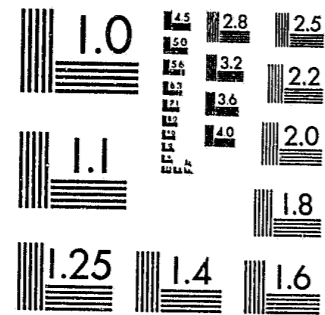


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LAW ENFORCEMENT ON INDIAN RESERVATION

AFTER OLIPHANT v. SUQUAMISH INDIAN TRIBE:

an identification of the problems, and recommendations
for remedies

(EXECUTIVE SUMMARY)

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EXECUTIVE SUMMARY

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INTRODUCTION

For the last year and a half, we have examined the problem of criminal jurisdiction over non-Indians on Indian reservations. The problem became apparent when on March 6, 1978, the Supreme Court in a 6-2 decision held in the case of Oliphant v. Suquamish Indian Tribe (435 U.S. 191 (1978)), that Indian tribes or nations did not have the inherent sovereign power to assume criminal jurisdiction over non-Indians committing crimes while on an Indian reservation.

It was felt that the decision created a jurisdictional void on Indian reservations. Who would now enforce the jurisdiction which previously had been exercised by the tribe? The ultimate goal of the project was to devise problem-solving models and propose legislation which could be implemented at either the local or national level. Therefore, our study was divided into three separate steps. During the first three months of the project, we did a literature search and legal analysis on the subject of criminal jurisdiction over non-Indians. We came to the ultimate conclusion that the Supreme Court in Oliphant should never have held that Indian tribes could not exercise criminal jurisdiction over non-Indians. In doing so, the court was making a completely political decision without any legal basis. However, the court did say that "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. But these are considerations for Congress to weigh ..." (Oliphant, 435 US 191, 212).

We concluded that Congress should take the Court's directive seriously and enact legislation along the lines of our recommended models (discussion to follow).

In the second phase of the project, we travelled to 12 different reservations which we felt constituted a good representative sample from which we could study the various problems encountered by tribes in coping with crimes committed by non-Indians on their reservations. Our field studies, which were later supplemented by survey questionnaires sent to all existing tribes, confirmed that the tribes need criminal jurisdiction over non-Indians. Although some tribes have coped with the problem by entering into cross-deputization agreements with the federal, state, or local governments, the problem can only be temporarily alleviated. Unless Congress enacts legislation allowing tribes to assert criminal jurisdiction over non-Indians the problem will never be resolved.

Devising problem-solving models and proposing legislative resolutions at the national level constituted the third and last phase of the project. Our basic recommendation (explained in the last section of this report) is that Congress should enact legislation which will authorize the Secretary to recognize tribal jurisdiction over non-Indians on the basis of individual tribal petition. The Secretary would not recognize such powers unless the tribe consented to have its decisions involving non-Indians subject to federal review. (Our suggestions about the "Review" process are explained below).

I. Literature Search/Legal Analysis

Our literature search attempted to explain why, from a legal point of view, the Court decided to deny Indian tribes the power to try non-Indians for crimes committed on Indian reservations.

Simply stated, at issue in Oliphant was whether an Indian nation can assert criminal jurisdiction over non-Indians who have committed crimes and were arrested on the reservation. The specific question was whether Indian nations have such jurisdiction pursuant to their powers of inherent sovereignty.

The Court ruled that Indian nations are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status." The Court reasoned that because tribes are dependent on the United States and because they are incorporated into the territory of the United States, they cannot exercise sovereign powers that conflict with the interest of the overriding sovereignty of the United States. Somehow, the Court concluded that tribal assertion of criminal jurisdiction must conflict with the interest of United States' sovereignty.

The Court engages in an historical analysis of treaties signed between the Indian nations and the United States and concludes that, "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 provisions to the effect." Oliphant at 197.

Although the Treaty of Point Elliott, signed in 1855 by, among others, the Suquamish Tribe and the United States, does not mention tribal criminal jurisdiction, the Court concludes that, "...the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction." Oliphant at 206.

In addition, Justice Rehnquist, after analyzing several executive documents, lower court decisions and Congressional acts, concludes that throughout history the three branches of the government all shared a presumption that Indian tribes were without jurisdiction to try non-Indians and, "while not conclusive on the issue before us, the commonly shared presumption of Congress, the executive branch and the lower federal courts, that tribal courts do not have the power to try non-Indians carries considerable weight." Oliphant at 206.

The Court, after analyzing the treaties involved and finding a presumption against tribal jurisdiction over non-Indians and after concluding that this presumption was shared by the three branches of the government, still acknowledges that this is not enough to remove tribal criminal jurisdiction if the tribes retain such jurisdiction. However, the Court concludes that,

"An examination of our earlier precedents satisfies us that even ignoring treaty provisions and Congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress... Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status." Oliphant at 208.

Therefore, although the Court recognizes that the tribes do retain certain inherent sovereign powers, it concludes that Indian tribes cannot exercise those powers which are "inconsistent with their status." In thus holding, the Court reverses one of the most venerable doctrines of Indian law, which states that tribes retained all of their original sovereign powers, unless such powers have been given up in treaties or are taken away by acts of Congress.

Taking the Court's approach step by step, we tried to provide an answer to the three questions which the Court had to respond to positively in denying tribal jurisdiction:

- 1) Does the history of Indian treaties show a presumption that tribes have no criminal jurisdiction over non-Indians?
- 2) Was there a commonly shared presumption by all three branches of government that Indian nations had no such criminal jurisdiction?
- 3) Is the power to try non-Indians inconsistent with the tribes' status as domestic, dependent nations?

1.1 We concluded that:

- 1) The history of Indian treaties does not reflect a presumption against tribal criminal jurisdiction over non-Indians.

Is the history of Indian treaties consistent with the presumption that Indians do not have criminal jurisdiction over non-Indians? There is no evidence to support such a presumption.

The most consistent treaty language to appear in the early treaties is contained in explicit provisions recognizing the power of Indian tribes to expel and punish white intruders. The 19th century brought changes in the treaty language that reflected the social evolution of the United States. Where the treaties were silent as to who had criminal jurisdiction over whom, they were still clearly indicative of an international exchange between two governments. Before the treaty-making process was terminated by the House in 1871, because members resented the superior role of the Senate in preparing such documents, there were specific treaty agreements that delineated criminal jurisdiction between citizens of both Indian and non-Indian nations.

The Court reasons that treaties with the Indians did not consistently recognize the power of tribal governments to exercise criminal jurisdiction over non-Indians. Thus, they conclude that tribes did not possess such authority. Unfortunately, the Court predicates this finding on a fallacious belief that Indian nations did not have native criminal justice systems at the time of contact with white culture. The facts of Indian history contradict such an assumption. Tribes did indeed operate under formal, defined, and effective systems of justice. The act of treaty-making itself was a tacit recognition by the European nations that Indian tribes were sovereign nations in their own right. Therefore, absence of specific reference to international jurisdiction cannot be interpreted to mean the Indians lacked such power.

Treaties served to identify and restrict pre-existing powers of Indian tribes. They never granted rights that were not already possessed.

It was not in the mandate of the United States to bestow such powers to other sovereign nations. Thus, the absence of language in reference to the specific issue of jurisdiction in Indian treaties does not imply the non-existence of such power. Quite the contrary, to the extent that treaties do not address the issue, it must be assumed that the rights were an active aspect of Indian tribal government that remained unaffected by the provisions of the treaty.

As the issue became more problematic in dealings between the Indians tribes and the United States, it was addressed specifically in the treaties. And, in case after case, Indian nations were acknowledged to retain the power to punish persons other than Indians. The treaties never established exclusive jurisdiction, for either the United States, or for Indian governments. Tribal governments never relinquished their powers of sovereignty, nor the right to impose criminal sanctions within their domain. The court is well aware of this as it built its argument on the basis of only a presumed understanding that Indian tribes did not possess the right to exercise criminal jurisdiction over non-Indians. The evidence to support this presumption is inconclusive.

