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Redefining Tribal Sovereignty to Expand Native Jurisdiction Over the Death Penalty

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REDEFINING TRIBAL SOVEREIGNTY TO EXPAND NATIVE JURISDICITON OVER THE DEATH PENALTY

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ABSTRACT:

Using Lezmond Mitchell's case as an example, this thesis will explore the ways in which the federal government should redefine tribal sovereignty to expand Native jurisdiction over the death penalty. For centuries, the U.S. has undermined the cultural beliefs and authority of tribal governments by legally and illegally executing Native Americans. Most recently, the Trump administration executed Lezmond Mitchell, completely disregarding the Navajo Nation's opposition to the death penalty. According to federal law, the government must receive tribal consent to seek out a death sentence against a Native defendant who is accused of committing an intra-tribal crime in Indian country. My investigation will prove the Trump administration found a loophole in federal law to garner public support and push a "tough on crime" agenda. To remedy this affront to Native jurisdiction, I analyze how each branch of the federal government defines tribal sovereignty and in what ways it compares to state sovereignty. All three branches have interpreted tribal authority differently over the years to either expand or restrict Native governance. This thesis concludes that Native jurisdiction over the death penalty should be strengthened, and that legislation should be adopted to ensure territory-based tribal sovereignty.

INTRODUCTION: A COMPLETE DISREGARD FOR TRIBAL AUTHORITY IN FEDERAL DEATH SENTENCES

Note to Reader

Throughout my senior thesis, I will be referring to Native Americans by the historical terminology to mirror the literature referenced (particularly in Chapter One which cites multiple historical archives documenting Indigenous executions). Yet, it is important to recognize the racial implications of the historical terminology and understand the contemporary identification of Indigenous people in modern-day. I am choosing to quote scholars who use outdated terminology not because it reflects my beliefs but to be consistent with the literature of the time.

For centuries, capital punishment has been debated by U.S. government officials and voters. Ever since the first execution took place in 1630, Americans continue to unshakably defend their moral standards for the punishment of severe crimes (Kirchner 653, 2021). This heated disagreement inevitably highlights the inequities which plague the death penalty—such as its disproportionate application to people of color. Statistical studies presented in *McCleskey v. Kemp* (1987) found evidence of racial disparities in capital proceedings. Despite these findings from the Baldus study, the Court held capital punishment as constitutional under the Eighth and Fourteenth Amendments. The case effectively "immunized the criminal justice system from judicial scrutiny for racial bias. It made it virtually impossible to challenge any aspect, criminal justice process, for racial bias in the absence of proof of intentional discrimination, conscious, deliberate bias" (Alexander, 2010). The relationship between race and capital punishment has persisted since the nation's founding, but it was particularly apparent once Trump took office.

The Trump Administration resumed executing death row prisoners after a seventeen-year hiatus. These prisoners were primarily people of color. Throughout Trump's four years in office, he put 13 people to death—cementing "his legacy as the most prolific execution president in over 130 years" (Tarm and Balsamo, 2020). Trump is not the only president to vehemently

endorse the death penalty. The Republican Administration has executed over a quarter of all federal death-row prisoners—including Lezmond Mitchell (Tarm and Balsamo, 2020). Mitchell was a Native American man and member of the Navajo Nation. At age 20, Mitchell and his friend were arrested for killing a Navajo woman and child on the Navajo reservation in the northeast corner of Arizona. Despite overwhelming opposition from local federal prosecutors, Navajo tribal leaders, the victims' family members, and hundreds of Native American citizens' pleas, the Trump administration chose to proceed with the death penalty. President Trump and Attorney General Barr's complete disregard for tribal sentiment undermined a fundamental amendment in the Federal Death Penalty Act of 1994 (Ortega et al. 2, 2020).

The Federal Death Penalty Act (FDPA) was enacted by Congress to establish constitutional procedures for the administration of the death penalty. An amendment in the FDPA, prohibited the use of capital punishment *unless* the affected tribe allows it. This is referred to as the "Tribal Option" and it is still in effect today. The Tribal Option expanded Native jurisdiction over capital offenses that are committed within reservation boundaries. Due to legal, cultural, political, and historical traditions, most tribes elect to opt out of the death penalty (Christensen, 2020). Not all crimes, however, are subjected to the FDPA's Tribal Option. The federal government is only required to ask permission of a tribe for capital offenses listed in the Major Crimes Act (MCA). Congress passed the MCA in 1885 to establish the federal government's exclusive criminal jurisdiction over serious felonies committed on Native American land by tribal members. So, the Tribal Option is only available for Native Americans convicted of crimes enumerated under the MCA. Passage of the MCA stripped Native communities of their jurisdiction over serious crimes, but the FDPA was an attempt by Congress to transfer some of that authority back to tribal governments.

The Tribal Option is one attempt by Congress to preserve tribal sovereignty over the death penalty. Over the past thirty years, the federal government has both expanded and infringed on tribal sovereignty. All three branches have transformed federal Indigenous policy in their own ways, some more than others. Kevin K. Washburn argues that the tribal self-determination initiative is at a crossroads because no new self-determination program has been implemented at the congressional level in several years (777, 2006). Other scholars, like Joseph William Singer, are more critical of the judiciary's recent efforts to restrict tribal governance, like prioritizing state jurisdiction over Native jurisdiction. Nonetheless, far more work needs to be done to achieve tribal sovereignty and respect tribal courts. Currently, the U.S. Sentencing Commission refuses to count tribal convictions when calculating criminal history. In other words, the Commission is deliberately undermining the legitimacy of tribal courts' work. Washburn is convinced that "tribal courts are entitled to the same respect as state court sentences in the federal sentencing regime" (213, 2005). His rationale is particularly relevant to Native jurisdiction over capital punishment because tribes cannot abolish, limit, or endorse the death penalty as states can. Eliminating capital punishment state-to-state is a trending topic in the United States, but bigotry surrounding tribal sovereignty is often left out of the conversation.

Modern-day ignorance toward tribal self-determination is rooted in the legal and illegal executions of Indigenous people across time. Since the beginning of colonization in the U.S., Native Americans have been sentenced to death regardless of their cultural and religious beliefs. And complete disregard for tribal governance and Native culture is still a problem today. Therefore, it is impossible to fully comprehend the impact of the Trump administration's negligence concerning tribal sovereignty without the historical context of these genocidal injustices.

Before the death penalty was formally implemented, government officials found other tools to attack Indigenous populations. For example, state government officials offered bounties for American Indian scalps and encouraged U.S. citizens to kill as many Native Americans as they could find. Beginning in the 1830s, white mobs would torture tribal members until they confessed to a crime they did not commit and then burn them alive. Mob violence continued into the 1930s while the government turned a blind eye to brutal murders of Native men, women, and children (Baker 317-326, 2007). Unofficial executions effectively marginalized the Indigenous community and laid the foundation for the disrespect of tribal sovereignty seen in legislation today.

The roots of federal Indian law were established by seven white men during the period of 1823 to 1832. Justice John Marshall wrote a trilogy of U.S. Supreme Court decisions, starting with *Johnson v. M'Intosh* (1823) where the Court extended the power of tribal law to include authority over all individuals who enter tribal lands, even non-Natives. *M'Intosh* was the first case to establish territory-based tribal sovereignty. Next, the Court defined Indigenous tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia* (1831). The case created "trust responsibility" between tribes and the U.S. government—a legally enforceable fiduciary obligation for the U.S. to protect tribal rights, land, assets, and resources. The final case, *Worcester v. Georgia* (1832), held state law as ineffective in Indian country, thus prohibiting state criminal prosecution of non-Natives. *Worcester* also explicitly defined tribal sovereignty in terms of territory. That precedent continued for nearly 200 years, until the Court switched to a membership-based definition of tribal sovereignty. I will explore this concept at length in Chapter Three, but it is important to note that territory-based sovereignty preserves Native jurisdiction, while membership-based sovereignty restricts it. The three branches of the federal

government are not in agreement over which definition prevails in modern-day. Yet, all leaders in the federal government look to the Marshall Trilogy for guidance in continuing tribal relations. Even though the three cases are "no longer considered current in their totality, these cases have historically had a profound effect on tribal government, including tribal criminal jurisdiction" (Chaney 173-174, 2000). The Marshall Trilogy subsequently had a significant impact on most legislation pertaining to tribal governance, like the MCA.

Like the Supreme Court cases previously mentioned, the MCA was also written by a group of white men in the 19th century. Its passage was primarily motivated by assimilationist efforts. Since then, the U.S. has worked to dismantle legislation that sought to facilitate assimilation and instead craft policies or laws that encourage tribal self-determination (Washburn 783, 2006). Still, felony criminal justice is excluded from federal initiatives favoring tribal self-determination. The MCA has consequently persisted in its original form. Many scholars, including Kevin K. Washburn, argue the century-old law lacks legitimacy in the modern-era due to its earliest purposes aimed at colonialization (780, 2006). The law itself expresses the congressional view that tribal law is insufficient to punish major crimes adequately, highlighting the federal government's general distrust in tribal courts.

Such outdated legislation cannot be overlooked because tribal governments are affected by federal sentencing guidelines more profoundly than any other distinct group in the U.S. (Washburn 403, 2004). Native Americans are subject to federal prosecution for numerous felonies outlined in the MCA—such as homicide, larceny, burglary, and rape—which outside of tribal land would not rise to the level of federal jurisdiction. In fact, Native American offenses constitute over 20 percent of the murders and assaults in federal court, and close to 75 percent of all manslaughter and sexual abuse cases (Sands 153, 1998). Thus, Native American offenses are

a substantial part of federal prosecution, demonstrating further reason to re-evaluate laws from a bygone era.

The Tribal Option in the FDPA is one congressional attempt of many to expand tribal self-governance amidst polarizing views on capital punishment. Some academics argue it is essential to administer the federal death penalty uniformly across all 94 federal districts, so all people are subject to the same punishment regardless of geography. Other scholars believe differing community views and values must be given a voice in the application of statutes to guarantee individualized fairness—like the Tribal Option (Little 8, 2001). Jon M. Sands goes one step further to suggest individualized fairness is only possible among the Indigenous population if tribes can opt out of federal criminal jurisdiction entirely (157, 1998). Under Sands' philosophy, tribes with their own system for punishment and prosecution are best equipped to represent tribal members' cultural and religious beliefs. For now, however, Congress does not respect tribes as distinct political entities.

The federal government, on the other hand, has not historically punished Native offenders according to the beliefs of their associated tribes. In 2001, the former head of the federal Bureau of Indian Affairs, Kevin Gover, apologized for the agency's history of discrimination against Native Americans: "Never again will we attack your religions, your languages, your rituals or any of your tribal ways" (Baker 364, 2007). Gover's apology cannot suffice for the BIA's complicity in the genocidal atrocities suffered by Indigenous people. Moreover, Lezmond Mitchell's execution is proof the federal government could not keep the BIA's promise.

If Lezmond Mitchell had been charged for the offense that naturally fit his crime, the federal government would not have been able to execute him. The authorities who first charged

Mitchell thought to charge him with murder. Adhering to the MCA, intra-tribal murder committed on tribal land is not subject to capital prosecution *unless* the affected tribe opts into the federal death penalty. Under the original murder charge, the Navajo Nation opted out of the federal death penalty and elected for Mitchell to face life in prison. The Trump administration had other plans. Attorney General Barr went out of his way to sentence Mitchell with a crime not listed in the MCA, paying no attention to the Navajo Nation's cultural disagreements with capital punishment. Barr pursued the charge, carjacking resulting in death, rather than murder. His announcement to capitally prosecute Mitchell under carjacking resulting in death highlighted the "tumultuous, historically oppressive, and tarnished relationship between the federal government and the Native American tribes" (Kirchner 649, 2021). The "loophole" found by the Trump Administration stripped the Navajo Nation of their tribal sovereignty in the criminal justice system.

In May of 2020, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reviewed Mitchell's habeas corpus challenge to his conviction and death sentence. Despite their denial of Mitchell's appeal, Judges Morgan Christensen and Andrew Hurwitz expressed serious concerns. The two judges did not agree with Barr's decision to override the authority of the Navajo Nation (Death Penalty Information Center, 2020). Judge Morgan Christensen acknowledged the federal government's discretion to capitally prosecute the case, but then also stated "[t]he imposition of the death penalty in this case is a betrayal of a promise made to the Navajo Nation, and it demonstrates a deep disrespect for tribal sovereignty" (Death Penalty Information Center, 2020). The Department of Justice deliberately ignored a tribes' right to execute or not execute their own members. Soon after, in July of 2020, Mitchell's attorneys wrote a petition for clemency and for the commutation of his death sentence. They urged the

president to see Mitchell's execution as "a lack of sensitivity to the tribe's values and autonomy and demonstrates a lack of respect for its status as a sovereign entity" (Ortega et al. 1, 2020). Ultimately, their efforts failed because Lezmond Mitchell was put to death by lethal injection and declared dead on August 26, 2020.

Not only was Mitchell's execution a complete disregard for tribal sovereignty, but the punishment was also arbitrary. Ryanne Wright compares two defendants, Tommy Dean Bullcoming and Lezmond Mitchell to prove the selection of death-eligibility under the FDPA is arbitrary. Both Tommy and Mitchell are equally *culpable* defendants yet are not equally *punished* (Wright 24). The two cases are quite similar. Both men committed violent carjackings and stabbings on tribal land that were followed by additional violence. Tommy acted alone and had a criminal history. Mitchell committed the crime along with multiple co-defendants—none of whom received the death penalty—and had no criminal history. The prosecutors for both cases chose to seek out dissimilar sentences demonstrating an "arbitrary deprivation of life and liberty, thereby shattering due process protections" (Wright 25, 2020). Tommy is currently serving a life sentence in Oklahoma while Mitchell became the first Native American to be executed by the federal government for an intra-tribal crime (Death Penalty Information Center, 2020).

Mitchell is not the only Native American to be formally executed in the U.S. From 1639 to 2006, a total of 464 American Indian executions have taken place—including 65 people under federal jurisdiction (Death Penalty Information Center, 2021). These executions occurred without being affected by tribal decisions to opt out of the death penalty (Christensen, 2020). A breakdown of legal, Indigenous executions can be seen below:

Registry of Known American Indian Executions, 1639-2006:

Jurisdiction of Execution	Total Number Executed
Military	150
State	132
Federal	65
Territorial	52
Indian Tribunal	33
Unknown	32
Method of Execution	**Total Number Executed**
Hanged	333
Shot	69
Lethal Injection	14
Electrocution	13
Asphyxiation	7
Other	28

Figure One

Source: Death Penalty Information Center

Mitchell's case was not about whether the death penalty should or should not be abolished. People will continue to disagree about capital punishment for years to come, but the imposition of the death penalty in this case was a betrayal of the Navajo Nation and tribal sovereignty (Christensen, 2020).

The community values of the Navajo Nation were completely ignored when the Department of Justice went out of its way to execute Mitchell. The U.S has repeatedly "moved to recognize and recognized the sovereignty of Indigenous peoples, but never acted in good faith on those recognitions" (Grubb 8, 2021). The case was not only unjust, but it was also characterized as arbitrary by Circuit Judge Stephen Reinhart. Reinhart noted how Mitchell was quite young at the time and had no prior criminal record. This characterization does not match the usual perpetrators who suffer federal death sentences. Those individuals are usually mass murderers and drug overlords who order numerous killings (Thompson, 2019). Mitchell's crime did not fit

the standard. As evidenced through the literature, there is no clear solution to the loophole found by the Trump administration to execute Mitchell without the consent of the Navajo Nation. Scholars have opposing views on how legitimate outdated legislation is in the modern era and thus, how much federal control should be exercised over crimes committed on tribal land. Nevertheless, there is a general consensus that the spirit of the Tribal Option in the FDPA should be respected to preserve tribal sovereignty in decisions related to capital punishment.

