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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALBERT DURO, Petitioner, v. EDWARD REINA,
CHIEF OF POLICE, SALT RIVER
DEPARTMENT OF PUBLIC SAFETY,
SALT RIVER PIMA-MARICOPA INDIAN
COMMUNITY, ET AL.

CASE NO: 88-6546

PLACE: Washington, D.C.

DATE: November 29, 1989

PAGES: 1 - 49

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 ALBERT DURO, :
4 Petitioner :
5 v. :
6 EDWARD REINA, CHIEF OF POLICE, : No. 88-6546
7 SALT RIVER DEPARTMENT OF :
8 PUBLIC SAFETY, SALT RIVER :
9 PIMA-MARICOPA INDIAN :
10 COMMUNITY, ET AL. :
11 -----x

12 Washington, D.C.

13 Wednesday, November 29, 1989

14 The above-entitled matter came on for oral argument
15 before the Supreme Court of the United States at 12:59
16 o'clock p.m.

17 APPEARANCES:

18 JOHN TREBON, ESQ., Flagstaff, Arizona; on behalf of
19 the Petitioner, (appointed by this Court).

20 RICHARD B. WILKS, ESQ., Phoenix, Arizona; on behalf
21 of the Respondents.

22 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; as
24 amicus curiae, supporting the Respondents.

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	JOHN TREBON, ESQ.	
4	On behalf of the Petitioner	3
5	RICHARD B. WILKS, ESQ.	
6	On behalf of the Respondents	25
7	LAWRENCE G. WALLACE, ESQ.	
8	As amicus curiae supporting	
9	the Respondents	36
10	<u>REBUTTAL ARGUMENT OF</u>	
11	JOHN TREBON, ESQ.	
12	On behalf of the Petitioner	46
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument first
4 this afternoon in Number 88-6546, Albert Duro v. Edward
5 Reina.

6 Mr. Trebon.

7 ORAL ARGUMENT OF JOHN TREBON

8 ON BEHALF OF PETITIONER

9 MR. TREBON: Thank you.

10 Mr. Chief Justice and may it please the Court:

11 The issue in this case is whether an American citizen
12 can be submitted to the criminal jurisdiction of an Indian
13 tribe even though he is not a member of the tribe simply
14 because he or she is an Indian; or, should they be treated
15 like Mr. Oliphant and other non-members with whom they are
16 similarly situated.

17 Albert Duro, the Petitioner in this case, is a
18 California Indian. He is a member of the Torez-Martinez
19 band of Mission Indians. He was raised in California on
20 private land and is a permanent resident of the State of
21 California. He is not a member of, nor is he eligible for
22 membership in the Salt River Tribe, who is the Respondent
23 in this case.

24 For approximately three months in 1984, Albert Duro
25 stayed on the Salt River reservation with his girlfriend,

1 who is also from California. During June of 1984, a
2 firearm discharged and accidentally shot a 14-year-old boy
3 that was riding a bicycle approximately two blocks away,
4 undoubtedly an unfortunate incident.

5 Mr. Duro, along with Sean Lackey, was indicated in
6 federal court for first degree murder relating to that
7 charge.

8 QUESTION: It resulted in a death?

9 MR. TREBON: It did result in death, Justice
10 O'Connor, yes.

11 He was indicted for first degree murder, and after
12 the case was in federal court for several months, it was
13 dismissed on motion of the government and dismissed
14 without prejudice. The government has never refiled that
15 charge against Mr. Duro.

16 Two days after the case was dismissed in federal
17 court, the federal marshals turned Mr. Duro over to the
18 Salt River Tribe. He was charged in the Salt River Tribe
19 with discharge of firearms, which is a misdemeanor.

20 A motion to dismiss was filed by Mr. Duro in the Salt
21 River Tribe. That motion was denied by Judge Manuel.

22 We then filed a habeas corpus petition before the
23 federal district court. Judge Copple, who the Court may
24 remember was the district court judge involved in the
25 Wheeler decision and upheld by this Court, issued a writ

1 of habeas corpus in favor of Mr. Duro. That was appealed
2 by the Respondent to the Court of Appeals for the Ninth
3 Circuit.

4 The Ninth Circuit, in a 2-1 decision with Judge Sneed
5 dissenting, held that non-member Indians, unlike
6 non-Indians, are subject to the criminal jurisdiction of
7 an Indian tribe if they have significant contacts with the
8 reservation; not if the crime involves significant
9 contacts with the reservation but merely whether or not
10 the person involved has significant contacts with the
11 reservation.

12 QUESTION: Did the Ninth Circuit adopt the context
13 rule as part of a statutory analysis? How did it purport
14 to justify the context rule?

15 MR. TREBON: It -- it purported to justify it on the
16 basis that the tribe had an interest in someone over whom
17 they had a significant contact. The significant context
18 test, as far as I can see, has no direct relation to any
19 statute.

20 QUESTION: Did -- did -- did it purport to be some
21 sort of a constitutional analysis?

22 MR. TREBON: No, it did not. I think, with all due
23 respect to the Ninth Circuit, it was a rule that they
24 modeled in order to fit the problem that they determined
25 to exist on the reservation.

1 QUESTION: Well, now, if you were to prevail here, I
2 take it no prosecution for the discharge of the firearm
3 would be possible in this case?

4 MR. TREBON: Well, Justice O'Connor, we don't
5 necessarily feel that that is true. In fact --

6 QUESTION: Why not?

7 MR. TREBON: Well, first of all, we think that two
8 separate sovereigns could fill the supposed void that the
9 Respondents argue exist. The state government could --

10 QUESTION: Well, in Arizona it has not, of course,
11 come within the purview of Public Law 280. It does not
12 have criminal jurisdiction for offenses --

13 MR. TREBON: You're correct, Justice O'Connor.
14 That's true.

15 QUESTION: So that's out.

16 MR. TREBON: That's true.

17 QUESTION: All right.

18 MR. TREBON: But the State of Arizona continues to
19 exercise criminal jurisdiction for crimes committed on the
20 reservation between two non-Indians, and that jurisdiction
21 exists regardless of whether or not it's a 280 state.

22 The same analysis that allows them under McBratney
23 and that line of cases to have jurisdiction over non-
24 Indians would similarly allow them to have jurisdiction
25 over non-member Indians. In fact --

1 QUESTION: Is there any case from this Court that you
2 would point to to indicate that the State of Arizona has
3 criminal jurisdiction here? I thought we took it as a
4 given that the state did not.

5 MR. TREBON: This Court has not directly focused upon
6 that issue as of yet. This is a case of first impression.

7 The cases that I would point the Court to would be
8 not only the McBratney line of cases but the cases ever
9 since Fletcher v. Peck through Brendale involving Oliphant
10 and Wheeler and the cases that follow that define tribal
11 sovereignty with respect to its own members in the state
12 interest on the reservation to all non-members, not simply
13 non-Indians.

