8. Telling Stories in Court

In *TELLING STORIES*, a special issue of *MICHIGAN LAW REVIEW*, sociologist Kim Lane Scheppele observed that "the resolution of any individual case in the law relies heavily on a court's adoption of a particular story." Thus, "there are few things more disempowering than having one's own self-believed story rejected, when rules of law (however fair in the abstract) are applied to facts that are not one's own, when legal judgments proceed from a description of one's own world that one does not recognize."[1] Milner Ball's contribution to the volume identified several such instances of American Indian disempowerment—cases in which the US Supreme Court espoused a prevalent "American origin story to the detriment of tribes." Among the cases on Ball's list was *Oliphant v. Suquamish Indian Tribe*.[2]

To resolve the dispute that began with the Suquamish Tribe's arrest of Mark Oliphant, the Supreme Court did adopt a particular story—one consisting largely of facts that Suquamish and other Indians would not have considered their own. In an opinion approved by five of his colleagues, Justice William Rehnquist related a variant of a common American history narrative in which a principled republic fulfills its destiny by bringing a vast territory and all inhabitants under the rule of law. Rehnquist described a world where no one doubted US supremacy or the Euro-American state's

right to define indigenous peoples' possibilities. Not included as essential facts were Indian beliefs about the original and contemporary nature of their societies, Indian conceptions of their evolving relationship to the United States, or Indian stories about their struggles to keep and control their territories and resources.

Rehnquist's account of history explained the ruling for the Suquamish Tribe's opponents but did not entirely adopt their version of the facts. It disregarded their "self-believed" story that a handful of people claiming dubious Indian tribal identity were bent on subjecting disfranchised non-Indians to unconstitutional Indian government rule. In Rehnquist's narrative, the key characters were neither Indians nor their non-Indian neighbors; the protagonists who mattered were agents of the US government.

After its publication in March 1978, the majority opinion in *Oliphant v. Suquamish Tribe* drew intense criticism from a variety of perspectives: predictable protests from Indians aligned with the Suquamish but also condemnation from presumably disinterested scholars of law and history. The scholars accused Rehnquist of drawing on the historical record selectively, even disingenuously, to describe a US government that had always denied tribes' right to sanction non-Indians for criminal acts. They stopped short of censuring Rehnquist for a blinkered focus on non-Indian intentions, probably because they knew that a corresponding record of Indian history was not available to the court.

ADVERSARIES' STORIES

The adversaries in *Oliphant et al. v. Suquamish Indian Tribe* first had an opportunity to tell the Supreme Court their stories when they submitted written arguments on the central issue in the case: whether the tribe had jurisdiction to prosecute Mark Oliphant and Daniel Belgarde for criminal violations of Suquamish law. Lawyers wrote those briefs—Philip Malone for petitioners Oliphant and Belgarde and Barry Ernstoff for the tribe. Malone filed the first one, with copies to his opponents; Ernstoff submitted a response, and Malone had the last word in a reply brief. At lengths that belied the name "briefs," those documents on both sides chiefly recounted how federal lawmakers, judges, and executive officials, over the course of US history, had conceived of Indian tribes' powers and relations with

non-Indians. How the Suquamish thought about such matters garnered scarcely a mention.

Malone began with a chronology of governmental actions affecting the Suquamish Tribe. Most were federal actions—the "establishment" of the Port Madison Reservation "with the signing" of the Point Elliott Treaty, the General Allotment Act of 1887, Washington's admission to statehood in 1889, US acquisition of the Suquamish village site in 1905, federal allotment of reservation lands in 1910, the Indian Reorganization Act of 1934, Public Law 83-280's authorization of state jurisdiction on reservations, federal approval of a Suquamish constitution in 1965, the Indian Civil Rights Act of 1968, a 1968 BIA-approved lease of "all remaining tribal lands except for 5 acres," and federal regulations for tribal law and order codes, promulgated in 1973.[3] Three state actions made the list: the legislation in 1957 and 1963 by which Washington assumed jurisdiction on the reservation and the partial retrocession of that jurisdiction in 1971. Only two items were Suquamish actions: "passage" in 1916 of "the first Suquamish constitution"[4] and the 1973 enactment of a law and order code.

Malone offered no explanation of the chronology's significance for the Suquamish claim of jurisdiction over non-Indians. If he intended to provide that analysis in the body of the brief, he did not follow through. In one hundred pages of argument, he said far less about events on the list than about other acts of Congress, none of them specific to the Suquamish Tribe. He also discussed numerous federal court rulings, contending that they implicitly precluded tribal prosecutions of non-Indians, even rulings that affirmed a US policy of supporting tribal self-government. He surveyed general legislation concerning federal jurisdiction over Indian affairs, particularly statutes from 1790 through 1854 that regulated non-Indian relations with autonomous Indian nations. Opinions by federal lawyers in 1834, 1934, and 1970 also figured in Malone's narrative of a United States government that consistently denied tribes jurisdiction over non-Indians.

The consistency Malone claimed to see was a conception of US supremacy that left no room for independent tribal sovereigns. By declaring its own sovereignty, Malone contended, the United States gained the right to determine the limit of Indians' powers. Starting with the Constitution, American law assumed and ensured the tribes' subordination simply by

declining to affirm their sovereignty. For evidence that Congress took that stance from the beginning of the republic, Malone cited early legislation authorizing federal trials of non-Indians who committed crimes in tribal territory. He also mentioned treaties allowing tribes to punish their own wayward people but stipulating that non-Indians would be tried in US courts. Such records were Malone's basis for arguing that "tribes were never given or considered to have jurisdiction over non-Indians."[5]

Malone disputed a key premise of the 1976 appellate court ruling for the Suquamish—that Indian tribes were originally sovereign and retained all essential attributes of sovereignty except those they surrendered. He denied that any statutes or Supreme Court opinions acknowledged inherent sovereignty as the basis for tribes' self-governance. In his view, the court merely blocked state interference with federal management of Indian affairs while upholding federal actions that progressively curtailed Indian self-governance until it could be phased out entirely. In 1953, declaring that time at hand, Congress permitted states to take jurisdiction in Indian country. Not until 1959, according to Malone (ignoring *Worcester v. Georgia* in 1832), did the Supreme Court recognize "an independent Indian interest in self-government which stood as a barrier to state powers," and it qualified that conclusion in 1972 when it observed, "'The trend has been away from the idea of inherent Indian sovereignty as a barrier to state jurisdiction and toward federal preemption.'"[6]

Malone then hedged his bet with an alternative argument: even if the Suquamish Tribe had once been a sovereign polity with jurisdiction over non-Indian offenders, Congress had exerted its "plenary power" to prohibit such tribal action. Malone again cited the early legislation that gave federal courts jurisdiction to try non-Indians for offenses in tribes' territory. He quoted a provision directing trial judges to apply "the general US laws as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States." Mistaking that language as an extension of all federal law to Indian country, Malone called it evidence of "Congress's steadfast refusal to grant tribal governments criminal jurisdiction over non-Indians."[7] The Indian Civil Rights Act of 1968 did not mark a change in policy, he added, even though it appeared to accept tribal governments and courts as permanent institutions. Instead, because the ICRA required tribes to provide accused persons with most of

the protections guaranteed by the Bill of Rights, it was yet another US-imposed limitation on tribes' autonomy and range of authority.

Although the Brief for Petitioners gave pride of place and space to non-Indian constitution drafters, treaty negotiators, lawmakers, and jurists, it also tried to influence how the justices thought about the Suquamish and their history. To make the point that non-Indians far outnumbered Indians on the Port Madison Reservation, Malone inserted current population and landownership figures, broken down by "race." He conceded that lower courts had not made "thorough findings" on the subject, and he admitted to casting available information "in the light most favorable to Petitioners" but claimed that his version of the facts had "gone uncontested." He also ventured an assertion not conceded by the tribe: "The Suquamish Indians have not had a tribal community at Port Madison for quite some time."[8]

Elsewhere in the memorandum, Malone suggested that the Suquamish had never constituted an organized, autonomous polity. "The degree and nature of powers originally possessed by Indian tribes is quite unclear," he began. "There is no evidence that the Suquamish Tribe was a sovereign entity exercising powers over non-members either before or after the relevant treaty."[9] A sentence referring to all Point Elliott Treaty tribes as a group cited only an unpublished law student essay and a general text on American Indians to support the contention that there was "no identification of any particular area of land individual tribes and bands occupied to the exclusion of others in the Washington Territory."[10]

Unfortunately for the jurists and lawyers who had to read Malone's analysis of law and legal history, he did not make cogent points in logical order. The brief's organization, long declarative headings, and prose were as convoluted as the history of Indian policy they attempted to explain. Justice Blackmun's law clerk, charged with preparing a synopsis of the parties' written arguments, lamented, "I am afraid that petitioners' brief is of the Faulkner genre, and it is difficult to summarize faithfully." In the margin of that memo, Blackmun jotted, "Oh, yes!"

