

POINT

Beyond *Oliphant*: Strengthening Criminal Justice in Indian Country

By Hon. Troy A. Eid

Violent crime continues to take a massive toll on Native Americans—to the point that more than one-third of Indian women will be raped during their lifetimes. Many Indian reservations suffer from a chronic lack of basic criminal justice services. Strengthening public safety means reassessing decisions by the U.S. Supreme Court that limit tribes from fighting crime. This includes revisiting the Court's decision in *Oliphant v. Suquamish Tribe*, which prevents tribes from asserting criminal jurisdiction over non-Indians, in order to bring more criminal justice resources to Indian country.

Introduction: Tragedy at Towaoc

Few of the half-million tourists who visit Mesa Verde National Park in southwestern Colorado each year would suspect that the nearby village of Towaoc is the murder capital of Colorado. Vacationing motorists might mistake this picturesque village (pronounced *TOY'awk*), nestled below Sleeping Ute Mountain—resembling a stone giant sprawled lazily on his back with arms folded across his chest—as a place of tranquility amid the vast landscape of the Four Corners area, where Arizona, Colorado, New Mexico, and Utah meet.

Yet everyday life in Towaoc, capital of the 2,000-member Ute Mountain Ute Tribe, is filled with violence, fear, and despair. Last year alone, five people were murdered on the Ute Mountain Ute Reservation. A sixth unexplained death is still being investigated, along with at least two prior unsolved homicides. At a time when the United States, outside of Indian country, has generally experienced steady or even declining incidents of violent crime, the murder rate on Ute Mountain is at least 20 times Colorado's state average.

Ute Mountain has become a haven for all kinds of criminals—Indian and non-Indian alike—who confront a capable but chronically short-staffed law enforcement presence. Only five police officers—all from the U.S. Department of the Interior's Bureau of Indian Affairs (BIA)—patrol a reservation about the size of Rhode Island. Sometimes just one BIA police officer is available on call, resulting in response times of more than one hour.¹ Unarmed groups of tribal employees were recently assembled into civilian patrols to serve as extra "eyes and ears" for BIA of-



Three Rivers Petroglyphs Site, New Mexico.
Photo by Lawrence Baca.

ficers. This creatively desperate attempt at self-help proved dangerous when one or more snipers, tracking the civilian patrols' movements with police radio scanners, began firing at the civilian patrols with high-powered rifles. Without enough trained patrol officers and investigators in the field, crime scenes on Ute Mountain are often compromised, critical evidence is destroyed, and witnesses disappear. BIA police chiefs at Towaoc have routinely served tours of duty of no more than 120 days—and sometimes just one month—before being rotated by BIA to work on other Indian reservations throughout the American West.

Promoting Tribal Self-Determination in a Post-*Oliphant* World: An Alternative Road Map

By Elizabeth Ann Kronk

Troy Eid's article, "Beyond *Oliphant*: Strengthening Criminal Justice in Indian Country," is an insightful commentary on a significant problem in Indian country: the jurisdictional and law enforcement quagmire created by the Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, holding that tribes do not have criminal jurisdiction over non-Indians. Eid's article portrays some of the problems faced by law enforcement in addressing the unacceptably high rate of crime in Indian country and accordingly calls for a congressional repeal of *Oliphant*. Whereas I agree with Eid that a congressional repeal of *Oliphant* is long overdue and would go a long way toward addressing the milieu of *Oliphant*-related problems in Indian country, I disagree with his proposed solution, which conditions repeal of *Oliphant* on requirements that would apply Western norms of criminal justice on tribal courts. I offer this commentary to further the discussion Troy Eid has started.

Rather than conditioning the repeal of *Oliphant* on making tribal courts adopt certain measures, a post-*Oliphant* discussion should begin with a consideration of tribal self-determination. Currently, tribes live with alien Western criminal justice norms that reflect the value judgments of an invasive, dominant society and do not consider tribal values of justice. Value judgments as to how tribal courts must operate and conditions on tribal jurisdiction over non-Indians are contrary to meaningful sovereignty and self-determination.