14 So if you follow that line of reasoning, the
15 McBratney rationale could easily be extended to cover non-
16 member Indians on the reservation.

17 QUESTION: But if -- not a non-member Indian
18 attacking a member, could it?

19 MR. TREBON: No, I would think -- well, yes. The
20 non-member Indian -- no, that would be federal court. I'm
21 sorry, Chief Justice. That's exactly right. That would
22 continue to be in federal court under 1152.

23 QUESTION: So your response to me was wrong. You do
24 not assert the State of Arizona could assert jurisdiction
25 here?

1 MR. TREBON: I think the State of Arizona could
2 assert jurisdiction involving an offense on the
3 reservation --

4 QUESTION: No, we're talking about this offense. I -
5 - I thought it was an -- a -- a member of the tribe who
6 was killed.

7 MR. TREBON: It was not. I'm sorry.

8 QUESTION: It's a non-Indian who was killed?

9 MR. TREBON: It's a non-member. It is a member of an
10 adjoining tribe, an adjoining reservation. Neither
11 Phillip Fernando Brown, who was the young child that was
12 accidentally shot in this case, nor Albert Duro, is a
13 member of the host tribe.

14 QUESTION: All right. Now, would you tell me so that
15 I understand it, please, whether you assert that the State
16 of Arizona has criminal jurisdiction over the offense, if
17 any?

18 MR. TREBON: Let me say, Justice O'Connor, I cannot
19 answer that question in the definitive manner now, but it
20 is very likely that the State of Arizona could have
21 jurisdiction under the rationale of McBratney. It is also
22 possible that the federal government could have
23 jurisdiction as well.

24 QUESTION: Well, I thought the federal government had
25 dismissed the suit, and the solicitor general representing

1 the federal government says it has no jurisdiction over
2 this offense.

3 MR. TREBON: That's true. I think that the
4 Respondent and the government would like to create a void
5 in this case, but one doesn't actually exist --

6 QUESTION: Well, I don't know about liking to. The
7 concern is there may in fact be a void.

8 MR. TREBON: The government said the same thing to
9 this Court in Oliphant. They said there could be a hiatus
10 created if you did not grant tribal court's jurisdiction
11 over non-Indians.

12 The same type of void arguably exists in this case.
13 We believe that the void could be filled in the same
14 manner that it was filled after Oliphant.

15 QUESTION: And how was that?

16 MR. TREBON: State courts exercise jurisdiction after
17 Oliphant.

18 QUESTION: Is it also a possibility that no void
19 exists because we interpret the exception clause of 1152
20 to apply to tribal members?

21 MR. TREBON: Precisely. That would erase the void
22 completely.

23 The other thing I guess I should point out is that --

24 QUESTION: Is there -- is there any precedent that
25 would allow us -- would we have to go contrary to our

1 precedence to do that?

2 MR. TREBON: The only case that the Court would have
3 to go contrary to arguably would be the dicta in United
4 States v. Rogers. Rogers is a case involving a non-Indian
5 crime against a non-Indian crime. The non-Indian argued
6 before the Court that he was an Indian because he was
7 adopted into the membership of the tribe, and this Court
8 held that you may become a member but you can't become an
9 Indian simply because you're adopted by the tribe as a
10 member.

11 Besides that, however, there is great authority for
12 doing exactly that, Justice Kennedy, for finding that the
13 Indian on Indian exception 1152 really means member on
14 member, and the basis for that is when that was first
15 included in the first permanent trade in the Intercourse
16 Act in 1834, it was introduced with three other bills, one
17 of them being the Western Territory Bill.

18 It was within the contemplation of Congress at that
19 time that the Western Territory would be created. That
20 bill provided that there would be a confederacy of the
21 Indian tribes that would handle jurisdiction involving
22 intra-tribal offenses, when there are offenses committed
23 by one member against the -- against a member of another
24 tribe. So that was the understanding in the Indian trade
25 in the Intercourse Acts.

1 And also, treaties generally provided -- at the time
2 that the Trade Intercourse Acts were passed, treaties
3 generally provided that the government would assert inter-
4 tribal jurisdiction. The United States agreed to keep
5 peace among the various tribes and, therefore, exercised
6 inter-tribal jurisdiction.

7 In fact, all the commentators, Prucha and Clinton and
8 Erhart and the commentators in our brief all agree that the
9 Indian -- the Indian exception 1152 indeed means tribal
10 members. It does not mean to vest the tribes with crimes
11 involving one member against another member of a different
12 tribe.

13 The other thing about the void -- I think the void is
14 an interesting aspect of this case -- is that even if the
15 Respondents win, there will still be a void. In order to
16 get away from equal protection and other problems in this
17 case, they suggested to this Court that it should find
18 that a tribe has jurisdiction over enrolled Indians of any
19 federally recognized tribe.

20 That would mean who would have jurisdiction over non-
21 enrolled Indians? The Indian on the Indian exception was
22 passed by Congress before there was ever such a thing as
23 enrolled Indians. It was passed in 1834, but there was no
24 enrolled Indians till 1934 when the Indian Reorganization
25 Act was passed. So that's certainly not what Congress

1 meant.

2 So the tribe now gets jurisdiction only over enrolled
3 members. Non-enrolled Indians living on the reservation
4 will be subject to no one's jurisdiction either within the
5 analysis of the Respondent and the government.

6 And in fact, the population statistics for this
7 particular reservation show that non-enrolled Indians are
8 about as great on the reservation in number as non-member
9 enrolled Indians, so the void will be equal. So that's
10 not a solution to the void problem.

11 In fact, it's interesting to point out in terms of a
12 void if this --

13 QUESTION: Couldn't one say that what Indians, what
14 all Indians meant in -- at the time 1152 was adopted is
15 not necessarily what all Indians means today; that in
16 light of the later legislation providing for enrollment
17 and so forth, who constitutes an Indian has simply been
18 changed? That would solve that problem, wouldn't it?

19 MR. TREBON: It would if the Court was willing to
20 change the definition of Indian as generally applied to
21 federal jurisdiction since Indian law began. The Federal
22 Government, we submit, does not exercise jurisdiction
23 simply over an enrolled Indian.

24 There has always been a definition for Indian in
25 federal law involving not only whether or not someone's

1 enrolled but also whether or not someone's an Indian by
2 race. The Indian Reorganization Act provides that if
3 someone's more than 50 percent Indian by race, he's an
4 Indian for federal purposes.

5 The custom and habits of a person have also been
6 looked at by this Court to determine whether or not
7 someone is an Indian.

8 So we --

9 QUESTION: So that response to Justice Scalia
10 indicates that it would be difficult, it seems to me, to
11 interpret 1152 to avoid -- to prevent the void?

