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In the

Supreme Court of the United States

MARK DAVID OLIPHANT AND
DANIEL B. BELGARDE,

PETITIONERS,

V.

THE SUQUAMISH INDIAN TRIBE ET AL,

RESPONDENTS

No. 76-5729

Washington, D. C.
January 9, 1978

Pages 1 thru 82

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE, Petitioners,	:	
v.	:	No. 76-5729
THE SUQUAMISH INDIAN TRIBE ET AL, Respondents	:	

Washington, D. C.

Monday, January 9, 1978

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

PHILIP P. MALONE, ESQ., Malone and Trentadue, Associates, P. O. Box 443, Poulsbo, Washington 98370 For Petitioners

SLADE GORTON, ATTORNEY GENERAL of the STATE OF WASHINGTON, Temple of Justice, Olympia, Washington 98504 For Amicus Curiae, State of Washington

BARRY D. ERNSTOFF, ESQ., 208 Pioneer Building, 600 First Avenue, Seattle, Washington 98104 For Respondents

APPEARANCES: [Continued]

H. BARTOW FARR, III, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530
For the United States as amicus curiae

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 76-5729, Oliphant against the Suquamish Indian Tribe.

Mr. Malone, you may proceed whenever you are ready.

ORAL ARGUMENT OF PHILIP P. MALONE, ESQ.

ON BEHALF OF PETITIONERS

MR. MALONE: Mr. Chief Justice and may it please the Court:

On behalf of the Petitioners, Mark Oliphant and Daniel Belgarde, Attorney General Gorton and myself will divide arguments of first impression before this Court in the history of the United States.

That is, as an Indian Tribe, inherent governmental police powers over non-Indian persons, citizens of the United States for their actions occurring within the boundaries of an Indian Reservation.

I will first discuss the facts and then argue the issues involved under the Fifth and the 15th Amendments of the United States Constitution and the Indian Civil Rights Act of 1968 which protect the privileges, rights and freedom of the Petitioners as non-Indians and non-members of the Tribe from the exercise of such powers claimed by the Respondent in this case.

QUESTION: Counsel, what basis do you rely on for

federal jurisdiction in this case?

MR. MALONE: Federal jurisdiction in this case in Federal District Court Constitution habeas corpus --

QUESTION: What particular statutory grants of jurisdiction to the Federal District Court do you rely on?

MR. MALONE: The Indian Civil Rights Act in particular.

QUESTION: I do not mean statutory -- it is the Indian Civil Rights Act.

MR. MALONE: Indian Civil Rights Act, primarily, testing --

QUESTION: When you say "primarily," is there something else that is secondary?

MR. MALONE: Well, also that -- I mean, not secondarily but there is the right under the United States Constitution for Petition of Writ of Habeas Corpus which --

QUESTION: And to whom may that be -- don't you have to be in custody, either in the federal or state commitment in order to rely on that?

MR. MALONE: Yes, that is correct.

QUESTION: Do you contend that your client was in custody under either federal or state commitments in this situation?

MR. MALONE: He was, for a period of time. Then he was released on his personal recognizance.

QUESTION: When he was detained by the Indians, it is your contention that it was the same as if he had been detained by the Federal Government?

MR. MALONE: Yes, Your Honor.

The Port Madison Reservation is located entirely within Kitsap County, Washington, approximately ten miles across the waters of Puget Sound from downtown Seattle.

Among the public services provided by the county and state for the Reservation, as in any other area not within the Indian Reservation, are schools, roads, public utilities, fire protection, social and health services and law enforcement.

The Suquamish Tribe provides no services as such to non-Indians except the police protection and law enforcement of tribal laws that are claimed in this case.

The Reservation is similar to the Puyallup Indian Reservation with which this Court, I am sure, is familiar.

The land area of the Reservation is approximately 7,300 acres. Two-thirds of that land is owned by non-Indians and some Indians in fee and that is subject to local taxes for payment of public services.

One-third of the land, approximately, is individually-owned allotted land with title held in trust by the United States for the protection of those individual Indian

allottees and it is exempt from taxation and I would -- a main note to make a distinguishing factor that this allotment arose here primarily under the treaty of Point Elliott.

QUESTION: These days, is there a termination date on the trust property?

MR. MALONE: No, there isn't.

QUESTION: There used to be.

MR. MALONE: There used to be. There was contemplated a termination date and as I understand, Congress extended that period.

QUESTION: Indefinitely, then.

MR. MALONE: Indefinitely.

In 1973, the time of the Oliphant incident, the Tribe had leased to a non-Indian corporation with the approval of the United States the last remaining unoccupied, unallotted trust lands on the Reservation and of that there was a portion known as the ballpark. That is where the Oliphant incident took place.

As of 1973, only 50 adult and minor Tribal members lived on the Reservation.

They were interspersed in the residential areas among an approximate non-Indian residential population of 3,000 people.

No distinct community occupying any certain area existed anywhere on the Reservation in 1973.

In 1965, of the total enrolled membership of the 112 tribal members entitled to vote at tribal elections, 56 members elected and adopted a Constitution for the Tribe as authorized by the Indian Organization Act of 1934 and approved by the Secretary of the Interior.

It provides for limited powers of government by a general council and a tribal council. Franchise to vote is in the general council and through an election by the members, they also elect officers in the tribal council.

The limitation on voting and membership is that they must be one-eighth Indian blood and generally 18 years or over. The tribal council as such is the executive branch of the general council.

Because of the limited executive powers of the tribal ordinances governing the Indians in the Constitution, which restricts, in effect, the executive body to regulating hunting and fishing and shellfishing, ordinances may be promulgated through the tribal council as such, provided the Secretary of Interior approves.

Therefore, the most recent ordinances relative to this case have been passed by a general council of all of the eligible voters and members of the Tribe.

In July, 1973, members of the general councils for the first time in the history of the tribe adopted a law and order code asserting tribal territory jurisdiction as an act

of self-determination over all Indians and non-Indians and their land within the Reservation.

The Code was not approved by the Secretary of Interior.

Tribal crimes are defined in the Code that include not only minor offenses but also major offenses. Amongst those major offenses are assaults, burglary, theft and rape.

At the same time, the Code provides the tribe that tribal courts established in the Code do not have juisdiction over offenses within the Major Crimes Act of the United States.

Since the Major Crimes Act applies only to offenses by Indian Affairs, the Tribal Court therefore has jurisdiction over the Code only over non-Indians and not Indians for those major tribal offenses as defined in the Law and Order Code.

The Code establishes a judicial system for the first time in the history of the Tribe, providing for a tribal court and an appellate court whose judges are the same.

They must be tribal members and have no further educational qualification than having graduated from high school. Their salaries are paid from funds of the United States. At the same time, we would note that the members of the jury, by recent enactment of the Tribe, must also be members of the Tribe and by being members of the Tribe, that means they must have one-eighth Indian blood or more.

In August of 1973, Mr. Oliphant, a non-Indian,

residing on the Reservation when the alleged violation took place by him on the Reservation -- for years prior to 1973, a local American Legion had sponsored this event. It was known as Chief Seattle Days and they also took place generally in this ball park area.

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In 1970, this is where the incident took place, in the Oliphant case. At the time, Mr. Oliphant became involved in an altercation with campers on the ball park that were attending that event. The record does not indicate that the campers involved in the altercation with him were tribal members.

He was arrested and charged by newly-appointed tribal police officers, not for the altercation with the campers but for assaulting one of the police officers and resisting arrest.

Due to lack of jail facilities, he was then imprisoned in the City of Bremerton jail off the Reservation for five days, pursuant to contract that had been made by the Federal Government with the City of Bremerton for the benefit of the Tribe to jail prisoners of the Tribe.

QUESTION: So the offense really that he was charged with was an altercation between himself and an Indian tribal policeman?

MR. MALONE: It was -- he was charged with resisting arrest and assaulting one of those police officers.

QUESTION: Who was an Indian tribal policeman?

MR. MALONE: Yes.

QUESTION: Mr. Malone?

MR. MALONE: Yes.

QUESTION: What is the size and composition of the total judicial branch of the Tribe?

I understood you to say only 53 members reside within the Reservation. How many of them are members of the judicial branch or what are their positions? How many judges, for example?

MR. MALONE: There are two judges, to my knowledge.

QUESTIONS: How many police officers?

MR. MALONE: At the time, there were a number of appointed deputies and at the present time I think there are three or four police officers.

QUESTION: Do they have a courthouse and a clerk? What establishment?

MR. MALONE: They have appointed court -- they have appointed clerk. The courthouse was -- in the Belgarde case was a barbershop.

QUESTION: And they have a jail?

MR. MALONE: No jail facilities.

QUESTION: Where do they incarcerate?

MR. MALONE: They held Mr. -- during a period of time after the arrest they held Mr. Oliphant in the local office,

a tribal office in the back room.

QUESTION: Who pays for all of this?

MR. MALONE: The United States. Part of the funds, though -- as I understand, part of the funds, tribal funds, are raised, one from the leasing of land and also from operation of a cigarette store and --

QUESTION: And how are the judges chosen? Are they elected?

MR. MALONE: As far as the Law and Order Court, it says by appointment, so I assume that the Executive Branch of the Tribe, the Tribal Council, appoint judges. As I understand it, the Executive Branch has a chairman and there are four people and vice-chairmen and so forth. It is appointed through that.

I know of no restrictions otherwise.

Now, Mr. Belgarde, also a non-Indian, resided on the Reservation in 1974 when he was arrested by the tribal police. He was driving his automobile on a public highway at the time tribal police cars took pursuit of him.

A roadblock was set up by those police on a public highway on non-Indian land within the Reservation to apprehend him. Belgarde's car collided with one of the police cars and he was arrested and charged with recklessly endangering a police officer and damaging the police car.

He, again, was jailed some 50 miles --

QUESTION: That police car was, again, owned by the Tribe, I take it?

MR. MALONE: The problem there -- I cannot answer for certain because the exact words of the charge is a "public car" and that the -- I believe there was contract with the United States Government for supplying of police vehicles and whether the title to that police vehicle was in the United States Government or in the tribe, I am uncertain.