It is useful to begin with a fundamental premise: Jurisdiction over non-Indians is an inherent right possessed by tribes before their first contact with Europeans, removed *only* through the policy changes made by the Supreme Court since 1978. The congressional intent behind the Indian Civil Rights Act of 1968 was to allow tribes to develop their own justice systems with the minimum baseline of civil rights imposed by the act. Therefore, tribal jurisdiction over non-Indians is not an increase of tribal power, but is rather a removal of a constraint created by the Supreme Court on a power that existed before the formation of the United States. In addition, given the restrictions of federal statutes such as the Major Crimes Act, tribes would still have jurisdiction only in mostly misdemeanor matters, as a result of a congressional repeal of *Oliphant*.

A congressional repeal of *Oliphant* without conditions or waivers of sovereign immunity is consistent with self-determination. A long-term solution to the problems laid out in Eid's article involves more than transforming tribal courts into agents of state and federal courts. Congress intended for tribal courts to develop their own systems, restrained by a minimum of civil rights, when it passed the Indian Civil Rights Act. Unacceptable errors can be corrected by habeas review. Eid suggests that habeas corpus

relief from tribal court decisions would not be sufficient without the conditions he proposes. The reality of practice, however, seems to suggest otherwise, as very few habeas petitions from tribal court convictions are filed every year. According to Professor Matthew L. M. Fletcher, in the past 39 years, there has been less than one petition per year for habeas review of a tribal court decision.

Moreover, the executive and legislative branches of the federal government support tribal self-determination. On Sept. 23, 2004, President George W. Bush released a memorandum articulating the administration's commitment to the policy of tribal self-determination.¹ The President's memorandum was merely the reiteration of a long-standing federal government policy of respecting tribal sovereignty and promoting tribal self-determination. Furthermore, congressional legislation has consistently supported and articulated the policy of tribal self-determination.²

Troy Eid's proposed remedy also runs afoul of the principles of cooperation and mutual respect that were articulated at the Federal Bar Association's 31st Annual Indian Law Conference held in Albuquerque, N.M., on April 7, 2006. At the conference, Christopher Chaney, deputy director of the Office of Law Enforcement Services at the Bureau of Indian Affairs; Matthew Mead, U.S. attorney for the District of Wyoming; and Willie Noseep, a member of the Eastern Shoshone Business Council, discussed how federal government, state and local officials, and tribes worked cooperatively to dismantle substantial drug trafficking organizations. (See the discussion of Jesus Sagaste-Cruz in the accompanying case study on the use of methamphetamines in Indian country.) Successes, such as those presented at the recent Indian Law Conference, show that tribal governments can work cooperatively with outside law enforcement officials without the need to apply Western norms of criminal justice to tribes in a unilateral manner.

Accordingly, given the federal government's policy of promoting tribal self-determination, suggestions—such as those made by Eid requiring tribes to conform to Western norms of criminal justice—are misplaced. Congress has recognized that the policy of tribal self-determination has been successful in promoting progress in Indian country.³ Therefore, it would not seem prudent to abandon this policy now. Also, some tribes have, as a sovereign and selective choice, taken steps to address some of the concerns raised by Eid; therefore, a conditional repeal of *Oliphant* is not necessary. For example, § 7 of the Navajo Nation's Bill of Rights guarantees the right to counsel, which has been recognized by the Navajo Supreme Court.⁴ In fact, many tribal courts require *more* protections from criminal procedures than federal or state courts ever did.⁵ Tribal judges have traditionally been more empathetic to defendants and have understood what works

In recent years, the tribal court in Towaoc, also run by the BIA on a contract basis, has functioned only sporadically. Aside from preventing the enforcement of misdemeanor laws under the tribal code, this lack of continuity causes violent crimes to go unpunished under federal law, because potential witnesses cannot be detained locally while investigations are completed and federal charges are filed. At one point, the BIA jail in Towaoc shut down entirely because of a lack of funds. All this uncertainty and lack of enforcement of the law has fueled local mistrust in the Federal Bureau of Investigation and the U.S. attorney's office—the agencies that, under the Major Crimes Act and other statutes, are chiefly responsible for ensuring that justice is done for victims of violent crime in Indian country. Meanwhile, the nearest U.S. district judge serving the citizens of Towaoc is more than 400 miles away in Denver, an eight-hour drive—even in good weather.