To fully understand the problem posed by Mitchell's execution, this thesis will proceed in four parts. Chapter One will give a historical overview of all documented legal and illegal Indigenous executions, ending with Lezmond Mitchell. Chapter Two will explore the ways in which politicians use the death penalty to garner public support. There, I will elaborate on the Trump administration's role in Mitchell's death. Chapter Three will outline how the different branches of the federal government have worked to expand, restrict, and define tribal authority in conformity with the U.S. Constitution. Generally, the legislative and executive branches have strengthened Native jurisdiction by consistently defining tribal sovereignty in territorial terms. Conversely, the Supreme Court has infringed on Native jurisdiction by switching to a membership-based definition of tribal sovereignty. Finally, I will conclude by arguing Congress needs to redefine tribal sovereignty in territorial terms to expand Native jurisdiction over the death penalty. Shifting to territory-based sovereignty will permit tribal authorities to govern according to Native cultural beliefs—particularly for capital offenses that occur within reservation boundaries.

1 CHAPTER ONE: NATIVE AMERICAN EXECUTIONS FROM 1532–PRESENT DAY

Throughout American history, the U.S. weaponized capital punishment against Indigenous people to advance the social, political, and economic interests of white Americans. During a particularly brutal attack initiated by the colonial army in 1639 a member of the Pequot Tribe, Nepauduck, murdered a white man culminating in the first execution of a Native American (Hearn 8, 1999). Since then, historical inventories indicate that death penalty jurisdictions have legally executed over 450 Native Americans (Baker 321, 2007). Nevertheless, death penalty researchers struggle to produce a number that accurately accounts for the number of executions, a result of two primary limitations. First, little information has been gathered on sociodemographic data and procedural issues influencing capital punishment for Indigenous people. Thus, only partial characteristics of Native executions and the attributes of Native offenders are available. Second, death penalty inventories fail to define the tribal membership of condemned prisoners, eliminating evidence that could link the sociocultural distinctions among tribal groups, criminality, and the likelihood of executions (Snell, 2007). It is also important to recognize the innumerable murderous encounters between European settlers, white "vigilante" groups, and Native Americans. These unofficial executions significantly contribute to the greater conversation about genocidal colonialism.

While the portrait of Indigenous executions continues to evolve as more information is uncovered, it is indisputable that capital punishment of Natives is nested within a sociopolitical context of genocidal colonialism. White colonial interests and power "dispossess[ed] American Indians of their *Indianism* by removing them from their sacred tribal territories, disrupting their traditional cultures, and continuing their marginalized status in US society today" (Baker 317,

2007). The arrival of European colonizers to North America had many overarching consequences for tribal members, including hundreds of years of armed conquest. In fact, every known attack was initiated by the U.S and was a result of American citizenry invading defined tribal land (Robbins 91, 1992). Defenseless Native women and children were tragically a sizeable percentage of the military casualties. Consequently, the Indigenous population dramatically dwindled in the 18th and 19th centuries (Stannard 120, 1992). Normalized violence against Native Americans led to the development of openly racist official policies. Such legislation allowed political leaders to systematically kill off tribal members without question.

For centuries Indigenous people have been treated as less than human in the political sphere. Famous presidents, like George Washington and Andrew Jackson, even compared Native Americans to animals. Washington considered Indigenous people to be "beasts of prey." After an attack in 1779, his troops skinned dead tribal members from the hips down to fashion boot tops and leggings (Baker 319, 2007). Additionally, Jackson referred to Natives as "savage dogs." During his purge of the Cherokee, he personally oversaw the mutilation of over 800 Indigenous corpses—scalping men, women, and children and slicing long strips of flesh to turn into bridle reins (Baker 319, 2007). Both Presidents' barbaric treatment of Native Americans paved the way for private citizens to aid in the annihilation of millions more tribal members while the local government looked the other way (Rummel, 1994).

The dynamic narrative illustrating how government initiatives systematically eliminated Native Americans across time is convoluted and insufficiently researched. Scholars Deloria and Lytle (1983) constructed a useful framework to investigate the criminal justice history of Indigenous people starting in 1532 (Baker 321-322, 2007). The timeline of contact between Native Americans and European whites is divided into six distinct periods: *discovery, conquest,*

and treaty-making (1532-1828); *removal and relocation* (1828-1887); *allotment and assimilation* (1887-1928); *reorganization and self-government* (1928-1945); *termination* (1945-1961*); and self-determination* (1961-present day). Both illegal and legal Indigenous executions were exploited by white colonizers to annihilate tribal members and their culture.

1.1 Discovery, Conquest, and Treaty-Making (1532-1828)

Prior to colonial conquest, more than 700 separate cultural units with deep-rooted civilizations made up the Indigenous populations across North America (Baker 317, 2007). Throughout the initial period, a combination of genocide, military assault, epidemic disease, psychological disorientation, high levels of pathogen and stress-induced infertility, and government executions put Natives at risk for complete destruction (Stannard 268, 1992). When traveling to the New World, Europeans brought with them various kinds of life-threatening diseases, such as influenza, diphtheria, measles, pneumonia, whooping cough, smallpox, malaria, typhoid, cholera, tuberculosis, and many more. While Europeans were mostly unaffected by these illnesses, "most Indigenous populations across the continent suffered death rates between 95 and 99 percent and some plagues fully decimated countless other tribes" (Baker 318, 2007). Prior to colonization, Native Americans were not exposed to these virulent diseases and therefore did not possess the proper immune system to survive these lethal foreign diseases.

Although some scholars assert these diseases were unintentionally spread by Europeans, there is significant evidence that suggests otherwise. In 1763, British forces deliberately gave the Ottawa tribe smallpox-infected blankets which spread rapidly and killed more than 100,000 Native Americans (Baker 319, 2007). Similarly, the U.S. Army distributed disease-ridden blankets at Fort Worth in South Dakota to kill the Mandan people and set into motion the pandemic of 1836-1840 (Stiffarm & Lane 32, 1992). The catastrophic destruction triggered by

deadly diseases dramatically reduced the Native American population—all at the hands of white colonizers.

Once Europeans settled down in the New World, they dealt with tribal members using treaties to gain a foothold in North America. Treaties were generally meant to distinguish the political and legal relationship between tribal nations and white European settlers. These agreements supposedly recognized Indigenous people as legitimate and capable individuals. In truth, treaties were a calculated tactic by the federal government to manipulate Native Americans and seize their sacred tribal lands (Robbins 91, 1992). Even more contemptuous, historical archives reveal the American government never honored a single treaty agreement (Baker 322, 2007). Hunkpapa Lakota leader, Sitting Bull, once asked, "What treaty that the whites have kept has the red man broken? Not one. What treaty that the whites ever made with us red men have they kept? Not one" (Blaisdell 175, 2000). Agreements between Natives and the national government were often written in English and interpreted by colonizers who held a direct interest in the outcome. Inevitably, with each broken treaty came the slaughter of thousands more Native Americans.

The racist philosophy, *Manifest Destiny,* became the rationalization behind every treaty made between government officials and tribal members. This way of thinking corroborated the white American belief, *divine ordination*. Divine Ordination encouraged the natural superiority of the white race, convincing colonizers that "they had a right (and indeed an obligation) to seize and occupy all of North America" (Morris 67, 1992). Westward expansionism was thus a direct consequence of Manifest Destiny, the catalyst behind extermination policy, and the explicit cause for racial subordination within the U.S. Constitution. Political leaders established a system

of rights entrenched in the ideology that *equality* in white society was reliant on the *inequality* of tribal nations (Baker 323, 2007).

Manifest Destiny paved the way for nearly 157 Native American executions to take place in the early 16th century. King Phillip's War (1675-1678)—an armed conflict between Indigenous people and European colonizers over English settlement on Native lands— caused the first major peak in military executions (Yirush, 2011).[1] Military authorities from Massachusetts, New York, and Rhode Island ordered the execution of 53 Native Americans over the course of a decade for both murder and sedition. The two primary means of execution were hanging and firing squad. Following the rise in armed conflict, New England's Native American population drastically dipped from 30,000 in 1630 to 12,000 in 1670 (Baker 324, 2007).

Indigenous executions peaked again in the 1700s when at least 46 Native Americans were put to death within the course of 80 years (Baker 324-325, 2007). Shortly after, Delaware tribe member, Mamachtaga, was hanged in 1785 for the murder of a white man named Smith, whose militia killed all but a few Natives encamped on an island. Mamachtaga's botched hanging was the first state execution in U.S. history of a Native man (Baker 325, 2007).[2] Indigenous executions then decreased in the 1790s but not for long: throughout the early 1800s, countless tribal members were publicly executed. One 17-year-old, John Tuhi from the Oneida tribe, was hanged in front of 15,000 people under military supervision (New York Corrections

[1] "Of the nearly 12,000 Indians in southern New England in 1675, King Phillips War claimed 68 percent of the population; colonists killed 1,875, exposure and disease killed 3,000, some 2,000 were forced from the region, and another 1,000 Indians were sold as Slaves" (Baker 331, 2007 and Axtell, 1992).

[2] Mamachtaga had to be hung twice because the first rope broke. The tribal member "fell, and having swooned a little, he rose with a smile and went up again." Two ropes were then provided, and he was hung for a second time until declared dead (Brackenridge, 2003).

History Society, 2006). Local residents were often encouraged to attend public executions to engage in the systematic killing of Native Americans, particularly in the era of discovery, conquest, and treaty-making. In total, Indigenous executions from the early colonial period represent about 35 percent of all Native executions that have taken place in the U.S. since 1639 (Baker 327, 2007).[3]

Aside from murder, Native Americans were also commonly sentenced to death for rape. The use of capital punishment for a crime like rape was almost unheard of in the early colonial period. It was far more common for the subjected defendants to be publicly whipped, castrated, or heavily fined (Baker 327, 2007). Despite this, Massachusetts' authorities hanged a tribal member known as Tom, along with four other Natives who were all convicted of rape. Another member of the Delaware-Lenape tribe, Nangenutch, was sentenced to death in 1654 for supposedly raping a white woman—but he escaped and avoided recapture (Strong, 1994). The disproportionate number of Indigenous executions for crimes that are typically subject to lesser punishments reaffirms the discrimination seen within early Native death sentences. Evidence further suggests that Native men were often falsely accused of raping white women. Rather, "there is consensus among scholars of the pervasiveness of white men raping Indian women" (Baker 328, 2007). Many whites rationalized the rape of Native women through Manifest Destiny and the conquest for westward expansionism. Colonizers' false criminalization of Native Americans highlights yet again the target placed on tribal communities by both the government and private citizens.

[3] The bulk of these executions took place in Massachusetts, Connecticut, and California (Baker 327, 2007).

Throughout this initial period, death penalty jurisdictions executed eight Native American women, including Hannah Occuish (Goodheart 69, 2020). Occuish is the youngest condemned Indigenous prisoner in U.S. history. In June of 1786, Hannah got in trouble for taking six-year-old Eunice Bolle's strawberries. Hannah's mistress, Mary Rogers, whipped her severely for stealing the fruit from the young white girl. When authorities confronted Hannah that July, she confessed to choking Eunice to death as an act of revenge. At that time, Connecticut laws considered a youth to be an adult at the age of fourteen and thus eligible for the death penalty. Hannah was twelve. Undoubtedly, the General Assembly's decision to hang the little girl was heavily influenced by the image of a white victim and a perpetrator of color, especially a young Native girl. Scholar Jan Schenk Grosskopf found that Hannah's mother, Sarah, was a member of the Nehantic tribe (Goodheart 67, 2020). All of Hannah's life she was plagued with mental health issues, racism, classism, an absent father, and an alcoholic mother—but the criminal justice system only saw the daughter of a Native mother who killed a white girl half her age. Without skewed racial dynamics, Hannah would not have paid the price with her life.

Indigenous slaves were also a victim of capital punishment in the early colonial period. Between 1700 and 1763, Virginia, New York, Massachusetts, Rhode Island, Michigan, and Louisiana hung and killed by firing squad at least seven Indigenous slaves (Espy & Smykla, 2004). These executions were for crimes like murder, slave revolt, and desertion. While historians have not been able to perfectly "piece together a partial mosaic of American Indian slavery," they are certain that Natives accounted for ten percent of the U.S. slave population by the mid-18th century (Baker 330-331, 2007). Most of these slaves were subjected to the abusive

treatment of white traders. The torture faced by colonial captives significantly contributed to the eradication of the Native population.

1.2 Removal and Relocation (1828-1887)

Native Americans suffered tremendously during the 19th century as the national government forcibly removed tribes from their ancestral lands to inhospitable territories. Thomas Jefferson was the first president to propose relocation. Soon after Andrew Jackson was elected president, Congress passed the Indian Removal Act strengthening the government's administrative hold over tribal nations (Baker 333, 2007). Before the Act was passed, federal agents uprooted the Kickapoos, Shawnees, Delawares, Sac and Fox, Miamis, and Ottawas against their will. The tribes were forcibly moved from the Great Lakes region to reservations near the Oklahoma territory (Baker 333, 2007). Jackson's policy directly contradicted U.S. Supreme Court holdings in *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832). I will explore both cases in detail later in Chapter Three. In the meantime, it is important to note that the Supreme Court granted tribes immunity from state jurisdiction and placed Indigenous people under the protection of the federal government. Jackson's complete disregard for tribal sovereignty and Native defense allowed 40,000 white settlers to descend onto tribal territory (Baker 334, 2007). An increase in white settlement destroyed many tribes' agricultural production and accelerated Native deaths because of mass starvation. Government encouragement of such appalling practices exacerbated the number of illegal Native executions, advancing the economic interests of white America.

Not only did forcible relocation strip away Native autonomy, but the maltreatment faced while traveling also caused the death rate of tribal members to skyrocket. The Cherokee Nation endured the consequences of involuntary migration when the infamous 'Trail of Tears' began in

1838. They were required to give up their land east of the Mississippi and move to land within present-day Oklahoma. Like animals, roughly 17,000 tribal members were herded by federal officers into territories knowingly infected with fatal diseases—one of which was cholera (Baker 334, 2007). As if coercing thousands of men, women, and children to march through disease-ridden land was not negligent enough, military officers also fed Native Americans spoiled flour and rancid meat along the way. A soldier from Georgia recounted his perspective on the Trail of Tears: "I fought through the Civil War and have seen men shot to pieces and slaughtered by thousands, but the Cherokee removal was the cruelest work I ever knew" (Abrams 14, 2014). The treacherous journey resulted in a death toll totaling 8,000 Cherokee people (Baker 335, 2007).

Other tribes' populations were liquidated undergoing the same process, like the Creeks and Seminoles. Over the course of a decade, government authorities confiscated the homes of 100,000 tribal members and forced them to brave brutal weather across hundreds of miles, with little except the clothes on their backs. Acting on presidential orders, American commanders watched as 15,000 Native Americans died of starvation, malnutrition, and disease (Abrams 14, 2014). Federal removal and relocation policies culminated in 193 Indigenous executions—comprising nearly half of all Indigenous executions recorded in U.S. history (Baker 335, 2007). Naturally, Native Americans' violent resistance to ceding their tribal homelands contributed to the spike in death sentences. These capital punishment cases primarily took place in Alabama, Arkansas, California, Minnesota, Oklahoma, and Oregon. Approximately 97 percent of the Native prisoners were convicted of murder, all were male, most were hanged, and the most states prohibited Native prisoners from appealing their capital cases to its highest court (Baker 340,

2007). The bulk of these executions took place over a 23-year period at Fort Smith, Arkansas, as well as on a single day in Minnesota.

Between August 1873 and July 1896, federal officers in Fort Smith, Arkansas executed more people than at any other time or place in American history. A total of 86 prisoners were condemned to the gallows. From those, 79 were sentenced to death by one man, Judge Parker, who was later nicknamed 'the hanging judge.' Executions at the military post were often witnessed by thousands of spectators. Most notably, of the 86 people hung to die by federal authorities, 41 percent were Native prisoners (Baker 335-337, 2007).