QUESTION: Was it not clearly marked as a police vehicle?

MR. MALONE: Yes, it was.

QUESTION: And this man was running away from a police vehicle.

MR. MALONE: That would be a matter of interpretation.

QUESTION: Well, he ran into him, did he not?

MR. MALONE: He was not runing away from him. He ran into him.

QUESTION: He ran into him, running away. He was not trying to escape him when he ran into him? Or did I misunderstand what you said?

You said they were chasing him.

MR. MALONE: Yes. Pursuit had taken place.

QUESTION: And during the pursuit -- that is a good word --

MR. MALONE: Yes.

QUESTION: -- he ran into him.

MR. MALONE: Well, the roadblocks, then, had taken place. Pursuit had --

QUESTION: Well, did he run into a police car or not?

MR. MALONE: Yes.

QUESTION: He did.

MR. MALONE: Yes.

QUESTION: And it was clearly marked.

MR. MALONE: Yes.

Well, in short, turning to the Constitutional situations here, we have a government -- a tribal government may be characterized governing all the non-Indians on the Reservation by some Indians and for some Indians with that system subsidized by the Federal Government.

This, then, leads to the constitutional problems involved in this case. I would first bring these problems in perspective.

My clients and a number of non-Indians, I believe, have no immediate interest in voting in the Suquamish General Council. Their immediate interest is to be free from the tribal laws and their enforcement promulgated without their consent.

They do not want to be subject to independent

tribal powers over which they have no control except with resort to the judiciary but if they may be not left alone, if they are to be subject to the tribal criminal code, then the best choice would be that they would have the right to vote which I believe and argue that they have under the Constitution.

This would mean, in effect, if non-Indians were entitled to vote, the very purpose of the claimed powers here or self-determination of tribes would end on such reservations as the Port Madison Indian Reservation.

But if a choice had to be made for their freedom, they would desire the choice and power and ability to vote.

QUESTION: The effect would be quite different in the Port Madison Reservation on the one hand, which your client came into contact with and a Reservation like the Navajo Reservation, which is 20,000 square miles, largely populated with Indians, would it not?

MR. MALONE: Startlingly different.

QUESTION: And that prompts me to ask, Mr. Malone, whether whatever principles are forthcoming in this case, you feel should apply to all Indian Reservations?

MR. MALONE: I believe that, qualifying my statement is that, first, to have powers, you should have a community that you should represent. That is not in this case.

QUESTION: But it is in a case later in the week involving the Navajos.

Are you familiar with that case?

MR. MALONE: Yes, I am, to a certain extent. I would say that as far as the Constitution, the Constitutional principles apply here. They apply to the Navajo Indian Reservation, if they are asserting similar claims over non-Indians.

QUESTION: Well, then, some of the facts are not particularly important then.

MR. MALONE: That is true.

QUESTION: Unless you were going -- unless it were possible that there would be a difference between a crime committed on trust property and off trust property but still on the Reservation. Or a difference between a crime committed against the Tribe itself and not against the Tribe itself; for instance, a trespass on tribal property.

Would you think the Tribe could prosecute somebody for that, even though they might not be able to prosecute for assault, for a misdemeanor in some bar somewhere?

MR. MALONE: I believe that the powers of the tribe should come from writing. They should come from the Treaty or Acts of Congress and not by implication or desire. That would be the first limitation so if the treaty -- if certain treaties, they do provide powers to exclude, they have the powers to exclude people from their lands.

QUESTION: Well, suppose somebody does not exclude?

Suppose he comes on anyway and there is a tribal regulation that says anybody who trespasses on our property has to pay $500. Then what are you going to say?

MR. MALONE: Well, I think that -- that becomes difficult, Mr. Justice.

QUESTION: It is a little late, is it not? They should have put a restrictive covenant in about 1600, should they not have?

MR. MALONE: I would -- that is --

QUESTION: Well, Mr. Malone, I gather that you are arguing what should be argued to Congress and not to a Court.

Now, show me that I am wrong.

MR. MALONE: Well, I --

QUESTION: You said the Tribal Civil Rights Law -- the Indian Civil Rights Law, did you not?

MR. MALONE: Yes.

QUESTION: Are you going to get to that point?

MR. MALONE: Yes.

QUESTION: Before you address that, what other law enforcement authority was available at the time and place of these incidents? What other police officers? Laying aside the judges for the moment.

MR. MALONE: Well, there had been complete county protection -- local county law enforcement continually.

QUESTION: Were they there at the scene at

the time?

MR. MALONE: They were at the scene at the Belgarde case, yes, and there were tribal police cars at the festivity at the Oliphant case -- that took place.

Well, in short, as to the constitutional issues involved here, I think they are quite clear. One is the Fifteenth Amendment of the Right to Vote.

The Fifth Amendment also protects my clients because of federal action. There are cases cited in the briefs that substantiate a direct connection between the Federal Government and the Tribe here.

QUESTION: Well, is it your contention that the provision for the right of habeas corpus in the Indian Civil Rights Act permits one to raise in that writ rights other than those that are conferred by the Indian Civil Rights Act?

MR. MALONE: It reads, the right of determining the tribal orders, as to the constitutionality of tribal orders. But -- is that my --

QUESTION: Well, I was curious as to whether you thought that the express provision in the Indian Civil Rights Act granting the right of federal jurisdiction to hear a writ of habeas corpus on behalf of someone detained by an Indian tribe permitted that person to raise claims other than those granted to him by the Indian Civil Rights Act.

MR. MALONE: Yes, I believe that the purpose of the

Indian Civil Rights Act was to give protection to any person before -- by tribal order of the court and it was not just restricted to those rights in the Civil Rights Act.

Section VIII of the Civil Rights Act, in effect, is the same word language as the Fifth Amendment protections.

QUESTION: But there is nothing in legislative history on that point?

MR. MALONE: Well, I have no answer to that, as to the legislative history.

QUESTION: Mr. Malone, you have submitted to us here constitutional claims. We do not reach those, however, at all, do we, unless we resolve the statutory issues against you? Do we not first proceed to canvass the statutory issues and determine whether or not the statutory issues to which these briefs are largely addressed determine whether or not the law provides that non-Indians shall be prosecuted on this Reservation by the Tribe under Indian law?

MR. MALONE: Yes, I agree.

QUESTION: Have we got, in other words, the cart before the horse a little bit?

MR. MALONE: That is true.

QUESTION: I assume your co-attorney here is going to handle the statutory issue.

MR. MALONE: That is right. The Attorney General will take that up and satisfy the statutory issues because if

there is no inherent sovereignty and the Court holds that, obviously we do not have the constitutional issues before the Court.

With that, if there are no further questions, I will withdraw.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

SLADE GORTON, ATTORNEY GENERAL OF WASHINGTON

ON BEHALF OF WASHINGTON AS AMICUS CURIAE

GENERAL GORTON: Mr. Chief Justice and may it please the Court:

One remark, Mr. Justice Powell, on your factual question; in each case, these Petitioners were jailed in state facilities, city jails, in Bremerton and Port Angeles pursuant to contracts between those cities and the Federal Government.

QUESTION: And it would be the same if they had been arrested by an FBI agent, would it not?

GENERAL GORTON: Yes. At the outset, it is well to note the expansive scope of Respondent's claim, that the Tribe has jurisdiction to try non-citizens in this instance under its laws, even though they may not participate in making those laws derived principally from the Tribe's retained inherent powers of government which is unlimited except as expressly qualified by treaty or statute.

QUESTION: There is nothing really unique about that, is there, Mr. Attorney General? If he crossed the line

into the next state, he would be subject to some laws that he had no part in making.

GENERAL GORTON: Yes, on a residential basis, Mr. Chief Justice, if he went to Idaho, he could become a citizen of Idaho on that day under your decision in Dunn v. Blumstein.

QUESTION: I am speaking --

GENERAL GORTON: For example, there is no duration --

QUESTION: -- I am speaking of a man who is just going over to a fair or a football game in the next state.

GENERAL GORTON: That is true, but these two persons are both residents of the Reservation over which the jurisdiction is asserted.

As a matter of fact, the Respondents' brief offers no source for the power asserted here of the retained inherent sovereignty. The Solicitor General presents the same broad claim. The tribal jurisdiction here asserted is an aspect of residual tribal autonomy which can only be lost by the terms of the treaty or statute.

QUESTION: Where do we -- Mr. Attorney General, I suppose you were going to tell us, but where do we turn to answer that question?

GENERAL GORTON: That is exactly where I propose --

QUESTION: Is it some statute or just from case law or what?

law or what?

GENERAL GORTON: It is a statute or a treaty.

This Court has rejected the analysis which Respondents of the United States present here. It has never authorized any exercise of Indian jurisdiction over the person or property of a non-Indian based on the platonic notion of sovereignty, to quote Mr. Justice Marshall in McClanahan.

This Court has upheld the Indian claims for tribal jurisdiction over non-Indians only when the authority for assertion can be found in a specific treaty provision or statute and, of course, that is exactly the position which we are taking here.

QUESTION: Well, has it ever held that it could not be found someplace else?

GENERAL GORTON: It has always been very careful to avoid basing the finding on sovereignty even when it makes lip service to it.

QUESTION: Well, then, I guess your answer is no.

GENERAL GORTON: Yes. Yes, my answer is no. To our knowledge, there have been only three cases in which this Court countenanced even a modest claim of Indian jurisdiction over non-Indian activities and in each of these cases, the Court used the McClanahan approach, finding the source in either a treaty provision or a statute.

In Morris v. Hitchcock in 1904, this Court found to

be valid legislation of the Chickasaw Nation levying a permit tax on horses and cattle owned by non-Indians but grazing on Chickasaw land. The Court found the authority for the tax lay both in the Curtis Act and the treaty under which the Chickasaws held their land but note, even so, even under those circumstances with a highly-organized Indian government, the sanction for failure to pay the tax was expulsion from the Reservation by federal official, not a criminal prosecution in the Chickasaw Tribal Court.