"For more coherent statements of essentially the same arguments," the clerk recommended that Blackmun turn to briefs filed by South Dakota and Kitsap County as friends of the court. Both of those governments, viewing tribal regulation of non-Indians as encroachment on state sovereignty, argued that tribes could exercise jurisdiction over non-Indian

offenders only if the federal government had used its power to preempt state jurisdiction and sanction Indian jurisdiction, and it had not. The county and South Dakota parsed the same statutes Malone cited, acknowledging that they were ambiguous but promoting an inference of intent on legislators' part to restrict tribal jurisdiction to Indians. In addition, South Dakota alluded to a history in the Bureau of Indian Affairs of advising tribes that they had no criminal law jurisdiction over non-Indians.[11]

The Suquamish Tribe's response to Malone's brief was an opportunity to dispute his broad account of history, but at the outset, Ernstoff seemed disinclined to do that. The case before the court, he wrote, was a narrow one involving a single tribe and its specific history.[12] Nevertheless, as most counsel would have done in the circumstances, Ernstoff let few of Malone's assertions go unanswered. He devoted most of his fifty-two-page memorandum to a similarly extensive analysis of past US Indian policies, treaties, and judicial pronouncements.

As evidence that history was on his clients' side, Ernstoff could and did cite the lower court rulings against Oliphant and Belgarde. To refute his opponents' depiction of legal history, he offered alternative interpretations of the treaties, statutes, court opinions, and government actions that Malone mentioned, and he analyzed additional events, from a treaty with Delaware Indians in 1778 to several Supreme Court decisions in the 1970s. Overall, the Suquamish Tribe's argument mirrored the petitioners' focus on non-Indian views of Indian tribes' status and powers. The adversaries' stories differed primarily in the lessons they drew from the words in written artifacts of United States governance.

Like Malone, Ernstoff urged the justices to see crucial continuity in the twists and turns of legal history. The continuity he described was repeated recognition in all branches of US government that tribes were sovereign before European colonization and had not ceded all the prerogatives of their sovereignty. Following an introductory summary of that reasoning, Ernstoff's brief promised to demonstrate five things: "Through early Statutes and treaties, the United States recognized tribal authority over non-Indians; that authority has not been subsequently extinguished by statute; the Treaty of Point Elliott did not extinguish the Suquamish Tribe's authority over non-Indians; [Supreme Court decisions] affirm tribal authority over non-Indians on all lands within the reservation as to matters in which there is a sufficient tribal interest; [and] Congress has

confirmed by statute the continuing existence of tribal authority over non-Indians."

The basis for this take on history was a passage in the 1958 *Handbook of Federal Indian Law* that stated "a cardinal principle of federal Indian law."

> The whole course of judicial decision on the nature of tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the Tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.

By incorporating this concise legal history in his brief, Ernstoff made a long exposition on the "course of judicial decision" unnecessary. He cited and quoted just six Supreme Court opinions, the first in 1832 and the latest in 1975, pointing out that they characterized Indian tribes variously as distinct political communities, separate peoples, and unique aggregations with sovereign or quasi-sovereign attributes. Rather than specifying that territorial jurisdiction to punish all offenders was an attribute of sovereignty, Ernstoff simply reiterated that the tribes originally "possessed the usual accoutrements of a sovereign government."[13]

One by one, Ernstoff considered numerous treaties and laws for what they might reveal about relevant federal intentions. None of them contained explicit language curtailing tribes' preexisting sovereign right to govern non-Indians in tribal territory. He also reviewed more than half a dozen cases in which a federal court or the Supreme Court affirmed Indian jurisdiction over non-Indians for purposes other than punishing crimes. Finally, he argued that two acts of Congress in the twentieth century—the Indian Reorganization Act of 1934 and Indian Civil Rights Act of 1968—promoted the "revitalization" of tribes' inherent sovereignty and the development of tribal courts.

Before 1934, Ernstoff conceded, there were "several decades" when tribes exercised very little of their sovereignty. The reasons were "not legal but historical and socio-political." "Overly paternalistic" federal policy discouraged tribal governance. By exerting US "plenary control" in ways that hamstrung and exploited Indians, the Office of Indian Affairs "created a sense of despair and impotence among the tribes. People so indoctrinated do not aggressively assert the full measure of their rights. In the area of criminal jurisdiction, this sense of powerlessness was aggravated by a federal policy discouraging tribal assertion of jurisdiction over non-Indians."[14] Ernstoff neither made this observation specific to the Suquamish nor distinguished Suquamish experience from this generality.

Ernstoff's brief did not directly refute Malone's contention that the pretreaty Suquamish were not a sovereign polity with a distinct geographical domain. In fact, it said little more than the petitioners' brief about pertinent Suquamish history. Rather than addressing that subject in full, Ernstoff adopted the statement of facts in the amicus brief of the United States, which in turn referred the justices to "facts set forth in the district court opinion," adding only that the reservation provided for the Suquamish was a "remnant" of their "aboriginal territory" and still "their home."[15] Otherwise, the Suquamish history that Ernstoff mentioned was recent. Regarding the Suquamish ordinance asserting jurisdiction over non-Indians as well as Indians, he averred merely that the tribe deemed it a necessary response to "many years of ineffective federal and state law enforcement on the isolated Port Madison Indian Reservation."[16]

For his reply brief, Malone had a cosigner—Jesse Trentadue, a recent law school graduate whose contribution may explain why the brief was noticeably more cogent than Malone's first effort.[17] It maintained a focus on acts of Congress, court opinions, and administrative records, describing them again as evidence that the US government had never considered Indian tribes fully sovereign or consented to tribal jurisdiction over non-Indians. The brief also tendered a new argument. Under the General Allotment Act, it noted, allottees were to have "the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." By leaping from there over considerable unmentioned factual ground, Malone and Trentadue reached a conclusion of marginal relevance to the dispute about jurisdiction on the Suquamish reservation: "A non-Indian settling on the Port Madison Reservation . . . was thus told

by the federal government that his Indian neighbor would become subject to state law, and not that he would become subject to the law of his Indian neighbor."[18]

The reply brief returned to the issue of aboriginal Suquamish sovereignty with more forcefulness than Malone had previously mustered. To view tribes of the Puget Sound area as sovereign nations in 1855, it declared, was "to ignore historical reality." In *U.S. v. Washington*, Judge Boldt acknowledged the reality in a finding that "no formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, *deliberately created political entities* for purposes of delegating responsibilities and negotiating treaties." Not mentioned in the reply brief were Boldt's additional findings that each tribe in the fishing rights case had "established its status as an Indian tribe recognized as such by the federal government," each was "a political successor in interest to some of the Indian tribes or bands which were parties" to a treaty, and "those treaties established self-government by treaty tribes."[19]

In the petitioners' narrative, Suquamish motivations for governing everyone on the reservation were significant only in that they were allegedly racist. Non-Indian residents of the reservation could not participate as voters in the Suquamish government; the tribe reserved that privilege for its members. Therefore, Malone contended, subjecting non-Indians to tribal jurisdiction deprived them of their right as Americans to have a voice in their own governance. The tribe's intended prosecution of people they had "completely disenfranchised" was also a violation of the US Constitution's Fifth and Fifteenth Amendments and the Indian Civil Rights Act (ICRA) because the reason for the disenfranchisement was "race."[20]

The petitioners likewise labeled Suquamish jury service qualifications a racially motivated denial of non-Indians' rights rather than equating the requirement of tribal membership with state laws that limited jury duty to US citizens. "Defendants are entitled to a jury trial," Malone noted, referencing the ICRA, "but the Suquamish, by vote of *thirty-two members*, passed [a resolution] to exclude non-Indian [*sic*] from the jury panel." Furthermore, because jurors could reside off the reservation, juries could potentially consist entirely of Indians who were not residents of the petitioners' home community.[21] The intensity of Malone's belief in the

righteousness of this argument was apparent, as was his mangled syntax, in a passage of the opening brief.