"People shouldn't have to live like this in the United States," U.S. Attorney General Alberto Gonzales said recently when asked about the situation on Ute Mountain.² Federal law enforcement officers, prosecutors, and judges should properly regard the attorney general's statement as a call to action. The condition that is perhaps the most obvious problem at Ute Mountain—too much violent crime, too little law enforcement—is being repeated to varying degrees on many of America's roughly 300 other Indian reservations. And if a lack of law enforcement personnel does not present enough of a challenge, there are similar problems with tribal courts' capacity to adjudicate criminal defendants and tribal detention facilities' ability to house them.

The U.S. Department of Justice reports that, from 1992 to 2001, the average rate of violent crime among American Indians (ages 12 and older) was two-and-one-half times the national rate.³ Examples abound. On the White Mountain Apache Reservation in Eastern Arizona, 10 people were murdered last year alone—13 times the national homicide rate.⁴ Violent crime helps explain why the life expectancy for adult men living on the Pine Ridge and Rosebud Indian Reservations in South Dakota is just 56.6 years—compared to a national average male life span of 72.9 years—and is lower than that of males in any nation in the Western Hemisphere except Haiti.⁵ Native American women are seven times more likely to be victims of domestic violence than all other women are; more than 60 percent of Indian women will be victims of violent assault during their lifetime, and more than one-third will be raped.⁶

Understanding why the rate of violent crime is so disproportionately high in Indian country is important to all of us, and our nation will benefit greatly from expanded research, analysis, and public discussion of this vexing problem. Yet no matter *why* such crime exists, there is also an urgent need to explore how Indian reservations can be made safer *now*, based on what we do know today. Decades of direct experience elsewhere strongly suggest that intensifying law enforcement, prosecution, and adjudication in troubled communities can reduce violent crime—often dramatically. According to the Justice Department's own estimates, in 1997, Indian country was served by only

half as many police officers per capita as similarly situated rural communities.⁷ This disparity has shrunk on several reservations thanks to a combination of increased tribal funding and targeted financial and technical aid from the Justice Department, the BIA, and other federal agencies.

Yet on Ute Mountain and in many other communities, the gap stubbornly persists. Last year, the BIA hired a private consultant to determine what it might take to put tribal law enforcement and corrections on an equal footing with similarly situated off-reservation communities. The consultant's report recommended that the BIA hire 1,097 new employees to achieve parity in criminal justice and corrections programs. (By comparison, the BIA's Office of Justice Services currently has about 450 total employees on its payroll.) According to the consultant's estimate, BIA had a 69 percent unmet staffing need for law enforcement officers and a 61 percent unmet need for correctional facilities and programs. In addition, the report concluded that tribes should hire 1,059 new law enforcement officers, based on a staffing gap of 33 percent in that category, and 341 correctional officers based on a 24 percent staffing gap.⁸

Strengthening public safety in Indian country through more effective law enforcement, prosecution, and adjudication may be a perennial budget challenge, but the conversation should not end there. Another critically important way to narrow the public safety gap in Indian country is to reassess legal decisions made by the U.S. Supreme Court and other federal tribunals that hinder tribal governments from devoting more of their own limited resources—along with whatever funds Congress might choose to provide—to fighting crime. The law simply does not reflect the federal government's long-standing policy of promoting tribal self-determination with respect to other core governmental functions, such as health, public welfare, and the environment—in President Bush's words, "to work with tribal governments on a sovereign-to-sovereign basis."⁹ Reforming federal criminal law and jurisdiction to give tribal governments more freedom to provide responsibly for their own public safety needs—for their members as well as for non-Indians who visit or live, work, and invest in Indian country—is a discussion worth having.

