members of the Tonawanda Band of Seneca Indians petitioned for writs of habeas corpus under the Indian Civil Rights Act of 1968 and sought to challenge the legality of orders issued by members of the tribal council purporting to "banish" the members from the tribe and its reservation. The United States District Court for the Western District of New York, Richard J. Arcara, J., dismissed the petitions for lack of subject matter jurisdiction. Members appealed. The Court of Appeals, José A. Cabranes, Circuit Judge, in a case of first impression, held that: (1) the banishment orders were "criminal sanctions" sufficient to permit invocation of habeas corpus jurisdiction, despite a claim that banishment reflected only a "civil" determination of tribal membership; (2) the members demonstrated a sufficiently severe restraint on liberty to be in custody for purposes of habeas jurisdiction; and (3) the tribe itself was not a proper respondent.

Affirmed in part, vacated in part, and remanded.

Jacobs, Circuit Judge, filed a dissenting opinion.

West Headnotes (16)

[1] **Indians**
Government of Indian Country, Reservations, and Tribes in General
Indians
Membership
Indians
Regulation of non-members by tribe or tribal government
Indians
Tribal court or authorities

Indian tribes are distinct political entities retaining inherent powers to manage internal tribal matters such as questions of membership, use of their natural resources, adjudication of civil disputes arising on their territory, with some limitations on power to exercise jurisdiction over non-Indians, and prescription of criminal laws applicable to Indians within their territorial borders and appropriate sanctions thereunder.

3 Cases that cite this headnote

[2] **Indians**
Government of Indian Country, Reservations, and Tribes in General
Indians
State regulation

Because tribal powers of self-government are "retained" and predate Federal Constitution, those constitutional limitations that are by their terms or by implication framed as limitations on federal and state authority do not apply to tribal institutions exercising powers of self-government with respect to members of tribe or others within tribe's jurisdiction.

5 Cases that cite this headnote

[3] **Indians**
Government of Indian Country, Reservations, and Tribes in General

Although those constitutional limitations that are by their terms or by implication framed as limitations on federal and state authority do not apply to tribal institutions exercising powers of self-government with respect to members of tribe or others within tribe's jurisdiction, even aspects of "sovereignty" thought to derive from status of Indian nations as distinct, self-governing entities are subject to congressional limitation.

4 Cases that cite this headnote

[4] **Indians**
Indian civil rights laws

In enacting Indian Civil Rights Act of 1968, Congress sought to apply some basic constitutional norms to tribal governments, in form of restrictions similar to those contained in Bill of Rights and Fourteenth Amendment. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1968, § 202, as amended, 42 U.S.C.A. § 1302.

1 Cases that cite this headnote

[5] **Habeas Corpus**
Native Americans; tribal courts
Indians
Indian civil rights laws

Federal enforcement of substantive provisions of Indian Civil Rights Act of 1968 is limited to those cases in which remedy sought is writ of habeas corpus pursuant to Act. Civil Rights Act of 1968, §§ 202, 203, as amended, 42 U.S.C.A. §§ 1302, 1303.

1 Cases that cite this headnote

[6] **Habeas Corpus**
Particular issues and problems
Habeas Corpus
Native Americans; tribal courts

Habeas corpus provision of Indian Civil Rights Act of 1968, which speaks of "detention" by order of Indian tribe as sole jurisdictional prerequisite for federal habeas review, does not explicitly limit its scope to tribal criminal proceedings. Civil Rights Act of 1968, §§ 202, 203, as amended, 42 U.S.C.A. §§ 1302, 1303.

6 Cases that cite this headnote

[7] **Habeas Corpus**
Particular issues and problems
Habeas Corpus
Native Americans; tribal courts

Banishment order issued against members of Tonawanda Band of Seneca Indians who had been "convicted of TREASON" was "criminal sanction" sufficient to permit invocation of jurisdiction under habeas corpus provision of Indian Civil Rights Act of 1968, despite claim that banishment reflected "civil" determination of tribal membership; "banishment" was clearly and historically punitive in nature. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303

17 Cases that cite this headnote

[8] **Habeas Corpus**
Particular issues and problems

Word "detention," as used in habeas corpus provision of Indian Civil Rights Act of 1968, was not intended to empower district courts to entertain petition for habeas relief in wider range of circumstances than analogous provisions for relief from state and federal custody permit. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

5 Cases that cite this headnote

[9] **Habeas Corpus**
Particular issues and problems

Fact that tribe has imposed criminal sanction does not itself trigger application of habeas corpus provision of Indian Civil Rights Act of 1968; petitioners must satisfy jurisdictional prerequisite for habeas review by demonstrating sufficiently severe potential or actual restraint on liberty. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

37 Cases that cite this headnote

[10] **Habeas Corpus**
Particular issues and problems

Actual physical custody is not jurisdictional prerequisite for federal habeas review under Indian Civil Rights Act of 1968. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

10 Cases that cite this headnote

[11] **Habeas Corpus**
Particular issues and problems
Habeas Corpus
Native Americans; tribal courts

Banishment notices served upon members of Tonawanda Band of Seneca Indians who had been "convicted of TREASON" were sufficient "restraint on liberty" to permit district court to entertain application for writ of habeas corpus under Indian Civil Rights Act of 1968; Congress could not have intended to permit tribe to circumvent Act's habeas provision by permanently banishing, rather than imprisoning, members "convicted" of offense of treason. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

23 Cases that cite this headnote

[12] **Indians**
Sovereign Immunity

Indian tribes and their governing bodies possess common-law immunity from suit absent unequivocal waiver by tribe or abrogation by Congress.

1 Cases that cite this headnote

[13] **Habeas Corpus**
Native Americans; tribal courts
Indians
Sovereign Immunity

Habeas corpus provision of Indian Civil Rights Act of 1968 does not serve as specific and unequivocal waiver of tribal sovereign immunity for habeas corpus actions brought under Act. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

4 Cases that cite this headnote

[14] **Habeas Corpus**
Parties; Standing

Petition for writ of habeas corpus is not properly a suit against the sovereign and, thus, tribe is not proper respondent under habeas corpus provision of Indian Civil Rights Act of 1968. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

7 Cases that cite this headnote

[15] **Habeas Corpus**
Parties; Standing

Tribal officials allegedly responsible for issuing banishment orders against members of Tonawanda Band of Seneca Indians could be considered "custodians" for purposes of habeas

corpus provision of Indian Civil Rights Act of 1968, even though banished members were not in physical custody. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

11 Cases that cite this headnote

[16] **Habeas Corpus**
Native Americans; tribal courts

General American legal norms or universal principles, rather than cultural relativism, could guide inquiry into "criminal" or "civil" nature of tribal action for purposes of habeas corpus provision of Indian Civil Rights Act of 1968; permitting tribe to avoid federal court jurisdiction by mere incantation of principles of cultural relativism would render congressionally created habeas remedy useless. Civil Rights Act of 1968, § 203, as amended, 42 U.S.C.A. § 1303.

3 Cases that cite this headnote

Attorneys and Law Firms

***876** Joseph E. Zdarsky, Buffalo, New York, James Cohen, Minneapolis, Minnesota (Gerald T. Walsh, Zdarsky, Sawicki & Agostinelli, Buffalo, New York, of counsel), for petitioners-appellants.

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Before FEINBERG, JACOBS, and CABRANES, Circuit Judges.

Opinion

JOSÉ A. CABRANES, Circuit Judge:

The petitioners are members of the Tonawanda Band of Seneca Indians, a federally recognized Indian tribe. They claim that on January 24, 1992, certain tribal officials summarily convicted them of "treason" and sentenced them to permanent "banishment" from the Tonawanda Seneca Indian Reservation ("Tonawanda Reservation"). The orders of "banishment" read in part as follows: "You are to leave now and never return.... [Y]our name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY." The petitioners claim that the banishment orders amount to a criminal conviction in violation of rights guaranteed under Title I of the Indian Civil Rights Act of 1968 ("ICRA" or "Act"), 25 U.S.C. §§ 1301–1303. In November 1992, they sought writs of habeas corpus in the United States District Court for the Western District of New York. In this case of first impression, the district court (Richard J. Arcara, *Judge*) concluded that the threat of permanent banishment was not a sufficient restraint on liberty to trigger the application of the ICRA's habeas corpus provision. The court therefore dismissed the petitions for lack of subject matter jurisdiction.

The respondents invite us to hold that the petitioners—citizens of the United States residing within our borders—cannot challenge the threatened loss of their tribal membership, cultural and religious identity, and property under the laws of the United States. It is undisputed that no avenue for tribal review of the actions of the members of the Council of Chiefs is available in this case. Accordingly, if the district court lacks subject matter jurisdiction to entertain the applications for writs of habeas corpus, the petitioners have no remedy whatsoever. We decline the respondents' invitation to hold that under ***877** current law basic American principles of due process are wholly irrelevant in these circumstances, or that the federal courts are completely divested of authority to consider whether the alleged actions of the members of the tribal Council of Chiefs conform to those principles. We conclude that the district court based its dismissal of the petitions on an erroneous view of the scope of the ICRA's habeas corpus provision. We therefore vacate the orders of dismissal and remand for further proceedings.

I

The Tonawanda Band of Seneca Indians is a federally recognized Indian tribe occupying a 7,500–acre

reservation near Akron, New York. Along with Seneca Indians now occupying the Cattaraugus and Allegany reservations in upstate New York, the Band was formerly recognized as the Seneca Nation, one of six nations known collectively as the Haudenosaunee or the Iroquois Confederacy.[1] Unlike the Indians currently recognized as the Seneca Nation—*i.e.*, the Seneca Indians of the Cattaraugus and Allegany Reservations—the Tonawanda Band retains the traditional governing institution of the Confederacy: the tribal Council of Chiefs ("the Council"), which carries out the views of the tribe on matters of internal governance. The petitioners claim, and the respondents do not appear to dispute, that this traditional form of Seneca government is based on consensus. The Tonawanda Band consists of eight "clans": the Snipe, the Heron, the Hawk, the Deer, the Wolf, the Beaver, the Bear, and the Turtle. Each clan appoints a clan mother, who in turn appoints an individual to serve as Chief. The clan mother retains the power to remove a Chief and, in consultation with members of the clan, provides recommendations to the Chief on matters of tribal government.[2] The clan mothers cannot disregard the views of the clan, nor can the Chiefs disregard the recommendations of the clan mothers.

[1] The split between the Tonawanda Band and the remainder of the Seneca Nation occurred in the mid–1800's. In 1838, nine Indian nations, including the Seneca Nation, entered a treaty with the United States providing for their withdrawal to a tract of land west of Missouri. Treaty of Buffalo Creek, Jan. 15, 1838, 7 Stat. 550; *see United States v. New York Indians*, 173 U.S. 464, 468, 19 S.Ct. 487, 489, 43 L.Ed. 769 (1899). A section of the treaty acknowledged that the four reservations then occupied by the Seneca Nation, including the Tonawanda Reservation, would be purchased by the Ogden Land Company. The treaty was modified in 1842 by a second treaty between the United States and the Seneca Nation, which reflected the purchase by Ogden of only two of the four Seneca reservations, including the Tonawanda Reservation. The chiefs of the Tonawanda Band had apparently signed neither treaty, and the Seneca Indians residing on the Tonawanda Reservation refused to leave their land. *See generally Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 15 L.Ed. 684 (1856) (recognizing objection of Tonawanda Band to 1838 and 1842 treaties; acknowledging that power to remove members of Tonawanda Band from reservation lay solely with federal government).

In 1848, the Seneca Indians of the Cattaraugus and Allegany reservations held a constitutional convention and adopted a non-traditional, elective form of government. The Tonawanda Band secured federal recognition as a distinct and independent Indian nation in 1857.

[2] Affidavits filed in support of the petitions by a member of the Council of Chiefs and by the Hawk clan mother suggest that three clans—the Heron, Deer, and Beaver—lost the right to have a clan mother or a Chief advise on matters of tribal government in the nineteenth century after engaging in illegal land transactions.

The petitioners also claim that the Tonawanda Band has held regular tribal elections, recognized under § 41 of the New York Indian Law (McKinney 1950), for President, Clerk, Treasurer, Peacemakers, and Marshal. The duties of these offices, or the functional relationship between these elected officials and the tribe's traditional government structure, are not clear from the record.

In November and December 1991, a dispute arose on the Tonawanda Reservation concerning alleged misconduct by certain members of the Tonawanda Council of Chiefs. The petitioners, Peter L. Poodry, David C. Peters, Susan LaFromboise, John A. Redeye, and Stonehorse Lone Goeman, and others, apparently accused members of the Council, particularly its Chairman, respondent Bernard Parker, of misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from the tribe's business affairs, and burning tribal ***878** records. Allegedly in consultation with other members of the tribe, the petitioners formed an Interim General Council of the Tonawanda Band.

Petitioners Poodry, Peters, and LaFromboise claim that on January 24, 1992, they were accosted at their homes by groups of fifteen to twenty-five persons bearing the following notice:

> It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return.
>
> According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason.
>
> Your actions to overthrow, or otherwise bring about the removal of, the traditional government at the Tonawanda Band of Seneca Nation, and further by becoming a member of the Interim General Council, are considered treason. Therefore, banishment is required.
>
> According to the customs and usage of the Tonawanda Band of Seneca Nation and the HAUDENOSAUNEE, your name is removed from the Tribal rolls, your

> Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members.
>
> YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.

The individuals bearing the notices attempted (without success) to take petitioners Poodry, Peters, and LaFromboise into custody and eject them from the reservation. Petitioners John A. Redeye and Stonehorse Lone Goeman received identical notices by mail. The notices were signed by respondents Parker, Kervin Jonathan, Emerson Webster, Darren Jimerson, Harley Gordon, and James Logan, all members of the Tonawanda Band's Council of Chiefs.[3] Respondent Darwin Hill, whose signature does not appear on the notices, is the tribal clerk.

[3] The notices were not signed by two other members of the Council of Chiefs, Chief Corbett Sundown of the Hawk Clan (now deceased) and Chief Roy Poodry of the Snipe Clan. The petitioners contend that Chief Sundown and Chief Poodry were excluded from Council meetings; the respondents contend that both were ill and therefore inactive.

After this initial attempt to remove the petitioners from the reservation, the respondents and persons purporting to act on their behalf allegedly continued to harass and assault the petitioners and their family members, attacking petitioner LaFromboise on Main Street in Akron and "stoning" petitioner Peters. The petitioners also claim to have been denied electrical service to their homes and businesses, at the direction of the Council.[4] In early February 1992, the respondents sent notices of the petitioners' "convict[ion]" and "banishment" to, *inter alia*, President Bush, the Bureau of Indian Affairs of the Department of the Interior, Governor Cuomo, Senator D'Amato, Senator Moynihan, and other federal and state officials, requesting recognition of the banishment orders and/or assistance in removing the petitioners from the Tonawanda Reservation. The New York Department of Public Health, which operates the Tonawanda Indian Reservation Medical Clinic, instructed the clinic (by an unsigned letter) to remove the petitioners from its list of eligible members; thereafter the petitioners were allegedly denied the health services and medications provided to other members of the tribe, both at the clinic and at local pharmacies. On February 3, 1992, the Bureau of Indian Affairs, in response to the political upheaval on the reservation, issued a notice that it continued to recognize "the traditional Council of Chiefs as the legal governing body of the Tonawanda Band of the Seneca Nation." On February 25, 1992, the clan mother of the ***879** Snipe clan allegedly removed respondent Bernard Parker as Chief. According to the petitioners, however, Parker continues to claim the chairmanship of the Council of Chiefs.[5]

[4] The Council's position that the provision of new or changed electrical service to the petitioners requires its prior approval is the subject of a separate proceeding, involving the public utility company that serves the reservation, the tribe and its officers, and the "banished" individuals. *See Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, No. 95–9014 (2d Cir.) (argued and submitted May 7, 1996).

[5] The petitioners also suggest that respondent Parker is, by his mother's blood line, a member of the Heron clan, which is not entitled to appoint a Chief. *See supra* note 2. They claim that he was merely a temporary Chief of the Snipe clan, and, though the self-proclaimed "Chairman" of the Council for several years, has no entitlement to that position. It appears that Chief Roy Poodry is also a Chief of the Snipe clan, *see supra* note 3; there is no clarification of this matter in the record.

The five targeted individuals filed petitions for writs of habeas corpus in the United States District Court for the Western District of New York on November 10, 1992, claiming that they had been denied several rights guaranteed under Title I of the Indian Civil Rights Act of 1968, including the right to a trial, the right to be informed of the nature or cause of accusations against them, the right to confront witnesses, the right to assistance of counsel, *see* 25 U.S.C. § 1302(6), and the right to assemble peaceably, *see id.* § 1302(1). The petitioners also claimed violations of the ICRA's prohibitions on cruel and unusual punishment, bills of attainder, and deprivations of liberty and property without due process of law. *See* 25 U.S.C. § 1302(7), (8), (9). The respondents filed motions to dismiss on January 13, 1993, claiming that the petitioners had been stripped of their Indian membership as a result of an internal tribal political dispute and that the district court therefore lacked subject matter jurisdiction over the petitions. On April 13, 1995, the district court dismissed the petitions for lack of subject matter jurisdiction, holding that banishment could not trigger application of the ICRA's habeas corpus provision. This appeal followed.

II

We face here a question of federal Indian law not yet addressed by any federal court: whether an Indian stripped of tribal membership and "banished" from a reservation has recourse in a federal forum to test the legality of the tribe's actions. More specifically, the issue is whether the habeas corpus provision of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1303, allows a federal court to review punitive measures imposed by a tribe upon its members, when those measures involve "banishment" rather than imprisonment. We conclude that the ICRA's habeas provision affords the petitioners access to a federal court to test the legality of their "convict[ion]" and subsequent "banishment" from the reservation and that the district court therefore erred in dismissing the petitions for writs of habeas corpus on jurisdictional grounds.

We first examine certain principles of federal Indian law that will guide our inquiry and explore briefly the substance and legislative history of the statute at issue in this case, Title I of the Indian Civil Rights Act of 1968. We then turn to the question of subject matter jurisdiction. Informed by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the only Supreme Court case analyzing the structure, purpose, and history of the ICRA, we examine the parties' respective claims with respect to subject matter jurisdiction. The respondents contend that the orders of permanent banishment are "civil" in nature, representing "membership determinations" committed to the absolute discretion of the tribe and unreviewable under the ICRA; the petitioners argue that the orders constitute criminal sanctions, and that habeas review under the ICRA is available for all tribal actions taken in a criminal context. We accept neither argument in full. We reject the respondents' claim that all tribal actions affecting membership are necessarily "civil" in nature and conclude that the orders of permanent banishment constitute punitive sanctions imposed for allegedly criminal behavior. Nonetheless, we find that the imposition of a criminal sanction is not *itself* sufficient to permit a district court to entertain an application for a writ of habeas corpus under the ICRA. We thus reject the petitioners' argument that the habeas provision of the ICRA, 25 U.S.C. § 1303, was intended to have broader reach than cognate statutory provisions governing collateral review of state and ***880** federal action. As with other statutory provisions governing habeas relief, one seeking to invoke jurisdiction of a federal court under § 1303 must demonstrate, under *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963), and its progeny, a severe actual or potential restraint on liberty. We conclude that the petitioners have done so here; the district court therefore improperly dismissed the applications for writs of habeas corpus.

Having concluded that the petitions should be considered on the merits, we examine the petitioners' claim that the tribe itself is a proper respondent in this action. We agree with the district court that it is not. The petitions for writs of habeas corpus are properly viewed as proceeding against *tribal officials* allegedly acting in violation of federal law and therefore outside of the lawful authority of the tribe; the petitions do not create actions against the tribe at all.

A. *Background: Tribal Sovereignty and Congressional Power*

[1] Although this case requires that we undertake an unusual jurisdictional inquiry in a complex area of federal law, we are guided by certain well-established principles. Federal courts have long acknowledged that Indian nations possess a unique status in our constitutional order. As Chief Justice Marshall first recognized in the famous Cherokee cases, Indian tribes are distinct political entities retaining inherent powers to manage internal tribal matters. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16, 8 L.Ed. 25 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483 (1832). Recognition that tribes "retain" certain aspects of sovereignty—*i.e.*, that tribes are not dependent upon the federal government for powers of internal self-government—has led to repeated judicial acknowledgements of certain specific rights that federally recognized Indian tribes possess in the United States, absent limitation by treaty or federal statute: to determine questions of membership, *see, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S.Ct. 1670, 1684 n. 32, 56 L.Ed.2d 106 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n. 18, 98 S.Ct. 1079, 1086 n. 18, 55 L.Ed.2d 303 (1978); to control the use of their natural resources, *see Tulee v. Washington*, 315 U.S. 681, 685, 62 S.Ct. 862, 864–65, 86 L.Ed. 1115 (1942); *see also Menominee Tribe v. United States*, 391 U.S. 404, 412–13, 88 S.Ct. 1705, 1710–11, 20 L.Ed.2d 697 (1968); to adjudicate civil disputes arising on their territory (with certain limitations on the power to exercise jurisdiction over non-Indians), *see Fisher v. District Court*, 424 U.S. 382, 388–89, 96 S.Ct. 943, 947–48, 47 L.Ed.2d 106 (1976) (per curiam); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959); *see also Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981); *A–1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir.1996) (en banc); and to prescribe criminal laws applicable to Indians within their territorial borders and impose appropriate sanctions, *see*

United States v. Antelope, 430 U.S. 641, 643 n. 2, 97 S.Ct. 1395, 1397 n. 2, 51 L.Ed.2d 701 (1977).[6]

[6] This power has been significantly limited by statute. Congress has conferred on federal courts criminal jurisdiction over major offenses committed by or against an Indian within Indian territory. *See* 18 U.S.C. § 1153(a) (establishing as federal crimes fourteen major crimes committed by an Indian on an Indian reservation); *id.* § 3242 (providing that Indian charged with offense punishable under § 1153 "shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States"); *id.* § 1152 (conferring on federal courts criminal jurisdiction over offenses committed within "Indian country," except by one Indian against another). A crime committed by a non-Indian against a non-Indian within Indian territory is subject to state jurisdiction. *See United States v. McBratney*, 104 U.S. 621, 624, 26 L.Ed. 869 (1882); *cf. Donnelly v. United States*, 228 U.S. 243, 271–72, 33 S.Ct. 449, 458–59, 57 L.Ed. 820 (1913). Tribal criminal jurisdiction includes jurisdiction over non-member Indians. *See* Pub.L. No. 101–511, § 8077(b), (c), 104 Stat. 1856, 1892–93 (1990) (overturning result of *Duro v. Reina*, 495 U.S. 676, 695–96, 110 S.Ct. 2053, 2064–65, 109 L.Ed.2d 693 (1990)).

[2] Because tribal powers of self-government are "retained" and predate the federal Constitution, those constitutional limitations that are by their terms or by implication framed as limitations on *federal* and *state* authority do not apply to tribal institutions ***881** exercising powers of self-government with respect to members of the tribe or others within the tribe's jurisdiction. Thus, in *Talton v. Mayes*, the Court found that criminal courts of the Cherokee Nation were not subject to the Fifth Amendment's requirement of indictment by grand jury. 163 U.S. 376, 384, 16 S.Ct. 986, 989, 41 L.Ed. 196 (1896). Although Congress could "regulate the manner in which the local powers of the Cherokee [N]ation shall be exercised," those local powers existed prior to the Constitution and were "not operated upon by the Fifth Amendment." *Id.* Following *Talton*, courts concluded that other provisions of the Bill of Rights as well as the Fourteenth Amendment do not constrain the powers of self-government enjoyed by Indian tribes. *See Martinez v. Southern Ute Tribe of the Southern Ute Reservation*, 249 F.2d 915, 919 (10th Cir.1957) (Due Process Clause of Fifth Amendment), *cert. denied*, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir.1959) (free exercise of religious beliefs under First and Fourteenth Amendments); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir.1967) (Due Process Clause of Fourteenth Amendment).[7]

[7] Members of federally recognized Indian tribes are citizens of the United States and are therefore afforded constitutional protection against violations of individual rights by *federal* and *state* institutions, but constitutional provisions limiting federal or state authority are of no force in constraining actions of tribal governments. *See* 8 U.S.C. § 1401(b) (providing that a person born in the United States to a member of an Indian tribe shall be a national and citizen of the United States at birth).

[3] However, as acknowledged by those cases recognizing specific areas of tribal authority and declining to read constitutional provisions as limiting that authority, even aspects of "sovereignty" thought to derive from the status of Indian nations as distinct, self-governing entities are subject to congressional limitation. *See, e.g., National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 & n. 10, 105 S.Ct. 2447, 2451 & n. 10, 85 L.Ed.2d 818 (1985) (" '[A]ll aspects of Indian sovereignty are subject to defeasance by Congress.' " (quoting *Escondido Mut. Water Co. v. La Jolla Bands of Mission Indians*, 466 U.S. 765, 787 n. 30, 104 S.Ct. 2105, 2118 n. 30, 80 L.Ed.2d 753 (1984))); *Wallace v. Adams*, 204 U.S. 415, 423, 27 S.Ct. 363, 366, 51 L.Ed. 547 (1907) ("The power of Congress over the matter of citizenship in ... Indian tribes was plenary."). *See generally* William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REVV. 1, 3–4 (1987).[8] In 1968, Congress passed what is perhaps the most significant limitation on tribal sovereignty: Title I of the Indian Civil Rights Act of 1968, Pub.L. No. 90–284, §§ 201–203, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. §§ 1301–1303).[9]

[8] The congressional power to legislate on tribal affairs, often referred to as "plenary," is not absolute. *See generally Shoshone Tribe v. United States*, 299 U.S. 476, 497, 57 S.Ct. 244, 251–52, 81 L.Ed. 360 (1937); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 375–76, 57 S.Ct. 826, 833–34, 81 L.Ed. 1156 (1937). Legislation must be tied rationally to Congress's "trust" obligations with respect to the welfare of Indian nations. *See Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974); *see also United States v. Sioux Nation*, 448 U.S. 371, 415–16, 100 S.Ct. 2716, 2740–41, 65 L.Ed.2d 844 (1980); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85, 97 S.Ct. 911, 919, 51 L.Ed.2d 173 (1977). The respondents do not challenge Congress's power to enact the ICRA, the statute at issue in this case.

[9] We refer here, as elsewhere, to the Title designations in S. 1843, an Indian civil rights measure passed by the Senate on December 7, 1967. 113 CONG. REC. 35,473 (1967). S. 1843 was identical to Amendment No. 430 to H.R. 2516, the broader civil rights measure signed into law on April 11, 1968, as Public Law 90–284. *See infra* pp. 883–884. Titles II through VII of Public Law 90–284 are collectively known as the Indian Civil Rights Act of 1968, and correspond to Titles I through VI of S. 1843.

B. *The Indian Civil Rights Act of 1968*

[4] With Title I of the Act, Congress sought to limit the effects of *Talton* and its progeny by applying some basic constitutional norms to tribal governments, in the form of restrictions similar to those contained in the Bill of Rights and the Fourteenth Amendment. Accordingly, 25 U.S.C. § 1302 provides as follows:

> ***882** No Indian tribe in exercising powers of self-government shall—
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures [sic], nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> (3) subject [sic] any person for the same offense to be twice put in jeopardy;
>
> (4) compel any person in any criminal case to be a witness against himself;
>
> (5) take any private property for a public use without just compensation;
>
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5000, or both;
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> (9) pass any bill of attainder or ex post facto law; or
>
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Among the most notable distinctions between § 1302 and cognate constitutional provisions, as interpreted, are the absence in the ICRA of a clause prohibiting the establishment of religion; the omission of a right to the assistance of counsel for the indigent accused; the absence of a right to a jury trial in civil cases; and the specific limitations on terms of imprisonment and fines. Title I of the ICRA identifies explicitly only one federal court procedure for enforcement of the substantive guarantees of § 1302: § 1303 makes available to any person "[t]he privilege of the writ of habeas corpus ..., in a court of the United States, to test the legality of his detention by order of an Indian tribe."[10]

[10] Title I of the ICRA was part of a broader package of measures affecting Indian governments. Title II of the ICRA (Title III of Public Law 90–284) required the Secretary of the Interior to recommend to Congress a model code governing the administration of justice by courts of Indian offenses on Indian reservations. Pub.L. No. 90–284, § 301, 82 Stat. at 78 (codified at 25 U.S.C. § 1311). Title III of the ICRA amended the controversial Public Law 280, which had ceded to five states—and provided other states with the opportunity to assume—jurisdiction over crimes committed by or against Indians on Indian territory and jurisdiction over civil causes to which Indians were parties and arising in Indian territory, Pub.L. No. 83–280, 67 Stat. 588, 589 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360); Title III provided that states could only assume jurisdiction with the consent of the affected tribe and permitted the federal government to accept any retrocession by states of any measure of criminal or civil jurisdiction previously acquired under Public Law 280. Pub.L. No. 90–284, §§ 401–406, 82 Stat. at 78–80 (codified at 25 U.S.C. §§ 1321–1326). Title IV broadened the category of major crimes over which the federal government would have jurisdiction to include "assault resulting in serious bodily injury." *Id.* § 501, 82 Stat. at 80 (codified at 18 U.S.C. § 1153). Title V of the ICRA placed a time limit upon the Department of Interior's approval of contracts between tribes and their

attorneys, providing that any contract not acted upon within ninety days would be deemed approved. *Id.* § 601, 82 Stat. at 80 (codified at 25 U.S.C. § 1331). Finally, Title VI required the Secretary of the Interior to revise various federally published materials relating to the rights of Indians. *Id.* § 701, 82 Stat. at 80–81 (codified at 25 U.S.C. § 1341).

A brief digression may be in order here, to explain some of the legislative history of this important statute and some of the underlying policy conflicts. The Indian Civil Rights Act was the product of seven years of sporadic legislative effort on Indian affairs. Beginning in August 1961, the Subcommittee on ***883** Constitutional Rights of the Senate Judiciary Committee held a series of hearings exploring the relationship between tribes and their members and among tribes, state governments, and the federal government.[11] These hearings led in 1964 to the introduction of eight bills and a proposed resolution on Indian matters before the Eighty–Eighth Congress. S. 3041–3048 and S.J. Res. 188, 88th Cong., 2d Sess., 110 CONG. REC. 17,325–30 (1964). In 1965, the chief sponsor of the legislation, Senator Sam J. Ervin Jr. of North Carolina, reintroduced the bills and resolution as S. 961–968 and S.J. Res. 40 in the First Session of the Eighty–Ninth Congress. 111 CONG. REC. 1799–1803 (1965). Most relevant for our purposes are S. 961, which would have fully applied to tribal governments the "same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution," and S. 962, which would have authorized the direct appeal of a criminal conviction by a tribal court to a federal district court, with a trial *de novo* on appeal. The subcommittee conducted additional hearings on these proposed measures in June 1965.[12]

11 *See Constitutional Rights of the American Indian: Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary Pursuant to S. Res. 53,* 87th Cong., 1st Sess., pt. 1 (1962) ("*1961 Senate Hearings pt. 1* "); *Constitutional Rights of the American Indian: Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., pt. 2 (1963); *Constitutional Rights of the American Indian: Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary Pursuant to S. Res. 260,* 87th Cong., 2d Sess., pt. 3 (1963); *Constitutional Rights of the American Indian: Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary Pursuant to S. Res. 58,* 88th Cong., 1st Sess., pt. 4 (1964); *Senate Committee on the Judiciary, Summary Report of Hearings and Investigations Pursuant to S. Res. 265,* 88th Cong., 2d Sess. (1964).

12 *See Hearings on S. 961–968 and S.J. Res. 40 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee,* 89th Cong., 1st Sess. (1965) ("*1965 Senate Hearings* "); *Senate Committee on the Judiciary, Summary Report of Hearings and Investigations Pursuant to S. Res. 194,* 89th Cong., 2d Sess. (1966) ("*1966 Summary Report* ").

During the 1965 subcommittee hearings, various tribes, attorneys specializing in Indian affairs, and the Department of the Interior opposed both S. 961's wholesale application of constitutional restraints to Indian tribes and S. 962's prospect of a trial *de novo* in federal district court for anyone convicted in a tribal court. *See, e.g.,* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act,* 9 HARV. J. ON LEGISS. 557, 589–94 (1972); *see also 1965 Senate Hearings, supra* note 12, at 17–18, 22, 36, 84–85, 90, 130, 227; *1966 Summary Report, supra* note 12, at 9. Revised versions of the proposed bills and resolution were introduced on May 23, 1967, as S. 1843 through 1847 and S.J. Res. 87. 113 CONG. REC. 13,473–78 (1967). S. 961 and S. 962 had been joined as S. 1843; rather than applying the full complement of restraints existing under the Constitution, the revised bill enumerated specific rights against actions of tribal governments. The enumerated rights largely tracked recommendations offered by the Department of the Interior at the 1965 Senate Hearings. *See 1965 Senate Hearings, supra* note 12, at 318. S. 1843 included a provision making available to any person "[t]he privilege of the writ of habeas corpus ..., in a court of the United States, to test the legality of his detention by order of an Indian tribe." S. 1843, 90th Cong., 1st Sess. § 103, 113 CONG. REC. 13,474 (1967). S. 1843 also preserved language from S. 962 regarding a right of appeal to a federal district court, but would have restricted the availability of trial *de novo* to circumstances in which the district court found "reasonable cause to believe, based upon the trial record," that the accused was deprived of his rights under the ICRA. *Id.* § 201, 113 CONG. REC. 13,474 (1967); *see also 1966 Summary Report, supra* note 12, at 25–26.

The bills were referred to the Senate Committee on the Judiciary, where they were consolidated and amended into one measure, S. 1843 as amended. This final version of S. 1843, as reported out of the Judiciary Committee, eliminated the provision that would have permitted a direct appeal of a tribal criminal conviction to federal district court, but preserved the habeas provision. S. 1843 ***884** (as amended), 90th Cong., 1st Sess. § 103, 113 CONG. REC. 35,471 (1967); *see* S. REP. NO. 841, 90th

Cong., 1st Sess. 2, 6 (1967). The Senate passed S. 1843, and its House equivalent was referred to the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs. 113 CONG. REC. 36,026 (1967).[13]

[13] The House subcommittee held one day of hearings on proposed Indian civil rights bills, including the House equivalent of S. 1843, during the next legislative session. *See Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968) ("*1968 House Hearing* ").

Meanwhile, the Senate equivalent of a more general civil rights bill passed by the House, H.R. 2516, had been referred to Senator Ervin's Subcommittee on Constitutional Rights of the Judiciary Committee. The subcommittee in late 1967 proposed a substitute measure that, among other things, included the Indian rights measures in a form identical to S. 1843 as amended (*i.e.*, as it would ultimately emerge from the Judiciary Committee). The Judiciary Committee did not report favorably on the substitute measure. S. REP. 721, 90th Cong., 1st Sess. 29, *reprinted in* 1968 U.S.C.C.A.N. 1837, 1863 (separate views of Senator Ervin). Senator Ervin introduced on the floor both the substitute bill, *see* Amendment No. 429 to H.R. 2516, 90th Cong., 1st Sess. §§ 201–701, 113 CONG. REC. 30,709–11 (1967), and a separate amendment to H.R. 2516 containing only the Indian rights provisions, *see* Amendment No. 430 to H.R. 2516, 90th Cong., 1st Sess. §§ 201–701, 113 CONG. REC. 30,711–12 (1967). During the next legislative session, the Senate considered and approved Amendment No. 430. *See* 114 CONG. REC. 5835–38 (1968). The Senate passed H.R. 2516 as amended on March 11, 1968. The bill was then approved by the House and signed into law by President Johnson on April 11, 1968.

C. *Subject Matter Jurisdiction Under § 1303 of the ICRA*

The petitioners' applications for writs of habeas corpus claim that Title I of the Indian Civil Rights Act limits the authority of the members of the Tonawanda Council of Chiefs to take the actions alleged in this case. The question presented on this appeal is not whether the petitioners' interpretation of the substantive provisions of the Act is correct, but whether a federal district court has subject matter jurisdiction to examine the merits of this claim. The relief sought in this case is styled as a petition for a writ of habeas corpus. The thrust of the respondents' jurisdictional challenge is that the petitioners are not entitled to seek habeas relief in this case, because (1) the decision to "banish" the petitioners was "civil" in nature, and relief is available under § 1303 only in "criminal" cases; and (2) even if the respondents could be said to have imposed "criminal" sanctions upon the petitioners in this case, habeas relief is not available because the effects of the banishment orders did not constitute severe restraints on liberty.

For guidance in our inquiry, both parties call our attention to the only Supreme Court case addressing the structure, purpose, and legislative history of Title I of the ICRA: *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). That this case remains—after nearly two decades—the only detailed treatment of Title I of the ICRA is unsurprising, in light of its holding: that Title I does not establish a federal civil cause of action against a tribe or its officers, and that no such cause of action can be implied. *Santa Clara Pueblo* thus precluded federal interpretation of the substantive provisions of the ICRA, except in cases in which the relief sought could properly be cast as a writ of habeas corpus.[14] We have discovered few cases in which habeas ***885** jurisdiction has actually been invoked under § 1303, and even fewer examining the jurisdictional prerequisites of § 1303. Understandably, both parties therefore rely on the jurisdictional inquiry of *Santa Clara Pueblo* and characterize the underlying reasoning as dispositive of the quite different jurisdictional inquiry required in this case. The petitioners claim that *Santa Clara Pueblo* contemplates federal subject matter jurisdiction in virtually all circumstances in which a petitioner challenges tribal action taken in a *criminal* context. The respondents contend that the reasoning of *Santa Clara Pueblo*—and its recognition of tribal autonomy in matters of membership—precludes characterization of the petitioners' actions as actions for a writ of habeas corpus. For the petitioners, this jurisdictional question is more than technical: the respondents concede that there is no tribal review available in the circumstances of this case. If the reasoning of *Santa Clara Pueblo* forecloses federal habeas jurisdiction, the petitioners have no remedy whatsoever.

[14] There is an arguable, and narrow, exception to *Santa Clara Pueblo,* created by the Tenth Circuit in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes,* 623 F.2d 682, 685 (10th Cir.1980), *cert. denied,* 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981), permitting federal court adjudication of certain civil actions where there is no tribal remedy. The *Dry Creek* exception is not relevant for our purposes and its reasoning has been rejected by at least two other circuits, *see Shortbull v. Looking Elk,* 677 F.2d 645 (8th Cir.), *cert. denied,* 459 U.S. 907, 103 S.Ct. 211, 74 L.Ed.2d 168 (1982); *R.J.*

Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 981 (9th Cir.), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); *Trans–Canada Enters., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir.1980), and limited by the Tenth Circuit itself, *see Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 n. 4 (10th Cir.1982); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1311–12 (10th Cir.1984).

1. *Santa Clara Pueblo v. Martinez*

[5] We turn, then, to *Santa Clara Pueblo*. Following enactment of the ICRA, numerous federal courts entertained suits involving claimed violations of Title I's substantive provisions. The exercise of subject matter jurisdiction was most often sustained under 28 U.S.C. § 1343(4), which confers jurisdiction over "any civil action authorized by law ... to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." *See, e.g., Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 933 (10th Cir.1975); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1234 (4th Cir.1974); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (9th Cir.1973); *Luxon v. Rosebud Sioux Tribe of South Dakota*, 455 F.2d 698, 700 (8th Cir.1972) (per curiam). *See generally* Alvin Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in the Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 20–21 nn. 70–80 (1975) (collecting cases); U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 12–14 (1991) (same). Those courts that exercised or sustained jurisdiction tended to address in perfunctory fashion, or to ignore altogether, two related elements of the jurisdictional inquiry: whether Title I of the ICRA creates a federal, civil cause of action; and whether Title I constitutes a waiver of tribal sovereign immunity. *But see Pinnow v. Shoshone Tribal Council*, 314 F.Supp. 1157, 1160 (D.Wyo.1970) (holding that, in light of tribal immunity, federal jurisdiction is unavailable absent express congressional authority), *aff'd on other grounds sub nom. Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir.1971); *Luxon v. Rosebud Sioux Tribe of South Dakota*, 337 F.Supp. 243 (D.S.D.1971) (same), *rev'd per curiam*, 455 F.2d 698 (8th Cir.1972).

The Supreme Court squarely addressed these matters in *Santa Clara Pueblo*. While the Court acknowledged Congress's authority to impose restrictions on tribal autonomy, it held that federal enforcement of the substantive provisions of § 1302 is limited to those cases in which the remedy sought is a writ of habeas corpus.

In *Santa Clara Pueblo*, Julia Martinez, a female member of the Santa Clara Pueblo, sought to bar enforcement of a tribal ordinance that denied tribal membership to the children of female Santa Clarans who married outside the tribe, but not to the children of male Santa Clarans who married outside the tribe. Martinez's children were denied membership in the tribe because their father was a non-Pueblo Indian. Although the Martinez children resided with their mother on the Santa Clara Reservation, they would not have the opportunity to vote in tribal elections, hold secular office in the tribe, or remain on the reservation after their mother's death. 436 U.S. at 52–53, 98 S.Ct. at 1673–74. Martinez and one of her children filed suit on behalf of themselves and others similarly situated, seeking injunctive and declaratory relief under 25 U.S.C. § 1302(8), ***886** which, among other things, prohibits a tribal government from "deny[ing] to any person within its jurisdiction the equal protection of its laws."

As had other federal courts, the district court in *Santa Clara Pueblo* concluded that the substantive provisions of the ICRA impliedly authorized civil actions for equitable relief and acted as a waiver of tribal sovereign immunity. The court therefore found subject matter jurisdiction proper under § 1343(4). *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 6–11 (D.N.M.1975). After a bench trial, the court sustained the tribal ordinance. *Id.* at 18–19. On appeal, the Tenth Circuit upheld the finding of jurisdiction, but reversed on the merits, holding that the ordinance violated the ICRA's equal protection provision. 540 F.2d 1039, 1042, 1048 (10th Cir.1976).

The Supreme Court granted certiorari and reversed on jurisdictional grounds, finding that the Act neither served as a waiver of tribal sovereign immunity nor impliedly provided for a civil cause of action in federal courts against tribal officials. As to the first inquiry, the Court noted that tribes are protected against suit by the common law immunity traditionally enjoyed by sovereign powers. Because nothing in Title I of the ICRA—including the Act's habeas provision—could be read as a general waiver of sovereign immunity, suits against the tribe itself under the ICRA were barred. *Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677. Relying on *Ex parte Young*, 209 U.S. 123, 159–60, 28 S.Ct. 441, 453–54, 52 L.Ed. 714 (1908), for the proposition that tribal *officials* are not absolutely immune from suit, 436 U.S. at 59, 98 S.Ct. at 1677, the Court turned to whether the civil cause of action against tribal officials asserted by the respondents was implicit in Title I of the ICRA. It concluded that it was

not, looking first to the structure and purpose of the Act and then to the legislative history of the Act's habeas provision. The Court reasoned that the structure and substantive provisions of the ICRA reflected two "distinct and competing purposes": to guarantee the rights of individual members of the tribe, on the one hand, and to further Indian self-government, on the other. *Id.* at 62–63, 98 S.Ct. at 1679. While inferring a civil cause of action against tribal officials for enforcement of the ICRA would serve the former objective, it would disserve the latter. In light of the availability of tribal judicial and nonjudicial institutions to apply the ICRA's provisions, the Court found that implication of a civil cause of action against tribal officials was not necessary to effectuate Congress's objective of extending constitutional protections to tribal governments. *Id.* at 64–66, 98 S.Ct. at 1680–81. To infer a cause of action to address matters previously confined to tribal competence would "disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief." *Id.* at 66, 98 S.Ct. at 1681.

The Court found that the legislative history of the ICRA's habeas review provision, 25 U.S.C. § 1303, buttressed the conclusion that recognition of a federal civil cause of action would be inappropriate. As discussed *supra* pp. 883–884, an earlier version of the legislation that emerged from Congress as the Indian Civil Rights Act had contained a provision for direct appeal of a criminal conviction to federal district court, with trial *de novo* on appeal. *See* S. 962, 89th Cong, 1st Sess., 111 CONG. REC. 1800 (1965). That approach was ultimately abandoned in favor of the more limited formula guaranteeing federal habeas review. 436 U.S. at 67, 98 S.Ct. at 1681–82. Similarly, the earlier bill contained another provision requiring the Attorney General to investigate complaints under the ICRA and, if necessary, to bring suit against a tribe in a federal court to enforce its provisions. *Id.* at 67–68, 98 S.Ct. at 1681–82; *see* S. 963, 89th Cong., 1st Sess., 111 CONG. REC. 1800 (1965). This provision was also dropped when the Indian civil rights legislation was reintroduced in the Ninetieth Congress. *See* S. 1843–1847 and S.J. Res. 87, 90th Cong, 1st Sess., 113 CONG. REC. 13,473–78 (1967). In addition, at the 1965 subcommittee hearings, the Department of the Interior had offered a proposal for a substitute bill that would have permitted the Secretary of the Interior to adjudicate civil complaints concerning tribal actions, with ultimate review of the administrative decision by federal courts. *See 1965 Senate Hearings*, *supra* note 12, at 318. ***887** That approach was also rejected. *See* 436 U.S. at 68, 98 S.Ct. at 1682.

Finding that the legislative history reflected a careful selection of a particular, and narrow, federal remedy for violations of Title I of the ICRA—a petition for a writ of habeas corpus—the Court concluded that the implication of a federal civil cause of action would constitute undue interference with tribal autonomy.

Santa Clara Pueblo obviously does not speak directly to the scope of Title I's habeas provision, which was a matter not raised in that case. While our consideration of the instant case is necessarily informed by *Santa Clara Pueblo* 's discussion of the tension between individual rights and tribal autonomy, *Santa Clara Pueblo* does not resolve the jurisdictional inquiry here presented: whether the ICRA's habeas provision permits federal court review of the banishment orders.

2. *Criminal vs. Civil Action*

[6] We examine first the parties' respective characterizations of the tribal action at issue in this case as exclusively "criminal" or "civil" in nature.[15] The relevance of this debate is not immediately obvious, insofar as § 1303 does not explicitly limit its scope to the criminal context: it speaks of "detention" by order of an Indian tribe as the sole jurisdictional prerequisite for federal habeas review. The respondents nonetheless contend that federal habeas review under § 1303 is available only where the alleged tribal violations of Title I occurred in a context safely or categorically described as "criminal." For this proposition, they rely upon a passage in *Santa Clara Pueblo* describing habeas review as the exclusive vehicle for "federal-court review of tribal criminal proceedings." 436 U.S. at 67, 98 S.Ct. at 1681. Of course, this language does not suggest that habeas jurisdiction is available *exclusively* as a vehicle for reviewing tribal criminal proceedings. That is, even if the dispute at hand is properly characterized as arising from a "civil" determination by a tribal government, that does not necessarily deprive a district court of subject matter jurisdiction to review tribal action under the substantive provisions of the ICRA if § 1303 would otherwise confer it.

15 We note that the respondents' challenge to subject matter jurisdiction in this case is "facial" rather than "factual." *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir.1990); *Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir.1983). That is, the respondents' motion to dismiss for lack of subject matter jurisdiction challenges the sufficiency of the jurisdictional facts alleged, not the facts themselves. The parties do not dispute that the banishment orders were a direct response to the petitioners' efforts to form

> an alternative ruling council. The question we face is thus legal in nature, as we need only to determine whether the tribal Council of Chiefs treated these actions as "criminal" and responded with "punitive" measures.

Two factors, however, favor the respondents' position that § 1303 applies only in the context of a criminal charge or prosecution. First, in *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982), the Supreme Court discussed the scope of federal habeas review of a decision of another "sovereign"—in that case, a state. The Court observed that earlier cases had limited the availability of the writ of habeas corpus, when used to challenge a *state* court judgment, to situations where "as a result of a state-court *criminal conviction* ... a petitioner has suffered substantial restraints." *Id.* at 510, 102 S.Ct. at 3236–37 (emphasis supplied). Thus, a writ of habeas corpus was unavailable to test the legality of a state child custody order, which the Court denominated a question of "civil" law. We will return in due course to a discussion of whether § 1303 is to be read coextensively with federal statutes permitting collateral review of state or federal judgments, *see infra* pp. 890–893; we simply note that if § 1303 is indeed to be interpreted as coextensive with provisions making habeas review available to an individual in custody pursuant to a *state* judgment, federal court review may be limited to tribal action taken in the criminal context.

Second, the first set of Indian rights bills, introduced in 1964 and 1965, would have permitted the direct appeal to federal district court of a conviction "in any *criminal* action hereafter commenced in an Indian court." S. 962, 89th Cong., 1st Sess. (1965) (emphasis supplied); *see also* S. 3048, 88th Cong., 2d ***888** Sess., 110 CONG. REC. 17,329 (1964). The original S. 1843, introduced in May 1967, preserved this language. S. 1843, 90th Cong., 1st Sess. § 201(a), 113 CONG. REC. 13,474 (1967). Since these proposed remedial sections referred specifically to criminal convictions, it would be possible to conclude that the remedial section ultimately enacted—providing for habeas review—was intended by Congress to apply only in criminal cases.

We note, however, that the ICRA's habeas provision *also* appeared in the original S. 1843. *See* S. 1843, 90th Cong., 1st Sess. § 103, 113 CONG. REC. 13,474 (1967). Accordingly, it is not accurate to say that the habeas provision *replaced* the section permitting a direct appeal; the latter was simply eliminated.[16] To put the matter simply: it is not possible to draw from Title I's legislative history a definitive conclusion as to whether Congress intended that habeas review be restricted to criminal convictions, or whether other circumstances of "detention" by a tribal court order could trigger habeas review. The report of the Senate Judiciary Committee—which eliminated the direct appeal provision—sheds no light on this issue. *See* S. REP. NO. 841, 90th Cong., 1st Sess. (1967).

[16] Similarly, the language of the habeas provision in the original S. 1843 was drawn from the substitute bill proposed by the Department of the Interior during the 1965 subcommittee hearings. The Department's measure also contained *both* a habeas provision and a proposal for direct appeal of a tribal court conviction to the Secretary of the Interior. *See 1965 Senate Hearings*, *supra* note 12, at 318 (§ 2(a)); *id.* at 319 (§ 3(b)).

