No. 19-1414

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSHUA JAMES COOLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS

DANIEL L. KAPLAN
Counsel of Record
ASSISTANT FEDERAL PUBLIC DEFENDER
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
dan_kaplan@fd.org

Counsel for Amici Curiae

302295

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

Page

Cited Authorities

Page

Page

Cited Authorities

Page

BRIEF *AMICI CURIAE* OF THE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS[1]

INTERESTS OF *AMICI CURIAE*

The Ninth Circuit Federal Public and Community Defenders listed in the Appendix provide representation, pursuant to 18 U.S.C. § 3006A, to indigent federal criminal defendants in the Ninth Circuit. The question presented is of particular importance to amici not only because it involves a Ninth Circuit precedent, but also because it implicates the criminal jurisdiction of Indian tribal governments. The jurisdiction of the Ninth Circuit contains over 75 percent of the Nation's Indian tribes, and roughly 80 percent of the Nation's total reservation lands.[2] A substantial portion of the matters handled by amici involve offenses committed in Indian country, and in many such cases, tribal law enforcement authorities played a role in the investigations. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court has reiterated many times that the ultimate authority over Indian tribes, including the scope and nature of tribal criminal jurisdiction, lies with

---

1. No counsel for a party authored this brief in whole or in part, and no person other than amici curiae and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

2. Br. Amici Curiae of the Nat'l Congress of Am. Indians, Tribal Nations and Inter-Tribal Orgs. (NCAI Amicus Br.) at 9.

Congress. Tribes understand this well, and have for many decades pressed their case for enhanced criminal jurisdiction before Congress – and their efforts have borne fruit, with Congress agreeing to a number of significant expansions of tribal criminal jurisdiction. Importantly, at every step along this path, Congress has taken note of the fact that tribes are not constrained by the Bill of Rights protections that restrict the federal and state governments. In light of this crucial fact, Congress has proceeded cautiously and incrementally, permitting narrow and discrete supplements to tribal jurisdiction, and pairing them with enhanced due process protections for persons subject to tribes' expanded powers. Moreover, where Congress has acted to overturn decisions of this Court limiting tribal jurisdiction, it has been explicit about its intention to do so – naming and directly addressing the precedents affected.

The government's and its amici's arguments in favor of the purported tribal authority at issue here fail to take heed of this history. The government and its amici gloss over Congress's principal reason for hesitancy with respect to the expansion of tribal criminal jurisdiction – which is and has long been its concern for the due process rights of individuals subject to that jurisdiction. They ask this Court to essentially make findings regarding the problem of non-Indian crime on reservations and the practical need for tribal police to exercise greater authority – which is an essentially legislative function. And they urge this Court to divine affirmative congressional authorization for the power in question from Congress's *silence* – which flies in the face of Congress's practice of supplementing tribal criminal jurisdiction by means of express, narrow, and carefully crafted increments. As

amici will demonstrate below, the history of congressional regulation of tribal criminal jurisdiction illuminates the error in the government's and its amici's arguments.

ARGUMENT

I. For the past half-century, Congress has carefully regulated the nature and scope of tribal criminal jurisdiction.

A. The Indian Civil Rights Act of 1968

Federal policy toward Indian nations has undergone several pendulum-like swings over the years.[3] Before the European conquest, North American Indian tribes employed "concepts of fairness in the way [they] handled disputes, seeking both to compensate the victim and to rehabilitate the wrongdoer."[4] Initially the federal government left tribes largely to their own devices.[5] In the 19th century the government moved toward a policy of assimilation, eroding tribes' traditional methods of dispensing justice.[6] But in 1934, the Indian Reorganization Act marked a shift back in the opposite direction, toward a policy of encouraging tribal sovereignty and self-determination.[7] Among other things, the Act authorized

---

3. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225, 227 n.2 (1989).

4. *Id.* at 226.

5. F. Cohen, *Handbook of Federal Indian Law* § 1.03 (2012).

6. *Id.* § 1.04.

7. *Duro v. Reina*, 495 U.S. 676, 690-91 (1990) (*citing* ch. 576, 48 Stat. 984, *codified at* 25 U.S.C. §§ 461-479).

tribes to replace Bureau of Indian Affairs-run "CFR courts" with their own court systems.[8] Many tribes took advantage of this opportunity, and tribal court systems proliferated.

By the early 1960s, the United States Senate Committee on the Judiciary's Subcommittee on Constitutional Rights (the Subcommittee) became aware of troubling deficiencies in tribal court systems. A pair of 1959 federal court decisions "reaffirmed that systems of tribal government were largely unregulated by the Constitution."[9] (This Court had held in 1896 that the Bill of Rights and the Fourteenth Amendment do not apply to Indian tribes.[10]) And the Subcommittee had "for several years" been receiving complaints alleging "that the individual Indians were being deprived of basic constitutional rights by the Federal, State, *tribal*, and local governments."[11] The Subcommittee convened a series of hearings and staff investigations to look into the matter.

---

8. *Id.*

9. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 573-75 (1971-72) (*citing Native American Church v. Navaho Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (holding that constitutional protection of freedom of religion did not apply to Navaho tribe), *and Williams v. Lee*, 358 U.S. 217 (1959) (holding that state court could not compel payment by Indians for goods purchased on credit at non-Indian's store on the reservation)).

10. *Talton v. Mayes*, 163 U.S. 376 (1896).

11. *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962) (1962 Hearings) at 713 (statement of Sen. Burdick) (emphasis added).

