The History of Federal Indian Policy and the Changes to Tribal Governments

FROM THE federal perspective, the U.S. policy toward Indians is justified in light of the federal trust relationship and the duty that the U.S. government owes to tribal peoples to protect their interests and welfare. This is the relationship first described in the U.S. Supreme Court case Cherokee v. Georgia as the “state of pupilage” in which tribes were in a relationship to the United States that was akin to that of a “ward to its guardian,” 35 U.S. (5 Peters) 2 (1831). Though this language bears all of the ethnocentric and racist understandings of Native Americans prevalent among Euro-Americans in the mid-nineteenth century, it is also the case that, at least in principle, the relationship has been described as a substantive responsibility of care that the United States owes to tribal citizens. Unfortunately, more often than not, what has been held by federal agents to be necessary to protect the interests and welfare of tribal peoples has been determined primarily by non-Indians, with only minimal input from Indians and tribal nations themselves. Historically, most of the non-Indians who affected federal policy regarding Indians have been convinced that what is best for Indian interests and welfare is to get them, ultimately, to adopt lifestyles and governmental operations more like those of American society.

Of course, at any particular period in the last two hundred years of federal Indian policy, how exactly to make Indians more like other American citizens has been handled differently. Sometimes the policy has been to
isolate tribal nations in far-removed territories and reservations until these people and their societies could “evolve” into the democratic civil society that Euro-Americans have already attained. Other times the policy has been assimilation—the breaking down of tribal communities and their collective landholdings to force tribal members to live like their more individualistic non-Indian neighbors—owning and farming private lands, sending their children to schools, and voting in state and federal elections. In the years of tribal reorganization and more recent federal policies of tribal self-determination, the renewed recognition of tribal nations as viable sovereign entities is still based on the fact that support from the federal government comes only if tribes can show that they have governmental institutions that are sufficiently similar to U.S.-style political and legal institutions.

At many times in U.S. history, competing federal interests in increasing non-Indian access to tribal lands and natural resources and limiting tribal authority seemed so prominent that one has to wonder if the federal trust relationship was merely used as a (rather thin) cover under which these much more harmful activities could be undertaken. Nonetheless, the trust relationship has always been a cornerstone of federal policy toward tribal nations. Hence actions taken in the name of that policy are arguably still informed by a general belief that tribal welfare and interests are better served the more that tribes adopt Anglo-American-style governmental institutions.

This chapter offers a brief review of the history of federal policy toward tribes, focusing on a few significant periods. As you read the materials provided, consider how, even in the early years, when the Supreme Court was describing tribal peoples as possessing some degree of sovereignty, the Court was also planting the seeds for future federal policy that would try to force tribes to abandon their unique culture and governmental systems and to adopt Anglo-American social and political organization. Figure 5.1 presents the different eras of federal Indian policy.

# EARLY RECOGNITION OF TRIBAL SOVEREIGNTY

**Patricia Sekaquaptewa***

In reviewing the foundational U.S. Supreme Court case law, there are two important things to focus on: (1) What is happening to tribal sovereignty

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FIGURE 5.1. Different Eras of Federal Indian Policy