Trapped in the Jurisdictional Maze

The sheer jurisdictional complexity of federal Indian law—with both the adjudicative forum and applicable law depending on the type of crime, status of the land where the offense occurred, and identity of the victim and the suspect (Indian or non-Indian)—seriously impedes the effective administration of justice. Since 1885, U.S. attorneys and tribal governments have had the primary responsibility for prosecuting violent crimes in Indian country. Yet even this basic division of labor has its arcane exceptions. For example, crimes involving only non-Indians in Indian country are subject to exclusive *state* jurisdiction. In states where Public Law 280 applies, state governments may or may not exercise criminal jurisdiction over Indians and non-Indians alike, depending on the specific reservation or criminal offense at issue.¹⁰ More recently, in *Nevada v. Hicks*, the Supreme Court allowed state officers investigat-

and what does not work on the grounds of tribal justice.

Moreover, there is evidence that Western norms of criminal justice may not even be effective in Indian country. “Though Congress has often justified imposition of the federal criminal justice system in Indian country on the theory that federal laws are necessary to protect public safety, numerous statistical surveys suggest that the federal Indian country criminal justice regime has not achieved any such purpose.”⁶ The ineffectiveness of Western norms of criminal justice in Indian country may be the result of divergent traditions. For example, according to one analyst, “State and federal enforcement come from a long history and practice of coercing confessions from suspects (one of the reasons to guarantee an attorney and a jury of peers) that is missing from most [tribes].”⁷

In fact, asserting Western norms of criminal justice may actually stifle the development of more effective tribal solutions to crime in Indian country by precluding tribes from creating models that more effectively incorporate their own tribal traditions. For example, the Navajo Nation has developed a culturally sensitive model to address problems on the Navajo Nation Reservation, the largest Indian reservation in the United States. After the Western police model that relied on power, force, and authority failed—partly because of the alien nature of that model—the Navajo Nation developed a system of justice “based upon discussion, consensus, relative need, and healing. It is ‘restorative justice,’ which puts people in good relations with each other, and in continuing relationships. The Navajo system is ‘horizontal’ or egalitarian law.”⁸ The Navajo Nation’s new model of restorative justice has succeeded where the Western model failed.

Tribal norms of criminal justice, such as the restorative justice practiced by the Navajo Nation, are just as relevant to non-Indians living in Indian country as they are to Indians. The vast majority of non-Indians over which a tribe would have jurisdiction following a congressional repeal of *Oliphant* would be permanent members of the community, not mere vacationers. As members of the tribal community, these non-Indians would have just as strong an interest in the community’s healing process as would Indian members of the community. Moreover, just as Indians should be willing to accept Western norms of criminal justice when they are outside Indian country, so too should non-Indians be prepared to accept tribal judicial norms when they are in Indian country.

Thus, given that Western norms of criminal justice have failed in Indian country and tribes have successfully developed effective means of enforcement, Congress should repeal *Oliphant* without conditions, such as those suggested by Eid, that run afoul of the policy of self-determination and would, in effect, make tribes agents of the federal government. An alternative post-*Oliphant* solution that furthers the policy of self-determination would be an amendment to 25 U.S.C. § 1301(2) recognizing tribal jurisdiction over “all persons.” This proposed solution offers multiple benefits: Unconditional congressional repeal of *Oliphant* increases tribal self-determination, breaks down a significant hurdle to effective law enforcement in Indian

country, and will “help relieve burdened [s]heriff’s offices that are currently primarily responsible for policing non-Indian misdemeanants in Indian [c]ountry.”⁹

I appreciate Troy Eid’s willingness to open the discussion about the most effective solution to the jurisdiction quagmire in Indian country that was created in part by the Supreme Court’s *Oliphant* ruling. However, rather than adopt a road map that applies Western norms of criminal justice to tribal courts, my proposed road map navigates toward a post-*Oliphant* world of greater tribal self-determination. I certainly look forward to the ride! **TFL**

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Endnotes

¹Memorandum from George W. Bush to Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004), available at www.whitehouse.gov/news/releases/2004/09/print/20040923-4.html.