1.2 The presumption was not shared by the three branches of the government.

A. Legislative Branch

Even setting aside the general rule that the grant of jurisdiction to one court does not, of itself, imply that jurisdiction is to be exclusive, a close scrutiny of the legislative policy of Congress clearly shows that tribal criminal jurisdiction over non-Indians was never expressly denied. In fact, the debates surrounding legislation cited as denying criminal jurisdiction reveals Congressional understanding that tribes did possess an original jurisdiction because of their sovereign nature, although there was

a need to establish concurrent jurisdiction because of the unsophisticated nature of tribal governments at that time. However, the legislation and history point to a belief that this concurrent jurisdiction should be of a temporary nature.

Therefore, because tribes have necessarily evolved in sophistication to a much more Anglo mode, one cannot logically argue that the exercise of criminal jurisdiction over non-Indians is any longer "inconsistent with their status." Determination of what is or is not "inconsistent with tribal status" cannot be based on a Congressional presumption that tribes never had jurisdiction over non-Indians since Congress never shared such a presumption.

B. Executive Branch

The "presumption" of the executive branch can only be drawn from a handful of Attorney General and Solicitor's opinions that do not register consistency over time. In the final analysis, they do not carry the weight on federal Indian policy that acts of Congress and treaties do. It is however, important to note that four years before Oliphant, a lengthy opinion was drafted and concluded that,

"Since Indian tribes originally had the power to exercise criminal jurisdiction over non-Indians and since that power has not been diminished either by treaty or by federal statute, it continues to exist today." (Solicitor Draft Memo, Oct.29,1974 at 126).

C. The Judicial Branch

The Court attempted to prove that there was a general presumption by the lower courts that Indian nations do not have the right to try non-Indians. The Court bases this finding on the holding of one case - Ex Parte Kenyon, decided in 1878 by Judge Parker of the District Court for the Western District of Arkansas. (14 Fed Cases 356 (W.D. Ark. 1878)).

Judge Parker decided two cases involving the issue of criminal jurisdiction over non-Indians, Ex Parte Kenyon and Ex Parte Morgan. (14 Fed Cases 356, and 20 Fed 298 (W.D. Ark. 1883)). An examination of these two cases shows that Judge Parker did not rest his opinion on the fact that it was inconsistent with tribal status to try non-Indians, but on the conclusion that assertion of tribal jurisdiction over non-Indians pursuant to inherent sovereign power was preempted or forbidden by acts of Congress, which reserved exclusive jurisdiction over such crimes to federal courts.

The Court in Oliphant also refers to In Re Mayfield, 141 U.S. 107 (1831) to prove its presumption theory. However, in this case the Supreme Court held that the tribunal of the Cherokee Nation had exclusive jurisdiction over an adopted member of the tribe. Thus, the Court concluded that,

"We see no reason to doubt that this is a criminal case arising within the Cherokee Nation, in which an adopted member of the nation is the only party...as Mayfield was a member of the Cherokee Nation by adoption, if not by nativity, we think it is clear that under the treaties and acts of Congress he is amenable only to the courts of the (Cherokee) nation." (141 US 107,114).

Therefore, in Mayfield, the Court did recognize tribal jurisdiction over non-Indians provided they were adopted members of the Indian nation prosecuting them.

The Court in Mayfield did comment that the general object of the various acts of Congress was to give jurisdiction to federal courts in cases where non-tribal members were involved. However, the Court indicated that Congress allowed tribes to assume powers of self-government, if such powers were "consistent with the safety of the white population." (Mayfield at 115). According to this criterion, the Court in Oliphant should have had no difficulty in deciding that assumption of tribal jurisdiction over non-Indians on reservations today, not only does not endanger the white population, but adds another measure of law and order protection.

Therefore, we can conclude that there was no general presumption on behalf of the federal courts, that Indians lost the inherent sovereign power to assume criminal jurisdiction over any non-Indians. The only evidence to the contrary is the opinion of Judge Parker who believed that the 1834 Trade and Intercourse Act reserved exclusive jurisdiction to the federal court. Fortunately, many of Judge Parker's opinions and presumptions were overruled by subsequent cases.

1.3 The power to try non-Indians is not inconsistent with the tribe's status.

Justice Rehnquist's impression that Indian criminal jurisdiction over non-Indians is a power that must be affirmatively delegated by Congress leads him to conclude that such power is inconsistent with their status. He finds that Indian tribes are proscribed from exercising those powers inconsistent with their status. Unfortunately for the Court, none of Justice Rehnquist's precedents held that Indian tribes could not exercise powers inconsistent with their status. In dicta, not necessary to the holding of the cases, some Supreme Court Justices expressed the view that because Indians were domestic dependent nations, they should not be able to sell their lands to others than the United States. More specifically, in the famous Cherokee Nation v. Georgia case, (30 U.S. (5 Pet.) 1, 1831); Justice Marshall commented that,

"...any attempt (by a foreign nation) to acquire Indian lands or to form a political connection with them will be considered by all as an invasion of our territory and an act of hostility." (Cherokee Nation at 17).

However, in the famous Worcester v. Georgia case, decided one year later, Justice Marshall clarified the "single exception" imposed by the United States on the sovereignty of the Indian nations,

"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, with the single exception of that imposed by an irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves as well as on the Indians. The very term 'nation' so generally applied to them means 'a people distinct from others.'" (Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

Therefore, the Court in early cases did specify only one restriction on inherent sovereignty. Consistent with this finding, the Court in Worcester, analyzing the extent of United States interference in the internal affairs of Indian nations, only found one such type of interference when it stated,

"Certain it is that our history furnishes no example from the first settlement of our country of any attempt on the part of the Crown to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traitors or otherwise, might seduce them into foreign alliances." (Worcester at 546).

Therefore, Justice Rehnquist's finding that there is more than one inherent limitation of Indian sovereign powers directly contradicts the dicta and the holdings of both Cherokee Nation v. Georgia and Worcester v. Georgia.

Furthermore, Justice Marshall did not view full and exclusive territorial jurisdiction of the tribes as being inconsistent with their status or conflicting with the sovereignty of the United States. In Worcester v. Georgia, Justice Marshall reviewed the various acts of Congress dealing with Indian nations and concluded that,

"All these acts...manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged but guaranteed by the United States." (Worcester at 556).

Therefore, we can conclude that Justice Marshall thought that the Indian nations had exclusive territorial jurisdiction over their country.

D. Deciding a Political Question: The Correctness of the Court's Extension of the Principle to the Issue of Oliphant

It seems that what does or does not conflict with the sovereignty of the United States should be a matter for Congress or the Executive to decide. Thus, the wisdom of a rule stating that tribal sovereign powers are limited only by acts of Congress and treaties. Instead, the Court in Oliphant put itself in a position of deciding for itself a political issue for which it had no factual basis. Why deny tribes jurisdiction over non-Indians? How can the Court bluntly assert that tribal jurisdiction over non-Indians conflicts with the sovereignty of the United States? If the Oliphant court agrees with Justice Marshall's definition of Indians as "fierce savages whose occupation is war," then the United States has to protect the personal liberty of its citizens from the Indian nations. Perhaps this is why Justice Rehnquist concludes that,

"This principle would have been obvious a century ago when most Indians were characterized by a want of fixed laws and competent tribunals of justice. It should be no less obvious today." Oliphant at 210.

Yet, Justice Rehnquist's principle is not a legal principle at all. It is a political finding rooted in racist assumptions about Indian nations. The legal principle involved is that tribes cannot exercise any powers inconsistent with their status. However, Justice Rehnquist should not and could not have made the political decision that the tribes' exercise of criminal jurisdiction over non-Indians conflicts with the sovereignty of the United States.

In the Oliphant case, Justice Rehnquist, after defining his new test that "tribes cannot exercise powers inconsistent with their status," had to make a political determination about tribes which would bring their assumption of criminal jurisdiction over non-Indians into conflict with the sovereignty of the United States. Unfortunately, the Court seems to have used the same racist assumption that Justice Marshall used 150 years ago that Indian nations were "uncivilized, fierce savages whose occupation is war" and silently applied them to deny Indian nations criminal jurisdiction over non-Indians.