> What is the difference between the *Suquamish Indian Tribe* as a quasi-governmental organization based upon racial ancestry of their members exercising for the benefit and protection of their members only powers of government over non-members and their property when chartered by the United States, receiving funds from the United States Government for Law and Order, being dependent upon and subject to the laws of Congress of the United States in its relationship with the United States and that of a *State* of the Union, using its powers of government to support a racial organization to which other citizens of the state and the United States cannot belong because of their race that exercises general powers of government over them in violation of the privileges and immunities clause of the United States Constitution.[22]

The Supreme Court received nine amicus briefs favoring Suquamish jurisdiction, most of which addressed the issue much as Ernstoff did. Aside from a few stipulated facts about the Suquamish Tribe and the reservation, the history they recited was a succession of federal statutes, court decisions, and government pronouncements or practices. However, four of the briefs did urge the court to consider tribal community histories and Indian perspectives on US policy.

A brief from the National Congress of American Indians and three tribes emphasized the practical consequences of shifting federal policies for historically self-governing tribes. Allotting tribal lands to individuals, it argued, did not achieve the stated goal of converting Indians to "the white man's competitive, acquisitive ways." Instead, "by distributing tribal property and bringing whites onto reservations," allotment laws and their implementation "worked to impair the ability of tribes to govern themselves." To correct the consequent "appalling social conditions" and "crippling loss of tribal lands," Congress approved the 1934 Indian Reorganization Act, under which "tribes slowly began to reacquire the strength and land base necessary for effective self-government." After the postwar period, when the federal aim "was to terminate federal protection of tribes and let their future development be a part of state structures and government," the United States returned by the 1970s to a policy of encouraging

tribal development, thus enabling many Indian reservations to become "effective, modern, self-governing communities."[23]

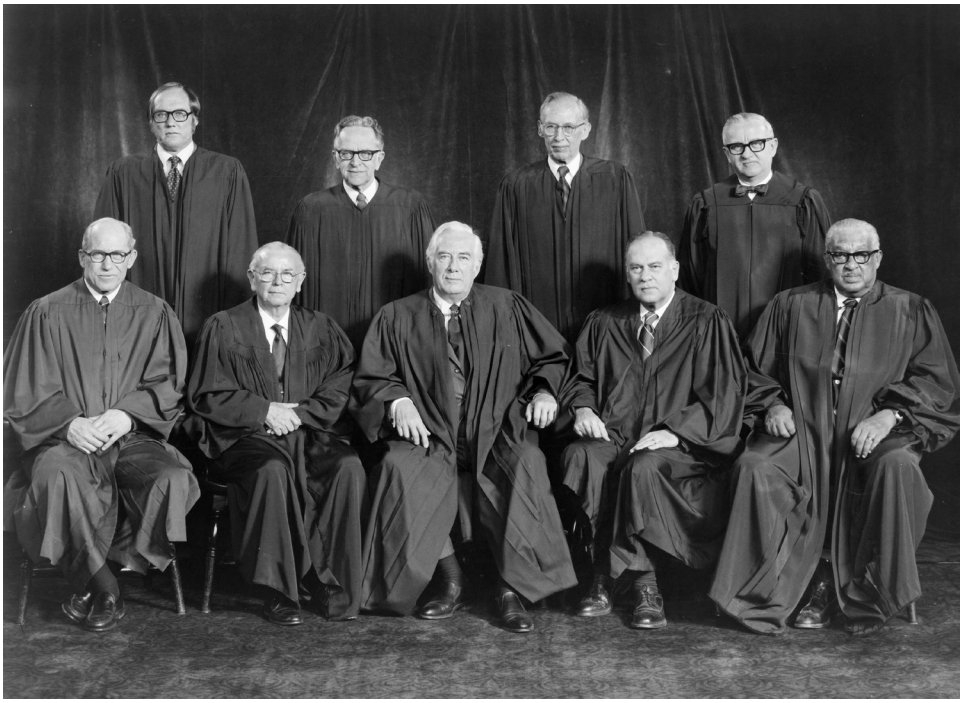
The National American Indian Court Judges Association (NAICJA) offered a history of tribal judicial systems, beginning with Courts of Indian Offenses created by the Interior Department in the 1880s. While conceding that many reservation courts remained arms of the Indian bureau until federal policy "shifted . . . to a greater recognition of the powers of self-government," NAICJA asserted that "tribes themselves retained the inherent power to administer justice," and many acted "to establish their own legal systems and . . . courts." In the 1960s and 1970s, a "major resurgence in the Indian court system . . . occurred simultaneously with the federal policy of Indian self-determination."[24]

A memorandum from three Southwest tribes explained their stake in the Suquamish case by recounting law enforcement challenges stemming from "exponential" population growth in their region. As Phoenix and two other Arizona cities expanded, thousands of outsiders regularly traversed the Salt River Pima-Maricopa reservation. Many viewed the Indian lands "as a place to dump refuse, speed from one city to another, and in recent years, use marijuana and narcotics beyond the control of City or County police." "To control all criminality within their borders," the Salt River Community enacted an ordinance giving their police and court jurisdiction over all persons regardless of race. Gila River Tribal Community officials took the same step in response to similar problems plaguing their reservation. At the Colorado River Reservation on the Arizona-California border, non-Indian farms and recreational opportunities attracted seasonal influxes of workers and tourists, giving rise by 1974 to a need for comprehensive policing. The Indian government decided to meet it in the same fashion as those at Salt River and Gila River.[25]

A slim brief on behalf of the Quinault Indian Nation and the Lummi Tribe reported that the Quinault government had been prosecuting non-Indians even longer than the three Southwest tribes. The tribe's judicial branch traced its roots to a fisheries court established in 1917. As of the 1960s, on a 200,000-acre reservation with 2,500 Indian residents, approximately 600 non-Indian residents, and a timber industry that brought non-Indian workers to the reservation every day, law enforcement was provided almost exclusively by tribal and BIA police. "The Quinault Nation began taking jurisdiction over non-Indians in some land-use matters in 1967,"

the brief related, and two years later "took jurisdiction over non-Indians involved in various criminal trespass offenses." A revised law and order code, in effect since March 21, 1973, gave the tribal court "civil and criminal jurisdiction over all persons acting within the boundaries of the reservation."[26]

After all briefs were in, the adversaries in *Oliphant v. Suquamish Tribe* had one more opportunity to tell stories that might inspire the rulings they wanted. The justices heard oral arguments on January 9, 1975. On that occasion, however, no one could present a complete narrative. The attorneys faced numerous interruptions from the bench, often with



At oral argument in *Oliphant v. Suquamish Indian Tribe*, lawyers faced eight of the Supreme Court justices who sat for this 1976 portrait. Left to right in front they are Byron White, William Brennan (absent that day), Warren Burger, Potter Stewart, Thurgood Marshall, and in back William Rehnquist, Harry Blackmun, Lewis Powell, and John Paul Stevens. Courtesy of the Library of Congress, LC-USZ-62-60135.

comments and questions suggesting that the justices expected to adopt a story substantially different than the speaker proposed.

Court members asked a few preliminary questions about the present-day Suquamish Tribe, the reservation, and the law enforcement situation there. Overall, however, they did not show interest in contemporary facts of life for people on the Port Madison Reservation, let alone the deeper history of the tribe. One justice even suggested—whether sarcastically or sincerely is not apparent in the transcript—that the court need not trouble itself with such specifics.[27] The comment came after Phil Malone said his arguments would be no different if circumstances at Port Madison were like those on the vast Navajo Reservation with its overwhelmingly Indian population and landownership. A justice replied, "Well, then, some of the facts are not particularly important," and Malone responded, "That is true"—one of the few coherent sentences he managed when addressing a justice's question.