One day, in December 1862 federal authorities executed 39 Native Americans in Minnesota, marking the largest mass execution to date (Baker 335, 2007). To understand why the Lincoln Administration took such drastic measures, we must look at the Dakota-Sioux Nation's relationship with the government a decade earlier. In 1851, the Sioux Nation was made of up seven tribes. Their land stretched from the Big Woods of Minnesota to the Rocky Mountains. The two southernmost tribes signed two treaties with the U.S. that required the surrender of most of their land in return for cash compensation, trade goods, and relocation along the upper Minnesota River (Baker 338, 2007). Officials from the Bureau of Indian Affairs (BIA) were responsible for upholding the treaty—which was like "entrusting the sheep to a pack of wolves" (Soodalter 125, 2015). Predictably, the U.S. dismissed its agreement with the Sioux Nation. Tribal members never received the promised payments and trade goods were rarely delivered. Plus, existence on the diminished reservation made it nearly impossible for the Sioux to sustain themselves by traditional means. The Minnesota tribe was left to die from hunger.

Complete disregard for the agreement continued for years until Sioux member, Chief Little Crow, traveled to Washington to advocate for the proper enforcement of the treaty. Alas, he returned home with even less. Upon government directive, white settlers encroached further upon the reservation members of the Dakota-Sioux tribe were forced to relocate to. Dakota trader, Andrew J. Myrick, declared "so far as I am concerned, if they are hungry, let them eat their own dung" (Soodalter 126, 2015). While the government continued to starve and manipulate Sioux members, tensions rose between neighboring white settlers and the Native Americans. So, the Dakota Sioux members finally decided to retaliate following 11 years of worsening economic conditions. Under the leadership of Little Crow, the tribal members attacked the nearby white settlers, simultaneously burning down their homes. In 37 days of fighting, 1,400 people died including Native Americans, white settlers, and military personnel (Baker 338, 2007). The American militia arrested hundreds of Sioux people, including those who had nothing to do with the attack, and promised safety to anyone who surrendered. Yet, every Native American who was arrested was put on trial (Linder, 2015).

The Dakota Conflict Trials were atypical for four reasons (Baker 338, 2007). First, the trials took place in front of a military commission rather than in state or federal courts. Second, each case was appealed to the President of the U.S. instead of a jurisdictional appellate court. Third, the convictions were derived from killings committed in warfare, which are rarely defined as crimes of murder. Fourth, military officials tried the Dakota-Sioux on civilian crimes for murder, rape, and robbery—not on violations of the customary rules of warfare. Such unconventional trials stressed the discrimination faced by Native Americans in the criminal justice system.

A total of 393 tribal members were put on trial, but each was conducted unfairly. Their trials lasted less than five minutes and more than 40 cases were judged every day (Linder, 2015). Ultimately, 303 Sioux people were sentenced to hang, 20 were sentenced to terms of imprisonment, and 69 others were acquitted (Baker 339, 2007). President Lincoln held the final approval for these executions. He determined killing 303 Native Americans would appear to be too genocidal. Thus, he reviewed their cases and favored the execution of 39 Dakota-Sioux tribal members. On December 26th, 1862, 4,000 white settlers watched as 39 Dakota Sioux tribal members were hanged in a single moment. Two more tribal members were also executed three years later for their participation in the Dakota uprising. To make matters worse, the Forfeiture Act of 1863 was passed, effectively nullifying the original treaty and expelling most tribal members from Minnesota (Baker 339, 2007).

1.3 Allotment and Assimilation (1887-1928)

By the third historical period of tribal relations with the federal government, military campaigns against Indigenous people formally came to an end. Congress instead 'weaponized the rule of law' to continue the marginalization of Native Americans—starting with the passage of the General Allotment Act (Dawes Act) in 1887 (Baker 342, 2007). The Act allowed the federal government to terminate tribes' general ownership of reservation land. Their goal was to assimilate Native Americans into mainstream U.S. society by dividing tribal reservations into individual plots and encouraging Natives toward farming and agriculture. Its underlying purpose, however, was to promote detribalization by surrendering surplus reservation lands to white control. Tribal landholdings decreased by more than half in a span of 47 years, going from 138 million acres to 48 million acres (Baker 342, 2007). Like the previous period, Native Americans were dispossessed of their homes—only this time around, it was done through allotment.

To expand the colonial indoctrination of Indigenous people, federal government authorities worked to assimilate Native children using education. Native schools were created to teach individualization, Christianization, citizenship training, and ultimately "eliminate any traces of the children's Native heritage" (Baker 343, 2007). These schools were often located great distances away from children's families and tribal leaders to support the philosophy of racial isolation. Although Native students were treated horribly by their teachers, parents continued to send their children to school because small meals were provided. Food incentivized attendance because many families could not afford to feed their children otherwise. When parents refused to send their children, Congress enabled federal police officers to round up their kids and take them by force (Baker 343, 2007). Many scholars note traumatizing psychological effects are the reason why assimilation policies failed miserably. Hence, the Americanization of Native children should only be defined as an "outright fraudulent [activity] of the national government toward American Indians" (Baker 342, 2007). Little resistance from Native Americans to allotment and assimilationist policies minimized the national government's retaliation against tribal members. Executions, therefore, significantly decreased in comparison to the previous period of removal and relocation. A total of 66 tribal members were executed and most of them were sentenced to death in Arkansas and Oklahoma for crimes involving murder (Baker 344, 2007).

1.4 Reorganization and Self-Government (1928-1945)

By 1928, Congress was pressured to reconsider the efficacy of the Dawes Act because it did not solve the federal government's "Indian problem" (Baker 345, 2007). Tribal members had not yet assimilated into American society to the government's standards, so Congress' next step was to enact a policy that would revert tribes back to their traditional ways of life. Creating an

effective policy was not easy. The majority of Indigenous people were living below the federal poverty line, and they were facing the highest mortality rate in the nation due to measles, pneumonia, and tuberculosis (Baker 345, 2007). Natives' dire situation called for legislation that would strengthen tribal governments, stimulate economic development, and encourage Natives to maintain their culture. In June 1934 Congress passed the Indian Reorganization Act to formally end the sale of allotments and minimize federal power over tribal governments. From there, tribal authorities set up a democratic self-governing structure where historically tribal elders and a tribal chief had governed (Baker 345, 2007). Despite the U.S. Constitution's recognition of tribes as inherently sovereign (which I explore in Chapter Three), federal officials did not acknowledge the independence of Native governments.

While tribes continued to deteriorate economically and socially, death penalty jurisdictions executed 15 Native American prisoners (Baker 345, 2007). The death of Nelson Charles emphasizes a common inequity faced by many indigent defendants in the criminal justice system: ineffective defense counsel. Ineffective counsel is particularly common for death row prisoners. After Charles spent six months in jail, a federal territorial judge appointed Adolph H. Zeigler to defend him. Zeigler was given a week to prepare for trial, never attended law school, held conservative beliefs on social issues, and was known to be "an unlikely champion of an Indian charged with murder" (Baker 346, 2007). During the trial, Zeigler did not put out any mitigating evidence. Following four hours of deliberation, an all-white jury convicted Charles of first-degree murder recommending the death penalty. Zeigler never appealed his case. Charles was hanged because the system failed him.

1.5 Termination (1945-1961)

Following World War II, the national government desperately needed to reduce public expenditures, making the termination of their trust relationship with Native Americans an easy target. Any progress made toward tribal sovereignty during the Reorganization and Self-Government period was entirely reversed once government officials suspended federal services to a long list of tribes devised by the Hoover Commission (Baker 347, 2007). Several congressional resolutions implementing federal policy changed tribal land ownership, reinstated state legislative jurisdiction and judicial authority over tribes, discontinued social programs for tribes, and terminated tribal self-governance (Deloria & Lytle, 1983). Between 1953 and 1958 government officials cut federal programs to 109 Native nations, like medical care and education assistance. Without federal assistance, Native Americans were left defenseless to systematic racism.

The effects of termination policies on tribes were catastrophic. Unemployment among Native Americans skyrocketed, all access to social services was cut off for tribal members, and the standards of living among reservation Natives plummeted. The welfare of Indigenous people fell into absolute chaos leaving many individuals in dire poverty. Unsurprisingly, the executions that took place from the 1940s to 1960s mainly took place in states where termination policies were most devastating. All in all, the death penalty states executed nine more Native American prisoners (Baker 348, 2007).

1.6 Self-Determination (1961-Present)

By the 1960s, the era of *Self-Determination* marked the failure of termination and assimilation policies and the long-awaited development of tribal independence. Many presidents and members of Congress acknowledged the inherent sovereignty of tribes through public

speeches or legislation. Unfortunately, recognition of tribal sovereignty by most federal authorities in the executive and legislative branches was not enough. The movement toward preserving tribal governance did not thoroughly establish fairness and equity for Native Americans. The Supreme Court posed quite a barrier to the autonomy of tribes by restricting the sovereignty of tribes within their territorial boundaries. I will explain that obstacle at length in Chapter Three. Centuries worth of discrimination and colonialization faced by Native Americans made it impossible for tribes to fully recover. To this day, Indigenous people are the most economically disadvantaged group of people in the U.S. More specifically, "the poverty rate for Indian populations is more than double the poverty rate for the overall U.S. population" (Baker 350, 2007). Perpetual unequal access to educational, economic, and political institutions has created a colossal gap between the incomes of non-Natives and Native Americans. Lower-income levels lead to abysmal living conditions, lesser occupational opportunities, inadequate health and medical care, and an increased mortality rate (Baker 350, 2007). A long history of bigoted policies against tribes has severe consequences both in the daily lives of Indigenous people and the lives of Native Americans trapped in the oppressive U.S. justice system.

Native Americans are at a significantly higher risk of encountering the legal system because of increased political, economic, and social marginalization. Multiple statistical studies have proven the continued victimization of Indigenous people by criminal justice agents. National arrest figures reveal Natives suffer from a disproportionate number of arrests for criminal offenses. Consequently, Indigenous people are more likely to be arrested for minor public offenses like drunken driving, liquor law violations, and public drunkenness. For violent and property crimes, "law enforcement agents arrest American Indian and Alaska Natives at nearly twice the rate as that of the greater U.S. population" (Baker 351, 2007). Besides disparate

arrests, the same study also found Native sentences to be much longer than those of non-Natives. Whether this discrimination is due to an overall lack of access to adequate counsel, racial profiling, or simply differential treatment by the system, Indigenous people regularly receive harsher punishments. On top of disproportionate arrest rates and more severe sentences, Native Americans are also incarcerated at a rate 19 percent higher than the national rate (Baker 351, 2007). The bulk of these crimes are prosecuted outside of tribal jurisdiction. So, while the national government claims the U.S. has entered an era of self-determination, those same federal authorities do not trust tribal governments to institute legal proceedings against their own members.

The Native American crime victimization rate parallels the rate at which Native Americans are prosecuted in the legal system. National crime victimization surveys found the victimization rate for crimes against Indigenous people to be twice that of non-Natives—specifically 2.5 times higher than the rate of whites, 2.0 times higher than that of Blacks, and 4.6 times higher than that of Asian Americans (Baker 352, 2007). These Native victims mostly suffer from crimes committed by white defendants. About 57 percent of violent crimes committed against Indigenous victims are at the hands of white perpetrators. Additionally, whites carry out 80 percent of rape and sexual assaults against Native people. Such a widespread presence of white rape on Native American women is seen by some scholars as an ongoing act of colonialism suffered by the Indigenous population in the U.S. (Baker 352, 2007). The same could be said for the unequal treatment tribal members experience when subjected to capital punishment.

Despite most tribes' cultural disagreements with the death penalty and the federal government's increased recognition of tribal sovereignty, Native Americans continue to be

sentenced to death. A small dip in Native executions is seen between the 1970s and 1980s because the Supreme Court held in *Furman v. Georgia* (1972) that the death penalty constituted cruel and usual punishment as practiced throughout every American jurisdiction (Kovarsky 5, 2021). All federal and state executions, therefore, came to a halt for nearly ten years. Once the death penalty was reinstated by *Gregg v. Georgia* (1976) and challenges to capital punishment came to an end, Native executions continued. Decades later in 2006, over 1.1 percent of the country's entire death row population was comprised of Indigenous prisoners with 39 Native Americans residing on state and federal death rows (Fins, 2006). Many of these prisoners were placed on death row for crimes against white victims. In fact, "American Indians are 13 times more likely to suffer execution for killing whites than whites are for killing American Indians" (Baker 352, 2007). This inequity is reflected by the 17 Native executions that have occurred since 1976—15 of which were sentenced to death for crimes committed against white victims (Death Penalty Information Center, 2022). Below is a list of the 17 names ending with the execution of Lezmond Mitchell. All 17 executions highlight the many problems which plague the criminal justice system like poor defense counsel, botched executions, racist prosecutorial discretion, increased voluntary executions, and mental illnesses. In each of the cases, the Native defendants suffered from alcoholism, drug abuse, and/or mental health issues (Baker 353, 2007). Although self-determination has improved, the inherent sovereignty of tribes is not fully recognized by the federal government, especially Native jurisdiction over the death penalty.

The 17 Native Americans sentenced to death since 1976:

Emmett C. Nave	Scott Dawn Carpenter	Robert Wallace West, Jr.
Daniel Eugene Remeta	John Walter Castro	Darrick Leonard Gerlaugh
Domingo Cantu	Derrell 'Young Elk' Rich	James Glenn Robedeaux
Dion Athanasius Smallwood	Terrance James	Jerald Wayne Harjo
Henry Lee Hunt	Clarence Ray Allen	Jeffrey Landrigan
James Allen Red Dog	**Lezmond Mitchell**	

2 CHAPTER TWO: POLITICS, CAPITAL PUNISHMENT, AND THE EXECUTION OF LEZMOND MITCHELL

Considering the modern administration of capital punishment against tribal members, it is important for this chapter to explore the evolution of federal death penalty laws. The environment under which these laws progressed will highlight the politicization of capital punishment, particularly following the 9/11 attack. Despite the rise in public support for the use of capital punishment against terrorists, the Department of Justice chose to seek out a death sentence against Lezmond Mitchell—a member of the Navajo Nation who killed two people in Indian territory. Mitchell's execution should not have been possible due to the "Tribal Option" within the Federal Death Penalty Act of 1994. The statute requires the United States Attorney General to receive consent from the associated tribe to pursue a federal death sentence. Ignoring congressional intent and statutory interpretation, the Trump Administration worked around the "Tribal Option" to execute Mitchell against the wishes of Navajo officials and the victims' families. Mitchell's conviction, death sentence, and execution emphasize the discrimination Native Americans face in the federal legal system, the general distrust between tribal nations and the Department of Justice, and just how apathetic the American government is toward tribal sovereignty.

2.1 RACIAL BIAS ON FEDERAL DEATH ROW

A major source of constitutional doubt about the death penalty stems from racial bias against defendants of color. Implicit racial prejudice among some law enforcement officers, witnesses, jurors, and others was placed under scrutiny when Warren McCleskey (a Black man convicted of murdering a police officer in Georgia) argued that Black defendants who kill white victims are more likely to receive a death sentence. An empirical study was conducted by law

professor David C. Baldus and brought before the Supreme Court in *McCleskey v. Kemp* (1987). At the case's core, it questioned whether McCleskey's sentence violated the Eighth and Fourteenth Amendments. Professor Baldus found that people who are accused of killing white victims were four times as likely to be sentenced to death than those accused of killing Black victims (Baldus et al 728, 1983). His results suggested that capital punishment violated the Eighth Amendment because death sentences are carried out in an inconsistent and arbitrary manner. The groundbreaking study powerfully demonstrated racial bias in the application of the death penalty.