[7] Because we conclude the tribal action in this case indeed arose in a criminal context, we ultimately need not resolve the question of whether habeas review is restricted to cases involving a tribal criminal conviction. The respondents' argument that the banishment orders issued against the petitioners reflected a "civil" determination relies principally on the Supreme Court's recognition in *Santa Clara Pueblo* that a tribe's right to define its membership is central to its autonomy. *See* 436 U.S. at 72 n. 32, 98 S.Ct. at 1684 n. 32. The respondents claim that *Santa Clara Pueblo* makes clear that (1) a federally recognized Indian nation possesses "*complete and absolute* authority to determine *all* questions of its own membership," Appellees' Br. at 12 (emphasis supplied); and (2) membership determinations "are considered civil in nature, regardless of the tribal values informing such determinations," *id.* at 18. *Santa Clara Pueblo* in fact supports neither statement. The first—that authority to determine membership questions is "complete and absolute"—simply goes too far. While Congress has deferred with regularity to tribal membership determinations, *see* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 23 (1982), there is little question that the power to define membership is subject to limitation by Congress, *see id.* at 248, 252 n. 84. Whether § 1302 of the ICRA does in fact impose any limits on tribal authority to determine questions of membership in the tribe is a question on the merits, and one not resolved in *Santa Clara Pueblo.*

The second point—that all membership determinations are "civil in nature"—is nowhere suggested or implied in *Santa Clara Pueblo.* While the Supreme Court observed in the course of its jurisdictional inquiry that a tribe's power to define its membership is an important element of its political and cultural autonomy, *see* 436 U.S. at 72 n. 32, 98 S.Ct. at 1684 n. 32, that observation does not

compel the characterization of all actions of tribal governments affecting tribal membership as "civil in nature." We decline the respondents' invitation to equate the membership ordinance of the Santa Clara Pueblo, which had general, prospective application, with action taken by members of the Tonawanda Band Council of Chiefs against a handful of individuals found to have engaged in certain prohibited conduct—namely, "treason." The Supreme Court in *Santa Clara Pueblo* fully recognized Congress's conclusion that "the most serious abuses of tribal power had occurred in the administration of criminal justice," 436 U.S. at 71, 98 S.Ct. at 1683–84 (citing *1966 Summary Report, supra* note 12, at 24); the case before it simply did not involve the administration of criminal justice. The Court's observation that it would be unwise to *infer* a cause of action that would intrude upon a tribe's right to ***889** adopt and enforce a membership ordinance does not bear upon whether an *explicitly created* habeas remedy applies where an individual—who concededly satisfies the general criteria for membership—is stripped of that membership in direct response to allegedly prohibited conduct.

In sum, *Santa Clara Pueblo* simply does not compel the conclusion that all membership determinations are "civil in nature" and therefore insulated from federal habeas review. While ordinarily the inquiry into whether a sanction is "criminal" or "civil" is neither simple nor mechanical, we have no doubt about its resolution here. The documents that the members of the Council of Chiefs served upon the petitioners and circulated to various government agencies indicate that the respondents themselves view the petitioners' conduct as "criminal": the petitioners are claimed to have engaged in "unlawful activities," including "actions to overthrow, or otherwise bring about the removal of, the traditional government" of the Tonawanda Band. For these actions, the petitioners were "convicted of TREASON." Moreover, "banishment" has clearly and historically been punitive in nature. Examining a statute imposing forfeiture of citizenship upon a natural-born citizen who evaded military service, the Supreme Court found reference to history "peculiarly appropriate":

> [F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment.... Banishment was a weapon in the English legal arsenal for centuries, but it was always adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.

Kennedy v. Mendoza–Martinez, 372 U.S. 144, 170 n. 23, 83 S.Ct. 554, 568 n. 23, 9 L.Ed.2d 644 (1963) (citations and internal quotation marks omitted).

The respondents urged at oral argument that "treason," though a criminal act in our judicial system, is not necessarily "criminal" in a traditional nation such as the Tonawanda Band. We doubt that this appeal to cultural relativism is relevant to our inquiry. The respondents supply no basis for concluding that Congress intended courts to adopt a relativistic view of what constitutes a "crime" when it enacted § 1303: such a reading would permit a tribal government to evade the federal court review specifically provided in the Indian Civil Rights Act simply by characterizing every tribal government action as "civil" or non-punitive. *See also infra* pp. 900–901. Although we are required to construe ambiguity in statutes on Indian affairs in favor of preserving Indian sovereignty, *see, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152, 102 S.Ct. 894, 909, 71 L.Ed.2d 21 (1982), neither this principle nor *Santa Clara Pueblo* 's tentative and inconclusive assessment of congressional sensitivity to tribal tradition, *see* 436 U.S. at 72 n. 32, 98 S.Ct. at 1684 n. 32, calls for wholesale deference to arguments of cultural difference in assessing the scope of a habeas remedy *explicitly* created by a federal statute. The respondents would have us accept on faith their characterization of the alleged acts as non-criminal and the alleged sanction as non-punitive in the tradition and culture of the Tonawanda Band. In light of multiple sworn statements in the record—including those of a tribal Chief and of clan mothers of the Tonawanda clans—claiming that there is nothing traditional or culture-bound about the treatment of the petitioners at the hands of the respondents, we decline to do so.

3. *The Scope of § 1303*

The determination that we deal here with a criminal sanction does not end our inquiry. We must ascertain whether the petitioners are being "detained" within the meaning of § 1303. The petitioners contend that this inquiry is unnecessary, because an individual can seek a writ of habeas corpus in any case in which a tribe has taken a punitive action. More specifically, the petitioners argue that the "custody" requirement as developed under other habeas statutes is not relevant to whether a writ of habeas corpus is available against a tribal official, because the language of § 1303 differs from that of other statutes

authorizing habeas relief and accordingly ***890** contemplates a more expansive application. The district court declined to accept this argument, basing its dismissal for lack of subject matter jurisdiction on its conclusion that the banishment orders failed to give rise to a sufficient restraint on liberty to satisfy the traditional test for the availability of habeas relief. The petitioners challenge (1) the court's failure to give a broader reading to the statute, and, alternatively, (2) its conclusion that the banishment orders in this case would not satisfy the jurisdictional prerequisites of analogous habeas statutes. We conclude that we must conduct the same inquiry under § 1303 as required by other habeas statutes, but we find that, contrary to the district court's conclusion, § 1303 supplies a jurisdictional basis for federal court review of the tribal government action alleged in this case.

a. *§ 1303 and Analogous Habeas Statutes*

[8] [9] Section 1303 of the ICRA provides that "[t]he 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." (Emphasis supplied.) In contrast, 28 U.S.C. § 2241(c)(3), along with § 2254(a), serves as a basis for a federal court to exercise jurisdiction over one held "*in custody* " by a state "in violation of the Constitution or laws or treaties of the United States." (Emphasis supplied.) Similarly, 28 U.S.C. § 2255 permits a district court to entertain a motion by "a prisoner in custody under sentence" of a federal court; § 2241(c)(1), which authorizes relief from federal restraint mainly in noncriminal settings,[17] also uses the phrase "in custody." The question is whether we should look to the interpretation of the "custody" requirement of these cognate federal statutes to inform our interpretation of the term "detention" in § 1303.[18] The petitioners seize upon the difference in language to urge that Congress's use of the term "detention" in the ICRA was deliberate, and was intended to empower district courts to entertain a petition for habeas relief in a wider range of circumstances than the analogous provisions for relief from state and federal custody permit.

[17] Section 2241(c)(1) may be invoked, for example, in a challenge to a military service obligation, *see Strait v. Laird*, 406 U.S. 341, 346, 92 S.Ct. 1693, 1696, 32 L.Ed.2d 141 (1972), or a challenge to an alien's exclusion from the United States, *see Brownell v. We Shung*, 352 U.S. 180, 182–84, 77 S.Ct. 252, 254–55, 1 L.Ed.2d 225 (1956). *See also Burns v. Wilson*, 346 U.S. 137, 139, 73 S.Ct. 1045, 1047, 97 L.Ed. 1508 (1953) (collateral attack upon a conviction in a court-martial proceeding). The statute has little contemporary relevance for federal prisoners, who must attack their sentences through the analogous statutory motion, § 2255. Section 2255 is essentially a venue provision, requiring a motion to the *sentencing* court rather than an application to the district court in the district in which the prisoner is confined. *See United States v. Hayman*, 342 U.S. 205, 215 n. 23, 219, 72 S.Ct. 263, 271 n. 23, 272, 96 L.Ed. 232 (1952).

[18] A subsidiary issue is whether we should look solely to cases addressing collateral attacks on *state* custody. The respondents claim that only cases decided under §§ 2241(c)(3) and 2254 are relevant, because cases addressing federal custody—and particularly federal "custody" of nonprisoners (*i.e.*, those seeking relief under § 2241(c)(1))—do not involve the additional sensitivity required when a federal court's jurisdiction permits it to reconsider the ruling of another sovereign. *See Lehman*, 458 U.S. at 509 n. 9, 102 S.Ct. at 3236 n. 9. In this context, the parties dispute in particular the relevance of cases involving habeas review of an alien's exclusion from the United States. *See, e.g.*, *Brownell*, 352 U.S. at 183, 77 S.Ct. at 254–55; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213, 73 S.Ct. 625, 629–30, 97 L.Ed. 956 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 540, 70 S.Ct. 309, 311, 94 L.Ed. 317 (1950); *United States v. Jung Ah Lung*, 124 U.S. 621, 626, 8 S.Ct. 663, 665–66, 31 L.Ed. 591 (1888).

> While it is true that review of a tribal order necessarily involves review of another sovereign's action, there is an important distinction: congressional power to limit tribal sovereignty is plenary. Thus, where Congress specifically provides for habeas review of a tribal order—a limitation on sovereignty—it is not clear that federalism concerns arising in the state context are relevant. Nonetheless, because we think this case can be decided based on cases under §§ 2241(c)(3) and 2254, we do not resolve this question here.

We are not persuaded. We find the choice of language unremarkable in light of references to "detention" in the federal statute authorizing a motion attacking a federal sentence, *see* § 2255, as well as in the procedural provisions accompanying § 2241, *see* §§ 2242, 2243, 2244(a), 2245, 2249, 2253. ***891** Congress appears to use the terms "detention" and "custody" interchangeably in the habeas context. We are therefore reluctant to attach great weight to Congress's use of the word "detention" in § 1303.

The petitioners also urge us to look to the ICRA's legislative history to discern a congressional intent to create a more expansive role for federal court habeas review of actions of Indian governments than analogous statutes would permit of federal and, principally, state action. The petitioners call our attention to references in the ICRA's legislative history to protecting Indians from "arbitrary action" of tribal governments. While this language may speak to the scope of the ICRA's substantive provisions, it tells us nothing about the availability of a federal forum to enforce those provisions. Indeed, if anything, the legislative history suggests that § 1303 was to be read coextensively with analogous statutory provisions.

The language of § 1303—permitting any person "to test the legality of his detention by order of an Indian tribe"—was first introduced by the Department of the Interior at the 1965 Senate subcommittee hearings, *see 1965 Senate Hearings, supra* note 12, at 318, and closely tracks the language of *Colliflower v. Garland,* 342 F.2d 369 (9th Cir.1965), a case frequently invoked with approval during the 1965 hearings, *see 1965 Senate Hearings, supra* note 12, at 2, 24–25, 66–67, 91–92, 95, 220, 227; *1966 Summary Report, supra* note 12, at 13; and cited in the final committee report accompanying the ICRA, *see* S. REP. NO. 841, 90th Cong., 1st Sess. 9 (1967). *See also 1968 House Hearing, supra* note 13, at 47, 112–13. In *Colliflower*, the Ninth Circuit had concluded that an individual convicted of criminal trespass in a Court of Indian Offenses—that is, a court operating under the regulations of the Department of the Interior, *see* 25 C.F.R. pt. 11—on the Fort Belknap Reservation in Montana could seek federal habeas review of her conviction in federal court. The source of the substantive right allegedly violated was the Due Process Clause of the Fifth Amendment; the Court of Appeals read *Talton v. Mayes,* 163 U.S. 376, 384, 16 S.Ct. 986, 989, 41 L.Ed. 196 (1896), not to preclude invocation of that constitutional provision against a tribal government. 342 F.2d at 378. It premised the district court's subject matter jurisdiction on a finding that the reservation's courts, having been developed under the supervision and guidelines of the Department of the Interior's Bureau of Indian Affairs, functioned "in part as a federal agency and in part as a tribal agency." *Id.* at 379. The court concluded that 28 U.S.C. § 2241(c)(1) and (3) would support jurisdiction for review of a petition for habeas corpus by a person " 'in custody under or by color of the authority of the United States' or 'in violation of the Constitution ... of the United States.' " *Id.* (alteration in original).

Although the *Colliflower* court spoke of the availability of habeas corpus to "test the legality of the *detention* of an Indian pursuant to an order of an Indian court," *id.* (emphasis supplied), the court's reliance on § 2241(c)(1) and (3) makes clear that it did not intend to suggest, much less hold, that the particular relationship of tribal governments to their members necessitated the availability of habeas relief in a broader range of circumstances than then-existing statutory provisions would allow—or that "detention" was a broader concept than "custody." *See also* Burnett, *An Historical Analysis, supra,* at 602 n. 240 (noting that § 1303 reflected incorporation of *Colliflower* formula). Although the Senate subcommittee hearings reflect references to habeas review, nowhere is there any detailed discussion of the scope of this remedy. *See 1965 Senate Hearings, supra* note 12, at 24, 57, 85, 91–92, 95, 227; *see also 1961 Senate Hearings pt. 1, supra* note 11, at 26, 84. Under the circumstances, the legislative history of the ICRA simply does not support the proposition that § 1303 was meant to be read more broadly than other habeas statutes.

In addition to claiming support in the legislative history for their view of § 1303's scope, the petitioners contend that cases decided under § 1303 confirm their position that the provision is not coextensive with other statutes providing for collateral relief. We disagree. Case law under § 1303 sheds little light on the issue; indeed, perhaps in part because criminal jurisdiction of tribal courts is restricted to crimes involving penalties ***892** of no more than one year of imprisonment or a $5,000 fine,[19] *see* § 1302(7), there have been few habeas cases decided under § 1303—both pre- and post-*Santa Clara Pueblo.* Most such cases involve individuals jailed at the time of the filing of their habeas petition, *see Tom v. Sutton,* 533 F.2d 1101, 1106 (9th Cir.1976) (affirming denial of writ based on district court's conclusion that the ICRA does not supply a right to the assistance of appointed counsel); *Red Elk v. Silk,* No. CV83–13–GF, 10 Indian L. Rptr. 3110 (D.Mont. Apr. 6, 1983) (granting writ of habeas corpus where tribal court records did not reflect that petitioner was informed of right to jury trial), or individuals set to begin serving a jail sentence upon exhaustion of legal remedies, *see, e.g., Wounded Knee v. Andera,* 416 F.Supp. 1236, 1237, 1241 (D.S.D.1976) (granting petition for writ of habeas corpus where petitioner was to serve five-day jail sentence; concluding that system in which tribal judge acts in dual capacity as prosecutor and judge is inherently violative of due process).

[19] The limit on prison sentences was originally six months and the limit on fines $500. *See* Pub.L. No. 90–284, § 202(7), 82 Stat. at 77.

A few more recent § 1303 cases involve challenges to

tribal court orders regarding child custody. In holding that federal habeas relief is not available under § 1303 to test the validity of a child custody decree of an Indian tribal court, courts have relied on the fact that the "custody involved is not the kind which has traditionally prompted federal courts to assert their jurisdiction [in challenges to state court custody decrees]." *Weatherwax on Behalf of Carlson v. Fairbanks*, 619 F.Supp. 294, 296 (D.Mont.1985); *see Sandman v. Dakota*, 816 F.Supp. 448, 451 (W.D.Mich.1992) (following *Weatherwax*), *aff'd mem.*, 7 F.3d 234 (6th Cir.1993). Courts thus appear to look to the development of law under 28 U.S.C. § 2254 for guidance as to whether habeas relief is available in such matters under § 1303. *Weatherwax*, 619 F.Supp. at 296 n. 2 ("This court has consistently found the law which has developed with respect to actions for habeas corpus relief under 28 U.S.C. § 2254 to be applicable by analogy to actions founded upon 25 U.S.C. § 1303.").[20]

[20] Some courts have concluded that a district court can entertain a habeas petition where the petitioner seeks to challenge the *jurisdiction* of a tribal court to render a custody decree, rather than the validity of that decree. *See DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 (8th Cir.1989) (permitting non-Indian father to challenge jurisdiction of tribal court to determine custody of his children, where he neither resided nor was domiciled within the jurisdiction of the tribal court); *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir.1974) (upholding grant of petition for writ of habeas corpus where tribal court lacked jurisdiction to determine custody of children), *cert. denied*, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975). Child custody cases of this sort are perhaps better characterized as falling under 28 U.S.C. § 1331: whether a tribal court has properly exercised jurisdiction presents a federal question. *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852, 105 S.Ct. 2447, 2451–52, 85 L.Ed.2d 818 (1985). The Eighth Circuit's opinion in *DeMent* appears to be in tension with the Supreme Court's opinion in *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982) (finding writ of habeas corpus unavailable to test legality of state child custody order), and thus the Court of Appeals took pains to distinguish its case on the ground that *Lehman* did not present the question of whether the state court had jurisdiction to render the custody decree. 874 F.2d at 515.

Only two cases appear to provide any authority for the proposition that the ICRA's habeas corpus provision should be more broadly construed than analogous statutes, and we do not find either of them dispositive or persuasive. In the case of *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir.1969), *cert. denied*, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970), the Ninth Circuit held that an Indian convicted by the Yakima Tribal Court of violating tribal fishing regulations could seek federal habeas review of his conviction. The petitioner had been sentenced to a fine or suspension of his fishing privileges and had posted bond pending review of his conviction by an Indian appellate court. *Id.* at 488. The conviction and fine in *Settler* occurred prior to the enactment of the ICRA, and, despite *Talton* and its progeny, the Court of Appeals first concluded that tribal action "so summary and arbitrary as to shock the conscience" can trigger a constitutional violation. *Id.* at 489. It then found that the Yakima Nation's tribal courts, established ***893** under the authority of the Secretary of the Interior, developed (like those in *Colliflower*) "in part as a federal agency." *Id.* Most important for our analysis, the Court of Appeals in *Settler* held that a *fine* is enough to trigger habeas review—based in part on the court's view that "the petitioner, although not held presently in physical custody, has no other procedural recourse for effective judicial review of the constitutional issues he raises." *Id.* at 490.

Settler, of course, did not involve construction of § 1303, but a later state case relied upon *Settler* for the proposition that "the habeas corpus provision of the ICRA is quite expansive," and specifically that a petitioner "need only be detained by the tribal court order, and need not be in custody." *Tracy v. Superior Court of Maricopa County*, 168 Ariz. 23, 810 P.2d 1030, 1049 (1991) (en banc). The relevant passage in *Tracy* is dicta, and we decline the petitioners' request to treat it as an authoritative interpretation of the ICRA, when the case on which it relies both preceded the effective date of the ICRA and contains questionable discussion of the applicable substantive law and the jurisdictional inquiry. *See Edmunds v. Won Bae Chang*, 509 F.2d 39, 42 n. 6 (9th Cir.) (distinguishing *Settler* in case involving $25 fine in non-Indian context), *cert. denied*, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975); *see also* COHEN, *supra*, at 669 n. 56 (questioning *Settler* 's conclusions that a fine can trigger habeas review and that federal court review can take place prior to exhaustion of tribal remedies). In sum, courts have not had occasion to fully consider the scope of § 1303, much less reach the conclusion pressed by the petitioners—that § 1303 was to serve as a broader basis of relief than cognate habeas provisions.[21]

[21] In concluding that Congress did not, in adopting § 1303, intend to create jurisdictional requirements different from those associated with traditional habeas remedies, we do not express a view on whether the substantive provisions of § 1302 must also be treated as coextensive with analogous constitutional provisions.

b. *Permanent "Banishment" as a Restraint on Liberty*

[10] The conclusion that § 1303 is no broader than analogous statutory provisions for collateral relief does not foreclose the possibility of habeas relief in this case. It is well established that actual *physical* custody is not a jurisdictional prerequisite for federal habeas review. *See, e.g., Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963). The respondents acknowledge as much, but claim that habeas review requires "restraints far more closely related to actual imprisonment than the disabilities allegedly suffered by the appellants in this case." Appellees' Br. at 24. The district court agreed, finding that, "[i]n the absence of the imminent possibility of incarceration or at least some other form of on-going supervision by the Tonawanda Band" or "any tribal official," *Poodry v. Tonawanda Band of Seneca Indians*, No. 92–CV–738A, at 11 (W.D.N.Y. Apr. 13, 1995), the petitioners had "failed to establish that [they are] 'in custody' within the meaning of the habeas corpus statute," *id.* at 10.

We disagree. We begin with three decades of case law rejecting the notion that a writ of habeas corpus, as applied to one subject to a judgment of conviction by a state court, is a formalistic remedy whose availability is strictly limited to persons in actual physical custody. In the 1963 case of *Jones v. Cunningham*, the Supreme Court concluded that the conditions routinely placed on parolees—and the possibility of re-arrest if parole officers believe a violation of those conditions has occurred—constitute restraints on liberty significant enough to render parole a species of "custody" for habeas purposes:

> History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.
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> ....
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> ... Of course, [the] writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, ***894** formalistic remedy; its scope has grown to achieve its grand purpose—*the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.*

371 U.S. 236, 240, 243, 83 S.Ct. 373, 375–76, 377, 9 L.Ed.2d 285 (1963) (emphasis supplied).

In a series of cases following *Jones*, the Court explored the contours of habeas review for individuals facing restraints on their liberty outside of conventional notions of physical custody or for whom the grant of a writ of habeas corpus would not achieve a release from custody. The Court held that a person released on his own recognizance pending sentencing after a state court conviction is "in custody" for habeas jurisdictional purposes, *see Hensley v. Municipal Court*, 411 U.S. 345, 351, 93 S.Ct. 1571, 1574–75, 36 L.Ed.2d 294 (1973) (finding custody requirement met where terms of personal recognizance required petitioner to appear at times and places as ordered by any court or magistrate; petitioner could not "come and go as he please[d]" and was subject to restraints " 'not shared by the public generally' " (quoting *Jones*, 371 U.S. at 240, 83 S.Ct. at 376)), as is one free on his own recognizance while awaiting a trial *de novo* in state court, *see Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 301, 104 S.Ct. 1805, 1809–10, 80 L.Ed.2d 311 (1984) (concluding that petitioner's obligation to appear in court and requirement that petitioner not depart the state without the court's leave demonstrated the existence of restraints on the petitioner's personal liberty "not shared by the general public"). *See also United States ex rel. B. v. Shelly*, 430 F.2d 215, 217–18 n. 3 (2d Cir.1970) (holding that probation, like parole, constitutes "custody" for habeas purposes); *Sammons v. Rodgers*, 785 F.2d 1343, 1345 (5th Cir.1986) (per curiam) (recognizing that jurisdictional prerequisites for habeas review are satisfied if defendant is subject to a suspended sentence carrying a threat of future imprisonment).

As *Jones* and its progeny make clear, while the requirement of physical custody historically served to restrict access to habeas relief to those most in need of judicial attention, physical custody is no longer an adequate proxy for identifying all circumstances in which federal adjudication is necessary to guard against governmental abuse in the imposition of "severe restraints on individual liberty." *Hensley*, 411 U.S. at 351, 93 S.Ct. at 1574; *see* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 998–99 (1985). *See generally* 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 191–210 (2d ed.1994). The custody requirement is simply designed to limit the availability of habeas review "to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Hensley*, 411

U.S. at 351, 93 S.Ct. at 1575. Thus, the inquiry into whether a petitioner has satisfied the jurisdictional prerequisites for habeas review requires a court to judge the "severity" of an actual or potential restraint on liberty. The most important example of this inquiry is a line of cases holding that a petition for a writ of habeas corpus cannot be used to challenge a conviction that resulted only in a cash fine or a short-lived suspension of privileges, *compare Edmunds,* 509 F.2d at 39 (modest fine insufficient to trigger custody requirement); *Lillios v. New Hampshire,* 788 F.2d 60, 61 (1st Cir.1986) (per curiam) (requirement not satisfied by modest fines and temporary suspension of driver's license); *Harts v. Indiana,* 732 F.2d 95, 96 (7th Cir.1984) (requirement not satisfied by one-year suspension of driving privileges) *with Dow v. Circuit Court of the First Circuit Through Huddy,* 995 F.2d 922, 923 (9th Cir.) (per curiam) (petitioner sentenced to fourteen hours of attendance at alcohol rehabilitation program "in custody" for purposes of federal habeas relief; requiring petitioner's physical presence at a particular place "significantly restrain[ed] [his] liberty to do those things which free persons in the United States are entitled to do"), *cert. denied,* 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 372 (1994), or the collateral consequences of a conviction where the petition is filed after the expiration of the challenged sentence, *see Maleng v. Cook,* 490 U.S. 488, 494, 109 S.Ct. 1923, 1927, 104 L.Ed.2d 540 (1989) (per curiam).

***895** [11] The petitioners have surely identified severe restraints on their liberty. In concluding otherwise, the district court ignored several material factual allegations and erred in its application of the law. The respondents contend that the district court is without subject matter jurisdiction because the revocation of the petitioners' tribal membership is, as a legal matter, not a significant restraint on liberty. They do not appear to contest certain relevant jurisdictional facts: that the banishment notices were served upon three of the petitioners by groups of fifteen to twenty-five people demanding the petitioners' removal; that there have since been other attempts to remove the petitioners from the reservation; that certain petitioners have been threatened or assaulted by individuals purporting to act on the respondents' behalf; and that the petitioners have been denied electrical service. The district court acknowledged the alleged "interfere [nce] with [the petitioners'] peaceful life on the Tonawanda Reservation" and the attempts at forcible removal. Nonetheless, the court found no "on-going supervision by the Tonawanda Band" or "any tribal official," nor any requirement that the petitioners receive "prior approval to do things that an unconvicted person would be free to do." Opinion at 11.

"Restraint" does not require "on-going supervision" or "prior approval." As long as the banishment orders stand, the petitioners may be removed from the Tonawanda Reservation at any time. That they have not been removed thus far does not render them "free" or "unrestrained." While "supervision" (or harassment) by tribal officials or others acting on their behalf may be sporadic, that only makes it all the more pernicious. Unlike an individual on parole, on probation, or serving a suspended sentence—all "restraints" found to satisfy the requirement of custody—the petitioners have no ability to predict if, when, or how their sentences will be executed. The petitioners may currently be able to "come and go" as they please, *cf. Hensley,* 411 U.S. at 351, 93 S.Ct. at 1575, but the banishment orders make clear that at some point they may be compelled to "go," and no longer welcome to "come." That is a severe restraint to which the members of the Tonawanda Band are not generally subject. *See id.*

Indeed, we think the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus. We deal here not with a modest fine or a short suspension of a privilege—found not to satisfy the custody requirement for habeas relief—but with the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation. To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason. Had the petitioners been charged with *lesser* offenses and been subjected to the *lesser* punishment of imprisonment, there is no question that a federal court would have the power to inquire into the legality of the tribe's action. The respondents would have us turn the ordinary custody inquiry on its head: the question is not whether a punishment *less* severe than imprisonment—*e.g.,* a fine, probation, or a temporary suspension of privileges—satisfies the custody requirement, but whether a *more* severe punishment does. We believe that Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provision by permanently banishing, rather than imprisoning, members "convicted" of the offense of treason.

The severity of banishment as a restraint on liberty is well demonstrated by the Supreme Court's treatment of (1) "denaturalization" proceedings, initiated where an individual has obtained a certificate of U.S. naturalization illegally or through willful misrepresentation; and (2) statutes imposing a penalty of "denationalization"—forfeiture of American citizenship—on a natural-born U.S. citizen.

Although a denaturalization proceeding is thought to be "civil" or "administrative" in nature, the Supreme Court has long recognized that a deprivation of citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences ***896** that flow from conviction for crimes." *Klapprott v. United States*, 335 U.S. 601, 611–12, 69 S.Ct. 384, 389, 93 L.Ed. 1099 (1949).[22] Similarly, the Court has also found the penalty of denationalization of a natural-born citizen, sought to be imposed after conviction for military desertion, to be unconstitutional. *See Trop v. Dulles*, 356 U.S. 86, 104, 114, 78 S.Ct. 590, 599–600, 605, 2 L.Ed.2d 630 (1958). Writing for a plurality, Chief Justice Warren decried the "total destruction of the individual's status in organized society" that accompanies denationalization:

> It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development....
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> ....
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> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and *when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people.* ... It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. *The threat makes the punishment obnoxious.*

Id. at 101–02, 78 S.Ct. at 598–99 (emphasis supplied) (footnotes omitted).

To suggest that banishment is a fate "universally decried by civilized people" is not, of course, to say that this was always so. The practice of banishment has existed throughout the history of traditional societies, and in our Anglo–American tradition as well. Although Blackstone described exile as "punishment [ ] ... unknown to the common law," 1 WILLIAM BLACKSTONE, COMMENTARIES * 137,[23] it was not unknown to Parliament. *See* ROBERT HUGHES, THE FATAL SHORE 40 (1987) (describing 1597 act providing that criminals "shall be banished out of this Realm ... and shall be conveyed to ... parts beyond the seas," which served as authority for British transportation of convicts to the American colonies during the seventeenth and eighteenth centuries). Early in American history, the punishment of banishment was imposed upon British loyalists, and was even celebrated as a matter of sound policy in dictum by a Justice of the Supreme Court. *See Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 20, 1 L.Ed. 721 (1800) ("The right to confiscate and banish, in the case of an offending citizen, must belong to every government.") (Cushing, J.).

The fact that permanent banishment has in the past been imposed as a punitive sanction, in our culture and in others, does not mean that under the laws of the United States it is ***897** a sanction not involving a severe restraint on liberty. Where, as here, petitioners seek to test the legality of orders of permanent banishment, a federal district court has subject matter jurisdiction to entertain applications for writs of habeas corpus.

[22] Concurring in *Klapprott*, Justice Wiley T. Rutledge wrote:

> To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow *the most cruel penalty of banishment.* No such procedures could strip a natural-born citizen of his birthright or lay him open to such a penalty.

335 U.S. at 616–17, 69 S.Ct. at 391–92 (emphasis supplied) (citations omitted); *see Schneiderman v. United States*, 320 U.S. 118, 122, 63 S.Ct. 1333, 1335, 87 L.Ed. 1796 (1943) ("In its consequences, [denaturalization] is more serious than a taking of one's property, or the imposition of a fine or other penalty."); *see also Kungys v. United States*, 485 U.S. 759, 791 n. 6, 108 S.Ct. 1537, 1557 n. 6, 99 L.Ed.2d 839 (1988) (Stevens, J., concurring in judgment).

[23] The famous Habeas Corpus Act of 1679 provided that "no subject of [the] realm ... shall or may be sent prisoner ... into parts, garrisons, islands or places beyond the seas, which are ... within or without the dominions of his Majesty." An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonments Beyond the Seas (Habeas Corpus Act), 31 Car. 2, ch. 2, § 12 (1679). The Act placed anyone convicted of violating this section beyond the pardon power of the King. *Id. See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 52–58 (1980).

In reaching this conclusion, we recall that this is a case of first impression, and that, if not considered in due course by the Supreme Court, the holding of the case may have significance in the future. This is especially true at a time when some Indian tribal communities have achieved unusual opportunities for wealth, thereby unavoidably creating incentives for dominant elites to "banish" irksome dissidents for "treason." Be that as it may, whatever doubts we might entertain about our construction of this legislation specially crafted for the benefit of Indian tribes is assuaged by the knowledge that, if we are wrong, Congress will have ample opportunity to correct our mistake. *See Feins v. American Stock Exch., Inc.*, 81 F.3d 1215, 1220–21 (2d Cir.1996).

We pause here to offer a respectful rebuttal to two arguments pursued by our colleague in dissent. First, the dissent suggests that the proper jurisdictional inquiry under § 1303 requires a court to measure the severity of the restraints on the petitioners in relation to "the American public at large" rather than in relation to other members of the Tonawanda Band. Dissenting Op. at 902. This conclusion is based principally on the fact that § 1303 makes the privilege of a writ of habeas corpus available to "any person" to test the legality of tribal conduct. We believe the reference to "any person" simply makes clear that § 1303 protects non-Indians and non-member Indians who may come within a tribe's jurisdiction from arbitrary tribal action. It does not follow that § 1303 guards only those liberties shared by all who may invoke its protection. If we recognize, as our dissenting colleague does, that there is something distinct and important about Indian nationhood and culture that the ICRA is designed to promote and sustain, surely § 1303 cannot be thought to guarantee only that "liberty" enjoyed *outside* an Indian reservation (by "the American public at large").

The dissent concedes that "one who is banished from the United States or excluded from some place within the United States" suffers a severe restraint on liberty, because such an individual cannot go or remain where the rest of the general population has the right to be. *Id.* at 903. Yet a deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence. To measure whether summary banishment from a tribe constitutes a severe deprivation solely by reference to the liberties of other Americans is tantamount to suggesting that the petitioners cannot live among members of *their* nation simply because other Americans cannot do so; and that the coerced loss of an individual's social, cultural, and political affiliations is unimportant because other Americans do not share them. Such an approach renders the concept of liberty hollow indeed.

Second, the dissent suggests that permitting a federal court to review a tribe's decision to banish one of its members would constitute undue interference with a tribe's sovereign power to determine tribal membership. *Id.* at 904–905. In examining what tribal sovereignty does and does not permit, the dissent merges the jurisdictional analysis that we must undertake in this case with an inquiry on the merits. We respectfully but emphatically disagree with the suggestion that "the decisive question on this appeal [is] whether the Tonawanda Band had the power to strip petitioners of their tribal membership," *id.* at 905; the question is, rather, whether a federal court has jurisdiction to examine the scope of and limitations on the Tonawanda Band's power to strip the petitioners of their tribal membership. *See supra* pp. 884, 888. Moreover, the dissent appears to resolve the inquiry on the merits without reference to the will of Congress. While we fully agree that the power to determine questions of tribal membership is one aspect of retained tribal sovereignty, *see supra* p. 880, that power exists only to the extent that it is not limited by treaty or federal statute. *See Santa Clara Pueblo*, 436 U.S. at 55–56, 98 S.Ct. at 1675 ("[Indian tribes] have power to make their own substantive ***898** law in internal matters.... [H]owever, Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess."); *Wheeler*, 435 U.S. at 322 n. 18, 98 S.Ct. at 1086 n. 18 ("[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership...."); *Martinez v. Southern Ute Tribe*, 249 F.2d at 920 ("[I]n [the] absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity...."). Although we do not reach the question here, we note that Title I of the ICRA may well be a federal statute that imposes limitations on a tribe's power to summarily banish its members.

It is for this reason that the dissent's reliance on *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897), a case decided seventy-one years prior to Congress's enactment of Title I of the ICRA, is misplaced. Dissenting Op. at 905. In *Roff*, the Court sustained the authority of a tribal legislature to "cancel[ ] the rights of citizenship" granted to certain individuals and to direct the removal of those individuals "beyond the limits of the nation," reasoning as follows:

> The only restriction on the power of the [tribe] to legislate in respect to its internal affairs is that such

> legislation shall not conflict with the Constitution or laws of the United States, and *we know of no provision of such Constitution or laws which would be set at naught* by the action of a political community like this in withdrawing privileges of membership in the community once conferred.

168 U.S. at 222, 18 S.Ct. at 62 (emphasis supplied). In 1897 the Supreme Court "kn[e]w of no provision of ... [the] laws [of the United States] which would be set at naught" by the actions of a tribe in circumstances such as those presented here, but we believe that in our time Title I of the ICRA may be such a law. Simply stated, *Roff* does not support the proposition that no federal law *now* limits the power of a tribe to expel its members.

In sum, it is premature in the posture of this case to address the question of whether a tribe's sovereign powers permit banishment, and it is error to purport to resolve this question without reference to the Indian Civil Rights Act.

D. *The Tonawanda Band as Respondent*

Having concluded that the petitions should be considered on the merits by the district court, we turn briefly to the question of whether the Tonawanda Band of Seneca Indians is a proper respondent in this action.

[12] [13] The named respondents in this suit include both the tribe itself and the tribal officials alleged to have imposed the orders of banishment upon the petitioners. Indian tribes and their governing bodies possess common law immunity from suit absent an unequivocal waiver by the tribe or abrogation by Congress. *See Santa Clara Pueblo,* 436 U.S. at 58–59, 98 S.Ct. at 1677; *United States v. United States Fidelity & Guar. Co.,* 309 U.S. 506, 512–13, 60 S.Ct. 653, 656–57, 84 L.Ed. 894 (1940). In *Santa Clara Pueblo*, the Court found that Title I of the Indian Civil Rights Act did not constitute congressional abrogation of tribal sovereign immunity, reasoning as follows:

> Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, *see, e.g.,* 28 U.S.C. § 2243, the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity.

436 U.S. at 59, 98 S.Ct. at 1677. The district court, relying upon this passage, concluded that the Tonawanda Band was not a proper respondent in this action. The petitioners challenge this conclusion, claiming that while § 1303 is not a *general* waiver of sovereign immunity for civil actions under Title I of the ICRA, it serves as a *specific* and unequivocal waiver of sovereign immunity for habeas corpus actions brought under that statute. The petitioners call our attention to the distinction between § 1303, which guarantees the availability of a writ of habeas corpus to test the legality of an individual's detention "by ***899** order of an *Indian Tribe*," and 28 U.S.C. § 2243, which specifically identifies the custodian of the prisoner as the proper respondent in a habeas action. They contend that the reference to the "tribe" in § 1303, and the passage from *Santa Clara Pueblo* quoted above, support the conclusion that a tribe itself is a proper respondent in a habeas action under § 1303.

We disagree. As previously discussed, we do not believe that Congress intended § 1303 to enact a unique variety of habeas review. *See supra* pp. 890–893. Section 1303 merely identifies *tribal* authority—as opposed to *state* or *federal* authority, *cf.* 28 U.S.C. §§ 2241(c)(1), 2254, 2255—as the source of the conduct allegedly taken in violation of federal law or the Constitution. An application for a writ of habeas corpus is never viewed as a suit against the sovereign, simply because the restraint for which review is sought, if indeed illegal, would be outside the power of an official acting in the sovereign's name. *See Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 690, 69 S.Ct. 1457, 1461–62, 93 L.Ed. 1628 (1949) (noting that, in actions for habeas corpus, "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign"); *Ex parte Young,* 209 U.S. at 167–68, 28 S.Ct. at 457 (noting that, in a habeas action challenging custody as unconstitutional, "it has never been supposed that there was any suit against the State by reason of serving the writ upon one of the officers of the state in whose custody the person was found"); *see also United States ex rel. Elliott v. Hendricks,* 213 F.2d 922, 926 (3d Cir.) (noting Blackstone's view that "the writ is not against the crown"; " 'the king is at all times entitled to have an account why the liberty of any of his subjects is restrained' and 'the extraordinary power of the crown is called to the party's assistance' " (quoting 3 WILLIAM BLACKSTONE,

COMMENTARIES *131, *132)), *cert. denied*, 348 U.S. 851, 75 S.Ct. 77, 99 L.Ed. 670 (1954).

[14] Thus, § 1303 does not signal congressional abrogation of tribal sovereign immunity even in habeas cases. In claiming otherwise, the petitioners misapprehend the reasoning of the cited passage from *Santa Clara Pueblo:* not only does § 1303 not serve as a general waiver of immunity in civil suits, there is no immunity issue here at all. Because a petition for a writ of habeas corpus is not properly a suit against the sovereign, the Tonawanda Band is simply not a proper respondent.

[15] The petitions also name as respondents the tribal officials allegedly responsible for issuing the banishment orders in this case. The respondents do not claim that tribal immunity bars actions against tribal officers for writs of habeas corpus. We note only that the individual respondents can be properly thought "custodians" of the petitioners, despite the fact that the petitioners, though restrained, are not in physical custody. As the "custody" requirement has expanded to encompass more than actual physical custody, so too has the concept of a custodian as a respondent in a habeas case. In examining who the proper respondent would be in a case involving a petitioner free on bail prior to a possible retrial, the Seventh Circuit has observed that

> [a] person released on his own recognizance is usually considered to be in his own custody; a person released after posting bail is usually considered to be in either his lawyer's custody or the bondsman's custody. But it would be odd to make any of these the respondent in a habeas corpus action....
>
> ....
>
> The truth is that no one has custody of a person who is out on bail but that the Supreme Court has decided that such a person should be allowed to seek unconditional freedom through an action for habeas corpus despite the absence of a custodian. The important thing *is not the quest for a mythical custodian, but that the petitioner name as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit—namely, his unconditional freedom.*

Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 408–09 (7th Cir.1985) (emphasis supplied). The individual respondents ***900** surely fit this description—they have an interest in opposing the petitions, as well as the ability to lift the banishment orders should the petitions be found on remand to have merit.

III

[16] Finally, we address briefly a tension inevitable in any case involving questions of rights and questions of culture: whether the principles that guide our inquiry into the "criminal" or "civil" nature of the tribal action in this case or the severity of the restraint imposed must be "culturally defined" by the tribe, or whether we can approach these questions guided by general American legal norms or certain universal principles. Here, the respondents adopt a stance of cultural relativism, claiming that while "treason" may be a crime under the law of the United States, it is a civil matter under tribal law; and that while "banishment" may be thought to be a harsh punishment under the law of the United States—indeed, Chief Justice Warren described it as a "fate universally decried by civilized people," *Trop*, 356 U.S. at 102, 78 S.Ct. at 599—it is necessary to and consistent with the culture and tradition of the Tonawanda Band.

We are unpersuaded. First, as previously indicated, we doubt that such an argument would be relevant in this context. As discussed fully *supra* pp. 890–893, Congress did not intend with § 1303 to enact a special variety of habeas review. Habeas corpus is, of course, a peculiarly Anglo–American remedy. No one has suggested that the ICRA's remedial provision, not to speak of its enumeration of basic rights, is rooted in Indian culture or history. And yet the fact remains that Congress enacted Title I of the ICRA specifically for cases involving actions taken by an Indian nation against its members. Permitting a tribe to avoid federal court jurisdiction by the mere incantation of principles of cultural relativism would render the congressionally created remedy useless.

Second, even if we thought the proposed inquiry relevant, sworn statements submitted to the district court on behalf of the petitioners in this case counsel against accepting the respondents' attempt to avoid jurisdiction on grounds of tradition and culture at face value. If true, those statements would support a finding that "banishment" has not occurred within the Tonawanda Band within living memory, and that, to the extent that "banishment" is appropriate at all, it was not here imposed in the manner that tribal traditions actually prescribe. Were the mere invocation of cultural difference and tradition to preclude jurisdiction—even in the face of sworn statements suggesting the possibility that the "tradition" is not as

claimed—our recognition of cultural relativism could only create a refuge for repression.

But we need not resolve the debate on whether basic rights can or should be culturally defined to resolve this case. We deal here not with a foreign state, but with admittedly distinct communities that have had a unique relationship with our federal government for centuries—a relationship that exists within the framework of American institutions and, in the last analysis, under American law. We need not condone policies pursued in the early years of our nation to conclude that federal influence—such as the role of the Bureau of Indian Affairs in recognizing a ruling council of the Tonawanda Band—is intertwined with tribal power. In this respect, the wide dissemination of material proclaiming to federal and state officials the petitioners' "convict [ion]" and "banishment"—indeed, seeking aid in removing the petitioners from the Tonawanda Reservation—speaks for itself. The respondents wish to use their connection with federal authorities as a sword, while employing notions of cultural relativism as a shield from federal court jurisdiction. We need not question the power of Indian nations to govern, to establish membership criteria, to exclude outsiders, or to regulate the use of their land and resources in order to acknowledge and vindicate a federal responsibility for those American citizens subject to tribal authority when that authority imposes criminal sanctions in denial of rights guaranteed by the laws of the United States. In sum, there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive ***901** "sovereignty" our country has long recognized and sustained.

CONCLUSION

To summarize:

1. The district court improperly concluded that it lacked subject matter jurisdiction to entertain the petitioners' applications for writs of habeas corpus under 25 U.S.C. § 1303.

a. We are unpersuaded by the respondents' claim that the orders of permanent banishment are "civil" in nature, representing membership determinations committed to the absolute discretion of the tribe. The respondents have here imposed punitive sanctions upon the petitioners for allegedly criminal conduct; the respondents' actions are not insulated from habeas review merely because they involve or affect membership in the tribe.

b. In enacting 25 U.S.C. § 1303, Congress did not seek to create a more expansive role for federal courts reviewing tribal actions than analogous statutes authorizing collateral review of state and federal action would permit. Accordingly, the fact that a tribe has imposed a criminal sanction does not *itself* trigger application of § 1303; the petitioners must satisfy the jurisdictional prerequisite for habeas review by demonstrating a sufficiently severe potential or actual restraint on liberty.

c. The petitioners have here demonstrated a sufficiently severe restraint on liberty.

2. Although the petitioners' applications for writs of habeas corpus should be heard on the merits by the district court, the Tonawanda Band of Seneca Indians is not a proper respondent in this case. The petitions for writs of habeas corpus are properly viewed as directed against *tribal officials* allegedly acting in violation of federal law and therefore outside of the lawful authority of the tribe; the Indian Civil Rights Act of 1968 does not authorize habeas actions against the tribe itself.

We therefore affirm the district court's dismissal of the Tonawanda Band of Seneca Indians as a respondent. We vacate the orders of dismissal in favor of the remaining respondents and remand the cause for further proceedings consistent with this opinion.

JACOBS, Circuit Judge, dissenting:

In many respects, I concur in the thoughtful and learned majority opinion. I thus agree that the Tonawanda Band is not a proper respondent, Maj. Op. at 899; that the writ afforded in section 1303 was intended by Congress to have no broader reach than the cognate statutory provisions governing collateral review of state and federal action, *id.* at 893; and that the writ therefore cannot issue unless petitioners show a severe actual or potential restraint on liberty, *id.* at 894. I respectfully dissent because I do not think these respondents have demonstrated a severe restraint on any liberty that the writ of habeas corpus protects. That conclusion would obviate any need to decide whether the order of banishment is an exercise of civil law or criminal law, or something else; still, I am bound to say that I view the conclusion in the majority opinion—that the banishment of these petitioners is a criminal penalty—as dubious.

For reasons adduced in the majority opinion, the "detention" required to support habeas corpus jurisdiction under section 1303 in no way differs from the general understanding of the term "custody" in other habeas corpus statutes. While I have found no controlling (or persuasive) cases that discuss whether banishment constitutes custody for purposes of habeas corpus, the Supreme Court has articulated some general principles:

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is ... uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

***902** *Hensley v. Municipal Court*, 411 U.S. 345, 351, 93 S.Ct. 1571, 1575, 36 L.Ed.2d 294 (1973). While courts should not "suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements," *id.* at 350, 93 S.Ct. at 1574, the writ should not issue unless a court discerns a "severe restraint[ ] on individual liberty," *id.* at 351, 93 S.Ct. at 1574. I conclude that, although the banishment of petitioners from the Tonawanda Band is a harsh measure, imposed here with small provocation, it cannot be deemed a restraint that habeas corpus can reach. Furthermore, I conclude that issuance of the writ here would impinge upon the tribe's power to define its membership and thereby disserves the ICRA goal of promoting tribal self-government.

A. *Petitioners' Rights.*

Petitioners claim that their liberty is restrained because the tribe threatens to remove them involuntarily from the tribe, their land, homes, and businesses, and to bar their return. Putting aside whether the threat of banishment is distinguishable from actual banishment, no one can discount the drastic impacts (cultural, economic, and social) that banishment and exclusion would have on one who has been a member of the Tonawanda Band. However, I think it is an error to measure the severity of the restraint by reference to the liberties enjoyed by the Tonawanda tribal community. There is of course no doubt that the petitioners, if banished, will lose all the rights conferred by the tribal sovereignty. But the proper inquiry is whether the petitioners, if banished, will suffer a severe impairment of the liberties that are enjoyed by the American public at large.

The applicable principle is that habeas corpus responds to restraints that are "not shared by the public generally." *Hensley*, 411 U.S. at 351, 93 S.Ct. at 1575 (quoting *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S.Ct. 373, 376, 9 L.Ed.2d 285 (1963)). Section 1303 is no different in this respect. It grants "any person" the right to challenge through habeas corpus any detention by an Indian tribe. The term "any person," which obviously includes members of Indian tribes, applies just as clearly to non-tribal Americans and to anyone else in the country. Since "any person" may seek relief from a severe restraint on liberty imposed by an Indian tribe, it follows that the restraints contemplated by the statute, and remediable by a writ of habeas corpus, are restraints on the liberties ordinarily enjoyed by "any person" and not solely or even especially by members of the Indian tribes.

What restraints will be brought to bear upon the petitioners after they are banished from the Tonawanda Band and its reservation? What liberties will they thereby lose? Natural born members of the Tonawanda Band are citizens of the United States. 8 U.S.C. § 1401(b). Once they exit the reservation, petitioners will be free to settle and travel where they wish, and to come and go as they please, in the same way and to the same extent as any other person in the United States. Although that freedom does not confer a right to settle or trespass on private lands, or on lands reserved to any Indian nation, the petitioners' constitutional rights will in no way be diminished after banishment; indeed, they will then enjoy important constitutional rights that are not guaranteed by the ICRA on the Tonawanda reservation. For example, a tribe may establish a religion, need not provide jury trials in civil cases, need not appoint counsel to indigent criminal defendants, and is not required to initiate criminal prosecutions by grand jury indictment. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 & n. 14, 98 S.Ct. 1670, 1679 & n. 14, 56 L.Ed.2d 106 (1978) (discussing ICRA's selective incorporation of provisions of the Bill of Rights).

The petitioners analogize banishment to alien exclusion, deportation, denaturalization or denationalization, and rely upon lines of cases holding that those deprivations support issuance of the writ. Banishment from an Indian

nation differs in some critical respects from the loss of rights faced by persons facing shipment abroad or a loss of citizenship that prefigures exile. One who is excluded or deported from the United States may go to a native and congenial country that guarantees every essential liberty; nevertheless, that departure means the loss of the liberties enjoyed by the general populace of the United States, and it is *that* loss of rights that conceptually justifies habeas relief ***903** from our courts. This view is entirely consistent with the observation in *Jones v. Cunningham* that "habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world." 371 U.S. at 239, 83 S.Ct. at 375 (footnote omitted).