12 MR. TREBON: I think that's true, unless the Court
13 does as you suggested, Justice Kennedy, define that it
14 means tribal members. And there's a great deal of
15 legislative history --

16 QUESTION: Well, but -- but how can you do that
17 consistently with what you just told Justice Scalia?

18 MR. TREBON: Well, I think the way you do it --

19 QUESTION: Because we're talking about the word
20 "Indian".

21 MR. TREBON: The way you do it, I believe, is not to
22 find that you redefine the term "Indian", but you look at
23 the legislative history to see what Congress meant.

24 In this case it was passed in conjunction with the
25 Western Territory Bill which tends to define the meaning

1 applied to the terms by Congress.

2 Moreover, this Court in United States v. Wheeler
3 looked at all these statutes in --

4 QUESTION: On any theory, you -- you would still say
5 -- when you say it means a member of the tribe, you assert
6 an enrolled member of the tribe, don't you? Isn't that
7 what you mean by a member of the tribe?

8 MR. TREBON: Not necessarily.

9 QUESTION: Not necessarily. Well, then
10 you're -- then you're into the gap again. Then you're
11 into the gap again.

12 If it includes not only enrolled members of the tribe
13 but unenrolled members of the tribe, then there's going to
14 be at least that gap, isn't there?

15 MR. TREBON: No. We would submit that if the tribe
16 exercised jurisdiction only over its own members --

17 QUESTION: Enrolled members.

18 MR. TREBON: However the tribe defines its own
19 membership. Different tribes, I think, have different
20 definitions for that.

21 QUESTION: Yes, but at the time of 1152, if you
22 assert that Indian there just means an Indian of that
23 tribe, it surely, as you just say, doesn't mean an
24 enrolled member of that tribe since there was no
25 enrollment.

1 MR. TREBON: That's correct.

2 QUESTION: It must mean an Indian who by blood
3 belonged to that tribe.

4 MR. TREBON: And the Indian who's considered a member
5 by the tribe itself.

6 QUESTION: All right.

7 MR. TREBON: That, we submit, would -- would be the
8 end of tribal jurisdiction and that the state has an
9 interest in any non-member, someone who isn't affiliated
10 by the tribe, who doesn't have the privileges of
11 membership and who's not considered a member by the tribe.

12 QUESTION: Equivalent to the definition of
13 enrollment?

14 MR. TREBON: I don't believe it's exactly equivalent
15 to the definition --

16 QUESTION: Well, if it isn't exactly equivalent, then
17 you're going to have the void of jurisdiction.

18 MR. TREBON: Well, the void, in fact, in this case,
19 if you decide that the tribe has jurisdiction over
20 enrolled Indians, it's interesting to know that 14 percent
21 of the Pimas and 16 percent of the Maricopas in this case
22 are not enrolled. So the tribe is apparently arguing we
23 want jurisdiction only over enrolled members. We're
24 willing to give up 14 percent of our own Pimas and 16
25 percent of our own Maricopas.

1 So there's another void created. Pimas and Maricopas
2 won't even be covered by that definition, not all of them,
3 and that represents approximately 6 percent of the total
4 population of the reservation as well.

5 So it's kind of interesting in order to get non-
6 member Indians who are not affiliated with the tribe that
7 they're willing to give up Indians who are, simply because
8 they're not enrolled.

9 We believe that this Court essentially grappled with
10 these issues and answered them not only in Oliphant but
11 also in Wheeler. In Wheeler, this Court construed the
12 same statutes, the same language, and explicitly
13 stated -- Wheeler was argued two days apart from Oliphant
14 and decided 16 days later, and in that case the Court
15 explicitly stated that tribes do not have jurisdiction
16 over non-members.

17 And the reasoning of those cases, I think, is
18 particularly applicable here. The Court reasoned that the
19 tribes have the right of self-government. The right of
20 self-government not only involves the same federal
21 interest in law and order but also involves the interest
22 in preserving orderly relations among their members and
23 the traditions and mores of a society, and that those
24 traditions and mores should be preserved through tribal
25 government, through self-government.

1 That necessarily excludes people who are not
2 associated with the tribe as members. They do not share
3 that language. They do not share in those customs and
4 traditions. They share no more in those customs and
5 traditions than Mr. Oliphant.

6 Mr. -- Mr. Duro and Mr. Oliphant are
7 indistinguishable before this Court in terms of their ties
8 with the community, their contacts with the community;
9 then Mr. Duro and Mr. Oliphant are similar.

10 QUESTION: Do you think Oliphant was correctly
11 decided?

12 MR. TREBON: Yes, Your Honor, I do.

13 QUESTION: It has been criticized.

14 MR. TREBON: It has.

15 The thing -- Oliphant is not only consistent with
16 history, and in this case we submit as well the history
17 shows that tribes historically did not exercise
18 jurisdiction over non-members. The government did. The
19 Federal Government, to keep peace among the various
20 tribes, took upon it that jurisdiction through treaties.
21 Especially from 1825 forward, they consistently exercised
22 that jurisdiction.

23 The other thing that's consistent about Oliphant and
24 other cases before this Court is that it agrees with the
25 definition of tribal self-government, that tribes have

1 always had the right to determine the relation among their
2 own members but not otherwise.

3 That's true in the tax cases. The state's interest
4 stops with members. The state can tax non-members on the
5 Indian reservation to the same extent that they can tax
6 non-Indians. The infringement against the tribe stops
7 with membership there as well.

8 The Williams v. Lee infringement test has been
9 applied by this Court to stop with membership; it is the
10 bright line that this Court has continuously used
11 throughout to define the integrity of self-government
12 versus the interest of some other government. The
13 interest in this case could be the state or the Federal
14 Government.

15 The argument for the Federal Government is that they
16 have, through treaties, had an obligation to exercise
17 jurisdiction over intratribal offenses. So if 1152 is
18 construed to mean something other than membership in a
19 tribe, then the United States is allowed to abrogate in a
20 sense its treaty obligations with numerous tribes. We
21 don't believe that the Court should do that.

22 And of course, there's a strong equal protection
23 argument here. Why would the Court want to treat --

24 QUESTION: Would you consider that a treaty
25 obligation or a treaty right?

1 MR. TREBON: Treaty obligation.

2 QUESTION: Well, why?

3 MR. TREBON: An obligation on the part of the United
4 States and a right on the part of the tribe.

5 QUESTION: Well, you -- in these treaties, the United
6 States was given by -- by the tribe the right to take care
7 of trials of non-members of the tribe. I would think that
8 I would regard that as a benefit that the United States
9 had under those treaties, not as an obligation that it
10 assumed.

11 MR. TREBON: Justice Scalia, I believe that you're
12 mistaken. I don't think the treaties provided that tribes
13 could exercise jurisdiction over intertribal offenses. It
14 provided jurisdiction over intratribal offenses. It
15 generally provided the United States with exercise
16 jurisdiction over intratribal --

17 QUESTION: That's exactly what I'm saying, but I --
18 but it seems to me that that power on the part of the
19 United States, I -- I would not regard that as an
20 obligation of the United States which -- which it is
21 repudiating in the statute but, rather, as a right of the
22 United States which it is permitted to give up by the
23 statute if it wants to.