In a 5-4 decision, the Court held that McCleskey's sentence posed no constitutional violation and Justice Powell refused to apply the Baldus study to the case. The Court's monumental decision left capital punishment open to ethnic-related criticisms, declaring execution policy "discriminates between some killers and other killers based on race" (Gross 778, 2018). Despite these arguments, *McCleskey* enabled the death penalty to be disproportionately applied to people of color, rendering a capital punishment scheme crippled by systematic racism (Kovarsky 6, 2021).

Native Americans often fall victim to racial discrimination within the justice system because federal prosecutors unequally charge suspects from tribal lands with violent crimes. Regardless of a victim's identity, federal courts are granted complete jurisdiction over Native Americans who commit any of the crimes listed under the MCA. These matters are submitted to U.S. attorneys by federal investigative agencies—like the Drug Enforcement Agency, FBI, and Bureau of Indian Affairs—as well as state and local investigative agencies. Then, U.S. attorneys decide what criminal charges, if any, will be used to initiate prosecution. Federal prosecutors

have historically investigated and subsequently charged Indigenous suspects for violent offenses at a much higher rate than any suspects of another race (Perry 18, 2004).

Data from the Bureau of Justice Statistics on violent crime arrests by race, underlines the excessive racial bias Native Americans face within the federal legal system. In 2000, about 6,036 of all new suspects examined by U.S. attorneys were investigated for violent offenses. Of those suspects, 1,525 were interrogated for offenses that took place in Indian country—representing 25 percent of all federal investigations of violent offenses in the fiscal year 2000 (Perry 18, 2004). As illustrated in Figure Two, most offenses that U.S. attorneys investigated during 2000 were violent crimes. Of that number, a little under 75 percent of suspects accused of breaking the law in tribal lands were investigated for a violent crime. When compared to the national total of five percent, these statistics prove Indigenous suspects are blamed for violent offenses 15 times more than suspects who commit crimes outside of Indian country. Such a staggering imbalance leaves Native Americans more susceptible to official legal proceedings, time in prison, and federal death sentences (Perry18, 2004).

Suspects in matters investigated by U.S. Attorneys, by offense, 2000

Type of offense	Percent of suspects investigated: Total	Indian country
All offenses	100%	100%
Violent	4.9	73.5
Property	23.0	12.5
Drugs	31.5	0.9
Other	40.6	9.5
Number of offenses	123,559	2,074

Source: BJS, Federal Justice Statistics Program (FJSP), Executive Office for U.S. Attorneys, Central System File, fiscal year 2000.

Figure Two

Not only were Native Americans investigated for violent crimes at a higher rate, but they also disproportionately entered the federal prison system as violent offenders. In the fiscal year 2001, 55 percent of Indigenous people who entered federal prisons served a sentence for a violent crime. Comparatively, only four percent of white offenders, 13 percent of Black offenders, and five percent of Asian offenders served similar sentences for violent crimes. The same trends were also recorded back in 1994. These drastic differences emphasize the fact that Indigenous people are more likely to spend time behind bars for violent offenses than federal prisoners of any other race (Perry 21, 2004).

Offenders entering Federal prison, by race and offense type, 1994 and 2001

Type of offense	Offenders entering Federal prison: All races	American Indian	White	Black	Asian
Persons entering prison in 2001					
All offenses	100.0%	100.0%	100.0%	100.0%	100.0%
Violent	8.4	**54.9**	4.4	13.3	5.1
Property	16.1	17.1	14.7	18.0	35.7
Drug	40.1	12.2	38.9	45.3	27.3
Other	35.4	15.8	42.0	23.5	31.9
Total number	69,900	1,662	45,398	21,919	921
Persons entering prison in 1994					
All offenses	100.0%	100.0%	100.0%	100.0%	100.0%
Violent	12.3	**59.7**	10.2	12.8	4.6
Property	25.8	16.8	28.1	22.6	32.2
Drug	50.4	13.0	55.6	45.8	29.6
Other	11.5	10.6	6.1	18.8	33.6
Total number	37,854	865	21,781	14,556	652

Note: Excludes prisoners for whom race was unknown.

Source: BJS, Federal Justice Statistics Program; Bureau of Prisons Sentry file, 1994 and 2001.

Figure Three

Forcing such a large proportion of Native American prisoners to suffer the label, "violent offender," puts many at risk for reincarceration; and with recidivism comes permanent instability brought on by the American legal system. An estimated 60 percent of Indigenous people released from prison in 1994 were arrested for a new crime within three years. More specifically, 40 percent of Native violent offenders who left prison in 1994 were convicted of a new crime shortly after their release (Perry 24, 2004). Federal prosecutors' propensity to investigate Indigenous suspects more than suspects of another race creates a vicious cycle for previously incarcerated Native Americans. The cycle makes it nearly impossible for people convicted in Indian country to stay out of the federal legal system. Those same individuals are automatically at a greater risk for capital punishment because the death penalty is legal at the federal level regardless of a state's position on the matter. Ultimately, the alarming number of Indigenous

people subject to federal sentences for a violent crime caused legislators to re-evaluate American death penalty laws and increase tribal sovereignty. I will elaborate on this legislative change in the "Tribal Option" section of Chapter Two on page 46.

2.2 Expansion of Federal Death Penalty Laws

Mass incarceration was the result of campaign promises made by political leaders that found their way into sustained policies beginning in the mid-1970s. Starting in 1964, Republican presidential nominee Barry Goldwater used Americans' fear of growing protests against the Vietnam War to promise "a government that attends to its inherent responsibilities of maintaining…and enforcing law and order" (Austin et al. 3, 2016). Richard Nixon followed suit in a campaign commercial pledging "order in the United States" with burning buildings and violent protesters in the background (Austin et al. 3, 2016). The overwhelming emphasis placed on combatting crime caused the nation's arrest and incarceration rates to skyrocket.

White America's culture of fear was rooted in the 270 percent increase in violent crime from 1960 to 1980—but political leaders conveniently left out how communities of color bore the brunt of this rise in crime. By the late 1970s, people of color were crime victims at a rate 24 percent higher than white Americans (Austin et al. 4, 2016). Nonetheless, the federal government garnered white votes to pass a series of laws that advanced the "tough on crime" agenda. Bill Clinton centered much of his election and presidency around the red-hot issue of crime. He interrupted an election campaign in 1991 to return to Arkansas for the execution of a brain-damaged defendant (Gross 773, 2018). It was critical to show his support for draconian punishments, like capital punishment. Doing so bridged the divide between the right and the left on matters related to crime and punishment—effectively eliminating support for the death penalty as a uniquely Republican position.

Most notably, President Clinton signed the Federal Death Penalty Act of 1994 (FDPA) which expanded the federal government's ability to seek the death penalty by increasing the number of death-eligible crimes.[4] To this day, Clinton's 1994 Crime Bill remains the most extensive federal crime legislation ever passed (Eisen, 2019). Congress passed the legislation to mandate life imprisonment for a third violent felony—often referred to as the "three strikes and you're out" rule. It also banned 19 types of semiautomatic assault weapons, created the Violence Against Women Act, and authorized the use of capital punishment for dozens of federal crimes.[5] More specifically, constitutional procedures for 60 death penalty eligible offenses were established under 13 existing and 28 newly-created federal capital statutes—all of which fell into three broad categories: homicide offenses, espionage and treason, and non-homicidal narcotics offenses (The United States Department of Justice Archives, 2020). The procedural framework set forth by the FDPA continues to trap more Americans in the ever-widening net of the criminal justice system (Eisen, 2019).

While the FDPA created the standard for determining whether a death sentence can be imposed, it did not decide when a death sentence should be sought against a federal defendant. The decision to sentence a person to death rests entirely with the Department of Justice, particularly the Attorney General (Broughton 1619, 2018). Department of Justice protocols require a United States attorney to secure pre-authorization from the Attorney General before

[4] The FDPA of 1994 was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13th, 1994.

[5] The FDPA of 1994 also provided $12.5 billion in grants to fund incarceration which helped fuel a prison construction boom. In fact, "the number of state and federal adult correctional facilities rose 43 percent from 1990 to 2005. For a period in the 1990s, a new prison opened every 15 days on average" (Eisen, 2019).

capitalizing the prosecution. The same attorney must provide the defendant with notice regarding any request for authorization so that the defense can inform the United States attorney of any information that might dissuade the prosecutor from seeking the death penalty (Kovarsky 7, 2021). Federal death sentences have fluctuated over time primarily because of the varying beliefs of different Attorney Generals.

Many people disagree about the essential role Attorney Generals play in federal death sentences. Richard J. Broughton, an expert in American politics and institutions, argues the Attorney General's "decision whether to seek the death penalty is informed, deliberative, and thorough. It is objective and apolitical and should inspire public confidence" (Broughton 1621, 2018). Yet, the process by which the Attorney General is appointed is far from diplomatic. The Attorney General is nominated by the President of the United States and then appointed with the advice and consent of the United States Senate. As the country becomes more polarized, it is impossible for the President to nominate a bipartisan Attorney General who will make apolitical decisions. The politicization of the death penalty over the last three decades directly impacts decisions made by the Attorney General causing the rise and fall of federal death sentences to be swayed by the President's attitude concerning capital punishment.

2.3 Politicization of the Death Penalty from 1988-2001

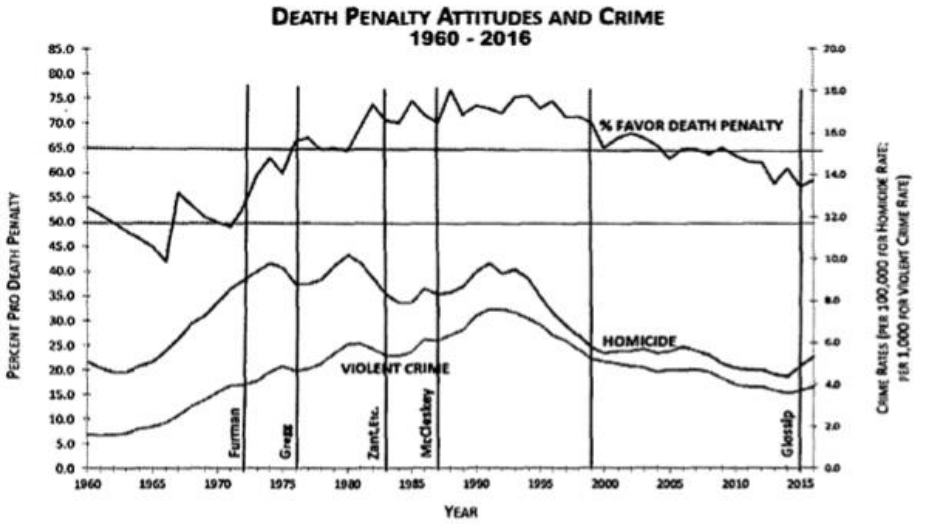
Support for the death penalty was at an all-time high from 1983 to 1999 in the United States. George H.W. Bush rallied voters by capitalizing on what most considered to be a major political issue during his 1988 presidential campaign against Michael Dukakis, the governor of Massachusetts (Gross 770, 2018). Bush used a man named Willie Horton to paint Dukakis as soft on crime. Horton was a Black man who was convicted of murder and imprisoned in Massachusetts. When he was released as a part of a prison furlough program, he robbed, raped,

and assaulted a couple. Although Dukakis had nothing to do with the release, Bush attacked him for allowing "first-degree murderers to have a weekend pass from prison" by running a campaign ad (Gross 770, 2018).

> On election day in 1988, ABC News conducted an exit poll of voters. Twenty-seven percent of the respondents agreed that the candidate's position on the death penalty was 'very important' to them in choosing the president. To put that in perspective, that means that more voters cared deeply about Bush and Dukakis' positions on the death penalty than about their positions on drugs, education, health care, or social security—or even the candidate's political party. The only issue that ranked ahead of the death penalty was abortion, and only by a few points. (Gross 770, 2018)

The advertisement distorted the reality surrounding prison release programs and centered the presidential election around crime, particularly the death penalty.

Following the election, attitudes toward the death penalty became a polarizing topic for American citizens. It was the second most popular controversy among single-issue voters, behind abortion (Gross 770, 2018). Yet, violent crime and homicides fell to an all-time low in 2000—the first time since the infamous *Furman* decision. Simultaneously, public opinion in defense of the death penalty tapered off demonstrating the close relationship between crime rates and support for capital punishment. Figure Four illustrates this phenomenon using the FBI's Uniform Crime Reports and public opinion polls (Gross 774, 2018). Due to the steep decrease in crime in 2000, what was once a popular topic of debate mostly dropped out of national political conversations.



Sources: "% FAVOR DEATH PENALTY" is derived from opinion poll data stored in the iPoll Databank of the Roper Center for Public Opinion Research [data on file with the author]; "HOMICIDE" and "VIOLENT CRIME" are derived from data on crime rates reported in the FBI's Uniform Crime Reports. FBI, UNIFORM CRIME REPORTING, https://ucr.fbi.gov/ [https://perma.cc/R48R-3EP4].

Figure Four

Even though crime was not on people's minds as much in the early 2000s, the 9/11 attack in New York transformed public opinion of the death penalty. U.S. citizens changed their defense of the death penalty from a severe punishment for everyday offenders to a punitive sentence for terrorists. The George W. Bush administration backed this sentiment "asserting that putting terrorists to death would deter future attacks on the United States" (Clarke et al 262, 2004). Before Bush became president in 2001, there had not been a federal execution for 38 years. He quickly put an end to that hiatus after executing three people on death row in the first three years of his presidency (Kovarsky 10, 2021). Bush was able to politicize the death penalty by convincing Americans that justice would not be found for the lives lost during 9/11 without capital punishment.

International governments have long frowned upon the United States' use of the death penalty. British authorities, for example, refuse to turn over al-Qaeda members or other terrorists to the American government until they agree not to seek out a capital sentence (Clarke et al 267,

2004). French Senator Robert Badinter argued with President George W. Bush over a similar issue, calling the execution of prisoners "barbaric" (Clarke et al 267, 2004). Similarly, critical rules and regulations require countries that still apply the death penalty to make assurances that capital punishment will not be sought before the extradition of suspected terrorists. These legal documents include Article 13 of the European Union's extradition treaty with the United States, the *Charter of Fundamental Rights of the European Union*, and Resolution 1271 passed by the Council of Europe. Americans' vehement defense of the death penalty is ultimately a major foreign policy impediment in the international community (Clarke et al 267, 2004).

Some scholars note international criticism of the death penalty violates American sovereignty because it impedes government authorities from pursuing foreign policy goals—like tracking down terrorists around the world (Clark et al 270, 2004). Ironically, the United States' treatment of Indigenous people mirrors this international obstacle to American sovereignty. Subsequently, American criticism of Native views surrounding capital punishment completely disregards tribal sovereignty. The federal legal system turns a blind eye to Native Americans' cultural and religious beliefs against the death penalty. Such ignorance causes the legitimacy of tribal law to be called into question while the United States' treatment of its own citizens is obscured from outside scrutiny (Clarke et al 271, 2004).

Since the 9/11 attack, opinion polls have found an increase in general support of the death penalty for people convicted of terrorism offenses. A poll taken in 2001 found that 62 percent of people backed the general use of capital punishment in the American legal system—75 percent said that Timothy McVeigh, the man who bombed the Oklahoma federal building, should be executed. A poll in 2015 reported a similar finding about Dzhokhar Tsarnaev, the man behind the Boston Marathon bombing (Gross 777, 2018). Many would think the decrease in overall

support of the death penalty since 2000, coupled with the bias to use capital punishment against terrorists, would lead to the executions of more people like McVeigh or Tsarnaev. Most of the time, however, defendants like Lezmond Mitchell are the people who fall victim to a federal death sentence. Ultimately, 9/11 was a critical moment in history because executive manipulation of the death penalty for political gain skyrocketed.