<table>
<thead>
<tr>
<th>Era</th>
<th>Period</th>
<th>Key Events</th>
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<tbody>
<tr>
<td>Colonial Period</td>
<td>(1492-1776)</td>
<td>Trade, land cessions, and war</td>
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<tr>
<td>Confederation Period</td>
<td>(1776-1789)</td>
<td>American Revolution, Articles of Confederation, Continental Congress, conflict between national and state government over management of Indian affairs</td>
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<tr>
<td>Trade and Intercourse Act Era</td>
<td>(1789-1835)</td>
<td>Adoption of U.S. Constitution, Congress to exclusively regulate trade, relations, and land cessions, and enter into treaties with tribes</td>
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<tr>
<td>Removal Period</td>
<td>(1835-1861)</td>
<td>Extinguishment of Indian title to eastern lands and removal of Indians beyond state boundary lines westward</td>
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<tr>
<td>Reservation Era</td>
<td>(1861-1887)</td>
<td>Westward non-Indian settlement leapfrog the Indian Territory to California, creation of reservations within states and territories, with resulting Indian Wars</td>
</tr>
<tr>
<td>Allotment Period &amp; Forced Assimilation</td>
<td>(1871-1934)</td>
<td>End of treatymaking, federal courts given some criminal jurisdiction over crimes committed by Indians in Indian Country, federal government individually allocates tribal lands, and opens up remainder for non-Indian settlement</td>
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<tr>
<td>Indian Reorganization Act Period</td>
<td>(1934-1940)</td>
<td>Allotment ended, tribes adopt constitutions and establish tribal councils and business committees</td>
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<tr>
<td>Termination Era</td>
<td>(1940-1962)</td>
<td>Controversy over IRA, Congress passes a number of statutes subjecting some tribes to termination of federal supervision and subjecting them to state jurisdiction, many Indians relocated to urban centers</td>
</tr>
<tr>
<td>Self-Determination Era</td>
<td>(1962-Present)</td>
<td>Revitalization of tribal entities and improvement of conditions on reservations, restoration of some tribes to federal recognition and supervision, passage of Indian Civil Rights Act, the Indian Self-Determination and Education Assistance Act, the Indian Child Welfare Act, Indian Tribal Government Tax Status Act, Indian Land Consolidation Act, Indian Gaming Regulatory Act</td>
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(powers); and (2) What is happening to tribal rights in land. The early cases defined both tribal sovereignty and rights in land as means of justifying why tribes did not have the power to sell land without permission and why the U.S. Supreme Court would not hear cases brought by tribes in federal court. The early cases are essentially about the right to buy (or take) and sell Indian lands.

During the 1500s, the countries of Europe were simultaneously competing for newly discovered lands and wealth and debating about the rights of the indigenous peoples they were encountering. The principles derived from this competition and debate became part of the European international law. About three hundred years later, the young U.S. Supreme Court, in the case of *Johnson v. McIntosh*, reached back to these principles to settle a dispute between two non-Indians over certain property. One of the parties claimed he acquired the land from the British government and the other claimed he acquired the same land from an Indian tribe. The Court had to justify why the title issued by the British government was better than the title issued by the Indians. In doing so, the Court first announced a "Doctrine of Discovery." According to this new doctrine, the first European power that "discovered" and claimed a particular territory then had the exclusive right to purchase the land from the Indians from that time forward. The Court reasoned that, in this particular case, the British discovered the land in question and had the exclusive right to purchase it from the Indians. The party who then received title to this land from the British government legitimately owned the land. When the new American government was established, it inherited all the discoverer's rights from the British, including the exclusive right to buy land from the Indians.

In 1831, the Cherokee Nation asked the U.S. Supreme Court to stop the state of Georgia from executing laws that would do away with the Cherokee government and seize its lands. The Cherokee argued that they had treaties with the United States that protected their government and lands. The Court found that it could not help the tribe, stating that it only had authority under the U.S. Constitution to hear disputes between "foreign nations" and "states," and the tribe could not be considered a foreign nation. The Court constructed a new category for tribes—the category of "domestic dependent nations":

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside
within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of papilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.¹

By the mid-1800s, U.S. law recognized that tribes were domestic dependent nations with limited sovereignty and the right to occupy and use (but not necessarily to sell) their aboriginal lands. Even then, these were considered serious blows to tribal sovereignty and rights in land. Nevertheless, these early cases formally recognized tribal governmental status under U.S. law, thus paving the way for modern federal-tribal, government-to-government relations.

The Taking of Tribal Lands and Resources

Whatever your political views on these issues, it is undeniable that most of the federal-tribal relationship has been, and continues to be, defined by the taking of tribal land and resources. The taking of tribal land, in the past, has seriously undermined the integrity and functioning of tribal government. There were three major interrelated processes for taking tribal land throughout the years: (1) by negotiating treaties where the Indians "ceded" their homelands to the federal government in exchange for lesser lands farther away, to the west of the non-Indian communities; (2) (after treaty-making was banned by Congress in 1871) by negotiating agreements with a tribe to cede more land, followed by Congress passing a law approximating the agreement; and (3) by implementing the General Allotment Act and related acts that cut up tribal lands into individual plots, giving each Indian family a small "farm" and opening up remaining tribal lands to non-Indian homesteaders. In some states (for example, California and Alaska), tribal lands were effectively confiscated and turned into public domain lands without any compensation whatsoever. Between 1887 (the General Allotment Act) and 1934 (the Indian Reorganization Act), Indian landholdings were decreased by 90 million acres.²


