

**The Changing Nature Of Federal Indian Law in the Federal Courts:
Why Scholarly Research on Tribal Institutions is Increasingly Important**

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- Over the past few decades, the Supreme Court of the United States, and to a lesser extent the lower federal courts, have become increasingly reluctant to adhere to longstanding principles of federal Indian law when those principles would require the federal courts to defer to tribal institutions.
- For example, as explained in Felix Cohen's classic *Handbook of Federal Indian Law*, published in the 1940's, a basic principle of federal Indian law is that tribes retain inherent sovereignty over their reservations unless the tribe in question has ceded away the authority by treaty or Congress has taken away that authority in a federal statute. Accordingly, it should be the case that tribes have criminal jurisdiction over all persons found on the reservation, because Congress has never enacted a statute eliminating that authority and tribes have generally not ceded away that authority by treaty.
- Yet in 1978, in the infamous case of *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that tribes do not have the authority to prosecute criminals who are non-Indians.
- There are many other cases like this as well.
- Why has the Supreme Court, and lower federal courts acting by example, been unwilling to accord tribes full sovereignty, subject to congressional control? We believe that a large component of this is because of a lack of knowledge by the Justices about, and a corresponding distrust of, tribal institutions.
- In *Oliphant* and later cases, it is clear that the Supreme Court Justices simply do not trust tribal courts to impose criminal penalties upon nonmembers. But it is equally clear that this distrust is not based on any knowledge or appreciation of tribal courts. It is a fear of the unknown. One must understand that, for example, on today's Supreme Court, it is likely that only a couple of the current Justices have ever even been on an Indian reservation once in their lives.
- The denial of full criminal jurisdiction to Indian tribes has had potentially enormous, though largely unexplored, impacts on Indian people and tribal governments. Criminal law is the vehicle that governments and societies use to protect their moral values and

police the boundaries of acceptable behavior. Denying tribes the ability to do this effectively has made reservations less safe, though many tribes use their limited existing criminal powers in unique and effective ways. The Supreme Court's understanding of the importance of tribal criminal law could be improved, and the Justice's mistrust and fear could be addressed, if the Supreme Court saw evidence of how tribes exercised these responsibilities.

- The same fear of the unknown has arisen in civil cases. For example, in a 2001 case in which the Supreme Court refused to allow a tribal court to hear a civil case brought against state officers, Justice Souter called tribal courts “special tribunals . . . which differ from traditional American courts in a number of significant respects.” But essentially all he could report about these differences were matters of law, such as that the Constitution does not apply to these courts. He said nothing about the facts on the ground concerning tribal courts. How many tribal courts are there? Have they often handled cases in which the defendants were nonmembers? If so, have the courts generally been fair, or unfair?
- In a few minutes, Professor Bethany Berger is going to talk briefly about a study she just completed, which addresses some of these questions. It is the kind of study we need. It is our view that tribes will continue to do poorly in federal court litigation until there is a knowledge base, grounded in reputable, published scholarship, about tribal institutions.
- The Supreme Court Project, formed by NCAI and NARF in response to the unfavorable trend of cases in the Supreme Court, has attempted to address these “on the ground” questions as best it can, in amicus briefs. But it is difficult to do that in the context of a contested case, and much of the information is hard to find.
- It is the general view of the attorneys helping with the Supreme Court Project that grounded studies on tribal institutions would greatly assist the federal courts and often give the courts good reasons to defer to tribal institutions.