2.4 Lezmond Mitchell's Crime, Conviction, and Sentence

Amidst the rise in federal capital sentences in the early 2000s, Lezmond Mitchell was charged with carjacking resulting in death. In 2001, Mitchell along with three others planned to rob a trading post on the Arizona side of the Navajo Indian reservation. That afternoon, on October 28th, Mitchell and 16-year-old Johnny Orsinger set out to steal a car to use during the robbery. They found themselves in the truck of Alyce Slim, who was riding with her nine-year-old granddaughter, Tiffany Lee. Near Sawmill, Arizona, Orsinger stabbed Slim with a knife and Mitchell allegedly joined in. Slim died, but at that point, Lee was still alive (*United States v. Mitchell,* 2007).

Mitchell and Orsinger proceeded to drive the truck 30-40 miles into the mountains to dispose of Slim's body. There, Orsinger took the lead stoning the young girl to death. The two men disposed of the bodies and fled the scene. Two days later, three Navajo men robbed the Red Rock Trading Post—one of which was Lezmond Mitchell. After stealing more than $5,530, the three men drove off and Mitchell set the truck on fire using kerosene stolen from the Trading Post. Navajo police found an abandoned pickup truck the next day in the Arizona Navajo Indian reservation with a burned interior. The investigation conducted by two FBI agents and a Navajo criminal investigator resulted in tribal warrants being issued for Mitchell and two other Navajo men, not including Orsinger (*United States v. Mitchell,* 2007).

Once arrested, Mitchell took the agents to the bodies of Alyce Slim and Jane Doe, and he gave up the name of Johnny Orsinger. Mitchell then returned to tribal jail and was taken before a tribal judge. A federal indictment was issued on November 21st, 2001. Then, on July 2nd, 2002, a superseding indictment charged both Mitchell and Orsinger with murder; felony murder; robbery; carjacking resulting in death; several robbery-related counts; kidnapping; and felony murder, kidnapping. Only two months later, the government filed a notice of intent to seek the death penalty based on the charge, carjacking resulting in death. At that point, the court chose to stop pursuing a joint trial between Mitchell and Orsinger. On May 8th, 2003, Mitchell was convicted on all counts and sentenced to death. None of his co-defendants received the same sentence (*United States v. Mitchell*, 2007).

Many death penalty abolitionists argue capital punishment is not always applied to the more culpable defendant and therefore is unfairly administered in the American legal system. Brandon Bernard fell victim to this unjust application when the federal government executed him on December 10, 2020. Bernard took part in a murder alongside four co-conspirators. Even though Bernard was not the gunman who took the lives of two victims, he was killed for the small role he played in their murders. His co-defendants, on the other hand, only served a life sentence for their crimes (Kirchner 668, 2021). Like Bernard, Lezmond Mitchell was the less culpable defendant. The evidence clearly identifies Johnny Orsinger as Alyce Slim's killer and the leader of Lee's murder. Despite Mitchell's lesser role, Orsinger is serving a life sentence behind bars while Mitchell is dead. His execution was the result of an "escape clause" established within the FDPA.

2.5 THE "TRIBAL OPTION"

A special provision of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3598, grants tribes the power to consent to the use of the death penalty against Native Americans. It states:

> [N]o person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for *any* offense the Federal jurisdiction for which is predicated solely on Indian country...and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction. (Kirchner 685, 2021)

Scholars refer to this special provision as the "Tribal Option" within the FDPA of 1994. Originally, the federal government was granted complete jurisdiction under the Major Crimes Act to execute tribal members who committed a crime that qualified for the death penalty on tribal land. Following the Tribal Option, tribes retained the right to "opt out" or "opt in" to the death penalty as applied to their members.

Most tribes "opt out" of the death penalty because they are critical of capital punishment for six reasons (Kirchner 686, 2021). First, executions are contrary to Indigenous cultures and religions. The Blackfeet in Montana, for example, believe the Creator is the only being with the right to take away life, no exception (Kirchner 686, 2021). Second, other tribes "opt out" of the death penalty as an act of rebellion against the federal government. The government's discriminatory treatment of Indigenous people across time adds distrust to their current relationship. Consequently, many tribes do not want to grant the government the power to determine when a Native American should die. Instead, tribal members want complete control

over their own people. Third, some tribes feel Native Americans are not adequately represented on juries, so a defendant sentenced to death would not receive a jury constituted of their peers. Fourth, Native people are generally concerned that a jury's decision to apply the death penalty will be affected by race. Fifth, there is a discrepancy regarding who might be subject to capital punishment based on the jurisdiction; a Native American could face the death penalty under federal jurisdiction, but a non-Native might not face the death penalty under state jurisdiction for the same crime. Sixth, tribes are aware that capital punishment has not proven to deter future alcohol-related or intra-family homicides—which are the majority of homicides committed on tribal land (Kirchner 668, 2021). Based on these six reasons, only one tribe has "opted in" to the Federal Death Penalty Act since 1994, the Sac and Fox Nation of Oklahoma (Kirchner 685, 2021).

It is important to note that although the development of the Tribal Option was a significant victory for tribal sovereignty, the provision does not prohibit a Native American from being sentenced to death. In fact, 16 Native Americans have been executed since 1976 for crimes that occurred off tribal land or in PL-280 states (Kirchner 685, 2021).[6] Tribal consent is also not required when a murder is partnered with certain federal crimes that are not listed in the Major Crimes Act, like carjacking, kidnapping, or the killing of a federal officer on tribal land. The exclusion of these felonies under the Major Crimes Act ensures tribal sovereignty is not completely realized in relation to capital punishment—forcing Native Americans to be bound by federal jurisdiction.

[6] Public Law 280 or "PL-280" was enacted by Congress to give six states (Alaska, California, Minnesota, Nebraska, Oregon, and Washington) criminal jurisdiction over tribal members and other individuals who reside in Indian country. The law also permitted other states to opt for similar jurisdiction (National Institute of Justice, 2008).

2.6 Attorney General Barr's Executive Decision

After federal executions completely came to a halt from 2003 to 2020, Attorney General William Barr announced that the federal government would start executing federal death row inmates again (Kirchner 670, 2021). Prior to his pivotal role in the Trump Administration, Barr authorized one of the first post-*Furman* capital prosecutions as the Attorney General for George H.W. Bush (Kovarsky 8, 2021). His supportive stance on the death penalty became obvious once he presided over the Department of Justice's implementation of a uniform lethal injection protocol (Kovarsky 10, 2021). Much of the modern federal death penalty is attributed to Barr, both at the policy and implementation level. In a list of 24 recommendations to the first President Bush, recommendation five stated:

> The death penalty has an important role to play in deterring and punishing the most heinous violent crimes ... It reaffirms society's moral outrage ... and assures the family and other survivors of murder victims that society takes their loss seriously. (Kovarsky 53-54, 2021)

It was not much of a surprise when Barr was the official who supervised and announced the roll-out of the 2019-2020 execution protocol. He declared, "we owe it to the victims and their families" to execute the designated offenders (Kovarsky 52, 2021). Barr personally decided who would be executed and what tactics would be used to secure public acceptance.

At the direction of Attorney General Barr, the Federal Bureau of Prisons scheduled the executions of five federal inmates from a list of 14 federal death row prisoners: Daniel Lee, Wesley Purkey, Alfred Bourgeois, Dustin Honken, and Lezmond Mitchell. These five men later became known as the "First Five" (Kovarsky 14, 2021). Ultimately, Barr's fervent commitment

to reinstitute the death penalty coupled with his bureaucratic initiative as Trump's second Attorney General prompted a long list of executions in 2020.

Donald Trump used pro-death penalty rhetoric and promises to gather public support and ultimately win the 2016 election. Throughout his candidacy for the presidency, Trump made no secret of his affinity for capital punishment (Broughton 1622, 2018). Trump's longstanding support of the death penalty was publicly known ever since he ran a full-page advertisement in New York newspapers calling for the executions of the Central Park Five (five teenagers aged fourteen to sixteen who were falsely accused and convicted of raping a jogger in Central Park and were later exonerated in 2014). Trump's unwavering support for the death penalty became a fundamental component of his political platform. Leveraging the votes of pro-death penalty Americans, Trump promised to appoint leaders committed to preserving capital punishment—like Attorney General Barr and Justice Neil Gorsuch. At a campaign fundraiser in New Hampshire, he even announced that one of his first executive orders would involve executing people who kill members of law enforcement (Broughton 1624, 2018). By politicizing the death penalty, Trump sold his "tough on crime" agenda and enhanced public confidence in his position as the future Commander-in-Chief. Fortunately, Trump did not fulfill all his death penalty promises, although he did execute 13 death row prisoners in the last six months of his presidency—a single-year total unmatched in modern history (Honderich 2021). For reference, there were only three federal executions in the fifty-seven years prior to Trump's killing spree, and none since 2003 (Kovarsky 1, 2021). Five of the thirteen executions occurred in the run-up to President Joe Biden's inauguration, "breaking a 130-year-old precedent of pausing executions amid a presidential transition" (Honderich 2021). This historically large sequence of executions

was a grim chapter of the Trump era that disproportionately impacted communities of color—including the Navajo Nation.

One of the 13 people who died at the hands of the Trump Administration was tribal member Lezmond Mitchell. He was executed without Navajo consent and against the wishes of the victims' families. While Mitchell was a Navajo member, Barr could schedule his execution because the specific crime for which he was convicted did not fall under the tribal consent statute—thus maneuvering around the Navajo Nation's disapproval of capital punishment. If Mitchell was charged with a crime other than carjacking that resulted in murder, the Department of Justice would have been required to receive consent from the Navajo Nation. Barr executed Mitchell for a crime that fell into the loophole which allows the federal government to execute tribal members (Kirchner 687, 2021).

To garner public support, the Department of Justice preyed on the vulnerability of the prisoners' victims painting the First Five as unforgivable monsters. Ironically, federal agencies never communicated with the victims' families when deciding whether to schedule the executions (Kovarsky 15, 2021). Despite Mitchell's violent crime, members of the victims' families strongly objected to the execution of a fellow tribal member—with the Navajo Nation backing their opposition to the federal government's administration of the death penalty (Christensen, 2020).

2.7 The Navajo Nation's Response

The Navajo Nation expressed their opposition to Mitchell's death sentence long before Barr announced the scheduled executions of the First Five. In 2002, Navajo officials wrote a

letter to the federal prosecutor assigned to Mitchell's case conveying their disapproval of the death penalty for those involved in the murders of Alyce Slim and Tiffany Lee:

> As part of Navajo cultural and religious values we do not support the concept of capital punishment. Navajo holds life sacred. Our culture and religion teach us to value life and instruct against the taking of human life for vengeance. Navajo courts recognize traditional peacemaking as part of the judicial system. It is through traditional peacemaking that harmony is restored in situations which have been disturbed through an act of crime. Committing a crime not only disrupts the harmony between the victim and the perpetrator but it also disrupts the harmony of the community. The capital punishment sentence removes with any possibility of restoring the harmony in a society. (Christensen, 2020)

These explicit concerns written by Navajo officials elucidate the fact that capital punishment has no basis in their culture. Slim's daughter and Lee's mother reiterated the tribe's demand by asking the prosecutor to not seek capital punishment. Subsequently, the prosecutor did not recommend the death penalty to the Justice Department.

As a steadfast proponent of capital punishment, then-Attorney General John Ashcroft ignored the prosecutor's recommendation and sought out a death sentence against Mitchell. Navajo officials fought back. Following several public hearings, the tribe chose to opt out of the FDPA entirely, meaning all crimes determined to be a federal offense based on their location in the Navajo reservation could not be punishable by death (Thompson, 2019). During the hearings, Lee's mother testified in favor of the tribe's decision. Still, Ashcroft insisted on seeking out a death sentence for Mitchell. His persistence was particularly unusual considering federal death

sentences are reserved for crimes of significant national interest, unlike Mitchell's crime. Ashcroft found a legal work-around the Navajo Nation's request to opt out of the death penalty by pursuing carjacking resulting in death.

While Mitchell's life was in limbo because the federal government ceased executions for nearly two decades, his attorneys tirelessly fought for his life. Mitchell's attorneys first appealed his death sentence to the Ninth Circuit Court of Appeals, claiming his defense counsel failed to stress his history of mental illness, abuse, and addiction to the jury. The court ruled against Mitchell in 2015. However, Circuit Judge Stephen Reinhardt wrote a noteworthy dissent:

> The arbitrariness of the death penalty in this case is apparent…Mitchell, who was 20 years old at the time and had no prior criminal record, does not fit the usual profile of those deemed deserving of execution by the federal government—a penalty typically enforced only in the case of mass murderers and drug overlords who order numerous killings. (Thompson, 2019)

Reinhardt's forceful dissent not only highlighted a popular critique of the administration of the death penalty within the American legal system; it also stressed just how anomalous Mitchell's death sentence was.

Mitchell's attorneys again filed an appeal in 2018 in federal district court focusing on the racial makeup of the jury that sentenced him to death in the first place. Out of 12 jury members, only one was Native American. Prosecutors tried to dismiss the one Native American, but the court blocked their removal from the jury. Many Navajo jurors could not participate in the trial because English was not their first language or because capital punishment is against their cultural beliefs. Additionally, it was nearly impossible for Navajo jurors to participate because

the trial was moved more than 100 miles away from the reservation. To remedy this injustice, Mitchell's attorneys tried to interview former jurors to prove racial bias in their decision to sentence him to death. If Mitchell's appeal took place in Arizona state court, those interviews would have been heard, but evidence from the investigation was barred from court simply because Mitchell was prosecuted at the federal level (Thompson, 2019).

Under-representation of Indigenous people on federal juries is not specific to Mitchell's case. Federal district courts are nowhere near tribal lands and most Natives are excluded due to language, religious beliefs, or geography. Without the proper representation of Native Americans in the federal legal system, many juries are at risk for "anti-Native American bias" (Kirchner 688, 2021). Undeterred by what could have been a potentially prejudiced jury, the court rejected Mitchell's appeal and another execution warrant was issued by the Federal Correctional Complex at Terre Haute, Indiana. Once the court ruled against Mitchell for the second time, Alyce Slim's grandson, Michael Slim, spoke out about his opposition to the death penalty. He wrote to Mitchell forgiving him and signed the letter: "Your friend. Your Navajo brother" (Thompson, 2019). With the Navajo Nation powerless to prevent his execution, Lezmond Mitchell was killed by lethal injection and declared dead at 6:29 pm on August 26, 2020. He was 38 years old.

2.8 The Consequences of Mitchell's Execution for Tribal Sovereignty

The Trump Administration's decision to proceed with Mitchell's execution despite the Navajo Nation's objection to the death penalty caused the distrust between tribes and the federal government to deepen. Through the FDPA, Congress explicitly recognized the unique position tribes hold in the American legal system—including special consideration for capital crimes that occur on tribal lands. The "Tribal Option" unambiguously requires a tribal government to

affirmatively elect to sanction capital charges before the United States can pursue a death sentence. Attorney General Barr's commitment to charge Mitchell with carjacking (because the prosecutor could not legally seek the death penalty under murder, kidnapping, or robbery charges) openly contradicted both congressional intent and statutory interpretation (Christensen, 2020). Such a clear disregard for tribal sovereignty by both the Ninth Circuit and the executive branch inflicted permanent injury to well-established legal principles that protect Indigenous beliefs against capital punishment.

The distrust was enhanced when prosecutors did not consult with the Navajo Nation before charging Mitchell with a crime outside the Major Crimes Act. Prosecutors later went on the record stating they would have pursued the death penalty even if Navajo officials had directly informed them of their opposition to Mitchell's potential execution (Kirchner 688, 2021). Indifference to tribal beliefs, like capital punishment, is far too common among federal prosecutors. To make matters worse, these district attorneys are prosecuting cases filed against Indigenous people at an increasing rate. From 2009 to 2013 alone, federal cases against tribal members increased by 34 percent (Grubb 5, 2021). Seeing that prosecutors are integral to the process of convicting Native Americans, it is critical they appropriately represent the community. However, they are not a part of the community or closely communicate with tribal members, so Indigenous people are at a greater risk of facing prosecutorial abuse.