If Barry Ernstoff had a different opinion about the importance of population and landownership statistics, he did not say so. Nor did he devote much of his allotted time to explaining the jurisdiction dispute from a Suquamish perspective. Rather than describing the history and local conditions that presented the Suquamish and other tribes with jurisdictional dilemmas or recounting developments that prompted them to assert inclusive territorial sovereignty, Ernstoff adhered to the strategy of emphasizing federal law and policy. Congress had created the troublesome "anomaly" of non-Indian residents and landowners in areas reserved for exclusive Indian homelands, Ernstoff argued. Congress should therefore solve the problem with legislation, especially since it had reversed its long-time policy of disabling tribal self-government. But even without explicit congressional approval, Ernstoff insisted, tribes had sufficient basis for the jurisdiction they were asserting. They could cite supportive "case law" and the Constitution's delegation of power over Indian affairs solely to the federal government. This argument brought a surprising statement from one member of the court, not named in the transcript. Because Ernstoff could cite no authority for the desired tribal jurisdiction *except* principles set out in Supreme Court opinions, he had nothing, the justice said.

Malone ceded some of his time on the hot seat to Washington attorney general Slade Gorton, who spoke before Ernstoff did. Although Washington's governor had asked the court not to review the lower court rulings,

Gorton submitted a separate brief advocating review and reversal. At oral argument, he downplayed the relevance of "case law," urging the court to rely instead on statutory law, but a barrage of questions and comments from justices forced him to talk first about court rulings. He eventually managed to say that the words of the Point Elliott Treaty and congressional legislation were decisive, and they did not explicitly acknowledge or authorize tribal jurisdiction. In the closing minutes of his allotted time, Gorton invoked post-treaty history as another reason to deny the tribe jurisdiction. "Literally tens of thousands of United States citizens," he said, "in reliance on" lawmakers' and officials' "consistent, longstanding" views that tribes could not govern non-Indians, "purchased land and settled on Indian Reservations in full confidence that they have not waived their rights to self-government and to participation in the administration of their criminal justice system." It was now too late to tell them they were effectively in a foreign country, one where they could never become "naturalized citizens."[28]

The court heard last from S. Barton Farr III, representing the United States government. Of the four lawyers who spoke that morning, Farr was presumably best suited to discuss federal policy history, but justices grilled him instead about Indians' thinking. Under questioning by Justice Potter Stewart, Farr found himself speculating about Indians' original conception of their tribal dominions. When Stewart posited that tribes' sovereignty did not begin as full sovereignty, Farr said, "We think it did," but Stewart countered, "Not a territorial sovereignty" and asked, "Was that not a concept wholly alien to Indian Tribes?" Unaccountably, giving no indication that he had more than supposedly common knowledge to go on, Farr responded, "That is correct . . . , they did not have a sophisticated concept of land ownership and there was not anybody else to govern. It was just them. . . . But that is because they did not view territories belonging to particular individual tribes . . . ; that is a concept in which the European settlers quickly educated them." To a justice who subsequently faulted Farr for failing to show that tribes originally had criminal jurisdiction at all, Farr answered, "I have given it my shot."[29]

Two days later, during oral argument in a case from the Navajo Reservation, court members initiated more discussion about Indian tribes' imputed sovereignty. The man accused of a crime in that case was Indian but not Navajo, and the tribe was not a party. Once again, some justices

expected an attorney for the United States to know the history of tribal governance, and the attorney—tapping into common stereotypes—simply guessed at how the Indians historically punished wrongdoers. "I understand that there is [*sic*] rudimentary institutions of justice," he said. 'I think they were called family courts. I think crimes of violence were not too well known to the Navajos until the introduction of alcohol by non-Indians, and I don't think that was much of a problem. So they had informal institutions of justice."[30]

The parties and justices agreed that resolution of the Navajo case—*United States v. Wheeler*—would turn on whether Indians' right of self-government was inherent in their history as a "tribe" that predated the United States. The court expected to answer the same question in *Oliphant v. Suquamish Tribe*, and during oral arguments in both cases, questioning from justices suggested an interest in comparing Suquamish and Navajo political history and contemporary circumstances. In neither case, however, did the court hear about those histories and circumstances from the Indians who experienced them.

THE COURT'S STORY

On March 6, 1978, the Supreme Court reversed the two lower court judgments in *Oliphant v. Suquamish Tribe*. Mark Oliphant and Daniel Belgarde would not face a Suquamish judge or jury after all. Eight justices had considered "whether Indian tribal courts have criminal jurisdiction over non-Indians," and six agreed on an answer, announced early in the Opinion of the Court: "We decide that they do not."[31]

In seventeen following pages, Justice Rehnquist gave two principal reasons for that decision. First, federal records supported an inference that the United States Congress and executive, for two centuries, had consistently viewed tribes as having no right to penalize non-Indians for crimes. Second, and crucially, the power to prosecute non-Indians was "inconsistent with [tribes'] status" as "dependents" of the United States, which controls the territory Indians occupy and has steadfastly aimed to protect US citizens from "unwarranted intrusions on their personal liberty." (The latter phrase was as close as the court came to a stand on petitioners' argument that tribal jurisdiction over "disenfranchised" people of another race would violate their rights under the US Constitution.)[32]

Most of the court opinion was a narrative about the intentions of non-Indian legislators, administrators, legal advisers, and jurists—people who had roles in governing the United States and creating the records from which Rehnquist crafted his story. Following a standard introduction identifying the adversaries and describing their dispute, the opinion said almost nothing about Suquamish or other Indian experiences, actions, or aims, let alone Indian conceptions of their tribal powers and territorial rights. In other words, the court narrative's focus corresponded to the focus of litigants' stories.

A footnote acknowledged that courts should interpret ambiguous wording of relevant US treaties or statutes "in favor of the weak and defenseless" Indians, taking into account their circumstances at the time of the agreements or legislation. Yet Rehnquist, considering no circumstances except the American-authored language of the Point Elliott Treaty, inferred that the Suquamish "in all probability" understood "the United States would arrest and try non-Indian intruders."[33]

The history of Indian self-governance garnered just one brief mention from Rehnquist, in a passage concerned solely with courts. Citing no sources, he wrote that the Indian effort to exercise criminal jurisdiction over non-Indians was "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," he continued, "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." The sole identified basis for this generalization was a report to Congress in 1834 from an Indian affairs commissioner who purported to know that "with the exception of two or three tribes . . . , the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint."[34]

From that point in Rehnquist's account, the significant actors were all in the federal government's employ. Among them were treaty negotiators in 1830 who supposedly spurned a Choctaw Nation request for a provision acknowledging its right to punish white violators of Choctaw law. Also featured were early Congresses that authorized federal trials of non-Indians for alleged crimes in Indian territory, bill drafters who were "careful" in 1834 "not to give the tribes of the [proposed Western] territory

criminal jurisdiction over United States officials and citizens traveling through the area," and authors of a 1960 Senate report who assumed that "Indian tribal law is enforcible [*sic*] against Indians only."

Judges at all levels of the federal court system were essential to Rehnquist's story as well. Most went unnamed, their roles indicated only by the mention of cases they decided. Of the three jurists Rehnquist did name, two served on the Supreme Court during its earliest decades, when it first saw a need to define Indians' relationship to the United States in American legal terms. One was Chief Justice John Marshall, whose conception of history was the basis for rulings on cases in 1824, 1831, and 1832. From Marshall's two opinions that firmly acknowledged Cherokees' status as an inherently self-governing nation, Rehnquist chose to quote only an assertion of Indians' need for "protection from lawless and injurious intrusions into their country," a reference to Cherokees as "quasi-sovereign," and a statement that they were "completely under the sovereignty and dominion of the United States."

A contemporary of Marshall, Justice William Johnson, made a cameo appearance in Rehnquist's account because—in an 1810 contest between two non-Indians—he wrote an individual opinion on the limits of Indian tribes' sovereignty. That was not the central issue in the case, but Rehnquist highlighted Johnson's gratuitous statement that US sovereignty prohibited tribes from governing "every person within their limits except themselves."[35]

The third jurist with a featured role in Rehnquist's story was Isaac Parker, a district judge in Arkansas Territory. Parker ruled in 1878 that a Cherokee Nation court did not have jurisdiction over a white man accused of theft. The fact that the theft occurred outside Cherokee Nation boundaries was sufficient basis for that ruling, as Parker conceded, but Rehnquist chose to quote another, unnecessary assertion. For the tribe's court to have jurisdiction over an offender, Parker wrote, "such offender must be an Indian." The accused man, the widower of a Cherokee woman, was a Cherokee citizen admittedly subject to Cherokee jurisdiction in Cherokee country, but neither Parker nor Rehnquist said so. Rehnquist took unusual pains to justify the attention he devoted to the uncalled-for opinion of a single lower court judge. In a long footnote, he claimed that Indian tribes in Parker's district held him in high esteem. No supporting evidence followed that claim.[36]

DISSENTERS AND DOUBTERS

Two members of the Supreme Court dissented from the majority opinion in *Oliphant v. Suquamish Tribe*. Thurgood Marshall explained why in one terse paragraph: he and Chief Justice Warren Burger agreed with Ninth Circuit judges that the tribe could try any tribal law violator in its territory because the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed," and no treaty or federal statute had expressly annulled that power. Marshall and Burger thus firmly endorsed the principle of law and the reasoning on which the Suquamish had based their bid for inclusive territorial authority.