The hearings revealed that "the most serious abuses of tribal power had occurred in the administration of criminal justice."[12] Senator Burdick of North Dakota informed the Subcommittee that "in many cases the tribal courts [we]re 'kangaroo courts,'"[13] and Senator Ervin of North Carolina proclaimed himself "much perplexed" by evidence indicating that "in all too many cases tribal courts were entirely subservient to the tribal council."[14] But while the Subcommittee had serious misgivings about the quality of justice meted out in tribal courts, it found a saving grace in the fact that, as a matter of tribal codes and/or tribal court sentencing practices, sentences exceeding six months' imprisonment were unheard of.[15] The low sentences were matched by the relatively petty nature of the offenses prosecuted in tribal courts:

---

12. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978); *see also* Br. *Amici Curiae* of the Nat'l Ass'n of Crim. Def. Lawyers and Experienced Tribal Ct. Crim. Litigators in Support of Respondent in *United States v. Bryant*, No. 15-240 (U.S.), 2016 WL 1055618 (Mar. 14, 2016), at 7-8 & nn.14-20.

13. *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 1st Sess. 501 (1961) (1961 Hearings) at 88.

14. *Id*. at 135.

15. 1961 Hearings at 384 (statement of Hualapai Judge Shirley Nelson); *id*. at 462-63 (statement of Zuni Judge Alfred Sheck); *id*. at 465 (statement of Nambe Pueblo Governor Ernest Mirabal); *id*. at 484 (statement of former San Juan Pueblo Governor Preston Keevana); 1962 Hearings at 574 (statement of Department of Interior Regional Solicitor Palmer King); *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) at 871 (statement of Warm Springs General Counsel Owen M. Panner).

Witnesses estimated that ninety percent of all charges brought before tribal courts were for disorderly conduct.[16]

By the time the field hearings concluded in 1963, the Subcommittee had heard nearly 1100 pages of testimony and collected nearly 2500 completed questionnaires.[17] Senator Ervin initially proposed a bill providing "[t]hat any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution."[18] But Interior Department Solicitor Frank J. Barry complained that the bill was "too general," and "include[d] limitations and restrictions which need not be included."[19] The Department recommended substitute legislation that would more narrowly "specif[y] the rights extended to individual Indians in relation to their tribal governments."[20]

---

16. *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965) (1965 Hearings) at 139 (statement of Washington, D.C. Indian law attorney Marvin J. Sonosky), *id.* at 148 (statement of Rosebud Sioux Tribe President Cato W. Valandra), *id.* at 237 (statement of Crow Tribe delegate Edison Real Bird).

17. Burnett, *supra* note 9, at 587.

18. 1965 Hearings at 5.

19. *Id.* at 17.

20. *Id.* at 18.

Following these hearings, the Subcommittee revised its proposals to produce what became the Indian Civil Rights Act of 1968. The prior bill's broad incorporation of constitutional rights was replaced with a specific enumeration of most – but not all – Bill of Rights protections.[21] Among other notable modifications, the Act provided that a tribal court criminal defendant enjoyed the right to counsel only "at his own expense."[22] Moreover, the Act's only mechanism for vindication of these rights outside of tribal court was a federal habeas corpus petition.[23] But the Act counterbalanced the dilution of defendants' constitutional protections by codifying tribal courts' de facto sentencing cap, providing that "[n]o Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both."[24] This cap remained unchanged until 1986, when a provision of the Anti-Drug Abuse Act raised the maximum sentence in tribal court to "a term of one year and a fine of $5,000, or both."[25]

B. *Oliphant v. Suquamish Indian Tribe*

Among the tribes that chose to create their own judicial system was the Suquamish Indian Tribe (the Suquamish), which occupies a reservation on Puget Sound

---

21. 113 Cong. Rec. 13473-74 (May 23, 1967).

22. *Id*. at 13473.

23. *Id*. at 13474.

24. *Id*. at 13473-74.

25. Pub. L. No. 99-570, § 4217 (1986).

across from Seattle.[26] In the mid-1970s, the Suquamish had developed a court system and adopted a Law and Order Code that "purport[ed] to extend the Tribe's criminal jurisdiction over both Indians and non-Indians."[27] During an annual celebration, tribal authorities arrested non-Indian Mark David Oliphant and charged him with assaulting a tribal officer and resisting arrest.[28] Oliphant sought habeas corpus relief in federal court, arguing that the Suquamish court lacked jurisdiction over non-Indians.[29] The federal district court and Ninth Circuit disagreed, and this Court granted certiorari in *Oliphant v. Suquamish Indian Tribe*.[30]

The Court first noted that no "affirmative congressional authorization or treaty provision" empowered the Suquamish to exercise criminal jurisdiction over non-Indians.[31] The Suquamish argued that the Indian Reorganization Act and Indian Civil Rights Act tacitly "confirmed" their power to exercise such jurisdiction,[32] but the Court rejected this theory, noting that neither Act "addresses, let alone 'confirms,' tribal criminal jurisdiction

26. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 (1978).

27. *Id.*

28. *Id.* at 194.

29. *Id.*

30. *Id.* at 194-95.

31. *Id.* at 195.

32. *Id.* at 195 n.6.

over non-Indians."[33] The key question, therefore, was whether this power was among the "retained inherent powers" that the Suquamish exercised within its reservation.[34] After surveying the history of federal interaction with Indian tribes with respect to criminal jurisdiction, the Court concluded that it was not.