There are additional reasons why the habeas rights of excluded aliens offer no analogy useful to petitioners. First, an excluded alien's right to invoke habeas corpus is a specific statutory right conferred by Congress. *See* 8 U.S.C. § 1105a(b) ("[A]ny alien against whom a final order of exclusion has been made ... may obtain judicial review of such order by habeas corpus proceedings...."). Second, the Supreme Court in *Brownell v. We Shung*, 352 U.S. 180, 183, 77 S.Ct. 252, 255, 1 L.Ed.2d 225 (1956)—one of the precedents cited in *Jones*—confirmed that any excluded alien seeking habeas corpus must still "be detained or at the least be in technical custody." *Id.* The excluded alien cases therefore do not expand the meaning of the term "custody" for purposes of habeas corpus jurisdiction; they merely affirm the well settled rule that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950)).

Petitioners' reliance on deportation cases is misplaced for all the same reasons. Deportation separates the individual from the rights and liberties enjoyed by the American populace at large. The availability of habeas corpus relief in deportation cases is also a matter of statutory law. 8 U.S.C. 1105a(a)(10) ("[A]ny alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."). Moreover, in creating this remedy, Congress provided (without elaboration) that the petitioning alien must be "in custody" to invoke section 1105a(a)(10). *See id.* The deportation statute therefore does not weaken or modify the usual requisite of habeas corpus jurisprudence that the petitioner show a restraint on liberty.

Similarly, the Supreme Court has held that denationalization violates the Eighth Amendment because it strips an individual of "the right to have rights" and raises the threat of banishment from all of the United States. *Trop v. Dulles*, 356 U.S. 86, 101–02, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958). Banishment is therefore a severe restraint on the liberty of one who is banished from the United States or excluded from some place within the United States that the general population has the right to be. Doubtless, petitioners could plausibly claim a severe restraint on liberty if they were facing banishment *to* the Tonawanda reservation.[1] But I do not see how banishment *from* the Indian reservation supports habeas relief. In terms of our habeas corpus jurisdiction, banishment *to the United States* is a meaningless concept.

[1] In *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.Neb.1879), persons who had withdrawn from the Ponca tribe, severing their relations with it and taking up the ways of American life, petitioned for a writ of habeas corpus to block an army officer from returning them to the Indian country. Granting the writ, the court observed: "If they could be removed to the Indian Territory by force, and kept there in the same way, I can see no good reason why they might not be taken away and kept by force in the penitentiary...." 25 F. Cas. at 700.

The majority opinion points out that the petitioners are complaining about several forms of restraint, of which banishment is only one, and enumerates them. In my view, these do not add up to the requisite severe restraint on liberty. Thus, the respondents "attempted (without success) to take petitioners ... into custody and eject them." Maj. Op. at 878. From this allegation it appears that the petitioners have *not* been taken into custody, and that the effort to lay hands on them was for the sole purpose of releasing them outside the reservation, not to detain them on it. Other alleged deprivations—the "continue[d][ ] harass[ment] and assault," *id.* at 878, the "stoning" of petitioner Peters, *id.*, the "deni[al of] electrical service to their homes and businesses," *id.* at 878, 895, the instruction that petitioners' names be removed from the list of eligible clients of the reservation clinic, *id.* at 878, and a continuing ***904** "supervision" (which seems to be no more than a hostile observation), *id.* at 895—do not amount to restraints of the person, and cannot very well be remedied by a writ of habeas corpus. Certainly, the writ of habeas corpus is an ill-adapted device for regulating utility services or clinic privileges.

The order of banishment itself, set forth in the majority opinion, recites the particular deprivations allegedly imposed. *See* Maj. Op. at 878. In addition to banishment, the petitioners' "lands will become the responsibility of the Council of Chiefs," petitioners will suffer loss of their

tribal names, citizenship, and rights of membership, and their names will be removed from the tribal rolls. Do any of these deprivations justify issuance of the writ?

It was undisputed at oral argument that the lands at issue are tribal lands allotted by the tribe but not owned by the individual members. It has long been settled that

> the powers of an Indian tribe with respect to tribal land are not limited by any rights of occupancy which the tribe itself may grant to its members, that occupancy of tribal land does not create any vested rights in the occupant as against the tribe, and that the extent of any individual's interest in tribal property is subject to such limitations as the tribe may see fit to impose.

Felix S. Cohen, *Handbook of Federal Indian Law* 144 (1941) (footnotes omitted). *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665, 99 S.Ct. 2529, 2536–37, 61 L.Ed.2d 153 (1979) ("Whatever title [in tribal land] the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." (internal quotation marks and citations omitted)); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1235 (4th Cir.1974) ("There can be no individual ownership of tribal land and the individual's right of use depends upon tribal law or custom."); *Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs, & Devisees*, 505 F.2d 268, 273 (9th Cir.1974) ("[S]o long as the land remains tribal in character the individual Indian has no vested right, as against the tribe, to any specific part of the tribal property."), *rev'd on other grounds*, 425 U.S. 649, 96 S.Ct. 1793, 48 L.Ed.2d 274 (1976).

Off the reservation, each petitioner has the right to use his tribal name or any other name he wishes (other than one selected to defraud creditors), and the tribe's banishment order cannot prevent him from doing so. On the reservation, the other members may refuse to utter the petitioners' tribal names, and a writ of habeas corpus (assuming jurisdiction to issue one) cannot force them to use those names. As to citizenship and rights of membership, I believe that the tribe has sovereign power to determine its membership, for the reasons stated in section B, *infra*. And as to the tribal rolls: to the extent that the rolls merely reflect the tribe's own membership decisions, the addition or removal of names seems to be a function of the tribe's undoubted power to make that determination. To the extent that rolls are maintained to determine entitlement to federal payments or federally controlled funds, the rolls are maintained by the Secretary of the Interior rather than by the tribe. 25 U.S.C. § 163.

B. *Tribal Powers.*

I therefore conclude that the only restriction claimed by petitioners that could remotely be deemed to support habeas relief is the deprivation of their right to live in and among the Tonawanda nation (and the threat that this exclusion will be visited upon them). However, Tonawanda membership (and the concomitant right to dwell on the Tonawandas' lands) is emphatically not a right "shared by the public generally." As an Indian tribe, the Tonawanda Band retains "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of [its] dependent status." *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978). It is well settled that a tribe may physically exclude non-members entirely or condition their presence on its reservation. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 103 S.Ct. 2378, 2385–86, 76 L.Ed.2d 611 (1983). Petitioners point to no provision in any treaty or statute that evidences a congressional ***905** intent to limit the Tonawanda Band's power to exclude or expel.

Given this power of the Indian nations to exclude *non-members*, the decisive question on this appeal becomes whether the Tonawanda Band had the power to strip petitioners of their tribal membership. The Supreme Court has not decided that question, but I think that it has pointed the way: "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S.Ct. 1670, 1684 n. 32, 56 L.Ed.2d 106 (1978). *See also Wheeler*, 435 U.S. at 322 n. 18, 98 S.Ct. at 1086 n. 18 ("[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership...."); *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir.1957) ("[I]n absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity.... It appears that for purposes of which the tribe has complete control, the tribe conclusively determines membership ...."), *cert. denied*, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958); *Johnson v. Eastern Band Cherokee Nation*, 718 F.Supp. 6

(N.D.N.Y.1989) (observing that "[t]he Supreme Court has held that controversies surrounding membership in an Indian Nation are reserved to the tribe's discretion, and therefore do not present a question of federal law," and dismissing suit to enjoin plaintiff's exclusion from an Indian tribe for lack of subject matter jurisdiction). The order of banishment in this case is harsh and disturbing, but a tribe's prerogative to define itself as a "culturally and politically distinct entity," *Santa Clara Pueblo*, 436 U.S. at 72, 98 S.Ct. at 1684, is a "delicate" matter in which federal courts should not lightly intrude, *id.* at 72 n. 32, 98 S.Ct. at 1684 n. 32, notwithstanding harsh consequences.

There is every reason to think that this tribal prerogative extends to the expulsion of existing tribal members. In *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897), a case cited in *Santa Clara Pueblo* as well as in *Wheeler*, a United States citizen whose wife had become a citizen of the Chickasaw Nation through Chickasaw legislation and was later stripped of her citizenship by a subsequent enactment, sued a representative of the tribe on a property-rights claim. The Court, which held that there was federal jurisdiction over the suit, observed: "[t]he Chickasaw legislature, by the second act, ... not only repealed the prior act, but canceled the rights of citizenship granted thereby, and further directed the governor to remove the parties named therein and their descendents beyond the limits of the nation." *Roff*, 168 U.S. at 222, 18 S.Ct. at 62. In a word, they were banished. The Court stated:

> The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the constitution or laws of the United States, and we know of no provision of such constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred.

Id.

C. *Conclusion.*

It cannot be said that the American populace at large, which has no right to settle on lands reserved to the Tonawanda, lives under a restraint that justifies issuance of a writ. It follows that the exclusion or "banishment" of *non*-members from the Indian nations is not a restraint of their liberty. No different rule can be applied to members of the tribe without abridging the tribe's sovereign power (one of the few appreciable sovereign powers remaining) to decide who is a member and who is not. This limitation on our habeas corpus jurisdiction under section 1303 serves the "[t]wo distinct and competing purposes" of the ICRA. *See Santa Clara Pueblo*, 436 U.S. at 62, 98 S.Ct. at 1678. On the one hand, the statute seeks to strengthen the rights of individual members against tribal power; on the other hand, it promotes the "well-established federal policy of furthering Indian self-government." *Id.* (internal quotation marks and citation omitted). While ***906** sections 1302 and 1303 grant substantive rights and afford a habeas corpus remedy, other provisions of the ICRA limit state jurisdiction over Indian matters, strengthen tribal courts, and minimize interference in tribal litigation by the Federal Bureau of Indian Affairs. *Id.* at 63–64, 98 S.Ct. at 1679–80. The circumscribed remedial power of the federal courts preserves that balance. "Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal government." *Id.* at 67, 98 S.Ct. at 1682. If we broaden the meaning of "detention" in section 1303 to include tribal banishment, the result will be a gross interference with tribal sovereignty—the abrogation of its ability to define itself—accomplished by means of a statute intended to promote tribal self-government.

Moreover, the writ that is sought cannot remedy many of the wrongs alleged. Tribal property and the quiet enjoyment of it cannot be allotted by writ; nor can the writ restore the petitioners' roles in tribal affairs or their utility service, allay the hostility of their fellows, or force people to address the petitioners by their tribal names. If we had the power, by a writ of habeas corpus, to restore the petitioners to their culture and birthright, we still could not do it without dismantling the vestiges of tribal sovereignty that Congress requires us to preserve.

I agree with my colleagues that this case raises issues of cultural and political accommodation that may justify consideration of this question by Congress. Until Congress acts, however, I agree with Judge Arcara that subject matter jurisdiction is lacking, because (i) section 1303 is the sole source of potential jurisdiction; (ii) the threat of petitioners' banishment from the Tonawanda Band is not "detention" within the meaning of section 1303, and (iii) petitioners' other grounds urged for grant

of the writ, such as denial of health benefits and electric service, do not support jurisdiction.

85 F.3d 874

All Citations

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5 A.D.3d 854
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of Clinton R. HILL, Respondent,
v.
Anthony P. EPPOLITO, as Judge of the City Court of the City of Oneida, Respondent,
and
Donald F. Cerio Jr., as District Attorney for the County of Madison, Appellant.

March 4, 2004.

Attorneys and Law Firms

Donald F. Cerio Jr., District Attorney, Wampsville, appellant pro se.

Morvillo, Abramowitz, Grand, Iason & Silberberg P.C., New York City (Robert J. Anello of counsel), for Clinton R. Hill, respondent.

Mackenzie Hughes L.L.P., Syracuse (Peter D. Carmen of counsel), and Zuckerman Spaeder L.L.P., Washington D.C., for Oneida Indian Nation of New York, amicus curiae.

Before: MERCURE, J.P., CREW III, ROSE and KANE, JJ.

Opinion

***855** CREW III, J.

Appeal from a judgment of the Supreme Court (O'Brien III, J.), entered July 17, 2003 in Madison County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate a decision of the Oneida City Court.

On July 11, 2002 petitioner, a member of the Oneida Indian Nation, was charged in Oneida City Court with the crime of harassment in the second degree. The charge arose out of an altercation between petitioner and another Oneida Indian that took place on Indian Nation property. While that charge was pending, a criminal complaint was filed against petitioner in the Nation tribal court charging petitioner with assault, harassment and disorderly conduct arising out of the same transaction giving rise to the City Court charge.[1]

[1] Of note is the fact that the elements of harassment found in the Oneida Indian Nation Penal Code are identical to those found in the Penal Law under which petitioner was charged in City Court.

While the harassment charge was pending in City Court, petitioner was tried and acquitted of the charges of assault and harassment in the tribal court and the charge of disorderly conduct was adjourned in contemplation of dismissal. As a consequence, petitioner moved to dismiss the City Court charge on double jeopardy grounds. That motion was denied, prompting petitioner to commence this CPLR article 78 proceeding in Supreme Court seeking to vacate the order of City Court. Supreme Court granted the petition and vacated the City Court order, resulting in this appeal by respondent District Attorney for Madison County.

The Criminal Procedure Law provides, in pertinent part, that "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless * * * [t]he offenses as defined have substantially different elements" (CPL 40.20[2][a]). It further provides that "a person 'is prosecuted' for an offense * * * when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States" (CPL 40.30[1]). We already have observed that the elements of the crimes of harassment as defined in the Oneida Indian Nation Penal Code and the New York Penal Law are ****635** identical (see n. 1, *supra*). The issue here then distills to whether the tribal court, in which petitioner was tried and acquitted, constitutes a court of any jurisdiction within the United States. We believe it does and, therefore, affirm.

***856** It is beyond cavil that Indian tribes are separate sovereigns whose " right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions" (*United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 55 L.Ed.2d 303 [1978]). The Oneida Indian Nation has enacted a Penal Code and Rules of Criminal Procedure providing the mechanism for enforcement of that Code, and its tribal courts clearly qualify as courts of any jurisdiction within the United States.[2]

[2] Courts in at least two of our sister states have concluded that prosecutions in tribal courts preclude subsequent prosecutions in state courts (*see Booth v. State*, 903 P.2d 1079 [Alaska 1995]; *People v. Morgan*, 785 P.2d 1294 [Colo.1990]; *but see State of Washington v. Moses*, 145 Wash.2d 370, 37 P.3d 1216 [2002]).

With regard to the District Attorney's contention that the failure of the Criminal Procedure Law to specifically address tribal courts implies their intended exclusion, we need note only that the fact that a statute contains no exception creates a strong presumption that none was intended (*see Matter of Pokoik v. Department of Health Servs., County of Suffolk*, 72 N.Y.2d 708, 712, 536 N.Y.S.2d 410, 533 N.E.2d 249 [1998]; McKinney's Cons. Laws of NY, Book 1, Statutes § 213). We have considered the District Attorney's remaining arguments and find them equally unavailing.

ORDERED that the judgment is affirmed, without costs.

MERCURE, J.P., ROSE and KANE, JJ., concur.

All Citations

5 A.D.3d 854, 772 N.Y.S.2d 634 (Mem), 2004 N.Y. Slip Op. 01453

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117 S.Ct. 1404
Supreme Court of the United States

William STRATE, Associate Tribal Judge, Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al., Petitioners,
v.
A–1 CONTRACTORS and Lyle Stockert.

No. 95–1872.
|
Argued Jan. 7, 1997.
|
Decided April 28, 1997.

Synopsis
Driver, his employer, employer's insurer, and tribal court filed action seeking declaratory judgment that tribal court lacked jurisdiction to adjudicate claims of non-Indian driver, who was widow of tribal member and mother of tribal members, for injuries arising out of automobile accident on state highway that ran through reservation land. The United States District Court for the District of North Dakota, Patrick A. Comny, J., 1992 WL 666051, determined that tribal court had jurisdiction. Appeal was taken. The Court of Appeals, in a divided panel, 76 F.3d 930, held that tribal court lacked subject matter jurisdiction. Certiorari was granted. The Supreme Court, Justice Ginsburg, held that when accident occurred on a portion of public highway maintained by state under federally granted right-of-way over Indian reservation land, tribal courts could not entertain civil action against allegedly negligent driver and driver's employer, neither of whom was a member of tribe, absent a statute or treaty authorizing tribe to govern conduct of nonmembers on highway in question.

Affirmed.

West Headnotes (4)

[1] **Indians**
Regulation of non-members by tribe or tribal government

Absent express authorization by federal statute or treaty, tribal jurisdiction over conduct of nonmembers exists only in limited circumstances.

172 Cases that cite this headnote

[2] **Indians**
Regulation of non-members by tribe or tribal government

Exception to *Montana* rule, that absent Congressional direction, Indian tribes lack civil authority over conduct of nonmembers on non-Indian land within a reservation, exists for activities of nonmembers who enter consensual relationships with tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

185 Cases that cite this headnote

[3] **Indians**
Regulation of non-members by tribe or tribal government

Exception to *Montana* rule, that absent Congressional direction, Indian tribes lack civil authority over conduct of nonmembers on non-Indian land within a reservation, exists for conduct that threatens or has some direct effect on political integrity, economic security, or health or welfare of tribe.

158 Cases that cite this headnote

[4] **Indians**
State regulation
Indians
Regulation of non-members by tribe or tribal government

When accident occurred on a portion of public highway maintained by state under federally

granted right-of-way over Indian reservation land, tribal courts could not entertain civil action against allegedly negligent driver and driver's employer, neither of whom was a member of tribe, absent a statute or treaty authorizing tribe to govern conduct of nonmembers on highway in question; such a case fell within state or federal regulatory and adjudicatory governance.

142 Cases that cite this headnote

****1405** *Syllabus*[*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***438** Vehicles driven by petitioner Fredericks and respondent Stockert collided on a portion of a North Dakota state highway that runs through the Fort Berthold Indian Reservation. The 6.59–mile stretch of highway within the reservation is open to the public, affords access to a federal water resource project, and is maintained by North Dakota under a federally granted right-of-way that lies on land held by the United States in trust for the Three Affiliated Tribes and their members. Neither driver is a member of the Tribes or an Indian, but Fredericks is the widow of a deceased tribal member and has five adult children who are also members. The truck driven by Stockert belonged to his employer, respondent A–1 Contractors, a non-Indian-owned enterprise with its principal place of business outside the reservation. At the time, A–1 was under a subcontract with LCM Corporation, a corporation wholly owned by the Tribes, to do landscaping within the reservation. The record does not show whether Stockert was engaged in subcontract work at the time of the accident. Fredericks filed a personal injury action in Tribal Court against Stockert and A–1, and Fredericks' adult children filed a loss-of-consortium claim in the same lawsuit. The Tribal Court ruled that it had jurisdiction over Fredericks' claim and therefore denied respondents' motion to dismiss, and the Northern Plains Intertribal Court of Appeals affirmed. Respondents then commenced this action in the Federal District Court against Fredericks, her adult children, the Tribal Court, and Tribal Judge Strate, seeking a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims; respondents also sought an injunction against further Tribal Court proceedings. Relying particularly on *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10, the District Court dismissed the action, determining that the Tribal Court had civil jurisdiction over Fredericks' complaint against respondents. The ***439** en banc Eighth Circuit reversed, concluding that the controlling precedent was *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493, and that, under *Montana*, ****1406** the Tribal Court lacked subject-matter jurisdiction over the dispute.

Held: When an accident occurs on a public highway maintained by the State pursuant to a federally granted right-of-way over Indian reservation land, a civil action against allegedly negligent nonmembers falls within state or federal regulatory and adjudicatory governance; absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases. This Court expresses no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation. Pp. 1409–1416.

(a) Absent express authorization by federal statute or treaty, tribal jurisdiction over nonmembers' conduct exists only in limited circumstances. In *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, the Court held that tribes lack criminal jurisdiction over non-Indians. Later, in *Montana v. United States*, the Court set forth the general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to exceptions relating to (1) the activities of nonmembers who enter consensual relationships with the tribe or its members and (2) nonmember conduct that threatens or directly affects the tribe's political integrity, economic security, health, or welfare. 450 U.S., at 564–567, 101 S.Ct., at 1257–1259. Pp. 1409–1410.

(b) *Montana* controls this case. Contrary to petitioners' contention, *National Farmers* and *Iowa Mutual* do not establish a rule converse to *Montana* 's. Neither case establishes that tribes presumptively retain adjudicatory authority over claims against nonmembers arising from occurrences anywhere within a reservation. Rather, these cases prescribe a prudential, nonjurisdictional exhaustion rule requiring a federal court in which tribal-court jurisdiction is challenged to stay its hand, as a matter of comity, until after the tribal court has had an initial and full opportunity to determine its own jurisdiction. See

U.S., at 857, 105 S.Ct., at 2454; 480 U.S., at 20, n. 14, 107 S.Ct., at 978, n. 14; see also *id.*, at 16, n. 8, 107 S.Ct., at 976, n. 8. This exhaustion rule, as explained in *National Farmers*, 471 U.S., at 855–856, 105 S.Ct., at 2453–2454, reflects the more extensive jurisdiction tribal courts have in civil cases than in criminal proceedings and the corresponding need to inspect relevant statutes, treaties, and other materials in order to determine tribal adjudicatory authority. *National Farmers'* exhaustion requirement does not conflict with *Montana*, in which the Court made plain that the general rule and exceptions there announced govern only in the absence of a delegation ***440** of tribal authority by treaty or statute. See 450 U.S., at 557–563, 101 S.Ct., at 1254–1257. Read in context, the Court's statement in *Iowa Mutual*, 480 U.S., at 18, 107 S.Ct., at 977–978, that "[c]ivil jurisdiction over [the] activities [of non-Indians on reservation lands] presumptively lies in the tribal courts," addresses only situations in which tribes possess authority to regulate nonmembers' activities. As to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, absent congressional direction enlarging tribal-court jurisdiction. Pp. 1410–1413.

(c) It is unavailing to argue, as petitioners do, that *Montana* does not govern this case because the land underlying the accident scene is held in trust for the Three Affiliated Tribes and their members. Petitioners are correct that *Montana* and the cases following its instruction—*Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343, and *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606—all involved alienated, non-Indian-owned reservation land. However, the right-of-way North Dakota acquired for its highway renders the 6.59–mile stretch here at issue equivalent, for nonmember governance purposes, to such alienated, non-Indian land. The right-of-way was granted to facilitate public access to a federal water resource project, forms part of the State's highway, and is open to the public. Traffic on the highway is subject to the State's control. The granting instrument details only one specific reservation to Indian landowners, the ****1407** right to construct necessary crossings, and the Tribes expressly reserved no other right to exercise dominion or control over the rightof-way. Rather, they have consented to, and received payment for, the State's use of the stretch at issue, and so long as that stretch is maintained as part of the State's highway, they cannot assert a landowner's right to occupy and exclude. Pp. 1413–1414.

(d) Petitioners refer to no treaty or federal statute authorizing the Three Affiliated Tribes to entertain highway-accident tort suits of the kind Fredericks commenced against A–1 and Stockert. Nor have they shown that Fredericks' tribal-court action qualifies under either of the exceptions to *Montana* 's general rule. The tortious conduct alleged by Fredericks does not fit within the first exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," 450 U.S., at 565, 101 S.Ct., at 1258, particularly when measured against the conduct at issue in the cases cited by *Montana*, *id.*, at 565–566, 101 S.Ct., at 1258–1259, as fitting within the exception, *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251; *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030; *Buster v. Wright*, 135 F. 947, 950; and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152–154, 100 S.Ct. 2069, 2080–2082, 65 L.Ed.2d 10. This dispute is distinctly nontribal in nature, arising between two non-Indians involved in a run-of-the-mill highway accident. Although ***441** A–1 was engaged in subcontract work on the reservation, and therefore had a "consensual relationship" with the Tribes, Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident. *Montana* 's second exception, concerning conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S., at 566, 101 S.Ct., at 1258–1259, is also inapplicable. The cases cited by *Montana* as stating this exception each raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government. *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 386, 96 S.Ct. 943, 946, 47 L.Ed.2d 106; *Williams*, 358 U.S., at 220, 79 S.Ct., at 270–271; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–129, 26 S.Ct. 197, 200–201, 50 L.Ed. 398; and *Thomas v. Gay*, 169 U.S. 264, 273, 18 S.Ct. 340, 343, 42 L.Ed. 740. Opening the Tribal Court for Fredericks' optional use is not necessary to protect tribal self-government; and requiring A–1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to the Tribes' political integrity, economic security, or health or welfare. Pp. 1414–1416.

76 F.3d 930, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

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Jonathan E. Nuechterlein, Washington, DC, for U.S. as

amicus curiae, by special leave of the Court.

Patrick J. Ward, Bismarck, ND, for respondents.

Opinion

***442** Justice GINSBURG delivered the opinion of the Court.

This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members. Specifically, we confront this question: When an accident occurs on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?

Such cases, we hold, fall within state or federal regulatory and adjudicatory governance; ****1408** tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question. We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.

I

In November 1990, petitioner Gisela Fredericks and respondent Lyle Stockert were involved in a traffic accident on a portion of a North Dakota state highway running through the Fort Berthold Indian Reservation. The highway strip crossing the reservation is a 6.59–mile stretch of road, open to the public, affording access to a federal water resource project. North Dakota maintains the road under a right-of-way ***443** granted by the United States to the State's Highway Department; the right-of-way lies on land held by the United States in trust for the Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) and their members.

The accident occurred when Fredericks' automobile collided with a gravel truck driven by Stockert and owned by respondent A–1 Contractors, Stockert's employer. A–1 Contractors, a non-Indian-owned enterprise with its principal place of business outside the reservation, was at the time under a subcontract with LCM Corporation, a corporation wholly owned by the Tribes, to do landscaping work related to the construction of a tribal community building. A–1 Contractors performed all work under the subcontract within the boundaries of the reservation.[1] The record does not show whether Stockert was engaged in subcontract work at the time of the accident. Neither Stockert nor Fredericks is a member of the Three Affiliated Tribes or an Indian. Fredericks, however, is the widow of a deceased member of the Tribes and has five adult children who are tribal members.[2]

1 Respondents state that the subcontract had forum-selection and choice-of-law provisions selecting Utah state courts and Utah law for dispute resolution. See Brief for Respondents 2. Petitioners do not contest this point, but the subcontract is not part of the record in this case.

2 The Court of Appeals for the Eighth Circuit stated that petitioner Fredericks resides on the reservation. See 76 F.3d 930, 932 (1996) (en banc). Respondents assert, however, that there is an unresolved factual dispute regarding Fredericks' residence at the time of the accident. See Brief for Respondents 1–2, n. 2; Brief in Opposition 3, n. 4. Under our disposition of the case, Fredericks' residence at the time of the accident is immaterial.

Fredericks sustained serious injuries in the accident and was hospitalized for 24 days. In May 1991, she sued respondents A–1 Contractors and Stockert, as well as A–1 Contractors' insurer, in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation. In the same lawsuit, Fredericks' five adult children filed a loss-of-consortium ***444** claim. Together, Fredericks and her children sought damages exceeding $13 million. App. 8–10.

Respondents and the insurer made a special appearance in the Tribal Court to contest that court's personal and subject-matter jurisdiction. The Tribal Court ruled that it had authority to adjudicate Gisela Fredericks' case, and therefore denied respondents' motion to dismiss the action. *Id.*, at 24–25.[3] Respondents appealed the Tribal Court's jurisdictional ruling to the Northern Plains Intertribal Court of Appeals, which affirmed. *Id.*, at 36. Thereafter, pursuant to the parties' stipulation, the Tribal Court dismissed the insurer from the suit. See *id.*, at 38–40.

3 Satisfied that it could adjudicate Gisela Fredericks' claims, the Tribal Court declined to address her adult children's consortium claim, App. 25; thus, no ruling

on that claim is here at issue.

Before Tribal Court proceedings resumed, respondents commenced this action in the United States District Court for the District of North Dakota. Naming as defendants Fredericks, her adult children, the Tribal Court, and Tribal Judge William Strate, respondents sought a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims. The respondents also sought an injunction against further proceedings in the Tribal Court. See *id.*, at 41–45.

Relying particularly on this Court's decisions in *National Farmers Union Ins. Cos.* ****1409** *v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), the District Court determined that the Tribal Court had civil jurisdiction over Fredericks' complaint against A–1 Contractors and Stockert; accordingly, on cross-motions for summary judgment, the District Court dismissed the action. App. 54–67. On appeal, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. App. 68–90. The Eighth Circuit granted rehearing en banc and, in an 8–to–4 decision, reversed the District Court's judgment. ***445** 76 F.3d 930 (1996). The Court of Appeals concluded that our decision in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), was the controlling precedent, and that, under *Montana*, the Tribal Court lacked subject-matter jurisdiction over the dispute.[4]

[4] Petitioner Fredericks has commenced a similar lawsuit in a North Dakota state court "to protect her rights against the running of the State's six-year statute of limitations." Reply Brief 6, n. 2. Respondents assert that they have answered the complaint and "are prepared to proceed in that forum." Brief for Respondents 8, n. 6. Respondents also note, without contradiction, that the state forum "is physically much closer by road to the accident scene ... than [is] the tribal courthouse." *Ibid.*

We granted certiorari, 518 U.S. 1056, 117 S.Ct. 37, 135 L.Ed.2d 1128 (1996), and now affirm.

II

[1] Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances. In *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the Court held that Indian tribes lack criminal jurisdiction over non-Indians.[5] *Montana v. United States*, decided three years later, is the pathmarking case concerning tribal civil authority over nonmembers. *Montana* concerned the authority of the Crow Tribe to regulate hunting and fishing by non-Indians on lands within the Tribe's reservation owned in fee simple by non-Indians. The Court said in *Montana* that the restriction on tribal criminal jurisdiction recognized in *Oliphant* rested on principles that support a more "general proposition." 450 U.S., at 565, 101 S.Ct., at 1258. In the main, the Court explained, "the inherent sovereign powers of an Indian tribe"—those powers a tribe enjoys apart from express provision by treaty or statute—"do not extend to the activities ***446** of nonmembers of the tribe." *Ibid.* The *Montana* opinion added, however, that in certain circumstances, even where Congress has not expressly authorized it, tribal civil jurisdiction may encompass nonmembers:

[5] In *Duro v. Reina*, 495 U.S. 676, 684–685, 110 S.Ct. 2053, 2059–2060, 109 L.Ed.2d 693 (1990), we held that Indian tribes also lack criminal jurisdiction over nonmember Indians. Shortly after our decision in *Duro*, Congress provided for tribal criminal jurisdiction over nonmember Indians. See 25 U.S.C. § 1301(2).

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 565–566, 101 S.Ct., at 1258–1259 (citations and footnote omitted).
>
> The term "non-Indian fee lands," as used in this passage and throughout the *Montana* opinion, refers to reservation land acquired in fee simple by non-Indian owners. See *id.*, at 548, 101 S.Ct., at 1249.

Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions:

****1410** The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare. The *Montana* Court recognized that the Crow Tribe retained power to limit or forbid hunting or fishing by nonmembers on land still owned by or held in trust for the Tribe. *Id.*, at 557, 101 S.Ct., at 1254. The Court held, however, that the Tribe lacked authority to regulate hunting and fishing by non-Indians on land within the Tribe's ***447** reservation owned in fee simple by non-Indians. *Id.*, at 564–567, 101 S.Ct., at 1257–1259.[6]

[6] *Montana* 's statement of the governing law figured prominently in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), and in *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993). The Court held in *Brendale*, 6 to 3, that the Yakima Indian Nation lacked authority to zone nonmembers' land within an area of the Tribe's reservation open to the general public; almost half the land in the area was owned in fee by nonmembers. The Court also held, 5 to 4, that the Tribe retained authority to zone fee land in an area of the reservation closed to the general public. No opinion garnered a majority. Justice White, writing for four Members of the Court, concluded that, under *Montana*, the Tribe lacked authority to zone fee land in both the open and closed areas of the reservation. 492 U.S., at 422–432, 109 S.Ct., at 3003–3009. Justice STEVENS, writing for two Justices, concluded that the Tribe retained zoning authority over nonmember land only in the closed area. *Id.*, at 443–444, 109 S.Ct., at 3014–3015. Justice Blackmun, writing for three Justices, concluded that, under *Montana* 's second exception, the Tribe retained authority to zone fee land in both the open and the closed areas. *Id.*, at 456–459, 109 S.Ct., at 3021–3023. In *Bourland*, the Court considered whether the Cheyenne River Sioux Tribe could regulate hunting and fishing by non-Indians in an area within the Tribe's reservation, but acquired by the United States for the operation of a dam and a reservoir. We determined, dominantly, that no treaty or statute reserved to the Tribe regulatory authority over the area, see 508 U.S., at 697, 113 S.Ct., at 2320–2321, and we left for resolution on remand the question whether either *Montana* exception applied, see 508 U.S., at 695–696, 113 S.Ct., at 2319–2320; see also 39 F.3d 868, 869–870 (C.A.8 1994) (decision of divided panel on remand that neither *Montana* exception justified regulation by the Tribe).

Petitioners and the United States as *amicus curiae* urge that *Montana* does not control this case. They maintain that the guiding precedents are *National Farmers* and *Iowa Mutual*, and that those decisions establish a rule converse to *Montana* 's. Whatever *Montana* may instruct regarding *regulatory* authority, they insist, tribal courts retain *adjudicatory* authority in disputes over occurrences inside a reservation, even when the episode-in-suit involves nonmembers, unless a treaty or federal statute directs otherwise. Petitioners, further supported by the United States, argue, alternately, that *Montana* does not cover lands owned by, or held ***448** in trust for, a tribe or its members. *Montana* holds sway, petitioners say, only with respect to alienated reservation land owned in fee simple by non-Indians. We address these arguments in turn.

A

We begin with petitioners' contention that *National Farmers* and *Iowa Mutual* broadly confirm tribal-court civil jurisdiction over claims against nonmembers arising from occurrences on any land within a reservation. We read our precedent differently. *National Farmers* and *Iowa Mutual*, we conclude, are not at odds with, and do not displace, *Montana*. Both decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases. Accord, *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 427, n. 10, 109 S.Ct. 2994, 3006, n. 10, 106 L.Ed.2d 343 (1989) (opinion of White, J.).

National Farmers involved a federal-court challenge to a tribal court's jurisdiction over a personal injury action initiated on behalf of a Crow Indian minor against a Montana school district. The accident-in-suit occurred when the minor was struck by a motorcycle in an elementary school parking lot. The school occupied land owned by the State within the Crow Indian Reservation. See 471 U.S., at 847, 105 S.Ct., at 2449. The school district and its insurer sought a federal-court injunction to stop proceedings in the ****1411** Crow Tribal Court. See *id.*, at 848, 105 S.Ct., at 2449–2450. The District Court granted the injunction, but the Court of Appeals reversed, concluding that federal courts lacked subject-matter jurisdiction to entertain such a case. See *id.*, at 848–849, 105 S.Ct., at 2449–2450.

We reversed the Court of Appeals' judgment and held that federal courts have authority to determine, as a matter "arising under" federal law, see 28 U.S.C. § 1331, whether a tribal court has exceeded the limits of its jurisdiction. See 471 U.S., at 852–853, 105 S.Ct., at

2451–2452. We further held, however, that the federal ***449** suit was premature. Ordinarily, we explained, a federal court should stay its hand "until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.*, at 857, 105 S.Ct., at 2454. Finding no cause for immediate federal-court intervention,[7] we remanded the case, leaving initially to the District Court the question "[w]hether the federal action should be dismissed, or merely held in abeyance pending ... further Tribal Court proceedings." *Ibid.*

[7] The Court indicated in *National Farmers* that exhaustion is not an unyielding requirement:
"We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." 471 U.S., at 856, n. 21, 105 S.Ct., at 2454, n. 21 (citation omitted).

Petitioners underscore the principal reason we gave in *National Farmers* for the exhaustion requirement there stated. Tribal-court jurisdiction over non-Indians in criminal cases is categorically restricted under *Oliphant*, we observed, while in civil matters "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S., at 855–856, 105 S.Ct., at 2453–2454 (footnote omitted).

The Court's recognition in *National Farmers* that tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings, and of the need to inspect relevant statutes, treaties, and other materials, does not limit *Montana* 's instruction. As the Court made plain in *Montana*, the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute. In *Montana* itself, the Court examined the treaties and legislation relied upon by the Tribe and explained ***450** why those measures did not aid the Tribe's case. See 450 U.S., at 557–563, 101 S.Ct., at 1254–1257. Only after and in light of that examination did the Court address the Tribe's assertion of "inherent sovereignty," and formulate, in response to that assertion, *Montana* 's general rule and exceptions to it. In sum, we do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts "to explain to the parties the precise basis for accepting [or rejecting] jurisdiction." 471 U.S., at 857, 105 S.Ct., at 2454.

Iowa Mutual involved an accident in which a member of the Blackfeet Indian Tribe was injured while driving a cattle truck within the boundaries of the reservation. 480 U.S., at 11, 107 S.Ct., at 973–974. The injured member was employed by a Montana corporation that operated a ranch on reservation land owned by Blackfeet Indians residing on the reservation. See *ibid.* The driver and his wife, also a Tribe member, sued in the Blackfeet Tribal Court, naming several defendants: the Montana corporation that employed the driver; the individual owners of the ranch; the insurer of the ranch; and an independent insurance adjuster representing the insurer. See *ibid.* Over the objection of the insurer and the insurance adjuster—both companies not owned by members of the Tribe—the Tribal Court determined that it had jurisdiction to adjudicate the case. See *id.*, at 12, 107 S.Ct., at 974.

Thereafter, the insurer commenced a federal-court action against the driver, his wife, the Montana corporation, and the ranch owners. ****1412** See *ibid.* Invoking federal jurisdiction based on the parties' diverse citizenship, see 28 U.S.C. § 1332, the insurer alleged that it had no duty to defend or indemnify the Montana corporation or the ranch owners because the injuries asserted by the driver and his wife fell outside the coverage of the applicable insurance policies. See 480 U.S., at 12–13, 107 S.Ct., at 974–975. The Federal District Court dismissed the insurer's action for lack of subject-matter jurisdiction, and the Court of Appeals affirmed. See *id.*, at 13–14, 107 S.Ct., at 974–975.

***451** We reversed. Holding that the District Court had diversity-of-citizenship jurisdiction over the insurer's complaint, we remanded, as in *National Farmers*, for a determination whether "the federal action should be stayed pending further Tribal Court proceedings or dismissed." 480 U.S., at 20, n. 14, 107 S.Ct., at 978, n. 14. The Court recognized in *Iowa Mutual* that the exhaustion rule stated in *National Farmers* was "prudential," not jurisdictional. 480 U.S., at 20, n. 14, 107 S.Ct., at 978, n. 14; see also *id.*, at 16, n. 8, 107 S.Ct., at 976, n. 8 (stating that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite"). Respect for tribal self-government made it appropriate "to give the tribal court a 'full opportunity to determine its own jurisdiction.' " *Id.*, at 16, 107 S.Ct., at 976 (quoting *National Farmers*, 471 U.S., at 857, 105 S.Ct., at 2454). That respect, the Court reasoned, was equally in order whether federal-court jurisdiction rested on § 1331 (federal question) or on § 1332 (diversity of citizenship). 480 U.S., at 17–18, 107 S.Ct., at 977–978. Elaborating on the point, the Court stated:

> "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States,* 450 U.S. 544, 565–566, 101 S.Ct. 1245 [1258–1259], 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152–153, 100 S.Ct. 2069 [2080–2081], 65 L.Ed.2d 10 (1980); *Fisher v. District Court [of Sixteenth Judicial Dist. of Mont.],* 424 U.S. [382,] 387–389 [96 S.Ct. 943, 946–948, 47 L.Ed.2d 106 (1976)]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.... In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion." *Id.,* at 18, 107 S.Ct., at 977–978.

Petitioners and the United States fasten upon the Court's statement that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts." Read in context, however, this language scarcely supports the view that the ***452** *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants.

The statement stressed by petitioners and the United States was made in refutation of the argument that "Congress intended the diversity statute to limit the jurisdiction of the tribal courts." 480 U.S., at 18, 107 S.Ct., at 978. The statement is preceded by three informative citations. The first citation points to the passage in *Montana* in which the Court advanced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U.S., at 565, 101 S.Ct., at 1258, with two prime exceptions, *id.,* at 565–566, 101 S.Ct., at 1258–1259. The case cited second is *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) a decision the *Montana* Court listed as illustrative of the first *Montana* exception, applicable to "nonmembers who enter consensual relationships with the tribe or its members," 450 U.S., at 565–566, 101 S.Ct., at 1258–1259; the Court in *Colville* acknowledged inherent tribal authority to tax "non-Indians entering the reservation to engage in economic activity," 447 U.S., at 153, 100 S.Ct., at 2081. The third case noted in conjunction with the *Iowa Mutual* statement is *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.,* 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (*per curiam*), a decision the *Montana* Court cited in support of the second *Montana* exception, covering on-reservation activity of nonmembers bearing directly "on the political integrity, the economic security, or the health or ****1413** welfare of the tribe." 450 U.S., at 566, 101 S.Ct., at 1258. The Court held in *Fisher* that a tribal court had exclusive jurisdiction over an adoption proceeding when all parties were members of the tribe and resided on its reservation. See 424 U.S., at 383, 389, 96 S.Ct., at 944–945, 947–948. State-court jurisdiction over such matters, the Court said, "plainly would interfere with the powers of self-government conferred upon the ... Tribe and exercised through the Tribal Court." *Id.,* at 387, 96 S.Ct., at 947. The Court observed in *Fisher* that state courts may not exercise jurisdiction over disputes arising out of ***453** on-reservation conduct—even over matters involving non-Indians—if doing so would " 'infring[e] on the right of reservation Indians to make their own laws and be ruled by them.' " *Id.,* at 386, 96 S.Ct., at 946 (citation omitted).

In light of the citation of *Montana*, *Colville,* and *Fisher*, the *Iowa Mutual* statement emphasized by petitioners does not limit the *Montana* rule. In keeping with the precedent to which *Iowa Mutual* refers, the statement stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, "[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts." 480 U.S., at 18, 107 S.Ct., at 977.

Recognizing that our precedent has been variously interpreted, we reiterate that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement, a "prudential rule," see *Iowa Mutual,* 480 U.S., at 20, n. 14, 107 S.Ct., at 978, n. 14, based on comity, see *id.,* at 16, n. 8, 107 S.Ct., at 976, n. 8. These decisions do not expand or stand apart from *Montana* 's instruction on "the inherent sovereign powers of an Indian tribe." 450 U.S., at 565, 101 S.Ct., at 1258. While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." *Id.,* at 563, 101 S.Ct., at 1257. Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." *Id.,* at 565, 101 S.Ct., at 1258. As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe." *Ibid.*

***454** B

We consider next the argument that *Montana* does not govern this case because the land underlying the scene of the accident is held in trust for the Three Affiliated Tribes and their members. Petitioners and the United States point out that in *Montana*, as in later cases following *Montana* 's instruction—*Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), and *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993), described *supra*, at 6–7, n. 6—the challenged tribal authority related to nonmember activity on alienated, non-Indian reservation land. We "can readily agree," in accord with *Montana*, 450 U.S., at 557, 101 S.Ct., at 1254, that tribes retain considerable control over nonmember conduct on tribal land.[8] On the particular matter before us, however, we agree with respondents: The right-of-way North Dakota acquired for the State's highway renders the 6.59–mile stretch equivalent, for nonmember governance purposes,[9] to alienated, non-Indian land.

[8] Petitioners note in this regard the Court's unqualified recognition in *Montana* that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." 450 U.S., at 557, 101 S.Ct., at 1254. The question addressed was "the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." *Ibid.;* see Brief for Petitioners 15–16.

[9] For contextual treatment of rights-of-way over Indian land, compare 18 U.S.C. § 1151 (defining "Indian country" in criminal law chapter generally to include "rights-of-way running through [a] reservation") with §§ 1154(c) and 1156 (term "Indian country," as used in sections on dispensation and possession of intoxicants, "does not include ... rights-of-way through Indian reservations").

****1414** Congress authorized grants of rights-of-way over Indian lands in 1948 legislation. Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323–328. A grant over land belonging to a tribe requires "consent of the proper tribal officials," § 324, ***455** and the payment of just compensation, § 325.[10] The grant involved in this case was made, pursuant to the federal statute, in 1970. Its purpose was to facilitate public access to Lake Sakakawea, a federal water resource project under the control of the Army Corps of Engineers.

[10] Rights-of-way granted over lands of individual Indians also require payment of compensation, 25 U.S.C. § 325, and ordinarily require consent of the individual owners, see § 324 (describing circumstances in which rights-of-way may be granted without the consent of owners).

In the granting instrument, the United States conveyed to North Dakota "an easement for a right-of-way for the realignment and improvement of North Dakota State Highway No. 8 over, across and upon [specified] lands." App. to Brief for Respondents 1. The grant provides that the State's "easement is subject to any valid existing right or adverse claim and is without limitation as to tenure, so long as said easement shall be actually used for the purpose ... specified." *Id.*, at 3. The granting instrument details only one specific reservation to Indian landowners:

> "The right is reserved to the Indian land owners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupan[cy] of the premises affected by the right-of-way; such crossings to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way, which may be occasioned by such crossings." *Id.*, at 3–4.

Apart from this specification, the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way.

Forming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's ***456** control.[11] The Tribes have consented to, and received payment for, the State's use of the 6.59–mile stretch for a public highway. They have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude. Cf. *Bourland*, 508 U.S., at 689, 113 S.Ct., at 2316–2317 (regarding reservation land acquired by the United States for operation of a dam and a reservoir, Tribe's loss of "right of absolute and exclusive use and occupation ... implies the loss of regulatory jurisdiction over the use of the land by others"). We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case.

[11] We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law. Cf. *State v. Schmuck*, 121 Wash.2d 373, 390, 850 P.2d 1332, 1341 (en banc) (recognizing that a limited tribal power "to stop and detain alleged offenders in no way confers an *unlimited* authority to regulate the right of the public to travel on the Reservation's roads"), cert. denied, 510 U.S. 931, 114 S.Ct. 343, 126 L.Ed.2d 308 (1993).

III

Petitioners and the United States refer to no treaty or statute authorizing the Three Affiliated Tribes to entertain highway-accident tort suits of the kind Fredericks commenced against A–1 Contractors and Stockert. Rather, petitioners and the United States ground their defense of tribal-court jurisdiction exclusively on the concept of retained or inherent sovereignty. *Montana*, we have explained, is the controlling decision for this case. To prevail here, petitioners must show that Fredericks' tribal-court action against nonmembers qualifies under one of *Montana* 's two exceptions.

[2] ****1415** The first exception to the *Montana* rule covers "activities of nonmembers who enter consensual relationships with the ***457** tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S., at 565, 101 S.Ct., at 1258. The tortious conduct alleged in Fredericks' complaint does not fit that description. The dispute, as the Court of Appeals said, is "distinctly non-tribal in nature." 76 F.3d, at 940. It "arose between two non-Indians involved in [a] run-of-the-mill [highway] accident." *Ibid.* Although A–1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, "Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident." *Ibid.*

Montana 's list of cases fitting within the first exception, see 450 U.S., at 565–566, 101 S.Ct., at 1258–1259, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (C.A.8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority ... to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U.S., at 152–154, 100 S.Ct., at 2080–2082 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status"). Measured against these cases, the Fredericks–Stockert highway accident presents no "consensual relationship" of the qualifying kind.

[3] The second exception to *Montana* 's general rule concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S., at 566, 101 S.Ct., at 1258. Undoubtedly, those ***458** who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana* 's second exception requires no more, the exception would severely shrink the rule. Again, cases cited in *Montana* indicate the character of the tribal interest the Court envisioned.

The Court's statement of *Montana* 's second exceptional category is followed by citation of four cases, *ibid.;* each of those cases raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government. In two of the cases, the Court held that a State's exercise of authority would so intrude, and in two, the Court saw no impermissible intrusion.

The Court referred first to the decision recognizing the exclusive competence of a tribal court over an adoption proceeding when all parties belonged to the Tribe and resided on its reservation. See *Fisher*, 424 U.S., at 386, 96 S.Ct., at 946; *supra*, at 1412-1413. Next, the Court listed a decision holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store. See *Williams*, 358 U.S., at 220, 79 S.Ct., at 270–271 ("[A]bsent governing Acts of Congress, the question [of state-court jurisdiction over on-reservation conduct] has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."). Thereafter, the Court referred to two decisions dealing with objections to a county or territorial government's

imposition of a property tax on non-Indian-owned livestock that grazed on reservation land; in neither case did the Court find a significant tribal interest at stake. See *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–129, 26 S.Ct. 197, 200–201, 50 L.Ed. 398 (1906) ("the Indians' interest in this kind of property [livestock], situated on their reservations, was not sufficient to exempt such property, ****1416** when owned by private individuals, from [state or territorial] taxation"); *Thomas v. Gay*, 169 U.S. 264, 273, 18 S.Ct. 340, 343, 42 L.Ed. 740 (1898) ("[territorial] ***459** tax put upon the cattle of [non-Indian] lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians").

[4] Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.... But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." 450 U.S., at 564, 101 S.Ct., at 1257–1258. Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S., at 220, 79 S.Ct., at 271. The *Montana* rule, therefore, and not its exceptions, applies to this case.

Gisela Fredericks may pursue her case against A–1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's highway.[12] Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A–1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court[13] is not crucial to "the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes]." *Montana*, 450 U.S., at 566, 101 S.Ct., at 1258.[14]

12 See *supra*, at 1409, n. 4.

13 Within the federal system, when nonresidents are the sole defendants in a suit filed in state court, the defendants ordinarily may remove the case to federal court. See 28 U.S.C. § 1441.

14 When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana* 's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854, 105 S.Ct. 2447, 2452–2453, 85 L.Ed.2d 818 (1985). Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see *supra*, at 1410–1411, must give way, for it would serve no purpose other than delay. Cf. *National Farmers*, 471 U.S., at 856, n. 21, 105 S.Ct., at 2454, n. 21; *supra*, at 1411, n. 7.
***460** * * *

For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is

Affirmed.