Dissenters, both on the court and outside it, attracted little attention from mainstream news media. The *Washington Post*, *Wall Street Journal*, and *New York Times* reported the outcome of the case without commentary. The *Seattle Times* solicited reactions from people with personal stakes in the litigation and gave top billing to Frank Ruano, president of the Association of Property Owners of Port Madison. Ruano had formerly "accused the Suquamish of repeatedly attempting to claim sovereignty . . . , avoid compliance with state and federal laws," and "force its will on non-Indian residents regarding land use, utilities, roads, and other matters." The Supreme Court decision, he exulted, would "establish that Indians are not a sovereign nation within this country, any more than is the People's Republic of China." Triumphant state attorney general Gorton pronounced the ruling "very, very profound."

The *Seattle Times* also relayed comments from two disappointed men. Barry Ernstoff, rather than decrying the court's decision, downplayed its importance. Oliphant's case involved only criminal law enforcement, he said. The ruling would not affect "other issues of sovereignty, such as those mentioned by Ruano," which were civil law matters. The non-Indian editor of the *Indian Voice*, a locally produced monthly with modest national circulation, was less accepting. "It's patently obvious," Bob Johnson rumbled, "if they'll allow rednecks to go driving drunk tearing up property through a reservation, the Supreme Court . . . is countenancing a situation that breeds lawlessness."[37]

Meanwhile, experts on federal Indian law scrutinized the ruling for Oliphant and Belgarde and found much to disparage. Among the first to

publish a thorough analysis were Russel Barsh and James Youngblood Henderson, who began their highly critical *Minnesota Law Review* article with studied restraint: "A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a body." Alex Skibine did not bother with measured language. In the journal of the Institute for the Development of Indian Law, he slammed the *Oliphant* holding as "perhaps the most political, racist and detrimental Supreme Court opinion in a long time," a signal that "the so-called trust relationship . . . can be used against the Indians and make a mockery out of Indian sovereignty."[38]

The legal analysts generally reproached the court for disregarding established doctrine. Most deplorably, in their view, the justices ignored the tenet that tribes retain all their original sovereign powers except those that they explicitly relinquished or Congress explicitly nullified.[39] Rehnquist conceded that neither exception applied in the Suquamish case; no treaty clause or act of Congress stated that the tribe could not punish non-Indians. Rehnquist simply fashioned a third exception to the rule of retained tribal power when he declared that Indians' "dependent status" could nullify an inherent power. Historian Bethany Berger stressed that the court thus "created something wholly new in Indian law, the principle that simply by incorporation within the United States tribes had been divested of criminal jurisdiction over non-Indians." The innovation dismayed law professor Sarah Krakoff because it disregarded another foundation of Indian law: congressional supremacy. The justices, bypassing Congress, claimed the right to determine whether a specific power is inconsistent with tribes' status. To Krakoff, this usurpation of legislators' prerogative was "the most important aspect" of the court's regrettable decision.[40]

Scholars also aimed scathing criticism at Rehnquist's assertions about history. Some found his choices and use of historical evidence so inapt, misleading, and illogical as to suggest deliberate deception, disingenuousness, or cynicism. The critics saw Rehnquist engaging in roughly five kinds of flawed argument: disregarding indisputably relevant evidence, denying the relevance of recent circumstances, generalizing from isolated examples, interpreting the "silence" of historical actors as consistent with his hypothesis, and failing to recognize and compensate for his own bias.

Several analysts found Rehnquist's evidence of single-minded US opposition to tribal jurisdiction unfairly selective. To show a constant assumption that Indians could not prosecute non-Indians, the justice ignored significant contrary evidence in federal records. Barsh and Henderson offered a lengthy list of disregarded items. Berger saw deceitful selectivity throughout the entire "two thirds of the opinion in which the Court discussed historic non-judicial assumptions about tribal jurisdiction over non-Indians." For example, Rehnquist pulled from Cohen's *Handbook of Federal Indian Law* a statement that US courts, since 1871, had generally condemned tribes' attempt to exercise jurisdiction over non-Indians. He omitted "what Cohen actually wrote . . . , that originally a tribe 'might punish aliens within its jurisdiction according to its own laws and customs,' and '[s]uch jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.'" This omission was not inadvertent, Berger emphasized; the court had received two briefs quoting the very language he ignored. A more glaring instance of biased evidence selection, in Berger's view, was Rehnquist's use of an 1834 congressional report on a bill that never became law. He chose a sentence suggesting that legislators intended to make federal court the only place to try non-Indians for crimes in a proposed Western Indian Territory. He did not mention statements on the same page of the report that "clearly showed the opposite" intent.[41]

Political scientist David Wilkins pointed out other disregarded evidence that ran contrary to the court's characterization of federal policy. For instance, Rehnquist cited two obscure opinions by government lawyers who denied tribal jurisdiction but did not mention Nathan Margold's influential contrasting opinion endorsed by Commissioner John Collier. The court's statement that tribal efforts to police non-Indians were "a relatively new phenomenon" also elided inconvenient evidence, including facts recited in an 1824 Supreme Court opinion.[42]

To Wilkins's consternation, more recent history carried no weight with the court majority. In depicting a federal government that had always rejected tribal jurisdiction over non-Indian offenders, Rehnquist wrote off a decade or more of late twentieth-century developments. Although he acknowledged that US policy and legislation since the 1960s had enabled some tribes to provide "sophisticated" law enforcement and justice services, that was a throwaway concession. In Rehnquist's analysis, the contemporary

policy era, like the New Deal period of fostering tribal government, was an immaterial exception to the United States' persistent denial of tribes' right to punish non-Indians. This indifference to changed circumstances would be "especially troublesome to larger tribes," Wilkins warned; they had acted on the belief that recent cases affirming tribal sovereignty and ongoing federal support for tribal court development, together with the predominance of Indians on their reservations, would weigh in favor of their "strong right to prosecute non-Indian criminals."[43]

Krakoff and Berger, among others, emphasized that the justices' opinion disregarded and misconstrued pertinent decisions of the Supreme Court itself. Rehnquist did not even cite the 1959 ruling in *Williams v. Lee*, identified by Krakoff as the leading case on "the proper analytical approach to determining the existence of inherent tribal powers." Instead, Rehnquist cited and quoted older cases that stressed the forced dependency and political weakness of tribes in the late 1800s. He relied on early nineteenth-century rulings for the notion that the court could determine whether a tribe's asserted power was consistent with its "status," but in all those cases, Krakoff observed, the issue was only the tribes' power over external affairs, which had been explicitly limited in nation-to-nation agreements with the United States. Rehnquist ignored the fact that the court at that time did not claim authority to "ferret out" implicit limitations on Indians' power over "purely domestic" matters.[44] Berger took issue with Rehnquist's citation of Justice Johnson's unnecessary concurring opinion in 1810. Why rescue from obscurity the only denial of tribal jurisdiction over non-Indians to be found in early court opinions? It was "a slender reed" on which to rest the claim that the court could suddenly redefine the powers of Indian nations, especially since Johnson's concurrences "always expressed radically different views on Indian law than the opinions of the Court."[45]

To Barsh and Henderson, the scandal of Rehnquist's skewed historical evidence was compounded by false claims for the representative nature of items he cited. He ignored records that did not fit his narrative and alleged that some unusual ones exemplified an entire pattern of federal understanding and intent. For instance, to show constant US opposition to tribal prosecution of non-Indians, Rehnquist wrote that the "'earliest treaties *typically* expressly provided' for punishment of non-Indian offenses in Indian country 'according to the laws of the United States.'"