III. Conclusion

The Court in Worcester v. Georgia said that "the settled doctrine of the law of nation is, that a weaker power does not surrender its independence - its right to self-government, by associating with a stronger, and taking its protection." Worcester at 560.

The Court in Oliphant does not explain how a loss of criminal jurisdiction over non-members cannot be considered an interference with self-government and a loss of independence. Nor is it explained how the Court can find jurisdiction of non-members inconsistent with tribal status or in conflict with the sovereignty of the United States. In other words, the crucial mistake in Oliphant is that the denial of tribal jurisdiction over non-Indians is a political question which the Court could not have decided without violating the United States Constitution. As pointed out earlier, the fact that Indian nations are weaker and under the protection of the United States or may also be within the territorial boundaries of the United States does not make tribal assertion of criminal jurisdiction over non-members inconsistent with tribal status as a matter of law.

What is or is not inconsistent with their status is still a political issue for Congress to resolve. Our constitutional doctrine of separation of powers preempts the judiciary from making such a political decision.

CHAPTER 2

DATA ANALYSIS

II. FINDINGS: ANALYSIS

What effect has Oliphant had on reservation law enforcement?

Numerous sources of data were examined to determine the immediate impact of the Supreme Court's ruling that Indian tribes do not have the inherent sovereign right to exercise criminal jurisdiction over non-Indians for crimes committed on the reservation. The principal problem areas that emerged from the collective data highlight four aspects of non-Indian criminal jurisdiction: ENFORCEMENT, who is currently exercising jurisdiction over non-Indian crimes on the reservation, REMEDIES, what actions have tribes and surrounding authorities attempted to fill this vacuum, JUDICIAL JURISDICTION, which courts now handle non-Indian misdemeanor offenses, and what is the role of tribal courts regarding non-Indians in non-criminal judicial proceedings, and ATTITUDE, how have the attitudes of police officers and both Indian and non-Indian reservation residents affected the performance of law enforcement in the wake of Oliphant? Our analysis of the data leads to the conclusion that:

Oliphant has created a serious gap in the enforcement and prosecution of non-Indian crime on the reservation.

1. The Problems

The data which leads us to the conclusion that justice is not being served was acquired through field research, survey questionnaires, and participation in a variety of Congressional hearings and national meeting convened to address the current status of criminal jurisdiction over non-Indians in Indian country.

For all tribes with an on-reservation non-Indian population and an active tribal police force, the decision resulted in an increase in non-Indian crimes going unenforced. Only those reservations closed to non-Indians experienced little immediate impact, although they express fears of future developments

resulting in an influx of non-Indians onto the reservation without adequate enforcement safeguards.

Prior to Oliphant a number of tribes exercised criminal jurisdiction over non-Indian offenses. For the most part, these reservations ceased all criminal enforcement activities after the decision, and neither the county or state, nor the federal government has assumed responsibility for these crimes.

Other tribes had cross-deputization agreements withdrawn as a result of the decision because states' misinterpreted Oliphant to mean that they could no longer authorize tribal officers to arrest non-Indians. The decision referred only to tribal agencies, not to officers acting under another jurisdiction's supervision.

And for those tribes that had not been exercising criminal jurisdiction over non-Indians, many were forced to scrap proposed revisions of their tribal Law and Order Codes assuming such jurisdiction.

Although the lapse in effective law enforcement remains the most severe problem resulting from Oliphant, the decision has been responsible for other breakdowns in justice as well. The power of tribal officers, and tribal courts to enforce civil jurisdiction over non-Indians has been wrongly denied by misapplication of the Oliphant ruling. Federal District Courts in Washington State and Montana (see footnote 3, infra) have held that tribal justice systems are powerless to enforce civil law against non-Indians for actions occurring on the reservation despite the fact that the Oliphant decision expressly states that the Court is addressing criminal and not civil Indian jurisdiction over non-Indians. This is a very dangerous and categorically unprincipled interpretation of the Supreme Court's finding on Oliphant.

The morale of tribal police officers was immediately impacted by the decision. They felt stymied in the performance of their duty.

This attitude problem was exacerbated by the resident Indian population who blamed them for the inequity which now places non-Indians beyond the law. These tensions remain, although most sources indicate that the problem has lessened over time.

The economic impact of Oliphant also proved to be an area of concern for most tribes. For those that were exercising non-Indian criminal jurisdiction, the loss in fines has been significant. For most of them however, the financial repercussions have been from a reduction in federal subsidies. Law Enforcement Assistance Administration (LEAA) funds to tribal police department were cut-back under the impression that they would be reducing their services. This has not been the case. Tribal justice systems are doing progressively more business, and they are dependent on continuing financial support from the federal government to enhance the development of tribal justice systems.

The confusion deriving from the ruling is at the root of most of the problems. All persons concerned called for a clear interpretation of the Oliphant decision and its legal concepts. The tribes request it for vindication of their retained rights. The county and state need such clarification as indicated by their serious misunderstanding of the case.

2. Attempted Remedies

A number of stop-gap remedies have been attempted by tribal and local government in response to the jurisdictional confusion spawned by Oliphant.

Cross-deputization of tribal police as county and/or state officers emerges as one of the most immediate remedies to the gap in enforcement of non-Indian crimes. These agreements take the form of mutual aid compacts as well as the formal cross-commissioning of officers. Although this attempt to resolve the problem has the advantage of certifying tribal officers to arrest non-Indians as well as Indian offenders, the tribes have expressed concern over the long range implications of such arrangements. There are fears that the need for a tribal police force may be eliminated by having tribal police serving as officers of the state.

The evidence indicates that cross-deputization is a temporary measure at best. It is highly contingent upon a favorable political climate. The cooperation of the local county sheriff is intrinsic to the success of these agreements. State and county personnel have often refused to enter into these types of agreements with tribes on the grounds that tribal officers do not have the necessary qualifications. We examined this issue of the training of tribal officers and concluded that it is an unfounded impediment to tribal/state agreements. Tribal officers are almost exclusively trained at the Indian Academy at Brigham City, Utah. In addition, many tribal officers have attended state police academies, and states have increasingly heightened the accessibility of tribal officers to their training facilities. Thus, tribal officers are comparably trained to state and county personnel. But, this type of resolution to the jurisdictional gap in non-Indian enforcement remains a questionable, and ultimately unreliable remedy.

Some tribes have reacted to the decision by recodifying certain criminal offenses as civil infractions. Particularly in the area of hunting and fishing, civil jurisdiction over non-Indians retained by the tribe affords them the authority to regulate non-Indian offenses in this area.

There are also potential remedies in the treaty rights under which tribes operate. As suggested by the Suquamish themselves, and practiced by other Indian tribes, they have the power, if not the obligation, to 'detain and deliver up' non-Indian offenders to the United States for prosecution under treaties signed with the federal government. Put into operation, this empowers tribal police to arrest non-Indians and turn them over to state or federal authorities.

Many treaties, and subsequently, tribal law and order codes contain exclusion provisions. Tribes have also exercised this remaining power to exclude troublesome non-Indians from the reservation.

Ultimately, the answer to the problem lies with the recognition and extension of tribal powers to assert total jurisdiction over all offenses occurring within their boundaries. Both Indians and non-Indian sources agreed that if an Indian community is endangered, it should have the right to protect itself. As the Supreme Court itself noted in its ruling on Oliphant, it is the responsibility of the federal government to protect the rights and property of Indians. The obligation to definitively resolve the problem of non-Indian jurisdiction in Indian Country rests with Congressional recognition of the tribes' powers to exercise some form of control over non-Indian offenses.

DATA ANALYSIS

Summary of Field Research

In an attempt to identify the nature of the vacuum in jurisdiction on Indian reservations created by Oliphant, we undertook to survey a sample of twelve reservations sites. The sites chosen were representative of a cross-section of specific variables which determine the manner of law enforcement on the reservation. The criteria included whether the on-reservation Indian population exceeded the non-Indian, or whether the reverse was true, whether the state(s) in which the tribe is located exercises jurisdiction under P.L. 280, whether the tribe asserted non-Indian criminal jurisdiction prior to Oliphant or not, or whether the Indian police were tribal, or Bureau of Indian Affairs officers.