Through the 19th century, the Court noted, only a few tribes had "formal criminal systems," and as to them "it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect."[35] A review of historical statutes, treaties, and holdings confirmed that the "unspoken assumption" of all three branches of the federal government was that tribes lacked criminal jurisdiction over non-Indians.[36] Because federal Indian law "draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress," this commonly shared presumption carried "considerable weight."[37]

The Court acknowledged that the authority to try persons committing crimes within their territory could be viewed as an inherent incident of the tribes' sovereignty, and that no statute or treaty had specifically *removed*

33. *Id.*

34. *Id.* at 195-96.

35. *Id.* at 197.

36. *Id.* at 197-203.

37. *Id.* at 206.

this authority with respect to non-Indians.[38] But the court stressed that "after ceding their lands to the United States and announcing their dependence on the Federal Government," the tribes' "retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments."[39] The "quasi-sovereign[ty]" retained by the tribes excluded not only powers expressly barred by statute, but also "those powers *inconsistent with their status*."[40] The power to try non-Indians fell into this latter category: "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[41]

The Court also drew an analogy to the "inverse" question presented in *Ex parte Crow Dog*, where the Court held that, absent a statutory grant of such authority, the federal courts had no jurisdiction to try Indians who commit crimes against fellow Indians on reservation land.[42] In that context, the Court found it doubtful that the federal courts could impose federal law on "'the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code.'"[43]

---

38. *Id.* at 208.

39. *Id.*

40. *Id.* (internal quotation marks omitted).

41. *Id.* at 210.

42. *Id.* (*citing Ex parte Crow Dog*, 109 U.S. 556 (1883)).

43. *Id.* (*quoting Crow Dog*, 109 U.S. at 406).

The Court found these same considerations compelling as applied to a non-Indian facing trial in a tribal court.[44]

In a brief but important coda, the Court placed the future of tribal criminal jurisdiction over non-Indians squarely in the hands of Congress:

> We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.[45]

C. *Duro v. Reina* and the "*Duro* Fix"

The ball that *Oliphant* placed in Congress's court has not lain idle. Tribal criminal jurisdiction has evolved considerably since 1978. That evolution has been

---

44. *Id*. at 211.

45. *Id*. at 211-12 (footnote omitted).

characterized by ongoing pressure from Indian tribes to expand their criminal jurisdiction, and by the increasing willingness of Congress to meet their demands – provided that, as was the case with respect to the original enactment of the Indian Civil Rights Act, tribal criminal jurisdiction is balanced by appropriate guarantees of fairness and due process.

The next major development involved the question of a tribe's power to criminally try a non-member Indian – *i.e.*, an Indian enrolled in a tribe other than the one seeking to prosecute him. In *Duro v. Reina*, Arizona's Pima-Maricopa Indian Community sought to try a member of the Torres-Martinez Band of Cahuilla Mission Indians for his illegal firing of a weapon on the former tribe's reservation.[46] The defendant objected to the Pima-Maricopa tribe's jurisdiction over him in a federal habeas corpus petition.[47] The district court granted the petition, but the Ninth Circuit reversed, and (citing a conflicting opinion of the Eighth Circuit) this Court granted certiorari.[48]

"As in *Oliphant*," the Court observed, it addressed a situation in which no statute or treaty expressly granted or precluded the tribal jurisdiction in question, and thus the question turned on the nature of "the sovereignty retained by the tribes in their dependent status within our scheme of government."[49] The Court again acknowledged that "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within

46. *Duro*, 495 U.S. at 679-81.

47. *Id.* at 681-82.

48. *Id.* at 682-84.

49. *Id.* at 684.

the sovereign's territory, whether citizens or aliens," and noted that "*Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense."[50] The Court found that the tribes' dependent status within the United States did not inherently divest them of their power "to prescribe and enforce rules of conduct for [their] *own* members," but it did divest them of that power with respect to non-members, including non-member Indians.[51] The Court noted, among other factors, that the Indian Civil Rights Act guarantees were "not equivalent to their constitutional counterparts," and that there are "constitutional limitations" on Congress's ability to subject American citizens to "criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."[52] The Court was accordingly unwilling to sanction tribal jurisdiction over nonmember Indians "through recognition of inherent tribal authority."[53]

Echoing its closing observation in *Oliphant*, the Court concluded by reiterating that Congress retained the "ultimate authority over Indian affairs":

> If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.[54]

---

50. *Id*. at 685.

51. *Id*. at 686-88 (emphasis added).

52. *Id*. at 693.

53. *Id*. at 694.

54. *Id*. at 698.

Congress exercised that authority with remarkable speed. Immediately after *Duro* issued, the House Committee on Interior and Insular Affairs "was inundated with anecdotal accounts describing serious jurisdictional law and order problems resulting from the Court's holding."[55] Tribes complained that nonmember perpetrators "could no longer be taken to the most accessible forums"; that reservations with high rates of intermarriage with other tribes "were facing chaos"; and that these problems were especially dire on reservations like the Flathead Reservation in Montana, where "upwards of 30 percent of its population consists of non-member Indians."[56] United States Attorneys reported that they "could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of non-member Indians."[57] And tribes in states that had taken on criminal jurisdiction in Indian country pursuant to Public Law 280[58] found their states' law enforcement officers unwilling to exercise jurisdiction over misdemeanors committed by nonmember Indians.[59]

"Within a few months, Congress responded to requests from tribes concerned about the jurisdictional void the Supreme Court had created" in *Duro* by amending the definitions section of the Indian Civil Rights Act to provide that tribes' "powers of self-government" included

---

55. H.R. Rep. No. 102-61, at 4 (1991).

56. *Id.*

57. S. Rep. No. 102-153, at 4 (1991).

58. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-89 (*codified at* 18 U.S.C. § 1162).