Government officials have made a few lackluster attempts over the past few decades to repair the disconnect between federal prosecutors and Indigenous people. The "Tribal Option" required the Department of Justice to listen to and respect tribes' political decisions regarding the death penalty—or so they thought. Realistically, too much discretion was left in the hands of federal prosecutors seeking the death penalty against Natives and many found ways to work

around the statute (Murray and Sands 31, 2001). Later, in July of 2010, the Executive Office of U.S. Attorneys developed a program called the National Indian Country Training Initiative (NICTI). The program offered voluntary classes for federal prosecutors to educate them about frequent issues that arise in tribal cases (Grubb 5, 2021). A combination of the training's voluntary requisite and its specific focus on violent crimes against Native American women and girls made the NICTI worthless for capital cases against Indigenous people.

Any progress made bridging the gap between the Department of Justice and the Navajo Nation was immediately quashed by Lezmond Mitchell's death. The Navajo Nation's demand to reduce Mitchell's sentence to life in prison was not farfetched. Navajo members rallied behind Mitchell, urging government authorities to allow the tribe to decide what is right for their own people—not to proclaim his innocence (Grubb 4, 2021). To ameliorate Native Americans' distrust toward federal prosecutors, tribal governments need to be able to punish their own people in conformity with their own cultural and religious values.

Mitchell's execution also reflects a lack of sensitivity to the wishes of Indigenous victims' family members, demonstrating the discrimination many Native families encounter in the federal legal system. Attorney General Barr's entire reasoning for executing the First Five was based on a legal obligation to victims and their families to execute the designated offenders. In Barr's own words, the death penalty is meant to "affirm society's moral outrage" on behalf of victims' families (Kovarsky 53, 2021). His victim-debt principle, however, was in complete disagreement with the sentiments of Alyce Slim and Tiffany Lee's families (Kovarsky 53, 2021). Barr's obsession to one day see Mitchell put to death made a complete mockery of the criminal justice system's intention to take their loss of life seriously. Thus, Barr's dismissal of the Navajo

families' pleas for a lesser sentence stressed the federal government's carelessness for Indigenous victims' individual beliefs and tribal sovereignty.

After centuries of injustices committed toward tribes by federal authorities, Mitchell's death is yet another example of a broken promise made by the American government. As emphasized by Judge Morgan Christen on the Ninth Circuit, the United States made a commitment to tribal sovereignty when the "Tribal Option" was enacted. But the steps taken by the Department of Justice to both seek out the death penalty and execute Mitchell is proof the federal government walked away from that commitment and violated the spirit of the FDPA (Kirchner 689, 2021). Furthermore, Mitchell's case symbolizes the continued weakening of tribal criminal jurisdiction. While the American government is essential to ensuring the safety and future of many tribal nations, it is up to federal authorities to preserve the path of traditional justice that honors Native values (Grubb 10, 2021). That being so, the federal government is currently not doing enough. Each branch of government needs to act against the politicization of the death penalty, and instead uphold the ethical standards embodied by the "Tribal Option" to strengthen tribal sovereignty.

3 CHAPTER THREE: THE SUPREME COURT'S MODERN ATTACK ON NATIVE JURISDICTION

While both U.S. Presidents and Congress have generally worked toward expanding tribal self-determination, the Supreme Court has worked to diminish Native Americans' retained, inherent sovereignty. As a result, tribal governments are prohibited from exercising criminal and civil jurisdiction over nonmembers—even if those individuals reside in Indian country and benefit from activities that take place within the land. Many scholars refer to the Court's ability to determine the extent of tribal sovereignty as the implicit-divesture theory, which directly contradicts the U.S. Constitution's protection of Native self-governance (Doran 87, 2020). In the last 50 years, the Court has redefined tribal government authority from a definition based on territorial boundaries to a definition centered around tribal membership. Doing so abandons the foundational principles of federal Indian law laid out in both the Constitution and three early Supreme Court decisions known as the "Marshall Trilogy." Undermining Native jurisdiction in the criminal legal system is a very serious assault on tribal self-determination and makes it nearly impossible for tribes to dispense with the federal death penalty altogether (Doran 90, 2020). Plus, not a single explanation has been agreed upon as to why tribal sovereignty should be so different from nontribal sovereignty—like state sovereignty, which is distinguished using territorial boundaries. Tribal nations have been singled out by the Court, prioritizing the rights of nonmembers and non-Natives over the rights and interests of tribes (Doran 144, 2020). The judiciary, consequently, has chosen to limit the sovereignty of Native Americans rather than strive for greater equality among all racial minorities.

3.1 Tribal Sovereignty within the U.S. Constitution

The U.S. Constitution has been interpreted by the three branches of government to both protect and undermine the independence of tribal nations. While tribal sovereignty is not explicitly defined in the Constitution, the text itself recognizes individual tribes as self-governing nations which pre-existed the creation of the United States. Natives, therefore, retain their inherent original sovereignty—or at least they are supposed to (Singer 200, 2018). The Supreme Court has made it its mission to limit tribal self-determination without the consent of Native officials. These efforts are acts of conquest and represent a direct betrayal of the most fundamental democratic values set forth by the Constitution and the federal government (Singer 203, 2018).

When the Constitution was first established, tribal nations did not sign the document, nor did they voluntarily disestablish their status as sovereigns. Instead, Native Americans were adopted into the federal system through treaties, which many scholars now consider to be "quasi-constitutional documents" (Singer 203, 2018). So, when the Constitution was written based on the notion of "We the People, of the United States," that did not originally include Native Americans (U.S. Const. pmbl.). This implied their status as separate autonomous nations. It was of critical importance that individual tribes formed a legitimate relationship with the United States since the constitutional system was founded upon democracy and self-determination. In other words, the federal government could not and cannot live up to its own democratic and constitutional values without respecting tribal sovereignty (Singer 203, 2018).

Tribal nations are explicitly mentioned a total of three times in the Constitution. First, it grants the President the power to enter treaties with "Indian nations," accompanied by the advice and consent of the Senate (Singer 644, 2002). Treaties were the only way in which tribal nations

became legally involved with the federal government, making this executive responsibility essential to Native Americans' survival in the United States. Additionally, the mention of treaties highlights the Constitution's recognition of tribes as self-governing nations because these agreements, by their very nature, are signed between sovereigns (Singer 204, 2018). The Constitution mentions "Indian nations" for a second time when the text excludes "Indians not taxed" from the population count for the House of Representatives (Singer 204, 2018). Tribal members were not taxed because Native Americans resided in Indian country and thus were not considered to be state citizens—further insinuating the United States approved of Native citizenship as a part of a separate government. Finally, the Commerce Clause in the Constitution gives Congress the power to regulate commerce *with* the Indian Tribes (Singer 204, 2018). Note the Clause states "with" and not "of." Such a distinction prohibits Congress from regulating Native Americans or tribal nations; Congress is simply permitted to manage commerce *with* them. Language from the Clause also eliminated any interpretation of state power over tribal affairs by granting exclusive power to regulate commerce with Native nations to the federal government (Singer 657, 2002). The Constitution's three separate references to Indian nations explicitly recognize tribes as autonomous populations whose sovereignty is independent of the federal government and the thirteen states who ratified the document as fundamental law.

Broadly speaking, the federal government has reversed Native American policy numerous times over the last 200 years in support of and against tribal sovereignty. As explained in Chapter One, we are currently living in what the U.S. has dubbed the Self-Determination Era; but the Supreme Court's more recent decisions have proved we are alternatively living in an era of "judicial divestment" (Singer 649, 2002). The Court has consequently held that Congress can regulate the internal affairs *of* tribes rather than the commerce *with* Indian tribes, contradicting

what was outlined in the Constitution. Supreme Court justices have strayed away from "basic constitutional wisdom that Congress has only those powers enumerated in the text of the Constitution…[T]hat rule apparently does not apply to laws affecting Indian nations and tribal citizens" (Singer 207, 2018). Judicial interpretation of the Commerce Clause has granted Congress the power to expressly limit or destroy the inherent sovereignty of tribes established in the Constitution itself—even when the legislation has nothing whatsoever to do with commerce. Despite the Constitution's core values protecting tribal self-determination and prohibiting continued conquest, the Supreme Court is intent on interpreting the text to refuse Native Americans equal rights (Singer 200, 2018).

3.2 An Early Interpretation of Tribal Sovereignty by the Judiciary

Over the past two centuries, decisions made by the Supreme Court have ebbed and flowed both in favor and against tribal sovereignty. At times the Court's jurisprudence has proved skeptical, if not hostile, toward tribal self-governance. That hostility is more apparent in recent cases, like *Oliphant v. Suquamish Indian Tribe* (1978), *Montana v. United States* (1981), *and Nevada v. Hicks* (2001). I will discuss the importance of these decisions in relation to the Court's modern attack on tribal sovereignty later in this chapter. Other decisions dating back to the early nineteenth century, however, reflect greater respect for Native nations—especially the three "Marshall Trilogy" cases: *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832). While these early Supreme Court decisions often contained offensive racist language that tarnished the relationship between the U.S. and Indian nations, they also centered around the concept of inherent tribal sovereignty from a territory-based perspective. The use of a territory-based definition preserved the authority of tribal governments and signified a moment of hope for Native America in federal Indian law (Doran 129, 2020).

The 1823 case, *Johnson v. M'Intosh,* was a landmark decision that revolved around whether Native Americans could sell land to private citizens. Chief Justice John Marshall authored the opinion of the Court suggesting that a non-Indian "who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws" (*Johnson v. M'Intosh*, 21 U.S. 543, 593 (1823)). To put it plainly, the Court extended the power of tribal law to include sovereignty over all individuals who enter Indian country, even nonmembers. *Johnson* also put the brakes on future conquest because the seizure of tribal lands became illegal without tribal consent (Singer 205, 2018). Following the Constitution's guidelines, this expansion of tribal authority could only be weakened in the future by a federal statute or treaty (Singer 660, 2002). The case set a precedent declaring how tribal sovereignty would be determined for the next 200 years, in territorial terms.

Less than a decade later, the federal government strengthened its administrative hold over tribal nations when the Court defined Indigenous people as *domestic dependent nations* in *Cherokee Nation v. Georgia*. The new relationship resembled "that of a ward to his guardian" (*Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831)). In *Cherokee Nation*, Georgia sought to deprive the Cherokee Nation of their rights within state boundaries, insisting the tribe submit to its state laws and sovereignty. Georgia's state legislature intended to divide up and distribute tribal lands to white citizens to force the Cherokee people off their reservation. Leader of the Cherokee Nation, Chief John Ross, believed the laws to be unconstitutional based on the treaties signed between the federal government and the tribe. Chief Justice Marshall and his fellow justices refused to hear the case on its merits, claiming the Court lacked original jurisdiction since the Cherokee Nation was a domestic dependent state rather than a foreign state as laid out

in the Constitution (Baker 334, 2007). Justice Smith Thompson's dissent expressed a major concern that tribes could not bring challenges to the Court when their rights were violated by a state like Georgia, which was already infringing on pre-existing treaty agreements (*Cherokee Nation v. Georgia*, 30 U.S. 1, 51 (1831)). Thompson's argument was quickly acknowledged the following year in *Worcester v. Georgia* when the Court finally asserted its authority to rule on cases between states and tribal nations.

A primary reason the Court chose to hear the arguments made on behalf of the Cherokee Nation in *Worcester* was due to the death of George "Corn" Tassel. In 1830, Corn Tassel was illegally tried, convicted, and executed by the state of Georgia for the murder of another Cherokee man. The murder itself occurred at Talking Rock, a community within the Cherokee Nation's reservation. At that time, U.S. law considered the tribe to be sovereign. Therefore, Corn Tassel should have been tried in a Cherokee court. Yet, Georgia appropriated his case and placed the Cherokee man in front of a jury comprised of 12 white men. Corn Tassel was quickly found guilty and sentenced to death. Less than two months later, he sat in his coffin on the way to his own execution while over 500 spectators watched the man hang by the neck until dead. Georgia's legislature authorized Corn Tassel's execution before the Supreme Court even had a chance to weigh in on the matter. His case proved to the Court what would happen if Georgia went unchecked for much longer, leading to *Worcester v. Georgia* a little over a year later (Breyer 220, 2000).

Worcester v. Georgia was not only a turning point for tribal-state relationships, but it also explicitly defined tribal sovereignty in terms of territory. To eliminate the Cherokee government and seize Cherokee lands for non-Indian settlement, Georgia's legislature passed a statute that required individuals to pledge loyalty to the state's constitution and obtain a license to reside in

Cherokee land (Doran 100, 2020). The case was brought to the Supreme Court and concerned whether the state of Georgia could regulate commerce between Georgia citizens and members of the Cherokee Nation. In an opinion delivered by Chief Justice Marshall, the Court held that Georgia laws could not be applied inside Cherokee country because Indian tribes are separate political entities. The 5-1 decision ruled state law to be ineffective at the border of Indian country, rendering the Georgia statute in question void. Instead, tribal sovereignty prevailed within Indian territory unless Native authority is given up by a treaty with the federal government or taken away by federal statute (Doran 89, 2020). Marshall described Indian nations as *distinct political communities* with exclusive authority, adding:

> The Cherokee nation…is a distinct community occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force,* and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and the acts of Congress. (*Worcester v. Georgia*, 31 U.S. 515, 561 (1832))

Marshall empowered tribal authorities to govern everyone and everything that would occur within their Indian territories, protecting retained, inherent tribal sovereignty. The majority opinion ensured the federal government's exclusive power to regulate commerce with tribal nations. The states lacked any such power. Furthermore, *Worcester* effectively defined the boundaries of tribal power as geographical.

The territorial definition of tribal sovereignty persisted for centuries, enduring only minor changes made by the Supreme Court. In 1881, for instance, a Native American named Kan-gi-Shun-ca (Crow Dog in English) killed another Native American in the Sioux tribe's reservation

land. Sioux tribal government officials handled Crow Dog's crimes applying traditional Sioux law; in accordance with their culture, Crow Dog was ordered to pay restitution to the victim's families. Simultaneously, the government of the Dakota territory (present-day South Dakota) charged Crow Dog with murder. He was quickly found guilty and sentenced to death. After filing a writ of *habeas corpus*, Crow Dog argued the federal court lacked jurisdiction over the murder for which he was convicted. The Court unanimously held that Congress never granted federal courts jurisdiction over the murder of one Native American by another within Indian reservations (Baker 341, 2007). At that time, *Ex parte Crow Dog* provided the basis for criminal law in tribal land and reaffirmed the territorial interpretation of tribal sovereignty (*Ex parte Crow Dog*, 109 U.S. 556 (1883)).