In Williams versus Lee --

QUESTION: The Chickasaws were one of the Five Civilized Tribes?

GENERAL GORTON: Yes, this was Oklahoma -- well, it was Indian Territory.

In Williams v. Lee this Court prohibited a licensed Indian trader on the Navajo Reservation from suing his Indian debtor in a state court, leaving him to pursue his claim, if he chose to do so, in the Navajo Tribal Court.

The exclusive jurisdiction of that court was found to rest in the 1868 treaty between the United States and the Navajos.

And finally, in the United States v. Mazurie, you validated an explicit statutory delegation by Congress of its power to control on-Reservation tavern licensing to the resident Indian Tribe. But the Mazuries were convicted of the

violation of a federal statute in a Federal District Court. They were not before a tribal court charged with the violation of a tribal ordinance.

Moreover, this consistent view of this Court, that claims of residual sovereignty standing alone are not sufficient grounds to support a claim of tribal jurisdiction over non-Indians has been matched step-for-step by the Congress and the Executive.

In 1834, immediately after the passage of the Trade and Intercourse Act of that year, the Attorney General of the United States expressed his view. The Congress passed that law, and I quote, "On the assumption that under the treaties, Indian laws would be applicable only to Indians themselves."

The same opinion takes the position that for such authority to exist in an Indian Tribe, it must be given by the United States.

Nor did the legislative history of the 1834 Act proceed from any other assumption. The clear implication is that either the United States or the Tribe might have jurisdiction but not both.

The Congress elected federal jurisdiction over non-Indians.

In 1854, the Congress reinstated the Treaty Exception in its present form.

QUESTION: Is your submission that Congress has, in effect, passed a statute or several of them that says, "There is no such thing as retained power"?

GENERAL GORTON: It is our position that the law of the United States is that the Indian tribes must show their right to try non-Indians either in a treaty or a --

QUESTION: Well, now, I understand your position. I am just trying to find out where you found the law on that. Is that just something you just picked out of the air somewhere or are you saying that Congress in effect has a statute which says, "No retained power and that the Tribe may exercise only such powers over non-Indians as you can find in the statute or treaty."

GENERAL GORTON: I am stating that the Congress has stated that there is no Indian power to try the non-Indians in these cases but that a subsidiary --

QUESTION: You are not just suggesting that Congress has said that there is a law someplace that -- some constitutional principle or what?

GENERAL GORTON: I am stating two separate propositions, that this Court consistently has held that Indian powers over non-Indians must be found in a treaty or statute. In addition to that, I am saying that the Trade and Intercourse Act rather explicitly denied that right and put exclusive jurisdiction over this kind of activity in the United States

at the time of those Acts, that the Attorney General of the United States at the time of the Trade and Intercourse Acts took exactly that position on two different occasions than that the courts of the United States, the courts lower than this Court, were taking on that position.

QUESTION: Do you say the same thing about the tribal sovereignty over Indians?

GENERAL GORTON: That, Mr. Justice White, is a very interesting question which, of course, is not directly involved in this case and --

QUESTION: Well, can you just answer yes or no, do the cases or the Congress recognize some sort of retained inherent power of the Tribe over Indians?

GENERAL GORTON: There is only one case in which this Court has even remotely based its decision on the retained tribal jurisdiction even over tribal members, in Talton versus Mayes. Even there, the power to try the Indians in the first place seems to stem from a treaty.

Whether or not this Court would continue that view even as to Indians I think is a moot questions.

Mr. Justice Harlan, the 19th century Mr. Justice Harlan dissented. He might have been as prophetic in that as he was in Plessie versus Ferguson.

In any event, the jurisdiction of the Indians to try Indians may be found in the Trade and Intercourse Act

which explicitly states that the United States, in effect, recognizes the rights of the Indian Tribes to try the non-Indians.

QUESTION: Well, your response to Mr. Justice White's question is they all depend on implication, do they not? That Congress saw fit to confer particular jurisdiction on federal courts in certain situations and on Indian Tribes in other situations and if that had existed independently of Congressional action, Congress would not have gone ahead and done it.

GENERAL GORTON: Exactly. In addition, there is another statutory scheme in connection with these Reservations in the State of Washington which I suspect but do not know is paralleled in most other Western states.

The sovereignty of the United States over the area which is now the State of Washington under the concepts of sovereignty which have always been accepted in Western civilization and the United States came from explorations beginning with those of Robert Gray and from a series of treaties, the Louisiana Purchase, treaties with Spain and Great Britain culminating in the treaty with Great Britain of 1846 under which we settled the Northwest frontier of the United States.

At that point, the United States claim to sovereignty over the Washington area was total, absolute and complete.

Moreover, two years later, the United States organized that area into the Oregon Territory and the Oregon Territory Statute says on this subject, "Nothing in this Act shall be construed to impair the rights of persons or properties now pertaining to the Indians in said territory so long as said rights shall remain unextinguished by treaty."

"Rights of persons or properties," Now, does this mean that the United States recognized -- this is before any of the Indian treaties were signed -- criminal jurisdiction by Indian Tribes over non-Indians, unlimited in subject matter and geography except by the borders of the Washington Territory?

I think that to state that question answers it. It means exactly the opposite, that the United States recognized in the Indians no power except rights of person or property which themselves depended on that Oregon Territory statute. All else was subsumed into the sovereignty of the United States.

In 1854, when the Trade and Intercourse Act was passed in its present form, at least for the purposes of this argument here today, the United States withdrew from federal jurisdiction certain authority to prosecute Indians and non-Indians where a Tribe held exclusive jurisdiction -- and I am quoting now -- "By treaty stipulations."

Later in that same year, 1854, in full knowledge of this provision, the United States presented the Treaty of

Point Elliott to the Suquamish Indians. That treaty contained no treaty stipulations conferring exclusive jurisdiction over non-Indians to the Tribe and the next year, in 1855, the Attorney General of the United States restated his early opinion that Indian Tribes may receive jurisdiction over non-Indians only from Congress.

In 1878 a circuit court in Ex Parte Kenyon held that the federal statute limited Tribal Court jurisdiction to offenses by Indians against Indians.

Now, from that point on, 1878 at the latest, the judiciary, the Congress and the Executive were in complete agreement. As late as 1970, the Solicitor of the Department of the Interior adhered to the same conclusion. Indian Tribes do not have jurisdiction over non-Indians.

True, that opinion was withdrawn in 1974 but not until the Solicitor General's brief in this case has the Federal Government ever expressed a contrary view.

Now, what has happened as a result of that view?

In reliance on these consistent, longstanding views, literally tens of thousands of United States citizens have 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 seems to us far too late in the day now, at least

in the absence of a clear declaration of Congressional intent, for the United States to tell these citizens that it was wrong and that they are"In the situation of anyone living in a foreign country," to quote precisely the extraordinary submission of the Solicitor General in this case -- not only a foreign country, but a foreign country in which they could never become naturalized citizens.

These citizens have not chosen to live in a foreign country and they do not do so now. They live in the United States and they are subject to its laws.

QUESTION: How about the -- most of your argument, as I have understood it, would lead to the conclusion that the government that does have jurisdiction over these people is not your state, the State of Washington, but, rather, the United States of America under 18 U.S.C. 1151 and the rest of your argument.

I suppose the issue here is whether or not the Indian Tribe has jurisdiction and we do not necessarily need to decide, if it does not, who does.

GENERAL GORTON: Precisely, Mr. Justice Stewart. I am not --

QUESTION: And the Amicus brief, as you know, suggests that we even defer argument in this case until we decide whether or not we are going to take the Yakima case.

GENERAL GORTON: But I do not believe that you need

to do that. I am not here as the Attorney General of the state, arguing for state jurisdiction.

QUESTION: Right.

GENERAL GORTON: I am here arguing against this assertion of jurisdiction.

QUESTION: Right.

GENERAL GORDON: Under the McBratney Exception, if the crime does not involve Indians, the original crimes in these cases -- the altercation in the ball park -- are clearly under state jurisdiction without regard to Public Law 280.

But if they are not under state jurisdiction, then they are under federal jurisdiction, absent Public Law 280.

QUESTION: Mr. Attorney General -- what do you think --

QUESTION: Your submission is, we do not need to decide -- in order to decide in your favor -- who does have jurisdiction?

GENERAL GORTON: No, you do not.

QUESTION: I think I misunderstood you. Did you say that Congress could give the Indians this right?

GENERAL GORTON: Congress at least has to try before they can validly assert it. Whether Congress can constitutionally give the Indians this jurisdiction is another point which was at least adverted to.

QUESTION: And you would not concede that.

GENERAL GORTON: I do not concede that. In our view, whether by statute or by Constitution, tribal self-government ends where the common self-government of all citizens begins.

May I reserve the balance of my argument?

QUESTION: Let me ask you one question, General Gorton. Your argument would apply equally, I suppose, to the 20,000 square miles of the Navajo Reservation and some person driving from Phoenix to Denver and spending about 120 miles on the road going through that Reservation.

GENERAL GORTON: It would have a very substantial impact upon that situation. I cannot tell you that it would govern it because there are at least two differences between this and that situation, Mr. Justice Rehnquist.

The first is that the individual whom you posited is not a resident and therefore does not have any right to self-government and secondly, the Navajo treaties may be different from the treaties with which we are dealing here, that jurisdiction may have been given to the Navajos but I just do not know the answer to that question.

MR. CHIEF JUSTICE BURGER: Mr. Ernstoff.

ORAL ARGUMENT OF BARRY D. ERNSTOFF, ESQ.

ON BEHALF OF RESPONDENTS

MR. ERNSTOFF: Mr. Chief Justice and may it please the Court:

The case before you I consider to be basically a fairly routine except, of course, for the novel legal questions behind it -- law and order case.

The only question really is -- and I think the last series of questions pointed this out -- who is going to have what we call misdemeanor jurisdiction over all persons within an Indian Reservation?