All Citations

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101 S.Ct. 1245
Supreme Court of the United States

State of MONTANA et al., Petitioners,
v.
UNITED STATES et al.

No. 79–1128.
|
Argued Dec. 3, 1980.
|
Decided March 24, 1981.
|
Rehearing Denied June 1, 1981.
|
See 452 U.S. 911, 101 S.Ct. 3042.

Synopsis

The United States in its own right and as fiduciary on behalf of Crow Tribe of Indians sought to quiet title to the bed and banks of the Big Horn River. The United States District Court for the District of Montana, 457 F.Supp. 599, declared that the state of Montana owned the bed and banks of the Big Horn River. The Court of Appeals, Ninth Circuit, reversed and remanded, 604 F.2d 1162. On writ of certiorari, the Supreme Court, Justice Stewart, held that: (1) title to the bed of the Big Horn River passed to Montana upon its admission to the Union, and (2) the Crow Indian Tribe had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

Judgment of Court of Appeals reversed, and case remanded.

Justice Blackmun filed an opinion dissenting in part, in which Justice Brennan and Justice Marshall joined.

Justice Stevens filed a concurring opinion.

West Headnotes (17)

[1] **Water Law**
Rights to bed in general
Water Law
Ownership by State

Owners of land riparian to nonnavigable streams may own adjacent riverbed, but conveyance by United States of land riparian to navigable river carries no interest in the riverbed, but, rather, ownership of land under navigable waters is incident of sovereignty.

8 Cases that cite this headnote

[2] **Water Law**
Title and rights held in public trust

As general principle, ownership of land under navigable waters is held in trust by federal government for future states, to be granted to such states when they enter Union and assume sovereignty on equal footing with established states.

14 Cases that cite this headnote

[3] **Federal Courts**
Water
Water Law
Navigation

After state enters Union, title to land under navigable waters therein is governed by state law, subject to only one limitation, i. e., paramount power of the United States to ensure that such waters remain free for interstate and foreign commerce.

9 Cases that cite this headnote

[4] **Water Law**
Power to grant

Congress may convey lands below high-water mark of navigable water, and so defeat title of a new state, in order to perform international obligations, or to effect improvement of such

lands for promotion and convenience of commerce with foreign nations and among several states, or to carry out other public purposes appropriate to objects for which the United States holds the Territory. Treaty With the Crow Indians, Arts. I et seq., II, 15 Stat. 649; Treaty of Fort Laramie, 11 Stat. 749.

20 Cases that cite this headnote

[5] **Water Law**
Grants to and Acquisition by Private Owners or Municipalities
Water Law
Grant as incident to grant of riparian lands

Control over property underlying navigable waters is so strongly identified with sovereign power of government that it will not be held that United States has conveyed such land except because of some international duty or public exigency, and thus court deciding question of title to bed of navigable water must begin with strong presumption against conveyance by the United States and must not infer such unless the intention was definitely declared or otherwise made plain or was rendered in clear and special words or unless claim confirmed in terms embraces land under waters of the stream.

29 Cases that cite this headnote

[6] **Indians**
Lands included and boundaries; appropriation and diminishment
Water Law
Grant as incident to grant of riparian lands

Mere fact that bed of navigable water lies within boundaries described in treaty does not make riverbed part of conveyed land, especially when there is no express reference to riverbed that might overcome presumption against its conveyance. Treaty With the Crow Indians, Arts. I et seq., II, 15 Stat. 649; Treaty of Fort Laramie, 11 Stat. 749; Act Feb. 8, 1887, ch. 119, 24 Stat. 388; Act June 4, 1920, ch. 224, 41 Stat. 751; 18 U.S.C.A. § 1165; 33 U.S.C.A. § 10; 43 U.S.C.A. § 931.

22 Cases that cite this headnote

[7] **Indians**
Treaties, construction, and operation in general
Water Law
Rights incident to state's admission to Union in general

Whatever property rights were created by treaty with Crow Tribe, there was failure to overcome established presumption that beds of navigable waters remained in trust for future states and passed to new states when they assumed sovereignty. Treaty With the Crow Indians, Arts. I et seq., II, IV, 15 Stat. 649; Treaty of Fort Laramie, 11 Stat. 749; Act Feb. 8, 1887, ch. 119, 24 Stat. 388; Act June 4, 1920, ch. 224, 41 Stat. 751; 33 U.S.C.A. § 10; 43 U.S.C.A. § 931.

18 Cases that cite this headnote

[8] **Water Law**
Rights incident to state's admission to Union in general

Title to bed of Big Horn River passed to state of Montana upon its admission into Union. Treaty With the Crow Indians, Arts. I et seq., II, IV, 15 Stat. 649; Treaty of Fort Laramie, 11 Stat. 749; Act Feb. 8, 1887, ch. 119, 24 Stat. 388; Act June 4, 1920, ch. 224, 41 Stat. 751; 18 U.S.C.A. § 1165; 33 U.S.C.A. § 10; 43 U.S.C.A. § 931.

5 Cases that cite this headnote

[9] **Indians**
Hunting, Fishing, and Similar Rights
Indians
Fishing Rights

Crow Tribe of Indians has power to prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and if Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging fee or establishing bag and creel limits. Treaty With the Crow Indians, Arts. I et seq., II, 15 Stat. 649; Act Feb. 8, 1887, ch. 119, 24 Stat. 388; Act June 4, 1920, ch. 224, 41 Stat. 751.

26 Cases that cite this headnote

[10] **Indians**
Treaties in General

Purposes of 1851 Treaty with Crow Tribe were to assure safe passage for settlers across lands of various Indian tribes, to compensate Tribes for loss of buffalo, other game animals, timber and forage, to delineate tribal boundaries, to promote intertribal peace and to establish way of identifying Indians who committed depredations against non-Indians. Treaty of Fort Laramie, 11 Stat. 749.

7 Cases that cite this headnote

[11] **Indians**
Reservations or Grants to Indian Nations or Tribes

The 1868 Fort Laramie Treaty with Crow Tribe obligated United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe. Treaty With the Crow Indians, Arts. II, IV, 15 Stat. 649; 18 U.S.C.A. § 1165.

12 Cases that cite this headnote

[12] **Indians**
Allotment or Partition

Policy of Allotment Act was eventual assimilation of Indian population and gradual extinction of Indian reservations and Indian titles. Indian General Allotment Act, § 1 et seq., 25 U.S.C.A. § 331 et seq.; Act June 4, 1920, ch. 224, 41 Stat. 751.

5 Cases that cite this headnote

[13] **Indians**
Hunting, Fishing, and Similar Rights
Indians
Fishing Rights

Neither language of 1868 Fort Laramie Treaty nor federal trespass statute provides support for tribal authority to regulate hunting and fishing on land owned by non-Indians. Treaty With the Crow Indians, Arts. II, IV, 15 Stat. 649; 18 U.S.C.A. §§ 1151, 1165.

13 Cases that cite this headnote

[14] **Indians**
Hunting, Fishing, and Similar Rights
Indians
Fishing Rights

Crow Indian Tribe does not have “inherent sovereignty” so broad as to constitute source for power on part of Tribe to regulate non-Indian hunting and fishing on non-Indian lands within reservation. Treaty With the Crow Indians, Arts. II, IV, 15 Stat. 649; 18 U.S.C.A. § 1165.

90 Cases that cite this headnote

[15] **Indians**
Domestic relations, marriage and dissolution of marriage in general
Indians
Government of Indian Country, Reservations, and Tribes in General
Indians

Membership

In addition to power to punish tribal offenders, Indian tribes retain inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members, but exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with dependent status of the tribes and cannot survive without express congressional delegation. Treaty With the Crow Indians, Arts. II, IV, 15 Stat. 649; Treaty of Fort Laramie, 11 Stat. 749; Indian General Allotment Act, § 1 et seq., 25 U.S.C.A. § 331 et seq.; Act June 4, 1920, ch. 224, 41 Stat. 751; Indian Reorganization Act, § 1 et seq., 25 U.S.C.A. § 461 et seq.

209 Cases that cite this headnote

[16] **Indians**
Regulation of non-members by tribe or tribal government

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands, and tribe may regulate, through taxation, licensing or other means, activities of nonmembers who enter consensual relationships with tribe or its members, through commercial dealing, contracts, leases or other arrangements. Treaty With the Crow Indians, Arts. II, IV, 15 Stat. 649; Treaty of Fort Laramie, 11 Stat. 749; Indian General Allotment Act, § 1 et seq., 25 U.S.C.A. § 331 et seq.; Act June 4, 1920, ch. 224, 41 Stat. 751; Indian Reorganization Act, § 1 et seq., 25 U.S.C.A. § 461 et seq.

465 Cases that cite this headnote

[17] **Indians**
Regulation of non-members by tribe or tribal government

Indian tribe may retain inherent power to exercise civil authority over conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe. Treaty With the Crow Indians, Arts. II, IV, 15 Stat. 649; 18 U.S.C.A. § 1165.

432 Cases that cite this headnote

****1247** *Syllabus*[*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***544** By a tribal regulation, the Crow Tribe of Montana sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the Tribe. Relying on its purported ownership of the bed of the Big Horn River, on treaties which created its reservation, and on its inherent power as a sovereign, the Tribe claimed authority to prohibit hunting and fishing by nonmembers of the Tribe even on lands within the reservation owned in fee simple by non-Indians. Montana, however, continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation. The First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or passing over" any of the lands in dispute. In 1868, the Second Treaty of Fort Laramie established the Crow Reservation, including land through which the Big Horn River flows, and provided that the reservation "shall be ... set apart for the absolute and undisturbed use and occupation" of the Tribe, and that no non-Indians except Government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. To resolve the conflict between the Tribe and the State, the United States, proceeding in its own right and as fiduciary for the Tribe, filed the present action, seeking a declaratory judgment quieting title to ****1248** the riverbed in the United States as trustee for the Tribe and establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and an

injunction requiring Montana to secure the Tribe's permission before issuing hunting or fishing licenses for use within the reservation. The District Court denied relief, but the Court of Appeals reversed. It held that the bed and banks of the river were held by the United States in trust for the Tribe; that the Tribe could regulate hunting and fishing within the reservation by nonmembers, except for hunting and fishing on fee lands by resident nonmember owners of those lands; and that nonmembers permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

Held :

1. Title to the bed of the Big Horn River passed to Montana upon ***545** its admission into the Union, the United States not having conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868. As a general principle, the Federal Government holds lands under navigable waters in trust for future States, to be granted to such States when they enter the Union, and there is a strong presumption against conveyance of such lands by the United States. The 1851 treaty failed to overcome this presumption, since it did not by its terms formally convey any land to the Indians at all. And whatever property rights the 1868 treaty created, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. Cf. *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465. Moreover, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. Pp. 1250–1254.

2. Although the Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to the Tribe or held by the United States in trust for the Tribe, it has no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. Pp. 1254–1259.

(a) The 1851 treaty nowhere suggested that Congress intended to grant such power to the Tribe. And while the 1868 treaty obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, thereby arguably conferring upon the Tribe authority to control fishing and hunting on those lands, that authority can only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation" and cannot apply to subsequently alienated lands held in fee by non-Indians. Cf. *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667. Nor does the federal trespass statute, 18 U.S.C. § 1165, which prohibits trespassing to hunt or fish, "augment" the Tribe's regulatory powers over non-Indian lands. That statute is limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians, and Congress deliberately excluded fee-patented lands from its scope. Pp. 1254–1257.

(b) The Tribe's "inherent sovereignty" does not support its regulation of non-Indian hunting and fishing on non-Indian lands within the reservation. Through their original incorporation into the United States, as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers of the tribe. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303. Exercise of tribal power beyond what ***546** is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Here, regulation of hunting and fishing by nonmembers of the Tribe on lands no longer owned by the Tribe bears no clear relationship ****1249** to tribal self-government or internal relations. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Tribe so as to subject themselves to tribal civil jurisdiction. And nothing suggests that such non-Indian hunting and fishing so threatened the Tribe's political or economic security as to justify tribal regulation. Pp. 1257–1259.

9 Cir., 604 F.2d 1162, reversed and remanded.

Attorneys and Law Firms

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Louis F. Claiborne, Washington, D. C., for respondent U. S.

Thomas J. Lynaugh, Billings, Mont., for respondent Crow Tribe of Indians.

Opinion

***547** Justice STEWART delivered the opinion of the Court.

This case concerns the sources and scope of the power of

an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries. We granted certiorari, 445 U.S. 960, 100 S.Ct. 1645, 64 L.Ed.2d 234 to review a decision of the United States Court of Appeals for the Ninth Circuit that substantially upheld this claim.

I

The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now southern Montana. In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the ***548** signatory tribes acknowledged various designated lands as their respective territories. See 11 Stat. 749 and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter Kappler). The treaty identified approximately 38.5 million acres as Crow territory and, in Article 5, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or passing over" any of the lands in dispute. In 1868, the Second Treaty of Fort Laramie established a Crow Reservation of roughly 8 million acres, including land through which the Big Horn River flows. 15 Stat. 649. By Article II of the treaty, the United States agreed that the reservation "shall be ... set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-Indians except agents of the Government "shall ever be permitted to pass over, settle upon, or reside in" the reservation.

Several subsequent Acts of Congress reduced the reservation to slightly fewer than 2.3 million acres. See 22 Stat. 42 (1882); § 31, 26 Stat. 1039–1040 (1891); ch. 1624, 33 Stat. 352 (1904); ch. 890, 50 Stat. 884 (1937). In addition, the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, authorized the issuance of patents in fee to individual Indian allottees within the reservation. Under these Acts, an allottee could alienate his land to a non-Indian after holding it for 25 years. Today, roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.

Since the 1920's, the State of Montana has stocked the waters of the reservation with fish, and the construction of a dam by the United States made trout fishing in the Big Horn River possible. The reservation also contains game, some of it stocked by the State. Since the 1950's, the Crow Tribal ***549** Council has passed several resolutions ****1250** respecting hunting and fishing on the reservation, including Resolution No. 74–05, the occasion for this lawsuit. That resolution prohibits hunting and fishing within the reservation by anyone who is not a member of the Tribe. The State of Montana, however, has continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation.

On October 9, 1975, proceeding in its own right and as fiduciary for the Tribe, the United States endeavored to resolve the conflict between the Tribe and the State by filing the present lawsuit. The plaintiff sought (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

The District Court denied the relief sought. 457 F.Supp. 599. In determining the ownership of the river, the court invoked the presumption that the United States does not intend to divest itself of its sovereign rights in navigable waters and reasoned that here, as in *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465, the language and circumstances of the relevant treaties were insufficient to rebut the presumption. The court thus concluded that the bed and banks of the river had remained in the ownership of the United States until they passed to Montana on its admission to the Union. As to the dispute over the regulation of hunting and fishing the court found that "[i]mplicit in the Supreme Court's decision in *Oliphant* [*v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209] is the recognition that Indian tribes do not have the power, nor do they have the authority to regulate non-Indians unless so granted by an act of Congress." 457 F.Supp., at 609. Because no treaty or Act of Congress gave the Tribe authority to regulate hunting or fishing by non-Indians, the court held ***550** that the Tribe could not exercise such authority except by granting or withholding authority to trespass on

tribal or Indian land. All other authority to regulate non-Indian hunting and fishing resided concurrently in the State of Montana and, under 18 U.S.C. § 1165 (which makes it a federal offense to trespass on Indian land to hunt or fish without permission), the United States.

The Court of Appeals reversed the judgment of the District Court. 604 F.2d 1162. Relying on its opinion in *United States v. Finch*, 548 F.2d 822, vacated on other grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048, the appellate court held that, pursuant to the treaty of 1868, the bed and banks of the river were held by the United States in trust for the Tribe. Relying on the treaties of 1851 and 1868, the court held that the Tribe could regulate hunting and fishing within the reservation by nonmembers, although the court noted that the Tribe could not impose criminal sanctions on those nonmembers. The court also held, however, that the two Allotment Acts implicitly deprived the Tribe of the authority to prohibit hunting and fishing on fee lands by resident non-member owners of those lands. Finally, the court held that non-members permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

II

The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River.[1] The question ****1251** is whether the United States ***551** conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627–628, 90 S.Ct. 1328, 1332–1333, 25 L.Ed.2d 615.

[1] According to the respondents, the Crow Tribe's interest in restricting hunting and fishing on the reservation focuses almost entirely on sports fishing and duck hunting in the waters and on the surface of the Big Horn River. The parties, the District Court, and the Court of Appeals have all assumed that ownership of the riverbed will largely determine the power to control these activities. Moreover, although the complaint in this case sought to quiet title only to the bed of the Big Horn River, we note the concession of the United States that if the bed of the river passed to Montana upon its admission to the Union, the State at the same time acquired ownership of the banks of the river as well.

[1] [2] [3] [4] [5] Though the owners of land riparian to *nonnavigable* streams may own the adjacent riverbed, conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed. *Packer v. Bird*, 137 U.S. 661, 672, 11 S.Ct. 210, 212, 34 L.Ed. 819; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 289, 19 L.Ed. 74; 33 U.S.C. § 10; 43 U.S.C. § 931. Rather, the ownership of land under navigable waters is an incident of sovereignty. *Martin v. Waddell*, 16 Pet. 367, 409–411, 10 L.Ed. 997. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v. Hagan*, 3 How. 212, 222–223, 229, 11 L.Ed. 565. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. *United States v. Oregon*, 295 U.S. 1, 14, 55 S.Ct. 610, 615, 79 L.Ed. 1267. It is now established, however, that Congress may sometimes convey lands below the high-water mark of a navigable water,

> "[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively v. Bowlby*, 152 U.S. 1, 48, 14 S.Ct. 548, 566, 38 L.Ed. 331.

***552** But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon, supra*, at 14, 55 S.Ct., at 615, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S., at 55, 46 S.Ct., at 199. See also *Shively v. Bowlby, supra*, at 48, 14 S.Ct., at 566. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, *United States v. Oregon, supra*, at 14, 55 S.Ct., at 615, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank, supra*, 270 U.S.,

at 55, 46 S.Ct., at 199, or was rendered "in clear and especial words," *Martin v. Waddell*, *supra*, at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird*, *supra*, at 672, 11 S.Ct., at 212.[2]

[2] Congress was, of course, aware of this presumption once it was established by this Court. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660.

In *United States v. Holt State Bank*, *supra*, this Court applied these principles to reject an Indian Tribe's claim of title to the bed of a navigable lake. The lake lay wholly within the boundaries of the Red Lake Indian Reservation, which had been created by treaties entered into before Minnesota joined the Union. In these treaties the United States promised to "set apart and withhold from sale, for the use of" the ****1252** Chippewas, a large tract of land, Treaty of Sept. 30, 1854, 10 Stat. 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat. 1165. See *Minnesota v. Hitchcock*, 185 U.S. 373, 389, 22 S.Ct. 650, 656, 46 L.Ed. 954.[3] The Court concluded that there was nothing in the treaties "which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose ***553** to depart from the established policy ... of treating such lands as held for the benefit of the future State." *United States v. Holt State Bank*, 270 U.S., at 58–59, 46 S.Ct., at 200. Rather, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.*, at 58, 46 S.Ct., at 200.

[3] The *Hitchcock* decision expressly stated that the Red Lake Reservation was "a reservation within the accepted meaning of the term." 185 U.S., at 389, 22 S.Ct., at 656.

[6] [7] The Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty. The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories. Treaty of Fort Laramie, 1851, Art. 5, 2 Kappler 594–595. It referred to hunting and fishing only insofar as it said that the Crow Indians "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," a statement that had no bearing on ownership of the riverbed. By contrast, the 1868 treaty did expressly convey land to the Crow Tribe. Article II of the treaty described the reservation land in detail[4] and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named...." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650. The treaty then stated:

[4] "[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning...." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650.

> "[T]he United States now solemnly agrees that no persons, except those herein designated and authorized to ***554** do so, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians...." *Ibid.*

Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. The treaty in no way expressly referred to the riverbed, *Packer v. Bird*, 137 U.S., at 672, 11 S.Ct., at 212, nor was an intention to convey the riverbed expressed in "clear and especial words," *Martin v. Waddell*, 16 Pet., at 411, or "definitely declared or otherwise made very plain," *United States v. Holt State Bank*, 270 U.S., at 55, 46 S.Ct., at 199. Rather, as in *Holt*, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.*, at 58, 46 S.Ct., at 200.

Though Article 2 gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches. The mere fact that the bed of a ****1253** navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance. In the Court of Appeals' *Finch* decision, on which recognition of the Crow Tribe's title to the riverbed rested in this case, that court construed the language of exclusivity in the 1868 treaty as granting to the Indians all

the lands, including the riverbed, within the described boundaries. *United States v. Finch*, 548 F.2d, at 829. Such a construction, however, cannot survive examination. ***555** As the Court of Appeals recognized, *ibid.*, and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as "absolute and undisturbed use and occupation" and "no persons, except those herein designated ... shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this "right of exclusivity" could not have the meaning that the Court of Appeals ascribed to it.[5]

[5] In one recent case, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615, this Court did construe a reservation grant as including the bed of a navigable water, and the respondents argue that this case resembles *Choctaw Nation* more than it resembles the established line of cases to which *Choctaw Nation* is a singular exception. But the finding of a conveyance of the riverbed in *Choctaw Nation* was based on very peculiar circumstances not present in this case.

Those circumstances arose from the unusual history of the treaties there at issue, a history which formed an important basis of the decision. *Id.* at 622–628, 90 S.Ct., at 1330–1333. Immediately after the Revolutionary War, the United States had signed treaties of peace and protection with the Cherokee and Choctaw Tribes, reserving them lands in Georgia and Mississippi. In succeeding years the United States bought large areas of land from the Indians to make room for white settlers who were encroaching on tribal lands, but the Government signed new treaties guaranteeing that the Indians could live in peace on those lands not ceded. The United States soon betrayed that promise. It proposed that the Tribes be relocated in a newly acquired part of the Arkansas Territory, but the new territory was soon overrun by white settlers, and through a series of new cession agreements the Indians were forced to relocate farther and farther west. Ultimately, most of the Tribes' members refused to leave their eastern lands, doubting the reliability of the Government's promises of the new western land, but Georgia and Mississippi, anxious for the relocation westward so they could assert jurisdiction over the Indian lands, purported to abolish the Tribes and distribute the tribal lands. The Choctaws and Cherokees finally signed new treaties with the United States aimed at rectifying their past suffering at the hands of the Federal Government and the States.

Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas Territory in fee simple, and also pledged that "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation ... and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333–334, quoted in *Choctaw Nation v. Oklahoma*, 397 U.S., at 625, 90 S.Ct., at 1331. In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would not become part of any State or Territory. *Id.*, at 626, 90 S.Ct., at 1332. In concluding that the United States had intended to convey the riverbed to the Tribes before the admission of Oklahoma to the Union, the *Choctaw* Court relied on these circumstances surrounding the treaties and placed special emphasis on the Government's promise that the reserved lands would never become part of any State. *Id.*, at 634–635, 90 S.Ct., at 1336. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

***556** Moreover, even though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, 152 U.S., at 48, 14 S.Ct., at 566, justifying a congressional conveyance of a riverbed, see, *e. g., Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 85, 39 S.Ct. 40, 63 L.Ed. 138, the situation of the Crow Indians at the time of the ****1254** treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively v. Bowlby, supra*, at 48, 14 S.Ct., at 566. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. 1 App. 74. Cf., *Alaska Pacific Fisheries v. United States, supra*, at 88, 39 S.Ct., at 41; *Skokomish Indian Tribe v. France*, 320 F.2d 205, 212 (CA9).

[8] For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its ***557** admission into the Union, and that the Court of Appeals was in error in holding otherwise.

III

[9] Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one. The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F.2d, at 1165–1166, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. *Ibid.* What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by non-member resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id.*, at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Ibid.*

The Court of Appeals found two sources for this tribal regulatory power: the Crow treaties, "augmented" by 18 U.S.C. § 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion.

A

[10] The purposes of the 1851 treaty were to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of iden tifying ***558** Indians who committed depredations against non-Indians. As noted earlier, the treaty did not even create a reservation, although it did designate tribal lands. See *Crow Tribe v. United States*, 284 F.2d 361, 364, 366, 368, 151 Ct.Cl. 281, 285–286, 289, 292–293. Only Article 5 of that Treaty referred to hunting and fishing, and it merely provided that the eight signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 2 Kappler 595.[6] The treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands. Indeed, the Court of Appeals acknowledged that after the treaty was signed non-Indians, as well as members of other Indian tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows. 604 F.2d, at 1167.

6 The complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired this privilege.

[11] [12] The 1868 Fort Laramie Treaty, 15 Stat. 649, reduced the size of the Crow territory designated by the 1851 treaty. ****1255** Article II of the treaty established a reservation for the Crow Tribe, and provided that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them ...," (emphasis added) and that "the United States now solemnly agrees that no persons, except those herein designated and authorized so to do ... shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians...." The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe ***559** the authority to control fishing and hunting on those lands.[7] But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, and the Crow Allotment Act of 1920, 41 Stat. 751.[8] If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.[9]

7 Article IV of the treaty addressed hunting rights specifically. But that Article referred only to "unoccupied lands of the United States," *viz.*, lands outside the reservation boundaries, and is accordingly not relevant here.

8 The 1920 Crow Allotment Act was one of the special Allotment Acts Congress passed from time to time pursuant to the policy underlying the General Allotment Act. See S.Rep.No.219, 66th Cong., 1st Sess., 5 (1919). The Senate Committee Report on the Crow Allotment bill stated that it "is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the [General Allotment Act]." *Ibid.*.

[9] The Court of Appeals discussed the effect of the Allotment Acts as follows:

> "While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts." 604 F.2d 1162, 1168 (footnote omitted).

But nothing in the Allotment Acts supports the view of the Court of Appeals that the Tribe could nevertheless bar hunting and fishing by non-resident fee owners. The policy of the Acts was the eventual assimilation of the Indian population. *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 569, 7 L.Ed.2d 573, and the "gradual extinction of Indian reservations and Indian titles." *Draper v. United States*, 164 U.S. 240, 246, 17 S.Ct. 107, 109, 41 L.Ed. 419. The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. See, *e. g.*, Secretary of the Interior Ann.Rep., vol. 1, pp. 25–28 (1885); Secretary of the Interior Ann.Rep., vol. 1, p. 4 (1886); Commissioner of Indian Affairs Ann.Rep., vol. 1, pp. IV–X (1887); Secretary of the Interior Ann.Rep., vol. 1, pp. XXIX–XXXII (1888); Commissioner of Indian Affairs Ann.Rep. 3–4 (1889); Commissioner of Indian Affairs Ann.Rep. VI, XXXIX (1890); Commissioner of Indian Affairs Ann.Rep., vol. 1, pp. 3–9, 26 (1891); Commissioner of Indian Affairs Ann.Rep. 5 (1892); Secretary of the Interior Ann.Rep., vol. 1, p. IV (1894). And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations. See, *e. g.*, 11 Cong.Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783–784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881).

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. See, *e. g.*, *id.*, at Cong.Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Sens. Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Sens. Edmunds and Williams). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if fee-holders could be excluded from fishing or hunting on their acquired property.

The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, at 25 U.S.C. § 461 *et seq.* But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.

****1256** [13] ***560** In *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (*Puyallup III*), the relevant treaty included language virtually identical to that in the 1868 Treaty of Fort Laramie. The Puyallup Reservation was to be "set apart, and, so far ***561** as necessary, surveyed and marked out for their exclusive use ... [and no] white man [was to] be permitted to reside upon the same without permission of the tribe...." See*id.*, at 174, 97 S.Ct., at 2622. The Puyallup Tribe argued that those words amounted to a grant of authority to fish free of state interference. But this Court rejected that argument, finding, in part, that it "clashe[d] with the subsequent history of the reservation ...," *ibid.*, notably two Acts of Congress under which the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. Thus, "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use.' " *Ibid. Puyallup III* indicates, therefore, that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians.

The Court of Appeals also held that the federal trespass statute, 18 U.S.C. § 1165, somehow "augmented" the Tribe's regulatory powers over non-Indian land. 604 F.2d, at 1167. If anything, however, that statute suggests the absence of such authority, since Congress deliberately excluded fee-patented lands from the statute's scope. The statute provides:

> "Whoever, without lawful authority or permission, willfully and

> knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined ....”

The statute is thus limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use ***562** by Indians.[10] If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of “Indian country” in 18 U.S.C. § 1151: “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” Indeed, a Subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of the Interior recommended against doing so in a letter dated May 23, 1958. The Department pointed out that a previous congressional Report, H.R.Rep.No.2593, 85th Cong., 2d Sess. (1958),[11] had made clear that the bill ****1257** contained no implication that it would apply to land other than that held or controlled by Indians or the United States.[12] ***563** The Committee on the Judiciary then adopted the present language, which does not reach fee-patented lands within the boundaries of an Indian reservation.

10 See *United States v. Bouchard*, 464 F.Supp. 1316, 1336 (W D Wis.); *United States v. Pollmann*, 364 F.Supp. 995 (D C Mont.).

11 House Report No.2593 stated that the purpose of the bill that became 18 U.S.C. § 1165 was to make it unlawful to enter Indian land to hunt, trap, or fish without the consent of the individual Indian or tribe:

> “Indian property owners should have the same protection as other property owners, for example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity.
>
> “Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers.” H.R.Rep.No.2593, 85th Cong., 2d Sess., at 2.

12 Subsequent Reports in the House and Senate, H.R.Rep.No.625, 86th Cong., 1st Sess. (1959); S.Rep.No.1686, 86th Cong., 2d Sess. (1960), also refer to “Indian lands” and “Indian property owners” rather than “Indian country.” In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, this Court referred to S.Rep.No.1686, which stated that “the legislation [18 U.S.C. § 1165] will give to the Indian tribes and to *individual Indian owners* certain rights that now exist as to others, and fills a gap in the present law for the protection of *their property*.” 435 U.S., at 206, 98 S.Ct., at 1019. (Emphasis added.)

Before the Court of Appeals decision, several other courts interpreted § 1165 to be confined to lands owned by Indians, or held in trust for their benefit. *State v. Baker*, 464 F.Supp. 1377 (W D Wis.); *United States v. Bouchard*, 464 F.Supp. 1316 (W D Wis.); *United States v. Pollmann*, *supra*; *Donahue v. California Justice Court*, 15 Cal.App.3d 557, 93 Cal.Rptr. 310. Cf. *United States v. Sanford*, 547 F.2d 1085, 1089 (CA9) (holding that § 1165 was designed to prevent encroachments on Indian lands, rejecting the argument that § 1165 makes illegal the unauthorized killing of wildlife on an Indian reservation, and noting that “the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations).

B

[14] Beyond relying on the Crow treaties and 18 U.S.C. § 1165 as source for the Tribe’s power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation, the Court of Appeals also identified that power as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation. 604 F.2d, at 1170. But “inherent sovereignty” is not so broad as to support the application of Resolution No. 74–05 to non-Indian lands.

This Court most recently reviewed the principles of inherent sovereignty in *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303. In that case, noting that Indian tribes are “unique aggregations possessing

attributes of sovereignty over both their members and their territory," *id.*, at 323, 98 S.Ct., at 1086, the Court upheld the power of a tribe to punish tribal members who violate tribal criminal laws. But the Court was careful to note that, through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. ***564** *Id.*, at 326, 98 S.Ct., at 1087. The Court distinguished between those inherent powers retained by the tribes and those divested:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe* ....
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.* (Emphasis added.)

[15] Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. ****1258** *Id.*, at 322, n. 18, 98 S.Ct., at 1085, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114; *Williams v. Lee*, 358 U.S. 217, 219–220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251; *United States v. Kagama*, 118 U.S. 375, 381–382, 6 S.Ct. 1109, 1112–1113, 30 L.Ed. 228; see *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171, 93 S.Ct. 1257, 1261, 36 L.Ed.2d 129. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations,[13] ***565** the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74–05.

[13] Any argument that Resolution No. 74–05 is necessary to Crow tribal self-government is refuted by the findings of the District Court that the State of Montana has traditionally exercised "near exclusive" jurisdiction over hunting and fishing on fee lands within the reservation, and that the parties to this case had accommodated themselves to the state regulation. 457 F.Supp. 599, 610. The Court of Appeals left these findings unaltered and indeed implicitly reaffirmed them, adding that the record reveals no attempts by the Tribe at the time of the Crow Allotment Act to forbid non-Indian hunting and fishing on reservation lands. 604 F.2d, at 1168, and n. 11A.

[16] [17] The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162—the first Indian case to reach this Court—that the Indian tribes have lost any "right of governing every person within their limits except themselves." 435 U.S., at 209, 98 S.Ct., at 1021. Though *Oliphant* only determined inherent tribal authority in criminal matters,[14] the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, *supra*, at 223, 79 S.Ct., at 272; ***566** *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030; *Buster v. Wright*, 135 F. 947, 950 (CA8); see *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–154, 100 S.Ct. 2069, 2080–2082, 65 L.Ed.2d 10. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 U.S. 382, 386, 96 S.Ct. 943, 946, 47 L.Ed.2d 106; *Williams v. Lee*, *supra*, at 220, 79 S.Ct., at 270; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–129, 26 S.Ct. 197, 200–201, 50 L.Ed. 398; *Thomas v. Gay*, 169 U.S. 264, 273, 18 S.Ct. 340, 343, 42 L.Ed. 740.[15]

[14] By denying the Suquamish Tribe criminal jurisdiction over non-Indians, however, the *Oliphant* case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen. Moreover, a tribe would not be able to rely

for enforcement on the federal criminal trespass statute, 18 U.S.C. § 1165, since that statute does not apply to fee patented lands. See *supra*, at 1256–1257, and nn. 10–12.

15 As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. *Arizona v. California*, 373 U.S. 546, 599, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542.

1259 No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe.[16] Furthermore, the District Court made express findings, left unaltered by the Court of Appeals, that the Crow Tribe has traditionally accommodated itself to the State's "near exclusive" regulation of hunting and fishing on fee lands within the reservation. 457 F.Supp., at 609–610. And the District Court found that Montana's statutory and regulatory scheme does not prevent the Crow Tribe from limiting ***567 or forbidding non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members. *Id.*, at 609.

16 Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the Crow Indians' treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State. Cf. *United States v. Washington*, 384 F.Supp. 312, 410–411 (W D Wash.), aff'd, 520 F.2d 676 (CA9).

IV

For the reasons stated in this opinion, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings.

It is so ordered.

***569** Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting in part.

Only two years ago, this Court reaffirmed that the terms of a treaty between the United States and an Indian tribe must be construed " 'in the sense in which they would naturally be understood by the Indians.' " *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 676, 99 S.Ct. 3055, 3070, 61 L.Ed.2d 823 (1979), quoting from *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1899). In holding today that the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court disregards this settled rule of statutory construction. Because I believe that the United States intended, and the Crow Nation understood, that the bed of the Big Horn was to belong to the Crow Indians, I dissent from so much of the Court's opinion as holds otherwise.[1]

1 While the complaint in this case sought to quiet title only to the bed of the Big Horn River, see *ante* at 1250, n. 1, I think it plain that if the bed of the river was reserved to the Crow Indians before statehood, so also were the banks up to the high-water mark.

I

As in any case involving the construction of a treaty, it is necessary at the outset to determine what ***570** the parties intended. *Washington v. Fishing Vessel Assn.*, 443 U.S., at 675, 99 S.Ct., at 3069. With respect to an Indian treaty, the Court has said that "the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." *Id.*, at 675–676, 99 S.Ct., at 3069–3070. Obviously, this rule is applicable here. But before determining what the Crow Indians must have understood the Treaties of Fort Laramie to mean, it is appropriate to ask what the United States intended, for our inquiry need go no further if the United States meant to convey the bed of the Big Horn River to the Indians.

The Court concedes that the establishment of an Indian reservation can be an "appropriate public purpose" justifying a ****1260** congressional conveyance of a

riverbed. *Ante*, at 1253. It holds, however, that no such public purpose or exigency could have existed here, since at the time of the Fort Laramie Treaties the Crow were a nomadic tribe dependent chiefly upon buffalo, and fishing was not important to their diet or way of life. *Ibid.* The factual premise upon which the Court bases its conclusion is open to serious question: while the District Court found that fish were not "a central part of the Crow diet," 457 F.Supp. 599, 602 (Mont.1978), there was evidence at trial that the Crow ate fish both as a supplement to their buffalo diet and as a substitute for meat in time of scarcity.[2]

[2] See 1 App. 39–40 (testimony of Joe Medicine Crow, Tribal Historian). See also *id.*, at 90, 97 (testimony of Henry Old Coyote). Thus, while one historian has stated that "I have never met a reference to eating of fish" by the Crow Indians, R. Lowie, The Crow Indians 72 (1935), it is clear that such references do exist. See 457 F.Supp., at 602. See also n. 7, *infra*.

Even if it were true that fishing was not important to the Crow Indians at the time the Fort Laramie Treaties came into being, it does not necessarily follow that there was no public purpose or exigency that could have led Congress to ***571** convey the riverbed to the Crow. Indeed, history informs us that the very opposite was true. In negotiating these treaties, the United States was actuated by two somewhat conflicting purposes: the desire to provide for the Crow Indians, and the desire to obtain the cession of all Crow territory not within the ultimate reservation's boundaries. Retention of ownership of the riverbed for the benefit of the future State of Montana would have been inconsistent with each of these purposes.

First: It was the intent of the United States that the Crow Indians be converted from a nomadic, hunting tribe to a settled, agricultural people.[3] The Treaty of Fort Laramie of Sept. 17, 1851, see 11 Stat. 749, and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter Kappler), was precipitated by the depletion of game, timber, and forage by the constantly increasing number of settlers who crossed the lands of the Plains Indians on their way to California. Aggrieved by these depredations, the Indians had opposed that passage, sometimes by force.[4] In order to ensure safe passage for the settlers, the United States in 1851 called together at Fort Laramie eight Indian Nations, including the Crow. The pronouncement made at that time by the United States Commissioner emphasized the Government's concern over the destruction of the game upon which the Indians depended.[5] The treaty's Art. 5, which set specified ***572** boundaries for the Indian Nations, explicitly provided that the signatory tribes "do not surrender the privilege of hunting, *fishing*, or passing over any of the tracts" described in the treaty, 2 Kappler, at 595 (emphasis added), and, further, its Art. 7 stated that the United States would provide an annuity in the form of "provisions, merchandise, domestic animals, and agricultural implements." *Ibid.*

[3] See generally *United States v. Sioux Nation of Indians*, 448 U.S. 371, 380, n. 11, 100 S.Ct. 2716, 2722, n. 11, 65 L.Ed.2d 844 (1980) (discussing federal reservation policy).

[4] The history of the events leading up to the Fort Laramie Treaty of 1851 is recounted in detail in *Crow Tribe of Indians v. United States*, 151 Ct.Cl. 281, 284 F.2d 361 (1960), cert. denied, 366 U.S. 924, 81 S.Ct. 1350, 6 L.Ed.2d 383 (1961); *Crow Nation v. United States*, 81 Ct.Cl. 238 (1935); and *Fort Berthold Indians v. United States*, 71 Ct.Cl. 308 (1930).

[5] According to an account published in the Saint Louis Republican, Oct. 26, 1851, Treaty Commissioner Mitchell stated:

> "The ears of your Great Father are always open to the complaints of his Red Children. He has heard and is aware that your buffalo and game are driven off and your grass and timber consumed by the opening of roads and the passing of emigrants through your countries. For these losses he desires to compensate you." Quoted in *Crow Tribe of Indians v. United States*, 151 Ct.Cl., at 290, 284 F.2d, at 366.

The same concern was expressed in internal communications of the Government. See, *e. g.*, *id.*, at 287–288, 284 F.2d, at 365 (letter of W. Medill, Commissioner of Indian Affairs to the Secretary of the Interior).

****1261** The intent of the United States to provide alternative means of subsistence for the Plains Indians is demonstrated even more clearly by the subsequent Fort Laramie Treaty of May 7, 1868, between the United States and the Crow Nation. 15 Stat. 649. United States Commissioner Taylor, who met with the Crow Indians in 1867, had acknowledged to them that the game upon which they relied was "fast disappearing," and had stated that the United States proposed to furnish them with "homes and cattle, to enable you to begin to raise a supply or stock with which to support your families when the game has disappeared."[6] Proceedings of the Great Peace Commission of 1867–1868, pp. 86–87 (Institute for the Development of Indian Law (1975)) (hereinafter Proceedings). Given this clear recognition by the United States that the traditional mainstay of the Crow Indians'

diet was disappearing, it is inconceivable that the United States intended by the 1868 treaty to deprive the Crow of "potential control over a source of food on their ***573** reservation."[7] *United States v. Finch*, 548 F.2d 822, 832 (CA9 1976), vacated on other grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977). See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918).[8]

[6] The 1868 treaty provided that members of the Crow Tribe who commenced farming would be allotted land and given agricultural supplies; it also provided that subsistence rations for a period of four years would be supplied to every Indian who agreed to settle on the reservation. See Arts. VI, VIII, and IX of the treaty, 15 Stat. 650–652.

[7] It is significant that in 1873 the United States Commissioners who sought to negotiate a further diminishment of the Crow Reservation were instructed by the very Act of Mar. 3, 1873, ch. 321, 17 Stat. 626, that "if there is upon such reservation a locality where fishing could be valuable to the Indians, [they should] include the same [in the diminished reservation] if practicable...."

That those fishing rights would have been valuable to the Crow Indians is suggested by the statement of Chief Blackfoot at the 1867 Fort Laramie Conference:

"There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. *There is plenty of fish too.* I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming." Proceedings, at 91. (Emphasis added.)

Edwin Thompson Denig, a white fur trader who resided in Crow territory from approximately 1833 until 1856, also remarked:

"Every creek and river teems with beaver, and good fish and fowl can be had at any stream in the proper season." E. Denig, Of the Crow Nation 21 (1980).

[8] In *Alaska Pacific Fisheries*, the United States sued to enjoin a commercial fishing company from maintaining a fish trap in navigable waters off the Annette Islands in Alaska, which had been set aside for the Metlakahtla Indians. The lower courts granted the relief sought, and this Court affirmed. The Court noted: "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement." 248 U.S., at 87, 39 S.Ct., at 41. This was because the reservation was a setting aside of public property "for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States." *Id.*, at 88, 39 S.Ct., at 41. The Court observed that "[t]he Indians naturally looked on the fishing grounds as part of the islands," and it found further support for its conclusion "in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.*, at 89, 39 S.Ct., at 42.

Second: The establishment of the Crow Reservation was ***574** necessitated by the same "public purpose" or "exigency" that led to the creation of the Choctaw and Cherokee Reservations discussed in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970). In both cases, Congress responded to pressure for Indian land by establishing reservations in return for the Indians' relinquishment of their claims to other territories.[9] Just as the Choctaws ****1262** and the Cherokees received their reservation in fee simple " 'to inure to them while they shall exist as a nation and live on it,' " *id.*, at 625, 90 S.Ct., at 1331, so the Crow were assured in 1867 that they would receive "a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass." Proceedings, at 86. Indeed, during the negotiations of both the 1851 and 1868 Treaties of Fort Laramie the United States repeatedly referred to the land as belonging to the Indians, and the treaties reflect this understanding.[10] ***575** Finally, like the Cherokee Reservation, see 397 U.S., at 628, the Crow Reservation created by Art. II of the 1868 treaty consisted of "one undivided tract of land described merely by exterior metes and bounds." 15 Stat. 650.

[9] That the Choctaws and Cherokees were forced to leave their original homeland entirely, while the Crow were forced to accept repeated diminishments of their territory, does not distinguish *Choctaw Nation* from this case; indeed, if anything, that distinction suggests that the Crow Indians would have had an even greater expectancy than did the Choctaws and Cherokees that the rivers encompassed by their reservation would continue to belong to them. The "public purpose" behind the creation of these reservations in each case was the same: "to provide room for the increasing numbers of new settlers who were encroaching upon Indian lands during their westward migrations." *Choctaw Nation v. Oklahoma*, 397 U.S., at 623, 90 S.Ct., at 1330. While the Fort Laramie Treaty of 1851 may have been designed primarily to assure safe passage for settlers crossing Indian lands, by 1868 settlers and miners were remaining in Montana. See N. Plummer, Crow Indians 109–114 (1974). Accordingly, whereas the signatory tribes, by Art. 5 of the 1851 treaty did not "abandon or prejudice any rights or

claims they may have to other lands," see 2 Kappler, at 595, by Art. II of the 1868 treaty the Crow Indians "relinquish [ed] all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the [reservation] limits aforesaid." 15 Stat. 650.

[10] See *Crow Tribe of Indians v. United States*, 151 Ct.Cl., at 288–291, 284 F.2d at 365–367; Proceedings, at 86. The Court suggests that the 1851 treaty was simply "a covenant among several tribes which recognized specific boundaries for their respective territories." *Ante*, at 1252. But this interpretation of the treaty consistently has been rejected by the Court of Claims, which has held that the treaty recognized title in the signatory Indian Nations. See *Crow Tribe of Indians*, 151 Ct.Cl., at 291, 284 F.2d, at 367; *Crow Nation v. United States*, 81 Ct.Cl., at 271–272; *Fort Berthold Indians v. United States*, 71 Ct.Cl. 308 (1930). Further, the Court's interpretation is contrary to the analysis of the 1851 treaty made in *Shoshone Indians v. United States*, 324 U.S. 335, 349, 65 S.Ct. 690, 697, 89 L.Ed. 985 (1945) ("the circumstances surrounding the execution of the Fort Laramie treaty [of 1851] indicate a purpose to recognize the Indian title to the lands described").

In any event, as the Court concedes, *ante*, at 1252, it is beyond dispute that the 1868 treaty set apart a reservation "for the absolute and undisturbed use and occupation" of the Crow Indians. Cf. *United States v. Sioux Nation of Indians*, 448 U.S., at 374–376, 100 S.Ct., at 2719–2721 (discussing the similar provisions of the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, between the United States and the Sioux Nation).

Since essentially the same "public purpose" led to the creation of both reservations, it is highly appropriate that the analysis of *Choctaw Nation* be applied in this case. As the State of Montana does here, the State of Oklahoma in *Choctaw Nation* claimed a riverbed that was surrounded on both sides by lands granted to an Indian tribe. This Court in *Choctaw Nation* found Oklahoma's claim to be "at the least strained," and held that all the land inside the reservation's exterior metes and bounds, *including the riverbed*, "seems clearly encompassed within the grant." even though no mention had been made of the bed. 397 U.S., at 628, 90 S.Ct., at 1333. The Court found that the "natural inference" to be drawn from the grants to the Choctaws and Cherokees was that "all the land within their metes and bounds was conveyed, including the banks and bed of rivers." *Id.*, at 634, 90 S.Ct., at 1336. See also *Donnelly v. United States*, 228 U.S. 243, 259, 33 S.Ct. 449, 453, 57 L.Ed. 820 (1913). The ***576** Court offers no plausible explanation for its failure to draw the same "natural inference" here.[11]

[11] As noted above, neither the "special historical origins" of the Choctaw and Cherokee treaties, nor the provisions of those treaties granting Indian lands in fee simple, serve to distinguish this case from *Choctaw Nation*. Equally unpersuasive is the suggestion that in *Choctaw* the Court placed "special emphasis on the Government's promise that the reserved lands would never become part of any State." *Ante*, at 1253, n. 5. Rather than placing "special emphasis" on this promise, the *Choctaw* Court indicated only that the promise reinforced the conclusion that the Court drew from an analysis of the language of conveyance contained in the treaties. 397 U.S., at 635, 90 S.Ct., at 1336.

****1263** In *Choctaw Nation*, the State of Oklahoma also laid claim to a portion of the Arkansas River at the border of the Indian reservation. The Court's analysis of that claim lends weight to the conclusion that the bed of the Big Horn belongs to the Crow Indians. Interpreting the treaty language setting the boundary of the Cherokee Reservation "down the main channel of the Arkansas river," the *Choctaw* Court noted that such language repeatedly has been held to convey title to the midpoint of the channel, relying on *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140 (1922).[12] 397 U.S., at 631–633, 90 S.Ct., at 1334–1335. Here, Art. II of the 1868 Treaty of ***577** Fort Laramie established the boundary of the Crow Reservation as running in part up the "mid-channel of the Yellowstone river." 15 Stat. 650. Thus, under *Brewer-Elliott* and *Choctaw Nation*, it is clear that the United States intended to grant the Crow the bed of the Yellowstone to the mid-point of the channel; it follows *a fortiori* that it was the intention of the United States to grant the Crow Indians the bed of that portion of the Big Horn that was totally encompassed by the reservation.[13]

[12] In *Brewer-Elliott*, the United States established a reservation for the Osage Indians that was bounded on one side "by ... the main channel of the Arkansas river." 260 U.S., at 81, 43 S.Ct., at 62. This Court held that the portion of the Arkansas River in question was nonnavigable and that "the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant *expressly carry the title to that line*." *Id.*, at 87, 43 S.Ct., at 64 (Emphasis added). While the Court purported to reserve the question whether vesting ownership of the riverbed in the Osage Indians would have constituted an appropriate "public purpose" within the meaning of *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894), if the stream had been navigable, that question essentially had been resolved four years earlier in *Alaska Pacific Fisheries*. See n. 8, *supra*. In any event, *Choctaw Nation* clearly holds, and

the Court concedes, *ante*, at 1253, that the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*.

[13] Later events confirm this conclusion. In 1891, the Crow Indians made a further cession of territory. See Act of Mar. 3, 1891, § 31, 26 Stat. 1040. This cession was bounded in part by the Big Horn River. Significantly, the Act, described the boundary of the cession as the "mid-channel" of the river; that language necessarily indicates that the Crow owned the entire bed of the Big Horn prior to the cession, and that by the Act they were ceding half the bed in the affected stretch of the river, while retaining the other half in that stretch and the whole of the bed in the portion of the river that remained surrounded by their lands.

II

But even assuming, *arguendo*, that the United States intended to retain title to the bed of the Big Horn River for the benefit of the future State of Montana, it defies common sense to suggest that the Crow Indians would have so understood the terms of the Fort Laramie Treaties.[14] In negotiating the 1851 treaty, the United States repeatedly referred to the territories at issue as "your country," as "your land," and as "your territory." See *Crow Tribe of Indians v. United States*, 151 Ct.Cl. 281, 287–291, 284 F.2d 361, 364–367 (1960). Further, in Art. 3 of the treaty itself the Government undertook to protect the signatory tribes "against the commission of all depredations by the people of the said United States," and to compensate the tribes for any damages ***578** they suffered thereby; in return, in Art. 2, the United States received the right to build roads and military posts on the Indians' territories. 2 Kappler, at 594.