59. S. Rep. No. 102-153, at 4 (1991).

"the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[60] This "*Duro* fix" was first enacted as part of the Department of Defense Appropriations Act of 1991, together with a provision declaring that the amendment would terminate on September 30, 1991.[61]

In the following Congress, alternative bills were introduced to either extend the legislation for another two years, or make it permanent. During the debates over these bills, some legislators "expressed the concern that tribal judicial systems offer the full panoply of [c]onstitutional rights to persons who come before their courts."[62] The Senate Select Committee on Indian Affairs preferred the two-year extension, in light of "the continuing interest of some members to tie a permanent resolution of the Duro case to further study of whether additional protections are needed in the Indian Civil Rights Act that affect the administration of justice in tribal courts."[63] The "strong consensus" among committee members was "that additional Federal resources need to be made available to tribal courts for salaries, for court personnel, for records management[], for technical assistance and such other expenditures as would be needed to bring about improvement of tribal judicial systems."[64]

Even some legislators who preferred the permanent "*Duro* fix" acknowledged concerns regarding "the

60. H.R. Rep. No. 102-61, at 4 (1991).

61. Pub. L. No. 101-511, § 8077(b), (c), (d) (Nov. 5, 1990).

62. S. Rep. No. 102-153, at 8 (1991).

63. *Id.* at 12.

64. *Id.*

adequacy and sophistication of tribal court forums," and the inadequacy of the Indian Civil Rights Act's habeas corpus remedy to ensure protection of the rights purportedly guaranteed by that law, but they proposed to address these concerns in separate legislation.[65] Notably, the legislative record contains numerous assurances that the permanent "*Duro* fix" would have no effect on the continuing viability of *Oliphant*.[66] With these assurances on the record, Congress chose to enact the permanent "*Duro* fix."[67]

D. The Tribal Law and Order Act of 2010

As tribes and the federal government moved into the 21st century, they, and others engaged in Indian

---

65. 137 Cong. Rec. H2988-02, H2989 (daily ed. May 14, 1991) (Statement of Rep. Rhodes); *see also* H.R. Conf. Rep. No. 102-261, at 6-7 (1991) (Separate Statement of Sen. Daschle) ("I am concerned that non-member Indians and all U.S. citizens subject to tribal court decisions should be guaranteed full protection under the U.S. Constitution, including the Bill of Rights."); 137 Cong. Rec. S14930-03, S14931 (daily ed. Oct. 17, 1991) (Statement of Sen. Gorton) (noting that he had agreed to the permanent "*Duro* fix" despite "strong reservations" regarding "inadequate civil rights protections for Native Americans on this country's Indian reservations" because he received assurances that hearings would be held regarding civil rights in tribal courts).

66. *See*, *e.g.*, 137 Cong. Rec. H2988-02, H2989 (daily ed. May 14, 1991) (Sen. Kyl supporting the bill after securing assurance that it would not be a "precursor to overturning the Oliphant decision"); 137 Cong. Rec. S13469-03, S13470 (daily ed. Sep. 23, 1991) (Sen. Inouye "assur[ing]" Sen. Gorton that "nothing in this bill is intended to alter or affect the holding in [*Oliphant*]").

67. Pub. L. No. 102-137 (Oct. 28, 1991) (*codified at* 25 U.S.C. § 1301(2)).

country law enforcement, periodically urged Congress to reconsider the remaining restrictions on tribal criminal jurisdiction. They pointed to high crime statistics in Indian country, and the inability or unwillingness of state and federal law enforcement authorities to take effective action in response, and they argued that loosening these restrictions would enable tribes to better provide for their own security.

Congress has been responsive to these concerns. In 2003, it considered (but did not pass) a proposed amendment to the Homeland Security Act that would have repealed *Oliphant* in certain instances involving homeland security.[68] Proponents of the bill testified to the Senate Indian Affairs Committee that "the net effect of *Oliphant* was to discourage or even prevent tribes from taking greater responsibility for their own public safety."[69] In 2006, Christopher B. Chaney, Deputy Director for the Bureau of Indian Affairs Office of Justice Services and member of the Seneca-Cayuga Tribe of Oklahoma, argued that the quality of justice in tribal courts had improved over the years, described *Oliphant* as "antiquated," and suggested a further amendment to the Indian Civil Rights Act providing "that tribal governments have criminal jurisdiction over 'all persons.'"[70] District of Colorado United States Attorney Troy Eid argued that Chaney's

68. Hon. Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, Federal Lawyer 44 (Mar./Apr. 2007).

69. *Id.*

70. Christopher B. Chaney, *Overcoming Legal Hurdles in the War Against Meth in Indian Country*, 82 N.D. L. Rev. 1151, 1151 n.a1, 1159-60 (2006).

ideas "deserve[d] serious discussion within the federal government and with the tribes."[71] He asserted that "much of Indian country ha[d] changed substantially since 1978," with many tribal governments "gaining substantially increased governmental sophistication and economic development."[72] And he suggested that "tribes might be given the flexibility to opt in to a post-*Oliphant* world on a case-by-case basis . . . provided they agree voluntarily to integrate federal constitutional substantive and procedural protections into their justice systems."[73]

Congress was attentive to concerns about the high rate of crime on reservations, and the fact that the existing legal framework hampered tribes' ability to address it. But these concerns led them to revisit the Indian Civil Rights Act sentencing cap before they turned to the question of an "*Oliphant* fix."