The methodology employed was to visit each reservation site and conduct extensive interviews of tribal law enforcement personnel, state and county officials, and in some cases, local U.S. Attorneys. These persons included tribal police chiefs, line officers, tribal judges and prosecutors, members of the tribal law and justice committees, tribal attorneys, county sheriffs, county prosecutors, state attorney generals, and United States attorneys. Each individual was questioned on the same issues regarding non-Indian criminal procedure on the reservation. We focused on the current enforcement of criminal offenses on non-Indian violators, cooperation among tribal, county, state and federal authorities, and the activities of the courts, both tribal and non-tribal justice systems. ^{1/}

1. The questions were determined through pilot testing at four reservation sites. The pilot studies produced a series of questions that captured the major concerns of people instrumental in effecting law and order on the reservation. A copy of these interview questions is attached. See Appendix I.

The data were collected primarily through interview techniques. In some cases interviews were recorded on tape. In the majority of cases however, the information was elicited informally; the data then recorded in field notes. An interview questionnaire was completed for each person polled, and these, coupled with the field notes and transcripts, were reduced to a single comprehensive report on each reservation site.

A total of 48 complete interviews were conducted at the 12 selected sites.^{2/} Eight major topics emerge which exemplify the effect the Oliphant decision has had on reservation law enforcement. From an analysis of the responses to the standard interview questions, with additional evidence from observational data and supplemental materials (copies of agreements, police reports, state case law) - an identification of each of these principal areas of concern follows.

1. Non-Indian Jurisdiction. One of the primary inquiries of the research has been to determine who is exercising jurisdiction over crimes committed by non-Indians in Indian country now that Oliphant has ruled that tribes do not have that power. County officials and reservation representatives frequently differ in their understanding of where the jurisdiction lies.

2. Cross-deputization. One immediate response to the jurisdictional vacuum created by the decision has been cross-deputization of tribal police with local and state authorities.

2. See Appendix II for a list of the sample sites. Although the number of informants significantly exceeded 48, in some instances the interviews were incomplete. These data were then either eliminated, or combined to produce a composite survey."

It is a remedy which has generated mixed feelings. The account of its feasibility varies from state to state (and often county to county) as demonstrated by the range of responses from the data herein analyzed.

3. Training. One of the criteria for determining the competence of tribal personnel to maintain law and order on the reservation, particularly in regard to non-Indian offenses, is the degree of training the officers have. Most of the tribal police received BIA training at the Indian Academy at Brigham City, Utah.. Each state has either a police academy, or a prescribed list of requirements that set its standards of law enforcement. And the proported discrepancies between types of training can present a serious impediment to cooperation depending on the state.

4. Morale. When asked what the immediate impact of Oliphant was, the frequent response was 'morale'. The ramifications of the frustration, and the community resentment manifested themselves as critical obstacles to maintaining effective law enforcement.

5. Economy. The economic impact of the ruling was a reoccurring problem at most sites surveyed. It was felt either in a loss of revenue for tribal courts which had previously exercised non-Indian jurisdiction, or in a withdrawal of federal funds under the impression that the tribal police force would be phasing down it activities.

6. Court. The decision had an effect on the judicial end of the legal system as well. In some cases, non-Indian cases were dropped from the dockett completely. In others, the tribal courts continued to assert civil jurisdiction over non-Indians. The unwillingness of the state and federal courts to assume the displaced non-Indian offenses was another principal factor.

7. Problems. The reservations could all cite specific problems which they trace directly to Oliphant. In certain areas, the repercussions overlapped. In other instances, they were specific to the communities involved. These case-by-case examples demonstrate the breadth of the fallout from Oliphant.

8. Recommendations. The response to suggestions for remedies ran the gamut from hopelessness, to highly detailed resolutions. These recommended courses of action included both long term, and short term remedies of local, regional, and national perspectives.

These are the primary topical areas which frame an analysis of the effects of the Oliphant decision of law enforcement in Indian country. They delineate the directions for problem-solving. Non-Indian crimes goes unregulated on many reservations due to a general state of confusion over the parameters of the Oliphant ruling. This calls for a concise interpretation of the decision for all parties involved with Indian law enforcement. The situation is compounded by a lack of cooperation from local and state authorities. Tribal-state dialogue must be encouraged. Cross-deputization is an immediate remedy with stop-gap effectiveness. Over the long term, it does not sufficiently guarantee protection for the reservation community. It should be used as the measure of limited utility that it is.

Training must be standardized. Tribal police do not necessarily have access to all the training facilities which non-Indian officers have at their disposal. Such inequities need to be evaluated. Removal of these barriers would contribute significantly to the morale of the tribal police and thereby increase their effectiveness as officers of the law.

The federal responsibility to subsidize tribal law enforcement programs is not diminished by the Oliphant decision.

Quite the contrary, the government is obligated to continuing supporting tribal self-determination, which includes aiding the tribes to improve the quality of their justice systems.

Aside from all these practical problems, there remains an underlying cultural conflict. The Oliphant decision itself, as well as the suggested remedies, are all products of an Anglo justice system. The tribes have adopted many of these principles, but they have also preserved elements of native preceptions of law and order. Thus tribal sanctions, and definitions of crime and punishment bear a marked cultural interpretation. These ways of viewing issues are often misunderstood by the non-Indian population at large. Racial conflicts continue to generate hostility. Because the punishments determined by the tribes do not always correspond to the non-Indian response to the same offense, non-Indians resent the verdict served on Indians. They feel they are getting away with something. There just is not complete comparability between native criminal justice systems and that practiced by the United States. Any potential remedy must be sensitive to this critical point.

The ultimate resolution to the jurisdictional confusion generated by Oliphant lies in the halls of Congress. The Supreme Court itself directed Congress to devise a legislative remedy. Acts of Congress such as the Tribal/State Compact Act, or the Criminal Code Reform, or the expansion of the Federal Magistrate System may hold the key to resolving the vacuum of effective law enforcement now being experienced on Indian reservations in the wake of the Oliphant decision.

The answer to the problem may be as one non-tribal official (a state district court judge) put it - if no one else is going to provide the enforcement, it should be left to the tribe. As another non-Indian (a tribal attorney) pointed out, there is no such thing as a victimless crime. If the Indian community is endangered, it should have the right to protect itself.

SUMMARY OF SURVEY DATA

To supplement the field research of the sample of 12 reservation sites, we administered a survey by mail to 270 tribal officers. The survey highlighted four essential issues characterizing the effect of the Oliphant decision on reservation law enforcement. These fundamental issues are:

- 1) Enforcement - who currently exercises jurisdiction over non-Indian crimes on the reservation?
- 2) Remedies - what steps have tribes and surrounding authorities taken to fill this vacuum in jurisdiction?
- 3) Judicial Jurisdiction - which courts now handle non-Indian misdemeanor offenses?
- 4) Attitude - how have the attitudes of police officers, and both Indian and non-Indian reservation residents affected the performance of law enforcement in the wake of Oliphant?

Ten questions are arranged on a three page questionnaire (copy attached in Appendix III to this section). There are three questions directed at determining current enforcement practices regarding non-Indians. Another three explore types of remedies. Two are geared toward eliciting information on judicial activities. And the remaining two are looking at the attitudinal consequences of the decision.

The questions are designed to produce quantitative, and non-quantifiable data. Each question is worded to generate either a YES or NO response. The sum totals as well as the percentage of responses per question have been calculated for each. These statistics are presented here. These data do not reflect a comprehensive accounting of all Indian tribes. The overall response rate to the survey was 24%. They do indicate a significant sampling however. The respondents come largely from areas where the state exercises jurisdiction in some capacity on Indian reservation.

69% come from states under P.L. 280, or from Oklahoma (where the practice has been for the state to exercise jurisdiction in Indian Country despite recent rulings, both executive and judicial, which clearly deny such state jurisdiction).

The non-quantifiable data is drawn from open-ended requests for explanation of the choice of a YES or NO answer. Following most questions there are a space provided for a fuller description of the respondent's answer. At the conclusion of the survey there is also an area reserved for comments, of which many respondents took advantage. There are even additional materials supplied by some tribes in response to an invitation to do so in our covering letter. Thus, these data further clarify the quantitative results. To glean the maximum information from this survey, it is necessary to review the results from both the quantitative, and the non-quantitative perspective.