[14] Counsel for the State of Montana acknowledged at oral argument that the Crow Indians did not understand the meaning of the equal-footing doctrine at the times they entered into the Fort Laramie Treaties. Tr. of Oral Arg. 13–14.

The history of the treaty of 1868 is even more telling. By this time, whites were no longer simply passing through the Indian territories on their way to California. Instead, in the words of United States Commissioner Taylor, who addressed the Crow representatives gathered at Fort Laramie in 1867:

> "We learn that valuable mines have been discovered in *your country* which in some instances are taken possession of by the whites. We learn that roads are laid out and travelled through *your land*, that settlements have been made upon *your* ****1264** *lands*, that your game is being driven away and is fast disappearing. We know also that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands. Under these circumstances we are sent by the great Father and the Great Council in Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties." Proceedings, at 86. (Emphasis added.)

It is hardly credible that the Crow Indians who heard this declaration would have understood that the United States meant to retain the ownership of the riverbed that ran through the very heart of the land the United States promised to set aside for the Indians and their children "forever." Indeed, Chief Blackfoot, when addressed by Commissioner Taylor, responded: "The Crows used to own all this Country *including all the rivers of the West.*" *Id.*, at 88. (Emphasis added.) The conclusion is inescapable that the Crow Indians understood that they retained the ownership of at least those rivers within the metes and bounds of the reservation ***579** granted them.[15] This understanding could only have been strengthened by the reference in the 1868 treaty to the mid-channel of the Yellowstone River as part of the boundary of the reservation; the most likely interpretation that the Crow could have placed on that reference is that half the Yellowstone belonged to them, and it is likely that they accordingly deduced that all of the rivers within the boundary of the reservation belonged to them.

[15] Statements made by Chief Blackfoot during the treaty negotiations of 1873 buttress this conclusion. See, *e. g.*, 3 App. 136 ("The Great Spirit made these mountains and rivers for us, and all this land"); *id.*, at 171 ("On the other side of the river all those streams belong to the Crows").

In fact, any other conclusion would lead to absurd results. Gold had been discovered in Montana in 1858, and sluicing operations had begun on a stream in western Montana in 1862; hundreds of prospectors were lured there by this news, and some penetrated Crow territory. N. Plummer, Crow Indians 109–110 (1974). As noted, Commissioner Taylor remarked in 1867 that whites were mining in Indian territory, and he specifically indicated

that the United States intended to protect the Indians from such intrusions. Yet the result reached by the Court today indicates that Montana or its licensees would have been free to enter upon the Big Horn River for the purpose of removing minerals from its bed or banks; further, in the Court's view, they remain free to do so in the future. The Court's answer to a similar claim made by the State of Oklahoma in *Choctaw Nation* is fully applicable here: "We do not believe that [the Indians] would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise."[16] 397 U.S., at 635, 90 S.Ct., at 1336.

[16] The Court suggests that the fact the United States retained a navigational easement in the Big Horn River indicates that the 1868 treaty could not have granted the Crow the exclusive right to occupy all the territory within the reservation boundary. *Ante*, at 1253. But the retention of a navigational easement obviously does not preclude a finding that the United States meant to convey the land beneath the navigable water. See, *e. g. Choctaw Nation, supra; Alaska Pacific Fisheries*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918).

***580** III

In *Choctaw Nation*, the Court was confronted with a claim almost identical to that made by the State of Montana in this case. There, as here, the argument was made that the silence of the treaties in question with regard to the ownership of the disputed riverbeds was fatal to the Indians' case. In both cases, the state claimant placed its principal reliance on this Court's statement in *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), that the conveyance of a riverbed "should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." The Court flatly rejected this argument in *Choctaw Nation*, pointing out that "nothing in ****1265** the *Holt State Bank* case or in the policy underlying its rule of construction ... requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor."[17] ***581** 397 U.S., at 634, 90 S.Ct., at 1336. Since I believe that the Court has so blinded itself today, I respectfully dissent from its holding that the State of Montana has title to the bed of the Big Horn River.[18]

[17] The Court's reliance on *Holt State Bank* is misplaced for other reasons as well. At issue in that case was the bed of Mud Lake, a once navigable body of water in the Red Lake Reservation in Minnesota. Prior to the case, most of the reservation, and all the tracts surrounding the lake, had been "relinquished and ceded" by the Indians and sold off to homesteaders. 270 U.S., at 52–53, 46 S.Ct., at 198. No such circumstances are present here. See n. 18, *infra*.

Moreover, a critical distinction between this case and *Holt State Bank* arises from the questionable status of the Red Lake Reservation before Minnesota became a State. The Court in *Holt State Bank* concluded that in the treaties preceding statehood there had been, with respect to the Red Lake area—unlike other areas—"no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein...." 270 U.S., at 58, 46 S.Ct., at 200 (footnote omitted). Thus, *Holt State Bank* clearly does not control a case, such as this one, in which, prior to statehood, the United States set apart by formal treaty a reservation that included navigable waters. See n. 10, *supra*.

Finally, the Court fails to recognize that it is *Holt State Bank*, not *Choctaw Nation*, that stands as "a singular exception" to this Court's established line of cases involving claims to submerged lands adjacent to or encompassed by Indian reservations. See *Choctaw Nation; Brewer-Elliott; Alaska Pacific Fisheries; Donnelly v. United States*, all *supra*.

[18] I agree with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. I note only that nothing in the Court's disposition of that issue is inconsistent with the conclusion that the bed of the Big Horn River belongs to the Crow Indians. There is no suggestion that any parcels alienated in consequence of the Indian General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751, included portions of the bed of the Big Horn River. Further, the situation here is wholly unlike that in *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). As the Court recognizes, *ante*, at 1256, the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. 433 U.S., at 173–174, and n. 11, 97 S.Ct., at 2621–2622, and n. 11. This is not such a case.

Justice STEVENS, concurring.

In its opinion in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615, the Court repeatedly pointed out that ambiguities in the governing treaties should be resolved in favor of the Indian tribes.[1] That

emphasis on a rule of construction favoring the tribes might arguably be read as having been intended to indicate that the strong presumption against dispositions ***568** by the United States of land under navigable waters in the territories is not applicable to Indian reservations. However, for the following reasons, I do not so read the *Choctaw Nation* opinion.

[1] The Court described this rule of construction, and explained the reasoning underlying it:

> "[T]hese treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, *e. g., Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1899), and any doubtful expressions in them should be resolved in the Indians' favor. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 41, 63 L.Ed. 138 (1918). Indeed, the Treaty of Dancing Rabbit Creek itself provides that 'in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws.' 7 Stat. 336." 397 U.S., 630–631, 90 S.Ct., at 1334.
>
> The Court went on to base its decision on this rule of construction:
>
> "[T]he court in [*United States v.] Holt State Bank* [270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465] itself examined the circumstances in detail and concluded 'the reservation was not intended to effect such a disposal.' 270 U.S., at 58 [46 S.Ct., at 200]. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor." *Id.* at 634, 90 S.Ct., at 1336.

In *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465, the ****1266** Court unanimously and unequivocally had held that the presumption applied to Indian reservations. Although the references to *Holt State Bank* in the Court's opinion in *Choctaw Nation* can hardly be characterized as enthusiastic, see 397 U.S., at 634, 90 S.Ct., at 1336, the *Choctaw Nation* opinion did not purport to abandon or to modify the rule of *Holt State Bank*. Indeed, Justice Douglas, while joining the opinion of the Court, wrote a separate opinion to explain why he had concluded that the *Choctaw Nation* record supplied the "exceptional circumstances" required under the *Holt State Bank* rule.[2]

[2] Before reviewing the history of the Cherokee and Choctaw Reservations, Justice Douglas wrote:

> "[W]hile the United States holds a domain as a territory, it may convey away the right to the bed of a navigable river, not retaining that property for transfer to a future State, though as stated in *Holt State Bank* that purpose is 'not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.' 270 U.S., at 55 [46 S.Ct., at 199]. Such exceptional circumstances are present here." 397 U.S., at 639, 90 S.Ct., at 1338.

Only seven Justices participated in the *Choctaw Nation* decision.[3] Justice WHITE, joined by THE CHIEF JUSTICE and Justice Black in dissent, relied heavily on the *Holt State Bank* line of authority, see 397 U.S., at 645–648, 90 S.Ct., at 1341–1343, and, as I noted above, Justice Douglas, in his concurrence, also appears to have accepted the *Holt State Bank* rule. Because only four Justices, including Justice Douglas, joined the Court's opinion, I do not believe it should be read as having made a substantial change in settled law.

[3] When *Choctaw Nation* was decided, the Court consisted of only eight active Justices. Justice Harlan did not participate in the consideration or decision of *Choctaw Nation.*

Finally, it is significant for me that Justice STEWART, who joined the *Choctaw Nation* opinion, is the author of the Court's opinion today. Just as he is, I am satisfied that the circumstances of the *Choctaw Nation* case differ significantly from the circumstances of this case. Whether I would have voted differently in the two cases if I had been a Member of the Court when *Choctaw Nation* was decided is a question I cannot answer. I am, however, convinced that unless the Court is to create a broad exception for Indian reservations, the *Holt State Bank* presumption is controlling. I therefore join the Court's opinion.

All Citations

450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493

137 S.Ct. 1285
Supreme Court of the United States

Brian LEWIS et al., Petitioners
v.
William CLARKE.

No. 15–1500.
|
Argued Jan. 9, 2017.
|
Decided April 25, 2017.

Synopsis
Background: Motor vehicle driver and passenger brought action against Indian tribe member in his individual capacity, alleging that member's negligence in driving tribe-owned limousine carrying patrons of tribe-owned casino caused off-reservation motor vehicle accident on interstate freeway. The Connecticut Superior Court, Judicial District of New London, Cole–Chu, J., 2014 WL 5354956, denied member's motion to dismiss based on tribal sovereign immunity. Member appealed. The Connecticut Supreme Court, Eveleigh, J., 320 Conn. 706, 135 A.3d 677, reversed and remanded with directions. Certiorari was granted.

Holdings: The Supreme Court, Justice Sotomayor, held that:

[1] tribe member was the real party in interest in the suit brought against him in his individual capacity, and thus, tribe member was not entitled to tribal sovereign immunity, and

[2] Indian tribe's indemnification statute for its employees did not make the tribe the real party in interest, as would support tribal sovereign immunity.

Reversed and remanded.

Justice Thomas filed an opinion concurring in the judgment.

Justice Ginsburg filed an opinion concurring in the judgment.

Justice Gorsuch took no part in the consideration or decision of the case.

West Headnotes (15)

[1] **Indians**
Employees of tribe
Indians
Sovereign Immunity

In a suit brought against a tribal employee in his or her individual capacity, for a tort committed by the employee within the scope of his or her employment, the employee, not the Indian tribe, is the real party in interest and the tribe's sovereign immunity is not implicated.

13 Cases that cite this headnote

[2] **Indians**
Employees of tribe
Indians
Sovereign Immunity

An indemnification provision for employees of an Indian tribe does not extend the tribe's sovereign immunity where it otherwise would not reach.

1 Cases that cite this headnote

[3] **Public Employment**
Substitution of Government as Defendant
States
What are suits against state or state officers
United States
In general; substitution of United States as defendant

In the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign

immunity bars the suit, and in making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign.

10 Cases that cite this headnote

[4] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity
Federal Courts
Arms of the state in general

If an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection, and for this reason, an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself. U.S.C.A. Const.Amend. 11.

5 Cases that cite this headnote

[5] **Public Employment**
Substitution of Government as Defendant

Lawsuits brought against public employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent, and the lawsuits may be barred by sovereign immunity.

8 Cases that cite this headnote

[6] **Public Employment**
Substitution of Government as Defendant

In an official-capacity claim, the relief sought is only nominally against the public official and in fact is against the official's office and thus the sovereign itself, so that the real party in interest is the government entity, not the named official; this is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation.

18 Cases that cite this headnote

[7] **Public Employment**
Individual or Official Capacity

Personal-capacity suits seek to impose individual liability upon a government officer for actions taken under color of state law, and the real party in interest is the individual, not the sovereign.

12 Cases that cite this headnote

[8] **Public Employment**
Sovereign immunity, and relation of official immunity thereto
Public Employment
Prosecutorial immunity

The identity of the real party in interest, in a suit against a public official, dictates what immunities may be available, and defendants in an official-capacity action may assert sovereign immunity, while sovereign immunity does not erect a barrier against suits to impose individual and personal liability; however, a defendant in an individual-capacity action may be able to assert personal immunity defenses, such as absolute prosecutorial immunity.

20 Cases that cite this headnote

[9] **Indians**
Employment
Indians
Actions

Indian tribe member, who was sued in his individual capacity, did not have tribal sovereign immunity in negligence action brought by driver

and passenger of motor vehicle that tribe member allegedly rear-ended on interstate freeway while driving tribe-owned limousine carrying patrons of tribe-owned casino, even if tribe member was acting within the scope of his employment; tribe member, and not the tribe, was the real party in interest.

2 Cases that cite this headnote

[10] **Indians**
Appeal or other review

Issue of whether official immunity, as a type of personal immunity defense, was available to Indian tribe member was not properly before the Supreme Court, on certiorari review of state appellate court's decision reversing state trial court's denial of tribe member's motion to dismiss on grounds of tribal sovereign immunity, in tort action against tribe member in his individual capacity; tribe member's motion to dismiss in the trial court had been based solely on tribal sovereign immunity, and tribe member argued for the first time in the Supreme Court that official immunity was available to him.

4 Cases that cite this headnote

[11] **Indians**
Appeal or other review

Supreme Court would consider, on certiorari review of state appellate court's decision reversing state trial court's denial of Indian tribe member's motion to dismiss on grounds of tribal sovereign immunity in tort action against tribe member in his individual capacity, whether tribe member should be entitled to tribal sovereign immunity on the basis of Indian tribe's indemnification statute, though state appellate court had not reached that issue; the issue was fairly included within the question presented, as it was a purely legal question that was an integral part of tribe member's sovereign immunity argument, and the question was both raised to and passed on by the trial court.

8 Cases that cite this headnote

[12] **Indians**
Employment
Indians
Actions

Indian tribe's indemnification statute for its employees did not make the tribe the real party in interest in negligence action against an employee of the tribe in his individual capacity, and thus, the tribe member was not entitled to tribal sovereign immunity in the action, which was brought by driver and passenger of motor vehicle that tribe member allegedly rear-ended on interstate freeway while driving tribe-owned limousine carrying patrons of tribe-owned casino; state courts exercised no jurisdiction over the tribe or its gaming authority, and their judgments would not bind the tribe or its instrumentalities in any way.

2 Cases that cite this headnote

[13] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

The concern that originally drove the adoption of the Eleventh Amendment was the protection of the States against involuntary liability. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[14] **Federal Courts**
Nominal or formal parties; real parties in interest

In assessing diversity jurisdiction, courts look to the real parties to the controversy, and the fact that a third party indemnifies one of the named

parties to the case does not, as a general rule, influence the diversity analysis.

Cases that cite this headnote

[15] **Federal Civil Procedure**
Necessary Joinder

A party does not become a required party for joinder purposes simply by virtue of indemnifying one of the named parties. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

Cases that cite this headnote

***1286** *Syllabus*[*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioners Brian and Michelle Lewis were driving on a Connecticut interstate when they were struck from behind by a vehicle driven by respondent William Clarke, a Mohegan Tribal Gaming Authority employee, who was transporting Mohegan Sun Casino patrons. The Lewises sued Clarke in his individual capacity in state court. Clarke moved to dismiss for lack of subject-matter jurisdiction, arguing that because he was an employee of the Gaming Authority—an arm of the Mohegan Tribe entitled to sovereign immunity—and was acting within the scope of his employment at the time of the accident, he was similarly entitled to sovereign immunity against suit. He also argued, in the alternative, that he should prevail because the Gaming Authority was bound by tribal law to indemnify him. The trial court denied Clarke's motion, but the Supreme Court of Connecticut reversed, holding that tribal sovereign immunity barred the suit because Clarke was acting within the scope of his employment when the accident occurred. It did not consider whether Clarke should be entitled to sovereign immunity based on the indemnification statute.

Held :

1. In a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. Pp. 1291 – 1293.

(a) In the context of lawsuits against state and federal employees or entities, courts look to whether the sovereign is the real party in interest to determine whether ***1287** sovereign immunity bars the suit, see *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301. A defendant in an official-capacity action—where the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself—may assert sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 87 L.Ed.2d 114. But an officer in an individual-capacity action—which seeks "to impose individual liability upon a government officer for actions taken under color of state law," *Hafer*, 502 U.S., at 25, 112 S.Ct. 358—may be able to assert *personal* immunity defenses but not sovereign immunity, *id.*, at 30–31, 112 S.Ct. 358. The Court does not reach Clarke's argument that he is entitled to the personal immunity defense of official immunity, which Clarke raised for the first time on appeal. Pp. 1291 – 1293.

(b) Applying these general rules in the context of tribal sovereign immunity, it is apparent that they foreclose Clarke's sovereign immunity defense. This action arises from a tort committed by Clarke on a Connecticut interstate and is simply a suit against Clarke to recover for his personal actions. Clarke, not the Gaming Authority, is the real party in interest. The State Supreme Court extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. Pp. 1292 – 1293.

2. An indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak. Pp. 1293 – 1295.

(a) This conclusion follows naturally from the principles discussed above and previously applied to the different question whether a state instrumentality may invoke the State's immunity from suit even when the Federal Government has agreed to indemnify that instrumentality against adverse judgments, *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55. There, this Court held that the indemnification provision did not divest the state instrumentality of Eleventh Amendment immunity, and its analysis turned on where the potential

legal liability lay, not from whence the money to pay the damages award ultimately came. Here, the Connecticut courts exercise no jurisdiction over the Tribe or Gaming Authority, and their judgments will not bind the Tribe or its instrumentalities in any way. Moreover, indemnification is not a certainty, because Clarke will not be indemnified should the Gaming Authority determine that he engaged in "wanton, reckless, or malicious" activity. Mohegan Tribe Code § 4–52. Pp. 1293 – 1294.

(b) Courts have extended sovereign immunity to private healthcare insurance companies under certain circumstances, but those cases rest on the proposition that the fiscal intermediaries are essentially state instrumentalities, and Clarke offers no persuasive reason to depart from precedent and treat a lawsuit against an individual employee as one against a state instrumentality. Similarly, this Court has never held that a civil rights suit under 42 U.S.C. § 1983 against a state officer in his individual capacity implicates the Eleventh Amendment and a State's sovereign immunity from suit. Finally, this Court's conclusion that indemnification provisions do not alter the real-party-in-interest analysis for sovereign immunity purposes is consistent with the practice that applies in the contexts of diversity of citizenship and joinder. Pp. 1294 – 1295.

320 Conn. 706, 135 A.3d 677, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, ***1288** C.J., and KENNEDY, BREYER, ALITO, and KAGAN, JJ., joined. THOMAS, J., and GINSBURG, J., filed opinions concurring in the judgment. GORSUCH, J., took no part in the consideration or decision of the case.

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

Indian tribes are generally entitled to immunity from suit. This Court has considered the scope of that immunity in a number of circumstances. This case presents an ordinary negligence action brought against a tribal employee in state court under state law. We granted certiorari to resolve whether an Indian tribe's sovereign immunity bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment and for which the employees are indemnified by the tribe.

[1] [2] We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. We hold further that an indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach. Accordingly, we reverse and remand.

I

A

The Mohegan Tribe of Indians of Connecticut traces its lineage back centuries. Originally part of the Lenni Lenape, the Tribe formed the independent Mohegan Tribe under the leadership of Sachem Uncas in the early 1600's. M. Fawcett, The Lasting of the Mohegans 7, 11–13 (1995). In 1994, in accordance with the petition procedures established by the Bureau of Indian Affairs, the Tribe attained federal recognition.[1] ***1289** See 59 Fed.Reg. 12140 (1994); Mohegan Const. Preamble and Art. II.

[1] There are currently 567 federally recognized Indian and Alaska Native entities. 81 Fed.Reg. 26826–26832 (2016); see also Native Hawaiian Law: A Treatise

303–324 (M. MacKenzie ed. 2015) (discussing the existing relationships between the U.S. Government and federally recognized tribes and other indigenous groups in the United States); F. Cohen, Handbook of Federal Indian Law §§ 1.01–1.07 (2012 and Supp. 2015); V. Deloria & R. DeMallie, Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979 (1999).

As one means of maintaining its economic self-sufficiency, the Tribe entered into a Gaming Compact with the State of Connecticut pursuant to the Indian Gaming Regulatory Act, 102 Stat. 2467, 25 U.S.C. § 2701 *et seq.* The compact authorizes the Tribe to conduct gaming on its land, subject to certain conditions including establishment of the Gaming Disputes Court. See 59 Fed.Reg. 65130 (approving the Tribal–State Compact Between the Mohegan Indian Tribe and the State of Connecticut (May 17, 1994)); Mohegan Const. Art. XIII, § 2; Mohegan Tribe Code 3–248(a) (Supp. 2016). The Mohegan Tribal Gaming Authority, an arm of the Tribe, exercises the powers of the Mohegan Tribe over tribal gaming activities. Mohegan Const. Art. XIII, § 1; Mohegan Tribe Code § 2–21.

Of particular relevance here, Mohegan law sets out sovereign immunity and indemnification policies applicable to disputes arising from gaming activities. The Gaming Authority has waived its sovereign immunity and consented to be sued in the Mohegan Gaming Disputes Court. Mohegan Const. Art. XIII, § 1; Mohegan Tribe Code § 3–250(b). Neither the Tribe nor the Gaming Authority has consented to suit for claims arising under Connecticut state law. See Mohegan Const. Art. IX, § 2(t); Mohegan Tribe Code § 3–250(g); see also *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (observing that Indian tribes have not surrendered their immunity against suits by States). Further, Mohegan Tribe Code § 4–52 provides that the Gaming Authority "shall save harmless and indemnify its Officer or Employee from financial loss and expense arising out of any claim, demand, or suit by reason of his or her alleged negligence ... if the Officer or Employee is found to have been acting in the discharge of his or her duties or within the scope of his or her employment." The Gaming Authority does not indemnify employees who engage in "wanton, reckless or malicious" activity. Mohegan Tribe Code § 4–52.

B

Petitioners Brian and Michelle Lewis were driving down Interstate 95 in Norwalk, Connecticut, when a limousine driven by respondent William Clarke hit their vehicle from behind. Clarke, a Gaming Authority employee, was transporting patrons of the Mohegan Sun Casino to their homes. For purposes of this appeal, it is undisputed that Clarke caused the accident.

The Lewises filed suit against Clarke in his individual capacity in Connecticut state court, and Clarke moved to dismiss for lack of subject-matter jurisdiction on the basis of tribal sovereign immunity. See 2014 WL 5354956, *2 (Super.Ct.Conn., Sept. 10, 2014) (Cole–Chu, J.). Clarke argued that because the Gaming Authority, an arm of the Tribe, was entitled to sovereign immunity, he, an employee of the Gaming Authority acting within the scope of his employment at the time of the accident, was similarly entitled to sovereign immunity against suit. According to Clarke, denying the motion would abrogate the Tribe's sovereign immunity.

The trial court denied Clarke's motion to dismiss. *Id.*, at *8. The court agreed with the Lewises that the sovereign immunity analysis should focus on the remedy sought in their complaint. To that end, the court identified Clarke, not the Gaming Authority or the Tribe, as the real party in interest because the damages remedy sought was solely against Clarke and would in no way affect the Tribe's ability to govern itself independently. The court ***1290** therefore concluded that tribal sovereign immunity was not implicated. *Id.*, at *2–*8. It also rejected Clarke's alternative argument that because the Gaming Authority was obligated to indemnify him pursuant to Mohegan Tribe Code § 4–52 and would end up paying the damages, he should prevail under the remedy analysis. *Id.*, at *7. The trial court reasoned that a "voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist." *Ibid.*

The Supreme Court of Connecticut reversed, holding that tribal sovereign immunity did bar the suit. 320 Conn. 706, 135 A.3d 677 (2016). The court agreed with Clarke that "because he was acting within the scope of his employment for the Mohegan Tribal Gaming Authority and the Mohegan Tribal Gaming Authority is an arm of the Mohegan Tribe, tribal sovereign immunity bars the plaintiffs' claims against him." *Id.*, at 709, 135 A.3d, at 680. Of particular significance to the court was ensuring that "plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he

acted outside the scope of his authority." *Id.*, at 720, 135 A.3d, at 685. To do otherwise, the court reasoned, would " 'eviscerate' " the protections of tribal immunity. *Id.*, at 717, 135 A.3d, at 684 (alterations and internal quotation marks omitted). Because the court determined that Clarke was entitled to sovereign immunity on the sole basis that he was acting within the scope of his employment when the accident occurred, *id.*, at 720, 135 A.3d, at 685–686, it did not consider whether Clarke should be entitled to sovereign immunity on the basis of the indemnification statute.

We granted certiorari to consider whether tribal sovereign immunity bars the Lewises' suit against Clarke, 579 U.S. ——, 137 S.Ct. 31, 195 L.Ed.2d 903 (2016), and we now reverse the judgment of the Supreme Court of Connecticut.

II

Two issues require our resolution: (1) whether the sovereign immunity of an Indian tribe bars individual-capacity damages against tribal employees for torts committed within the scope of their employment; and (2) what role, if any, a tribe's decision to indemnify its employees plays in this analysis. We decide this case under the framework of our precedents regarding tribal immunity.

A

[3] [4] [5] Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. See *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. See, *e.g.*, *Ex parte New York*, 256 U.S. 490, 500–502, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. For this reason, an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself. *E.g.*, *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429–430, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). Similarly, lawsuits ***1291** brought against employees in their official capacity "represent only another way of pleading an action against an entity of which an officer is an agent," and they may also be barred by sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 165–166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (internal quotation marks omitted).

[6] [7] The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Dugan v. Rank*, 372 U.S. 609, 611, 620–622, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. *Hafer*, 502 U.S., at 25, 112 S.Ct. 358. The real party in interest is the government entity, not the named official. See *Edelman v. Jordan*, 415 U.S. 651, 663–665, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). "Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law." *Hafer*, 502 U.S., at 25, 112 S.Ct. 358 (emphasis added); see also *id.*, at 27–31, 112 S.Ct. 358 (discharged employees entitled to bring personal damages action against state auditor general); cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). "[O]fficers sued in their personal capacity come to court as individuals," *Hafer*, 502 U.S., at 27, 112 S.Ct. 358 and the real party in interest is the individual, not the sovereign.

[8] The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. *Graham*, 473 U.S., at 167, 105 S.Ct. 3099. An officer in an individual-capacity action, on the other hand, may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. *Van de Kamp v. Goldstein*, 555 U.S. 335, 342–344, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009). But sovereign immunity "does not erect a barrier against suits to impose individual and personal liability." *Hafer*, 502 U.S., at 30–31, 112 S.Ct. 358 (internal quotation marks omitted); see *Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

B

[9] There is no reason to depart from these general rules in the context of tribal sovereign immunity. It is apparent that these general principles foreclose Clarke's sovereign immunity defense in this case. This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which "will not require action by the sovereign or disturb the sovereign's property." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). We are cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.

In ruling that Clarke was immune from this suit solely because he was acting within the scope of his employment, the court ***1292** extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. See, *e.g.*, *Graham*, 473 U.S., at 167–168, 105 S.Ct. 3099. The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity.

[10] Accordingly, under established sovereign immunity principles, the Gaming Authority's immunity does not, in these circumstances, bar suit against Clarke.[2]

[2] There are, of course, personal immunity defenses distinct from sovereign immunity. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 811–815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Clarke argues for the first time before this Court that one particular form of personal immunity is available to him here—official immunity. See *Westfall v. Erwin*, 484 U.S. 292, 295–297, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988). That defense is not properly before us now, however, given that Clarke's motion to dismiss was based solely on tribal sovereign immunity. See *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007).

III

[11] The conclusion above notwithstanding, Clarke argues that the Gaming Authority *is* the real party in interest here because it is required by Mohegan Tribe Code § 4–52 to indemnify Clarke for any adverse judgment.[3]

[3] As noted above, the Supreme Court of Connecticut did not reach whether Clarke should be entitled to sovereign immunity on the basis of the indemnification statute. We nevertheless consider the issue fairly included within the question presented, as it is a purely legal question that is an integral part of Clarke's sovereign immunity argument and that was both raised to and passed on by the trial court. See *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) ("[T]he purely legal question on which [petitioner's] claim of immunity turns is appropriate for our immediate resolution notwithstanding that it was not addressed by the Court of Appeals" (internal quotation marks omitted)).

A

We have never before had occasion to decide whether an indemnification clause is sufficient to extend a sovereign immunity defense to a suit against an employee in his individual capacity. We hold that an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak.

Our holding follows naturally from the principles discussed above. Indeed, we have applied these same principles to a different question before—whether a state instrumentality may invoke the State's immunity from suit even when the Federal Government has agreed to indemnify that instrumentality against adverse judgments. In *Regents of Univ. of Cal.*, an individual brought suit against the University of California, a public university of the State of California, for breach of contract related to his employment at a laboratory operated by the university pursuant to a contract with the Federal Government. We held that the indemnification provision did not divest the state instrumentality of Eleventh Amendment immunity. 519 U.S., at 426, 117 S.Ct. 900. Our analysis turned on where the potential *legal* liability lay, not from whence the money to pay the damages award ultimately came. Because the lawsuit bound the university, we held, the Eleventh Amendment applied to the litigation even though the damages award would ultimately be paid by

the federal Department of Energy. *Id.*, at 429–431, 117 S.Ct. 900. Our reasoning remains the same. The critical inquiry is who may be legally bound by the court's ***1293** adverse judgment, not who will ultimately pick up the tab.[4]

[4] Our holding in *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), is not to the contrary. There the immunity question turned on whether the Port Authority Trans–Hudson Corporation was a state agency cloaked with Eleventh Amendment immunity such that any judgment "*must* be paid out of a State's treasury." *Id.*, at 48, 51–52, 115 S.Ct. 394 (emphasis added). Here, unlike in *Hess*, the damages judgment would not come from the sovereign.

[12] Here, the Connecticut courts exercise no jurisdiction over the Tribe or the Gaming Authority, and their judgments will not bind the Tribe or its instrumentalities in any way. The Tribe's indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing. Moreover, indemnification is not a certainty here. Clarke will not be indemnified by the Gaming Authority should it determine that he engaged in "wanton, reckless, or malicious" activity. Mohegan Tribe Code § 4–52. That determination is not necessary to the disposition of the Lewises' suit against Clarke in the Connecticut state courts, which is a separate legal matter.

B

Clarke notes that courts have extended sovereign immunity to private healthcare insurance companies under certain circumstances. See, *e.g.*, *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71–72 (C.A.2 1998); *Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co.*, 485 F.2d 1073, 1074–1075 (C.A.D.C.1973); Brief for Respondent 19, n. 4. But, these cases rest on the proposition that the fiscal intermediaries are essentially state instrumentalities, as the governing regulations make clear. See 42 C.F.R. § 421.5(b) (2016) (providing that the Medicare Administrator "is the real party of interest in any litigation involving the administration of the program"). It is well established in our precedent that a suit against an arm or instrumentality of the State is treated as one against the State itself. See *Regents of Univ. of Cal.*, 519 U.S., at 429, 117 S.Ct. 900. We have not before treated a lawsuit against an individual employee as one against a state instrumentality, and Clarke offers no persuasive reason to do so now.

[13] Nor have we ever held that a civil rights suit under 42 U.S.C. § 1983 against a state officer in his individual capacity implicates the Eleventh Amendment and a State's sovereign immunity from suit.[5] Federal appellate courts that have considered the indemnity question have rejected the argument that an indemnity statute brings the Eleventh Amendment into play in § 1983 actions. See, *e.g.*, *Stoner v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection*, 50 F.3d 481, 482–483 (C.A.7 1995); *Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (C.A.9 1988); *Duckworth v. Franzen*, 780 F.2d 645, 650 (C.A.7 1985). These cases rely on the concern that originally drove the adoption of the Eleventh Amendment—the protection of the States against involuntary liability. See *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 39, 48, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994). But States institute indemnification policies voluntarily. And so, indemnification provisions do not implicate one of the underlying rationales for state sovereign immunity—a government's ***1294** ability to make its own decisions about "the allocation of scarce resources." *Alden*, 527 U.S., at 751, 119 S.Ct. 2240.

[5] A suit against a state officer in his official, rather than individual, capacity might implicate the Eleventh Amendment. See *Kentucky v. Graham*, 473 U.S. 159, 165–166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

[14] [15] Finally, our conclusion that indemnification provisions do not alter the real-party-in-interest analysis for purposes of sovereign immunity is consistent with the practice that applies in the contexts of diversity of citizenship and joinder. In assessing diversity jurisdiction, courts look to the real parties to the controversy. *Navarro Savings Assn. v. Lee*, 446 U.S. 458, 460, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). Applying this principle, courts below have agreed that the fact that a third party indemnifies one of the named parties to the case does not, as a general rule, influence the diversity analysis. See, *e.g.*, *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 865 (C.A.5 2003); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 936–937 (C.A.2 1998). They have similarly held that a party does not become a required party for joinder purposes under Federal Rule of Civil Procedure 19 simply by virtue of indemnifying one of the named parties. See, *e.g.*, *Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (C.A.3 1998); *Rochester Methodist Hospital v. Travelers Ins. Co.*, 728 F.2d 1006, 1016–1017 (C.A.8 1984).

In sum, although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities. An indemnification statute such as the one at issue here does not alter the analysis. Clarke may not avail himself of a sovereign immunity defense.

IV

The judgment of the Supreme Court of Connecticut is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

Justice THOMAS, concurring in the judgment.

I remain of the view that tribal immunity does not extend "to suits arising out of a tribe's commercial activities conducted beyond its territory." *Michigan v. Bay Mills Indian Community*, 572 U.S. ——, 134 S.Ct. 2024, 2046, 188 L.Ed.2d 1071 (2014) (dissenting opinion); see also *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 764, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) (Stevens, J., dissenting). This suit arose from an off-reservation commercial act. *Ante*, at 1290. Accordingly, I would hold that respondent cannot assert the Tribe's immunity, regardless of the capacity in which he was sued. Because the Court reaches the same result for different reasons, I concur in its judgment.

Justice GINSBURG, concurring in the judgment.

On the scope of tribal immunity from suit, I adhere to the dissenting views expressed in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) (Stevens, J., dissenting), and *Michigan v. Bay Mills Indian Community*, 572 U.S. ——, ——, 134 S.Ct. 2024, 2045–2046, 188 L.Ed.2d 1071 (2014) (THOMAS, J., dissenting). See also *id.*, at ——, 134 S.Ct., at 2055–2056 (GINSBURG, J., dissenting). These dissenting opinions explain why tribes, interacting with nontribal members outside reservation boundaries, should be subject to nondiscriminatory state laws of general application. I agree with the ***1295** Court, however, that a voluntary indemnity undertaking does not convert a suit against a tribal employee, in the employee's individual capacity, into a suit against the tribe. I therefore concur in the Court's judgment.

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137 S.Ct. 1285, 197 L.Ed.2d 631, 101 Empl. Prac. Dec. P 45,785, 85 USLW 4215, 17 Cal. Daily Op. Serv. 3926, 2017 Daily Journal D.A.R. 3953, 26 Fla. L. Weekly Fed. S 549

U.S. Department of Justice

Tribal Law and Order Act Report on Enhanced Tribal-Court Sentencing Authority

Background:

The Tribal Law and Order Act (TLOA), Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (2010), was signed into law by President Obama on July 29, 2010. In part, Congress intended TLOA to empower tribal law enforcement agencies and tribal governments. To that end, Section 234(b) of TLOA (amending the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*) requires the Attorney General, in coordination with the Secretary of the Interior, to submit a report to the appropriate committees of Congress that includes:

1) A description of the effectiveness of enhanced tribal-court sentencing authority in curtailing violence and improving the administration of justice on Indian lands; and
2) A recommendation of whether enhanced sentencing authority should be discontinued, enhanced, or maintained at the level authorized by TLOA.

Tribal Court Sentencing Authority:

Tribes have jurisdiction to prosecute member and non-member Indians for any offense addressed in the tribe's criminal code. However, the tribe's authority to punish an offender convicted in tribal court is limited by ICRA, 25 U.S.C. § 1302. When originally enacted in 1968, ICRA limited the punishment a tribe could impose to a maximum of six months' imprisonment and/or a $500 fine. In 1986, an amendment to ICRA increased the maximum sentence to one year of imprisonment and/or a $5,000 fine. Tribal leaders deemed it inadequate that tribes could legally prosecute offenses up to and including homicides, but could only give offenders misdemeanor-level sentences even for the most serious crimes. These concerns led to further changes in TLOA.

TLOA Felony Due-Process Protections:

TLOA further amended ICRA and restored limited felony sentencing authority to tribes that meet certain conditions. Specifically, TLOA allows tribes to impose sentences of up to three years' imprisonment and/or a $15,000 fine per offense for a combined maximum sentence of nine years per criminal proceeding. 25 U.S.C. § 1302(b). To qualify as a felony, a tribal offense must be either a repeat offense or an offense considered to be a felony by any state or by the federal government. For a tribe to charge a defendant with a felony-level offense, the defendant must be afforded the following five due-process protections provided in ICRA, 25 U.S.C. § 1302(c), as amended by TLOA:

1) The right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;
2) The right of an indigent defendant to the assistance of a licensed defense attorney, at the expense of the tribal government;
3) The right to a criminal proceeding presided over by a judge who is licensed to practice law and has sufficient legal training;

4) The right to have access, prior to being charged, to the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and
5) The right to a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Under TLOA's amendments to ICRA, these five rights must be provided to a defendant in any criminal proceeding in which the tribe imposes on the defendant a total term of imprisonment of more than one year. Therefore, these five rights are sometimes referred to as the "TLOA felony sentencing" requirements.

TLOA Felony Sentencing Options:

In addition to the requirements described above, TLOA provided a number of sentencing options for defendants sentenced as felons in tribal court. Specifically, a tribal court may require the defendant to serve the sentence in one of the following facilities:

1) a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after TLOA's enactment;
2) the nearest available and appropriate federal facility, at the expense of the United States, pursuant to the Bureau of Prisons' (BOP) tribal-prisoner pilot program;
3) a state or local government-approved detention or correctional center, pursuant to an agreement between the Indian tribe and the state or local government;
4) an alternative rehabilitation center of an Indian tribe; or
5) an alternative form of punishment, as determined by the tribal court under tribal law.

TLOA does not require the Department of Justice (Department) to review or certify a tribe's use of felony sentencing authority or the status of a tribe's efforts to amend its codes and court processes to provide defendants with the five TLOA felony sentencing requirements. Nor does the Department believe it would be appropriate for it to have oversight authority over the criminal justice system of a federally recognized tribe, given tribal nations' sovereign status. However, in some cases, the Department of the Interior (Interior) may be required to review a tribe's efforts to amend its codes and court processes based upon the requirements of federal statutes other than TLOA.

The Department is aware of three tribes that fully implemented felony sentencing because they successfully transferred defendants sentenced in tribal court to the federal BOP pilot program, also established by TLOA. Under this pilot program, BOP could accept a maximum of 100 offenders at any time. Since implementation of the BOP pilot program on November 29, 2010, tribes have submitted requests for six tribal offenders to be confined under BOP's pilot program. BOP accepted all six offenders. The BOP pilot program expired in November 2014, as it was a four-year pilot program. As a result, the BOP is currently unable to accept new inmates ordered to serve a prison sentence by a tribal court. The chart below describes each of the six pilot participants.

Tribal Law and Order Act Pilot Program				
Inmate	**Tribe**	**Charge**	**Sentencing Information**	**Bureau Facility**
1	Confederated Tribes of the Umatilla Reservation	Felony Assault and Felony Conspiracy to Commit an Assault	Sentence Imposed: 2 years and 3 months Released on 4/3/2015	Federal Correctional Institutions (FCI) Herlong – initial designation. Transferred to United States Penitentiary (USP) Victorville.
2	Confederated Tribes of the Umatilla Reservation	Assault	Sentence Imposed: 2 years and 2 months Released on 2/13/2015	FCI Sheridan – initial designation. Transferred and released from a residential reentry center in Seattle.
3	Eastern Band of Cherokee Nation	DWI; DWLR; Assault on a Female; Injuring Public Property; and Failure to Obey a Lawful Order of the Court	Sentence Imposed: 4 years Projected Release Date: 11/16/2016	USP McCreary – initial designation. Transferred to USP Hazelton.
4	Eastern Band of Cherokee Nation	Assault Inflicting Serious Bodily Injury and Assault with a Deadly Weapon	Sentence Imposed: 3 years Projected Release Date: 5/3/2016	FCI Butner II
5	Tulalip Tribes	Sexual Abuse of a Minor	Sentence Imposed: 2 years, 11 months, 30 days Projected Release Date: 11/18/2016	FCI Sheridan – initial designation. Transferred to FCI Pollock.

6	Confederated Tribes of the Umatilla Reservation	Felony Assault	Sentence Imposed: 2 years, 1 month, 25 days Projected Release Date: 11/17/16	USP Atwater – initial designation. Transferred to USP Victorville.

Additional information concerning the identification of tribes considering implementing felony sentencing authority is available in the context of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, 127 Stat. 54. Title IX of VAWA 2013, entitled "Safety for Indian Women," contains section 904 ("Tribal jurisdiction over crimes of domestic violence") and section 908 ("Effective dates; pilot project"). The purposes of sections 904 and 908 of VAWA 2013 are to decrease the incidence of crimes of domestic violence in Indian Country, to strengthen the capacity of Indian tribes to exercise their sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior. Section 904 recognizes the inherent power of "participating tribes" to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over certain defendants—regardless of those defendants' Indian or non-Indian status—who commit acts of domestic violence or dating violence or violate certain protection orders in Indian Country. Section 904 also specifies the rights that a participating tribe must provide to defendants in SDVCJ cases.

VAWA 2013's section 904(d) specifies the rights that a participating tribe must provide to defendants in SDVCJ cases.[1] Specifically, a tribe must provide all applicable rights of defendants under ICRA, as amended, which largely tracks the United States Constitution, including the right to due process. If a term of imprisonment of any length may be imposed, the tribe must provide defendants the due-process protections described in TLOA. In addition, participating tribes must provide the defendants the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross-section of the community and do not systematically exclude any distinctive group in the community, including non-Indians. The tribe must also provide any persons detained by a tribal order timely notice of their rights and privileges to petition a federal court for a writ of habeas corpus and for release from detention pending resolution of the habeas petition. Finally, the tribe must provide all other rights whose protection is necessary under the Constitution in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise SDVCJ over the defendant.

Recognizing that many tribes might need time to implement these due-process requirements, Congress set an effective date two years after the enactment of VAWA 2013 (*i.e.*, March 7, 2015), while giving tribes that were ready sooner the opportunity to participate in a pilot project at the Attorney General's discretion. On February 6, 2014, the Department announced that the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Confederated Tribes of the Umatilla Reservation of Oregon were selected for the pilot project. On March 6, 2015, the Department announced that the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana and the Sisseton Wahpeton Oyate of the Lake Traverse

[1] Codified at 25 U.S.C. § 1304(d).

Reservation of South Dakota and North Dakota were also selected for pilot-project status. Prior to their designation as a pilot project tribe, each submitted a detailed application and copies of relevant tribal codes. Multiple components within the Department as well as the Department of the Interior reviewed each application and supporting documentation to ensure that all SDVCJ due-process requirements were available to non-Indian defendants in the tribal court. The Department also consulted with affected tribes, as required by VAWA 2013. As of March 7, 2015, by statute, no tribe is required to apply for SDVCJ status or submit an application and documentation to the Department. Any tribe can exercise SDVCJ, so long as the required due-process protections are in place. The Department is aware of three tribes that have implemented SDVCJ either on or after March 7, 2015: the Eastern Band of Cherokee Indians of North Carolina, the Seminole Tribe of Oklahoma, and the Little Traverse Bay Band of Odawa Indians of Michigan.

Between the tribes that have participated in the BOP pilot program and the tribes that participated in the SDVCJ pilot program, at least six tribes have fully satisfied the requirements that TLOA demands for exercising enhanced sentencing authority, as of November 2015.

Improving public safety and the fair administration of justice in Indian Country is a significant priority for the Department. The Department recognizes that in many cases tribal governments are best positioned to effectively investigate and prosecute crime occurring in their own communities. That is why the Department has supported congressional efforts to increase tribal courts' legal authority to address crime in their own jurisdictions, such as the expansion of tribal sentencing authority in TLOA and the recognition of SDVCJ in VAWA 2013.

The Department continues to support the tribal and federal criminal justice systems to further equip them with both the authority and much-needed resources to properly address crime in Indian Country. To this end, the Department works through its components to strengthen relationships with federally recognized tribes, improve the coordination of training and information sharing, and enhance tribal capacity:

- Through its Tribal Civil and Criminal Legal Assistance Program, the Bureau of Justice Assistance has provided resources to tribes to: 1) enhance the operations of tribal justice systems and improve access to those systems; and 2) provide training and technical assistance (TTA) for developing and enhancing tribal justice systems. The TTA services under this program help tribal communities provide procedural justice in tribal civil and criminal legal procedures, legal infrastructure enhancements, and public education. Specifically, TTA services have included the following: indigent legal-defense services; civil legal assistance; public defender services; and strategies for developing and enhancing tribal-court policies, procedures, and codes.
- During consultation regarding the implementation of the SDVCJ pilot project, tribal officials and employees repeatedly highlighted the usefulness of exchanging ideas with their counterparts in other tribes. In June 2013, with these views in mind, the Department established an Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG) to exchange views, information, and advice about how tribes can best exercise SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and fully protect defendants' rights. To date, 45 tribes have voluntarily joined the ITWG, and almost of all of them have remained actively engaged in ITWG

meetings, webinars, and information exchanges. The Department is supporting the ITWG with training and technical assistance, including a three-year award by OVW to the National Congress of American Indians (NCAI) to support the ITWG's ongoing work. The ITWG is scheduled to hold its fifth in-person meeting in November 2015 at Squaxin Island Reservation in Washington.

- In July 2010, the Executive Office of U.S. Attorneys (EOUSA) launched the National Indian Country Training Initiative (NICTI) to ensure that federal prosecutors and agents, as well as state and tribal criminal-justice personnel, receive the training and support needed to address the particular challenges relevant to Indian Country prosecutions. Since 2010, the NICTI has delivered residential training at the National Advocacy Center (NAC) in Columbia, South Carolina, webinars, and regional training for federal agencies, tribes, and technical assistance providers to thousands of federal, state and tribal stakeholders on a host of criminal-justice issues, including implementation of TLOA and VAWA 2013. Importantly, the Office of Legal Education covers the costs of travel and lodging for tribal attendees at classes sponsored by the NICTI. This allows many tribal criminal-justice officials to receive cutting-edge training from national experts at no cost to the tribe.

- In March 2010, the Department established the Access to Justice Initiative (ATJ) to address the access-to-justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. ATJ's staff works within the Department, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance, and to improve the justice delivery systems that serve people who are unable to afford lawyers. ATJ remains actively involved in the implementation of TLOA and VAWA 2013.

Conclusion:

Working together through meaningful collaboration as exemplified by the work of the ITWG, tribal, state, and federal governments can help keep Indian Country safe. According to NCAI, as of September 1, 2015, the eight tribes now exercising SDVCJ have made 42 SDVCJ arrests, resulting in 18 guilty pleas, 5 referrals for federal prosecution, 1 acquittal by jury, and 12 dismissals, with 6 cases still pending. *See* http://www.tribal-institute.org/download/Training/handout.pdf. Not one of the non-Indian defendants in these SDVCJ cases has filed a habeas petition in federal court challenging his arrest or prosecution.

At this early stage of implementation, it is too soon to definitively determine the effectiveness of enhanced tribal-court sentencing authority in curtailing violence and improving the administration of justice on Indian lands. In the near term, the Department recommends the continuation of enhanced sentencing authority at the level authorized by TLOA. The Department would also be supportive of tribal interest to extend the BOP tribal-prisoner pilot program, which expired in 2014. That program can play a helpful role in making enhanced sentencing affordable for tribes that have sophisticated criminal justice systems with due-process protections but lack the budgetary resources to adequately fund longer terms of incarceration.

With assistance on this and other fronts, tribes in the medium to long term can be expected to increasingly exercise enhanced sentencing authority, likely at levels well beyond those currently authorized by TLOA, and thereby both improve the administration of justice and curtail violence against victims who live or work on Indian lands. The Department of Justice and the Department of the Interior look forward to engaging with tribal governments as they work to implement this sentencing authority.

Tribal Courts in New York: A Case Study of the Oneida Indian Nation

November 20, 2018

Program Materials:

Part IV – Interaction Between Tribal Courts and New York State Courts

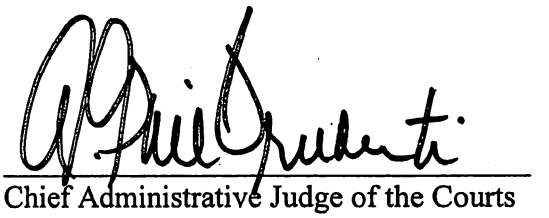
Faculty: Hon. Robert G. Hurlbutt, Hon. Marcy L. Kahn, Hon. Mark A. Montour

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby promulgate a new section 202.71 of the Uniform Civil Rules of the Supreme and County Courts, relating to recognition of tribal court judgments, decrees and orders, effective June 15, 2015, to read as follows:

Section 202.71. Recognition of Tribal Court Judgments, Decrees and Orders

Any person seeking recognition of a judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment, decree or order appended thereto in the County Clerk's office in any appropriate county of the state. If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York. This procedure shall not supplant or diminish other available procedures for the recognition of judgments, decrees and orders under the law.



Chief Administrative Judge of the Courts

Dated: May 26, 2015

AO/107/15

bring an action to enforce his or her judgment instead of proceeding under this Rule remains unimpaired.