²Indian Self-Determination and Education Assistance Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2296 (1988).

³*Id.* (“... compared to state, county and municipal governments of similar demographic and geographic characteristics, the level of development attained by [tribal] governments over the past twelve years is remarkable. This progress is directly attributable to the success of the federal policy of Indian self-determination.”).

⁴*Boos v. Yazzie*, 6 Nav. R. 211, 214 (Nav. Sup. Ct. 1990).

⁵*E.g. Rodriguez v. Navajo Nation*, No. SC-CR-03-04 (Nav. Sup. Ct. 2004), available at navajolawblog.com/wp-content/Rodriguez.pdf.

⁶Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 786 (March 2006).

⁷Matthew L.M. Fletcher, *Fletcher: Means Case a Supreme Affirmation of Tribal Authority*, INDIAN COUNTRY TODAY (Oct. 20, 2006), available at www.indiancountry.com/content.cfm?id=1096413861.

⁸Robert Yazzie, “*Hozho Nabasdlii*”—*We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 120 (Fall 1996).

⁹Christopher B. Chaney, *Overcoming Legal Hurdles in the War Against Meth in Indian Country*, 82 N.D. L. REV. ____ (forthcoming, March 2007).

ing off-reservation crime to search an Indian's residence on trust land within a reservation, undermining the often delicate cooperative policing arrangements that have been painstakingly forged between many state and tribal law enforcement officers.¹¹

The federal criminal statutes operating in Indian country themselves add to the jurisdictional maze. Under the Major Crimes Act, the United States has jurisdiction to prosecute a laundry list of serious crimes—but only those involving Indians. The General Crimes Act, in contrast, applies to *all* federal offenses, but does not apply to crimes that are committed by Indians and whose victims are Indians. In still other federal prosecutions, state law is assimilated through federal law, with the offense charged and prosecuted in federal court but the crime itself defined and the sentence determined by state law. An example is a vehicular homicide case where a non-Indian suspect, allegedly impaired by using alcohol or illegal drugs, causes the death of an Indian on a state right-of-way within the boundaries of a reservation.¹²

Justifiably concerned about this jurisdictional quagmire, in July 2002, the Senate Committee on Indian Affairs convened a hearing focused on how federal law frustrates law enforcement in Indian country. Then U.S. Attorney Thomas B. Heffelfinger of Minnesota, who at the time chaired the Native American Issues Subcommittee of the Attorney General's Advisory Committee, called on the committee to provide "jurisdictional clarity in order to allow us to do our multiple functions within the Department of Justice." Heffelfinger stressed the need for a comprehensive approach to jurisdictional reform, rather than a narrower fix provided by *Hicks* or other decisions: "[W]e have to develop a pattern of cooperation across Indian country and across the United States. The law must foster that."¹³ Heffelfinger repeated this position the following year, when the Indian Affairs Committee met to consider Senate Bill 578, a series of amendments to the Homeland Security Act broadly aimed at including tribes in national antiterrorism planning. He again called for jurisdictional clarity, achieved through comprehensive legislative reform, to remove legal barriers to more effective law enforcement in Indian country.



Bandelier National Monument, New Mexico. Photo by Lawrence Baca.

The Role of *Oliphant*

This time, the legislation before the committee contained a new twist: A proposed section to the Homeland Security Act—§ 13—which would repeal, albeit only in certain instances involving homeland security, the Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*. *Oliphant* held that, absent express authorization from Congress, Indian tribes lack criminal jurisdiction over non-Indians.¹⁴ "In the view of many," Heffelfinger testified, "the *Oliphant* decision has created a gap in Indian [c]ountry law enforcement and negatively impacts tribes' abilities to respond effectively to terrorist incidents and other crimes which may be committed by non-Indians in Indian [c]ountry." Nonetheless, Heffelfinger continued, "overruling *Oliphant* in a broad and isolated manner," without comprehensive jurisdictional reform, was "premature." In the end, § 13 was never enacted.¹⁵