The most recent confirmation of territorial-based tribal sovereignty occurred in 1959 when the Court decided *Williams v. Lee* (Doran 102, 2020). A unanimous ruling for Williams modernized tribal self-governance by holding state courts do not possess jurisdiction to hear claims that arise in Indian country against Native defendants, without congressional authorization. Justice Hugo Black's majority opinion stated:

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation… [T]o allow the exercise of state jurisdiction here would undermine the authority of tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves. It is immaterial that [the] respondent is not an Indian. He was on the Reservation, and the transaction with an Indian took place there… [The Supreme Court] has consistently guarded the authority of Indian governments over their reservations…If this power is to

be taken away from them, it is for Congress to do it. (*Williams v. Lee*, 358 U.S. 217, 223 (1959))

Williams broadened civil jurisdiction for suits brought by outsiders against Native American defendants under the rationalization that states lack the power to regulate tribal affairs on a reservation. Once again, the judiciary established the parameters of tribal sovereignty based on territorial boundaries. Author and Professor Dewi Ioan Ball acknowledges how *Williams* temporarily strengthened tribal sovereignty. Even so, he argues that the language used in Black's opinion also formed the foundations for weakening Native authority; it opened the door for the erosion of tribal sovereignty by focusing on how federal authority can prohibit the application of state law on reservations (Ball 404, 2010). Nonetheless, from *Worcester* through *Williams*, the judiciary consistently defined tribal sovereignty in territorial terms, confirming the jurisdiction of tribal courts over non-Natives in Indian country—until 1978 when the Court drastically revised tribal criminal jurisdiction in *Oliphant v. Suquamish Indian Tribe* (Doran 103, 2020).

3.3 Executive Endorsement for a "Government-to-Government" Relationship

Concurrent with the Supreme Court's *Williams* decision in 1959, the executive branch of the federal government publicly declared its opposition to Native American termination policy and support of tribal sovereignty. Eisenhower's Interior Secretary Fred Seaton spoke out against termination when he announced it is "absolutely unthinkable…that consideration would be given to forcing upon an Indian tribe a so-called termination plan which did not have the understanding and acceptance of a clear majority of the members of the affected tribe" (U.S. Department of Justice, 2015). Seaton's critique not only signaled the end of the termination era, but it also convinced Richard Nixon and John Kennedy to raise issues with assimilation laws and practices in their run for the presidency. Both candidates challenged the ethics of termination policy in the

absence of tribal consent. Nixon and Kennedy disagreed with what most mainstream Americans had grown accustomed to. This represented the first time presidential candidates used their national platform to protect tribal sovereignty (U.S. Department of Justice, 2015).

About a decade later, President Lyndon B. Johnson followed suit, pressuring Congress to end termination and endorse tribal self-determination. He proposed federal Indian programs embrace a new goal that would specifically incentivize the American government to encourage self-determination. Johnson urged his peers to give Native Americans an opportunity to remain in their homelands without surrendering their pride. Alternatively, if Native Americans sought out opportunities away from Indian country, then it was the federal government's responsibility to equip them with the necessary skills for a life rooted in equality and dignity (U.S. Department of Justice, 2015). Johnson's address to Congress was symbolic of the growing partnership between the executive and legislative branches and their subsequent work to expand tribal sovereignty together. President Nixon again condemned the forced termination of Indian tribes in 1970 to rally support for his new federal Indian policy proposal. To embolden the self-determination movement, Nixon suggested an Indian Trust Counsel Authority be created to provide independent legal representation for Indian interests (U.S. Department of Justice, 2015). As a separate entity from the Department of Justice, the Indian Trust Counsel Authority combatted the conflict of interest that arose when both federal interests and Native interests were represented by the same institution. His announcement was made in a special message to Congress and reaffirmed the federal government's obligation to defend and assist Native Americans.

Three President's administrations in a row all backed what is now referred to as a "government-to-government" relationship, publicly recognizing tribal nations as sovereign. First,

in 1983, President Ronald Reagan explicitly acknowledged the existence of a government-to-government relationship between the federal government and Native tribes in a statement on federal Indian policy. In his address, Reagan expressed his support for self-determination (U.S. Department of Justice, 2015). Next, in 1991, President George H.W. Bush issued a statement confirming Reagan's prior promise to increase tribal self-governance and maintain a government-to-government relationship. Lastly, in 1994, President Bill Clinton issued a memorandum to all executive departments and agencies asserting the U.S. interacts with federally recognized tribes on a government-to-government basis. His administration tried to consult with tribal authorities prior to taking actions that would affect their members. Hence, Clinton utilized his presidential powers to issue Executive Order 13084 demanding federal consultation with tribal governments. Executive Order 13084 was replaced two years later with Order 13175 to mandate an "accountable practice" where tribal input was required for the development of regulatory policies (U.S. Department of Justice, 2015). Although that Order remains in place, some Presidents' administrations have chosen to neglect their fiduciary duty to Indigenous people. Still, Presidents Reagan, Bush, and Clinton's three separate references to a government-to-government relationship legitimized the sovereignty of Native tribes and established a timeline demonstrating the executive branch's ongoing commitment to self-determination.

Every President since Clinton has acknowledged or supported the government-to-government relationship between the U.S. and Native Nations. Even President Donald Trump joined his predecessors by issuing a brief proclamation recognizing the existence of tribal sovereignty in modern-day. American presidents since Clinton have furthermore required the federal government to take counsel from tribal authorities over matters that affect their members.

Nearly a year after being elected, Trump finally accepted his obligation to consult with tribes (Singer 205, 2018). Obviously, however, the precedent set by previous administrations was not strict enough to stop President Trump or Attorney General Barr from executing Lezmond Mitchell. Both were completely undeterred by the Navajo Nation's cries of opposition to his death sentence. Despite Trump's blatant disregard for the Navajo Nation's counsel on the issue, it is evident that most recent Presidents have tried to cultivate a government-to-government relationship grounded in cooperation, consultation, and mutual respect (Singer 207, 2018). Following the Constitution, as interpreted by Chief Justice Marshall, executive officers have generally been more considerate of the relationship between the United States and Native Americans—especially in comparison to the judiciary. Future Presidential nominees' decision to support and strengthen tribal sovereignty seems inevitable, but the Court's new interpretation of self-determination poses a threat to the executive branch's historically reliable perspective on the matter.

Although the executive branch does not explicitly define tribal sovereignty as territorial, it is indisputable that every President has recognized tribal governments as sovereign entities. The law traditionally defines sovereign nations in territorial terms. For example, the U.S. government along with the governments of the fifty constituent states all assert civil and criminal jurisdiction over the people and activities that take place within their boundaries, as do national governments like Greece and the United Kingdom (Doran 99, 2020). The relationship between sovereignty and territorial-based jurisdiction is so logical that it almost seems redundant. To argue self-governance over a state "is very nearly the same as asserting jurisdiction over everyone and everything within the claimant's territory, and to assert jurisdiction over everyone and everything within the claimant's territory is very nearly the same as claiming sovereignty"

(Doran 99, 2020). It is therefore reasonable to conclude the executive branch's repeated recognition of tribal sovereignty to be territorial.

3.4 Recent Congressional Efforts to Expand Tribal Self-Determination

Without going into too much detail, it is imperative to understand how Congress has worked to preserve and even expand tribal sovereignty. Doing so highlights the juxtaposition between the judicial and legislative branches' interpretation of self-determination. There is a common misconception that tribal sovereignty is a partisan issue among federal legislators, but that is simply not true. Since the 1960s, "a relatively consistent policy of both Republican and Democrat administrations, as well as Congress, has been to revitalize tribal governments and to transfer powers from the Bureau of Indian Affairs to those governments" (Singer 648, 2002). Republicans often find themselves in favor of self-determination because it delegates control from the federal government to the local government. Plus, strengthening Native authority decreases tribal reliance on federal dollars due to increased prosperity within Indian country. Democrats like tribal sovereignty because Native Americans are an underrepresented population in the United States who deserve respect and dignity after all the racial injustices Indigenous people have faced as a consequence of colonialism (Singer 648, 2002). Measures taken by Congress to preserve tribal sovereignty have been consistent and bipartisan, proving it is not as much of a polarizing issue as it is belittled.

Throughout the last 60 years, Congress has passed countless acts to bolster tribal self-governance; three Congressional Acts in particular emphasize their commitment. In 1973, Congress passed the Menominee Restoration Act to reinstate all the rights and privileges of the Menominee Tribe in Wisconsin that had been previously terminated by the federal government (U.S. Department of Justice, 2015). The Act federally recognized the sovereignty of the

Menominee and transferred authority over their property and members back to the tribe. Numerous other tribes were subsequently restored and identified as sovereign nations. Then, in 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA) to protect Native Americans' inherent right to believe, express, and exercise the traditional religions of Indigenous people (U.S. Department of Justice, 2015). AIRFA's passage underlined the importance of tribal identity and the different elements which make up that identity. The Senate again demonstrated its dedication to expanding tribal sovereignty when the Senate Select Committee on Indian Affairs was re-established and made permanent in 1984. Its creation indicated the progressing significance of tribal affairs on the national stage and gave Native Americans a voice within the Senate (U.S. Department of Justice, 2015). These three Congressional Acts are just a small sample of U.S. policies that reflect federal legislators' support of self-determination.

Unlike the executive branch, the legislative branch has been quite transparent about its definition of tribal sovereignty. Language found in U.S. federal laws suggests Congress defines tribal sovereignty in territorial terms. The 1988 Indian Gaming Regulatory Act (IGRA) was enacted to provide a statutory basis for the operation of gaming by Native members as a means of promoting economic development for Indigenous individuals and tribal governments (U.S. Department of Justice, 2015). IGRA allowed federally recognized tribes to permit gaming only on "Indian lands" within their jurisdiction (L. 100–497, §1, Oct. 17, 1988, 102 Stat. 2467). The Act established the jurisdictional framework that governs Indian gaming and explicitly indicated tribal governments as sovereign over gambling within territorial boundaries. Language from the FDPA's Tribal Option demonstrates a similar conclusion. As I communicated in Chapter Two, the Tribal Option forbids the execution of a tribal member who is subject to a capital sentence for a crime "which has occurred within the boundaries of Indian country, unless the governing

body of the tribe has elected" to pursue capital punishment (18 U.S.C. § 3598, 1994). Yet again, another federal act concerning tribal sovereignty distinguishes tribal jurisdiction based on territorial boundaries. While these two U.S. federal laws cannot entirely depict the legislative branch's understanding of tribal authority, both point to a definition that hinges on territorial sovereignty.

3.5 The Supreme Court's Shift Away from Worcester

In the last three decades, the Supreme Court has deviated from the executive and legislative's interpretation of tribal governance to prioritize judicial divestment. Contrary to the other two branches of the federal government, the judiciary has redefined tribal sovereignty from territorial to membership-based—which is seen by many as an assault on self-determination. The Court first established this change in *Oliphant v. Suquamish Indian Tribe* (1978) when it held that tribes have no power to impose criminal penalties on non-Natives (Singer 650, 2002). *Oliphant* arose after Mark David Oliphant (a non-Native who resided on the Suquamish's Port Madison Indian Reservation) was arrested by tribal authorities during a Suquamish celebration for assaulting a tribal officer and resisting arrest. The Court's ruling in favor of Oliphant stripped tribes of criminal authority and applied to non-Natives who entered a reservation and committed a crime against a Native member. Most of the justices made their decision on the notion that tribal sovereignty is inherently limited, despite the Constitution's recognition of tribes as sovereign nations. Such inherent limitations "were not based on legislation, prior precedent, existing congressional policy, or executive practice. Rather, the Court used its power to create federal common law—a power it rarely exercises—to define what it saw as the legitimate scope of" tribal self-governance (Singer 650, 2002). *Oliphant* marked the beginning of the Supreme Court's modern attack on tribal sovereignty.

Another case, *Montana v. United States* (1981), extended the Court's restriction on tribal governance over non-Natives to include civil regulation. *Montana* centered around whether the Crow Tribe of Montana could prohibit hunting and finishing on a reservation by individuals who were not a member of the tribe (Singer 652, 2002). Crow Tribe's argument relied on their inherent authority as a federally recognized sovereign nation. Conversely, the State of Montana claimed it possessed the power to control such activities by nonmembers within the same reservation. The Court ruled against the Crow Tribe, holding that inherent tribal sovereignty did not include authority over the regulation of non-Natives on land owned by non-Natives within a reservation. As Justice Harry Blackmun insinuated in his dissent from *Brendale v. Confederated Tribes and Bands of Yakima Nation* (1989), the *Montana* decision completely departed from the precedent set in prior cases— specifically from the foundational case *Worcester v. Georgia* in 1832. By siding with the state of Montana over the Crow Tribe, the Supreme Court effectively overturned their previous ruling in *Worcester* eliminating state power within tribal lands. *Montana* furthermore affirmed the judicial shift to a membership-based definition of tribal sovereignty (Singer 652, 2002).

Although many scholars refer to *Montana* as "the hallmark" case defining tribal authority over nonmembers, other recent rulings have also affected a tribe's right to regulate non-Natives. *Atkinson Trading Co. v. Shirley* (2001), for instance, held tribes incapable of imposing taxes on non-Native landowners who reside within Indian territory—even if the tribe provides considerable services to the owner (Singer 652, 2002). *Atkinson Trading Co.* and similar Supreme Court decisions encapsulate just how much the general principle behind inherent tribal sovereignty has changed. Blackmun says it perfectly in his *Brendale* dissent: the Court's new interpretation of self-determination rests on "a principle according to which tribes *retain* their

sovereign powers over non-Indians on reservation lands… [That is] unless the exercise of that sovereignty would be 'inconsistent with the overriding interests of the National Government'" (Singer 653, 2002). The Marshall Trilogy had set the precedent for tribes to retain sovereignty over all that occurs within tribal lands, yet somehow in a span of three years, the Court rescinded the definition of tribal sovereignty that had been in place for over 200 years.

The U.S. Constitution never intended for the Court to exercise plenary power over Native Americans, especially not in a manner that limits tribal sovereignty. As outlined by the Constitution, Congress can regulate Indian affairs and the President can enter treaties with Indian nations, given Senate consent (Doran 99, 2020). Nothing in the national frame of the U.S. government grants the judiciary complete and absolute power over tribal members. American legal theorist Joseph William Singer suggests there may be a role for federal common law if disputes arise among tribes, the states, or the federal government. Recently, however, Congress and the President have predominantly agreed with one another over the interpretation of tribal sovereignty and the broader objective to expand self-determination (Singer 644, 2002). Restricting tribal governance to exclude jurisdiction over non-Natives within Indian country does not advance this goal. If the federal government were to exclusively follow the executive and legislative branch's definition of tribal authority, then even the Supreme Court would agree "a basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens" (*Duro v. Reina*, 495 U.S. 676, 685 (1990)). Territorial sovereignty would grant tribes jurisdiction over everyone and everything within reservation boundaries, like state sovereignty.

3.6 Judicial Bias Toward State Sovereignty

The Supreme Court has elected to limit the scope of tribal sovereignty in ways that vastly differ from state jurisdiction—despite the U.S. Constitution's explicit recognition of tribal and state governments as inherently sovereign (Singer 655, 2002). Unlike tribal sovereignty, the Court has interpreted the Constitution to define state sovereignty in territorial terms and to include jurisdiction over nonmembers. Inarguably, the Constitution does not treat tribes and states equally. States, for example, have rights that are expressly protected by the Tenth Amendment while tribes do not. Be that as it may, the Constitution does acknowledge both tribes and states as inherently sovereign entities that can pass legislation and regulate persons and property within their borders (Singer 655, 2002). Similarly, tribes and states are disabled by the Constitution from entering treaties with foreign nations and are subject to lawful actions taken by the federal government, as established by the Supremacy Clause. The Court has strayed away from the Constitution's identification of inherent sovereignty, particularly for tribes. Recent Supreme Court decisions demonstrate basic trust in state governments and their ability to exercise powers wisely, even over racial minorities like Native Americans. Tribal governments, on the other hand, have suffered from judicial divestment policy that suggests the Court does not trust their ability to be sensitive to the rights of non-Natives (Singer 667, 2002). Judicial bias against tribal self-determination has forced Native authorities into a corner with very little power over what occurs within reservation borders.