In the 110th and 111th Congresses, the Senate Committee on Indian Affairs held twelve hearings "that focused on various aspects of the criminal justice system in place on Indian lands."[74] In the 111th Congress, North Dakota Senator Dorgan introduced S. 797, the "Tribal Law and Order Act of 2009."[75] In his report accompanying the bill, Senator Dorgan expressed concern that "the divided system of justice in place on Indian reservations lack[ed] coordination, accountability, and adequate and

71. Eid, *supra* note 68, at 45.

72. *Id.*

73. *Id.* at 46.

74. S. Rep. No. 111-93, at 4 (2009).

75. *Id.*

consistent funding."[76] Among other things, he bemoaned the "jurisdictional maze" that required tribal police officers to answer a series of questions before deciding to "arrest a suspect, investigate a crime, or bring a defendant to trial," including: "Did the crime occur in Indian country?" and "Is the suspect or defendant Indian or non-Indian?"[77]

The bill proposed to address these issues by improving the process for granting special law enforcement commissions to tribal officers, upgrading reporting on federal prosecutors' decisions to decline prosecution of tribal offenders, improving coordination between federal and tribal authorities with respect to reservation domestic violence – and adjusting the sentencing cap initially imposed in the Indian Civil Rights Act.[78] Senator Dorgan acknowledged that the cap had been motivated by the finding that, in the mid-1960s, tribal courts were "essentially justices of the peace, which dealt primarily with petty offenses."[79] But he stressed that "[f]acts have changed dramatically in the past twenty years," with tribal courts increasingly "trying violent offenses," up to and including homicide.[80] The bill proposed to raise the sentencing cap to three years – but only for tribes that agreed to implement heightened due process protections, including providing counsel for indigent defendants at the tribe's expense, requiring the presiding judge to

76. *Id.* at 1.

77. *Id.* at 3.

78. *Id.* at 10-21.

79. *Id.* at 16.

80. *Id.*

have "sufficient legal training," and publishing the tribe's criminal code.[81]

Congress did not pass the Tribal Law and Order Act in 2009, but the following year Senator Dorgan tucked it into a bill to protect Indian arts and crafts.[82] Some complained of the unusual procedure by which the bill was introduced (in the House it was considered on the streamlined "suspension calendar"),[83] and one representative specifically expressed concern that the training standards for tribal police officers were not sufficiently rigorous.[84] But others lauded the bill's balancing of increased tribal sentencing authority with provisions that "improve[d] the procedures in tribal courts and better protect[ed] the rights of tribal defendants."[85]

The Tribal Law and Order Act was enacted on July 29, 2010.[86] Notably, among the law's introductory provisions was an express assurance that "[n]othing in this Act confers on an Indian tribe criminal jurisdiction over non-Indians."[87] The Act reorganized the federal-tribal liaison

---

81. *Id.* at 17.

82. 156 Cong. Rec. S5324-02, S5365-76 (daily ed. Jun. 23, 2010).

83. 156 Cong. Rec. H5852-01, H5862-63 (daily ed. Jul. 21, 2010) (Statement of Rep. Hastings); *id.* at H5867 (Statement of Rep. Lungren).

84. *Id.* at H5867 (Statement of Rep. Lungren).

85. *Id.* at H5866 (Statement of Rep. Scott).

86. Pub. L. No. 111-211, tit. II.

87. *Id.* § 206.

functions of the Department of Justice.[88] It provided for training and grant funding to support tribal law enforcement.[89] And it raised the tribal court sentencing cap to three years for certain crimes – provided that tribes exercising this authority supply defendants with "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," provide indigent defendants with licensed counsel at the tribe's expense, ensure that the presiding judge has "sufficient legal training," make their criminal codes publicly available, and maintain records of their proceedings.[90] The Act also created an Indian Law and Order Commission, and directed it to conduct a comprehensive study of criminal justice in tribal communities and report its findings to Congress.[91]

E. The Violence Against Women Act Reauthorization of 2013

Although the Tribal Law and Order Act of 2010 was not the "*Oliphant* fix" for which some had called, it was not long before Congress revisited the question of tribal criminal jurisdiction over non-Indians.

On March 12, 2012, Vermont Senator Leahy issued a report on behalf of the Senate Committee on the Judiciary regarding the third reauthorization of the Violence Against Women Act, a law originally enacted in 1994 that was designed to address domestic and

88. *Id.* subtit. A.

89. *Id.* subtit. D.

90. *Id.* § 234 (*codified at* 25 U.S.C. § 1302(b), (c)).

91. *Id.* § 235.

sexual violence.[92] Senator Leahy noted that rates of domestic violence were especially high on reservations, and commonly involved Indian victims and non-Indian offenders.[93] He acknowledged that the federal government could prosecute these offenders, but noted that federal prosecutors may be too far away and too preoccupied with other types of crimes to become involved.[94]

The Committee proposed to address this issue by including in the reauthorization a provision empowering tribes to prosecute non-Indians "in very limited circumstances."[95] Senator Leahy stressed that the new jurisdiction would be "narrowly crafted," extending only to Indian-country crimes of domestic and dating violence and violation of protection orders, in which the non-Indian offender had "significant ties to the prosecuting tribe."[96] Senator Leahy also noted that, "[s]imilar to the approach taken in the Tribal Law and Order Act," the expanded jurisdiction would be balanced by a heightened obligation to "protect effectively the same [c]onstitutional rights as guaranteed in State court criminal proceedings."[97]

The minority views of Senators Grassley, Hatch, Kyl, Cornyn, Sessions, Coburn, and Lee demonstrated that even this "narrowly crafted" extension of tribal

92. S. Rep. No. 112-153 (2012).

93. *Id.* at 2-9.

94. *Id.* at 9.

95. *Id.*

96. *Id.* at 9-10.