Proponents of § 13 testified at the July 2003 hearing that the net effect of *Oliphant* was to discourage or even prevent tribes from taking greater responsibility for their own public safety. The majority opinion in *Oliphant* hinted at this in its ruling, leaving the issue to Congress but warning: "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." A generation after the *Oliphant* decision, then U.S. Sen. Ben Nighthorse Campbell (R-Colo.), questioning the impact of *Oliphant* during the hearing held in July 2002, observed that "the word is out that people can get off the hook, so to speak, if they are not Indian and they do something on Indian land."¹⁶

Sen. Campbell's warning is a familiar scenario to federal prosecutors in Indian country, especially in domestic violence and child abuse cases in which the suspect claims to be a non-Indian and therefore beyond the jurisdiction of the tribal police officers who typically respond in such cases.¹⁷ One current way to thread the jurisdictional needle is for tribal officers to obtain cross-commissions from state, local, and federal officials to expand their authority to arrest non-Indian criminal suspects under state or federal law. In practice, this is much easier said than done, particularly after the *Hicks* decision. The resources for cross-training officers can be severely limited, requiring innovative approaches. The U.S. Attorney's Office for the District

of Colorado, the Southern Ute Indian Tribe (headquartered in Ignacio, Colo.), and the Bureau of Indian Affairs recently joined forces to develop a pilot training program for tribal police officers. The pilot program is intended to reduce by one-half the training time required for BIA to grant special law enforcement commissions that enable tribal police officers to issue federal citations.¹⁸ In too many other instances, however, civil liability considerations interfere with cooperative law enforcement.

As an *Oliphant* jurisdictional work-around, cross-designation agreements are not nearly as practical or plentiful as one might conclude from reading about them in federal court decisions. Effective law enforcement over non-Indians who commit crimes in Indian country varies widely depending on the reservation, and in practice such enforcement often does not exist. This state of affairs, in turn, has prompted a searching review by several commentators into whether *Oliphant* itself should be modified or repealed. Most recently, the BIA's law enforcement director, Christopher B. Chaney, a veteran former federal and tribal prosecutor, takes direct aim at *Oliphant* along with the Indian Civil Rights Act, which prevents tribes from imposing fines in excess of \$5,000 or jail sentences of more than one year. *Oliphant*, Chaney writes, is a legal hurdle in the war against methamphetamine trafficking and abuse in Indian country. Congress could strengthen public safety in Indian country by amending 25 U.S.C. § 1301(2) to give tribal governments criminal jurisdiction over "all persons"—much as Congress did when it passed legislation that overturned the Court's decision in *Duro v. Reina*—an amendment that recognizes tribes' jurisdiction over "all Indians" rather than just their own tribal members.¹⁹ "This would bring added law enforcement authority to tribal communities," Chaney concludes, "and help relieve sheriff's offices that are currently primarily responsible for policing non-Indian misdemeanants in Indian [c]ountry."²⁰

Chaney cautions that he is writing for himself, not announcing any change in BIA or Department of the Interior policy related to the *Oliphant* decision. He concludes that overturning *Oliphant* could increase law enforcement resources in Indian country and thus reduce crime there, and that the proper focus should be on structuring tribal justice systems in a way that will protect the civil liberties of all defendants—Indian and non-Indian alike. Given the unacceptably high rate of violent crime in Indian country and the need to enlist more law enforcement, prosecution, and adjudication resources to meet that challenge, Chaney's ideas deserve serious discussion within the federal government and with the tribes.

What Chaney does not state in his groundbreaking article—and what should also be said plainly—is that a congressional repeal of *Oliphant* would give non-Indians a far greater stake in the future of Indian country than they would otherwise have during our lifetimes. The possibility that non-Indians might face criminal proceedings in tribal court, unlikely though it might be for the vast majority of Americans, would nonetheless be *real*. Over time, potential exposure of non-Indians to tribal courts and police departments, in addition to federal and tribal policy-mak-

ers' justifiable concern about such matters, would create a valuable off-reservation constituency to support tribes in their efforts to improve their criminal justice systems. At the same time, moving beyond *Oliphant* would create a practical deterrent to non-Indian and Indian offenders tempted to treat Indian lands as prosecution-free zones.