LAW AND LEGISLATION

*Carole Goldberg*

Treaty-Making between the United States and the Indians

Between the founding of the nation and 1871, when Congress banned further Indian treaties, the United States entered into hundreds of agreements, most of them embodying the following terms:

1. a cession (giving up) of Indian land, in exchange for a reservation or grant of land set aside for the Indians' permanent and exclusive use and occupancy;
2. acknowledgement that the tribe retains the rights of self-government, but that the tribe has also come under the "protection" of the United States;
3. provision for water, hunting, fishing, and gathering rights for the Indians in lands set aside for them, and sometimes hunting and fishing rights in ceded territories as well;
4. assertion of federal control over matters involving non-Indians in areas reserved for the Indians, including trade and crimes between Indians and non-Indians, with such control to supersede state authority; and
5. provision of needed supplies and services by the United States.

Congress eventually abandoned treaty-making with Indian tribes because the House of Representatives did not like the fact that it was excluded from the treaty-making process. Under the United States Constitution, treaties are signed by the president and ratified by a two-thirds vote of the Senate. After 1871 Congress dealt with Indian affairs through legislation, in which both houses of Congress participate. This change of method did not alter the legal status of Indian nations.

Some Indian tribes have never entered into treaties with the United States, either because the Senate refused to ratify treaties that were negotiated or because the tribes' first contact with the United States occurred

late in the nineteenth century. Nevertheless, the terms of Indian treaties have served as the model for federal law applicable to all tribes, perhaps because the treaties represent a form of consent to limited tribal incorporation within the American political system. Absent such consent of the governed, American political theory views governmental power as unjust and illegitimate. The treaties are thus a means to justify the authority of the federal government over Indian lands and people.

**Indian Policy of the New American Government**

The earliest Indian policy of the American government, embodied in legislation known as the Trade and Intercourse Acts (first adopted in 1790 and reenacted with amendments many times thereafter), sought to preserve peace between Indians and land-hungry settlers by ruling out most contact between the two groups. Among other things, the acts restricted non-Indian entry into Indian lands, regulated trade with the Indians, limited the introduction of alcoholic beverages into Indian country, and punished interracial crimes involving Indians and non-Indians. One of the most important features of the Trade and Intercourse Acts was the prohibition on transfer of Indian lands without federal approval. Some states, notably New York and Georgia, resisted this policy, and continued to make their own Indian treaties. Land transfers resulting from these agreements have been the source of many modern Indian land claim cases, such as the successful suit brought by the Oneida of New York. In that litigation, the Oneida challenged treaties with the state of New York that date back to 1793, claiming that the transfer of land to the state was invalid because the federal government never gave its consent. The United States Supreme Court agreed, and found that the passage of time had not weakened the Oneida claims, in part because the state of New York and the United States had done their best to discourage and prevent claims in the past.

The federal policy of physically separating Indians and non-Indians, as embodied in the Trade and Intercourse Acts, began to weaken in the early decades of the nineteenth century, as settler pressure for westward expansion swelled. The crisis was most acute in the lands of the Cherokee, where gold was discovered in the late 1820s. In 1829 Georgia enacted laws purporting to extend its authority onto Cherokee lands and to abolish the Cherokee government. Throughout the 1820s the Cherokee adopted a constitution and tribal laws modeled on the U.S. system, and abolished traditional legal regimes such as the blood feud, which entailed retaliation for the death of a clan member by killing a member of the killer's clan.
Tribal Governments Undermined by the Reservation System and Allotment

Through the second half of the nineteenth century, as pressure from non-Indians made the existence of Indian Territory politically unfeasible, the federal government embarked on a policy of concentrating Indians on reservation lands where they could be "civilized" and assimilated.
The Office of Indian Affairs was established to act as administrator of these new reservations; initially as part of the War Department, the office came under the Department of Interior in 1849.