(TABLE 1) 2 /

	1	3	4	5	6a	6b	7	8	9a	9b	10
YES	.30	.35	.29	.49	.64	.33	.10	.49	.24	.40	.49
NO	.70	.65	.71	.51	.36	.67	.90	.51	.76	.60	.51
Response Rate	.89	.72	.64	.64	.61	.56	.63	.61	.72	.75	.77

*Response Rate = Number of responses per questions over total number of responses.

2. Table 1 explanation - the chart depicts what percentage of the responses to each question is in the affirmative, and what percentage is in the negative. The third row of figures indicate the percentage of the total number of respondents answering each particular question. Not every question was answered on every survey submitted. Question #2 is omitted because it asks for an identification of which police forces serve the reservation regarding non-Indian crime. Those answers are not quantifiable. Thus, an example reading of the chart would be: for question #1, 30% of those responding did exercise non-Indian jurisdiction prior to Oliphant: 70% of those responding did not. The response to question #1 represents 89% of the total number of questionnaires completed.

ENFORCEMENT

Since the majority of the respondents resided within the boundaries of states exercising jurisdiction on the reservation, enforcement of non-Indians rests in the hands of the state. To a certain degree, these county and state enforcement agencies have met their responsibilities. But 40% of those responding to the question feel that non-Indian crime has been increasingly unenforced since Oliphant. BIA and FBI are characterized as responding to major crimes only. Tribes repeatedly report, 'No one will pay attention to non-Indian crime', particularly misdemeanor offenses. And tribes with active police forces who do not rely solely on federal agents persist to seek ways to enforce the law on their own reservations without relying on unstable state and county cooperation.

REMEDIES

The remedies tribes have adopted to protect their reservations from disorderly non-Indian crime in the wake of Oliphant have proven only moderately effective. For most solutions, it is too soon to tell what success they may have - the recodifying of certain offenses from criminal to civil for example, must pass the test of time. The political instability of tribal-county relations makes the long-term efficacy of cross-deputization unreliable. And the potential threat of removal of tribal officers to serve elsewhere in the county, or otherwise serve the state rather than the reservation makes cross-deputization an undesirable remedy for some tribes.

JUDICIAL JURISDICTION

These data indicate that not only law enforcement has suffered as a result of Oliphant, but the whole criminal justice system has experienced the after shocks. The indications are clear: there must be coordination of tribal, state and federal judiciaries to thoroughly compensate for the tremendous gaps

presently apparent in regulating non-Indian crime in Indian country. It is imperative that the rightful powers of tribal courts are respected as such.^{3/} And it is equally important, judging from these data, that the federal courts must assume their responsibility to administer justice on behalf of Indian tribes where they are unable to do so themselves.

ATTITUDE

One of the most immediate effects of the Oliphant case was the impact it had on the morale of tribal police officers, as well as the community at large. The emotional and pragmatic reactions to the decision are as crucial as the practical problems of enforcing and adjudicating non-Indian crimes in any evaluation of the effect of Oliphant. The data clearly show the degree to which attitudinal problems even on reservations which had not been asserting non-Indian jurisdiction, have intensified the breakdown in enforcement in Indian country.

5. There have been two instances where Federal District Courts has misinterpreted Oliphant to deny tribes civil jurisdiction over non-Indians. The Court explicitly restricts its holding to criminal non-Indian jurisdiction. Tribes unequivocally retain the power to assert civil non-Indian jurisdiction. The first case to apply Oliphant to restrict tribal jurisdiction over non-Indians in a civil matter is Trans Canada Enterprises Ltd. v. Muckleshoot Indian Tribe, No. C77-882M (W.D. Wash. July 27, 1978). This has subsequently been used as precedent in denying the Flathead reservation the right to impose tribal land use laws on non-Indians, see Confederated Salish and Kootenai Tribes, et al, v. Namen, et al. Civ. No. 2343; City of Polson v. Confederated Salish and Kootenai Tribes, Civ. No. 75-143-M., U.S. v. City of Polson, et al, Civ. No. 77-70-M, (D. Mont., Sept. 20, 1979).

CONCLUSION

The data collected from the mail survey corroborate the conclusions drawn from an analysis of the field data. Oliphant has had a negative impact on law enforcement throughout Indian Country. For those tribes previously exercising criminal jurisdiction over non-Indians prior to Oliphant, the decision has created serious gaps in enforcement services and despite the fact that most of the responses to the survey come from tribes within 280 states, and tribes that had not been exercising non-Indian jurisdiction, the data indicate that severe problems stemming from the Supreme Court decision on Oliphant threaten the law and order on their reservations as well. The few remedies that have arisen are largely untested, and generally of a temporary nature. The need for a more permanent resolution to the problem is painfully clear.

It is equally clear that the ramifications do not stop with the enforcement systems alone. The judicial offices which are empowered to adjudicate crimes committed by non-Indians in Indian Country have not responded to the need to process these offenses. Tribal courts in rare cases have continued to prosecute these cases, but only with the individual non-Indian's consent. Most tribes have had to cease all activities involving non-Indians in their courts' and neither the federal system, nor the state or local courts have assumed responsibility for prosecuting these offenses.

Ultimately, the laws point to the obligation of the federal government to protect the rights and property of Indian tribes. As the Supreme Court itself realized in its ruling on Oliphant, the power to definitively resolve the problem of jurisdiction in Indian Country rests in the hands of Congress. It is imperative that Congress affirms the power of tribes to protect themselves.

APPENDIX I

Interview Questions

JURISDICTION SURVEY - INTERVIEW QUESTIONS

I. Law Enforcement

1. Did the tribe exercise non-Indian jurisdiction prior to Oliphant? Yes ___ No ___
2. If so, have tribal officers continued to arrest non-Indian offenders? Yes ___ No ___
3. If not, please explain who does exercise jurisdiction over non-Indian crime on the reservation _____
4. Does the tribe have an implied consent ordinance for non-Indians? Yes ___ No ___
5. Please describe when it was instituted(_____), and how it works.
6. What is the size of the police force that operates on the reservation? _____
7. Are there cross-deputization agreements between your police and the other authorities, on either a formal, or informal basis? Yes ___ No ___
8. Please describe.
9. When did these agreements start? _____
10. Have they changed as a result of Oliphant? Yes ___ No ___
11. Have there been any indications for withdrawal of agreements since Oliphant? Yes ___
12. If so, who has initiated them? _____
13. Are they still actively maintained? Yes ___ No ___
14. Have training qualifications ever impeded cross-deputization agreements? Yes ___ No ___
15. Do your training requirements differ from the other authorities? Yes ___ No ___
16. Please describe.

Interview Questions

page 2

17. Have state or county forces instituted any changes in manpower to handle non-Indian reservation crime since Oliphant? Yes ___ No ___
18. Do you have adequate facilities to incarcerate all offenders, both Indian and non-Indian, who have committed crimes on the reservation? Yes ___ No ___
19. Is there a pronounced delay between the initial report of an on-reservation crime, and action by state or county authorities? Yes ___ No ___
20. Has this delay increased since Oliphant? Yes ___ No ___
21. Have there been any charges brought against Indian officers by non-Indians for false arrest since Oliphant? Yes ___ No ___
22. Have tribal police attempted to regulate non-Indian crime through citizen's arrest? Yes ___ No ___
23. Is there a feeling of unfairness among tribal members about the jurisdictional vacuum regarding non-Indian crime on the reservation? Yes ___ No ___
24. Have non-Indian residents expressed concern over the jurisdictional confusion in law enforcement since Oliphant? Yes ___ No ___
25. Are non-Indians willing to submit to tribal jurisdiction? Yes ___ No ___
26. Are non-Indian residents willing to serve on tribal courts? Yes ___ No ___
27. Have non-Indians openly defied tribal authority since Oliphant? Yes ___ No ___
28. Has the tribal economy been adversely effected by a reduction in revenue from fines since Oliphant? Yes ___ No ___
29. Please estimate the difference in the annual revenue last year (1978) from the year preceding Oliphant (1977). _____