The alternative at this point, so far as the law is stated, is the Tribe or the Federal Government and I would pose that any federal judge sitting in any of the federal courts around this country who was told that he was going to have to have in his courtroom all of the littering offenses, failure to stop for a stop sign, failure to signal for a turn, that he would have to be prosecuting those under the Assemblative Crimes Act, which is what the U.S. Attorney would have to do, would tend to agree with the position.

QUESTION: Well, the ones in the Sixth Circuit are not crazy about prosecuting the Black Lung cases either, I take it.

MR. ERNSTOFF: I would presume so, Your Honor.

But the question -- I think it is a serious question, a matter of federal judicial policy aside from the legal issues that are involved and that is --

QUESTION: What do you do about old Army camps?

MR. ERNSTOFF: Well, the Army camps -- my

understanding is, there is a system of military justice as well as the federal courts.

QUESTION: The federal magistrate is there.

MR. ERNSTOFF: The federal magistrate is used.

QUESTION: Well, put a federal magistrate here.

MR. ERNSTOFF: Well, perhaps, but thus far, at least in Seattle, I am sure that the Chief Justice has heard everyone complaining about not enough federal judges and federal magistrates. There does not seem to be a great deal of time available.

QUESTION: None of this will settle this case, will it?

MR. ERNSTOFF: That is correct, Your Honor.

I think, though, more important is to understand, really, what the case is about in terms of the treaties and the agreements between Indian tribes and the United States and perhaps I am trying to attempt to make this too large a case for what seems to be a relatively minor issue in terms of the offense but that is, what do the treaties do?

And I think it is important for the Court to understand this.

The treaties established what was to be the final homeland for Indians in this country. Anyone who is knowledgeable about Western history, certainly in our state, knows that Indians basically roamed throughout the state and they agreed --

there were no wars in the State of Washington. They agreed basically to cede land to the United States Government in exchange for being given their Reservation as a homeland.

Now, I acknowledge that because of the United States Government, Federal Government, there is an anomaly today and that is that these Reservations, non-Indians were allowed to settle on them, whether through the General Allotment Act or through treaty provisions which in this case is what prevails. The allotments, the assignments of land were made through the treaty, not the General Allotment Act -- or whether through the opening up of Reservations to settlement.

And the question that remains now is, how is this anomaly going to be dealt with? I am the first to acknowledge that it is, I think, an important question, the fact that people living within the Reservation cannot participate in tribal government.

But the question remains then, which way does one go? And it seems to me that the danger to American Indian policy and to the promises of this government in telling Indian tribes that in choosing between -- because of this anomaly -- in choosing between these two alternatives, that we have chosen basically to eliminate any control you might have on your Reservation over non-Indian trespasses or other committers of minor offenses is the wrong way to go and is really going to harm Indian interests and the interests that

this Court has upheld in previous cases, in recent cases, much more than the harm that might be done to the non-Indian who I admit is in an unfortunate situation.

I think that the question that was asked earlier by the Court about "Should you not be arguing to Congress about this?" is the proper question. This Court has always held that Congress is the place to determine how jurisdiction should be allocated amongst states, Federal Government and the Indian tribes and in fact, Congress has taken this challenge since the case began in the District Court.

Congress established an 11-man commission, the American Indian Policy Review Commission, to investigate over a period of two years -- a very extensive Congressional Commission investigation -- matters of jurisdiction on Indian Reservations and to come up with legislative solutions and that report was issued -- this was in the brief -- was issued in May of 1977.

There were six members of Congress on the Commission and five Indians on the Commission, Indian leaders, and that Commission said that they find that not only do they as a matter of law consider that Indian tribes have jurisdiction over non-Indians but because of the heinous situation in most Western states about local law enforcement from counties and states, that it is necessary and there is a cataloguing of all the problems in the State of Washington.

QUESTION: You don't suggest this is an Act of Congress?

MR. ERNSTOFF: No. What I am suggesting, though, is that the answer to the question, "Shouldn't Congress be dealing with this?" is correct. That is where this ought to be behind closed doors.

QUESTION: The fundamental difference between you and your opponent is, who has the burden of proof with Congress, as I understand it.

Your opponents say unless Congress has conferred jurisdiction on the Indian tribes they do not have it and you say, unless Congress has taken it away, they do have it --

MR. ERNSTOFF: I think that is --

QUESTION: And I do not see how this rapport really moves the ball one way or the other.

MR. ERNSTOFF: It does not. One hopes that legislation will come for this and it is my position that a legislative framework, a legislative solution which takes a great deal of time and lot of discussion and much testimony to decide how to deal with these problems is a much better solution than this Court having to deal with the problem in terms of exacting definitions of elimination of tribal --

QUESTION: But this case is here and now and not five years from now.

QUESTION: That all could have been handled by

not arresting these men.

MR. ERNSTOFF: That brings up the problem of the facts, Mr. Justice Marshall.

QUESTION: Well, before we move on, this is not just a matter for legislative solutions, if there is anything in the constitutional claims made by your opponent because even though your position were clear as a matter of legislation or treaty, we still, then, would have the constitutional claims to deal with, would we not?

MR. ERNSTOFF: That is correct. I was really --

QUESTION: Checking on the claims and, for example, is there a jury trial?

MR. ERNSTOFF: There is a right to a jury trial under the Indian Civil Rights Act.

QUESTION: And for these offenses?

MR. ERNSTOFF: For these offenses.

QUESTION: And how many eligible jurors are there?

MR. ERNSTOFF: At this point, the number of eligible jurors are the members of the tribe.

QUESTION: Well, not even all members of the tribe. I assume some of them are children, are they not?

MR. ERNSTOFF: That is correct.

QUESTION: So a couple of dozen eligible jurors?

MR. ERNSTOFF: I think, Your Honor, at this point that is a very important point and that is --

QUESTION: Well, just answer. Would you answer the question?

MR. ERNSTOFF: When these problems come up -- the answer to the question is, it is very posssible, for instance, that the lack of non-Indians on the venire to be selected for the jury is, in fact, impermissible under the Indian Civil Rights Act.

QUESTION: You would have about the same jury every case, would you not?

MR. ERNSTOFF: The point I am making is that that is exactly what the --

QUESTION: What is the answer to my question?

MR. ERNSTOFF: The answer is yes. At this point the venire is very small.

QUESTION: And none of the jurors would be of the same ethnic background as any of the defendants.

MR. ERNSTOFF: That is correct and it may be impermissible under the Indian Civil Rights Act. It is up to the Federal Court to determine that and it has not yet been determined.

What I am saying and this is what this Court said in the United States versus Mazurie. There is a protection for non-Indian residents of Indian Reservations. Since 1968 there has been the Indian Civil Rights Act and these petitioners had no problem invoking that act and in attempting to get

reviewed on what they considered to be the violation of their statutory rights.

QUESTION: Yes, those are statutory rights, though. American citizens have constitutional rights, do they not?

MR. ERNSTOFF: American citizens have constitutional rights but most constitutional rights of the first ten Amendments are rights as against the state government and against the Federal Government.

This Court in 1897, in Talton versus Mayes, held that those constitutional rights, the Bill of Rights, did not apply to the actions of Indian tribes.

QUESTION: Exactly. Exactly. And therefore, these defendants are deprived of the constitutional rights that are accorded to most American citizens, if not all others.

MR. ERNSTOFF: It is a matter of definition. If one does not have a constitutional right and this Court has determined that, one is not being deprived of it.

QUESTION: Well, if you are a member of a Moose Lodge and the Grand Master locks you up in the men's room overnight, you are not being deprived of any constitutional right, are you?

MR. ERNSTOFF: No.

QUESTION: No.

MR. ERNSTOFF: The question being presented here -- I think it is important that this be understood, too, is not

one of exclusive jurisdiction by the Respondents. We are talking about here about that gap in law enforcement that occurs when the only jurisdiction able to deal with misdemeanors on the Reservation is the Federal Government and the Federal Government I can tell you, and there is a history of this in the American Indian Policy Review Commission Report.

The Federal Government has not been able to deal with minor offenses on Indian Reservations for a very good reason. Indian Reservations are generally far from urban centers. I can tell you as attorney for the Tribe how difficult it is to get the F.B.I. to come out to an Indian Reservation to investigate something other than a major crime and the question is not one of, does this Tribe have jurisdiction and no one else?

The question is one of misdemeanor concurrent jurisdiction.

I think it is important to realize in the history of the cases since 1973 when this case started that there are almost no, if any, cases on any other Indian Reservations dealing with jurisdiction over non-Indians and I think it is an important question.

Many tribes, and the amicus briefs show this, are exercising such jurisdiction. Several tribes have had thousands of non-Indians before their courts and not one of them has filed a habeas corpus action.

I think that there is an alarmist attitude on the part of the Attorney General about what harms are going to be done. For the most part, the system has worked out quite well.

QUESTION: I thought constitutional rights were individual and did not depend on how many people exercised them.

MR. ERNSTOFF: Not at all. I am merely pointing out as a matter of policy to the Court --

QUESTION: So you agree with that?

MR. ERNSTOFF: I do agree with that. As a matter of policy for the Court --

QUESTION: Well, what do we have to do with policy?

MR. ERNSTOFF: Well, the Attorney General has raised the question of what I consider to be policy of in what way the misdemeanor jurisdiction should be decided and what is going to happen to the residents of these Reservations and I am merely countering that to show that in fact nothing serious has really happened to cause any federal court anywhere to come down on an Indian Tribe that is exercising that jurisdiction.

QUESTION: Do you think that somewhere in the federal law system that you find some authority for the Indian Tribe to exercise the jurisdiction that you claim they have?

MR. ERNSTOFF: Yes, I do, Your Honor.

QUESTION: Where do you find this?

MR. ERNSTOFF: Mr. Gorton attempted to say that this Court has never decided this issue before and the answer is yes, if you had, we would not be here today. But this Court has decided other cases that come close to the issue or deal with analytical matters that come under that issue. Let us take the United States versus Mazurie, decided two years ago.