35. COMITY

Rule 35. COMITY

Comity may be given in the Oneida Nation Court to the judicial proceedings of any court of competent jurisdiction in which final judgments, orders or stays have been obtained, provided, however, that comity shall not be given to final judgments, orders and stays rendered by any court which declines or refuses to similarly recognize the final judgments, orders or stays of the Oneida Nation Court. Comity shall not be extended in any case which involves treaty rights of Nation members, including matters related to taxation and hunting and fishing, nor may comity be extended to any final judgment, order, stay, subpoena or compulsory process the enforcement of which would infringe upon the sovereignty of the Nation.

Upon the granting of comity by the Oneida Nation Court to the final judgment, order or stay of a foreign court, the Nation shall honor and fulfill such final judgment, order or stay. The Nation shall be given notice and an opportunity to be heard on any motion for the extension of comity, and due regard shall be had by the Oneida Nation Court for the sovereign prerogatives of the Nation.

CHAPTER TWO
SMALL CLAIMS

36. DEFINITIONS.

Rule 36. DEFINITIONS.

The small claims process may be used for claims for money or the delivery of tangible property where the matter in dispute has a value of three thousand dollars ($3,000.00) or less, exclusive of interest and costs.

37. JURISDICTION; LIMITATIONS.

Rule 37. JURISDICTION; LIMITATIONS.

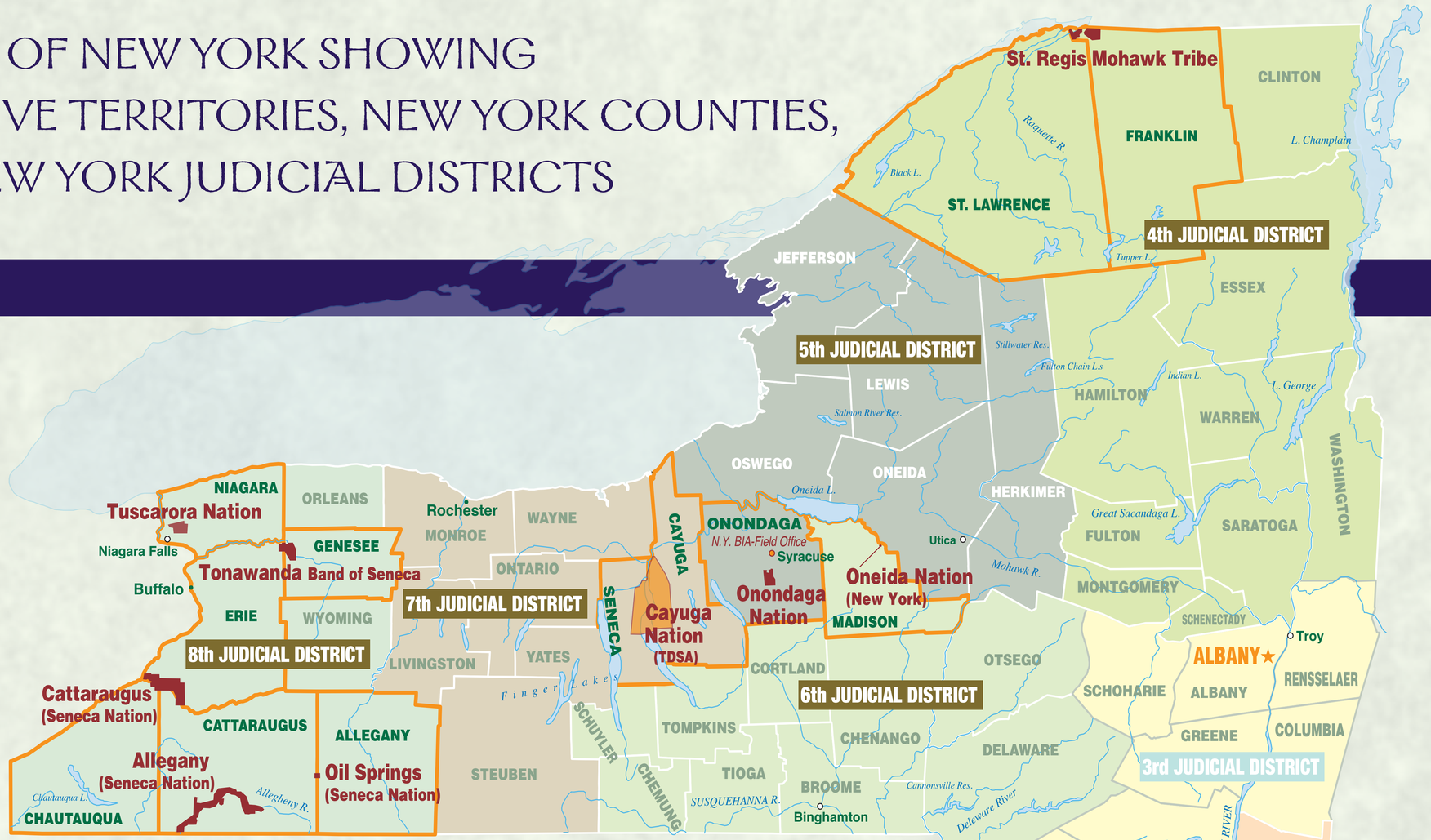
Jurisdiction and limitations of actions in the small claims process proceedings shall be the same as in Rule 1 and Rule 32 of Chapter 1 of these Rules.

38. INITIATION OF SMALL CLAIMS PROCESS

Rule 38. INITIATION OF SMALL CLAIMS PROCESS

The small claims process is initiated by the claimant completing a form to be provided by the court clerk and paying the filing fee of five ($5.00) dollars.

MAP OF NEW YORK SHOWING NATIVE TERRITORIES, NEW YORK COUNTIES, & NEW YORK JUDICIAL DISTRICTS



American Indian Reservations (AIRs) are legal entities having boundaries established by treaty, statues, and/or executive or court order. They are identified by the Bureau of Indian Affairs (BIA) as Federal Reservations. An AIR recognized by the Federal Government may be located in more than one state.

Tribal Designated Statistical Area (TDSAs) are statistical entities identified and delineated for the U.S. Census Bureau by federally recognized American Indian tribes that do not currently have a federally recognized land base (reservation or off-reservation trust land). A TDSA generally encompasses a compact and contiguous area that contains a concentration of people who identify with a federally recognized American Indian tribe and in which there is structured or organized tribal activity. A TDSA may be located in more than one state, and it may not include area within an American Indian reservation, off-reservation trust land, or state designated American Indian statistical area.

Counties with Indian Entities
New York State Counties with Indian Entities are outlined in orange with the county name in dark green.

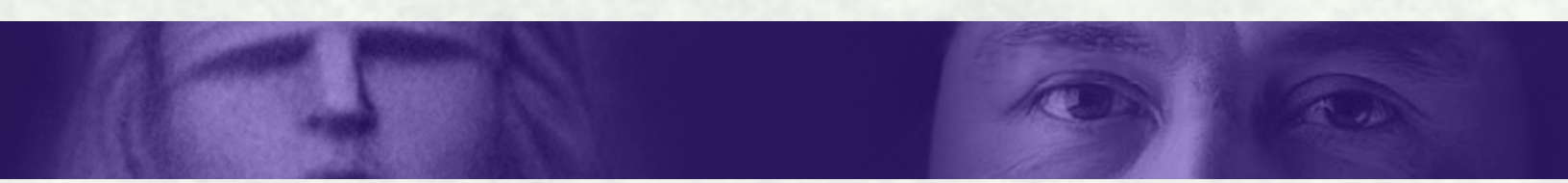
JD New York State Judicial District with Indian Entities

Indian Entities	New York Counties	N.Y. Judicial Districts
Cayuga Nation	Cayuga, Seneca	8th
Oneida Indian Nation	Madison	6th
Onondaga Nation	Onondaga	5th
Saint Regis Mohawk Tribe	Franklin, St.Lawrence	4th
Seneca Nation of Indians – Allegany Reservation	Cattaraugus	8th
Seneca Nation of Indians – Cattaraugus Reservation	Cattaraugus, Chautauqua, Erie	7th, 8th
Seneca Nation of Indians – Oil Springs Reservation	Allegany, Cattaraugus	8th
Shinnecock Indian Nation	Suffolk	10th
Tonawanda Band of Seneca Indians	Erie, Genesee	8th
Tuscarora Nation	Niagra	8th
Unkechaug Indian Nation	Suffolk	10th

Base map source: Bureau of Indian Affairs (Federal Reservations)

THE SECOND NEW YORK LISTENING CONFERENCE REPORT

"Working Toward Solutions"



Co-Sponsored by

The NY Federal-State-Tribal Courts & Indian Nations Justice Forum

The New York State Judicial Institute and

The Western Community Policing Institute

THE SECOND NEW YORK LISTENING CONFERENCE REPORT

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EVENT CO-SPONSORS

The New York Federal-State-Tribal Courts and Indian Nations Justice Forum
The New York State Judicial Institute
The Western Community Policing Institute

ADDITIONAL SUPPORT

The United States Department of Justice, Bureau of Justice Assistance
The State Justice Institute
Western Oregon University, Western Community Policing Institute

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Preface

DENISE E. O'DONNELL, THEN DIRECTOR, BUREAU OF JUSTICE Assistance, U.S. Department of Justice, was the keynote speaker at the dinner at the Second Listening Conference, which took place on Thursday and Friday, September 29 - 30, 2016. The following are a few short excerpts from her encouraging talk.

On Tuesday in his remarks at the Tribal Nations Conference, President Obama highlighted the progress that has been made in the last eight years by elevating Native American Affairs within the White House and across the Federal Government. In addressing Tribal leaders about the progress made in the justice area, he said this:

"Together, we've strengthened your sovereignty and reauthorized the Violence Against Women Act so that tribes can prosecute those who commit domestic violence against women in Indian Country, whether they are Native American or not. We worked to ensure your rights to equal justice under the law, and gave more power to tribal courts and police."

The President's words echo our belief at the Department of Justice, a belief I think that is shared by all of you at this summit, that public safety in Indian Country will improve once Native Nations and Tribes have greater freedom to build and maintain their own justice systems. And that requires collaboration among the state, federal and tribal judicial and justice system leaders in this room (judges, prosecutors, defenders, victim advocates, law enforcement, academics) working in a spirit of cooperation and mutual respect to find solutions to complex systems, problems and barriers.

I can't applaud you enough for those efforts and on behalf of the Bureau of Justice Assistance we are proud to have had the honor to support your initial Summit ten years ago in 2006 which created this rich culture of collaboration, of listening and learning from one another, and this important Summit, ten years later, to build on your work and keep the dialog ongoing. And as I said earlier, I am so encouraged by the leadership and progress made by members of the judiciary, under the leadership of Judge Kahn and others, to promote understanding, respect and cooperation between state and tribal judiciaries, reduce jurisdictional conflicts, expand tribal court capacity, grant full faith and credit to each other's judgments and orders, and improve the quality of justice for all.

As President Obama said at the Indian Nation's Conference earlier this week: "We haven't solved every issue. We haven't righted every wrong. But together, we've made significant progress in almost every area".

Thank you—each and every one of you, for your leadership and for caring so deeply about the work we are doing together.

The Second New York Listening Conference

Let's take away all the things we have learned, keep talking with one another, and keep looking for new ways to collaborate with one another.

HONORABLE MARCY L. KAHN,
Associate Justice, New York Supreme Court, Appellate Division, First Department

Introduction

ON SEPTEMBER 29 - 30, 2016, NEW YORK'S INDIAN TRIBES AND NATIONS and state and federal justice representatives gathered in Albany, New York, to discuss issues of common concern and listen to stories of successes. The Second Listening Conference of the New York Federal-State-Tribal Courts and Indian Nations Justice Forum (The Forum) brought together 100 participants over the course of two days. It provided an opportunity to review and discuss Forum accomplishments, promising local collaborations, and national reports and innovations that may be helpful to address issues related to federal-state-tribal collaborations in New York State. Topics covered included domestic violence, protection orders, enforcement of tribal court orders, the Indian Child Welfare Act (ICWA), Native American grave protection, law enforcement collaboration, re-entry, bail reform, and regional issues. The conference afforded participants the opportunity to reflect on how far the Forum has come over the last thirteen years of its existence with an eye toward emerging issues on the horizon that are ripe for Forum action.

Background of the New York Federal-State-Tribal Court and Indian Nations Justice Forum

In 2002, then New York State Chief Judge Judith S. Kaye created the New York Tribal Courts Committee to study the possibility of establishing a federal-state-tribal courts forum for New York, following the lead taken by the Conference of Chief Justices to explore how different justice systems might collaborate to foster mutual understanding and minimize conflict. She appointed the Honorable Marcy L. Kahn, now Associate Justice of the New York Supreme Court, Appellate Division, to chair the Committee.

In May 2003, Judge Kahn met for the first time with members of New York's nine-recognized Indian Tribes and Nations to ascertain their interest in developing a federal-state-tribal courts forum. Following subsequent meetings, with support from Judge Kahn and the Tribal Courts Committee Co-Chair, the Honorable Edward M. Davidowitz, the group formalized the New York Federal-State-Tribal Courts Forum in 2004 with a six-pronged mission:

1. To develop educational programs for Judges and Tribal Chiefs and Indian Communities;
2. To exchange information among Tribes and Nations and agencies;
3. To coordinate the integration of ICWA training for child care professionals, attorneys, judges and law guardians;

4. To develop mechanisms for resolution of jurisdictional conflicts and inter-jurisdictional recognition of judgments;
5. To foster better cooperation and understanding among justice systems; and
6. To enhance proper ICWA enforcement.

Together with the New York Tribal Courts Committee, the Forum sponsored the First New York Listening Conference in 2006. The First Listening Conference galvanized the Forum members to develop concrete steps to implement the mission. The First New York Listening Conference convened state and federal judges and court officials in sessions with tribal judges, chiefs, clan mothers, peacemakers, and other representatives from justice systems of New York's Indian Tribes and Nations to exchange information and learn from each other.

Ten years later, the Forum decided that the time had come to discuss the Forum's accomplishments and identify current issues that the Forum might address in the future, so it organized the Second New York Listening Conference, which is the subject of this report.

Indian Nations' Justice Systems within the State of New York

New York State is home to nine state-recognized Indian Nations. Seven of the Indian Nations are from the Six Nations of the Haudenosaunee—the Cayuga Nation, the Saint Regis Mohawk Tribe, the Oneida Indian Nation, the Seneca Nation of Indians, the Tonawanda Band of Seneca, the Onondaga Nation, and the Tuscarora Nation. These Tribes and Nations have territory in five New York Judicial Districts covering thirteen counties in upstate New York. Additionally, the Unkechaug (Poospatuck) and the Shinnecock Nations are located on Long Island. All Nations except the Unkechaug are recognized by both the federal government and New York State. The Unkechaug nation is recognized by the State of New York.

The justice systems of the Nations within New York State span a broad range of models. The Onondaga, Tuscarora, Cayuga, and Tonawanda Band of Seneca adhere to the oral tradition relating to laws and practices. Their justice systems involve community healing through consensus. These Nations have no judges, no courts, and no written laws. Each Nation's government centers around a clan system, and most are represented on the Haudenosaunee Council of Chiefs, which meets in the Longhouse in Onondaga territory on a regular basis.

The Oneida adopted a Western court structure and system in 1997 with written criminal and civil codes. They also have a more traditional Peacemaking Court.

The Saint Regis Mohawk Tribe has a Traffic and Civil Court, a Healing to Wellness Court that works with neighboring courts in providing supervision and cultural practices to aid in the rehabilitation and healing of the individuals, and currently has a plan for a family court under development.

The Seneca have a court system that consists of a Supreme Court, a Court of Appeals, a Peacemaking Court, and a Surrogate Court.

The Unkechaug and the Shinnecock rely primarily on state courts for criminal and civil matters.

Listening Conference Program

The program at the Listening Conference balanced presentations on numerous collaborative efforts and projects within New York State with efforts occurring between Native Nations and the federal government, other states, and Canada. The primary topics of these presentations appear in this report. The conference also provided information on federal legislation impacting Native Nations within the state, such as the Violence Against Women's Act Reauthorization of 2013, the Tribal Law and Order Act and the Indian Child Welfare Act.

Panel discussions ensured the presentation of a variety of viewpoints, projects and ideas. A working breakfast, lunch, and dinner made the most of the time provided for the conference.

Regional breakout sessions provided opportunities to garner information on critical issues to each of the regions, as well as provide time for regional discussions. The four regional groups included:

- Long Island/New York City
- Northern Region
- Western Region
- Central Region

Each of these regions discussed issues that greatly impacted their areas, and the topics varied. Information from these breakout sessions was presented to all the participants during the final session of the conference. Reports from these four regional breakout sessions are meant to provide direction for the Forum's future work. The synopsis of these regional sessions appears in the conclusion of this report.

Conference materials and videos of sessions can be found at
http://www.nyfedstatetribalcourtsforum.org/forumConf.shtml

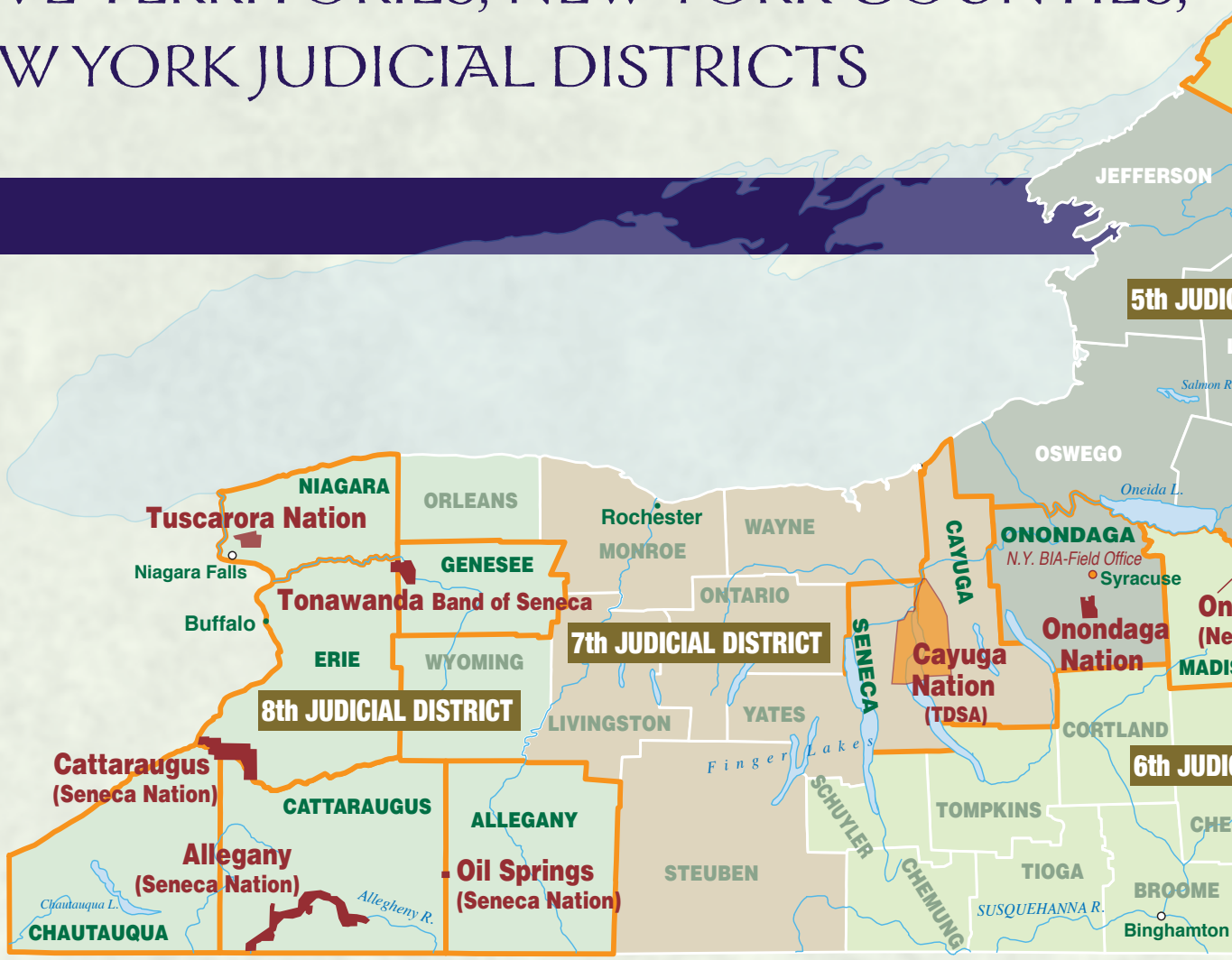
Other materials including history and current work of the Forum is available at:
http://www.nyfedstatetribalcourtsforum.org/index.shtml

Report Organization

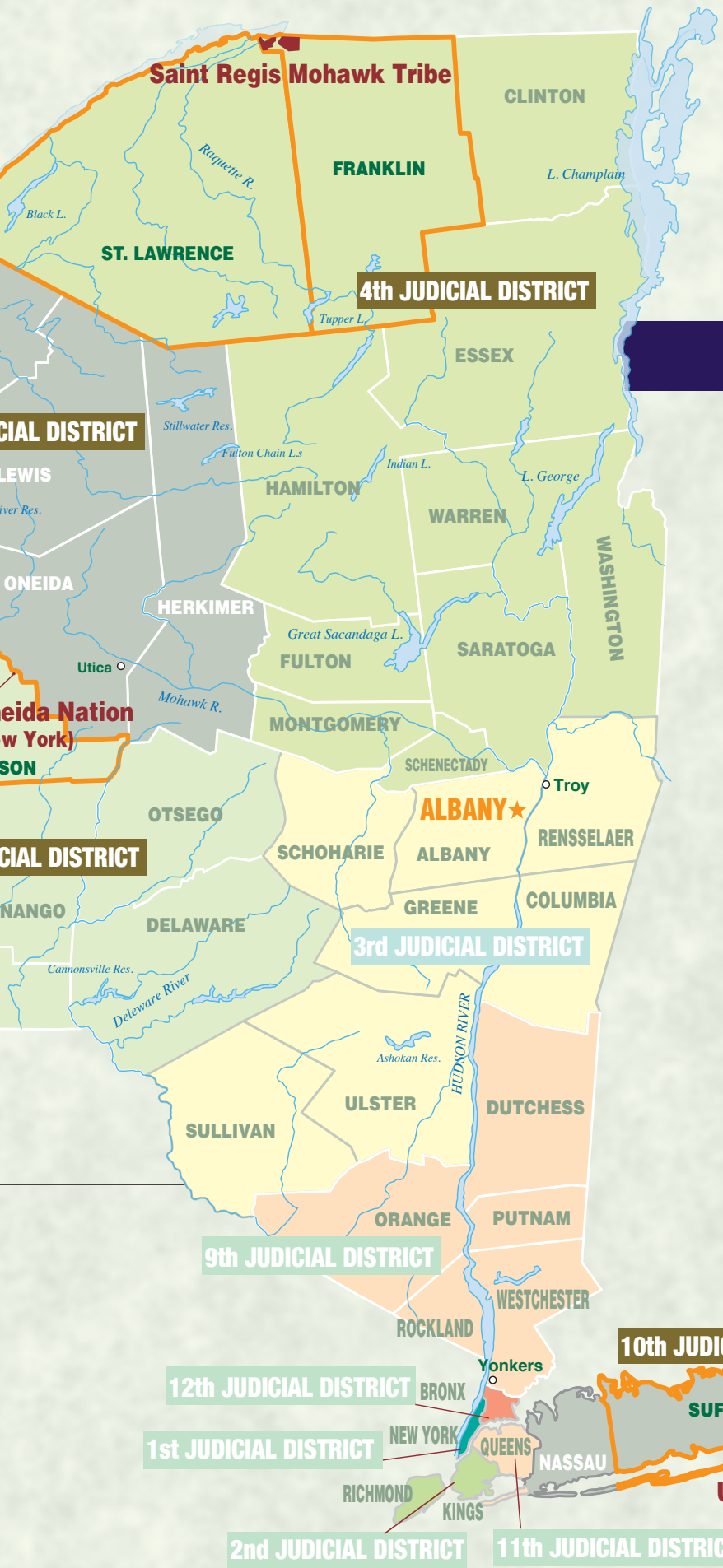
This report - a publication of the New York Federal-State-Tribal Courts and Indian Nations Justice Forum - is topically organized to provide educational value and convey a narrative of the Forum's accomplishments and future work to be done. The topics were discussed in some detail at the Listening Conference, and frequently were discussed in more than one session. The topics are divided into two primary sections: (1) New York Federal-State-Tribal Courts and Indian Nations Justice Forum Accomplishments and Promising Collaborations; and (2) National Perspectives Helpful to New York Strategies. The first section describes New York specific successes and strategies that were highlighted at the conference. The second section reviews new federal laws and programs successful elsewhere, which may prove helpful to New York. Each of the two sections is divided into topical discussions which highlight key points presented on the topic at the conference.

The final section, the Conclusion, provides a look towards future work. It highlights common issues-

MAP OF NEW YORK SHOWING NATIVE TERRITORIES, NEW YORK COUNTIES, & NEW YORK JUDICIAL DISTRICTS



Indian Entities	New York Counties	N.Y. Judicial Districts
Cayuga Nation	Cayuga, Seneca	8th
Oneida Indian Nation	Madison	6th
Onondaga Nation	Onondaga	5th
Saint Regis Mohawk Tribe	Franklin, St.Lawrence	4th
Seneca Nation of Indians – Allegany Reservation	Cattaraugus	8th
Seneca Nation of Indians – Cattaraugus Reservation	Cattaraugus, Chautauqua, Erie	7th, 8th
Seneca Nation of Indians – Oil Springs Reservation	Allegany, Cattaraugus	8th
Shinnecock Indian Nation	Suffolk	10th
Tonawanda Band of Seneca Indians	Erie, Genesee	8th
Tuscarora Nation	Niagara	8th
Unkechaug Indian Nation	Suffolk	10th



American Indian Reservations (AIRs) are legal entities having boundaries established by treaty, statues, and/or executive or court order. They are identified by the Bureau of Indian Affairs (BIA) as Federal Reservations. An AIR recognized by the Federal Government may be located in more than one state.

Tribal Designated Statistical Area (TDSAs) are statistical entities identified and delineated for the U.S. Census Bureau by federally recognized American Indian tribes that do not currently have a federally recognized land base (reservation or off-reservation trust land). A TDSA generally encompasses a compact and contiguous area that contains a concentration of people who identify with a federally recognized American Indian tribe and in which there is structured or organized tribal activity. A TDSA may be located in more than one state, and it may not include area within an American Indian reservation, off-reservation trust land, or state designated American Indian statistical area.

Counties with Indian Entities
New York State Counties with Indian Entities are outlined in orange with the county name in dark green.

JD New York State Judicial District with Indian Entities

Base map source: Bureau of Indian Affairs (Federal Reservations)

and obstacles in the four regions of New York, as well as strategies that work, and regional successes. It is a synopsis of the regional breakout sessions.

Please note that technical report writing assistance was provided by the Tribal Law and Policy Institute (Tribal Advocacy Legal Specialist Maureen White Eagle and Program Director Heather Valdez Freedman) under Grant No. 2016-IC-BX-K00l awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

> I am here to remind you that we can all do better, each one of us. When we come together and we listen to each other; when we truly listen to each other, some magic happens. We have traditional words for that magic. There is no English word for it, but when we listen, when we gather, and when we understand people who are not us, or don't have privilege, then we can truly change the laws.
>
> **DEBORAH PARKER,**
> *Former Vice Chair, Tulalip Tribe, Keynote Speaker*

New York Federal–State–Tribal Courts and Indian Nations Justice Forum Accomplishments and Promising Collaborations

SINCE ITS BEGINNING IN 2004, THE FORUM HAS SEEN ACCOMPLISHMENTS on many fronts, including recognition of tribal orders and judgments, Indian Child Welfare Act collaborations, wellness court success stories, and innovations in Native bail reform. These accomplishments were highlighted at the Listening Conference to disseminate these best practices to a wider audience and to talk through the ongoing work involved in sustaining these collaborative successful strategies.

Recognition of Indian Nations' Judgments, Orders, Decrees and Official Action

A recent major accomplishment of the Forum was the passage of a court rule that provides a simplified process for the recognition of tribal court judgments. Honoring tribal court orders has been a continuing problem; it was even a discussion at Judge Kahn's first meeting with the Tribes and Nations in 2003. Finding a method to ensure recognition of valid tribal court orders has been a key project of the Forum and the adoption of Rule 202.71 of the Uniform Civil Rules of the Supreme and County Courts relating to the recognition of tribal court orders was a significant achievement.

The panel discussion of the recently passed court rule highlighted the need for the administrative rule, the administrative process leading to its adoption by the Administrative Board of the New York courts, content of the rule, impact of the rule, and continued work necessary on this issue.

Panel members discussed the following complications, for tribal members especially, resulting from the failure of the state to recognize tribal court orders: The Honorable Esther Maybee, Seneca Indian Nation Surrogate Judge, noted the problems that members of the Seneca Nation experienced when administrators and executors attempted to sell vehicles in an estate of a deceased. The New York State Department of Motor Vehicles (DMV) had refused to honor tribal surrogate court orders and allow transfer of the deceased's vehicle, something the DMV routinely does with New York State Surrogates' orders. Honorable Patricia Maxwell, former family court judge, in Erie County, discussed the problems with name changes in tribal divorce actions. In both situations, the individuals, who presented valid tribal court orders, were advised by the county that they needed a state court order to obtain the relief desired. Additionally, social services and the DMV refused to recognize name changes in tribal orders. Banks would not recognize tribal court estate administrations and required an administrator of an estate to file in state court. State court filing was expensive and time consuming. The new rule should address these problems.

The new rule is rooted in principles of comity. The state court has the authority to exercise comity to recognize a tribal court order, in the same way it may use comity to recognize an order from any another nation. Adopting a rule specific to tribal court orders simplifies and expedites this process.

Section 202.71. Recognition of Tribal Court Judgments, Decrees, and Orders
Any person seeking recognition of a judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment, decree or order appended thereto in the County Clerk's office in any appropriate county of the state. If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York. This procedure shall not supplant or diminish other available procedures for the recognition of judgments, decrees and orders under the law.

In addition to providing a simplified and clean process for the courts to follow in recognizing tribal court orders, the adoption of Rule 202.71 resulted in governmental agencies and banks recognizing tribal orders without the requirement that the tribal order go through the formal comity process. Banks that had previously not recognized tribal orders, now honor them. The New York Motor Vehicle Department has now issued the following directive to all Department of Motor Vehicle offices.

Recognition of Tribal Court Orders, Decrees, and Judgments
Effective immediately, all issuing offices must recognize orders, decrees and judgments issued by Indian tribal courts. Examples include orders related to divorces, name changes, and Letters of Administration issued by a tribal Surrogate's Court.

You should honor all orders, decrees and judgments issued by the following New York State tribes: Cayuga Nation, Oneida Nation of New York, Onondaga Nation of New York, Saint Regis Mohawk Tribe, Seneca Nation of Indians, Tonawanda Band of Seneca, Tuscarora Nation, Shinnecock Indian Nation and Unkechaug Nation. In addition, you should also honor orders, decrees and judgments issued by tribes from non-NY states recognized by the federal Bureau of Indian Affairs. A list of recognized tribes can be found at the Bureau of Indian Affairs. If you have any questions regarding the authenticity of a document when it is presented, please contact the IOCU for assistance.

The panel expressed the need for the Forum to provide education about this new rule and continue to monitor and support the mutual recognition of valid orders by state and Indian Nations. Local attorneys, bankers, and courts need education on this issue.

Saint Regis Mohawk Tribe's Healing to Wellness Court

Aaron Arnold, then Director of the Treatment Court Programs and Tribal Justice Exchange for the Center for Court Innovation, and Micaelee Horn, Coordinator for the Saint Regis Mohawk Tribe's Healing to Wellness Court, discussed healing to wellness courts, specifically describing the Saint Regis Mohawk Tribe's Healing to Wellness Court. Healing to wellness courts use the drug court model, where the court brings together all support that offenders may have in the community, and works collaboratively to provide the offender every opportunity to succeed in achieving wellness. The collaborative generally has dedicated court staff to coordinate and provide case management. Wellness courts provide traditional or cultural-based services. Research has shown that in such cases the judge is the most influential factor in determining the offender's success.

The Saint Regis Mohawk Tribe does not exercise criminal jurisdiction, so their wellness court partners with the surrounding county courts. Cases handled by the wellness court are misdemeanor cases. This type of jurisdiction-sharing between state and Native Nation was modeled after the Leech Lake wellness court, but remains one of the few cross-jurisdictional courts in the country.[1]

The Saint Regis Mohawk Tribe territory is unique in that an international border runs through the community. A member can literally walk across the street to visit his or her grandmother, and enter Canada. The tribal wellness court accesses resources from the Mohawk Council of Akwesasne in Quebec and Ontario, in addition to services available in the United States. An offender may be charged in the United States, but live in Canada. The wellness court team includes representatives from both sides of the international border and includes Elizabeth Horsman, Assistant U.S. Attorney, Northern District of New York, who is the designated Tribal Liaison for the Office of the United States Attorney for the Northern District of New York. The wellness court has experimented with handling federal as well as state cases.

1 More information regarding the Leech Lake Court can be found on their website (http://www.llojibwe.org/court/tcAwards.html)

It is hoped that this successful model will be adopted by other Indian Nations and counties in New York State. Horn recommended that any Native Nation interested in developing a wellness court contact the Tribal Law and Policy Institute or the Center for Court Innovation for technical assistance.[2]

Indian Child Welfare Act and Suffolk County—Unkechaug Nation Cooperation

The Forum has been very active in providing and assisting with basic and advanced education on ICWA. The panel discussion on ICWA at the Listening Conference focused on a few primary interpretations of ICWA, model state-tribal relationships, and a few highlights of the new federal ICWA guidelines. The panel primarily focused on the unique program existing between Suffolk County and the Unkechaug Nation.

Veronica Treadwell (Unkechaug Nation),[3] Foster Care Family Team Conference Facilitator for Suffolk County Office of Family Services, highlighted the importance of a Nation's involvement on first contact with social services. Treadwell indicated that in Suffolk County, she or the Chief of the Unkechaug Nation are notified immediately if a child identified as Unkechaug could be involved with family services. Once contacted, Treadwell does a quick safety assessment, sets up a meeting with family, and gets services in place, and either she or the chief appears in court. This has proven to be a very effective community model, as strong relationships have developed.

Suffolk County includes the Nation at the table every step of the way. Treadwell stressed the importance when looking at the best interest of the Indian child of considering not only the effect on a child presently, but also the effect on the child fifty years from now. Cultural identity and tribal and family connection are so important to a child. She indicated that when keeping the family together is not possible, placements are not always possible with Native families, and each case needs to be individually evaluated. She provided an example of a case in which a non-Indian family adopted several children from one family, but the family kept the children connected to their culture, their tribe, and each other.

Child Support Enforcement in the Saint Regis Mohawk Tribe

The Saint Regis Mohawk Tribe is the first Indian nation in New York State to establish a IV-D[4] Agency with the goal of establishing paternity and holding parents accountable for supporting their children. Sandra Rourke, the Child Support Enforcement Unit (CSEU) Administrator for the Saint Regis Mohawk Tribe, explained that since establishing the agency in 2014, their agency has focused on family centered services. Historically, child support enforcement on Indian territory was handled by the state through counties. The Saint Regis IV-D operation has some significant differences from the state operation. It looks at the whole family and works closely with other tribal and nontribal programs to help meet the needs of each family member. This includes working across the Canadian

2 Information and contact information for Tribal Law and Policy Institute is available at http://www.home.tlpi.org/. Information and contact information for Center for Court Innovation is available at http://www.courtinnovation.org/.

3 The Unkechaug Nation is a New York State recognized Nation on Long Island. ICWA applies to the Nation, even though it is not federally recognized.

4 IV-D refers to Title IV, Part D of the Social Security Act that provides federal direction in the establishment and enforcement of child support.

boundary because part of their territory is in Canada. This might include working with the Three Sisters Program (domestic violence program) if the family has experienced domestic violence or Tribal Vocational Rehabilitation to assist in training and securing employment. The parties are not required to go to court, and mediation services are encouraged. The Saint Regis Mohawk Tribe allows noncash support, such as providing auto repair and fuel, provided the parties agree.

A current objective for the Saint Regis Mohawk Tribe is to develop a memorandum of understanding (MOU) with the state on the "repatriation"[5] of child support cases currently in the county courts. The Forum was encouraged to discuss and review this further. Rourke mentioned that processes for repatriation could be done by an MOU, and consideration should be given to adopting court rules. She provided the California Court Rules as an example. Judge Townsend, New York Supreme Court, Erie County indicated that if more of the Indian Nations established IV-D agencies, the establishment of court rules would be even more important.

Eileen Stack, Deputy Commissioner, Office of Temporary and Disability Assistance, indicated that her agency is working with the Saint Regis Mohawk Tribe on developing an MOU and had met with the counties primarily affected and with tribal staff to discuss the details. Once the MOU and resulting forms are developed, the Forum could assist in providing feedback and training.

Native Bail Reform in Town of Bombay Court and Saint Regis Mohawk Tribe

The purpose of bail is to allow a defendant's release from pretrial incarceration, but assure reappearance in court on a criminal matter. The New York Court of Appeals has struck down cash-only bail, due to disparate impact on the indigent. Residents of Native American territories in New York are faced with an unequal opportunity to secure pretrial release from incarceration as procuring a commercial bail/bond (using land owned on the reservation as collateral) is not possible, because federal and tribal laws make lands in Indian territory inalienable. Thus, a Native accused of a crime is frequently left with only the cash bond option. Because of this inequity, a proposed pretrial bail/bond alternative pilot program, to be spearheaded by the Saint Regis Mohawk Tribal Court and the Town of Bombay Court, is planned. This is the first known tribal and state collaboration on a bail reform initiative. The New York State Office of Court Administration approved the planning of a pilot project, with committee members consisting of state and tribal court judges, Forum representatives, and Office of Court Administration officials.

The Town of Bombay is a town of approximately 1,400, just ten miles south of the Saint Regis Mohawk Tribe's territory. More than 80 percent of the defendants appearing in Bombay Town Court are Native American. State criminal laws apply on Indian territory in New York. The Bombay Town Court has jurisdiction over crimes that take place on or off the territory and the arresting officer could be state, town or tribal police.

The pilot program would provide an alternative for the Town of Bombay Court to divert defendants who would normally have bail imposed or be released under the supervision of the Franklin County Probation Department to be released to the supervision of the pilot program and its tribal coordinator in the territory.

5 Repatriation—One tribal leader stated that rematriation might be a more culturally sensitive word for the matrilineal Mohawks and reference to Mother Earth, although not currently in the dictionary.

Key stakeholders developed a basic outline of the proposed Native Bail Program operations. Key components of the proposed pilot program are as follows:

- The Town of Bombay Court provides an immediate notification to the Native Bail Reform Program Coordinator in the Saint Regis Mohawk Tribal Court, once it determines that the defendant is Native American and that either bail/bond or release under supervision are considerations.
- Upon notification by the Town of Bombay Court, the program coordinator performs an evaluation of the suitability of the individual for the program with a screening tool that is currently being developed. The screening tool is being designed to be culturally appropriate with respect to Native Americans from a current evidence-based risk assessment tool used generally in the United States.
- The results of the screening assessment are provided to the town court for consideration in determining pretrial release.
- Acceptance into the pilot program means supervision conducted by a tribal entity that can be more responsive and culturally sensitive to the Native defendant. The supervision envisioned is similar to the tribal court's supervision in wellness court.
- The Town of Bombay Court is promptly notified of problems with compliance with release conditions and provided potential response recommendations. The town court then makes a new release determination.

The Saint Regis Mohawk Tribal Court submitted a U.S. Department of Justice Coordinated Tribal Assistance Solicitation Grant Application to obtain funding for a three-year period in which to get the Native Bail Reform Initiative Pilot Program off the ground. The grant was not approved. The project is not yet launched and other funding sources are being explored.

Subsequent to the Second Listening Conference, the Saint Regis Mohawk Tribe was awarded the full three year United States Department of Justice Coordinated Tribal Assistance Solicitation Grant. The pilot program is currently underway in both the Saint Regis Mohawk Tribal Court and the Bombay Town Court.

> Nurture affects nature.
>
> **BEVERLY COOK**
> *Chief, Saint Regis Mohawk Tribe, Opening Speaker*
>
> In my opinion the number one threat to our tribal nations is unresolved trauma.
>
> **SARAH DEER,**
> *Muscogee (Creek) Nation of Oklahoma, 2014 MacArthur Fellow and Co-Director, Indian law Program, Mitchell Hamline School of Law, Session Speaker*

National Perspectives Helpful to New York Strategies

AS THE NEW YORK FEDERAL-STATE-TRIBAL COURTS AND INDIAN NATIONS Justice Forum continues to evolve and tackle new issues, there is a need to stay informed of the latest research and emerging issues in Indian country. The Listening Conference provided an opportunity for participants to hear from experts in the field on the impacts of child abuse on Native children, violence against Native women, and relevant state and federal initiatives.

The Adverse Childhood Experiences Study

Beverly Cook, Chief, Saint Regis Mohawk Tribe, and a Family Nurse Practitioner, discussed the results of the Adverse Childhood Experiences Study. Adverse child experiences are the most basic and long-lasting cause of health risk behaviors, mental illness, social malfunction, disease, disability, death, and health care costs. People with multiple adverse childhood experiences are:

- 1.4–1.6× risk for severe obesity;
- 2× as likely to smoke;
- 7× as likely to be alcoholics;
- 6× as likely to have had sex before age fifteen; and
- 12× more likely to have attempted suicide.[6]

Chief Cook also explained the scientific evidence showing that adverse childhood experiences also affect future generations: "Nurture affects nature." Adverse childhood experiences change the gene expression. These kinds of effects are called epigenetic. Cook stated, "Epigenetic mechanisms can provide a potential pathway by which early experience can have lasting effects on behavior."[7] A clear message throughout the conference was that the high incidence of violence directed at Indian people is directly related to trauma experienced by Indian people and the resulting negative consequences of the trauma.

6 Beverly Cook, Second New York Listening Conference from Adverse Childhood Experiences Study, Center for Disease Control and Prevention, available at https://www.cdc.gov/violenceprevention/acestudy/ (accessed March 3, 2017).

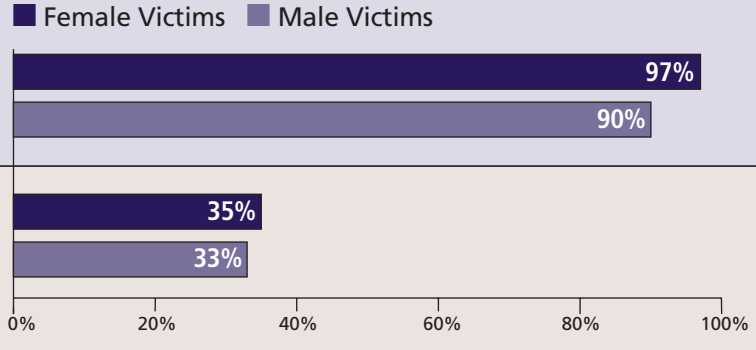
7 Gluckman, Peter, et al., "Effect of In Utero and Early-Life Conditions on Adult Life and Disease," New England Journal of Medicine 359: 61-73, 2008.

TABLE 1. VIOLENCE AGAINST WOMEN		
Type of Violence	American Indian or Alaska Native, %	Non-Hispanic White Only,*%
Any Lifetime Violence	84.3	71.0
Sexual Violence	56.1	49.7
Physical Violence by Intimate Partner	55.5	34.5
Stalking	48.8	26.8
Psychological Aggression by Intimate Partner	66.4	52.0

TABLE 2. VIOLENCE AGAINST MEN		
Type of Violence	American Indian or Alaska Native, %	Non-Hispanic White Only,*%
Any Lifetime Violence	81.6	64.0
Sexual Violence	27.5	20.9
Physical Violence by Intimate Partner	43.2	30.5
Stalking	18.6	13.4
Psychological Aggression by Intimate Partner	73.0	52.7

TABLE 3: INTERRACIAL AND INTRARACIAL VIOLENCE AGAINST NATIVES

Estimates of Lifetime Interracial and Intraracial Violence Against Native Women and Men



The Violence Against American Indian and Alaskan Women and Men Study

Sarah Deer in her presentation stated "It is normal in many parts of Indian country to be a victim of abuse. This does not mean it is acceptable, but it is so prevalent that is more likely than not, that a Native is a victim of abuse." Deer cited the recent study, Violence Against American Indian and Alaska Native Women and Men, completed in May 2016, which provided the statistical information in Tables 1-3.[8] In Deer's opinion, the number one threat to Indian Nations is unresolved trauma. Widespread trauma is a result of violence. A Native is 4.4 times more likely to suffer from posttraumatic stress disorder than another individual in the United States.[9]

Who is committing these crimes? If you are Indian, most of the perpetrators are from a different race. This is very unusual, and does not exist with any other ethnicity. It becomes very important when we review and discuss criminal jurisdiction and the restrictions on sovereignty.[10]

A Personal Story

Deborah Parker shared her moving personal story of surviving multiple episodes of violence as a child and young woman and the failure of the system to hold the perpetrators accountable. She discussed her efforts to secure passage of the Violence Against Women's Act, Reauthorization of 2013: "If we don't speak up, we don't have a voice. There is no way we can find justice." She encouraged the participants in the listening session to connect. "Connect to something much greater than yourselves: Let's connect in such a way that we change the way we are moving in this world."

Full Faith and Credit of Tribal Protection Orders

Native victims of crime continue to encounter barriers with enforcement of tribal protection orders off reservation in the state of New York. In most regional breakout discussions, the enforcement of protection orders was discussed. There is no clear way of quickly entering tribal protection orders into the New York system. This results in victims of domestic violence being placed at great risk during the most dangerous time—24 to 48 hours after a protection order has been issued. Additionally, issues of enforcement of Canadian tribal protection orders exist with Akwesasne because it is divided by the Canadian boundary. Representatives of the Forum agreed to work on these issues in coming months.

Sarah Deer's presentation provided some strategies used in other states that may be helpful in New York. Any protection order (ordering perpetrator to stay away and refrain from violence), where the court had jurisdiction over the subject matter and parties, and where reasonable notice and an opportunity to be heard was provided to the respondent, is entitled to full faith and credit.[11]

8 Andre R. Rosay, "Violence Against American Indian and Alaska Native Women and Men," National Institute of Justice, May 2016. The information in the three charts were taken from the Rosay report, which were included as slides in her presentation, Second New York Listening Conference, 2016.

9 Deborah Bassett, Dedra Buchwald, and Spero Manson, "Posttraumatic Stress Disorder and Symptoms among American Indians and Alaska Natives: A Review of the Literature," Social Psychiatry Psychiatric Epidemiology, 2014 Mar; 49(3): 417–433.

10 Rosay, "Violence Against American Indian and Alaska Native Women and Men." The information in the three charts were taken from the Rosay report, but the charts were slides in Sarah Deer's presentation, Second New York Listening Conference, 2016.

11 18 USC 2265(a).

However, law enforcement officers too frequently do not enforce tribal protection orders, in violation of federal law. This is frequently due to a lack of training. Tribal court orders may look different or the officer may simply not understand what authority the tribal court might have.

Registration or filing the order in the new jurisdiction is not required for a tribal protection order to be enforced outside the Indian nation. If the order is valid on its face, nationwide protection is required. The law is also clear that a tribe may issue and enforce protection orders civilly against "any person."[12] Neither the victim nor the perpetrator needs to be Native. Enforcement against non-Indians can be through civil contempt proceedings or other civil proceedings.

One strategy used outside New York is Project Passport, which started with an effort to ensure enforcement of protection orders from state to state and created a common cover sheet for all the states involved. The law enforcement officer could then recognize the common cover sheet and be more likely to enforce a valid tribal order. Some tribes have used this as well. Thirty-eight states and several tribes have adopted this method to decrease enforcement problems across jurisdictions.

Another strategy that has been helpful in ensuring enforcement of tribal court protection orders is the Hope Card. The Hope Card was a brainchild of a Bureau of Indian Affairs law enforcement officer in Montana. It is a laminated card with essential information about the protection order, like a driver's license. On the front of the card is the victim's information and on the back is the perpetrator's information. Idaho, Montana, and Indiana have implemented the Hope Card.

Federal Responses to Domestic Violence

There are several federal laws that apply to all of Indian country that relate to domestic violence:

- Interstate travel to commit domestic violence
  - 18 U.S.C. 2261(a)1—Specific intent required
  - 18 U.S.C. 2261(a)2—Specific intent not required
- Interstate stalking, 18 U.S.C. 2261A
- Firearms prohibition 18 U.S.C. 922(g)(8) (while subject to protection order)
- Firearms prohibitions 18 U.S.C. 922(g)(9) (lifetime ban with domestic violence conviction)
- Habitual offender, 18 U.S.C. 117

The habitual offender law allows any person to be charged with domestic assault in federal court, if he or she has previously been convicted on two or more separate occasions in state, federal, or tribal court. Because Indian Nations' criminal sentencing authority is generally limited to one year (unless the Tribal Law and Order Act has been implemented), this federal law is an effective tool for tribes seeking to effectively deal with the habitual offender in domestic violence cases. A perpetrator could be fined and imprisoned for up to five years or up to ten years if there has been serious injury. This law was challenged in the United States Supreme Court in *United States v. Bryant*.[13] The defendant was a repeat offender in the Northern Cheyenne Nation, where he had pled guilty five times. He argued that because he was not afforded a right to counsel in the Northern Cheyenne Nation, the federal court could not consider the convictions as valid convictions in establishing a crime under the habitual offender statute. The Supreme Court ruled that the convictions in tribal court were valid, as they complied with the Indian Civil Rights Act.

12 18 USC 2265(e).