24 I mean, you -- you look upon it as an obligation.
25 I'm not sure it should be regarded as an obligation as

1 much as a duty.

2 MR. TREBON: At the time --

3 QUESTION: As a right.

4 MR. TREBON: At the time that those treaties were
5 negotiated, the United States undertook what I would call
6 an obligation in order to prevent Indian wars. At that
7 time, of course, the United States government considered
8 tribal customs and traditions to be that of the blood
9 avenger between tribes.

10 QUESTION: They told the tribes, though, you can't --
11 you cannot try members of other tribes. We'll try them.

12 MR. TREBON: Correct.

13 QUESTION: Do you think the tribes thought that the
14 U.S. was doing them a favor when they said you can't try
15 members of other tribes? You thought that that's how they
16 regarded that, as an obligation of the United States?

17 MR. TREBON: I would characterize it not merely as a
18 favor, Your Honor, but as an obligation of the United
19 States.

20 But within the scope of Oliphant and its review of
21 history, I would argue that it's -- it's through
22 tradition. It's the backdrop of history that this Court
23 must look at to decide this issue, and the backdrop of
24 history in this case shows that the United States
25 exercised that power the same way that it exercised the

1 obligation or the favor, whatever you call it, in Oliphant
2 over non-Indians.

3 And I suppose that's essentially the point here. Why
4 would we want to treat Mr. Duro any differently than we
5 treated Mr. Oliphant? What's the difference between them?
6 There's only one.

7 The only difference between them is that one is an
8 Indian and one is not. It is a distinction based merely
9 upon race. There's no other social reasons. There's no
10 other void reasons. There's no other reason besides
11 treating them differently except that one's an Indian and
12 one is not. After years of assimilation, after Mr. Duro
13 has become a citizen of the United States, we submit that
14 he should be treated equally with non-Indians.

15 QUESTION: Is it the position of the -- of your
16 opponents that Duro could not have resigned his membership
17 in his tribe and thereby avoided jurisdiction?

18 MR. TREBON: They say that he could give up his
19 membership.

20 QUESTION: And that would make him a non-Indian?

21 MR. TREBON: It would make him a non-enrolled Indian.
22 I -- I find that to be particularly offensive that Mr.
23 Duro would have to give up the last formal vestige of
24 relationship to his tribe in order to enjoy equal rights
25 with all other citizens that are not members of the tribe

1 that are simply non-Indians. Why should he have to give
2 that -- why should he have to give up membership in a
3 tribe 500 miles away to enjoy equal rights with other
4 citizens on the Salt River reservation?

5 QUESTION: May I ask you this question? If this case
6 had arisen prior to 1924 when your client was not an
7 American citizen, would you make the same argument?

8 MR. TREBON: I would have made the same argument but
9 for two reasons. Let first say that there's a very good
10 argument that Mr. Duro's ancestors were citizens to the
11 Treaty of Guadalupe Hidalgo or at least entitled to
12 citizen -- citizenship rights; therefore, he -- his people
13 could have been a citizen in 1848.

14 But to answer the question directly, I think things
15 have changed now. If Mr. Duro would have been treated
16 differently because he was a ward rather than a citizen,
17 then the -- but I think that difference relates more to
18 the Federal Government's treatment more than the treatment
19 by another tribe.

20 In fact, the treaties during that time would have
21 generally given the United States the role, if not the
22 obligation or the favor, the role of exercising
23 jurisdiction over those offenses.

24 QUESTION: Aside from the equal protection point, do
25 you argue that there is any constitutional problem with

1 the United States consenting to the tribes asserting
2 jurisdiction over Duro?

3 MR. TREBON: Yes, Your Honor, we do.

4 QUESTION: What -- what is that constitutional
5 argument?

6 MR. TREBON: Well, the Indian Civil Rights Act was
7 passed and applied some of the constitutional protections
8 of the Bill of Rights to the exercise of criminal
9 jurisdiction by Indian tribes but not all. It's important
10 to point out that it was a compromise, that it allowed
11 traditions and customs of the tribe which is unique to
12 each tribe to be applied.

13 QUESTION: But what is the constitutional principle
14 that would be violated if the United States were to say
15 that Duro could be tried by this tribe?

16 MR. TREBON: Number one, no right to counsel.
17 Indigents do not have a right to counsel in tribal court.
18 The penalty that can now be imposed in tribal court for
19 each count is one year. No right to counsel.

20 Secondly and most fundamentally, I would argue, is
21 that by the tribal constitutional law, no one but a tribal
22 member can sit in a jury in tribal court; therefore, Mr.
23 Duro, his ethnological group and any other group of non-
24 members cannot sit on tribal juries in tribal court.

25 And, of course, the Fifth Amendment grand jury

1 requirement doesn't apply to Indian tribes either.

2 And, of course, other constitutional rights that are
3 outside of the Bill of Rights that apply are generally you
4 don't have the right to vote. The consent of the governed
5 notion of this country -- you don't have the right to
6 vote, you don't have the right --

7 QUESTION: Do you have any -- do you have any cases
8 on -- on that -- for that proposition?

9 MR. TREBON: Nevada v. Hall, I believe, is a case on
10 point for consent of the governed.

11 But generally, the democratic ideals in this country
12 is that there's -- Kagama says there's two sovereigns in
13 this nation. Indian tribes are considered to be domestic
14 dependent sovereigns. United States citizens are not
15 generally submitted -- unless the Court does it in this
16 case -- they are not generally submitted to courts that
17 are not established under the Constitution that are not
18 afforded the Bill of Rights, that are tried by forums in
19 this country without constitutional protection.

20 And if this Court decides that in this case, it will
21 be doing it for Mr. Duro even though there's no difference
22 between him and Mr. Oliphant, absolutely none. In fact, I
23 think that history will show that especially now in
24 Washington where that case arose from that non-Indians are
25 much more integrated into some Indian tribes than non-

1 member Indians. They're married to BIA employees. They
2 live on the reservation. They own fee land within the
3 confines of a reservation. They have just as many
4 connections as a non-member Indian.

5 If -- if you don't find an equal protection
6 violation, per se, then at least you should be guided by
7 notions of fair treatment.

8 If I can, I'd like to reserve a few minutes for
9 rebuttal.

10 QUESTION: Very well, Mr. Trebon.

11 Mr. Wilks.

12 ORAL ARGUMENT OF RICHARD B. WILKS

13 FOR THE RESPONDENTS

14 MR. WILKS: Mr. Chief Justice, and may it please the
15 Court:

16 Albert Duro came onto the Salt River Pima-Maricopa
17 Indian community reservation with his girlfriend, lived
18 with her, lived with her there for three and a half
19 months, worked for the PiCopa Construction Company, a
20 wholly-owned company by the Salt River Pima-Maricopa
21 Indian community, subjected himself to the laws of the
22 community by committing an offense under the laws of the
23 community and the possession of alcohol and marijuana,
24 pled guilty to the charge brought by the community, was
25 found guilty and was fined.