97. *Id.* at 10.

jurisdiction to non-Indians was quite controversial.[98] Senators Grassley, Hatch, Kyl, and Cornyn wondered, "[o]n what basis is the majority report confident that all tribes are able to provide all defendants with all rights guaranteed by the United States Constitution?"[99] Senators Kyl, Hatch, Sessions, and Coburn objected that non-Indian defendants are generally excluded from tribal membership because of their race, insofar as most tribes require "a specific quantum of Indian blood."[100] They also observed that many tribal criminal justice systems "fail to provide due process," and cited examples of tribes authorizing judges to overrule jury verdicts, refusing to provide indigent defendants with counsel, and even preventing defendants from retaining counsel at their own expense.[101] Senators Coburn and Lee objected that the bill would "allow a non-Indian to be tried in tribal court without the full protection of the Constitution."[102]

The controversy extended to the House of Representatives as well. In fact, the House version omitted the limited "*Oliphant* fix" altogether.[103] Texas Representative Smith explained that the House Committee on the Judiciary was concerned that "[n]on-Indians tried within the Indian Tribal government system would not be guaranteed their full constitutional rights," would have no ability to take a direct appeal from tribal court to federal

98. *Id.* at 36-56.

99. *Id.* at 38.

100. *Id.* at 48.

101. *Id.* at 50.

102. *Id.* at 56.

103. H.R. Rep. No. 112-480(I), at 58 (2012).

court, and could seek relief for violations of their rights only through the "inadequate" mechanism of federal habeas corpus petitions.[104] The dissenting Representatives criticized the omission, stressing that the bill would extend tribal criminal jurisdiction only "in a very narrow set of cases over non-Indians who voluntarily and knowingly established significant ties to the tribe."[105]

These controversies carried over to the floor debates on the reauthorization. Senator Grassley described the extension of tribal jurisdiction over non-Indians as "[t]he key stumbling block" to the bill's enactment, citing "serious constitutional questions concerning both the sovereignty of tribal courts and the constitutional rights of defendants who would be tried in those courts."[106] The

104. *Id.* at 58-59.

105. *Id.* at 245.

106. 159 Cong. Rec. S461-02, S462 (daily ed. Feb. 4, 2013); *see also* 159 Cong. Rec. S497-03, S499 (daily ed. Feb. 7, 2013) (Statement of Sen. Cornyn) (objecting that the bill "would deny U.S. citizens their full constitutional protections under the Bill of Rights in tribal courts"); *id.* at S505 (Statement of Sen. Hatch) ("I simply cannot support depriving American citizens of constitutional rights and judicial protection."); 159 Cong. Rec. S571-06, S576 (daily ed. Feb. 11, 2013) (Statement of Sen. Coburn) ("What we have done with this solution is to trample on the Bill of Rights of every American who is not a Native American."); 159 Cong. Rec. H707-01, H737 (daily ed. Feb. 28, 2013) (Statement of Rep. Cramer) ("Friends, let's vote for the Violence Against Women Act that not only protects the vulnerable in our society, but also protects the civil liberties upon which our system of justice is built."); *id.* at H795 (Statement of Rep. Hastings) ("[E]nactment of Section 904 will be the first time that Congress has purposefully removed a U.S. citizen's constitutional rights while on American soil so that a political entity defined according to ethnic ancestry may arrest, try, and punish the citizen.").

bill's defenders pointed to provisions specifying that non-Indian defendants in tribal court "would essentially have the same rights in tribal court as they do in State court."[107] They also proffered a Department of Justice analysis that defended the bill's constitutionality, in part by stressing that it would "effectuate only a limited change," as the extended jurisdiction was "narrowly focused" and would reach only "persons who, though non-Indian, have entered into consensual relationships with the tribe or its members."[108]

In the end, the Violence Against Women Act reauthorization passed with the controversial partial "*Oliphant* fix" included, and for the first time, tribes were given congressional authorization to exercise criminal jurisdiction over non-Indians.[109] The law strictly limits the exercise of this jurisdiction to cases of "dating violence," "domestic violence," or protective order violations, against Indian victims, by non-Indian defendants who live or work in the tribe's territory or are in relationships with tribe members or other Indians living in the tribe's territory.[110]

---

107. 159 Cong. Rec. S480-02, S488 (daily ed. Feb. 7, 2013) (statement of Sen. Udall); *see also* 159 Cong. Rec. S497-03, S506 (daily ed. Feb. 7, 2013) (Statement of Sen. Cantwell) ("this law has specifically broad language, making sure the defendant would be protected with all rights required by the United States in order for this jurisdiction to have oversight.").

108. 159 Cong. Rec. H707-01, H738 (daily ed. Feb. 28, 2013) (analysis of Associate Attorney General Thomas J. Perrelli).

109. Pub. L. No. 113-4, tit. IX, § 904 (Mar. 7, 2013) (*codified at* 25 U.S.C. § 1304).

110. 25 U.S.C. § 1304(b).

It guarantees to defendants rights extending beyond those guaranteed by the Indian Civil Rights Act, including the right to juries that do not exclude non-Indians, the right to secure stays from federal district courts in connection with petitions for habeas corpus relief, and "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe" to exercise jurisdiction over non-Indians.[111] It also provides for grants "to strengthen tribal criminal justice systems" and support the provision of indigent counsel and the selection of compliant juries, and specifies a two-year phase-in period during which tribes could prosecute non-Indians only upon the United States Attorney General's designation identifying them as having "adequate safeguards in place to protect defendants' rights."[112]

F. Ongoing advocacy for additional "*Oliphant* fix" legislation

Several tribes began exercising this new form of jurisdiction soon after the reauthorization passed, and by 2018 tribes reported having obtained 74 convictions of non-Indians in domestic violence prosecutions.[113] But the limited "*Oliphant* fix" contained in the 2013 Violence Against Women Act Reauthorization has not ended the tribes' push to expand their criminal jurisdiction. Many

111. *Id.* § 1304(d), (e).