Interview Questions
page 3

30. Have there been changes in your insurance policy since Oliphant? Yes ___ No ___
31. Please compare the rates and coverage between the years preceding, and following Oliphant (1977, 1978). _____
32. Is this variation markedly different from previous years? Yes ___ No ___
33. Has there been a decline in the tribes operating funds since Oliphant? Yes ___ No ___
34. Are the law enforcement funds distributed under 638? Yes ___ No ___
35. What was your annual budget for fiscal year 1978? _____ 1977? _____
36. Is the difference noticeably greater than in previous years? Yes ___ No ___

II. Misapplications of Oliphant to Civil Cases

37. Has the Oliphant finding been applied to civil matters? Yes ___ No ___
38. Do these incidents occur with hunting and fishing violations? Yes ___ No ___
39. Have civil decisions made before Oliphant been appealed on the basis of that decision? Yes ___ No ___
40. In which courts do these cases arise? _____

III. Court Jurisdiction

41. Please describe any agreements between tribal, state and local courts.
42. Are they written? Yes ___ No ___
43. How long have they been effect? _____

Interview Questions
page 4

44. Do federal courts recognize the warrants and decisions issued by your court?
Yes ___ No ___
45. Have any of these agreements changed as a result of Oliphant? Yes ___ No ___
46. Is there concurrent jurisdiction between your court and any other concerning criminal cases involving non-Indian offenders for crimes on the reservation? Yes ___ No ___
47. Who has jurisdiction over such offenses, tribal court ___ local ___ state ___ federal ___
48. Is there an understanding of this arrangement among tribal, local, state and federal authorities? Yes ___ No ___
49. Do the same arrangements hold for civil cases? Yes ___ No ___
50. Are offenders, either Indian or non-Indian, ever cited in state courts for violation of tribal laws? Yes ___ No ___

Date _____

Name and Title _____

Address _____

Phone _____

Additional Questions:

I. Law Enforcement

Has there been a change in morale among police officers regarding enforcement on reservations?

II. Misapplications of Oliphant to civil cases

Does one authority (tribe, county) have comprehensive zoning jurisdiction over the reservation?

Who regulates land use on the reservation?

III. Court Jurisdiction

Does the tribe have someone who serves as prosecutor in tribal court?

Has the Indian Civil Rights Act affected the procedure of the tribal court?

Could federal magistrates remedy some of the gaps in jurisdiction in enforcement and prosecution of on-reservation crime?

APPENDIX II

Sample Sites

Sample Sites

1. Colville, Okanogan and Ferry Counties, Washington.
2. Swinomish, Skagit County, Washington.
3. Suquamish, Kitsap County, Washington.
4. Quinault, Grays Harbor and Jefferson Counties, Washington.
5. Muckleshoot, King County, Washington.
6. Colorado River, Yuma County, Arizona, San Bernardino and Riverside Counties, California.
7. Fort Mojave, Clark County, Nevada, San Bernardino County, California, Mohave County, Arizona.
8. White Mountain Apache, Apache, Gila, and Navajo Counties, Arizona.
9. Laguna Pueblo, Valencia, Bernalillo, and Sandoval Counties, New Mexico.
10. Isleta Pueblo, Bernalillo and Valencia Counties, New Mexico.
11. Papago, Maricopa, Pima, and Pinal Counties, Arizona.
12. Mescalero Apache, Otero County, New Mexico.

Appendix III

Survey

JURISDICTION IN INDIAN COUNTRY : THE EFFECT OF THE OLIPHANT DECISION

1. Did the tribe exercise non-Indian criminal jurisdiction prior to the Oliphant decision? Yes ___ No ___

2. (a) What authority now regulates crime by non-Indians occurring on the reservation? :
Tribal police ___ BIA police ___ State or County ___ Federal ___
Other (please specify) _____

(b) Please describe how this enforcement works _____

3. (a) Does the training of your police differ from other authorities? Yes ___ No ___

(b) If yes, please describe how training differs _____

4. (a) Is cross-deputization of tribal police with state and county forces an effective means of enforcing law and order on the reservation? Yes ___ No ___

(b) Please explain your answer _____

5. Does such cross-deputization now exist? Yes ___ No ___

6. (a) Does the tribal enforcement agency turn over non-Indian offenders to federal magistrate court? Yes ___ No ___

(b) Has the federal magistrate system proven useful in handling non-Indian crime on the reservation? Yes ___ No ___

(c) Please explain your answer _____

7. (a) Has the Oliphant ruling been applied to civil jurisdiction cases concerning the power of tribal police to regulate non-Indians? Yes ___ No ___

(b) If yes, please describe _____

8. (a) Has the Oliphant decision had an effect on the morale of tribal police officers? Yes ___ No ___

(b) If yes, please describe _____

9. (a) Has there been an increase in non-Indian crime on the reservation since the Oliphant decision, March 1978? Yes ___ No ___

(b) Has there been an increase in the number of non-Indian crimes going unpunished? Yes ___ No ___

10. (a) Has Oliphant created problems in law enforcement on the reservation? Yes ___ No ___

(b). If yes, please identify the major problems _____

Please provide the following information:

Today's Date _____

Position of person responding _____

Tribe _____

Address _____

Use the remainder of this page for further comments or continuation of answers.

CHAPTER 3

REMEDIES

Chapter 3 Remedies

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1. Summary

Having established that a serious problem exists in reservation law enforcement as a result of Oliphant, we have developed a number of potential remedies to resolve the vacuum in criminal jurisdiction. These recommended problem-solving models fall into two categories: those which require federal action, and those which can be undertaken by tribes at the local level.

The fundamental principle upon which all our proposed remedies rest is that Indian tribes possess original jurisdiction over all crimes occurring within their territory, including those committed by non-Indian offenders. Only the Congress has the power to definitively resolve the issue of tribal criminal jurisdiction over non-Indians. We propose federal authorization for the Secretary of the Interior to recognize tribal jurisdiction over non-Indian crimes committed on the reservation on the basis of individual tribal petition. Legislation will be enacted which provides one of three possible appellate forums for non-Indians to appeal decisions of tribal courts, thus providing them adequate judicial process. They could have recourse to the Federal Magistrates Court, Federal District Court, or to an Indian Circuit Court. The procedure for these appellate processes is specified in the legislative language proposed herein.

Tribes currently possess the power to enter into agreements with county and state authorities at the local level. National legislation is unnecessary to endorse the creation of tribal/state compacts. We have drawn up model cross-deputization and mutual aid agreements that can be implemented at any time, for any given period upon the mutual agreement of the parties. We also propose the formation of a Tribal/State Commission on non-Indian criminal jurisdiction working out of the Governor's Office, or the State Department of Justice to regulate these agreements and to protect the tribes from unilateral state action regarding enforcement in Indian Country. These local level remedies can provide temporary relief to the jurisdictional problems plaguing tribal communities.

But it is up to the federal government to recognize its obligation to definitely resolve the issue by acknowledging tribes' rights to protect themselves.

2. FEDERAL REMEDIES:
CRIMINAL MISDEMEANOR JURISDICTION OVER NON-INDIANS

A Model Approach

Since the Supreme Court's decision in Oliphant, tribes, the tribal judiciary, and tribal law enforcement mechanisms have been constrained in their efforts to provide comprehensive law enforcement within Indian Country. Lack of tribal jurisdiction over the non-felonious criminal acts of non-Indians in Indian Country has resulted in significant gaps in law enforcement. This model will attempt to suggest methods for eliminating those gaps, based upon a legislative mandate to the tribes and to the Secretary of the Interior, whose delegated duty it is to administer the trust responsibility of the United States toward Indian nations.