1 Thereafter, the incident of the firing of the gun
2 took place. He was indicated by the federal grand jury.
3 That indictment was later dismissed with prejudice, and he
4 was charged by the Salt River community in that offense
5 which resulted in the death of a 14-year-old boy who was a
6 member of the Gila River Indian community, which
7 interestingly enough, is also a community made up of Pima
8 and Maricopa Indians. The young boy was a resident of the
9 Maricopa -- of the -- of the Salt River Pima-Maricopa
10 Indian community.

11 The issue here, I think, is whether the jurisdiction
12 and powers of the Salt River Pima-Maricopa Indian
13 community, which it clearly and without a doubt had at the
14 time of American sovereignty, that is to try and, if
15 guilty -- found guilty, to punish offenders against its
16 law, have been diminished since American sovereignty,
17 either by incompatibility with the nature of the dependent
18 status of the Salt River Indian community, or by explicit
19 federal enactments.

20 There have been no explicit federal enactments which,
21 I would submit, limit the jurisdiction of the community in
22 regard to Albert Duro or to such an offender.

23 QUESTION: Well, the -- the Indian Civil Rights Act
24 gives one pause when if that requires us to make an equal
25 protection sort of analysis.

1 MR. WILKS: I don't think it requires an equal
2 protection analysis in this case, Justice O'Connor. The
3 civil rights equal protection provision says that they
4 will not deny equal protection to anyone within its
5 jurisdiction. Non-Indians are not within the jurisdiction
6 of the Salt River community court since Oliphant and,
7 assumably, before that. So there is not a -- that kind of
8 invidious distinction can't be made.

9 The -- the people who are before are within the
10 jurisdiction of the Salt River court are all Indian
11 people, and by that it must be clear that that means
12 enrolled members of federally recognized Indian tribes.
13 As we have attempted in our brief to point out, when we
14 talk about enrolled Indians, we're talking about a status
15 as this Court has in Fisher and Mancari and Antelope.

16 We're not talking about an ethnic group; Indian
17 people who are enrolled members of tribes can indeed opt
18 out of that status and can indeed --

19 QUESTION: Mr. Wilks, why just --

20 MR. WILKS: -- give up the benefits that accrue to
21 Indian people under federal law and perhaps gain other
22 benefits, as Mr. Duro might have, had he not been a member
23 of a federally recognized tribe.

24 QUESTION: Mr. Wilks, why just enrolled Indians? Why
25 do you just limit these rights that you're talking about?

1 If you're appealing to the rights that the tribes had way
2 back in history, how can you limit that principle to just
3 enrolled Indians from other tribes?

4 MR. WILKS: What I did not say, Justice Scalia, is
5 that the rights that the tribes had before American
6 sovereignty have as to criminal jurisdiction over Indians
7 has remained unchanged through history. It has obviously
8 been changed. The -- that whole unit of -- of -- of
9 juridical powers has been changed by federal legislation
10 so that, under the Major Crimes Act, federal jurisdiction
11 is had over certain kinds of enumerated crimes.

12 Under the Indian Country Crimes Act and Assimilated
13 Crimes Act, certain acts committed by Indians against non-
14 Indians are in federal court jurisdiction to the exclusion
15 of tribal court jurisdiction.

16 The -- the -- but -- but -- the court has or the
17 Congress has defined Indians. They've defined Indians in
18 the Indian Reorganization Act, and they've defined as we
19 have pointed out in our -- in the exhibits in our brief,
20 they defined with care what an Indian is, and they've
21 defined it by explaining so that an enrolled Indian under
22 the Indian Reorganization Act is defined, and that's the
23 limitation of it.

24 Now the Indian Reorganization Act as well speaks of
25 Indian by blood quantum. I think that is not a -- in

1 practice something which still exists as an enrollment
2 characteristic in tribal constitutions.

3 QUESTION: Does -- does that act, Mr. Wilks, in
4 effect make all Indians fungible for -- for purposes like
5 this?

6 MR. WILKS: I don't know if I'd use that word, Mr.
7 Chief Justice, but I think that the answer is yes, and I
8 think that, for instance, this Court, in Morton v.
9 Mancari, did the same thing or recognized that principle
10 when it upheld the Indian preference law on the grounds
11 that Indian employees of the Bureau of Indian Affairs,
12 even though they are not members of the tribes to which
13 they are assigned, would benefit those tribes in
14 their -- in their ability to govern themselves. So that
15 fungibility, if the word is fungibility, I think is there.

16 So what we have is a pattern beginning from before
17 American sovereignty, a pattern where there have been
18 changes, there have been restrictions on Indian
19 jurisdiction, tribal court jurisdiction. And this Court
20 and the executive have noted from time to time what those
21 restrictions are not, because if you have a whole and
22 you've taken pieces out of it and you've said this is in
23 federal court, you leave something.

24 And what has been left, as the Court on a couple of
25 occasions has said, is for the -- for the Indian tribes to

1 deal with these questions. So that in Rogers, this tribe
2 or some other would have criminal jurisdiction.

3 QUESTION: Based on -- based on that analysis,
4 if -- if we were to find that there was a void here, I
5 take it Congress couldn't cure it by giving the Indian
6 tribes additional jurisdiction without then laying itself
7 open to the charge that they're surrendering the rights of
8 citizens?

9 I mean, I take it there's a difference between
10 sovereignty that exists in the Indian tribes and is taken
11 on the one hand and sovereignty that is reconferred or
12 regranted by the United States?

13 MR. WILKS: That's correct; and as the Court pointed
14 out in Wheeler in an -- in the unresolved question as to
15 whether if -- if the sovereignty, if the jurisdiction had
16 been accorded by Congress to the tribes, would there then
17 be the dual jurisdictions. Yes, if -- if there would be a
18 void if -- if the Petitioner were to prevail and that void
19 could be cured, if it would be cured, and if time in
20 passing killed the cure, if it ever occurred, did not
21 result in great harm.

22 QUESTION: My -- my suggestion is that perhaps it
23 could not be cured.

24 MR. WILKS: It could not be totally cured. You're
25 right, Justice Kennedy. It could not be cured, so that

1 the cure would allow this Court to rule as it did in
2 Wheeler.

3 QUESTION: Well, now, under your view, Mr. Wilks, the
4 tribe has jurisdiction over any enrolled member of any
5 Indian tribe if the offense is committed by that member on
6 the reservation?

7 MR. WILKS: That's correct, Justice O'Connor.

8 QUESTION: But if the person were not an enrolled
9 member and yet were an Indian living on the reservation
10 but not of that tribe, then the tribe could not exercise?