That language, Barsh and Henderson found, "appears in only one treaty."[46] Law professor Robert Clinton observed that Rehnquist paired this pattern of privileging isolated documents with the misrepresentation of records that could undercut his thesis. He "brushed aside a number of early Indian treaties" containing declarations "that non-Indian United States citizens who illegally entered and settled in Indian country were subject to tribal punishment. Since these treaties were seemingly inconsistent with the remainder of Justice Rehnquist's theory, he simply misinterpreted them by suggesting that they did not really provide what they seemed to say."[47]

To show what Rehnquist overlooked, Barsh and Henderson compiled a table of the numerous and varied Indian treaty clauses that expressly addressed jurisdiction over non-Indian criminal conduct. "In the final analysis," they summarized, "Justice Rehnquist cited only six treaties out of 366. None of the articles he quoted appear . . . to have been representative; one treaty he relied on is unique, and another has been materially misquoted. From this insubstantial foundation, Justice Rehnquist concluded that tribal treaties acquiesced in a historical federal policy against tribal criminal jurisdiction over non-Indians."[48]

The Suquamish treaty was one of many without an explicit provision concerning tribal punishment of non-Indians. It included only the Indians' promise "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Several scholars identified that as a simple agreement to extradite people accused of breaking US laws, not tribal law. Rehnquist himself noted the treaty's silence on the subject at issue in the Suquamish case, but in a footnote he mentioned that an early draft of the treaty did contain a clause providing for federal prosecution of non-Indians charged with on-reservation crimes. Dismissing the possibility that its omission from the final agreement was due to Indian objections, Rehnquist simply deemed it "probable" that the Indians understood the treaty "as acknowledging exclusive federal criminal jurisdiction over non-Indians."

This reasoning struck Barsh and Henderson as "the ultimate absurdity of historical inference: resolving silence in favor of the hypothesis" when there was "no evidence to support either view of the matter." It was the kind of reasoning Rehnquist used more than once to infer US officials' thinking. He purported to intuit the unspoken assumptions of people who

wrote documents that said nothing at all about the issue at hand. Barsh and Henderson called that "*Gestalt* jurisprudence."[49]

Critics directed some of their sharpest barbs at the surprisingly ahistorical analysis in the following passage of the court opinion.

> From the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . [a] great solicitude that its citizens be protected 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.

David Wilkins, his tongue perhaps in his cheek, responded to this passage with questions the court did not address. If the federal government wanted to protect its citizens' rights, and if tribal courts would presumably impose "unwarranted intrusions" on citizens' liberty, why had Congress or the justices not protected Indians from the jurisdiction of tribal courts? Indians—citizens at least since 1924—were still tried in tribal courts. The Indian Civil Rights Act of 1968 guaranteed essential protections for defendants in tribal courts. Why was that not an assurance for non-Indians too? As Rehnquist himself noted, lawmakers amended a draft of the ICRA so that its guarantees would apply to "any person" who came under tribal jurisdiction.

One passage in the opinion hinted at how the justices might have answered Wilkins's questions. Rehnquist quoted a Supreme Court ruling from 1883 that explained why a federal statute left the punishment of Indian-on-Indian crimes to the tribes: Indians were "aliens and strangers . . . , separated by race and tradition" from non-Indians; it would be wrong to judge Indians in US courts "by a standard made by others and not for them." The converse of that idea, Rehnquist reasoned (as if a nineteenth-century

characterization of Indians needed no reevaluation), was that trying non-Indians by the standards of Indian-made laws would also be unfair. If so, Wilkins remarked, then Indians are aliens to the state courts where they are often tried.[50]

More directly than Wilkins, law professor Robert A. Williams, Jr., denounced the court opinion in *Oliphant* for its "rigid adherence" to old doctrine rooted in European colonizers' assumption that indigenous American societies were deficient, particularly in matters of law and governance. Because of that assumption, Williams observed, Indians had endured decades of US disrespect for their "self-defining vision." Over the decade preceding 1978, however, the "tradition" of disrespect "had begun to dissolve with the dramatic shift of federal policy." Now the court had suddenly "revived the [objectionable] tradition." In ruling against the Suquamish, a few white men had reflexively rendered a decision reflecting discredited premises of Indian inferiority and lawlessness rather than a conception of Indian-US relations as a process of give-and-take between nations whose legal traditions deserved equal respect.[51]

Ultimately—in the eyes of Wilkins, Barsh, Henderson, Williams, and others—the most shameful thing about the decision in *Oliphant v. Suquamish Tribe* was not the justices' detection of a long-standing US government desire to protect non-Indians from punishment by Indian tribes; it was the justices' endorsement of that desire in 1978, apparently because they expected tribal courts to treat non-Indian defendants unfairly. As Barsh and Henderson wrote, "Justice Rehnquist seemed to assume that the protection of citizens' liberty only required that whites be immunized from the risk of tribal prosecution." Did he assume that tribal courts would improperly interfere solely with non-Indians' liberty? "Or has Justice Rehnquist told us that Congress only cares what happens to white people? . . . In effect, Justice Rehnquist's policy argument . . . discriminates against Indians because of their ethnicity and customs."[52]

Barsh and Henderson labeled the court's decision a "betrayal" for revoking a recent US bargain with Indian tribes. Policy changes since the 1950s, new federal laws, and corresponding administrative actions had signaled to Indians that the reward for "modernizing" their legal systems would be United States recognition of tribal governments as the appropriate managers of reservations. Tribal courts had consequently been evolving, with federal help, toward an Anglo-American legal model, and

tribes had reasonably come to expect respect for those courts. Now six high court jurists had intervened to prohibit the fulfillment of that expectation.

This argument implied that the tribes' expectations were more consistent with historical facts than the court's story of unchanging federal assumptions and policy. Throughout the history of US-Indian relations, from the 1770s to the 1970s, the power balance and the degree of Indian autonomy had been in continual negotiation, changing over time to reflect fluctuating Indian circumstances as well as new US government considerations. In 1978, when the court stepped in to foreclose one area of tribal governance, it preempted that political process, preventing Indians and the United States from continuing to adjust an important term of their historic nation-to-nation relations.

MISSING STORIES

While the justices' desire to protect non-Indians from tribal prosecutions drew charges of racial bias from members of the legal profession, their one-sided view of history did not incur equivalent censure. That tacit acceptance of the court's near-exclusive concentration on US government beliefs and intentions is notable because a rule of federal law requires that Indian treaties be interpreted according to the Indian parties' reasonable understandings.

Even critics evidently expected the court to focus on the thinking of federal officials and lawmakers. After all, the Supreme Court is an organ of the US government charged with upholding US laws. More to the point, appellate courts in the United States rely on case records to provide nearly all the facts the judges should consider, and in *Oliphant v. Suquamish Tribe*, the record contained almost no evidence of pre-1970s Indian expectations or practices related to crime and punishment, tribal powers, tribal territory, and tribes' relationship to the United States.[53]

The nature of the litigation partly accounts for the case record's dearth of Indian history. There is seldom much testimony in habeas corpus proceedings because essential facts are not numerous or disputed. Documents confirm a petitioner's detention and circumstances affecting its legality; the judge determines as a matter of law whether that detention is proper. The initial court review of Oliphant's detention fit this pattern. The

parties agreed on the facts that presented the question of law: an Indian tribe had arrested and charged a non-Indian for actions he did not deny. The lean record therefore consisted of a petition and written reply, a few affidavits, and briefs arguing legal points. The tribe did not offer live testimony or documentation of past Suquamish beliefs about tribal power and jurisdiction, let alone evidence regarding other Indians over a century or more. Barry Ernstoff counted on an argument grounded in law—a treaty, federal statutes, rulings by other courts, and established legal principles—to carry the day.

Consequently, the files that reached the Supreme Court revealed nothing about the deep history of Indian self-governance, methods of social control, or expectations of autonomy and territorial control after their treaties with the United States. No one had testified to nineteenth-century Suquamish concepts of crime or practices that corresponded to American law enforcement. No one had submitted evidence of Suquamish reactions to criminal acts by early American settlers. The habeas corpus pleadings and affidavits scarcely mentioned Suquamish relations with non-Indian neighbors or other governments, historical or contemporary.