13 United States v. Bryant, 136 S. Ct. 1954 (2016).

Grave Protection and Repatriation

The Long Island and New York City Region raised serious concerns over the destruction of burial sites of ancestors. Melanie O'Brien, Program Manager, Native American Grave Protection and Repatriation Act (NAGPRA) Program, was invited to discuss the application of NAGPRA. Unfortunately, there are many situations in which this act provides no protection to ancestor's graves. The need for a state law, which would cover private and state lands, was discussed. A representative from Florida discussed Florida's state law on grave protection, which predates NAGPRA. Florida's law appeared to be an example of an effective state law that is far more comprehensive than NAGPRA and could be helpful in developing a law for New York State. The Forum's support in addressing this issue was requested and a sub-committee was formed to address concerns and develop solutions.

NAGPRA Resources

https://www.nps.gov/nagpra

http://dos.myflorida.com/historical/archaeology/human-remains/abandoned-cemeteries/what-is-nagpra-and-when-does-it-apply/

> This is our opportunity to have some new concepts and some new ideas and start to formulate. Ideas are good when they change because that means everyone has had input into the process.
>
> HONORABLE HUGH GILBERT
> *Justice, New York Supreme Court, Jefferson County.*

Conclusion

THE FINAL PANEL OF THE SECOND LISTENING CONFERENCE DISCUSSED matters and ideas generated from the regional breakout sessions. The panel brought together some common threads from the regional discussions, important strategies in moving forward and local successes, and highlighted obstacles that require focus and possible Forum assistance in the future. The panel provided some helpful and directive information for the Forum to consider as it moves forward.

Some common threads in regional discussions:

- Relationships and communication across boundaries and programs are so important to success.
- Continued education about sovereignty and culture is required to address the turnover of personnel and relationship building.
- Continued education and communication about each other's systems and programs is vital, as unclear policies and procedures cause problems.
- Drug trafficking and drug abuse is a problem for many of the Indian Nations.

Strategies that are important in moving forward:

- Collaborations are required among Indian Nations and state and federal programs.
- Incorporating culture into programs and collaborations is vital to success.
- Developing and implementing tribal laws is necessary for community safety.

Success happens when local projects are tribal specific and tribally driven. Regional discussion raised the following regional successes, including growth in relationships between state and Indian Nations

- Effective collaboration with county regarding exclusion orders.
- Child advocacy center working well with the county.
- Increased dialogue between the tribe and police.

Current obstacles that impede community and individual safety are issues that may need to be addressed by the Forum in the future. Regional discussions raised the following obstacles:

- Failure to enforce protection orders.
- Funding restrictions impede responding comprehensively to problems.
- Insufficient cultural sensitivity training and dialogue between tribal law enforcement and nonnative law enforcement.
- Inadequate protection of ancestor's graves and insufficient notifications of NAGPRA.
- Inadequate protection of Indian Nations from pollution of water and land.
- Inadequate prosecution of environmental and drug crimes in Indian territory.

The Second Listening Conference, through the presentations and regional discussions, raised participants' awareness of many problems and issues that may need the support of the Forum. Clearly there is much to be done in the future. The response of participants to the Second Listening Conference was overwhelmingly positive. The conference also energized the Forum members. Plans to address issues raised at the conference will be further addressed at the Forum's annual April and October meetings.

Response to the Advisory Committee on Civil Practice's June 14, 2012 Recommendation Regarding State Court Recognition of Tribal Court Judgments

Submitted by the New York Tribal Courts Committee
January 2013

In October 2011, the New York Tribal Courts Committee ("Tribal Courts Committee") recommended for inclusion in the New York State Unified Court System's 2012 legislative agenda, among other things, "mutual recognition, based on established principles of comity, of judgments of the State courts and courts of the Nations." On June 14, 2012, the Advisory Committee on Civil Practice (the "Advisory Committee") submitted a letter to the Honorable A. Gail Prudenti, opposing the proposal "that New York essentially extend full faith and credit to tribal court judgments." As the Advisory Committee's letter was submitted without the benefit of briefing on underlying issues, background information and research supporting and creating the basis for the Tribal Courts Committee's recommendation, the Tribal Courts Committee has prepared this document to provide that additional information. The goals of the Tribal Courts Committee in submitting this information are: 1) to seek the Advisory Committee's willingness to revisit the position expressed in its June 14 letter; and 2) to request that the Advisory Committee work with the Tribal Courts Committee to develop an appropriate and mutually agreeable proposal to provide for New York State court recognition of certain judgments and orders of Indian tribal courts.

I. Background Information

Faced with a myriad of issues and sensitivities associated with recognition of tribal orders and judgments by New York State courts (and reciprocal recognition of New York State court orders and judgments by tribal courts), the Tribal Courts Committee began working towards a solution, and ultimately developed the legislative proposal advanced in 2011. Specifically, the Tribal Courts Committee researched and prepared a comprehensive commentary addressing the problems associated with recognition of tribal judgments throughout the United States, and the various judicial solutions adopted to address these issues.[1] This commentary ultimately formed the basis for the 2008 pilot protocol adopted by a Fifth Judicial District Supreme Court part and the Oneida Nation, which was approved by the Chief Administrative Judge, and which provides for the reciprocal recognition of tribal and state judgments. A copy of the 2008 Protocol (the text of which is identical to the 2011 draft of the Tribal Courts Committee's proposed rule) is attached as Exhibit A.

II. Analysis of the Advisory Committee's Letter Comments on Legislative Recognition of State Court and Tribal Court Judgments

The Advisory Committee's opposition to the proposal for "mutual recognition, based on established principles of comity, of judgments of the State courts and courts of the Nation" appears to be based on three things: (i) its misunderstanding or mischaracterization of the Tribal Courts Committee's proposal as seeking "full faith and credit" for tribal court judgments; (ii) its

[1] The Tribal Courts Committee would be happy to provide a copy of this commentary upon request.

belief that the language of CPLR Article 53 sufficiently allows for the recognition of tribal judgments as "judgments of foreign nations;" and (iii) its concern that variations among the tribal court systems in New York dictate that recognition of tribal judgments should be "on a case-by-case basis." The Tribal Court Committee offers the following for further consideration of each these items.

A. *Comity versus "Full Faith and Credit."* The proposal for recognition of tribal court judgments is based on comity, and not "full faith and credit" as stated in the subject line and twice in the opening paragraph of the Advisory Committee letter. Giving full faith and credit means virtually ministerial enforcement of the judgment by the receiving state. Although a small number of states give tribal court judgments full faith and credit, most extend a form of comity, such as that recommended by the Tribal Courts Committee. As explained below, the proposed rule imposes conditions on recognition that are consistent with comity, but not consistent with full faith and credit. The proposed rule also adopts the New York comity rules adopted by the Court of Appeals in *Sung Hwan Co. v. Rite Aid Corp*, 7 N.Y.3d 78 (2006).

The Constitution mandates that states give unqualified recognition—"full faith and credit"—to actions by courts of sister states. U.S. CONST., art. IV, § 1. Federal law also requires "every court within the United States and its Territories and Possessions" to give full faith and credit to "records and judicial proceedings" of any court of any "State, Territory or Possession." 28 U.S.C. § 1738. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.21 (1978), the Supreme Court recognized that "[j]udgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts." Although early federal cases classified tribal courts as courts of territories entitled to full faith and credit,[2] more recent federal cases have looked to the more flexible recognition standards for foreign court judgments under the Restatement (Third) of Foreign Relations.[3] Increasingly, as tribal court systems have developed with federal support, Congress has mandated extending full faith and credit to particular categories of tribal court judgments.[4] The state courts are divided on recognition standards: some states extend full faith and credit to tribal

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[2] *See United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 102, 104 (1855) (letters of administration issued by Cherokee probate court can be enforced in the District of Columbia because the Cherokee Nation is a "domestic territory" and a "territory of the United States" under subsequently-repealed statute); *Mehlin v. Ice*, 56 F. 12 (8th Cir. 1893); *Exedine v. Pore*, 56 F. 777 (8th Cir. 1893); *Raymond v. Raymond*, 83 F. 721 (8th Cir. 1897).

[3] *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

[4] 25 U.S.C. § 1911(d) (tribal judicial proceedings applicable to Indian child custody); 18 U.S.C. § 2265 (domestic protection orders); 28 U.S.C. § 1738B (child support orders under specified conditions); 25 U.S.C. § 3106(c) (tribal court judgments in forest trespass cases under specified conditions); 25 U.S.C. § 3713(c) (tribal court judgments in agricultural trespass cases under specified conditions); 25 U.S.C. § 1725(g) (reciprocal full faith and credit between State of Maine and Passamaquoddy Tribe and Penobscot Nation). Many states accordingly have passed laws that mirror – and in some instances that expressly implement – federal mandates. A number have adopted the Uniform Interstate Family Support Act, which expands upon the requirements of the Child Support Orders Act by including tribal alimony support orders as well as the federally mandated child support orders within its full faith and credit provisions. For its part, New York has passed legislation to implement the full faith and credit requirements of the Violence Against Women Act. *See* N.Y. CRIM. PROC. LAW § 530.11; N.Y. FAM. CT. ACT § 154-e; N.Y. DOM. REL. LAW §§ 240 & 252.

judgments, either across the board, or within limits to particular tribes or on the basis of reciprocity;[5] most states extend recognition by comity under a range of standards set forth in statutes, court rules, or ad hoc judicial decisions;[6] no states categorically deny recognition to tribal court judgments.[7]

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[5] Idaho is the only state that grants full faith and credit to tribal court proceedings across the board and without reservation. Its highest court has adopted the now-minority view that places tribes within the meaning of "Territories" under 18 U.S.C. § 1738. *See Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982). The Idaho Supreme Court has not revisited its holding since the Ninth Circuit, in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), held that 28 U.S.C. § 1738 does not apply to tribal court judgments. Because Idaho is within the Ninth Circuit, there is at least a possibility that the court would now defer to the Ninth Circuit's decision regarding federal law in *Wilson*. New Mexico's Supreme Court also has adopted the view that a tribe fits within the meaning of "Territories" under 18 U.S.C. § 1738 and that, as a result, tribal court proceedings are entitled to full faith and credit. *See Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751 (N.M. 1975); *see also Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088, 1089 (N.M. Ct. App. 1997). However, in a recent case, the New Mexico Supreme Court suggested that its reasoning in *Jin* has been called into question by the subsequent development of case law over the thirty-five years following *Jin*, and that comity is likely the more appropriate rule to apply to tribal court judgments. *See Garcia v. Gutierrez*, 217 P.3d 591, 606-08 (N.M. 2009). The Supreme Court of Washington also has held that tribal court decrees are entitled to full faith and credit. *In re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976). The state subsequently has adopted a court rule that addresses the procedures for recognition and enforcement under a more discretionary approach than full faith and credit. *See* WASH. SUPER. CT. CIV. R. 82.5. And, like Idaho, Washington resides within the Ninth Circuit, and its highest court has not revisited *Buehl* since *Wilson*. By statute, the Oklahoma legislature has vested the Supreme Court of Oklahoma with the power to issue standards to extend full faith and credit to the courts of federally recognized tribes as long as the "tribal courts agree to grant reciprocity of judgment of the courts of the State of Oklahoma in such tribal courts." *See* OKLA. STAT. ANN. tit. 12 § 728. In accordance with the authority granted by that statute, the Oklahoma Supreme Court adopted Rule 30 to the Rules for the District Courts of Oklahoma, which grants full faith and credit to tribal court judgments, orders and decrees, so long as the issuing tribal court grants reciprocity to Oklahoma courts. *See Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994). Arizona also, through a mixture of case law and Rule 5 of the Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments, gives effect to tribal court decisions on the merits. *See Astorga v. Wing*, 118 P.3d 1103, 1108 (Ariz. Ct. App. 2006) ("Once a tribal court appropriately reaches a decision on the merits, Arizona law also provides that the decision be given effect.") (collecting authorities). *But see Leon v. Numkena*, 689 P.2d 566, 569-70 (Ariz. Ct. App. 1984) (stating that the Arizona Supreme Court has rejected the application of full faith and credit to tribal court judgments, noting that the Arizona Supreme Court found a Navajo divorce decree conclusive and binding, and applying the principle of comity). By statute, a handful of states accord full faith and credit to the judicial proceedings of specified tribes. Along these lines, the laws of New York provide for state court enforcement of the proceedings of the Seneca Nation Peacemakers' Court. *See* N.Y. INDIAN LAW § 52; *but see* Section III.A, *infra* (noting the fact that N.Y. INDIAN LAW § 52 does not provide for the recognition of the full range of judgments and orders rendered by the Peacemakers' Court). North Carolina accords full faith and credit to the orders, judgments and decrees of the Eastern Band of Cherokee Indians. N.C. GEN. STAT. ANN. § 1E-1. South Carolina, pursuant to a codified settlement agreement, extends full faith and credit to tribal court judgments of Catawba Indian Tribe. S.C. CODE ANN. § 27-16-80. As a matter of federal law, Maine is required to give full faith and credit to the judicial proceedings of the Passamaquoddy Tribe and Penobscot Nation. *See* to 25 U.S.C. § 1725(g) (provision of federally codified settlement). Accordingly, the state has passed laws implementing the federal requirements. *See, e.g.*, ME. REV. STAT. ANN. tit. 15, §§ 702 & 706 (providing full faith and credit for arrest warrants issued by tribal courts of the Passamquoddy Tribe or the Penobscot Nation). Arizona grants recognition to civil commitment orders by tribal courts. ARIZ. REV. STAT. § 12-136(A).

[6] New Jersey and Connecticut apply common-law standards. *See Mashantucket Pequot Gaming Enter. v. Malhorta*, 740 A.2d 703 (N.J. 1999); *Mashantucket Pequot Gaming Enter. v. Dimasi*, No. CV 990117677 S, 1999 WL 799526 (Conn. Super. Ct. Sept. 23, 1999). *See* Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 338-39 (2000). Such standards may be hard to predict. For instance, while Montana courts approach questions of recognition and enforcement under judicially crafted comity rules, *State v. Spotted Eagle*, 71 P.3d 1239 (Mont. 2003), the case law does not specify the factors

In broad terms, giving "full faith and credit" requires the receiving court to take a judgment at face value, relegating all challenges to the judgment to the court system of the issuing court. Comity, on the other hand, conditions recognition on factors intended to assure fundamental fairness while allowing for variations in court procedures. Thus, under the proposed rule, a court applying comity can examine whether the issuing court: (a) lacked jurisdiction; (b) violated the due process requirements of the Indian Civil Rights Act; (c) denies reciprocity; (d) was defrauded; or (e) violated a strong state or federal public policy. Those conditions are more rigorous, and permit a broader inquiry by the receiving court, than the Restatement (Third) standards applied by federal courts to tribal judgments. As the California Judicial Council explained in rejecting a proposal for across-the-board procedural standards, "only Congress can impose restrictions on Indian tribes" and "[s]tate attempts to impose additional requirements [such as those imposed in the Tribal Law and Order Act as a condition of enhanced criminal law authority], would be inappropriate given the constitutional structure that vests such authority in Congress * * * *." (California Judicial Council Report, 9). The California Judicial Council Report is a very thorough and recent review of enforcement of tribal court judgments, and is attached as Exhibit B for reference.

Importantly, under the proposal advanced by the Tribal Courts Committee, non-Indians affected by tribal court judgments have an additional avenue for seeking relief not open to those affected by foreign court judgments or state or territorial judgments—a federal court action challenging the tribal court's authority to adjudicate once tribal remedies have been exhausted. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (setting aside tribal court judgment for lack of jurisdiction); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997) (same); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (requiring exhaustion of tribal remedies as a matter of comity). The proposal also provides for recognition of State court judgments and orders by tribal courts, which provides additional enforcement relief for State court litigants that would not be available absent the proposed amendment to the CPLR, or a protocol such as the one adopted by a Fifth Judicial District Supreme Court part and the Oneida Nation (*see* Section III below).

B. *Recognition of Tribal Court Judgments Is Not Already Covered by CPLR Art. 53*

The Advisory Committee letter states that the proposed legislative action is not needed "since the CPLR already provides in Article 53 for the recognition of foreign country money judgments." Insofar as the response appears to be suggesting that it is already settled that CPLR Article 53 literally governs the recognition of tribal court judgments, that suggestion is erroneous in two respects: (a) the application of CPLR Article 53 is not settled; and (b) even if it were, Article 53 is limited to money judgments and does not address other kinds of tribal court judgments.

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that will be considered before recognition is extended. Other states have adopted statutes or rules, similar to legislation that the California Judicial Council is now considering. *See* Exhibit B, attached; s*ee also, e.g.,* Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments, Rule 5; MICH. CT, R, 2.615; N.D. CT. R. 7.2; Wash. CR 82.5; WIS. STAT. ANN. § 806.245; WYO. STAT. ANN. § 5-1-111; MINN. GEN. R. PRAC. 10.02; S.D. CODIFIED LAWS § 1-1-25. North Dakota extends limited recognition by comity to family court orders of the Three Affiliated Tribes of the Ft. Berthold Reservation. N.D. CENT. CODE § 27-01-09.

[7] Several examples of court rules from other jurisdictions providing for state court recognition of tribal court judgments are provided in the attached Appendix.

1. CPLR Article 53's Application To Tribal Court Judgments Is, At Best, Unsettled

The Advisory Committee response cites no New York cases applying CPLR Article 53 to tribal court judgments, and we are aware of only one such case, an unreported decision by the New York County Supreme Court.[8] Article 53 adopts a uniform law (the Uniform Foreign Country Money Judgment Recognition Act ("UFCMJRA" or the "Act"), but we have not found "well-established case law" applying the Act to tribal court judgments in other states, either. Minnesota's intermediate appellate court ruled that the UFCMJRA definition of "foreign state" is so broad that it "would appear to include Indian tribes," *Shakopee Mdewakanton Sioux Gaming Ent. v. Prescott*, 779 N.W.2d 320, 324 (Minn. App. 2010), but applied its tribe-specific rule of practice to determine recognition "with guidance from the UFCMJRA." *Id.* The Montana courts have declined to decide whether the Act is applicable to tribal court judgments. *Anderson v. Engelke*, 287 Mont. 283, 290 (1998) (noting that the court's "research has revealed no federal nor any state case authority under which an Indian tribal court judgment has been enforced, either on the reservation or off the reservation via the Recognition Act."). Some states have made the Act applicable to tribal courts by adding language not included in the New York CPLR. For example, California explicitly defines "Foreign country judgment" to include "a judgment by any Indian tribe recognized by the government of the United States," CAL. CODE CIV. PRO. §1714(b), but even with that deviation from New York's CPLR Article 53, as discussed in detail in Exhibit B, California is taking under careful consideration to specifically provide for the enforcement of tribal court judgments separately from this "catch all." *Accord* MICH. COMP. LAWS § 691.1132(a)(3) (including "[a] federally recognized Indian tribe whose tribal court judgments are entitled to recognition and presumed to be valid under a court rule adopted by the supreme court."), MICH. CT. R. 2.615 (rule). Oregon adopted a special recognition provision for "[a] foreign judgment of a tribal court" in a domestic relations case. OR. REV. STAT. § 24.115. Iowa enacted a separate parallel provision for recognition of tribal court judgments. IOWA CODE §§ 626D.2-8. Those enactments are inconsistent with the notion that it is already settled that tribes are considered to be foreign countries under the UFCMJRA.

The suggested characterization of tribes as foreign countries under the UFCMJRA is not free from controversy. Tribes are not foreign states because they are subject to the paramount authority of the federal government, and because geographically they are "within the United States." *See United States ex rel. Mackey*, 59 U.S. at 104 (administrator of an estate appointed by a Cherokee tribal probate court could enforce the estate's claims in the District of Columbia under an 1812 federal statute because, "[t]he Cherokee country, we think, may be considered a territory of the United States, within the act of 1812. In no respect can it be considered a foreign State or territory, as it is within our jurisdiction and subject to our laws."); *Hill v. Eppolito*, 772 N.Y.S. 2d 634 (3d Dep't 2004) (tribal court criminal judgment precludes re-prosecution under New York law applicable to courts "within the United States.").[9]

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[8] *Mashantucket Pequot Gaming Enterprise v. Yau*, 2010 WL 7505742 (N.Y. Sup. NY County Feb. 17, 2010). As an unreported Supreme Court decision, this case is not universally binding throughout the state, and, in any event, only relates to money judgments.

[9] The Supreme Court long ago ruled that Indian tribes are not foreign states for purposes of federal court jurisdiction. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 19-20 (1831). Even federal courts like the Ninth Circuit holding that tribal court judgments are recognized on the basis of comity like foreign judgments do so on the basis

Accordingly, the Advisory Committee's suggestion that the need for enforcement of tribal court judgments is already addressed by Article 53 as a "foreign" judgment is contrary to federal law, and subjects tribal judgments and orders to uncertainty, misunderstanding and confusion when litigants attempt to enforce such judgments in the State court system. The primary motivation behind the Tribal Courts Committee's recommendation is to remove such uncertainty and create a workable framework of uniform, statewide application for both the judiciary and litigants to follow.

2. CPLR Article 53 Is Inapplicable to Non-Money Judgments

Tribal courts preside over cases involving a variety of issues, including divorce, custody, support, adoption, domestic violence, name change, contract dispute, and landlord tenant matters. As discussed in detail in Section III below, many of these cases involve non-money tribal court judgments and orders. The scope of CPLR Article 53, however, is limited to money judgments only. The Report to the California Judicial Council highlights this insufficiency, because the UFCMJRA:

> does not cover the entire range of issues currently being dealt with in California's tribal courts but is instead limited to money judgments * * * and some family law judgments. In addition, the process can be lengthy and time consuming. Tribal court judges report that, in some instances, matters that have been fully litigated in tribal court must essentially be relitigated in state court in order to obtain recognition under these provisions. This adds immensely to the costs to both litigants and the court systems and is an inefficient and ineffective use of judicial resources." (Report to the Judicial Council, Exhibit B, at 4).

Similarly, New York Indian Law Section 52 (attached hereto as Exhibit C), enacted over a century ago to provide for limited enforcement of judgments from the Seneca Peacemakers' Court, does not apply to the full range of judgments and orders issued by the Peacemakers.[10] Section 52's language is also strictly limited to recognition of judgments from the Seneca Peacemakers' Court, and does not address judgments and orders rendered by any other tribal court. Furthermore, even with respect to the Peacemakers' Court, the terms of this statute are now over one hundred years old, and do not reflect the most efficient or effective mechanism for enforcing valid tribal court orders outside of Indian country.

New York has already passed legislation providing for state recognition of tribal court child custody judgments (outside the Indian Child Welfare Act) rendered "in substantial conformity with the jurisdictional standards of this article [the Uniform Child Custody Jurisdiction and Enforcement Act]." N.Y. DOM. REL. LAW § 75-c. These provisions of the Indian and Domestic Relations Laws illustrate that New York has a long history of according recognition to and enforcement of tribal court judgments in certain circumstances. However, the current laws

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of policy rather than by classifying tribes as foreign states. *See also Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (tribes are not foreign states).

[10] Section 52 provides that a litigant in the Peacemakers' Court "shall be entitled to recover the amount awarded to him [by the tribal court]... in an action in justice's court before any justice of the peace of the county in which such reservation or a part thereof is situated." N.Y. INDIAN LAW § 52, Exhibit C.

simply do not address the full range of issues being dealt with in tribal courts. As a result, and as discussed in detail in Section III below, the tribal experience of enforcement and recognition of tribal judgments, even for routine, day-to-day, administrative matters, has been at the whim of individual judges and clerks and, at best, inconsistent and unreliable.

Even with the Fifth Judicial District and Oneida Nation pilot protocol in place, enforcement of tribal judgments under that protocol has been difficult. Notably, the New York court has been unwilling to enforce default judgments in cases where litigants have expressly consented to Oneida Nation court jurisdiction and selected Oneida Nation court as the appropriate jurisdiction and venue for any disputes arising out of their transactions. This has had the effect of encouraging litigants to default because there can be no enforcement, and the only court with jurisdiction is the tribal court, which has no enforcement capability over non-Indians. Interestingly, New York's sister state, Connecticut, has recognized and enforced Oneida Nation tribal court judgments on its citizens under a procedure very similar to that proposed by the Tribal Courts Committee. It is very disappointing that Connecticut can recognize tribal court judgments, but the New York courts will not.

The proposed rule, or some revised version thereof, provides a better framework for affording comity to tribal court judgments than the more general language of CPLR Article 53 for two important reasons. *First*, there is undoubtedly a need to clarify the process for recognition of tribal court judgments, in any case. *Second*, the criteria in the proposed rule are tailored to tribal court judgments, and identify reasons for non-recognition specific to tribal rather than foreign courts (such as the federal Indian Civil Rights Act).

C. *Concerns About the Lack of Uniformity Among Various Tribal Courts*

The Advisory Committee's response also contends that variations among tribal court systems dictate that recognition of tribal judgments should be "on a case-by-case basis" rather than on the basis of full faith and credit. However, the proposed rule is based on the principles of comity, not full faith and credit, and therefore does allow courts to take into consideration "case-by-case" circumstances just as the Advisory Committee's letter urges. For example, the proposed rule explicitly denies recognition to a tribal court when the tribal court "lacked jurisdiction over a party or the subject matter," as would be the case, for example, when the tribal government had abolished the tribal court prior to the judgment (leaving the court with no jurisdiction). *See Vacco v. Harrah's Operating Co.*, Decision and Order, No. 07-CV-663, 5-7 (N.D.N.Y. Sept. 28, 2009) (recounting dissolution of tribal court by tribal government and BIA action disregarding actions by the court). Indeed, the proposed rule is more restrictive than the standard for recognition of foreign court judgments in the Restatement (Third) of Foreign Relations § 482 (1987), and followed by several federal appellate courts,[11] because it provides more grounds for denying recognition of a tribal court judgment.

The Advisory Committee's comments regarding the development of effective, well-functioning court systems among tribes seems to stem from concerns about fairness, uniformity, and fundamental due process for litigants. Such issues were of essential importance in recommending this new proposed legislation and in developing the Fifth Judicial District and

[11] *See United States v. Shavanaux*, 647 F.3d 993, 999 (10th Cir. 2012) (citing Ninth and Tenth Circuit cases).

Oneida Nation protocol, and are reflected in the proposal. Under the proposal and protocol, State courts will only recognize tribal court judgments if they have been issued in accordance with certain procedural requirements and with the specific due process provisions of the Indian Civil Rights Act of 1968 (25 U.S.C. 1302) ("ICRA"). These constraints ensure adequate procedural protections for litigants in tribal courts. The proposed rule mirrors these requirements by providing for non-recognition of tribal court judgments in certain circumstances, including: where the tribal court lacked jurisdiction over a party or the subject matter of the litigation; where the judgment was rendered without due process as provided by ICRA; where the judgment was rendered under fraudulent circumstances; or where enforcement of the judgment would violate strong State or federal public policy. The proposed rule also requires mutual recognition of judgments, by permitting non-recognition of a judgment where the issuing tribal court does not provide for reciprocal recognition and enforcement of State court judgments.

The lack of uniformity among tribes is not unique to New York, and is no reason to reject the Tribal Court Committee's proposal for a rule regarding mutual enforcement of tribal and state court orders. Federal legislation has considered variation issues and adopted federal legislation that recognizes and specifically provides for such variation. The federal Tribal Law and Order Act of 2010 ("TLOA") is an example of legislation that recognizes and provides an alternative model for ensuring ample procedural and due process protections for persons subject to tribal court jurisdiction. Prior to TOLA, tribal court criminal sentencing authority was limited to imposing prison sentences on persons within their jurisdiction of up to only one year. TOLA provides tribal courts with enhanced authority to impose prison sentences of up to three years, provided that certain criteria are met for the protection of the criminal defendant's rights. Specifically, in a criminal proceeding where a tribal court imposes a total term of imprisonment of more than one year, the tribe must:

1. Provide the defendant with the right to effective counsel at least equal to that guaranteed by the U.S. Constitution;

2. If the defendant is indigent, provide the defendant (at the tribe's expense) with the assistance of a defense attorney licensed to practice law in any jurisdiction in the United States;

3. Require that the judge presiding over the criminal proceedings has sufficient legal training to preside over such proceedings;

4. Require that the judge presiding over the criminal proceedings is licensed to practice law by any jurisdiction in the United States;

5. Prior to charging the defendant, make publicly available the tribal government's:

    - Criminal laws (including regulations and interpretive documents);
    - Rules of evidence; and
    - Rules of criminal procedure (including rules governing recusal of judges).

6. Maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

In addition, the enhanced sentence must have been issued after a conviction in conformity with the other provisions of ICRA, which enumerates rights for criminal defendants analogous to those guaranteed by the U.S. Constitution.

Although the TOLA is tailored towards criminal matters, certain of its criteria for enhanced sentencing authority would address many of the Advisory Committee's concerns about the uniformity and procedural soundness of tribal courts in the civil context as well. In particular, the requirements to employ well-trained and duly-licensed judges, to make available the tribe's written laws and rules of evidence and procedure, and to maintain a recording of the proceedings might be relevant to addressing the Advisory Committee's concerns in this area.

III. Practical, Everyday Problems in the Administration of Justice in New York in the Absence of Clear Standards for the Recognition of Tribal Court Judgments.

"Today, in the United States, we have three types of sovereign entities – the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system and each plays an important role in the administration of justice in this country." Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 37 TULSA L. REV. 1, 2 (1997). Tribal courts have assumed, and are assuming, an increasingly important role in our nation's legal system. "[B]y the beginning of the twenty-first century, more than 140 tribes had tribal courts, actively engaged in dispute resolution and interpretation of tribal laws." Felix Cohen, Handbook of Federal Indian Law § 4.04[3][c][iv][A] (2005 ed.).

The United States Supreme Court has recognized the vital role of tribal courts. *Iowa Mutual Ins. Co.*, 480 U.S. at 14 ("Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."). Congress also has recognized the importance and legitimacy of tribal courts. 25 U.S.C. § 3601 (finding that tribal courts are "an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments . . . the appropriate forums for the adjudication of disputes affecting personal and property rights . . . [and] essential to the maintenance of the culture and identity of Indian tribes"); 25 U.S.C. § 3651; 25 U.S.C. § 3652; 25 U.S.C. § 3681; 42 U.S.C. § 3797u-4. So has the Executive branch. Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 Judicature 113 (1995).

In most states, civil jurisdiction over tribal lands ("Indian country" as defined in 18 U.S.C. § 1151) is purely federal. In a few states, Congress extended state court civil jurisdiction to Indian country through what is popularly known as "Public Law 280." *See California v. Cabazon Band*, 480 U.S. 202 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976). Some states, such as New York, have their own federal statutes (New York has 25 U.S.C. § 233) generally conferring state court civil jurisdiction over disputes involving Indians whether or not the Indian party lives on reservations within the state or the dispute arises on such a reservation. While tribal sovereignty precludes state courts from issuing decisions concerning internal tribal matters, there may be overlapping jurisdiction over disputes concerning land, child custody, divorce, probate, and the like. The degree of jurisdictional overlap between state and tribal courts, and

hence the need for coordination of proceedings and clear standards for recognition of judgments to reduce the waste of judicial resources or conflicting judgments is greater in states like New York and those subject to Public Law 280 than in states with clearer geographic lines of demarcation between tribal and state affairs.

At present there are eight federally-recognized tribes in New York, and one tribe that is recognized by the state, but not by the federal government.[12] According to the Tribal Courts Clearing House, three federally-recognized tribes maintain court systems: the Oneida Nation, the St. Regis Mohawk Tribe, and the Seneca Nation (on both the Allegany and Cattaragus reservations).[13]

As described below, the experience of these tribal courts with respect to state recognition of tribal court judgments has been frustrating, inconsistent and totally unreliable.

A. *The Seneca Nation of Indians Experience*

The Seneca Nation Territories share regional jurisdiction with Erie and Cattaraugus counties. However, enrolled members living off territory are also affected in other counties throughout New York State.

The Seneca Nation Peacemakers' Court hears matters involving members of the Seneca Nation, matters referred to them from other tribes, and cases involving disputes arising on Seneca lands. These cases include domestic relations matters of divorce, custody, support, adoption and domestic violence, and civil matters, including but not limited to, contract disputes, landlord tenant issues, and name changes.

Judgments and orders from these cases are issued on a daily basis, and the vast majority of these are not money judgments. The recognition of these judgments and orders ends at the Peacemakers' Courthouse door.

A litigant receiving a Judgment of Divorce from State Court granting the right to resume the use of a former name has the ability to file that judgment in the local clerk's office, and may then use that judgment to effectuate the name change at the Department of Motor Vehicles, Social Security Office and Board of Elections. However, the Seneca Peacemakers' Judgment of Divorce does not provide the same legal effect, as no mechanism currently exists to effect the filing of the tribal court judgment.

The current practice in the eight counties in Western New York prevents such tribal judgments and orders from being filed, even in the case of routine orders such as name changes. None of the County Clerks have a procedure in place for filing such documents, and all operate under the impression that New York State does not recognize these as valid court orders. Additionally, they are all unable to articulate any state or local policy for this position.

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[12] New York Family Court Act § 115(d) addresses the jurisdiction of tribal courts "designated as such by the state of New York," i.e., courts of state-recognized tribes, alongside federally-designated tribes.

[13] See www.tribal-institute.org.

Because the majority of the judgments rendered by the Peacemakers' Court are non-money judgments and orders, CPLR Article 53 does not address these problems. Thus, the only suggested procedure for filing a "foreign" court order would be to "domesticate" that order in the local state court. This imposes an additional, unnecessary cost upon the tribal court litigant, and undermines the sovereignty of the tribal court by requiring the approval and signature of a non-tribal court judge. Similarly, New York Indian Law Section 52 does not address these problems. Section 52 provides only that a tribal court litigant "shall be entitled to recover the amount awarded to him" by the tribal court, and transfers the enforcement of tribal court money judgments to the local, non-tribal court. As such, Section 52 does not provide for the recognition of the full range of judgments and orders regularly issued by the Peacemakers' Court..

B. ***The Oneida Nation Experience***

As noted above, in 2008, having mutually identified the need for effective coordination between State and tribal courts, the Oneida Indian Nation and the New York Fifth Judicial District entered into an agreement and protocol, which provides for the recognition and enforcement by State courts of the Oneida Nation's court orders, judgments, decrees, and other judicial actions. At its core, the agreement requires courts in the Fifth Judicial District to recognize and enforce orders from the Oneida Nation court in the same manner as the orders and decrees of any New York court, provided that the tribal court order was issued in a manner that accorded certain due process obligations and protections to the person against whom the order was issued. The protocol also requires the Oneida Nation tribal court to provide for reciprocal recognition of New York State and federal courts. The protocol is essentially identical to the current draft of the proposed rule.

The protocol was born of the State and tribal courts' mutual need for recognition and coordination, and has been successful in achieving benefits for both parties, both in terms of procedural efficiency and substantive administration of justice. Under the protocol, State courts have had a number of opportunities to recognize and enforce properly-rendered tribal court judgments and orders, thus avoiding substantial duplication of litigation and potentially conflicting judgments. State court litigants have also begun to take advantage of the reciprocal recognition provisions afforded by the protocol—there is currently a matter pending before the tribal court in which a litigant is seeking to enforce a child support order, granted by a State court against an Oneida Nation member, in tribal court in order to garnish the member's income from tribal revenue streams. Absent the protocol's mutual recognition requirements, there would be no mechanism or incentive for the tribal court to enforce this State court judgment as Oneida Nation court does not have jurisdiction over domestic relations matters, including custody and child support, and the Oneida Nation and its instrumentalities are cloaked with sovereign immunity absent waiver. As knowledge and understanding of the protocol and mutual recognition increases within the region, the tribe expects more non-Indians to begin seeking enforcement of State court judgments in tribal court.

These significant mutual benefits, however, have been limited due to the restrictions of the protocol, and the lack of a legislatively enacted stamp of approval. Most obviously, the benefits of the Protocol are limited only to mutual recognition of judgments between the State courts within the Fifth Judicial District and the court of the Oneida Nation. In order to achieve

efficiency and consistency in the courts, there must be a uniform approach that courts can apply to effect state-wide mutual recognition of all properly-rendered judgments.

Furthermore, even within the Fifth Judicial District, the lack of state-wide approval or formal publication of the protocol has had a chilling effect that has limited the protocol's effectiveness. As a practical matter, some State courts have been reluctant to enforce certain types of judgments rendered by the tribal court, particularly in the case of default judgment. A thoroughly-vetted, formal, state-wide system of mutual recognition is necessary to give State courts the full confidence and authority necessary to achieve the efficiencies and benefits contemplated by the protocol.

C. *The St. Regis Mohawk Experience*

The St. Regis Mohawk Tribe regularly encounters many of the same problems encountered by the Seneca Nation of Indians and the Oneida Nation. The St. Regis Mohawk Tribal Court has seen an expansion of the volume of cases it hears in recent years, and continues to experience difficulty with the same enforcement and recognition problems as the other tribal courts in New York State.

IV. Conclusion

The Tribal Courts Committee understands the Advisory Committee's apparent concern that State courts should not find themselves in the position of having to recognize tribal court judgments that may have been issued under procedurally unsound or fundamentally unfair circumstances. The Tribal Courts Committee believes that the concerns in this area can and should be addressed in a revised draft of the proposed rule. Indeed, by adopting a version of the proposed rule tailored to thoroughly address these issues, New York will be able to create a system of mutual recognition that encourages tribes to continue to develop sophisticated, effective, and reliable tribal court systems. The Tribal Courts Committee welcomes the opportunity work with the Advisory Committee to address these concerns, and would particularly welcome any input from the Advisory Committee with respect to additional criteria for State court recognition that should be included in a revised draft of the proposed rule.

M E M O R A N D U M

TO: Tribal Forum Participants

FROM: Justice Marcy L. Kahn

DATE: April 21, 2016

RE: Doctrine of comity requirements

Issue

What is required for a New York court to find that a foreign judgment, decree, or order is entitled to recognition under the common law of comity?

I. COMITY DOCTRINE REQUIREMENTS

New York courts have the discretion to recognize judgments that are "rendered in a foreign country under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of . . . sister States." Greschler v Greschler, 51 NY2d 368, 376 (1980). Common law comity embodies the "spirit of cooperation" that domestic courts use to resolve cases that involve "the laws and interests of other sovereign states." See Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi, 10 NY3d 243, 247 (2008) (quoting Societé Nationale Industrielle Aérospatiale v U.S. Dist. Court for the Southern Dist. of Iowa, 482 U.S. 522, 568 n.27 (1987)). The Court of

Appeals has further provided that "[t]he comity doctrine is . . . pragmatically necessary to deal properly and fairly with the millions of relational and transactional decrees and determinations that would otherwise be put at risk, uncertainty and undoing in a world of different people, Nations and diverse views and policies." Matter of Gotlib v Ratsutsky, 83 NY2d 696, 700 (1994).

In New York, courts can recognize a foreign judgment under the doctrine of comity if: the foreign court had personal jurisdiction over the parties; the parties were accorded due process of law; the judgment was not procured through fraud; and recognition of the judgment will not offend New York public policy. See Sung Hwan Co. v Rite Aid Corp., 7 NY3d 78, 83, 82 (2006); see also Bond v Lichtenstein, 129 AD3d 535, 535 (1st Dept.) (holding that the New York Supreme Court properly recognized a Hong Kong judgment under comity because the "[d]efendant was accorded due process in the Hong Kong proceeding, which he commenced, and the court had personal jurisdiction over him. The judgment did not violate New York's public policy . . . [n]or was the judgment procured through fraud"), lv. denied, 26 NY3d 949 (2015). If this criteria is met, "and enforcement of the foreign judgment is not otherwise

repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding." Sung Hwan Co., 7 NY3d at 83.

A. Personal Jurisdiction

Whether a New York court will find that the foreign court had personal jurisdiction over the parties as required by the comity doctrine "turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction." Sung Hwan Co., 7 NY3d at 83. Therefore, compliance with New York's general personal jurisdiction statute, CPLR Section 301 ("Jurisdiction over persons, property or status"), or with New York's long-arm statute, CPLR Section 302 ("Personal jurisdiction by acts of non-domiciliaries"), can satisfy this requirement.

In Goodyear Dunlop Tires Operations, S.A. v Brown, 131 S. Ct. 2846, 2851 (2011), the Supreme Court held that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." Recently, in Daimler v Bauman, 134 S. Ct. 746, 773 n. 19 (2014), the Supreme Court heightened this standard, and

held that only "in an exceptional case . . . [can] a corporation's operations in a forum other than its formal place of incorporation or principal place of business . . . be so substantial and of such a nature as to render the corporation at home in that State." As the Second Circuit has noted, this holding has "expressly cast doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum. Gucci America, Inc. v Weixing Li, 768 F3d 122, 135 (2d Cir. 2014). Consequently, individuals seeking to have a judgment against a corporation recognized in New York pursuant to comity should take care to demonstrate that the foreign court had personal jurisdiction over the corporation that comported with this stricter standard.

B. Due Process

If personal jurisdiction is satisfied, New York courts will only recognize foreign judgments under comity if "that foreign jurisdiction shares our notions of procedure and due process of law." Sung Hwan Co., 7 NY3d at 83; see Bond, 129 AD3d at 535 (affirming the lower court's grant of comity to the plaintiff's judgment she obtained in Hong Kong, in part because "[d]efendant was accorded due process in the Hong Kong proceeding").

Due process requires that parties whose rights may be affected by a proceeding are given notice of the proceeding and an opportunity to be heard. See John Galliano, S.A. v Stallion, Inc., 15 NY3d 75, 80 (2010). Therefore, failure to give notice of the foreign proceeding can be legitimate grounds for denying recognition of a foreign judgment. Id. at 80-81; Tal v Tal, 158 Misc2d 703, 707-08 (Sup. Ct. Nassau Co. 1993).

C. Absence of Fraud

Another requirement for the doctrine of comity is that the judgment cannot have been procured through fraud. Bond, 129 AD3d at 535. Courts require parties who assert that a foreign decree is the product of fraud, coercion, or oppression to make particularized claims, and support such claims with "[s]ome evidentiary basis." See Matter of Gotlib, 83 NY2d at 699, 700. For example, in Matter of Gotlib, the Court of Appeals held that general claims regarding "red tape" and "delays" were "not the kind or quantum of specificity our settled principles require to raise a cognizable legal coercion . . . claim." 83 NY2d at 700-01. Furthermore, evidence that the foreign court investigated claims of fraud and found them to be without merit can serve as proof that the foreign court was not defrauded. See Bond, 129 AD3d at 535 (holding that a Hong Kong court's determination that defendant's claims regarding the source of plaintiff's money was irrelevant was sufficient for the New York court to conclude that the Hong Kong court had not been defrauded).

D. Consistent with State Public Policy

Courts have discretion to decline to recognize a foreign

judgment under comity when the judgment contravenes New York's public policy. Greschler, 51 NY2d at 377. This is a narrow exception to the doctrine of comity that is usually only used when enforcing the foreign judgment would promote a "transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." Intercontinental Hotels Corp. (P.R.) v Golden, 15 NY2d 9, 13 (1964).

As with the requirement that foreign judgments are not the product of fraud, courts require that a party asserting that a foreign judgment is contrary to New York public policy provide "some evidentiary basis" to support this claim. See Matter of Gotlib, 83 NY2d at 699-700. The Court of Appeals has held that it "requires particularization in claims emanating out of public policy assertions." Id. at 700. The Court of Appeals has further held that ignoring established facts and seemingly regular documents on the basis of generalized public policy claims "would seriously undermine the 'rare' public policy exception to the appropriate application of the doctrine of comity." Id. at 701.

To ascertain public policy, courts examine the dominant attitudes of the people of New York. Greschler, 51 NY2d at 377-78. For example, in Greschler, the court held that a Dominican Republic divorce decree that contained a provision in which the wife waived her right to alimony did not contravene New York's public policy. 51 NY2d at 377-78. The court used the relevant section of the General Obligations Law to gauge public policy regarding waivers of alimony. Id. Because the present version of the statute abandoned the gender distinction that the previous version had contained, the court held that the public consensus

was that wives could validly waive their rights to receive alimony. Id.; see Bond, 129 AD3d at 535 (holding that a Hong Kong judgment directing a father to pay child support did not violate New York public policy because the Hong Kong court recognized that both parents have an obligation to pay child support).

II. OTHER ISSUES

A. Collateral Attacks

A party is precluded from collaterally attacking the validity of a foreign judgment in New York if the party properly appeared in the action; there is no showing of fraud in the procurement of the foreign country judgment; and there is no showing that recognition of the judgment would violate a strong public policy in New York. Greschler, 51 NY2d at 376.

B. Divorce Decrees

New York courts may recognize an *ex parte* divorce decree to the extent that it terminates the parties' marital status if one spouse is a resident of a foreign country but the foreign court does not have personal jurisdiction over the nonresident spouse, provided that the nonresident spouse has been given sufficient notice of the proceeding. See Somma v Somma, 19 AD3d 477, 477-78 (2d Dept. 2005).

Additionally, if a foreign divorce decree does not address certain economic issues between the parties, New York courts can address such issues in a separate action brought in New York. See Nikrooz v Nikrooz, 167 AD2d 334, 335 (2d Dept. 1990). For

example, in Nikrooz, the plaintiff obtained an English divorce decree that awarded plaintiff custody of the parties' child, but did not address child support or marital property. 167 AD2d at 335. The plaintiff then filed a separate action in New York for equitable distribution of the parties' marital assets. Id. The court rejected the defendant's arguments that the plaintiff was collaterally estopped from bringing the New York action. Id.

Lastly, New York courts may recognize a foreign divorce decree "where the jurisdiction of the foreign tribunal was predicated upon the consent of both parties and residency, rather than domicile, was established by a statutory 'brief contact' through appearance of one of the parties." T.T. v K.A., 20 Misc3d 1104(A) 1, 3 (Sup. Ct. Nassau Co. 2008); see Rosentiel v Rosentiel, 16 NY2d 64, 74 (1965) (holding that "[a] balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy").

III. CONCLUSION

Typically, in deciding whether or not a foreign judgment is entitled to comity, courts analyze whether the foreign court had personal jurisdiction over the parties, the parties were afforded due process in the foreign proceeding, if the judgment was procured through fraud, and if enforcing the judgment would

violate New York's public policy.

IDA L. TRASCHEN
First Assistant Counsel
Legal Bureau

NEW YORK STATE | **Department of Motor Vehicles**

6 EMPIRE STATE PLAZA • ALBANY, NY 12228

July 21, 2015

The Honorable Marcy L. Kahn
Unified Court System
100 Centre Street, Room 1730
New York, New York 10013

Re: Recognition of Tribal Court Orders

Dear Judge Kahn:

Deputy Commissioner Timothy Lennon requested that I respond to your letter of June 15, 2015, regarding Indian tribal court orders, decrees and judgments.

The Department of Motor Vehicles will honor tribal orders, decrees and judgments, and anticipates a uniform practice across all Department of Motor Vehicle issuing offices and county offices that conduct business as agents of the Department. Accordingly, we have issued the attached directive.

We trust that this directive will bring uniformity to our practices and address concerns raised by the Unified Court System's Tribal Courts Committee. Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

Ida L Traschen

Ida L. Traschen
First Assistant Counsel

July 21, 2015

Mailbag 28, 2015

RECOGNITION OF TRIBAL COURT ORDERS, DECREES AND JUDGMENTS

Effective immediately, all issuing offices must recognize orders, decrees and judgments issued by Indian tribal courts. Examples include orders related to divorces, name changes, and Letters of Administration issued by a tribal Surrogate's Court.

You should honor all orders, decrees and judgments issued by the following New York State tribes: Cayuga Nation, Oneida Nation of New York, Onondaga Nation of New York, St. Regis Mohawk Tribe, Seneca Nation of Indians, Tonawanda Band of Seneca, Tuscarora Nation, Shinnecock Indian Nation and Unkechaug Nation. In addition, you should also honor orders, decrees and judgments issued by tribes from non-NY states recognized by the federal Bureau of Indian Affairs. A list of recognized tribes can be found at the Bureau of Indian Affairs. If you have any questions regarding the authenticity of a document when it is presented, please contact the IOCU for assistance.

Please share this information with all appropriate staff. If you have any questions regarding this information, please contact the IOCU at (518) 473-2322. County offices may call 1-800-662-4628.

State of New York
Unified Court System
Tribal Courts Committee
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New York Federal-State-Tribal Courts
and Indian Nations Justice Forum
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Hon. Lizbeth Gonzalez
Hon. Sharon S. Townsend
Todd Weber, Esquire

December 9, 2014

BY E-MAIL AND U.S. MAIL
John McConnell, Esquire
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Supplemental Comments in Support of Proposed Court Rule §202.71

Dear Mr. McConnell:

The New York Unified Court System Tribal Courts Committee (the "Tribal Courts Committee" or the "Committee") respectfully submits for the consideration of the Administrative Board of the Courts the following comments in further support of proposed rule §202.71 (Recognition of Tribal Court Judgments) and in response to the opposition submitted by the Committee on Civil Practice Law and Rules of the New York State Bar Association (the "Bar Association Committee"). The Tribal Courts Committee appreciates the Administrative Board's further consideration of this proposed rule and the courtesy afforded to us by this opportunity to submit additional comments for its consideration.

Background

In October 2011, the Tribal Courts Committee recommended for inclusion in the New York State Unified Court System's 2012 legislative agenda, among other things, an enactment requiring mutual recognition, based on established principals of comity, of judgments of the State courts and the courts of New York's Indian Nations. This recommendation was based, in part, upon a 2008 pilot protocol adopted by a Fifth Judicial District Supreme Court part and the Oneida Indian Nation, which provided for the reciprocal recognition of tribal and state court judgments.[1] In June 2012, the Unified Court System Advisory Committee

[1] A copy of the Proposed Pilot Program Rules on Enforcement of Judgments and Jurisdictional Protocol Between the Courts of New York's Fifth Judicial District and the Oneida Indian Nation of March 19, 2008 ("5th District-OIN Pilot Protocol") is attached as Exhibit A.

on Civil Practice (the "Advisory Committee") initially opposed the Tribal Courts Committee's 2011 recommendation, but later, at the suggestion of Chief Administrative Judge A. Gail Prudenti, agreed to meet with, and consider information provided by, the Tribal Courts Committee. Representatives of the Tribal Courts Committee met with representatives of the Advisory Committee in January 2013 and submitted a response to the Advisory Committee's concerns.[2] The pending proposed rule is the result of the Advisory Committee's thoughtful reconsideration of the recognition issues and concerns advanced by the Tribal Courts Committee and the New York Federal-State Tribal Courts and Indian Nations Justice Forum. During the Administrative Board's public comment period on the proposed rule, comments in support were provided by Tribal Courts Committee, the Oneida Indian Nation and the Honorable James C. Tormey,[3] in addition to those of the Advisory Committee in its memorandum in support.