11 MR. WILKS: That's correct, Justice O'Connor.

12 QUESTION: Then there would be a void.

13 MR. WILKS: I think there would not be a void if --

14 QUESTION: There would be, wouldn't there?

15 MR. WILKS: I think there would not be a void.

16 QUESTION: Why?

17 MR. WILKS: Because the individual as defined was not
18 an enrolled member of any tribe, of any Indian tribe, and
19 there -- of any federally recognized Indian tribe, and,
20 therefore, could be dealt with either in federal or state
21 court, depending on what the circumstances are.

22 QUESTION: You don't think under federal law that
23 they might look to see if the person was in fact of Indian
24 blood?

25 MR. WILKS: I have some difficulty in answering that

1 definitively because of the 50 percent blood quantum in
2 the --

3 QUESTION: Exactly.

4 QUESTION: 1152 and 1153 just speak of Indians.

5 MR. WILKS: Yes, and I think, as it was earlier
6 pointed out, Indian is now defined. It may not have been
7 defined at the time of the first passage of --

8 QUESTION: I know, but it certainly isn't defined as
9 an enrolled Indian.

10 MR. WILKS: Yes. The Indian is a -- an enrolled
11 member of a federally recognized Indian tribe, I believe
12 is the definition, the one -- the first definition. The
13 second I believe is a person who may be enrolled, a child
14 perhaps who has not yet been enrolled; and the third is
15 the blood -- more than 50 percent blood quantum
16 definition.

17 QUESTION: And those latter two people wouldn't be
18 covered for purposes of tribal jurisdiction, I take it?

19 MR. WILKS: I -- I think that they probably would be,
20 but I -- that again -- again is not something that has
21 been determined.

22 It seems to me the question here of whether there has
23 been a loss of jurisdiction since American sovereignty
24 over -- over member Indians, members of other tribes, has
25 to in the end deal with the question of what the effect of

1 not having jurisdiction would be, what the effect of such
2 a determination would be.

3 And this Court has spoken in -- in Brendale and has
4 spoken in Wheeler in regards to what I would view as a --
5 as a bottom line kind of test. Does the removal of
6 jurisdiction or the nonrecognition of tribal jurisdiction
7 impact to the significant disadvantage of Indian tribes so
8 that they wouldn't be able to carry on or not successfully
9 carry on as -- as polities, as governmental units.

10 And I think the answer is, as you've seen from the
11 brief filed by the Native American Rights Fund, the amicus
12 brief, with its detail of what's happening now in Indian
13 country, that the large numbers of Indian people of
14 different tribes living on reservations would make the
15 control of -- of criminal activity almost impossible. A
16 government, an Indian tribe can't exist in that way, and I
17 think the Brendale test, the test in Wheeler and Antelope
18 covered that.

19 QUESTION: The problem -- go ahead.

20 QUESTION: But any void that might exist wouldn't be
21 a void with respect to serious crimes, would it?

22 MR. WILKS: Would not be -- we're dealing only with
23 misdemeanors.

24 We essentially have a tautological question. You
25 don't lose -- Indian tribes don't lose their initial

1 sovereignty, initial jurisdiction, simply because it
2 disappears. They lose it because it's incompatible with
3 the dominant sovereign, and they lose it only if it does
4 not have such an effect upon their existence as will tend
5 to -- to -- to destroy them, terminate Indian tribes.

6 And I would suggest in this situation with the facts
7 that we all know exist in Indian country, with the
8 mobility of Indian people and the many Indian people of
9 different tribes living on reservations not their own,
10 that the effect would be disastrous.

11 QUESTION: But is that true, Mr. Wilks, if --

12 QUESTION: Justice Stevens had a question for you,
13 Mr. Wilks.

14 QUESTION: You're too fast for me, Mr. -- . I just
15 said is the point you're making valid if we -- first of
16 all, it doesn't apply to non-Indian residents of the
17 tribe, in other words, white -- white American --

18 MR. WILKS: That's correct.

19 QUESTION: -- citizens of the tribe.

20 And with respect to the non-member Indian residents,
21 two questions. Is the problem with respect to them any
22 different than it is with the non-Indians if you assume
23 that there would be state jurisdiction over these
24 misdemeanors under the McBratney line of reasoning?

25 MR. WILKS: That's a very large leap of faith. I

1 would not -- I would not make that assumption. McBratney
2 has just been manhandled earlier here. McBratney --

3 QUESTION: It, itself, did some manhandling.

4 MR. WILKS: To some extent.

5 QUESTION: Yes.

6 MR. WILKS: I don't disagree with that. But at least
7 the rationality of McBratney and its prodigy dealt with --
8 with equal footing, with questions of whether there was -
9 -

10 QUESTION: Right.

11 MR. WILKS: -- implicit amendment. We don't have any
12 of that here.

13 QUESTION: But the gap argument that you make is
14 really the same gap argument that the government made in
15 Oliphant.

16 MR. WILKS: And if that is correct, and I -- I --

17 QUESTION: And it may or may not have been valid. It
18 depends on how one anticipates the state jurisdiction
19 might fill this void.

20 MR. WILKS: It was not valid, I think, because the
21 state had jurisdiction at the time of Oliphant, and the
22 state does not now have jurisdiction. The State of
23 Arizona has never adopted --

24 QUESTION: I know not under Public Law 280, that's
25 right, but under the line of reasoning that applied in

1 McBratney.

2 MR. WILKS: McBratney line of reasoning does not
3 apply, I think.

4 QUESTION: Thank you, Mr. Wilks.

5 We'll hear now from you, Mr. Wallace.

6 ORAL ARGUMENT OF LAWRENCE G. WALLACE

7 ON BEHALF OF THE UNITED STATES

8 AS AMICUS CURIAE SUPPORTING RESPONDENTS

9 MR. WALLACE: Thank you, Mr. Chief Justice, and may
10 it please the Court:

11 Our submission here is based on this Court's analysis
12 in the Oliphant case. Here, as there, there has been no
13 express divestiture of jurisdiction in the tribe by either
14 treaty or statute. Some reference has been made to early
15 treaty provisions which had so-called depredation
16 provisions. Those provided that, rather than engage in
17 warfare with other tribes, compensation would be available
18 for depredations committed by members of other tribes.

19 They were not treaty provisions written in terms of
20 conferring criminal jurisdiction on the Federal Government
21 to prosecute those persons. They provided either for an
22 arbitration process under the auspices of the President of
23 the United States to provide compensation for such
24 depredations or, in some instances, for compensation from
25 the federal Treasury in return for the Indians' agreement

1 not to engage in warfare with other tribes as a result of
2 such so-called depredations.

3 So there has been no express divestiture of the
4 jurisdiction here, and the question is whether its
5 retention is subject to an implied divestiture because it
6 would be incompatible with the status of the tribes as
7 dependent limited sovereigns.