.1 Legislative Proposals

Any legislative enactment pertaining to the affirmation of the judicial jurisdiction of Indian tribes over crimes, including those offenses commonly known as victimless crimes, committed within Indian Country by non-Indians against the persons or property of Indians should include the following elements:

- 1 - a recognition by the United States that tribal courts possess original jurisdiction over such crimes;
- 2 - a recognition by the United States that federal courts possess concurrent jurisdiction over such crimes;
- 3 - an amendment to 25 U.S.C. § 1302 (7) of the Indian Civil Rights Act of 1968 conferring to tribal courts the right to impose for conviction of any one offense no penalty or punishment greater than imprisonment for a term of one year or a fine of \$1,000.00, or both, to comport with standard practice and procedures existing elsewhere for non-felonious conduct; and

4 - a retrocession upon tribal request of all criminal jurisdiction now accorded to the states under the provisions of Public Law 83-280.

2. Procedure

The following procedures may be utilized to accomplish those objectives enumerated above:

- 1 - On a tribe-by-tribe basis, the governing body of the tribe shall, after an appropriate decision-making process petition the Secretary of the Interior, who shall be empowered by Congress to accord criminal jurisdiction over non-Indians as enumerated above, to return such jurisdiction to the tribe.
- 2 - Before according to the tribe such jurisdiction, the Secretary of the Interior must find:-
 - A. That the tribe has or proposes to have an adequate tribal law and order code and tribal judicial system to implement such criminal jurisdiction;
 - B. That the tribe has or proposes to have an adequate law enforcement division to implement and enforce its law and order code.
- 3 - A tribe may request the return of either full or partial criminal jurisdiction. The Secretary of the Interior may not return less jurisdiction than that requested by the tribe, unless, after consultation with the tribe, the tribe subsequently agrees to a return of less than that jurisdiction originally requested by the tribe.
- 4 - The Secretary of the Interior must respond to a tribal request for the return of criminal jurisdiction to the tribe within a reasonable period of time. Such reasonable period of time shall be that time

agreed upon by the Secretary and the tribe, but in no event shall such time be greater than 180 days from the time such initial request for the return of non-Indian criminal jurisdiction is filed with the Secretary of the Interior. The tribe may waive the 180-day limit in its discretion.

3. Judicial Forum Alternatives

To avoid criticism by non-Indians that the tribal judiciary as structured provides no recourse to an appropriate appellate forum for the taking and hearing of appeals after an initial judicial determination, the Congress shall empower one or more of the following judicial appellate forum models to review adjudicated cases or controversies at the request of one or more of the parties to any action filed and decided in tribal court:

- 1 - A right of appeal by a non-Indian of a tribal court decision may be had to the appropriate United States District Court in the district wherein the tribal court sits. Such review shall be based upon the record as established in the tribal court. Provided, that such review shall be review de novo should the tribal court be a court not of record, as determined pursuant to rules established by concurrence of both the tribal court and the appropriate United States District Court.
- 2 - A right of appeal by a non-Indian of a tribal court decision may be had to the appropriate United States Indian Reservation Magistrate for the district wherein such United States Magistrate shall sit. Such review shall be based upon the record as established in the tribal court. Provided, that such review shall be review de novo should the tribal court be a court not of record, as determined pursuant to rules established by concurrence of both the tribal

court and the appropriate United States Indian Reservation Magistrate.

N.B.: This section depends upon the creation of a system of United States Indian Reservation Magistrates, a concept now in the formative stages of congressional legislation. As such, the powers and jurisdiction, and practice and procedures for such magistrates are at present not enumerated. Legislation creating those magistrates and according criminal misdemeanor jurisdiction to Indian tribes should be considered in conjunction with one another.

3 - A right of appeal by a non-Indian of a tribal court decision may be had to the appropriate Indian Circuit Court of Appeals for the district wherein the tribal court sits. The powers and jurisdiction, and practice and procedures of such Indian Circuit Courts of Appeals shall be established pursuant to rules established by the United States with the consent and approval of those Indian tribes which adopt the Indian Circuit Court of Appeals Model.

N.B.: The Indian Circuit Court of Appeals concept is the natural consequence of the evolution of an increasingly sophisticated national network of tribal courts. Participating tribes could establish procedures for the selection of tribal court judges to their court of appeals. The legislative mandate for such courts should come concurrently from the United States Congress and from Tribal Constitutional amendments.

A National Tribal Justice Center, previously proposed by numerous Indian advocacy organizations, could formulate standard practices and procedures and assist tribes in establishing and operating these courts.

4. Miscellaneous

Funding for all models should be provided by the United States with contributions by tribes as appropriate.

Nothing in any of the suggested models should be construed to accord to any state criminal jurisdiction over offenses occurring within Indian Country. The well established federal-Indian jurisdictional relationship is both acknowledged and endorsed. Further, nothing proposed herein should be read to suggest the vesting of jurisdiction in any Court of Indian Offenses as established pursuant to 25 CFR Part 11. In all cases, appellate forums should apply in whole the laws of the tribe, not federal, state or local laws. 1/

1. Jurisdiction not addressed in these models includes, but is not limited to, concurrent tribal and federal jurisdiction over major crimes in Indian Country in situations involving Indian v. Indian, non-Indian v. Indian, and Indian v. non-Indian. Also not addressed are the issues of jurisdiction over non-Indians v. non-Indians for offenses occurring in Indian Country.

3. Tribal/State Remedies

There are a number of local level remedies which can provide at least temporary solutions to the jurisdictional problems created by Oliphant. These fall into two categories: 1) cross-deputization/mutual aid agreements between tribe and county, and 2) Tribal/State Commission on jurisdiction in Indian country within the state government.

The cross-deputization/mutual aid agreements have been effective in certain instances in closing the gap in enforcement of non-Indian crimes. The most typical model is the cross-commissioning of tribal officers as county deputies. This type of one-way cross-deputization authorizes tribal police to not only continue enforcing tribal laws against Indian residents, but also to enforce state laws against both Indian and non-Indian offenders. This allows the tribe to control the traffic-related misdemeanor offenses which have gone increasingly unenforced since the decision.

Two-way cross-deputization is less common. There are few cases however, where the tribe has granted a tribal officer's commission to a state or county officer empowering him to enforce tribal laws over both Indians and non-Indians. Most tribes wish to retain exclusive jurisdiction over their members.

Mutual aid agreements are less formalized. No commissions are issued per se. Both parties extend aid and assistance upon request of the others but their primary affiliations remain with their home police force.

One drawback to cross-deputization is in making tribal officers officers of the state, they can potentially be called upon to serve the state off the reservation. An even greater worry of the tribes is that by certifying tribal officers as state officers, the state may in effect assume total jurisdiction on the reservation thereby eliminating the need for a tribal police force.

These outcomes can be guarded against in the specific wording of the agreement. All examples of such agreements currently in operation are of limited duration, and these potential future threats are not as prevalent. But, this points to another factor which diminishes the efficacy of these agreements as long term solutions to the problem. They are inherently temporary. They are subject to the political shifts in tribal, and county and state governments. Thus, they are most effective as stop-gap remedies to the policing of non-Indian on-reservation crimes. A more permanent remedy can be achieved by implementing an ongoing tribal/state commission on jurisdiction in Indian country at the state government level.

This remedy calls upon the state governor to convene a Commission to oversee tribal-state agreements on cross-deputization and mutual aid. The members of this body are to be drawn in equal numbers from the Indian and non-Indian communities. This Commission could either work out of the Governor's office, or be affiliated with the State Department of Justice. Its purpose would be to promote regularized agreements among local police forces for (comprehensive) law enforcement on Indian reservations within the state. The actions of this Commission can thus maintain the continuity of these agreements through periods of political change. They can assess existing models, and recommend alternative solutions. They will at all times operate with an equal representation of tribal and state personnel. No other agency within the state government will have the power to legislate on matters falling under the Commission's jurisdiction. This will protect tribes from any unilateral state action.

There is no need for a federally legislated act to effect these tribal/state agreements. They are presently being reached between the parties at the local level. The only resolution that the federal government can implement would be to return criminal jurisdiction over all offenses on the reservation (to the tribes) no matter the offender.

The local level remedies presented in the following pages are immediate actions which can be taken to contain the consequences of Oliphant. Ultimately, the answer to the jurisdiction confusion stemming from the decision lies with a Congressional act recognizing the tribes' power to regulate law and order in their own communities.