Clearly, it was a delegation case, can the United States Government delegate the power of the liquor to an Indian Tribe? But Mr. Justice Rehnquist, in writing the opinion, does not really rely on the question of delegation because he notes that in order to delegate a power, the body that is receiving it has to have some sort of independent power over the matters at hand and in the United States versus Mazurie decided two years ago, this Court held that Indian Tribes are unique aggregations, possessing attributes of sovereignty over both their members and their territory and used that analysis to determine the fact the Tribe could decide whether or not the Mazuries, non-Indians on fee-patent land, could sell liquor.

I acknowledge it was a delegation case. It is a matter of federal prosecution. But the analysis is really the same. Do Indian Tribes possess these attributes of sovereignty over their members and their territory?

QUESTION: To say the Tribe possesses an attribute of sovereignty does not necessarily mean it possesses all

attributes of sovereignty.

MR. ERNSTOFF: That is correct. Most attributes, what we call real sovereignty, have been given up by Indian Tribes. There is no question about it. Indian Tribes cannot mint money. They cannot enter into treaties with other nations. But this Court has consistently held that there are powers that have not been taken away.

Let me give an example. If Mr. Gorton is right -- and you have got to look to some kind of federal statute to determine what powers the Tribe has got, Indian Tribes would not be able to point to one single treaty or statutory enactment which would justify the exercise of most of their powers including powers which this Court has upheld.

Morris versus Hitchcock is a pure case of this Court saying that even though the prosecution was federal because of the federal regulations involved --

QUESTION: I think what the Attorney General said, you either look to a statute or a treaty or a decision of this Court.

MR. ERNSTOFF: That is correct and I --

QUESTION: And you are now talking about decisions of this Court, are you not?

MR. ERNSTOFF: I am saying that in Morris versus Hitchcock in 1905 there was no previous decision of this Court.

QUESTION: Well, what is it? Is it just sort of a federal commonlaw which we are not -- if this Court holds that the Tribe has some residual sovereignty, what authority have we got to say that? Is this sort of a federal commonlaw?

MR. ERNSTOFF: It is the law of the cases of this Court. This Court has never -- let me give another example --

QUESTION: Not based on the Constitution or statute or --

MR. ERNSTOFF: It is based on the Constitution because the Constitution gave the United States Congress the power to enter into treaties with Indian Tribes so to the extent that those treaties recognize Indian Tribes as having been sovereign nations at one time, it is based, certainly, on both constitutional provisions and on treaties so --

QUESTION: Do you think that Indian Tribes, in exercising this power, are exercising part of the sovereignty of the United States as well as of the Indian Tribes?

MR. ERNSTOFF: I do not think so. I think Indian Tribes are exercising a sovereignty which is recognized and reaffirmed by the United States.

Last year you had a case here called Fisher versus District Court dealing with adoption. It involved Indians in Montana and this Court held that the Tribe, in fact, had jurisdiction over that adoption.

Now, nowhere could anyone point to any statute,

treaty or enactment which gave the Northern Cheyenne Tribe jurisdiction over adoption. What this Court said was that the Indian Reorganization Act of 1934 -- which by the way, does not at all give any powers to Indian Tribes, it merely recognizes powers, was sufficient, a sort of a peg upon which to hang your hat and this Court did not point to any statutory enactment which actually gave that power to the Tribe.

QUESTION: So your piggy-back argument is that where we once do something without power, we are therefore authorized to continue to act without power.

MR. ERNSTOFF: When we say "we are," do you mean the Tribe or --?

QUESTION: The Supreme Court of the United States.

MR. ERNSTOFF: I am not saying that. I am saying --

QUESTION: Is that what you are arguing?

MR. ERNSTOFF: I am arguing that the Court's analysis under those cases that Indian Tribes must retain whatever it was they were except that which was expressly taken away by Congress, by treaty, or, in the analysis of this Court, has to be viable because if it is not, then Indian Tribes really possess almost no power.

QUESTION: And you also admit that there is no decision of this Court that says that an Indian Tribe has authority to punish a misdemeanant who is not an Indian.

MR. ERNSTOFF: There is no question that there is

no decision of this Court on that.

QUESTION: So you do want us to extend, do you not?

MR. ERNSTOFF: I do, Your Honor; if there had been a decision of the Court we would not be here today.

QUESTION: Well, if you keep on arguing that we did not have power to do what we did, how can you keep on arguing that we have power to do more?

MR. ERNSTOFF: What I am saying is is that your analysis, which was correct, that one does not have to look for an express treaty or statutory enactment in order to find that an Indian Tribe has the power, that is the correct analysis that this Court has used over the years.

QUESTION: Well, what do you have -- what do you point to?

MR. ERNSTOFF: I point to Mazurie which talks about Tribes having independent authority to some extent over these matters.

QUESTION: What do you point to other than an opinion of this Court?

MR. ERNSTOFF: It is impossible to point --

QUESTION: Then actually, you do not have anything.

MR. ERNSTOFF: The answer is that Congress has never --

QUESTION: The answer is, you do not have anything.

MR. ERNSTOFF: That is correct because, Your

Honor, it is very difficult to prove a negative. Congress has never enacted a statute giving a Tribe power and this Court has recognized the power, how can I point to a statute which gave the Tribe that power? All I can point to is this Court's analysis of the fact that one does not need a statute or a treaty in order to determine that there is a power.

Take a look at Williams versus Lee. Williams versus Lee in 1959, this Court said that a non-Indian must go to Tribal Court for a civil matter in order to have a judgment entered for him to be able to benefit from a debt that was owed to him and the Court said, in Williams versus Lee, "It is immaterial that Respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there."

And that was the reason for this Court's decision.

Now, nowhere can anyone point to any statutory enactment which says that tribal courts have --

QUESTION: Can anyone point to a constitutional provision that says there is difference between civil and c riminal?

MR. ERNSTOFF: I agree, Your Honor. Again, if this case had been decided in Williams versus Lee, we would not be here. All I can do is rely on this Court's analysis previously and it should not just --

QUESTION: Mr. Ernstoff, could I ask you a

question about your basic theory, about where the jurisdiction all comes from? Supposing we had the case arising in 1850, after the Treaty with Great Britain and before the Treaty of Port Elliott. Would you say that at that time if an American scout wandered onto tribal lands that the Tribe would have had jurisdiction in the sense we are talking about to try that person and that the American courts would recognize that jurisdiction at that time?

MR. ERNSTOFF: I believe so, Your Honor.

QUESTION: That is critical to your case, is it not?

MR. ERNSTOFF: Yes, it is. As a matter of fact, I think it is important to point out the time and period of the treaty negotiation with the Point Elliott Tribes, of which Suquamish is one. It is very important.

A draft treaty was prepared in 1854 by the local Commissioner of Indian Affairs, the Governor of the Washington Territory, Isaac Stevens.

In that treaty was a specific provision which said, the Tribe will give up jurisdiction, criminal jurisdiction over non-Indians and will have criminal jurisdiction only over its own members -- a specific provision. This is in the brief.

That language was written by the attorney who was the Secretary of the Treaty Commission on December 10, 1854.

Six weeks later, on January 22nd, 1855, the Point

Elliott Treaty was signed. The only provision of a 15-section draft treaty which had been written for the purpose of negotiation, the only provision that does not find its way into the Point Elliott Treaty are those express words, that the Tribe will give up, non-Indians will not have jurisdiction over non-Indians and will turn them over to the United States for prosecution.

Every other provision of the draft treaty is in there. There are even provisions which were part of the Article in which this language appears which find their way into the treaty. It is the only provision that is not in the treaty. Certainly, I cannot tell you. I was not there. We do not have notes. I can't tell you that the Indians were clever enough in 1855 to negotiate a waive act because they knew what trouble it would bring them but some conclusion must be drawn from the fact that the Commissioners at that time -- and this is 20 years after the passage of the 1834 Trade and Intercourse Act, felt it necessary to negotiate and to put into a treaty a provision terminating jurisdiction which Mr. Gorton says had been terminated 20 years before, in 1834.

QUESTION: Well, what we have here, however, is not the 1834 Act but the Amendment of 1854 which predated the conclusion of this treaty.

MR. ERNSTOFF: That is correct.

QUESTION: And that 1854 statute said that the

United States should have federal criminal jurisdiction within any Indian Reservation with three exceptions and the third exception, which is the only one applicable here, is any case where by treaty stipulation the exclusive jurisdiction over such offenses is or may be secured by the Indian Tribes respectively.

MR. ERNSTOFF: Yes, Your Honor.

QUESTION: And certainly the negotiators for the United States of America knew of the enactment of that statute in 1854 when they concluded this treaty in 1855 and they realized that in the absence of stipulations to the contrary, the Tribe, under the 1854 Act, simply would not have criminal jurisdiction over the non-Indians. Is that not the reason that that original provision was deleted because it was not necessary from the point of view of the United States?

MR. ERNSTOFF: No, I do not believe so, Your Honor, because one has to remember, again, we are examining a period in time of which we have little record but it was well after the 1854 enactment that the Secretaries of the Commission, before they actually went out on this trip to negotiate treaties, put a provision in, not that gave the tribe exclusive jurisdiction but that took it away.

After the 1854 Act, it was not necessary to take away tribal jurisdiction over non-Indians had the 1854 enactment actually done that.

QUESTION: There had to be treaty stipulation to the contrary. Otherwise, the statute took it away.

MR. ERNSTOFF: That is exactly correct and there are no treaty -- I do not take the position, by the way, that we are talking about the third exception. It is our position -- the Government may have had a different position but it is our position that the Federal Government, in fact, would have had jurisdiction over these offenses, over both Oliphant and Belgarde. The only question is, concurrently, can the Tribe claim jurisdiction? And, as it occurred in the facts of this situation, employ that jurisdiction when there is no one else around to do it?

You are dealing with a situation where both offenses occurred in the middle of the night. You are dealing with a situation in which the county and the Federal Government were asked to provide law enforcement assistance during the tribal celebration in the Oliphant case and the county gave one deputy for an eight-hour period and the Federal Government provided no one.

Had the tribal police not effected this arrest, had the Tribe not prosecuted it, both Oliphant and Belgarde would have gone unpunished.