What little information the justices did have about the Suquamish was surely on their minds as they pondered the tribe's assertion of sovereignty. The briefs told them—without further explanation—that non-Indians in 1973 vastly outnumbered the few Indians on the Port Madison Reservation and owned most of the land there, that the tribe's current formal government was barely a decade old, that its criminal law code and court were new when a Suquamish judge arraigned Mark Oliphant. Kitsap County urged the court to consider facts of another sort: the array of services the county ostensibly provided on the reservation, including law enforcement.

Common sense suggests that such information could inhibit the justices' receptivity to arguments for tribal jurisdiction. Indeed, three years later a political scientist compiled data suggesting just such an effect. Philip Lee Fetzer examined Supreme Court decisions in eleven recent jurisdictional disputes between tribes and state governments. He found, with one exception, that the ruling favored the state every time the non-Indian population of the reservation exceeded the Indian population.[54]

In the words of legal scholar Stephen Winston, "The issues before a court, no matter how broad their potential impact, are framed in a

microcosm. . . . It is only in concrete, specific factual situations that a court issues its rulings on the law."[55] Mindful of this reality, some tribe leaders and attorneys feared the effect that the unique Suquamish facts might have on justices' feelings about tribal trials of non-Indians. Several amicus briefs therefore aimed to expand the court's view of relevant facts. The NCAI brief characterized Port Madison Reservation demographics as atypical and urged the court not to let non-Indians' predominance "cloud the issue"; there were more representative situations to consider. "The issue . . . might have arisen on, say, the Quinault Reservation in Washington State, which has an area of 190,000 acres (entirely rural), a population of about 1,100 Indians and 200 non-Indians, and a comparatively well-equipped law and order system." Even on some reservations with larger minority non-Indian populations, inclusive tribal law enforcement was already standard and not controversial. Around the country, the Bureau of Indian Affairs counted three hundred tribal arrests of non-Indians for nontraffic offenses in the first half of 1977, and traffic citations were surely more numerous.[56]

Yet amicus briefs could not make up for a case record lacking evidence of pertinent Indian expectations. Indian experiences described in the briefs were either recent or general consequences of repressive US policies. Moreover, justices likely gave little weight to unsworn factual assertions in amicus briefs. Mike Taylor thought they simply ignored his. Asked in 2012 whether he had had qualms about the Supreme Court's decision to review the Suquamish case, Taylor said, "No. . . . We used to think the Supreme Court read amicus briefs though."[57]

It is reasonable to imagine that the justices' vote on the tribal jurisdiction issue might have been closer or their ruling less sweeping if a tribe such as Quinaults had made the disputed arrest, then documented their decades of formal self-governance, their long-running determination to control affairs on their reservation, and their persistent expectation of US respect for their political autonomy. As it was, even if the justices read and believed briefs from the Quinaults and other amici, Suquamish reservation demographics probably did cloud their analysis. Still, that shadow may not have darkened their view of tribal jurisdiction significantly more than if the case had originated elsewhere. After all, the court ruled out tribal prosecution of non-Indians everywhere, including reservations with large majority Indian populations, and Rehnquist expressed concern for

the rights of non-Indians in all tribal courts, even the well-established, "sophisticated" ones.

In the end, because the Supreme Court—with the parties' consent—chose to answer the jurisdiction question for every tribe in the United States, it ruled as if the specific experiences of the Suquamish or other Indians did not matter much. A single local dispute had become the occasion to announce a new rule of law that would apply nationwide to hundreds of diverse tribes. In that situation, the Suquamish understandably opted to emphasize general legal principles rather than their unusual local history and circumstances. They hoped to win judicial approval of their recent political resurgence by claiming a part in the larger story of US-Indian relations and federal Indian law.

A bare-bones case record is not the only reason for the court's concentration on non-Indian characters in the story; another, more potent factor was at work. The intentions of federal government personnel were the focus of the litigation from the beginning because no interested party made an issue of US hegemony. No lawyer directly questioned the right of the United States to make and enforce law that limited or denied tribes' sovereignty. No one contested the court's role as enforcer of tribes' subordination to the colonial power of the United States. In effect, even the Indians tacitly acknowledged that US government intentions were what ultimately mattered in *Oliphant v. Suquamish Tribe*.

Weighty factors either deterred a challenge to US hegemony or kept attorneys for tribes from imagining such a stratagem. For one, the Supreme Court had long since approved the United States' claim of nearly unlimited power to govern Indian tribes and their members. Indian law experts have found that approval in two opinions—*United States v. Kagama* (1886) and *Lone Wolf v. Hitchcock* (1903). Both rulings upheld acts of Congress inconsistent with prior US acknowledgment of the tribes' sovereignty. In Kagama's case, the court converted an early metaphorical characterization of the United States' relationship with the Cherokee Nation to a federal legal status for all Indians. Justice Marshall had suggested in 1831 that the relationship *resembled* a guardian's protection of a ward. The *Kagama* opinion declared that Indians in 1886 *were* dependent wards of the federal government, and Congress could therefore "protect" them by authorizing federal prosecutions of tribe members for Indian-on-Indian crimes, which had previously been the tribes' exclusive concern. In Lone Wolf's case,

Kiowas could not prevent US abrogation of a treaty. With reasoning that allowed Congress to make virtually any law affecting its putative wards, the court held that lawmakers could disregard treaty-secured Kiowa property rights to achieve well-intentioned US objectives.[58] The court described the government's "plenary authority" over Indian affairs as "a political one, not subject to be controlled by the judicial department." In other words, courts had no business second-guessing legislators' Indian policy decisions.[59]

After the 1970s, some scholars of Indian law disputed the court's premise that the United States can unilaterally nullify tribes' sovereign rights. Their argument—an attack on the conception of federal plenary power announced in *Kagama* and *Lone Wolf*—was one that the Suquamish might have made if they had chosen to contest the supremacy of US law. The critics deplored the opinions in those cases as creative rationalizations of colonial control, lacking a legal foundation. The court in *Kagama* cited no judicial precedent for unlimited US power, nor could it have found that power spelled out in the Constitution. Under the Constitution, which clearly identified Indian tribes as politically separate peoples, Congress's power in Indian affairs was supreme or "plenary" only vis-à-vis state governments. Robert Clinton suggested that even Congress's 1871 ban on future Indian treaties was unconstitutional, and nowhere did the Constitution authorize direct congressional rule of Indian nations' internal affairs. In the critics' view, the *Kagama* and *Lone Wolf* rulings were so flawed that the Supreme Court should and could now reverse them.[60]

Petra Shattuck and Jill Norgren attributed those flaws to historical circumstances. By the late 1800s, tribes were weak, and pressures on the federal government to serve non-Indian interests were strong. The court, like Congress, felt free then to disregard their own precedents that had "defined the limits of federal power" over Indians "by reference to" Indian nations' rights under international law. Ignoring tribes' inherent rights as well, the justices went along with lawmakers' renunciation of relations with tribes as nations. To meet contemporary "political demands for the dispossession of the Indian," they assigned new meaning to Congress's "plenary" power so that "questions of Indian rights" could "be decided according to the preponderance of white power without giving the appearance of lawlessness." Thenceforth, the court would recognize "no limits to the federal

power over Indians other than those the United States government had chosen to impose on itself."[61]

Shattuck and Norgren argued that the present-day court could reverse the insupportable *Kagama* and *Lone Wolf* holdings. By doing so, it would reaffirm the original Indian law principles derived from international law, especially the principle of inherent tribal sovereignty. It would acknowledge that the US refusal to make more treaties with tribes did not invalidate the tribes' claim of nationhood. Unilateral federal government decisions were just that; they did not extinguish tribes' inherent sovereignty. Because the United States had undeniably superior power, it might in practice limit the powers that tribes exercised, but it could not dictate how Indians conceived of their tribes, law, or justice. Furthermore, tribes would still have grounds in American legal doctrine as well as international law to maintain their sovereignty and contest the US claim of unlimited power.[62]

That the Suquamish Tribe in 1977 did not mount this challenge to the doctrine of federal plenary power is hardly surprising. Pragmatic considerations and the culture of the legal profession effectively precluded such a radical tack. On the practical front, the research and analysis needed to discredit *U.S. v. Kagama* and *Lone Wolf v. Hitchcock* would have been a tall order for a small-firm lawyer with limited time and resources. Critiques of those cases were not yet available in publications an advocate could conveniently cite. At best, tribal attorneys would have to draw on basic reasoning in a few law review articles and Felix Cohen's work from decades earlier, but they would not find a robust refutation of *Kagama* and *Hitchcock* spelled out there.[63]

Professional commitments and culture would also have deterred lawyers such as Ernstoff from contesting the unilateral imposition of US law on tribes. By joining the legal profession, attorneys accepted the authority of their country's courts on a wide range of subjects, including Indian affairs. They presumably shared with judges a basic respect for American legal culture, its tenets, its methods of reasoning, and its procedures for resolving disputes. They were trained to help clients achieve goals in a system where the usual objective was to persuade judges that those goals were consistent with previous judicial decisions, statutes, and other legal authorities. Arguing that relevant precedents favored a judgment for their clients was certainly preferable to seeking a reversal of

long-standing precedent, and Ernstoff could invoke recent as well as old Supreme Court opinions that did affirm tribes' inherent sovereignty. In those circumstances, questioning the very foundation of federal government power to determine the limits of tribal sovereignty—had that occurred to him or his colleagues—would have seemed unnecessary as well as unwise.