Response to Bar Association Committee Opposition

The Bar Association Committee advances three primary objections to the Advisory Committee's proposed rule §202.71: (1) CPLR Article 53 does not apply to tribal court judgments; (2) the proposed rule is not necessary because tribal court judgments are already entitled to comity and, sometimes, full faith and credit and tribal court judgments may be enforced under current procedures in the CPLR; and (3) the proposed rule could "invite forum shopping" and "could make New York a nationwide clearing house for conversion of tribal court judgments." We address each objection in turn below.

1. **Article 53 (Recognition of Foreign Money Judgments**

The Bar Association Committee "doubts the applicability of CPLR Article 53 . . . to tribal-court judgments" because tribes are not "foreign states."[4] Article 53 adopts the Uniform Foreign Country Money Judgment

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[2] A copy of the Tribal Courts Committee's January 2013 Response to the Advisory Committee's concerns is attached as Exhibit B.

[3] Justice Tormey, the Administrative Judge for the Fifth Judicial District, oversaw the implementation of the 5th District-OIN Pilot Protocol. A copy of his letter in support of the proposed rule is attached as Exhibit C.

[4] Ironically, the Advisory Committee's initial response to the Tribal Courts Committee's recommendation on enforcement of tribal court judgments concluded that Article 53 would apply to all tribal court judgments. Our Committee expressed concern about this issue as being unsettled, and because tribal court judgments often provide equitable, rather than monetary relief, we proposed language different from that ultimately advanced by the Advisory Committee. We continue to believe that a broader rule, based on mutual recognition of orders, decrees and judgments, such as was established in the 5th District-OIN Pilot Protocol, is warranted. However, we support the Advisory Committee's proposed rule as an important measure required to alleviate uncertainty and promote appropriate recognition of tribal court orders, decrees and judgments under New York's settled comity rules.

Recognition Act ("UFCMJRA"), and whether the UFCMJRA applies to tribal court judgments is, at best, an unsettled question throughout the United States with various state and federal courts reaching differing conclusions. (*See* Exhibit B, p. 5).[5] In New York, however, the only court to have considered the issue, to our knowledge, concluded that Article 53 does apply to tribal court judgments. *See Mashantucket Pequot Gaming Enterprise v. Yau*, 2010 WL 7505742 (Sup. Ct. NY County Feb. 17, 2010). Accordingly, the Bar Association Committee's blanket assertion that Article 53 does not apply to tribal judgments is not uniformly accepted and does not appear to be supported by existing New York case law.

The proposed rule, however, does not change or alter any of the substantive requirements for recognition or non-recognition of a tribal money judgment under Article 53. It merely clarifies that "[i]f the court finds that the judgment is entitled to recognition under provisions of Article 53 of the CPLR or under principles of the common law of comity, it shall direct entry of the tribal judgment as a judgment of the Supreme Court of the State of New York." It is, therefore, hard to see how the Bar Association Committee can characterize the clear and careful language of the proposed rule as an attempt to legislate or modify Article 53.

2. The Proposed Rule is Necessary

The Bar Association Committee argues that the proposed rule is unnecessary because tribal court judgments are entitled to comity (and, sometimes, full faith and credit), and because such judgments can be enforced by an action on a judgment under CPLR §5014 or by summary judgment in lieu of complaint under CPLR §3213. We agree that tribal court orders, decrees and judgments are, at a minimum, entitled to recognition under the doctrine of comity as articulated in *Sung Hwan Co. Ltd. v. Rite Aid Corp.*, 7 NY3d 78 (2006) ("Historically, New York courts have accorded recognition to judgments rendered in foreign countries under the doctrine of comity . . . [a]bsent some showing of fraud in procurement of the foreign court judgment or recognition of the judgment would do violence to some strong policy of the state"). However, the Tribal Courts Committee has learned that those who are directly involved with, or attempting to obtain, New York state court recognition of tribal court orders and judgments have not experienced a uniform, expeditious, or predictable process for recognition. (*See* Exhibit B). As noted in the Oneida Indian Nation's submission during the public comment period supporting the proposed rule, "New York law has been silent on the general recognition and enforcement of tribal court judgments leaving litigants (and potential tribal court litigants) to question whether a particular New York court will in fact recognize a judgment obtained in tribal court." Indeed, the CPLR and current court rules are completely silent on the recognition of tribal court orders, decrees and judgments and leave open the process and procedure by which tribal court judgments will be recognized by New York courts.

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[5] Notably, the California Tribal Court-State Court Forum has recently secured the passage by its state Legislature of SB 406, the Tribal Court Civil Money Judgment Act (CA Stats. 2014, Ch. 243, effective January 1, 2015), to simplify and clarify the process by which tribal court money judgments are recognized by California state courts. (*See* www.courts.ca.gov/3065.htm/LegislativeChaptered [last visited Dec. 9, 2014]).

The experience of tribal courts and litigants with respect to state recognition of tribal court judgments has been frustrating, inconsistent and unreliable. (See Exhibit B). The Bar Association Committee points to various sections of New York's Indian Law relating to the Seneca Nation of Indians as evidence that the proposed rule is unnecessary. Unfortunately, New York Indian Law does not, in and of itself, address the problem initially raised by this Committee and now addressed by the Advisory Committee's proposed rule. First, these referenced sections of the New York Indian Law only afford recognition and establish procedures for the orders and judgments of the Seneca Nation Peacemakers' Court, leaving uncertainty regarding the process for the decision, orders and judgments of the two other New York tribal nations that maintain court systems. Second, despite the clear language of sections cited by the Bar Association Committee, current practice in Western New York prevents the Seneca Nation's tribal judgment and orders from being filed and enforced, even in the case of the most routine orders. Neither of the county clerks in Allegany or Cattaraugus counties, where the Seneca Nation is located, has a procedure in place for the filing of Seneca Nation orders and judgments, and both county clerks' offices operate as if New York does not recognize these as valid court orders. In fact, judges of the Seneca Nation have reported to this Committee, and the Cattaraugus County Clerk has confirmed, that the Cattaraugus County Clerk's office flatly refuses to recognize Seneca Peacemakers' Court divorce decrees and name change orders. The adherence to this policy deprives tribal court litigants of the ability to effectuate a name change at the Department of Motor Vehicles,[6] Social Security Office or Board of Elections, notwithstanding the clear language of the existing New York Indian Law. Accordingly, although the Bar Association Committee believes that New York's existing case law, statutes and rules demonstrate little or no need for the proposed rule, the real world experiences of the Indian nations (*see* Exhibit B), the Administrative Judge whose judicial district includes a portion of three of New York's Indian reservations (*see* Exhibit C), and the participants in the New York Federal-State Tribal Courts and Indian Nations Justice Forum indicate otherwise.

The Bar Association Committee also suggests that tribal court judgments and orders may be enforced in New York courts through existing procedural provisions of the CPLR, namely by an action upon a judgment (CPLR §5014) or by a motion for or summary judgment in lieu of complaint (CPLR §3213). Requiring tribal court litigants to commence yet another action with the potential for re-litigation of the entire controversy would not only impose additional, unnecessary costs upon the victorious tribal court litigant, but would also undermine the sovereignty of the tribal courts of New York while flouting New York's settled common law rules of comity. The purpose of the proposed rule is to promote judicial economy by avoiding such costly and time-consuming re-litigation of matters already decided in the tribal courts. The proposed rule clearly recognizes that properly rendered tribal court judgments and orders are entitled to comity and establishes an expeditious procedure (a special proceeding pursuant to Article 4 of the CPLR) for recognition of such judgments that is compatible with due process requirements and consistent with well-established New York State law on comity.

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[6] The opposition comment submitted by Russell J. Genna, Esquire, of the New York State Department of Motor Vehicles, suggests that tribal court jurisdiction should only occur when "both parties consent to the adjudication of their dispute by the 'Indian Courts' [and] then they should be treated as an arbitration and should be entitled to have the judgment enforced." This comment misapprehends well-established law regarding the jurisdiction of tribal courts and itself exemplifies the need for the proposed rule.

(*See Sung Hwan v. Rite Aid Corp., supra*). The proposed rule also avoids duplicative litigation and the potential for conflicting judgments that could result from the commencement of new actions for the sole purpose of state recognition. This proposed rule, although not the mutual recognition and jurisdictional transfer rule that the Tribal Courts Committee initially sought and recommended, will provide a state-wide uniform system of recognition that will give state and tribal courts, as well as county clerks' offices, the full confidence and authority necessary to achieve the efficiencies and benefits contemplated by the Committee's recommendation for a court rule for mutual recognition of orders and judgments.[7]

3. **The Proposed Rule Will Not Make the New York Courts System a Clearinghouse for Conversion of Tribal Court Judgments**

The Bar Association Committee fears that the proposed rule would (a) invite forum shopping and compel a tribal court judgment debtor to defend an action in a distant county unrelated to the dispute or parties, and (b) make the New York courts a nationwide clearing house for the conversion of tribal court judgments. The Bar Association Committee's fears are unfounded.

With respect to its first concern, the Bar Association Committee's assertion that a tribal court judgment creditor should be required to demonstrate personal jurisdiction and convenient venue as a precondition of recognition under the doctrine of comity is contrary to established New York law. In a recent First Department decision, the Court expressly held that New York's common law of comity does not require such prerequisites, explaining the requirements of the comity doctrine as follows:

> Judgments of foreign countries are accorded recognition only through comity. "[T]he inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law" . . . . "If the above criteria are met, and enforcement of the foreign judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding" . . . .
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> * * *

[7] The specific language of the proposed rule is currently limited to "judgments." The Committee respectfully suggests that the Administrative Board add clarifying language to the proposed rule to make clear that "judgment" as used in the proposed rule includes only judgments, but also orders and decrees of the tribal courts. This would not be unprecedented. Indian Law §52 is titled "Enforcement of judgments," but the statute's application is not limited to judgments and has been judicially extended to include the "orders, directions and judgments of the Peacemakers' Court." *Silverheels v. Maybee*, 82 Misc. 48, 51 (Sup. Ct. Cattaraugus Co. 1913). The Committee urges that the same reading should be applied to the proposed rule to ensure that enforcement applies to all tribal orders, decrees and judgments, including those Seneca Peacemakers' Court orders and decrees which are not currently receiving recognition in western New York.

> [S]ince CPLR article 53 and the [foreign jurisdiction] court are already protecting the defendant's due process rights, including personal jurisdiction, the [New York] court charged with recognition and enforcement should not be required to grant further protection during a ministerial enforcement action . . . .

Abu Dhabi Commercial Bank v. Saad Trading Contr. & Fin. Serv. Co., 117 AD3d 609, 612, 613 (1st Dept. 2014), quoting *Sung Hwan Co. v. Rite Aid Corp., supra,* 7 N.Y.3d at 82-83.

Regarding the Bar Association's second concern, that the proposed rule will create a nationwide clearing house for recognition of tribal court judgments, as a practical matter, tribal court litigants will be unlikely to incur the expense and effort associated with seeking recognition of their tribal court judgments by the New York courts if the tribal court judgment debtor has no assets in the state. The more practical and likely motivation for seeking recognition of tribal court judgments and orders is to enforce them against assets that are located within the State of New York, such as real property, bank accounts, etc.

In any case, although neither required by New York's comity law, nor necessary from a practical standpoint, the Administrative Board could slightly revise the language proposed by the Advisory Committee to address the concern advanced by the Bar Association Committee by making clear that the proposed rule relates only to the judgments and orders by the duly established courts of the Indian nations or tribes listed in Indian Law § 2 ("term 'Indian nation or tribe' means one of the following New York state Indian nation or tribes . . . .").

Conclusion

As demonstrated above and in Exhibit B, there is a need for this proposed rule, as the process and path to recognition of tribal court orders and judgments is anything but clear. The Bar Association Committee does not disagree that tribal court judgments are entitled to enforcement by the New York state courts. Moreover, its own comments demonstrate the need for the proposed rule so that the courts of this state are aware of the existing rules on comity for tribal court judgments and are able to apply those rules efficiently and fairly in accordance with a clear, predictable and uniform rule.

The Advisory Committee carefully considered and balanced potential concerns such as those raised by the Bar Association Committee against the need of litigants, practitioners and judges to have a uniform roadmap and predictable procedure for the enforcement of tribal court judgments. Proposed rule §202.71 is the result of those considerations and is a carefully and deliberately crafted proposed court rule. It neither changes the substantive requirements for recognition found in comity principles nor amends any existing procedures for enforcement. It merely, and carefully, provides a predictable roadmap following the comity rules of New York

as set forth by the Court of Appeals in *Sung Hwan Co. v. Rite Aid Corp.*, *supra*. Accordingly, we urge adoption of proposed rule 202.71.

We thank the Administrative Board for its consideration of this supplemental submission.

Respectfully submitted,

Marcy L. Kahn
Chair of the New York Tribal Courts Committee

MLK:ob
Enclosures

STATE OF NEW YORK
UNIFIED COURT SYSTEM
FIFTH JUDICIAL DISTRICT
ONONDAGA COUNTY COURTHOUSE
SYRACUSE, NEW YORK 13202
(315) 671-1100
FAX: (315) 671-1183
E-MAIL: jtormey@courts.state.ny.us

A. GAIL PRUDENTI
Chief Administrative Judge

MICHAEL V. COCCOMA
Deputy Chief Administrative Judge
Courts Outside New York City

JAMES C. TORMEY
Justice of Supreme Court
District Administrative Judge
Fifth Judicial District

GERARD J. NERI, ESQ.
Special Counsel/Court Attorney Referee

DAVID S. GIDEON, ESQ.
Principal Law Clerk

KATHERINE M. VAETH
Confidential Secretary

September 25, 2014

John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

RE: Proposed adoption of new 22 NYCRR § 202.71 relating to establishment of a procedure for recognition of judgments by tribunals of tribes recognized by the State of New York of the United States

Dear Mr. McConnell,

As Administrative Judge of the Fifth Judicial District, I have had an opportunity to review rule 22 NYCRR 202.71, Uniform Civil Rules for Supreme Court and County Court, as recommended by the Advisory Committee on Civil Practice. The proposed rule provides needed clarity for tribal and state court litigants that judgments and orders obtained in courts established by federally and state recognized nations may be enforced, and identifies the uniform and predictable process for the enforcement of such judgments and orders in state and county courts.

I believe this new rule will clarify the concept that Supreme Courts may recognize tribal judgments under both Article 53 of the CPLR and Principals of the Common Law of Comity. It will clearly set out a uniform and predictable approach that litigants and practitioner can utilize and the New York Courts can apply.

Our experience in this District is that tribal courts have been performing their duties at a high level of professionalism, and it is appropriate that we embrace this new rule to afford them the recognition they deserve.

I am fully supportive of this proposed rule change.

Very truly yours,

Hon. James C. Tormey
Administrative Judge
Fifth Judicial District

SUPREME COURT STATE OF NEW YORK
COUNTY OF_____
[Name of County]
----------x
In the Matter of the Application of

_____ Index No._____

_____

_____

Petitioner(s**) [Name(s)]**

Petition

Recognition of Tribal Court Judgment, Decree, or Order

-against-

_____

_____

_____
Respondent(s) **[Name(s)]**

----------x

Petitioner (name of Petitioner) _____ states as follows:

1. I live at: (address)
_____
_____
_____.

2. The Respondent is: (name and address of respondent)

_____

_____
_____
_____.

3. I ask that this Court recognize the attached Tribal Court judgment.

4. The attached Tribal Court judgment was made by the Tribal Court known as: (nation, tribe or band recognized by New York State or the United States)

_____
_____.

5. The attached order: (check all that apply)

- ☐ Is a true and correct copy obtained from the Tribal Court Clerk
- ☐ Is currently valid and in full force and effect
- ☐ Has not been changed, cancelled, or replaced by any other order
- ☐ Is not being appealed

6. That the Tribal Court had personal jurisdiction* over the parties. Information regarding the procedures and rules of how the Tribal Court has personal jurisdiction can be obtained from the Tribal Court Clerk or their official Tribal Court website. The following Tribal Courts systems' personal jurisdiction information can be found at the following links:

Oneida Nation

http://www.oneidaindiannation.com/wp-content/uploads/2017/09/OneidaNationCourt.pdf

St. Regis Mohawk https://www.srmt-nsn.gov/_uploads/site_files/RulesOfCivilProcedure.pdf

Seneca Nations **https://sni.org/government/peacemakers-court/**

Attach this information.

7. That the Tribal Court's judicial system provided due process* which is compatible with the procedures and requirements of the State of New York. This information can be obtained from the Tribal Court Clerk or their official Tribal Court website. The following Tribal Courts systems' due process procedures can be found at the following links:

Oneida Nation

http://theoneidanation.com/codesandordinances/rulesofcivilprocedure/chapter01.pdf

St. Regis Mohawk https://www.srmt-nsn.gov/_uploads/site_files/RulesOfCivilProcedure.pdf

Seneca Nations **https://sni.org/government/peacemakers-court/**

Attach this information.

8. I ask that the attached Tribal Court judgment be recognized and entered as a judgment of the Supreme Court, State of New York.

Dated: _____

Petitioner's signature_____

Petitioner's Printed Name_____

Address_____

Phone Number_____

---

*__personal jurisdiction__ means that the court has power over a person to make a decision.

*__due process__ means court rules and procedures that provide a person fair treatment in the legal system with notice and an opportunity to be heard.

Verification

State of New York)
) ss.:
County of_____)

_____, being duly sworn, deposes and says: I am the Petitioner in this matter. I have read the foregoing petition and know the contents within. The contents are true to my knowledge, except as to matters within stated to be alleged on information and belief and as to those matters I believe them to be true.

_____
Petitioner's Signature

_____
Print Name

NOTARY PUBLIC

On_____ before me personally came to me the Petitioner know to be the person described in and who executed the foregoing Petition. Such person duly swore to such instrument before me and duly acknowledged that he/she executed the Petition.

SS:

_____
Notary Public
Commission Expires:
(Affix Notary Stamp or Seal)

State of New York
Unified Court System
Tribal Courts Committee
serving the
New York Federal-State-Tribal Courts
and Indian Nations Justice Forum
100 Centre Street, Room 1730
New York, New York 10013
(646) 386-3986
Fax (212) 748-5095

January 25, 2016

BY FAX AND FEDERAL EXPRESS
Chief Eric Thompson
Chief Ron LaFrance
Chief Beverly Cook
St. Regis Mohawk Tribal Council
412 State Route 37
Akwesasne, NY 13655

Re: Proposed New York State/St.Regis Mohawk Tribe
Native Bail Reform Initiative

Dear Chief Thompson, Chief LaFrance and Chief Cook:

I send my greetings and good wishes for the New Year. I have been asked by St. Regis Mohawk Tribal Court Chief Judge Peter J. Herne to provide background information to the members of the Tribal Council on a very exciting pilot project for reforming the current practice of New York's state and local criminal courts in setting monetary bail determinations in cases involving Native arrestees.

As each of you knows, I have been designated by New York State Chief Administrative Judge Lawrence Marks to head his Tribal Courts Committee, and have served as the convener of the New York Federal-State-Tribal Courts and Indian Nations Justice Forum since its creation in 2003. The Forum was launched at the suggestion of then-Chief Judge Judith Kaye as part of a project of the Conference of Chief Justices to promote justice and resolve jurisdictional conflicts among our respective justice systems. The Forum has met semi-annually since that time and has enjoyed the participation of all nine of the tribal nations resident in and recognized by the State of New York. The St. Regis Mohawk Tribe has actively participated in our programming since the Forum's earliest days, and we have been honored by the attendance of chiefs and sub-chiefs of your nation at our meetings and programs. My former co-chair of the Tribal Courts Committee, the late Justice Edward Davidowitz, and I, along with the former Chief Judge of the United States District Court for the Northern District of New York, the Honorable Norman Mordue, had the pleasure of visiting Akwesasne to tour the reservation and meet with your

leaders a few years ago. We are quite proud of the work we have all done together at the Forum, when we bring our good minds and commitment to a project. We have received national recognition for our work, including this past year in securing the adoption of a court rule for New York State courts providing for the recognition of tribal court judgments, orders and decrees.

In 2013, Chief Judge Herne brought to the attention of the Forum the unique problems faced by Native individuals in satisfying monetary bail requirements imposed by state and local courts.[1] As Judge Herne explained at that and subsequent Forum meetings over the next two years, while the topic of bail reform has been widely studied and discussed in recent years, one aspect of the inequity of the monetary bail system which has escaped notice in all the talk of reform is the particularly inequitable and disparate impact of New York's monetary bail system on Native American arrestees. Since 1948, when New York State was granted the authority by Congress to exercise its criminal jurisdiction in Indian Country within its state borders,[2] Native arrestees frequently lack the opportunity theoretically available to their non-Native counterparts of posting monetary bail using one of the most commonly employed forms of statutorily authorized bail, namely, an insurance company bail bond.[3] This avenue for pre-trial release is often not realistically available to Natives, because alienation of real property within tribal nation territory is often prohibited by federal or tribal nation law. Under such circumstances, bail bond companies refuse to accept such real property as collateral to secure the bond. Accordingly, where a significant amount of bail is set at arraignment, while a non-Native of modest means might have difficulty obtaining a bail bond to secure release, a Native of similar economic status could find it an impossibility. Such a circumstance leaves the Native defendant detained in county jail, and frequently results in a guilty plea, whether well-advised or not, in order to secure release from that detention. The insidious impact of a state criminal conviction for a Native reservation resident extends beyond the creation of a criminal record, as even a non-violent conviction may disqualify the person from many of the opportunities for federal government-supported employment available within the territory.

Judge Herne's discussion built on the call for significant reform of New York's bail system raised by New York's then-Chief Judge Jonathan Lippman in his State of the Judiciary address in early 2013. Over the course of the ensuing two years, members of the Forum explored

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[1] Although New York law provides for the setting of bail in any of several alternative forms, the customary practice among New York courts is to set bail in the alternative forms of cash and insurance company bond, effectively creating a monetary bail system.

[2] *See* 25 U.S.C. §232 (1948).

[3] *See* New York Criminal Procedure Law §§520.10(1)(b); 520.20.

avenues for educating New York state and local criminal court judges on alternative bail settings available under current law, and followed proposed legislative reforms in Albany and educational efforts by the bar. Although changes in the law have not yet been adopted by the Legislature, we determined to develop judicial training programs for state and local judges to educate them on the issue as to Native defendants and to remind them of the non-monetary options available to secure attendance under the existing law.

This summer, I convened a small group of lawyers from three of the tribal nations (Chief Judge Herne and his law clerk, Lisa Garabedian; Chief Harry Wallace, from Unkechaug; and Marguerite Smith, Esquire, from Shinnecock) to focus on how we might address this problem. I felt that if we came up with a sound, well-researched proposal, Chief Judge Lippman would be very likely to support it, given his deep commitment to bail reform. We did some research on approaches taken in various jurisdictions to obviating the unjust impact of monetary bail, and were most impressed by two programs currently operating–very successfully–in New York City. These pre-trial supervised release programs were developed and are operated by the New York City Criminal Justice Agency, which has programs for arrestees charged with felonies in Queens and New York Counties, and by the Center for Court Innovation, which operates a program for those charged with misdemeanors in Kings County. Both agencies' programs had been launched with the support of Chief Judge Lippman and the State Unified Court System. In these programs, the state arraignment court judge may approve diversion of individuals detained in jail in lieu of bail to supervision by the program personnel, who assure their adherence to curfews, meet regularly with them, and refer them to appropriate programs for services such as mental health treatment, drug or alcohol treatment, vocational skills training or educational support. Research studies show that each of the three programs has been able to demonstrate significant success in assuring that defendants returned for their scheduled court appearances: the compliance rate was approximately 87 percent, on par with individuals whom the courts had released on recognizance without requiring the posting of bail. My own experience with the CJA program, although limited, has been very positive. And upon my interviewing their directors, each program expressed a willingness to help the Forum develop a similar program designed for Native arrestees in New York state courts outside of New York City.

Our small Forum working group decided that an appropriately designed pre-trial supervised release program for Native arrestees would not only offer otherwise jailed individuals a chance for release without the necessity of posting monetary bail and link them with services to enhance their rehabilitation. Such a program, we felt, would also recognize that confinement and isolation from the community is not always a traditional or culturally relevant punishment, much less pre-trial supervision method, in Native communities. We sought information on the greatest incidence of Native arrestees passing through the state and local courts. Reviewing data provided by the New York State Division of Criminal Justice Services, we concluded that

outside of New York City, the Bombay Town Court and the Salamanca City Court handled the highest numbers of Native defendants.[4]

By late July, we had put together a proposal to Chief Judge Lippman for a pilot Native pre-trial supervision program in one of the local courts in New York. He enthusiastically approved the idea, and in September, I met with Chief Administrative Judge Lawrence Marks to discuss the plan for the project and the role of the state court system in it. Judge Marks carefully reviewed the various facets of the program, and suggested that we undertake the pilot program in the Bombay Town Court. One of the reasons for selecting that court was its successful ongoing working relationship with the SRMT Tribal Healing-to-Wellness Court, to which Town Court defendants residing on the reservation have been referred for monitoring and supervision of their drug treatment during the pendency of their cases. It was felt that siting the pilot with the Bombay court and partnering with SRMT justice and social service personnel offered the greatest opportunity for success of the program. It was anticipated that the program, once operating smoothly, could be expanded to other courts around the state.

Chief Administrative Judge Marks committed the following members of the Unified Court System to work on plans for the pilot program: the undersigned, and Justice Sharon Townsend of Erie County, the chair and a vice chair, respectively, of his Tribal Courts Committee; the Director of the Office of Court Administration's Office of Policy and Planning, Justice Sherry Klein Heitler, who launches innovative programs for the courts throughout the state; Mr. Frank Woods, a grant-writer for OCA; Administrative Judge for the Fourth Judicial District Vito Caruso; Franklin County Acting Supreme Court Justice Robert G. Main; Fourth Judicial District Town and Village Court Supervising Judge and St. Lawrence County Court Judge Jerome Richards; Bombay Town Justices Terrance Durant and C. Curtis Smith; Director of the Office of Justice Court Support, Justice Nancy Sunukjian; and Special Counsel to the Town and Village Justice Courts Matthew Chivers.

Judge Marks also supported the commitment we had secured from the Center for Court Innovation to partner with us in the project. We are very pleased that Aaron Arnold, Director of CCI's Tribal Justice Initiative, enthusiastically agreed to join us. He has committed two of his staff members to the project, and, of course, has access to the wealth of information on pre-trial supervised release garnered by his colleagues who have been operating CCI's program in Brooklyn so successfully. I understand that Chief Judge Herne has recently visited the Brooklyn program to observe its operations.

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[4] We would be glad to make available to the Tribal Council either the full data set we received from DCJS, or the relevant excerpts upon which we relied.

By October, the original small working group of four Forum members had thus conceived the first Native Bail Reform Initiative pilot project. The project has two components: a special Native pre-trial supervision project involving the Bombay Town Court and operating in conjunction with service providers in the SRMT territory, modeled on the CCI and CJA programs in New York City, but specially designed for the realities of rural court practice and the needs of the Native arrestees; and the development of training programs for local court judges on alternatives to monetary bail and the unique need for momentary bail alternatives for Native arrestees. At its October 29, 2015 meeting, the Forum enthusiastically endorsed the NBRI. The bulk of the discussion actually involved requests from tribal court judges and lawyers from around the state for early expansion of the Bombay-SRMT supervision pilot to venues in their regions. Sub-Chief Cheryl Jacobs was present for the discussion of the project at that meeting.

The NBRI project committee convened shortly thereafter, recognizing that a launch of the project in 2016 would require the preparation of a formal grant proposal by February 2016. In addition to the previously-mentioned representatives from the Unified Court System, Center for Court Innovation and the Federal-State-Tribal Courts Forum, the critical stakeholders participating in the committee's meetings have included several officials from the SRMT Tribal Court: Chief Judge Herne; Treatment Coordinator Micaelee Horn; Court Clerk Isaac White; Court Administrator Phillip Barreiro; and Law Clerk Lisa Garabedian.[5] Thus far, meetings have included: an organizational conference call on November 4; a three-day session of the critical stakeholders mentioned above which included site visits to observe both the Bombay and Akwesasne courts and an all-day planning workshop to discuss the features of the program December 8-10; a half-day meeting January 8 to review project development and a draft report/proposed grant application on the project, at which other key stakeholders were identified for consultation on the outline of the project; and another half-day meeting to refine the project with critical as well as key local stakeholders, including representatives of the Franklin County District Attorney, Public Defender, Conflicts Defender, Probation Department and Sheriff's offices. Further adjustments were made in the proposed operation of the NBRI pre-trial supervision program and the draft report/grant application based upon the comments made at that meeting.

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[5] The involvement of officials from the Tribe's court exclusively at this point in no way reflects any view of the project committee, the Forum or the Unified Court System that the tribal-based entity providing supervision services for the project necessarily must be part of the SRMT Tribal Court. Rather, that is one, of several, possible options. Others might include an SRMT social service agency, or a newly conceived entity staffed by members of the Tribe. The project committee would welcome participation from social service specialists or other tribal representatives as we further refine the project.

At this writing, the NBRI pre-trial supervision pilot project awaits the approval of the St. Regis Mohawk Tribal Council. The project committee and the Forum stand ready to answer any questions you have about the project. Our goal is to have a tribal-based entity submit an application for a federal CTAS grant by the due date of February 23. If the Tribal Council wishes to review the current draft of the proposal, I believe that can easily be arranged.

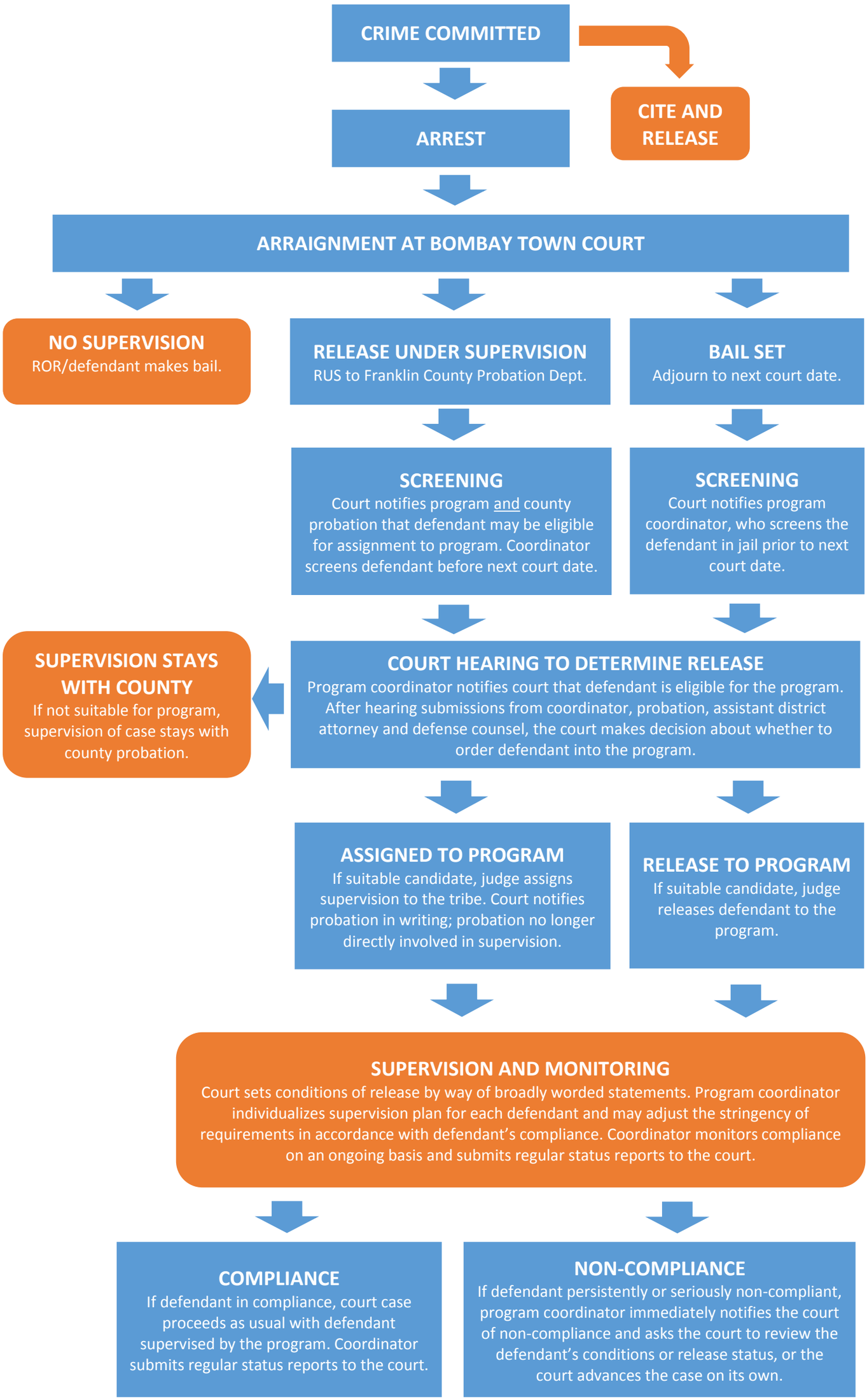
We are very proud of the fact that the United States Department of Justice has expressed its enthusiasm for this pilot project and its desire to fund development of a culturally appropriate risk assessment instrument for Native arrestees, such as we plan to create for use in the NBRI. The initiative will be breaking new ground in this important area, and is already being heralded as a model for the nation.

We thank you for your consideration of this exciting project and would welcome your input.

Sincerely yours,

Marcy L. Kahn

MLK:ob
cc: Honorable Robert G. Main
Chief Judge Peter J. Herne
Honorable Sharon Townsend
Mr. Aaron Arnold


CRIME COMMITTED
CITE AND RELEASE
ARREST
ARRAIGNMENT AT BOMBAY TOWN COURT
NO SUPERVISION
ROR/defendant makes bail.
RELEASE UNDER SUPERVISION
RUS to Franklin County Probation Dept.
BAIL SET
Adjourn to next court date.
SCREENING
Court notifies program and county probation that defendant may be eligible for assignment to program. Coordinator screens defendant before next court date.
SCREENING
Court notifies program coordinator, who screens the defendant in jail prior to next court date.
SUPERVISION STAYS WITH COUNTY
If not suitable for program, supervision of case stays with county probation.
COURT HEARING TO DETERMINE RELEASE
Program coordinator notifies court that defendant is eligible for the program. After hearing submissions from coordinator, probation, assistant district attorney and defense counsel, the court makes decision about whether to order defendant into the program.
ASSIGNED TO PROGRAM
If suitable candidate, judge assigns supervision to the tribe. Court notifies probation in writing; probation no longer directly involved in supervision.
RELEASE TO PROGRAM
If suitable candidate, judge releases defendant to the program.
SUPERVISION AND MONITORING
Court sets conditions of release by way of broadly worded statements. Program coordinator individualizes supervision plan for each defendant and may adjust the stringency of requirements in accordance with defendant's compliance. Coordinator monitors compliance on an ongoing basis and submits regular status reports to the court.
COMPLIANCE
If defendant in compliance, court case proceeds as usual with defendant supervised by the program. Coordinator submits regular status reports to the court.
NON-COMPLIANCE
If defendant persistently or seriously non-compliant, program coordinator immediately notifies the court of non-compliance and asks the court to review the defendant's conditions or release status, or the court advances the case on its own.

CENTER
FOR
COURT
INNOVATION

STATUS REPORT

Bombay Town Court/St. Regis Mohawk Tribe
Pretrial Supervision Project

January 14, 2016

CENTER
FOR
COURT
INNOVATION

The Center for Court Innovation seeks to help create a more effective and humane justice system by designing and implementing operating programs, performing original research, and providing reformers around the world with the tools they need to launch new strategies.

Founded as a public/private partnership between the New York State Unified Court System and the Fund for the City of New York, the Center creates operating programs to test new ideas and solve problems. The Center's projects include community-based violence prevention projects, alternatives to incarceration, reentry initiatives, court-based programs that seek to promote positive individual and family change, and many others. The Center disseminates the lessons learned from innovative programs, helping justice reformers around the world launch new initiatives. The Center also performs original research evaluating innovative programs to determine what works and what doesn't.

The Center for Court Innovation grew out of a single experiment; the Midtown Community Court was created in 1993 to address low-level offending around Times Square. The project's success in reducing both crime and incarceration led the court's planners, with the support of New York State's chief judge, to establish the Center for Court Innovation to serve as an ongoing engine for justice reform in New York. The Center has received numerous awards for its efforts, including the Peter F. Drucker Award for Non-Profit Innovation, the Innovations in American Government Award from Harvard University and the Ford Foundation, and the Prize for Public Sector Innovation from the Citizens Budget Commission.

In 2008, the Center for Court Innovation created its Tribal Justice Exchange program to provide technical assistance to tribal communities seeking to develop or enhance their tribal court systems. Funded by the Bureau of Justice Assistance's Tribal Courts Assistance Program, the Tribal Justice Exchange has three major goals: (1) ensuring that tribal communities have access to training and ongoing technical assistance about problem-solving community-based practices; (2) encouraging formal collaborations between traditional tribal justice systems and state and local court systems; and (3) identifying and disseminating best practices developed in Indian country that could help strengthen public safety initiatives elsewhere in the United States.

I. BACKGROUND

On July 27, 2015, NYS Supreme Court Judge Marcy Kahn submitted a letter to Chief Judge Jonathan Lippman in her capacity as convener of the New York Federal-State-Tribal Courts and Indian Nations Justice Forum (the Forum). On behalf of the Forum, Judge Kahn outlined a number of concerns about New York's current monetary bail system, especially regarding the disparate impacts the system has upon Native Americans arrestees.

Judge Kahn's letter highlighted several important aspects of the current bail system. First, Native Americans living on reservation lands typically cannot use their real property as security for a bond, as the property is subject to federal and tribal restrictions on alienation. As a result, Native American defendants often remain in jail pending disposition of their cases. Second, incarceration—including pretrial confinement—is not generally considered a traditional or culturally appropriate punishment for Native Americans. Third, defendants who cannot post bond are frequently known to plead guilty in order to effectuate their own release from jail, resulting in criminal convictions with life-long consequences. The impacts of such criminal convictions can be particularly problematic for Native Americans, as the majority of employment opportunities on tribal lands are government jobs, and tribal policies often prohibit the hiring of individuals with criminal convictions.

To remedy these issues, the Forum proposed the development of a pilot supervised release program for Native Americans defendants in the state court system. In concept, the pilot project would set up a system in which Native American defendants who would normally be held on bail would instead be released without bail—in appropriate cases—to the supervision of a tribal program. These defendants would be monitored by the tribe and would have access to culturally-appropriate services during their release.

The Forum and the New York State Office of Court Administration, upon consultation with Acting Supreme Court Justice Robert Main of Franklin County and Chief Judge P.J. Herne of the St. Regis Mohawk Tribe (SRMT), identified the Bombay Town Court as a suitable location for such a pilot project. Justice system data compiled by the Division of Criminal Justice Services indicates that the Bombay Town Court has one of the largest caseloads in the state involving Native American defendants. In addition, the Bombay Town Court and the SRMT have previously developed a system for referring tribal members to the SRMT's Healing to Wellness Court in cases involving substance abuse.

In late 2015, the NYS Office of Court Administration approved the planning of a pilot project. A planning committee chaired by Justice Main and Judge Herne and consisting of state and tribal court judges, Forum representatives, and Office of Court Administration officials, was formed to guide the development of this project. The Center for Court Innovation was asked to support the project by facilitating planning meetings, making recommendations regarding project design, and helping to pursue grant funding.

II. PLANNING WORKSHOP

On December 8-10, 2015, Center staff traveled to Franklin County to observe the Bombay Town Court, visit the St Regis Mohawk Tribe reservation, and facilitate a full-day planning workshop. During the morning session, Chief Judge PJ Herne of the St. Regis Mohawk Tribe discussed the history of criminal and civil jurisdiction on tribal territory. Center staff then provided information about several supervised release models from around the country, including a Center-run program in Brooklyn.

Following these background discussions, the committee explored existing court practices in Bombay Town Court and the St. Regis Mohawk Tribal Court, including some of the jurisdictional complexities that result from the international border that bisects the tribal territory, special issues facing town courts in New York State, and preliminary court data.

The afternoon session of the planning workshop focused on the design of the proposed pilot project. The committee began the process of creating a case flow chart for criminal cases filed in Bombay Town Court. This exercise was designed to ensure that the committee members shared a common understanding of the case processing and bail system currently in place. The final two hours of the meeting involved the creation of a preliminary project design, outlined below.

III. PROJECT DESIGN

A. Project Goal

The proposed supervised release program will address the issue of Native American arrestees' inability to secure bail bonds and therefore reduce pre-trial detention of Native American arrestees. Eligible arrestees will be released without bond, under the supervision the St. Regis Mohawk Tribe. While on pre-trial supervision, program participants will also have access to a range of culturally-relevant services.

B. Key Components

The planning committee agreed upon a number of important project design elements.

1. *Project staffing.* A program coordinator employed by the SRMT will have primary responsibility for overseeing the day-to-day operation of the supervised release program. This tribal staff member, with the concurrence of the Bombay Town Court, will screen potential participants, supervise participants in the community, refer participants to appropriate services, and provide updates to the Bombay Town Court regarding participant compliance with the terms of release. The project coordinator may be assisted in these activities by other program and SRMT staff, Franklin County Probation Department staff, and/or other partner agencies to be determined.

2. *Eligibility*. All Native American arrestees will be considered for the supervised release program, subject to the limitations on bail established in the Criminal Procedure Law, section 530.20. The program will accept both Mohawk and non-Mohawk participants, whether

living on tribal territory or off. In addition, the program will consider accepting participants who live on the northern portion of the St. Regis Mohawk Indian Reservation (the Canadian portion of the SRMT territory). There will be no categorical exclusion based the offense charged. Rather, the Bombay Town Court will consider each case on its merits, and release decisions will be made on a case-by-case basis.

3. *Referral process*. There will be two possible referral paths depending on the outcome of the defendant's first court hearing. (1) Bail cases: If the court sets bail at the defendant's arraignment, the court will immediately notify the supervised release program coordinator and set the case for a hearing on the next court date, typically the following week. The program coordinator and will screen the defendant in the jail (or in the community if the defendant posts bail) prior to the next court date. If the defendant remains in custody, probation staff will also screen him or her at the jail, as per their usual protocol. If the program coordinator determines that the defendant is appropriate for the supervised release program, the coordinator will recommend to the court, at the court hearing, that the defendant be released and ordered into the program. The court will make a determination regarding release after considering all information presented at the hearing by the prosecutor, defense counsel, probation, and the program coordinator. Submissions may be made to the court verbally on the record or by written submission. (2) Release Under Supervision (RUS) cases: If the court releases a Native American defendant under the supervision of Franklin County Probation Department at arraignment, the court will notify both the program coordinator and the probation department that the defendant may be eligible for assignment to the tribal supervised release program. The program coordinator will screen the defendant in the community at the first available opportunity. If the program coordinator determines that the defendant is appropriate for the program, the coordinator will present this information at the next court appearance. The prosecutor, defense counsel, and probation may make submissions at this hearing. If the judge decides to release the defendant to the tribal supervised release program, the court will immediately notify the probation department in writing that the defendant's supervision now rests with the tribal program. Notwithstanding the screening process for the tribal supervised release program, RUS defendants are required to attend for intake with Franklin County Probation Department upon release, and will continued to be supervised by probation until the court assigns the case to the supervised release program.

4. *Screening*. The program coordinator will screen potential participants using a validated risk-need screening tool to be selected by the SRMT in consultation with the Office of Court Administration and the Center for Court Innovation. Rather than adopting an existing tool, the SRMT would prefer to develop a new, culturally-relevant screening tool for this project in partnership with the Center for Court Innovation. The Center agrees to work with the SRMT to develop such a tool, with input and guidance from an advisory committee of Native American legal and cultural advisors to be assembled for this purpose.[1] However, in the event that a new tool cannot be developed prior to the launching of the proposed supervise released program, the program would initially use an existing validated tool (e.g., COMPAS, ORAS, LSI-R, etc.) selected in consultation with the Office of Court Administration.

[1] The Center will also pursue separate funding from the U.S. Department of Justice to implement the new screening tool with several "pilot" tribes, including the SRMT, and conduct an evaluation of the tool over a three-year period. Until such an evaluation is completed, the new screening tool would not be considered validated.

5. *Supervision and monitoring.* The program will establish three tiers of supervision based on the defendant's risk level: low risk, medium risk, and high risk. The program coordinator will use the results of the risk-need screening to assign each defendant the appropriate tier. The specific supervision protocols associated with each tier will be developed collaboratively by the SRMT, Town of Bombay Court, and Office of Court Administration at a later stage of project implementation. Supervision activities may include: phone check-ins, in-person check-ins, curfew, drug testing, electronic monitoring, and others. The court will set general conditions of release, leaving the frequency and manner of reporting to the discretion of the program coordinator. The program coordinator may adjust the intensity of reporting, drug testing, and other mandated monitoring activities at his or her discretion, as defendants demonstrate compliance or non-compliance with supervision requirements. The program coordinator will provide status reports at regular intervals to the Bombay Town Court regarding the defendant's compliance with his/her supervision plan. The presiding judge may review the report and make a determination about whether to keep the existing court date, or advance the case to address non-compliance. In cases of serious or persistent non-compliance, the program coordinator will notify the court immediately through the filing of appropriate paperwork in order to return the case to the Bombay Town Court at the next available date. The court may change the supervision conditions, impose bail, or take no action.

6. *Treatment and other services.* In addition to helping the program coordinator assign defendants to the appropriate tier of supervision, the screening tool will also identify criminogenic needs that may be addressed during the defendant's pretrial supervision period. The program coordinator will have the authority, pursuant to the court's order, to require the defendant to actively participate in treatment or other services to address the areas of need revealed through the risk-need screening. The conditions of release set by the court will indicate the types of services (e.g., substance abuse treatment, employment counseling, mental health services, cultural activities) being mandated. The program coordinator will have discretion to determine specific service programs, as well as the intensity of services. The program coordinator's regular reports to the court will include updates about a defendant's compliance with mandated services. In cases of serious or persistent non-compliance with mandated services, the program coordinator will notify the court immediately through the filing of appropriate paperwork in order to return the case to the Bombay Town Court at the next available date. The court may change the supervision conditions, impose bail, or take no action. In addition to directing services pursuant to the court's order, the program coordinator may facilitate the defendant's engagement in additional local services on a voluntary basis.

7. *Partnership with Franklin County Probation Department.* Integral to the success of this supervised release program is a strong partnership with the Franklin County Probation Department. The probation department has access to criminal history reports, information about new arrests, and other data that may be important to the case. The probation department will share this information, to the extent permitted by law, with the supervised release program to enhance its supervision of defendants. Likewise, the supervised release program will share compliance updates to assist the probation department in writing pre-sentence reports. When a current probation client is rearrested and the court deems him or her eligible for pre-trial release, the release will presumptively be to the Franklin County Probation Department—and not to the tribal program—as that person is already under probation supervision. The collaborative

relationship between the probation department and the tribal program will be memorialized in a memorandum of understanding.

C. Project Partners

The proposed supervised release program will succeed only insofar as all stakeholders support the project and help to effectuate its goals. Critical stakeholders include the Office of Court Administration, the Forum, the 4th Judicial District Administrative Judge, Franklin County Court, Bombay Town Court, SRMT, Franklin County Probation Department, District Attorney's Office, Public Defender's Office, Assigned Counsel Coordinator, Conflicts Counsel, County Sheriff, and tribal service providers.

In addition to the critical and key stakeholders listed above, the committee identified the following agencies as interested parties for this project:

- Boys & Girls Club
- Franklin County Department of Social Services
- Mohawk Council of Akwesasne (probation office, police, and justice department)
- New York State Police
- North Star Behavioral Health Services
- Private mental health practitioners
- St. Joseph's Alcohol Rehab Center
- SRMT Mental Health
- SRMT Department of Social Services
- SRMT Tribal Police
- SRMT Resource Center
- SRMT Tribal Vocational Rehabilitation
- SRMT Chemical Dependency Program
- Three Sisters Program

IV. Next steps.

The Center for Court Innovation submits this revised report to the planning committee on January 22, 2016. It reflects feedback and suggestions made by the committee during at the second on-site planning session held on Tuesday, January 19th in Malone, NY. Present at this meeting were judges from Franklin County, the Town of Bombay, and the St. Regis Mohawk Tribe, as well as representatives from the Franklin County District Attorney's Office, the Public Defender's Office, Conflict Defender's Office, Assigned Council Coordinator, and the Franklin County Probation Department. During this meeting, stakeholders helped refine the project design and define their own roles in the project in more detail.

Next steps will include further conference calls to plan a proposal for the U.S. Department of Justice's FY16 Coordinated Tribal Assistance Solicitation (CTAS), which may provide needed funding for the program.

Specific questions to be addressed during upcoming conference meetings may include:

- Project staffing.

- Funding requirements.
- The specific risk-need screening tool to be used by the program coordinator.
- The need for additional justice system data to support the project design and grant proposal, such as (1) additional data pertaining to the county probation department's supervised release program; (2) data regarding the local jail population, and (3) projected savings to county jail facilities resulting from the proposed program.
- The need for a tribal council resolution authorizing the program and the grant proposal.
- Other issues to be determined.

The Center will assist the committee with the preparation of the CTAS grant proposal. In addition, the Center will continue to be available to assist with project implementation to the extent that implementation is possible prior to the receipt of federal funding.

Finally, the committee has expressed interest in developing a written policies and procedures manual and participant contract in preparation for launching the project. It was agreed at the January 19th meeting that development of the manual will take place in the months between submission of the CTAS grant proposal and the announcement of awards.

V. Conclusion

The Center for Court Innovation thanks the committee for the opportunity to participate in this groundbreaking project. For years, the St. Regis Mohawk Tribe and the Bombay Town Court have been seen as leaders in the field of tribal-state collaboration based on their collaboration around the SRMT Healing to Wellness Court. The proposed supervised release program would build upon this history of successful collaboration and would represent the first such tribal-state collaboration in the country. We look forward to continuing to support the committee in this important project.