

# The Burger Court Opinion Writing Database

*United States v. Wheeler*

435 U.S. 313 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 14, 1978

Re: 76-1629 - United States v. Wheeler

Dear Potter:

I join. The Oliphant dissent having persuaded only one (myself), it is now "gospel," and unless Thurgood writes as persuasively here as he did (for me) in Oliphant, I bow to heavier, if not better, "firepower".

Regards,

WSB

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
 Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart  
1 MAR 1978  
Circulated:

**1st DRAFT**

Recirculated:

**SUPREME COURT OF THE UNITED STATES**

No. 76-1629

United States, Petitioner, ) On Writ of Certiorari to the  
v. ) United States Court of Appeals  
Anthony Robert Wheeler. ) for the Ninth Circuit.

[March —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether the Double Jeopardy Clause of the Fifth Amendment bars the prosecution of an Indian in a federal district court under the Major Crimes Act, 18 U. S. C. § 1153, when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident.

I

On October 16, 1974, the respondent, a member of the Navajo Tribe, was arrested by a tribal police officer at the Bureau of Indian Affairs High School in Many Farms, Ariz., on the Navajo Indian Reservation.<sup>1</sup> He was taken to the tribal jail in Chinle, Ariz., and charged with disorderly conduct, in violation of § 17-351 of the Navajo Tribal Code. On October 18, two days after his arrest, the respondent pleaded guilty to disorderly conduct and a further charge of contribut-

<sup>1</sup> The record does not make clear the details of the incident that led to the respondent's arrest. After the bringing of the federal indictment an evidentiary hearing was held on the respondent's motion to suppress statements he had made to police officers. This hearing revealed only that the respondent had been intoxicated at the time of his arrest; that his clothing had been dishevelled and he had had a blood stain on his face; that the incident had involved a Navajo girl; and that the respondent claimed that he had been trying to help the girl, whg had been attacked by several other boys.

SEE PAGES: 5, 11, 12, 13, 16  
footnotes renumbered

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_  
7 MAR 1978

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1629

United States, Petitioner, | On Writ of Certiorari to the  
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Anthony Robert Wheeler. | for the Ninth Circuit.

[March —, 1978]

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### I

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 27, 1978

MEMORANDUM TO THE CONFERENCE

Re: Case heretofore held for No. 76-1629,  
United States v. Wheeler

No. 77-5539, John Walking Crow v. United States

The petitioner, after pleading guilty to a charge of theft in the tribal court of the Rosebud Sioux Tribe, was indicted for robbery, in violation of 18 U. S. C. §§ 1153 and 2111, in the United States District Court for the District of South Dakota. The federal indictment was based on the same conduct as the tribal conviction. The petitioner's motion to dismiss the indictment on the ground that it was barred by the Double Jeopardy Clause was denied by the District Court, and he was convicted after a nonjury trial. The Court of Appeals for the Eighth Circuit affirmed, holding that tribal courts and federal courts are not arms of the same sovereign.

Since the judgment and opinion of the Eighth Circuit are in conformity with the decision in United States v. Wheeler, I shall vote to deny certiorari.

P. S.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 4, 1978

Re: 76-1629 - United States  
v. Wheeler

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Dear Potter,

Please join me.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 16, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1629, United States v. Wheeler

I tentatively vote to affirm the judgment of the Court of Appeals. While I believe that tribes retain certain rights of self-government through a residual sovereignty not deriving from the federal Constitution but pre-existing it, I do not at this time think that different sources of sovereignty necessarily require application of the "dual sovereign" doctrine of Abbate. What strikes me as peculiar about the relationship between the tribes and the federal government is the plenary nature of Congress' authority to act vis-a-vis the tribes. Unlike the states, whose sovereignty (and concomitant police power) is protected and recognized in the Constitution, the tribes continue to possess any criminal jurisdiction at all wholly at the sufferance of the federal government (absent limiting treaty language); and Congress has enacted numerous statutes arguably controlling the tribes' criminal jurisdiction, 18 U.S.C. 1152, 1153, and the manner in which such jurisdiction is exercised, 25 U.S.C. 1301 et seq.

For these reasons, I am presently inclined to believe that the relationship between the tribes and the United States is more comparable to that of the territories and the United States, Grafton v. United States, 206 U.S. 333, or municipalities and states, Waller v. Florida, 397 U.S. 387, than it is to that of the states and the federal government, which, as the SG's office has conceded, are the only full sovereign powers in the United States. My vote is tentative, however, since the majority opinion in this case or developments in Oliphant or Santa Clara may persuade me otherwise.

*J.M.*

T.M.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 15, 1978

Re: No. 76-1629, United States v. Wheeler

Dear Potter:

Please join me.

Sincerely,

*JM.*  
T. M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 8, 1978

Re: No. 76-1629 - United States v. Wheeler

Dear Potter:

Please join me.

Sincerely,

*Harry*  
—

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 3, 1978

No. 76-1629 United States v. Wheeler

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 2, 1978

Re: No. 76-1629 - United States v. Wheeler

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

✓  
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 3, 1978

Re: 76-1629 - United States v. Wheeler

Dear Potter:

Your opinion is excellent and I am prepared to join it subject to one very minor reservation. I frankly do not understand the sentence in footnote 30 on page 16 which says:

"The reason that the Fifth Amendment does not apply to certain territorial governments is that they are unincorporated territories . . . ."

Why does the status of being an "unincorporated territory" explain the applicability of the Double Jeopardy Clause and the inapplicability of the balance of the Fifth Amendment?

Respectfully,

*John*

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 8, 1978

Re: 76-1629 - United States v. Wheeler

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

Copies to the Conference