I. Tribal/State Compact Act of Congress

No federal sanction is required for tribes and states to enter into mutual agreements. The proposed Tribal/State Compact Act before Congress is at best, an unnecessary document, and at worst, a wrongful delegation of federal responsibility to the state.

Jurisdiction over crimes committed on the reservation belongs to the tribes regardless of the ethnicity of the offender.

If any limitations are to be placed upon this exercise of tribal sovereignty, it is the responsibility of the federal government alone to assume those powers removed from the tribe.

The Act has the potential for states to relieve the federal government of its obligations to protect the rights of tribes; an undertaking they are neither prepared, nor qualified to assume.

Tribal/State compacts do have limited efficacy. They can serve to fill in the gaps at the local level caused by the failure of the federal government to adequately protect tribal interest. Oliphant has precipitated a vacuum in the enforcement and prosecution of misdemeanor and low grade felonies because of confused jurisdiction, and lack of inter-governmental cooperation. Common complaints from both tribal, and local state and county officials are that the U.S. Attorneys Offices do not handle these offenses when committed by non-Indians. States are often unequipped to handle them as well. To these ends, the tribes and the states can agree to mutual aid and assistance maximizing the utility of their collective police forces and judicial systems to cover all gaps in criminal jurisdiction in Indian country.

They can be made contingent on mutual consent as is demonstrated in the model agreements which follow-effectively eliminating the threat of an overriding action of the state legislature. One other attribute credited to a federal Tribal/State Compact Act that can be achieved at the local level is the degree of formality it would inject into agreements. The existing agreements range from informal, unwritten understandings, to highly technical documentation complete with state's Attorney General and Secretary of State approval, and tribal council resolutions. These compacts have effectively been made at the local level. National legislation is not needed.

2. Cross-Deputization/Mutual Aid Agreements

Cross-deputization has been proven to be an effective short term remedy to erradicate the gap in enforcement of non-Indian crimes on the reservation. The agreements certify tribal officers to carry county commissions, and in some cases, the tribes reciprocate and confer tribal officer status on qualified county or state officers. These types of agreements are considered 'one-way', or 'two-way' respectively.

The contracting parties can be a tribe and the local county sheriff; or they can be between the tribe and a city police force located within, on the boundaries of the reservation. Agreements can also be drawn up between tribal forces and the state police, or the State Department of Public Safety.

What follows are two example agreements based on actual compacts presently being implemented. The first model is a tribal/county agreement with one-way cross-deputization of the tribal police as fulltime deputy sheriffs. The second represents a mutual aid agreement between a tribe and county police. It is a model of two-way cooperation that can optionally be established for a specified period.

Both agreements are constructed upon formal documentation procedures. They each contain a provision whereby either party can terminate the agreement with thirty days notice to the other party. They each specify powers of use.

The cross-deputization agreement address issues such as the liability of the county sheriff for actions by the cross-commissioned tribal officers. The qualifications of the tribal personnel are set forth. A procedure of suspension and/or revocation is also detailed.

The mutual aid agreement established the extent of the assistance to be provided by each party vis-a-vis their primary duties to their own police forces. Procedure for use is stated; and each agree to pay for their own officers. An arrangement is also set up for the tribe to use the county jail facilities.

MODEL CROSS - DEPUTIZATION AGREEMENT

I. Preamble

- A. General Terms: A limited number of Deputy Sheriff Commissions to be granted Tribal officers as selected by the County Sheriff and the Chief of Tribal Law Enforcement.
- B. Liability: Tribe agrees to bear total cost per person. Tribe agrees to hold harmless the County, and the Sheriff for actions taken by Tribal officers acting under County commissions.
- C. Termination: The Agreement can be terminated by either party, or by mutual consent with a minimum thirty (30) days notice.
- D. Powers: Powers and duty as County officer set forth by County Sheriff.
- E. Qualifications Of Appointees: The basic training academy or equivalency recognized by the State within fifteen (15) months of commissioning. A minimum of thirty (30) hours annual training.
- F. Notice of Use: Tribal officer must notify County Sheriff's office within six (6) hours upon exercising Deputy Commission.
- G. Suspension/ Revocation:
 - If an appointee is suspended by the Tribal Police Department, the County Sheriff shall have like power.
 - : If an appointee is fired or likewise terminated the Deputy Commission is automatically revoked.
 - : A hearing must be held out of fairness. Notice of the hearing must be given to appointee no less than fifteen (15) days in advance. The Hearings Board to consist of two command officers of the Tribal Police Department, and the County Sheriff, and Undersheriff. Decision is final.

MODEL MUTUAL AID AGREEMENT

- I. Preamble : :An agreement of mutual protection and assistance in the field of law enforcement.
:A joint exercise in powers.
:(Optional - approval of the State legislature and the Tribal Council, and/or the Secretary of Interior).
- A. Statement of Policy :Parties agree to cooperate and assist each other to their mutual benefit in the field of law enforcement.
:(Optional - specify period of duration).
- B. General Terms : Duly designated Tribal police agree to assist and aid County officers when called upon by the County and when it does not conflict with present on reservation duties.
: Duly designated County officers agree to assist and aid the Tribe when called upon by a Tribal officer and when it does not conflict with present duties.
- C. Procedure : Upon duly authorized request of Tribal officer for County aid, County officers shall assist in law enforcement for the Tribe in relation to all crimes set forth in the Tribal Law and Order Code, and all other criminal violations for which local enforcement is not prohibited by 18 U.S.C. 1152, and 18 U.S.C. 1153.
- D. Financial Obligations: The Tribe agrees to hire and pay entire salaries of Tribal officers without compensation from the County, and the County agrees to hire and pay the salaries of the duly commissioned officers of the County with compensation from the Tribe.

- E. Authority/ Notice of Use : Officers of either party shall have the authority to make arrests within the jurisdiction of the other party PROVIDED they report such action to a duly authorized officer of the jurisdiction where an offense occurs within six (6) hours of the action.
- F. Special Jurisdiction : Tribal officers may have the authority to issue summons to traffic offenders on the reservation to non-Indians to appear before the justice court having jurisdiction of the offense, said summons shall be the state traffic complaint form.
- G. Radio Frequency: Tribal officers shall be assigned a call number on the County Sheriff's radio frequency. Tribe assumes all costs connected with the purchase, installation and repair of the any radio equipment to be used in Tribal patrol vehicles.
- H. Facilities: : The Tribe shall be allowed to use the facilities of the County jail for the incarceration of persons arrested within the jurisdiction of the Tribe and over whom the Tribe has exclusive jurisdiction whenever necessary, but the Tribe shall reimburse the County all expenses incurred in the County jail for any violators of the Tribal Law and Order Code.
- I. Employment Status : Nothing herein shall be construed as an employment contract of individual officers of either the County or the Tribe by the other, and when an officer of either party acts under the authority, or on the behalf of the other party it shall be under the direct control and supervision

- I. (continued) : of the party having jurisdiction of the offense, except as otherwise specifically provided herein.
- J. Termination : This agreement may be cancelled or terminated by either party or by mutual consent at any time upon thirty (30) days notice by registered mail.

3. MODEL TRIBAL/STATE COMMISSION ON JURISDICTION IN INDIAN COUNTY

I. Tribal/State Commission

- A. Definition : Independent Commission of at least three and no more than five tribal representatives and an equal number of State personnel. (Tribal representation will vary according to the Indian population within the state).
- B. General Terms : The Commission to serve as an Advisory Board overseeing Tribal/State compacts at all levels. The Commission will arbitrate agreements when the parties fail to reach a mutual understanding.
- C. Powers : The Commission has the power to ratify agreements drawn up between Tribes and Offices of the State. It has the power to demand a review of agreements at the request of either party, or by its own determination. It has the power to recommend revisions, continuation, and suspension of Tribal/State compacts.
- D. Authority : The Commission can be instituted out of the State Governor's Office acting under an independent executive mandate;
: The Commission can alternatively be established as an independent agency within the State Department of Justice.
- E. Appointment. : The Commission members shall be appointed by the Governor, upon the approval of the Tribes within the State. Appointees will serve for a period two years, with a mandatory review after that tenure by the Governor's office, and the approval of the Tribal Council. Members can be reappointed to serve additional terms.