In the Belgarde case it is even worse because the tribal police, basically under my instructions at the time, attempted to -- not to act in a matter which might bring about

a court case and the tribal police called the State Patrol and the County Sheriff and asked them to come, that they had now made an arrest of a person who was intoxicated and speeding through town.

They came. They said, "Well, this is a misdemeanor. We did not observe it and so therefore we won't prosecute." This is in the record. And so you have a situation, it is the perfect situation. The facts really show the law in this case.

Had that Tribe not been able to make that arrest, to make that prosecution, who knows what destruction would have occurred on that night, particularly in the Belgarde case where you are talking about an individual in a truck, speeding and probably highly intoxicated.

So the answer to the question is, no, we are not claiming exclusive jurisdiction. I can tell you that the U.S. Attorney and the federal courts had really not much desire to get involved in either the Oliphant or the Belgarde cases in terms of a prosecution. They are relatively minor offenses. They were two young kids and they were making some trouble.

If the Tribe cannot do that, particularly when the other side of the offense is tribal police, tribal property, tribal dignity and breech of the peace, not just for Indians but for non-Indians -- if the Tribe cannot do that, what is left to them of this homeland that has been created for them?

QUESTION: How about the state?

MR. ERNSTOFF: The state on the Oliphant case was on trustland.

QUESTION: Okay, so what about representing the state?

MR. ERNSTOFF: So under our strange partial jurisdiction statute, there would be no jurisdiction over Oliphant.

In the Belgarde case, but for the Yakima case, which the Court has already acknowledged --

QUESTION: Right.

MR. ERNSTOFF: -- the state might also have jurisdiction but in this case they refused to do anything about it even though at the time the Yakima case had not been decided. What you find especially --

QUESTION: What happens if the state refuses to prosecute a felony? What can the Tribe do?

N-O-T-H-I-N-G.

MR. ERNSTOFF: That is correct.

QUESTION: Well, now, why are you saying it is so difficult with a misdemeanor? If the refusal to act in a felony would be much more devastating if a man was running around shooting people.

MR. ERNSTOFF: That is correct, Your Honor, but we have never had the problem. The state, I think, is certainly responsible and the county certainly would not let a felony

go unpunished. When you are talking about minor offenses, mostly which affect the Tribe, not the County and in which the land involved, for the most part, is non-taxable land, the county is getting no income from it --

QUESTION: Was this man driving down the road aiming at Indians only? How could he tell them?

MR. ERNSTOFF: Sir? He was aiming at everyone.

QUESTION: Oh, I thought so.

MR. ERNSTOFF: He was aiming at everyone.

QUESTION: But he did hit --

MR. ERNSTOFF: He happened to pick the Indian and he hit the Indian but he was aiming at everyone and that is the very question: Why was not the county interested enough to get involved and to prosecute?

As I said, on my advice, the Tribe was not going to prosecute until it became a matter of assault on the dignity of the Tribe, that everyone in the community would look and know that you can violate the law on the Reservation and there would be no retribution whatsoever, no kind of punishment.

QUESTION: Mr. Ernstoff, is there any way of distinguishing your case from a civil jurisdiction of the Tribe so that the Court could, in a principal way, say there was criminal jurisdiction here but not civil jurisdiction?

MR. ERNSTOFF: That is a very interesting question, Your Honor. I really do not know that they can, to be honest

with you, I have been trying to do that because I thought it would be of benefit to me to come in with the most narrow case that I can possibly come in with.

To be intellectually honest, I do not think you really can and I do not think that you should.

Let me give an example, if I may. Take the Northern Cheyenne Tribe in Montana which has much more trust land, 3,000 Indians, almost no non-Indians. Coal is about to be developed on that Reservation. It is going to bring an influx of 25,000 non-Indians, probably, to develop that coal. The county seat is at least 60 to 70 but perhaps over 100 miles away. Billings is about 150 miles away.

Now, you picture what it is going to do to that Reservation when 25,000 non-Indian workers can come onto a [sic] Reservation of three Indians, a half-million acres and get involved in the kinds of things that people get involved in and the Tribe is powerless to act.

So while the Port Madison case, we admit is -- the Tribe is still there. It has always been recognized. It has never been terminated, disestablished, there is no agreement or statute doing that.

The principle of law, though, whether it be civil regulation or criminal regulation can be better seen in a situation like that.

Tribes have not done this before. There is no

question about this. The dissent in the Ninth Circuit in Oliphant makes it very clear that its position is, if this is all true, why did it not happen earlier?

And there are several answers. One is that until 1968, you had no remedy. I think the Court has already pointed that out. Talton versus Mayes said you had no constitutional rights.

And the second reason, and perhaps the more important reason is that until the 1960's, Indian Tribes depended upon the Federal Government. This Court said in Mancari versus Norton, just two years ago, it talked about the paternalistic attitude of the Federal Government and the fact that Indian interests basically suffered because the Federal Government said to Indians, "We'll take care of you."

Well, the American Indian Policy Review Commission Report and other things that this Court can take note of, shows how the Federal Government took care of the Indians and the concept of self-determination basically is a concept that tribes have been operating on over the last ten years and that is, the Federal Government is not going to do it for us. We are going to have to do it ourselves.

And Congress has recognized this. You know that the Suquamish Tribe is the recipient of all revenue-sharing funds for the entire Reservation so any programs that they have, have to be for all members of the Reservation.

The Suquamish Tribe is the recipient --

QUESTION: Well, what do you mean, "members of the Reservation"? There is no such thing. They are either members of the Tribe or residents on the Reservation.

MR. ERNSTOFF: That is right, Your Honor. Of all residents of the Reservation. In other words, the formula that is used for determining how much money the Tribe will get by the Federal Government by Congress is the number of residents of the Reservation, not the number of Indians.

QUESTION: And then where does that money go?

MR. ERNSTOFF: That then goes to the Tribe which then has to account for it in terms of the programs that revenue-sharing monies are used for.

QUESTION: And what are the programs?

MR. ERNSTOFF: The kinds of programs that are involved are first of all, a good deal of the money is used for law enforcement because that is the major problem there. There is money used for social services, for social workers.

QUESTION: By the Tribe.

MR. ERNSTOFF: By the Tribe because that is considered by the Federal Government as the local government of the Reservation.

QUESTION: When they get money based on the number of people on the Reservation --

MR. ERNSTOFF: That is correct.

QUESTION: -- money goes to the Tribe and to the tribal uses and that is just --

MR. ERNSTOFF: For the tribal use for all Indians of the Reservation. Law enforcement on the Reservation, the tribal police officers -- and there are ten, not three -- the tribal police officers and the three tribal police cars go through the entire Reservation.

They do not stop -- and this Court pointed out, for instance, in Moe and in Seymour versus Superintendent the problems of trying to use a tract book in going through an Indian Reservation to determine whether or not you are on trust land or fee land.

Think of how much work it would be if they had to get out genealogical charts at the same time and before they made an arrest, they had to look and see, first of all, is it fee or trust land? Secondly, is it a member of the Tribe or not? They cannot even rely on the fact that it is an Indian because an Indian on a Reservation --

QUESTION: May I ask again, that applies to felonies, too?

MR. ERNSTOFF: The situation would apply to felonies, too, but the Tribe --

QUESTION: I Do not see how you make these arguments when you realize that.

MR. ERNSTOFF: The situation would apply to

felonies, also. But as to felonies, the Tribe basically has not been involved in any kind of prosecution. The Tribe has allowed and would hope that the Federal Government and the state would take that over.

The point I am making is that the law would apply and that is why, very quickly, to deal with the Fifteenth Amendment question, that is why it is an irrelevant question.

Indianess is not a racial classification. This Court has already decided that in Mancari versus Norton. Indianess is a political status.

A man can be barely an Indian in terms of his blood and be a member of the Tribe and therefore come under the definition of Indian at at the same time, another man can be a whole-blood Indian but a member of a different Tribe and he would be in the same status as the non-Indian resident of the Reservation.

Let's make that very clear. We are talking about a political status and not a racial classification.

I believe that if this Court were to examine the authorities that are in our brief -- and it is a very complicated issue. I acknowledge that. It is one that has never been decided by the Court before or we would not be here and if the Court were to take its own analyses in related areas and, more important, if the Court were to take a look at something like the American Indian Policy Review Commission Report,

the Court would see that without this kind of jurisdiction, Indian Reservations, already a very difficult place to live for an Indian, Indian Reservations are going to be even more difficult for an Indian to live on and for an Indian Tribe to be able to accomplish anything.

QUESTION: And an even more difficult place to live for a non-Indian, if you are right.

MR. ERNSTOFF: That, Your Honor, would depend on the supposition that non-Indians would not receive justice in Indian tribal courts and I would venture to say that the justice that is given out in Indian tribal courts is equal to or surpasses the justice given out in most J.O.P. courts -- Justice of the Peace Courts -- throughout this country.

I am talking about for the most part, minor offenses, misdemeanors. I would venture to say that any non-Indian who felt he was not getting --

QUESTION: And you are citing what? to back that up, other than your head?

MR. ERNSTOFF: That is correct, Your Honor, I cannot find anything --

QUESTION: I cannot use that.

MR. ERNSTOFF: I cannot cite anything -- but I can cite the American Policy Review Commission Report which I think the Court should address itself to because that is what says what the situation is.

I think that the non-Indians have available to them the Indian Civil Rights Act and I think that the law will develop -- we have suggested, for instance, in our brief, the concept of a tribal subject matter interest test for this Court to establish, which is really what you have been using, where the Tribe has an interest and can show it; where it is not totally unrelated to the Tribe, then the Tribe will have jurisdiction and we have used, for instance, the long-arm jurisdiction kinds of cases of this Court.

We have used the taxing of foreign corporations cases. We have used the cases that talk about when the state can get involved in interstate commerce, cases that show that this Court is concerned about a local government having sufficient authority to be able to maintain peace, dignity and law within their area.

Thank you, Your Honor.

QUESTION: Mr. Ernstoff, before you sit down, am I correct, did your firm, in addition to the Respondents' brief also file a brief amicus?