More fundamentally, much of Indian country has changed substantially since 1978, when *Oliphant* was decided, let alone since 1968, when the Indian Civil Rights Act was enacted. Building on President Richard M. Nixon's Indian self-determination policy, many tribal governments are undergoing what has been compared to a renaissance, gaining substantially increased governmental sophistication and economic development. These tribes have tended to embrace laws and policies that seek to devolve more discretion and responsibility from the federal government to tribal authorities.²¹

To make this a more productive dialogue, however, we must be realistic about the scope, magnitude, and difficulty of what we are talking about. Ending the results of the *Oliphant* ruling means applying tribal court jurisdiction to all citizens, but in a way that fully protects their rights under the U.S. Constitution. Anything less than that could become the "broad and isolated" repeal against which Tom Heffelfinger testified on behalf of the Justice Department in 2003. In other words, what would it *really* take for a repeal of *Oliphant* not to be "broad and isolated"? How might the change be positioned within a comprehensive reform that achieves greater jurisdictional clarity for law enforcement officers, attorneys, and judges?²²

Charting a Post-*Oliphant* Road Map

Any serious (albeit hypothetical) discussion of what a post-*Oliphant* world might look like starts with this premise: The depth and consistency with which tribal courts protect criminal defendants' civil rights must be on a par with that of defendants in state court criminal proceedings. Otherwise, habeas corpus relief from tribal court decisions alleged to have violated federal constitutional rights might not realistically be a sufficient remedy.²³ Defendants would presumably expect to be retried *de novo* in U.S. district court for violating tribal criminal codes—essentially imposing a costly and frustrating exhaustion requirement for all concerned and, from the tribes' perspective, a serious infringement on tribal courts' sovereignty, with federal judges applying tribal law.

A better approach would be to ensure that the tribal courts themselves meet federal constitutional requirements in terms of ensuring due process and providing a full and fair forum by an independent, neutral arbiter. Several tribal court systems, such as the Navajo Nation Supreme Court and district courts, are already meeting that threshold standard in some respects, but not in all, such as judicial independence. This development is remarkable given that these court systems were not designed—and are not currently configured—to adjudicate criminal matters involving non-Indian defendants. Other tribes could probably make the transition, provided that the tribe's leadership decided it was a priority.

All this suggests that tribes might be given the flexibility to opt in to a post-*Oliphant* world on a case-by-case basis. Those tribal courts wishing to exercise criminal jurisdiction over non-Indian defendants could be supported in doing so starting on a certain date, provided they agree voluntarily to integrate federal constitutional substantive and procedural protections into their justice systems. This would mean, as in state courts, that the definition of what constitutes a permissible search and seizure under tribal case law, for example, would be separate and distinct from its federal counterpart, provided again that all federal constitutional requirements are met as a “floor” on permissible rights. The Indian Civil Rights Act would necessarily need to be modified in several critical respects, such as providing indigent defendants a right to defense counsel. Another concern—one raised by the *Oliphant* Court—involves jury pools. At the time the case was decided, the court for the Suquamish Tribe did not allow non-Indians to participate in juries. That situation has changed dramatically for many tribal courts, which now require a “fair cross-section of the community” standard for jury selection and service. For instance, the Navajo Nation Supreme Court has held that non-Indians in the community are entitled to sit on juries in Navajo courts.²⁴