112. Pub. L. No. 113-4, tit. IX, §§ 901-04, 908.

113. *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report* at 1 (Nat'l Congress of Am. Indians (Mar. 20, 2018)), available at https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.

tribes and advocacy groups continue to press Congress to further expand their jurisdiction over non-Indians – or simply to overrule *Oliphant* entirely and give them plenary criminal jurisdiction over non-Indians.

In November of 2013, the Indian Law and Order Commission (which was created by the Tribal Law and Order Act) recommended that Congress permit tribes to "opt out" of federal and/or state criminal jurisdiction within their territory, as well as the Indian Civil Rights Act sentencing caps, and exercise criminal jurisdiction over "all persons" within their territorial boundaries, provided that they afford defendants "civil rights protections equivalent to those guaranteed by the U.S. Constitution" and provide for "full Federal judicial appellate review."[114] One of the advantages of this approach, the Commission argued, was that it would give participating tribes essentially what the government and its amici seek from the Court in this case – *i.e.*, "clear arrest and prosecutorial authority over all suspects/defendants on the reservation."[115]

In November of 2014, the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence issued a report recommending that Congress "restore the inherent authority of American Indian and Alaska Native (AI/AN) tribes to assert full criminal jurisdiction over all persons who commit

---

114. *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* at ix-xi (Indian Law and Order Commission (Nov. 2013)), available at https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

115. *Id.* at 101.

crimes against AI/AN children in Indian country."[116] The Committee also supported the Indian Law and Order Commission's broader recommendation for a plenary, voluntary "*Oliphant* fix."[117]

In 2016 and 2017, citing the Indian Law and Order Commission's recommendations, Senators Tester and Udall introduced bills to expand tribes' criminal jurisdiction over non-Indians to cover drug-related crimes, domestic violence against children, and crimes against tribal law enforcement officers, along with "related" crimes.[118]

In June of 2016, the National Congress of American Indians passed a resolution calling for a "Full Oliphant Fix," which would expand tribal criminal jurisdiction "over all persons committing any crime in their Indian country" and permitting tribes to exercise this jurisdiction "at [their] sole discretion."[119]

---

116. *Ending Violence so Children can Thrive* at 9 (Att'y Gen. Advisory Comm. on Am. Indian/Alaska Native Children Exposed to Violence (Nov. 2014)), available at https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf.

117. *Id.* at 50.

118. S. 2785, 114th Cong., 2d Sess. (Apr. 12, 2016); S. 2233, 115th Cong., 1st Sess. (Dec. 14, 2017).

119. Nat'l Congress of Am. Indians Resolution #SPO-16-037 (Jun. 27-30, 2016), available at https://www.ncai.org/attachments/Resolution_orvkZwEdbgGeAHMvJqyzAWvdDwRXttpGCTmoRcxCStvLSHnXNGv_SPO-16-037%20final.pdf

In October of 2017, Senator Franken introduced a bill to expand tribes' criminal jurisdiction over non-Indians to include non-relationship sexual violence, sex trafficking, and stalking.[120]

In 2019, Congress considered expansions of tribal criminal jurisdiction over non-Indians similar to those proposed by Senators Tester, Udall, and Franken, in connection with another reauthorization of the Violence Against Women Act.[121] For the time being, the reauthorization has stalled in the Senate and is unlikely to pass, in light of (among other factors) "the continuing concern for non-Indian defendants' civil rights."[122]

II. This history refutes the government's and its amici's efforts to extract legislative approval of the authority in question from congressional silence.

Several important themes emerge from this survey of the history of Congressional regulation of tribal criminal jurisdiction.

---

120. S. 1986, 115th Cong., 1st Sess. (Oct. 19, 2017).

121. H.R. Rep. No. 116-21(I), at 74 (2019) (noting bill would extend tribal criminal jurisdiction over non-Indians "to cover the additional crimes of assault of a law enforcement or correctional officer; obstruction of justice; sex trafficking; sexual violence; and stalking"); *see also id.* at 303 (Dissenting Views) (objecting that the proposed extensions of tribal jurisdiction over non-Indians "creates due process concerns").

122. Emily Mendoza, *Jurisdictional Transparency and Native American Women*, 11 Cal. L. Rev. Online 141, 156 n.112 (May, 2020).

First, as this Court has repeatedly stressed[123], the ultimate responsibility for adjusting the boundaries of tribal criminal jurisdiction rests, not with this Court, but with Congress. To the (considerable) extent that the government and its amici urge this Court to ratify the seizure and search at issue here because a contrary holding would carry adverse practical consequences for Indian-country law enforcement,[124] those arguments are properly directed to Congress, rather than to this Court. Indeed, for decades those arguments *have* been addressed to Congress – and Congress has taken them seriously, enacting a series of significant expansions of tribal criminal jurisdiction where a compelling need for them has been demonstrated.

Second, when Congress has contemplated expansions of tribal criminal jurisdiction, its primary concern has been for the due process rights of individuals who may be subject to that jurisdiction. Whether supporting or opposing an expansion of tribal criminal jurisdiction, legislators have consistently expressed concern as to tribes' ability to offer the same protection for the constitutional rights of suspects and defendants that are demanded of the federal and state governments. These concerns have arisen largely from Congress's awareness of the fact that tribes remain unconstrained by the constitutional restrictions that govern state and federal law enforcement authorities, and thus are accustomed to being held only to the lesser standards of the Indian Civil Rights Act.