MR. ERNSTOFF: We represent a number of tribes and two Tribes, clients of ours, requested that we file an amicus brief on the issue only of Public Law 280 jurisdictions.

QUESTION: So you get a one-two punch.

MR. ERNSTOFF: Well, we could have put it in our original brief, Your Honor but the United States had informed

us that they were going to request that matter not be heard as part of this case since it is an ancillary issue. It was never decided by the Ninth Circuit in this case and we felt rather than burden the Court with a very long brief, that it made more sense to incorporate by reference an amicus brief which set out the arguments should the Court want to hear them.

QUESTION: Do you often file amicus briefs in cases in which you are counsel for one of the primary parties?

MR. ERNSTOFF: We have done that once before in this Court, Your Honor.

QUESTION: Which case was that?

MR. ERNSTOFF: Tenacio versus State of Washington. A number of tribes filed amicus briefs on issues which were ancillary to the basic issue. We feel that our clients certainly have a right to be represented and even though we happen to be counsel for both sides.

And I did not write the amicus brief, Your Honor, that was submitted.

QUESTION: Yes, but your firm has done it and you are a partner in the firm.

MR. ERNSTOFF: That is correct, Your Honor. I did not know that it was improper and if it is, we certainly would not do it again. We really were trying to relieve the Court of the burden of a very long brief on what are really two separate issues, one of which has been briefed very thoroughly

in another case.

QUESTION: Mr. Ernstoff, there is no conflict between the position of your client and the position of the amicus?

MR. ERNSTOFF: No, it is the exact same position, Your Honor. We incorporate it by reference in our brief. Again, it is a long drawn-out explanation of something which we felt the Court might want to refer to but not have in front of it at all times.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Farr.

ORAL ARGUMENT OF H. BARTOW FARR, III, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. FARR: Mr. Chief Justice and may it please the Court:

Because the issues in this case are numerous and difficult and because of the extensive briefing on all sides, I would like at the outset to make clear what the position of the United States is and is not.

First, at the heart of our submission and directly opposed to the position taken by Petitioners in the State of Washington, is the priciple that the Indian Tribes do not depend upon the United States for the creation of their powers of government. These powers instead are derived from an inherent sovereignty that antedates the European settlement

of the United States and, indeed, the formation of the United States itself.

Now, in the questioning earlier in this case, it has been asked whether, in fact, we depend on particular federal statutes or treaties to establish that power.

QUESTION: Or the Constitution.

MR. FARR: Or the Constitution of the United States itself. We do not depend on those. We believe that the sovereignty antedates all of that and in fact, the reason that Congress did not pass statutes, for example, creating the sovereignty of the Tribes.

QUESTION: And you suggest we should just assume to recognize that?

MR. FARR: I believe that the Court has recognized it before and should again, yes, sir.

QUESTION: Well, even if we buy that position one hundred percent, the question would still remain whether or not that historic sovereignty included the power to try and convict non-tribal members of criminal offenses in violation of tribal law and certainly historically, before the white man got here, it did not, by hypothesis.

MR. FARR: Before the white man -- all right, before there were anybody but Indians, it had to cover only Indians itself.

QUESTION: Right.

MR. FARR: However, we believe that even when the white settlers did get here that the sovereignty of the Indian Tribes -- who at that time, of course, were dealing by treaty with the settlement nations, were occasionally at war with them, did extend far enough at least to protect themselves against intrusions by whites for crimes against the Tribe itself or against its members and that that sovereignty continues now.

QUESTION: Do you think that that was changed at all by the first sentence of the First Amendment of the Fourteenth Amendment that reads, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside"?

MR. FARR: No, I do not.

QUESTION: You think that there is no negative implication of ruling out other sovereignties than the United States or the state in that?

MR. FARR: I think in terms of pure sovereignties, which is the point I am going to discuss in just a moment, that this Court has recognized and the Fourteenth Amendment recognizes that there are principally the Federal Government and the states. There are two sovereignties.

However, the fact that the sovereignty of the Indians is not a full sovereignty to the extent that the

Federal Government possesses sovereignty or the states possess sovereignty does not seem to me to settle the question of whether the sovereignty that they have is so thin that it does not cover this type of thing.

QUESTION: Well, it leaves it open, does it not? I mean, you concede that it is not a full sovereignty -- as indeed, you must.

MR. FARR: We do concede that it is not a full sovereignty.

QUESTION: And the question is, then does it include, as I say, the power to try and convict and punish either non-members of the Tribe or non-Indians?

MR. FARR: That is right. I mean, I think that that is a question which the Court has to decide in this case.

QUESTION: And you begin by concluding that it is not full, so the --

MR. FARR: We can see that it is not full. We recognize, as Chief Justice Marshall said away back in Worcester versus Georgia, that the Indian Tribes, are, to the extent that they are sovereignties, dependent sovereignties and that they are dependent upon the Federal Government, at least if not to create their powers, not to take them away.

History and nearly two centuries of legal authority demonstrate that the Tribe's sovereignty is subject to the greater sovereignty of the United States and in the exercise

of its own sovereignty, the United States has established a special relationship toward and a unique responsibility to the Indians in the United States but we do agree with Petitioners, Mr. Justice Stewart, that tribal sovereignty can be and in many respects, has been circumscribed by the United States so to that extent it is not a full sovereignty.

QUESTION: Well, and also, it did not begin as full sovereignty, did it?

MR. FARR: Well, I think it did begin as a full --

QUESTION: Not a territorial sovereignty, did it?

MR. FARR: Well, it did not begin --

QUESTION: Was that not a concept wholly alien to Indian Tribes, the concept of territorial sovereignty? They were by -- even those that were not nomadic did not stay right within the meets and bounds of what is now a Reservation because there were no such things. Is that not correct?

MR. FARR: That is correct, Mr. Justice Stewart.

At the time before there was any Indian settlement --

QUESTION: It was tribal self-government but it was not territorial sovereignty was it? Ever?

MR. FARR: Well, in the beginning it was certainly tribal self-government because, as you posit, they did not have a sophisticated concept of land ownership and there was not anybody else to govern. It was just them.

QUESTION: Or territorial sovereignty itself.

MR. FARR: But that is because they did not view territories belonging to particular individual tribes -- that is a concept to which the European settlers quickly educated them.

QUESTION: Correct.

MR. FARR: And it is not clear to me that that means that once they developed that understanding that their sovereignty, because it did not depend on it at the outset, was not sufficient to cover it when it was developed.

QUESTION: Mr. Farr, you said they did not have a sophisticated concept of land ownership.

QUESTION: They did not have any.

QUESTION: Did the United States recognize any land ownership rights to the Indians, other than those granted by treaty?

QUESTION: None.

MR. FARR: Well, no, they did not. I think one of the first sovereign rights that they lost, to the extent that they would have been inclined to assert it at all, was the right to own land as against the sovereignty of the United States.

QUESTION: And how did they lose that right?

MR. FARR: I think that that is an essential part of living within the jurisdiction of a sovereign on which you are dependent.

QUESTION: Was it not essentially by virtue of the United States exercising total jurisdiction over the territory that their, what would ordinarily be a sovereign right, simply was assumed not to exist?

MR. FARR: I think necessarily it must. I mean, clearly the Indian Tribes --

QUESTION Why does not the same argument apply to the criminal jurisdiction over non-Indians? By the same analysis.

MR. FARR: Because I do not think by necessary implication that it is inconsistent with the right of the United States to assert their own criminal jurisdiction to assert that the Tribes can also have criminal jurisdiction, whereas I do think that it is inconsistent necessarily with the position of the United States as a sovereign over its lands to say that the Indians could contract or make treaties with foreign countries, could lease out their lands for a naval base of a foreign country so I do not think there is a necessary inconsistency in this case.

As the result of these positions, we do believe it is necessary, in order to resolve these cases, to examine -- as the Court unsually has to do in Indian cases -- the relevant statutes and treaties in accordance with the principles of sovereignties just discussed.

At the same time we ask that the Court keep in mind

established rules of statutory construction that again are repeated in all Indian cases, that where the statutes and treaties are ambiguous, that they should not be construed to the Indians' detriment.

Now, with regard to the present cases, the particular treaty provision at issue is the Treaty of Point Elliott and the particular statute, in our opinion, is 18 U.S.C. 1152 which comes at the end of a long line of similar statutes.

Now, we find in that treaty, in that statute, no clear expression of Congressional intent to cut off tribal jurisdiction entirely in every instance where non-Indians have committed a crime.

At best, we can find some provisions that seem ambiguous, that are suspect, that can be interpreted, as Petitioners and the State of Washington have done, to support one conclusion or the other but we find no clear statement such as we think is required by the principles of statutory construction that this Court has laid down.

QUESTION: Well, when you say there is no intention to cut it off, you have to, first of all, have convinced yourself and us that it existed beforehand.

MR. FARR: That is correct.

QUESTION: And nothing you have said so far has indicated that to me.

MR. FARR: Well, I have, as I suppose, given my

best shot. I mean, I think that the case -- the authorities we cite in our brief and the position we take is apparent there and I believe that that sovereignty exists and it does cover that point.

QUESTION: Well, there was limited sovereignty but there is no case in this Court where that sovereignty included the power, was there, to try and punish for a criminal offense, a non-Indian?

MR. FARR: The Court has not said that.

QUESTION: Right.

MR. FARR: That is true, but if that sovereignty does not exist to some extent, it is difficult to explain to begin with, where the Indians get the sovereignty over their own members. That has not been conferred by anything in particular.

QUESTION: Well, that is tribal.

QUESTION: They could all get together and vote it.

MR. FARR: Well, they have, in fact, done that in many cases.

QUESTION: Well, some bands. But this band petitioned in this case that they were not allowed to vote on it.

MR. FARR: But the Court has said that they are not in the situation of a private club. The opinion of the Court in Mazurie said that, that they are something far more than that and that they have a unique position which is not that of

a group of people who banded together.

QUESTION: Well, my point is, you said there was no way for the Tribe to do it and I said, the Tribe can pass its own laws. That is what I am getting at.