Two Supreme Court cases from 1999 and 2001 illustrate the stark contrast between judicial trust in state sovereignty as opposed to tribal sovereignty. *Alden v. Maine* (1999) was a case that called into question whether Congress could use its powers to revoke a state's sovereign immunity from private suits in its courts (Singer 654, 2002). In a 5-4 decision, the

Court ruled in favor of states and against the federal government. Justice Anthony M. Kennedy based the majority opinion on the fact that "states entered the federal system with their sovereignty intact" (*Alden v. Maine*, 527 U.S. 706, 713 (1999)). The ruling expanded the sphere of state sovereign immunity, granted states plenary governmental power, and limited federal authority. A case decided only two years later, *Nevada v. Hicks* (2001), dealt with a comparable issue—but concluded against tribal sovereignty. *Hicks* arose when state game wardens from Nevada obtained a search warrant to investigate a member of the Fallon Paiute-Shoshone Tribe, Floyd Hicks, who resided on tribe-owned reservation land. The wardens believed Hicks killed an endangered species protected by Nevada law outside of the reservation. Once the warrant was executed, Hicks filed a lawsuit in Tribal Court claiming the wardens trespassed on his land, abused the process, and generally violated his civil rights—like denial of equal protection, denial of due process, and unreasonable search and seizure. The Tribal Court, Tribal Appeals Court, District Court, and the Court of Appeals all agreed the matter fell under the Tribal Court's jurisdiction because Hicks resided on tribe-owned reservation land (*Nevada v. Hicks*, 533 U.S. 353, 355 (2001)). Supreme Court justices subsequently assessed whether any tribal court should be able to assert jurisdiction over civil claims against state law enforcement officials who enter Native territory to execute a search warrant against a tribal member for crimes that occur outside Indian country. In a unanimous decision, the Court held that tribes had no jurisdiction over state officials who enter the reservation. Many scholars to this day consider *Hicks* a devastating infringement on tribal sovereignty (Singer 647, 2002).

Justice Antonin Scalia's majority opinion was on the verge of claiming tribes have no authority to regulate the conduct of non-Natives even if they trespass on tribal land. The *Hicks* opinion transformed "tribes from sovereigns, who have governmental power over both their

members and their territory, into associations that have the power to regulate only those who voluntarily agree to regulation, either by membership or by engaging in consensual relationships with the tribe" (Singer 648, 2002). Hicks was not only an incursion on tribal sovereignty, but it also shifted the definition of self-determination farther away from the precedent set by *Worcester*. The Court dismissed their previous decision concluding states have inherent powers within tribal territory (Singer 659, 2002). Their alternative interpretation of the law also contradicted the structure of tribal relations as laid out by the Constitution. Rather than complying with the Constitution's framework asserting congressional power over tribes, the Court transferred a large portion of that power to states. Unlike *Alden* which was decided based on the Framer's original intent, the *Hicks* ruling, therefore, rejected the original intent analysis and contradicted current congressional and executive policy (Singer 659, 2002).

Hicks failed to provide tribes the protection for sovereignty they would have been afforded if they had been states. Applying the interpretative techniques behind *Alden* to *Hicks,* the judiciary "would interpret the Constitution in a manner that would be vastly more protective of tribal sovereignty" (Singer 646, 2002). An inconsistency such as this is not uncommon for the Supreme Court, but the absence of an explanation as to why the two cases are so different from one another is. At the very least, the Court must acknowledge an inconsistency exists between competing theories of state and tribal sovereignty (Singer 660, 2002). The Court must also address their unreasonable fear that tribal courts are likely to be unfair to nonmembers. If anything, tribal authorities have a greater incentive to treat non-Natives without prejudice because Congress can abrogate their sovereign powers entirely (Singer 667, 2002). Plus, state courts have repeatedly been found to treat tribal members unfairly—especially in states where judges are elected and are thus subject to political pressures that disapprove of tribal rights.

Ultimately, analyzing Native jurisdiction in the same manner as state jurisdiction would expand tribal sovereignty to include authority over all people and all matters inside territorial boundaries. Consensus among all three branches backing a territorial definition of tribal sovereignty would allow tribal governments to make legitimate legal arguments for or against polarizing issues in federal Indian law—like the death penalty.

CONCLUSION: HOW THE FEDERAL GOVERNMENT CAN INCREASE TRIBAL SOVEREIGNTY OVER THE DEATH PENALTY

Centuries of legal and illegal Indigenous executions demonstrate only a small sliver of the discrimination faced by Native Americans in the federal legal system. Oppressive laws and draconian judicial decisions perpetuate such racist chauvinism by enabling the federal government to kill Native members despite the cultural values of their associated tribes. Although the Federal Death Penalty Act (FDPA) was a beacon of hope for many Native Americans who opposed capital punishment, government leaders have politicized the death penalty and exploited the Tribal Option to seize political influence. Attorney General Ashcroft, Attorney General Barr, and President Trump all used the death of Lezmond Mitchell as a platform to garner public support. Their political gain came at the expense of the Navajo Nation's cultural disagreements with the death penalty and the victims' families' peace of mind. Mitchell's execution was not a one-off afront to tribal sovereignty. His death sentence called attention to the massive "escape clause" stipulated in the FDPA's opt-in amendment. Federal authorities can completely ignore a tribal government's disapproval of a capital sentence by simply charging a Native defendant with a crime outside of the Major Crimes Act—even if that charge does not ordinarily fit the crime. In order to preserve the spirit of the Tribal Option, the federal government must commit to preserving tribal authority over capital punishment. And, following the standards set forth by the U.S. Constitution, tribal sovereignty must be expanded by Congress.

I propose two different avenues for Congress to increase tribal sovereignty over the death penalty. The first option requires a congressional action to update the list of crimes enumerated in the Major Crimes Act (MCA). Since the law was enacted in 1885, Indigenous rights have

progressed tremendously. The Act's interpretation of federal jurisdiction over crimes committed by Natives Americans in tribal territory is consequently outdated and must be reevaluated. Second, Congress could redefine tribal sovereignty in territorial terms. If Congress chooses to redefine tribal sovereignty, then it should go one step further to treat tribal jurisdiction over the death penalty the same as state jurisdiction over the death penalty. Doing so would enable Native Nations to retain or abolish the death penalty altogether—giving tribal governments, at the very least, authority over the executions of their own members. To address current concerns about the fairness of trials for non-Natives who reside on tribal lands, nonmembers must be able to protect their constitutional rights in federal court. Creating a limited constitutional right for nonmembers would tackle one of the primary arguments against territorial-based tribal sovereignty. Updating the MCA or redefining tribal authority in territorial terms, will reaffirm the Constitution's recognition of tribes as sovereign entities, as well as empower Native officials to govern in line with their cultural beliefs. Ideally, Congress would expand the MCA to include all death-eligible crimes *and* establish territorial-based tribal sovereignty over nonmembers and capital offenses. However, we do not live in a perfect world. Realistically, Congress should focus primarily on redefining tribal sovereignty, and if necessary, update the MCA as an interim step. Regardless, both avenues will expand Native jurisdiction over the death penalty.

Expanding the MCA to include all federal death-eligible crimes would cement tribal consent as a standard practice in federal sentencing for capital offenses. Looking at how the MCA is currently written, only 15 federal crimes are subject to the FDPA's Tribal Option (U.S. Department of Justice, 2022). For perspective, there are a total of 41 capital offenses punishable by death in the federal justice system (ProCon.org, 2021). Therefore, when sentencing a Native American to death for committing a crime against another Native American in tribal lands, the

U.S. Attorney General can choose from 26 capital offenses to legally ignore tribal dissent. Such an unsettling disparity underscores just how little sovereignty tribes possess over the executions of their members. In essence, the Tribal Option enables the government to barely acknowledge tribal authority while simultaneously disregarding its validity. Lezmond Mitchell's death is proof of this inconsistency.

Barr's decision to charge Mitchell with a crime outside of the MCA was a clear violation of the promise made by Congress to tribal governments. The whole purpose of the Tribal Option was to "respect tribal sovereignty and accord tribal governments a status similar to State governments by allowing them to choose whether to have the death penalty apply to crimes committed by their members within their land" (Ortega et al. 13, 2020). Without Native jurisdiction over all 41 capital offenses, tribal sovereignty is not comparable to state sovereignty. To close the loophole, Congress should revise the MCA to include all federal death-eligible crimes. Finally updating the 137-year-old law will grant tribal governments the authority to elect whether intra-Native offenses committed on their land are subject to the death penalty. The only limitation to expanding the MCA would be that Congress could pass new legislation increasing the number of death-eligible crimes. Still, amending the current law would require the federal government to receive tribal consent for 26 more capital offenses—including Mitchell's charge: carjacking resulting in death. Even though updating the MCA is not a perfect solution, it is better than leaving tribes with close to little authority over the death of their members. Increasing the number of crimes in the MCA from 15 to 41 guarantees more Native death row prisoners, like Mitchell, are not executed without the consent of tribal nations.

A similar, yet more impenetrable path to strengthen Native jurisdiction over capital punishment would be for Congress to explicitly redefine tribal sovereignty in territorial terms. A

territorial-based definition would revert Native jurisdiction back to the precedent set by *Worcester v. Georgia* (1832)—which effectively determined the boundaries of tribal power as geographical. Under *Worcester's* definition, tribes are empowered to govern everyone and everything that occurs within their reservations, thus protecting inherent tribal sovereignty as laid out by the Constitution. Tribal sovereignty is still subject to acts of Congress, so Native jurisdiction over nonmembers and capital offenses is at the discretion of legislators. There is a good argument to be made in favor of tribal governance over nonmembers, and I will engage in that discussion later in the conclusion. Regarding jurisdiction over death-eligible crimes, Congress should pass legislation recognizing tribal sovereignty over capital punishment as equal to that of state sovereignty.

The law traditionally defines sovereign nations, like states, in territorial terms. State governments all assert civil and criminal jurisdiction over the people and activities that take place within their boundaries. Furthermore, state governments have the right to decide whether to employ, limit, or abolish capital punishment in their legal systems. Tribes should have identical sovereignty over the death penalty. Following the reinstatement of territorial jurisdiction, tribal authorities must be able to implement or abolish capital punishment for intra-Native crimes committed within reservation boundaries. Some death penalty advocates may argue that this change would inevitably lead to the abolition of capital punishment in most tribal lands. Seeing that only one tribe has "opted in" to the FDPA since 1994, the majority of tribes likely *would* choose to eliminate capital punishment—but so have nearly half of the states. Currently, 23 states have abolished the death penalty and three additional states have declared a moratorium on executions (Death Penalty Information Center, 2022). Thus, tribes—who govern a significantly smaller percentage of the population—would only mirror the pattern already set

forth by states. Moreover, this is a completely irrelevant critique of expanding Native jurisdiction since the issue at hand is not the death penalty itself, but tribal sovereignty. To clarify, my goal is not to argue for or against capital punishment. I am merely recommending two ways in which the federal government can expand tribal authority over the death penalty to make certain Native beliefs are respected. Legislation defining Native jurisdiction like state jurisdiction, would permit tribes to make their own laws about the legality of the death penalty for people who commit capital offenses within reservation boundaries.

Once territorial tribal sovereignty is established, a debate will emerge discussing whether tribes possess jurisdiction over crimes that involve non-Natives who reside in Indian country. To address the controversy, a limited constitutional right must be created so that nonmembers can challenge tribal court actions in federal court. Adhering to the current understanding of the Constitution, a federal court review of tribal court decisions should be developed by Congress. However, if the Supreme Court is determined to step in, precedent has shown the judiciary is perfectly capable of remedying the problem by implementing the same constitutional right as Congress (Singer 667-668, 2003). Either way, it is of the utmost importance that nonmembers have access to a legal system outside of Native jurisdiction to vindicate the protection of their rights to fundamental fairness. Law Professor Matthew L.M. Fletcher makes a similar recommendation in "A Unifying Theory of Tribal Civil Jurisdiction" (2014). Under his suggestion, the Supreme Court would need to lift its ban, prohibiting lower courts from reviewing cases connected to Native jurisdiction over nonmembers (Fletcher 829, 2014). Federal court review of tribal court decisions would solve non-Native bias among Indigenous authorities. At the same time, the Court's recent history limiting the legitimate scope of tribal sovereignty does not bode well for expanding Native jurisdiction over nonmembers.

Contemporary rulings demonstrate Supreme Court justices have deviated from the executive and legislative branches' interpretation of tribal governance to prioritize judicial divestment. Law Professor Bethany Berger attributes Indian law decisions supporting the implicit-divesture theory to "an inability to see tribal interests as sovereign interests or to understand what tribal sovereignty means to Native people and others" (Doran 132). In other words, the Court does not trust that tribal authority will be sensitive to the rights of nonmembers. Native Americans, consequently, have been stripped of their power over people and activities in tribal lands. However, the Court's most recent case involving tribal jurisdiction, indicates a glimmer of hope for territorial sovereignty and in opposition to judicial divestment. In *McGirt v. Oklahoma* (2020), the Supreme Court held 5-4 that states lack the jurisdiction to prosecute members of the Creek Tribe for crimes committed within the historical Creek boundaries. Under the MCA, that land remains "Indian country" granting the federal government exclusive jurisdiction to try certain major crimes committed by Creek tribal members (*McGirt v. Oklahoma*, 591 U.S. ___ (more) 140 S. Ct. 2452 (2020)). *McGirt* reaffirmed a territorial-based definition of tribal sovereignty and returned some of the power given to states back to tribes. The recent landmark ruling allowed Creek members to maintain their established sovereignty and territorial boundaries.

If the Court continues down this track and fully redefines tribal sovereignty in territorial terms, then justices would likely rely on the definition written in Justice Anthony Kennedy's majority opinion from *Duro v. Reina* (1990). While the Court concluded in *Duro* that tribes do not have the authority to prosecute members of other tribes, the majority opinion clearly defines what full territorial sovereignty should entail. Kennedy asserts "a basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory,

whether citizens or aliens" (*Duro v. Reina*, 495 U.S. 676, 685 (1990)). The reference to "citizens or aliens" extends territorial jurisdiction over nonmembers. Accordingly, Kennedy's description coupled with the Court's redefinition of tribal sovereignty, suggests full territorial tribal authority would include jurisdiction over nonmembers. Having said that, it is difficult to be optimistic about the future of tribal governance from a judicial perspective considering the significant polarization among current justices. The political make-up of the justices has shifted to a conservative super-majority (6-3), making it nearly impossible to arrive at a consensus on major legal issues—especially cases evaluating constitutional controversies. According to Justice Breyer, justices are more likely to split when the Court's docket primarily consists of constitutional cases (Rosen, 2013). As opposed to statutory cases, constitutional cases tend to be more contentious because justices have stronger preconceived views about those topics, like Native jurisdiction. Nevertheless, *McGirt* is the first case since *Williams v. Lee* (1959) to confirm tribal sovereignty in territorial terms, advancing the goal to expand Native jurisdiction over the death penalty.

Overlapping sovereignty is not a new concept in the U.S. It has been a major point of contention since the nation's founding. The Constitution itself managed to outline the appropriate relations between state and federal governments and it did not do so by ignoring states or denying them any-reserved powers (Singer 209, 2018). The federal government "know[s] about divided sovereignty; [it] simply needs to extend that knowledge to Indian nations" and the federal government "respects divided sovereignty; [it] simply needs to extend that respect to Indian nations" (Singer 209, 2018). Crafting legislation recognizing Indigenous beliefs about capital punishment is one step toward respecting the sovereignty of Native nations. Ultimately, expanding the MCA is a great option to increase tribal authority for the time being.

Doing so will ensure no presidential administration can kill Native members by ignoring tribal dissent. For example, Lezmond Mitchell would not have died if all 41 capital offenses, including carjacking resulting in death, were listed in the MCA. Better yet, the Navajo Nation would be able to abolish the use of the death penalty altogether for crimes committed in their reservation if the tribe obtained full territorial tribal sovereignty. To thoroughly address the issue at hand, I recommend Congress redefine tribal sovereignty in territorial terms. Full territorial sovereignty will guarantee Native jurisdiction over the death penalty for all crimes committed on tribal lands.

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