---

123. *E.g.*, *Oliphant*, 435 U.S. at 212; *Duro*, 495 U.S. at 698.

124. *E.g.*, Gov. Br. at 44-47; *see generally* NCAI Amicus Br.

The government's assertion that the "principal rationale for denying tribes the authority to prosecute non-Indians" is that "they have no part in tribal government"[125] is thus mistaken. From the 1968 Indian Civil Rights Act to the present, the "principal rationale" for maintaining limits on tribal criminal jurisdiction has been concern for the due process rights of individuals who may be subject to that jurisdiction. And the government's assurance that the Indian Civil Rights Act "subjects investigation and detention of non-Indian (and other) suspects by tribes to the same limitations that the Constitution imposes on those activities by federal and state officers"[126] is equally mistaken. This Court has observed that the Indian Civil Rights Act "guarantees are *not* identical,"[127] and both tribal[128] and federal[129] courts have declined to insist that

125. Gov. Br. at 24 (internal quotation marks omitted).

126. *Id*. at 21.

127. *Oliphant*, 435 U.S. at 194 (emphasis added).

128. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) ("[T]here is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the [Indian Civil Rights Act's] due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents "jot-for-jot[.]"'") (*quoting* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 344, n.238 (1998)).

129. *E.g.*, *Randall v. Yakima Nation Tribal Ct.*, 841 F.2d 897, 900 (9th Cir. 1988) ("In reviewing tribal court procedures to determine if they comport with [the Indian Civil Rights Act's] due process guarantee, 'courts . . . [have] correctly sensed that Congress did not intend that the . . . due process principles of the Constitution disrupt settled tribal customs and traditions.'") (*quoting* F. Cohen, *Handbook of Federal Indian Law* 670 (1982 ed.) (footnote omitted)).

they be given the same construction as their constitutional counterparts.

Third, and relatedly, when Congress has seen fit to expand tribes' criminal jurisdiction, it has proceeded incrementally, making narrowly tailored additions to tribal jurisdiction, and pairing these additions with enhanced procedural requirements – as well as financial and logistical support designed to ensure that tribes exercising expanded forms of jurisdiction will be able to meet these requirements. This approach confirms the wisdom of ensuring that expansions of tribal criminal jurisdiction are for Congress, rather than for this Court, as they involve the inherently legislative functions of assessing the policy needs of tribal communities, detailing their obligations, and providing necessary funding and an infrastructure for government-to-government cooperation in exercising expanded authority. Moreover, when Congress has taken steps to override a holding of this Court limiting tribal criminal jurisdiction, it has made very explicit its intent to do.

In view of this pattern of express, measured, and deliberate congressional expansions of tribal criminal jurisdiction, the government's[130] and its amici's[131] suggestion that Congress's *silence* as to the existence of the power in question here should be construed as a tacit affirmation of that power is misguided.

---

130. Gov. Br. at 32 (faulting the Ninth Circuit for failing to identify an "express abrogation" of the authority in question).

131. *See generally* Br. of Current and Former Members of Congress as Amici Curiae Supporting Petitioner (arguing that Congress's silence with respect to the power in question should be construed as an implicit authorization).

CONCLUSION

For the reasons set forth above, as well as those set forth in Respondent's brief, amici urge the Court to affirm the judgment below.

Respectfully submitted,

Daniel L. Kaplan
Counsel of Record
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
dan_kaplan@fd.org

Counsel for Amici Curiae

APPENDIX

APPENDIX - LIST OF FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Michael Filipovic
Federal Public Defender
Western District of Washington
Westlake Center Office Tower
1601 Fifth Ave., Rm. 700
Seattle, WA 98101

Anthony Gallagher
Executive Director
Federal Defenders of Montana
104 Second St. South, Ste. 301
Great Falls, MT 59401

Andrea George
Executive Director
Federal Defenders of E. Washington
10 N. Post St., Ste. 700
Spokane, WA 99201

John T. Gorman
Federal Public Defender
District of Guam
First Hawaiian Bank Building
400 Route 8, Rm. 501
Mong Mong, GU 96910

Lisa Hay
Federal Public Defender of Oregon
101 S. W. Main St., Ste. 1700
Portland, OR 97204

Steven G. Kalar
Federal Public Defender
Northern District of California
Phillip Burton U.S. Courthouse
450 Golden Gate Ave., Ste. 19-6884
San Francisco, CA 94102

Salina M. Kanai
Federal Public Defender
District of Hawai'i
300 Ala Moana Blvd., Ste. 7104
Honolulu, HI 96850

Jamie McGrady
Federal Public Defender
District of Alaska
425 G St., Ste. 800
Anchorage, AK 99501

Kathryn Nester
Executive Director
Federal Defenders of San Diego, Inc.
225 Broadway, Ste. 900
San Diego, CA 92101

Cuauhtemoc Ortega
Federal Public Defender
Central District of California
321 E. Second St.
Los Angeles, CA 90012

Charles Peterson
Federal Public Defender
District of Idaho
702 W. Idaho St., Rm. 1000
Boise, ID 83702

Jon M. Sands
Federal Public Defender
District of Arizona
850 W. Adams St., Ste. 201
Phoenix, AZ 85007

Rene L. Valladares
Federal Public Defender
District of Nevada
411 E. Bonneville Ave.
Las Vegas, NV 89101

Heather E. Williams
Federal Public Defender
Eastern District of California
801 I Street, 3d Fl.
Sacramento, CA 95814