MR. FARR: I assume that they could form a voluntary association if they --

QUESTION: Like a Moose Lodge.

QUESTION: No, no, I am saying that the Tribe in its private council votes its own laws -- do they not?

MR. FARR: They do now and I believe they do so in the exercise of their sovereignty. I believe they probably could do so, at least to govern themselves by a voluntary organization.

Fourth, and just completing our submission on this general point, we do not believe that Public Law 280 constitutes a bar to assertion of tribal jurisdiction in this case.

Now, we have discussed this briefly in our brief here and we have also alluded to it in our Amicus memorandum in the Yakima Nation case which we filed late last week.

Although we recognize that Congress, in Public Law 280, has extended to the rights the opportunity to assert jurisdiction over the Indian Tribes, we do not believe that the assertion by the State of Washington is valid and therefore it would not reach to this case.

Now, in the few moments remaining I would just like

to say a brief word about the practical effects of Indian jurisdiction. Although we do not underestimate the possible difficulties, we do not believe that the result will be the catastrophe that the Petitioners in the State of Washington seem to predict.

We do not believe it is an extraordinary notion that Indians would have a right to protect themselves against crimes committed by other persons --

QUESTION: Mr. Farr, could I ask you --

MR. FARR: Yes, Mr. Justice.

QUESTION: -- why does not Indian sovereignty, the tribal sovereignty, extend to the prosecution of felonies?

MR. FARR: It does not extend to the prosecution of felonies at this time because the Indian Civil Rights Act has limited the punishment which the Indian Tribes can mete out to six months.

QUESTION: So you are saying there is a federal statute which cuts back the sovereignty?

MR. FARR: There is a federal statute that cuts back --

QUESTION: Without a federal statute that reads on prosecutions for felony, are the limits of punishment the Tribe would have the --

MR. FARR: I think encompassed within the notion of tribal sovereignty is the fact that if a non-Indian came on

the Reservation and killed an Indian that they could have tried him if the Federal Government had not taken that away.

QUESTION: Or killed a non-Indian.

QUESTION: Or killed a non-Indian, on the Reservation.

MR. FARR: Had killed a non-Indian, then McBratney and those cases put exclusive jurisdiction in the state under terms of the Enabling Act and that doctrine so it would be necessarily their interest would be implicated by the killing of an Indian.

QUESTION: So that in the killing of a non-Indian, the tribal sovereignty that existed has been taken away? You would say.

MR. FARR: In the killing of the non-Indian, the tribal sovereignty -- to the extent that it existed there is an open question and that is as to whether Indian interests are sufficiently connected to that.

QUESTION: Right. Under McBratney.

MR. FARR: Right. To justify an assertion of sovereignty involved but to the extent that there was any sovereignty, it has been taken away; that is correct.

QUESTION: But your position is confined to situations where there is a tribal interest?

MR. FARR: Right. We do believe that there must be a tribal interest. We are not saying --

QUESTION: There were two charges against Belgarde, as I recall. One was for speeding or reckless driving and the other was for damaging Indian property.

MR. FARR: That is correct.

QUESTION: If there had only been the first charge, would the Indian courts have had jurisdiction?

MR. FARR: I believe, as I read the facts in this case, that they would have, that speeding through an Indian Reservation is --

QUESTION: Well, suppose Belgarde, instead of being driving had just mugged another non-Indian on the Reservation?

MR. FARR: I believe that would be covered by McBratney, Mr. Justice Powell and the state would have jurisdiction of that crime.

QUESTION: Unless he would prefer to precipitate a riot.

MR. FARR: It is possible -- this is questionable ground that I am getting into but it is possible that if a crime by a non-Indian against a non-Indian sufficiently endangered tribal interests, that there might be some way for the Tribe to assert jurisdiction but I think in the normal case McBratney leaves that to the states.

QUESTION: If I may ask just one other question, putting aside all the statutes for a moment and going back to what the Tribe retained as its original concept of

sovereignty, if I understand your position correctly, you do not contend that they originally retained the power to try for major crimes.

MR. FARR: No, I believe that our position is not that. I believe originally that they did have the power to try for major crimes if they had the sovereign power to protect themselves and their members from anything.

QUESTION: How did they lose the power to try non-Indians for major crimes?

MR. FARR: They lost that in the Indian Civil Rights Act.

QUESTION: Until 1968 they possessed that power?

MR. FARR: That is right. Now, there is no question that that power was ignored.

QUESTION: They never exercised it, though.

MR. FARR. That is right.

QUESTION: Subject to the Major Crimes Act.

MR. FARR: The Major Crimes Act covering Indians, yes.

QUESTION: That is correct. And the Indian Civil Rights Act did not take away from them the power to punish for major crimes, it just said you cannot sentence a person convicted of first degree murder for more than six months.

MR. FARR: That is correct. It defines it in terms of punishment and not the actual crime but I think that both

as a practical matter that that will more or less disable them.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General, you have about six minutes left.

REBUTTAL ARGUMENT OF

SLADE GORTON, ATTORNEY GENERAL OF WASHINGTON

GENERAL GORTON: Mr. Chief Justice and may it please the Court:

I trust that you have noted how extraordinary that presentation of the United States is, that until 1968 this Indian Tribe could have hung a non-Indian for burglary but without offering him any constitutional rights whatsoever.

I think I do want to speak very briefly on the technically not-quite relevant facts about whether this --

QUESTION: Well, Mr. Gorton, before 1968, the State of Washington could have hung an Indian or a white man without offering him any constitutional rights at all, could it not? There was no Fourteenth Amendment.

GENERAL GORTON: Before 1968?

QUESTION: Yes.

GENERAL GORTON: That may be correct. There was at least a Constitution under those circumstances for the state and during those years pre-1968 this Tribe had no Constitution, either. There were not even Indian constitutional rights but they are claiming, the United States' submission is that

Indian jurisdiction or, rather, yes, that the Indian tribal jurisdiction on this Reservation over non-Indians, except under the McBratney Exception, was plenary and was not derived from the Constitution. It was not subject to constitutional guarantees.

Here, the Respondent has constantly made the point of what a terrible situation will exist as far as the enforcement of the law on this Reservation is concerned unless they are allowed to try these cases.

They fail to tell you that they have objected vociferously and consistently to any exercise of state jurisdiction under Public Law 280. At this point, unless you hear an appeal on it, they have successfully objected to that jurisdiction.

On the one hand they are saying the state should come and enforce its laws on the Reservation and on the other, when we try to do so, they are saying that you can't come and enforce your law on the Reservation.

The cure to that situation is extraordinarily simple. Even if they are correct in their position on Public Law 280, the Indian Civil Rights Act gives them the power to ask the state to take jurisdiction, total or limited, on that Reservation.

Our state has already deputized other tribal police officers on Reservations such as the Yakima who have the

authority to make arrests for the violation of state laws. Therefore, they do not need a genealogical chart in order to --

QUESTION: Does the 280 question -- that question relates to Indians and non-Indians alike, I take it.

GENERAL GORTON: Yes. No, that question relates primarily to jurisdiction over Indians. Now --

QUESTION: I take it now you do not say now that the Indian Tribe does not have power to try Indians?

GENERAL GORTON: I do not.

QUESTION: But do you say the state does?

GENERAL GORTON: I am sorry?

QUESTION: Do you say the state has concurrent power to try Indians?

GENERAL GORTON: Whether the state power has concurrent power to try Indians depends on the validity of Public Law 280. That is a separate case which we have asked --

QUESTION: That question is raised in the Yakima case.

GENERAL GORTON: Yes, that is in the Yakima case.

QUESTION: And now in the Ninth Circuit decision --

GENERAL GORTON: We do not.

QUESTION: -- you do not.

GENERAL GORTON: That is quite correct.

Finally, to state the proposition that the state

and local authorities have no interest in providing law enforcement authority for 3,000 of their own voting citizens on this Reservation -- or perhaps for 25,000 potential voting citizens on a Reservation someplace in Montana is nonsense.

Of course the county has exactly the same interest in the enforcement of the law in this area as it does in any other area in that county.

Mr. Justice Stevens asked a question of counsel as to the situation of the Indian scount in 1950 after the Oregon Territory Act but before any Indian treaties were signed.

Mr. Justice Stevens, I believe, could have asked a much broader question and received the same answer.

Now, under the submission of the Tribes, the Indians would have had the right to seek out that scout at any place in the Oregon Territory and tried him for any asserted violation of this code whatsoever because of this doctrine of retained sovereignty.

We say there are at least two grounds under which the answer is no to that question.

The Indians simply did not retain that sovereignty under the way in which sovereignty is considered by the United States. As of 1846, by the time of the completion of the Treaty with Great Britain, the sovereignty of the United States over that territory, of the United States was total.

When the United States, in the Oregon Treaty

Statute, sought to preserve rights of Indians, it did not talk about some kind of retained sovereignty, it said that we will not take away their rights, their personal or property rights except by treaty.

Again I say, it is absurd to think that the United States blithely left all of the settlers who were moving into that territory to the plenary jurisdiction of the Indians under those circumstances until they could reduce them -- but reduce them geographically only -- to a set of Reservations. That simply is not consistent with the history of the United States.

Thank you very much.

QUESTION: May I ask you, Mr. Attorney General, is the Suquamish Reservation part of the historic area in which the Tribe lived or is it different?

GENERAL GORTON: The answer to that question is clearly no because the Suquamish Tribe did not exist --

QUESTION: Right.

GENERAL GORTON: -- until Governor Stevens came out there and organized it as a political unit in order to sign a treaty with it.

QUESTION: So that the area -- the Reservation area is one --

GENERAL GORTON: Arbitrarily selected by Governor Stevens.

QUESTION: And it is not one as to which the Tribe had any Indian title originally?

GENERAL GORTON: Well, there was no Tribe before Governor Stevens created it in order to sign this treaty. The particular -- some of the particular Indians who were later denominated Suquamish may very well have lived in this area.

QUESTION: That is what I want to know. Did they live in this area?

GENERAL GORTON: They may have. It is very difficult to tell at this point.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 11:39 o'clock p.m., the case was submitted.]