8 The Court concluded in *Oliphant* that there was such
9 an implied divestiture because of the long historical
10 understanding that the jurisdiction over non-Indians did
11 not exist and because the Federal Government by statute
12 had assumed jurisdiction to prosecute those offenses.

13 The same considerations quite clearly, it seems to
14 us, lead to the opposite conclusion here. From 1817 to
15 the present, the federal criminal statutes applicable to
16 crimes in Indian country have contained an exception for
17 crimes by Indians against the person or property of other
18 Indians. That exception was authoritatively interpreted
19 by this Court in *United States v. Rogers* back in 1846.

20 It was the version that has been carried forward ever
21 since, and we have quoted the applicable language on page
22 12 of our brief, and the exception does not speak of
23 members of a tribe, it says, but of the race generally of
24 the family of Indians, and it intended to leave them as
25 both regarded their own tribe and other tribes also to be

1 governed by Indian usages and customs.

2 That was not an obscure opinion. It was an opinion
3 by Chief Justice Taney for a unanimous court. It is not a
4 lengthy opinion in which this interpretation might be
5 overlooked. The opinion is -- the opinion portion of the
6 opinion is only four printed pages in the United States
7 Reports, and --

8 QUESTION: And so we might read it.

9 (Laughter.)

10 MR. WALLACE: And the provision has been reenacted
11 repeatedly, interpreted in an opinion of the Attorney
12 General that we cite, and there has never been any
13 repudiation of that interpretation by Congress as it has
14 carried that provision forward.

15 QUESTION: But Mr. Wallace, does it raise equal
16 protection concerns, do you think, that kind of race-based
17 division?

18 MR. WALLACE: Well, we think it is not entirely race
19 based even though as we say there is an ancestral element
20 included in it.

21 Much of the reason that there is commingling of
22 members of various tribes on the reservations today is
23 because benefits are made available by the Federal
24 Government under the authority of Morton v. Mancari and
25 other decisions of this Court to members of tribes

1 regardless of whether they're members of the home tribe.
2 Indian health services are available; employment
3 preferences are available both in the Bureau of Indian
4 Affairs and in tribal enterprises.

5 This has encouraged the living together of Indians
6 and the identification of Indians as tribal persons
7 subject to some unique legal relationships based on their
8 history and on the Constitution's provision in Article 1
9 that Congress can regulate commerce with the Indian
10 tribes.

11 QUESTION: Mr. Wallace, can I interrupt you for a
12 moment on the Rogers case?

13 At that time in 1846 when the Court talked about the
14 family of Indians including both members and non-members,
15 all of the members of that family shared the
16 characteristic of noncitizenship --

17 MR. WALLACE: That is correct.

18 QUESTION: -- which is no longer true. Does that
19 make a difference, do you think? Because now the family
20 of Indians, if you construe it broadly, includes those who
21 have the benefit of American citizenship as well as those
22 who do not.

23 MR. WALLACE: That is correct, and we don't think
24 that does make a difference. There --

25 QUESTION: But it makes this difference, doesn't it?

1 At that time there would have been no differential
2 treatment between the litigant in this case and other
3 citizens, whereas now, in order to sustain your position,
4 you must say some citizens are treated differently than
5 other citizens.

6 MR. WALLACE: That was the question before this Court
7 in United States v. Antelope, and the Court unanimously
8 held that Congress justifiably could treat members of
9 Indian tribes who are citizens of the United States
10 differently from other citizens with respect to which
11 court has criminal jurisdiction over them and the
12 punishment to which they are subjected.

13 I think that is precisely what was at issue in the
14 Antelope case.

15 QUESTION: Yes, but the rationale was that they were
16 -- there were characteristics which differentiated them
17 from other citizens; namely, their Indian status. But
18 that isn't true here.

19 MR. WALLACE: But it is true here. These are members
20 of tribes. These are enrolled members of tribes who are
21 in a unique relationship with the Federal Government and
22 enjoy certain benefits and obligations as a result of
23 that, and it changes the tribunals that have jurisdiction
24 over certain offenses that they may commit. It is very
25 similar to the Antelope case in that respect.

1 These are authorized tribunals, the tribal courts,
2 and they are trying citizens of the United States.
3 Members of their own tribe are citizens of the United
4 States. And we don't believe that there is a
5 jurisdictional gap of any kind.

6 QUESTION: Well, what about non-enrolled?

7 MR. WALLACE: While that question need not be faced
8 in this case because we're dealing with an enrolled
9 member, we think that if -- if a person is eligible for
10 enrollment as a member and has not repudiated membership
11 in the tribe, that that person should be treated the same
12 as an enrolled member for these purposes just as someone
13 who hasn't registered to vote. If it's just a formality
14 that has kept someone off the rolls, that would not be a
15 repudiation of tribal identification.

16 QUESTION: That's really allows a construction of the
17 federal statute.

18 MR. WALLACE: It does, but --

19 QUESTION: And if you can construe it that way, you
20 might be able to construe it some other way.

21 MR. WALLACE: Well, that is correct, but otherwise
22 you would get into a peculiar anomaly with respect to the
23 members of the tribe itself who are resident on the
24 reservation, some of whom may not have bothered to get
25 their names onto the tribal rolls; and why they should be

1 treated differently with respect to the tribal court's
2 jurisdiction is not apparent.

3 QUESTION: Under that line of reasoning, I take it
4 that Duro could not opt out his Indian status?

5 MR. WALLACE: Duro can opt out. Any person can
6 resign his membership but not retroactive.

7 QUESTION: Well, why, if you say he's entitled,
8 if -- if the test is he's entitled to enrollment?

9 MR. WALLACE: No, and I -- but I -- I added and he
10 has not repudiated his membership in the tribe. If a
11 person does not want to be treated as a tribal member but
12 wants to be treated as any other citizen, that is his
13 right.

14 QUESTION: Well, then he would -- he would not be an
15 Indian with respect -- in the -- the --

16 MR. WALLACE: In any of the jurisdictional statutes.

17 QUESTION: He would not be considered an Indian even
18 though he was just because he wasn't enrolled and that he
19 had opted out.

20 MR. WALLACE: That's correct, but not retroactively.
21 At the time of the offense --

22 QUESTION: Well, I know, but then -- then he be
23 subject to federal jurisdiction.

24 MR. WALLACE: Or even or to state jurisdiction if
25 there was no Indian involved in the crime. He would not -

1 -

2 QUESTION: Are there laws, Mr. Wallace, under which
3 we treat unenrolled Indians who are eligible for
4 enrollment but have chosen not to enroll the same as
5 enrolled Indians?

6 MR. WALLACE: There's no decision of this Court on
7 the subject, but I think the logic of the Court's
8 decisions are assumed in the 19th Century that Indians are
9 all members of tribes. Enrollment is something that came
10 much later.

11 And as I say, in this case enrollment is satisfied,
12 and we don't have to face up to that problem. Either way,
13 we think there would not be a jurisdictional gap, but we
14 think that the jurisdiction of the tribal court would
15 extend beyond enrollment.