The good faith pursuit of parity between tribal courts and state courts, as a condition precedent for repealing *Oliphant*, also means acknowledging that tribes should not be required to provide *greater* civil rights protections to criminal defendants than states do. Ironically, several provisions of the Indian Civil Rights Act currently do just that. Professor Kevin K. Washburn, another seasoned former Indian country federal prosecutor, writes eloquently on this point, noting, for example, that the right to a jury trial is much broader in tribal courts than in state courts because of ICRA. In a tribal court, a defendant is entitled to a jury trial if he or she is accused of an offense that is punishable by any term of imprisonment—even petty offenses—whereas a state court defendant may only demand a jury trial if charged with a felony or a misdemeanor punishable by a term of imprisonment of at least six months. Parity between tribal courts and state courts ought to mean exactly that—no less, but also no more.²⁵

Still another matter that might arise if *Oliphant* is repealed is the sovereign immunity of government officials in the civil context. The combined effect of § 1303 of the Indian Civil Rights Act and the Supreme Court’s decision in *Santa Clara Pueblo v. Martinez* is to limit federal review of tribal court decisions to habeas corpus.²⁶ This expansive definition of tribal sovereign immunity is actually greater than that afforded to the states, where defendants have the alternative remedy under 42 U.S.C. § 1983 to challenge alleged misconduct by state and local police and other government officials. In conjunction with repealing *Oliphant*, the *Santa Clara Pueblo* ruling might be modified to provide a qualified waiver of sovereign immunity in such cases, again to ensure greater government accountability and protection of defendants’ civil liberties.

Conclusion

Wherever a hypothetical post-*Oliphant* conversation might lead, the discussion is timely and extraordinarily important, given the disproportionately high rate of violent crime in Indian country and the need for expanded law enforcement there. A greater emphasis on tribal sovereignty and self-determination in tribal criminal justice policy would echo the approach that has so dramatically improved the delivery of many other essential government services on Indian reservations in recent years. That approach holds enormous promise for making Indian country safer for all, provided there is no compromise on protecting the rights of the accused in federal criminal proceedings. The status quo—and the lingering public safety gap between Indian country and similarly situated rural communities—is unacceptable and must end. Too many lives have already been lost on Colorado’s Ute Mountain Ute Reservation and other Indian nations. To cynics who say it will take too long to turn this tragedy around, our answer must be this: Let’s get started. **TFL**

Hon. Troy A. Eid is the U.S. attorney for the District of Colorado. He took office on Aug. 11, 2006, following his appointment by President George W. Bush and unanimous confirmation by the U.S. Senate. A graduate of Stanford University and University of Chicago Law School, Eid is licensed to practice law in the courts of Colorado and the Navajo Nation. The contents of this article are solely the opinion of the author and do not represent the positions or views of the U.S. Department of Justice. The author thanks Jim Allison, Diandra Benally, Jim Candelaria, Chris Chaney, Jeff Dorschner, Janelle Doughty, Allison Eid, Judy Evans, Paul Farley, Paul Frye, Leslie Hagen, Albert Hale, Tom Heffelfinger, Ernest House, Paul Moorehead, Tom Shipps, Tracy Toulou, Kevin Washburn, and Sam Winder for their helpful insights. Special thanks to Cheriene Nowick, Amy Petri, and Mariann Storck for research assistance.

Endnotes

¹The relatively slow response times of law enforcement on Indian reservations can be common, as compared to average response times of five or six minutes in major U.S. metropolitan areas. See Sen. Daniel K. Inouye, *Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the U.S. Supreme Court*, 107th Cong., 2d Sess., S. Hrg. 107-605, Senate Committee on Indian Affairs, p. 2 (July 11, 2002).

²Hon. Alberto R. Gonzales, meeting with the ROCKY MOUNTAIN NEWS editorial board, Denver, Colo., Nov. 20, 2006.

³U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Violent Crime*, BJS STATISTICAL PROFILE, 1992–2002, 4–5 (2004).

⁴*FBI Probes 10th Murder on the Reservation*, WHITE MOUNTAIN INDEPENDENT, Show Low, Ariz., p. A1 (Dec. 22, 2006).

⁵Dr. Christopher Murray of the Harvard School of Public Health, reported in Chet Brokaw, *Study: Improved Health Needed for Indians*, YANKTON (S.D.) PRESS & DEMOC-