There was another possible way to discredit the case law that allowed unilateral US denial of tribal sovereignty. Ernstoff alluded to it without developing an argument. He quoted the Supreme Court's admission in *Morton v. Mancari* (1974) that "overly paternalistic" US exercise of its plenary power had been "both exploitative and destructive to Indian interests." That paternalism was contrary to the more enlightened federal policy in effect since the mid-1960s.[64] If Ernstoff or Justice Department attorneys had taken this thought farther, their reasoning could have gone as follows. The court's formulation of the unlimited power doctrine in 1886 and 1903 was the product of a time in history when judges and government officials harbored a since-discredited belief in Indians' inferiority and whites' moral superiority. The tribes' defeat and dependency had enabled the federal government to impose severe practical limits on their autonomy without fear of effective retaliation. The court simply recognized the imbalance of power and called it "law." By the 1970s, however, circumstances had changed again as long-disadvantaged US populations mobilized to demand fairness and empowerment. Federal policy makers, recognizing Indians' enduring expectations of tribal self-government and their capacity for managing their own affairs in the contemporary American context, had agreed to a redistribution of power in Indian country. Such change required reconsideration of the assumptions about Indians that underlay the *Kagama* and *Lone Wolf* holdings.

To this argument, the Suquamish Tribe's opponents would likely have replied that Indians had long since acquiesced to ultimate United States control. When the court decided *United States v. Kagama*, most Indians had effectively conceded the US government's authority or would soon do so. Over the next half century or more, in practice if not in their hearts, they had acknowledged their subjection to American law in many aspects of life. They had asked US courts to ensure fulfillment of federal Indian law principles, including the rule that the government's self-assigned guardianship role came with solemn obligations to tribes. As Shattuck

and Norgren observed in 1991, Indians had tried to hold "the law to its own promises and pretensions of justice" and at times had succeeded.[65] Thus, tribes and their lawyers had come to think of federal Indian law as a body of doctrine they could invoke for Indians' protection so long as court procedures were fair and judges followed accepted methods of achieving doctrinal coherence. Some Indian leaders in the 1970s sounded happy with the results. Joe DeLaCruz, for instance, said in 1976, "Today we have 250 lawyers fighting for our rights. We learned the laws of this great land. We like them." Ernie Stevens told members of the American Indian Policy Review Commission in 1977, "We feel secure in the law as it exists."[66]

To refute the implication that Indians' acknowledgment of US hegemony was an intentional, permanent renunciation of their sovereign powers over outsiders in tribal territory, tribes would have needed historical evidence that they did not provide in Oliphant's case. Ideally, that evidence would have included accounts from at least the 1850s to the 1970s of Indians policing non-Indians, imposing consequences for their crimes, or resisting US opposition to such tribal actions. Indian responses to criminal non-Indian conduct before the American conquest could also have been instructive.

Such evidence would not have been easy to muster, if indeed it had ever existed, particularly for the Suquamish and neighboring tribes. As of the 1970s, historical research about the Suquamish was all but nonexistent, and published histories of other tribes in western Washington were nearly as scarce. Nationwide as well, few historians had documented Indians' experiences for their own sake. Over the following four decades, scholars did begin to uncover and tell more history of indigenous peoples, some of which detailed Indian tribes' efforts to retain or regain as much self-governing power as possible under colonial domination. Ethnohistorians and authors of "new Indian history" employed innovative methods that could have enabled the Suquamish and their supporters to offer a fuller story of relevant Indian history. But in 1973, that surge of Indian-centered research was yet to come.[67]

Furthermore, even if the Suquamish could have commissioned such research for the habeas corpus hearing, a rich yield of material suitable for trial testimony and exhibits was hardly guaranteed. For several reasons, evidence of Indian beliefs and intentions would likely have been sparse, spotty, and ambiguous. Much of it would have taken forms such as orally

transmitted memories, which a judge was apt to find unconvincing or inadmissible as evidence.[68]

The Suquamish had one close-to-home example of litigation that did produce a rich trial record of historical Indian expectations and understandings, but the persuasiveness of that record became apparent only after Judge Sharp denied Oliphant's petition. In *U.S. v. Washington*, a key witness for the United States and tribes was an anthropologist who had thoroughly researched how Indians understood the treaty clause securing their right to fish, both in 1855 and over ensuing decades. In ruling for the tribes, Judge Boldt described that witness's conclusions, based on fieldwork interviews with Indians and historical documents, as "well taken, sound, and reasonable" and found her "summaries of relevant aspects of Indian life" "authoritative."[69]

Even if the tribes could have generated a comparable record in *Oliphant v. Suquamish Tribe*, such as evidence of reasonable past Indian expectations that the reservations would be Indian-regulated enclaves, would that have overcome the Supreme Court's unease about tribal prosecutions of non-Indians? It seems unlikely. Still, such evidence might at least have bolstered an argument that the court should respect the recently renewed US government support for expanded tribal government powers and tribal courts. The Suquamish could have argued that tribes, as they gathered new strength over the twentieth century, had essentially engaged federal lawmakers and administrators in negotiations for more power, and they had won concessions that the court should not gainsay, including federal approval of codes that extended tribal governments' reach to non-Indians. The court could then have done what it purportedly did in *Lone Wolf v. Hitchcock*: it could have declined to decide whether tribal jurisdiction over non-Indians was proper and left the issue to be settled in the ongoing political process.

A record richer in testimony about Indian community history might have had another salutary effect for tribes. Telling Indian stories about the past in American courts has long been part of tribes' efforts to negotiate better terms of relations with non-Indians. The more such stories become public records and gain credibility in institutions that non-Indians respect, the more power those stories are likely to carry for tribal negotiators in other situations. That was an apparent consequence of the effort to educate the trial judge in *U.S. v. Washington*. Indians gained a hearing and

ultimately a public outlet for history they could subsequently invoke for new purposes in their relations with non-Indians. If Indians in the Suquamish jurisdiction case had told more stories about matters related to the non-Indian problem on reservations—for example, stories about the circumstances of reservation land sales to non-Indians, county officials' disdain for tribal government, tribe members' eviction from reservation beaches, tribes' efforts to work with non-Indian authorities, and Indians' demonstrated respect for American legal culture and institutions—the Supreme Court might still have ruled as it did, but the tribes would have created a record and memories of potential use to them in future negotiations for control of their homelands.

In sum, when Mark Oliphant and his lawyer chose to resist Suquamish tribal prosecution on federal Indian law grounds, tribe leaders—despite a history of US policies that saddled them with a reservation populated largely by non-Indians—put their fate and perhaps their faith in the hands of non-Indian judges and lawyers. That strategy recommended itself in large part because of past Indian victories in federal courts, some in the early years of the American republic, some very recent, and some close to home. But the Supreme Court betrayed the Indians' faith (if faith it was). Rather than affirming the tribes' power based on foundational principles of Indian law that neither Congress nor the court had renounced—inherent tribal sovereignty and the enduring legal force of unabrogated Indian treaties—the court invoked judicial pronouncements that reflected a late-nineteenth-century conception of tribes whose sovereignty existed only at the pleasure of the federal government and its top jurists. Ignoring a trend in the US government of respecting tribes' aspirations for meaningful power, six justices decided that Indian tribes could not be allowed to judge non-Indians' guilt. To them, it seems, Indian societies were still too alien to ensure fairness for non-Indian defendants but no longer independent enough to define their own powers.