16 The other case --

17 QUESTION: Mr. Wallace, if -- if -- if we were to
18 read 1153 to mean tribal member as the Petitioners here
19 wish us to, should we read the exception clause in 1152
20 the same way to prevent the void from arising?

21 MR. WALLACE: Well, there would still be a
22 considerable problem when the -- when an Indian was
23 involved in the crime. I don't see how the state would
24 have jurisdiction when it has not --

25 QUESTION: Well, the Federal Government -- the

1 Federal Government --

2 MR. WALLACE: -- through Public Law 280, and that
3 would require a reinterpretation of that exception. It
4 would really mean that the Rogers interpretation is being
5 changed by the Court even though Congress has seen fit to
6 carry forward this provision and has never questioned that
7 interpretation.

8 The -- the other case that I want to call to the
9 Court's attention that I think sheds considerable
10 historical light on this was the interpretation initially
11 of the Major Crimes Act provision in United States v.
12 Kagama, this Court's 1886 decision. At page 383 of Volume
13 118, the Court made very clear that it was reading the
14 Major Crimes Act which was enacted because state courts
15 did not have jurisdiction and these major crimes would
16 only be subject to tribal courts, and they were worried
17 that the tribal courts would not deal adequately with
18 these major crimes.

19 And the Court ruled, again unanimously, in a
20 reasonably concise opinion, that the fair inference is
21 that the offending Indian shall belong to that or some
22 other tribe. It does not interfere with the process of
23 state courts within the reservation, or nor would the
24 operation of state laws upon white people found there.

25 It was quite clear that the state courts were thought

1 not to have jurisdiction over members of other tribes.
2 Its effect is confined to the acts of an Indian of some
3 tribe of a criminal character committed within the limits
4 of the reservation.

5 That was the category of offenses that
6 correspondingly were within the jurisdiction of the tribal
7 courts and where Congress felt that for major crimes the
8 tribal court should not be relied upon but they still were
9 being relied upon for the minor offenses, the minor
10 assaults, domestic violence, disorderly conduct, the same
11 offenses on which we continue to rely upon the tribal
12 courts to keep law and order on the reservations.

13 And this case is of great practical importance to the
14 ability to maintain law and order on the reservations. We
15 have been striving --

16 QUESTION: Why is that so? I mean, there -- there --
17 there are more white -- there are more white residents on
18 the reservation who are not subject to the tribe than
19 there are residents of other kind by a -- by a good deal.

20 MR. WALLACE: On many reservations that is true, and
21 those are the reservations where other enforcement
22 authorities tend to be more available. But on the ones
23 where it's mostly other Indians who are residents, there
24 isn't much else to rely on.

25 QUESTION: Thank you, Mr. Wallace.

1 Mr. Trebon, you have three minutes remaining.

2 REBUTTAL ARGUMENT OF JOHN TREBON

3 ON BEHALF OF PETITIONER

4 MR. TREBON: Thank you.

5 There's no compelling reason for this Court to add
6 another crazy patch to the quiltwork of Indian law. The
7 bright line that's been established by this Court in not
8 going back to Rogers but in United States v. Wheeler
9 should be applied here. Rogers doesn't control this case.
10 Oliphant and Wheeler do, but not just language in those
11 cases. The rationale of those cases apply here.

12 Let me clear up some confusion I may have caused. We
13 are suggesting one solution is to read 1152 to mean member
14 on member. We still believe that 1153, the Major Crimes
15 Act, would apply to any Indian on the reservation.
16 Heretofore, that has not meant enrolled member. That is
17 not a definition as Congress used -- has used, and we
18 don't believe that that has been applied in the past.

19 You'd have to rewrite all the federal statutes in
20 order to gain this argument for the Respondents so that
21 you can shift one void to another. It's clear, I think
22 the Court can see, from the questioning thus far there's
23 not -- you're not going to avoid a void by deciding this
24 case in a certain way.

25 QUESTION: How would you like us to read 1152?

1 MR. TREBON: I believe 1152 -- and just not my
2 opinion but the legislative history, we believe, supports
3 that it should be member on member. The tribal court
4 would have jurisdiction over member on member. If it's a
5 non-member crime, it goes into federal court or into state
6 court if they can -- if they can argue, in a subsequent
7 case, that the state interest is great enough to extend
8 the McBratney line of cases.

9 QUESTION: But what about an enrolled Indian who says
10 I want out and I opt out and he's no longer an enrolled
11 member and doesn't want to be? What about 1153? He would
12 still be an Indian, wouldn't he?

13 MR. TREBON: Of course. He's an Indian by federal
14 definition. If he's over -- if he's over 25 percent
15 Indian blood under some definitions he is. Under the
16 Indian Reorganization Act, if he's over 50 percent blood,
17 he is.

18 And this Court I hope is not going to create an
19 incentive for enrolled Indians to disenfranchise
20 themselves with their own tribes in order to gain equal
21 rights with other citizens. I mean, hopefully we get back
22 to the position sometime in this case that Mr. Duro and
23 Mr. Oliphant are exactly the same except for one fact:
24 one's an Indian and one is not. Why should we treat them
25 differently?

1 This Court in the United States -- in Antelope didn't
2 say that you could. Indians are tried under 1153 in
3 federal court, and so are non-Indians. They're both
4 accorded the same rights. There was no racial
5 classification created in Antelope. Federal jurisdiction
6 was exercised over both.

7 Here, tribal jurisdiction would be exercised over one
8 group but not another, even though they're generally
9 within the class of non-members simply because one is an
10 Indian and one is not.

11 The analysis is pretty cohesive if you apply the same
12 rationale that you used in Wheeler, that you used in
13 Oliphant, that you've used in Rice v. Rehner, that you use
14 in the tax cases, that you use when you applied the
15 Williams v. Lee infringement test.

16 In all cases, the same rationale applies here, and
17 tribal government is preserved, in fact greater so,
18 because the tribe can still continue to exercise not only
19 jurisdiction over its own members but they can apply the
20 customs and traditions and mores that they have always
21 applied in tribal court. They don't have to have the Bill
22 of Rights applying to them. We don't have to destroy
23 tribal sovereignty in order to gain jurisdiction over this
24 void.

25 QUESTION: Could your client be charged and tried and

1 tried by his own tribe for this offense?

2 MR. TREBON: Very good argument that he could.
3 Tribes have always exercised personal sovereignty, not
4 territorial sovereignty. In this court, the Ninth Circuit
5 in Settler v. Lameer and even the CFR regulations provide
6 that they have jurisdiction beyond their boundaries --

7 QUESTION: So if you win, there isn't any gap at all?

8 MR. TREBON: That's true.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Trebon. The
10 case is submitted.

11 (Whereupon, at 2:01 p.m., the case in the
12 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 88-6546
Albert Duro, Petitioner, v. Edward Reina, Chief of Police, Salt River

Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)

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