In the course of administering reservation life, this Office of Indian Affairs came to dominate, weaken, and drive underground tribal government and legal systems. With tribal economies disrupted by the move to reservations, much of the Indian administration's power came from its control over the necessities of life, such as food and shelter. The Office of Indian Affairs established Courts of Indian Offenses and Indian Police, staffed with handpicked Indians, to replace traditional sources of law and authority. The judges and police thus enforced a Code of Indian Offenses, drafted by the Indian Affairs administrators, that prohibited many traditional cultural and religious practices, including the Ghost Dance (part of a largely religious movement), the destruction of an individual's personal property at death, Indian games of chance, and polygamy. Agents of the Office of Indian Affairs on each reservation (called superintendents) also designated tribal leaders who were willing to sign leases of tribal land and otherwise cooperate in pursuing the assimilationist goals of federal policy. Many traditional tribal functions, such as the allocation of land-use rights and the organization of agriculture, were taken over by the superintendents.

The weakening of tribal government and legal systems accelerated in the last decades of the nineteenth century, when Congress enacted laws requiring the allotment (division) of communally held lands on many reservations into individually owned parcels, thereby eliminating a defining element of tribal life. The parcels were to be held in trust (protected from being taxed or sold) by the federal government for a brief period of time, after which they were to be freely owned by the individual Indian. The state federal purpose of imposing allotment was to transform Indians into individualist farmers. Allotment diminished tribal powers by withdrawing lands from tribal control and reducing the total acreage under Indian ownership. The federal government sold off "excess" lands that it did not deem necessary for allotment, and the parcels allocated to individual Indians often found their way into non-Indian hands, either through fraud or tax sales. Eighty-six million acres, over 60 percent of the Indians' land base, was lost during the allotment era (approximately 1886-1934).

Another legacy of allotment is the fact that some modern reservations have large numbers of non-Indian residents, living on once-allotted land that they now own. These non-Indian residents often wish to be free from tribal authority, even though they are living within the boundaries of an Indian reservation.
Congress formally abandoned the policy of allotment in 1934 and extended the trust period for existing allotments indefinitely. Thus, many previously established allotments remain held in trust by the federal government. Through inheritance, many of these allotments are now owned by hundreds of people, which makes it extremely difficult to use the allotments efficiently. Congress has attempted to find some way to return these allotments to tribal ownership. The United States Supreme Court has refused to allow such transfers, however, unless the United States or the tribes compensate all of the allotment owners for their fractions of ownership rights.

Allotment laws frequently abrogated treaty promises to the Indians. But when tribes challenged these laws in the U.S. Supreme Court, they lost on the grounds that the United States was free to act as it thought was best for Indians, even though that meant violating treaty promises. The U.S. Supreme Court has said that Congress may abrogate Indian treaties just as it may abrogate treaties with foreign countries, even though Indian tribes are not in the same position as foreign countries. For example, Indian tribes are unable to appeal to international bodies or to military force if the United States unilaterally abandons a treaty promise. Nevertheless, there are some constraints on Congress when it contemplates violating an Indian treaty.

If the treaty has created property rights (including the rights to hunt and fish), the U.S. Supreme Court has said that Congress must compensate the tribe for any rights it loses when the treaty is abrogated. The Sioux claim against their loss of the Black Hills, part of their ancestral lands, is based on this principle. To the disappointment of many Sioux, however, this principle provides only monetary compensation, not a return of land. Some groups of Sioux have refused to accept the money, insisting that they are entitled to reclaim their ancestral lands in accordance with their treaty rights.

The Indian Reorganization Act and Federal Recognition of Tribal Governments

In 1934, Congress adopted the Indian Reorganization Act, now referred to as the IRA. The IRA provided a way for tribes to form tribal councils and business committees, to draft and adopt constitutions, and for Congress and the president to formally recognize a tribal government as a government. It is difficult to overestimate the influence of this law on the development of modern tribal governments. Whether contemporary tribal governments were coerced to accept or rejected the terms of the act, most tribal
governments today will find that their tribal council structure, business council structure, and/or provisions in their constitutions have elements of the IRA or related provisions in them. Often, even non-IRA tribes are dealt with "through the lens of the IRA" by federal officials and others.

THE EVOLUTION OF TRIBAL GOVERNMENTS

Vine Deloria Jr. and Clifford M. Lytle*

Tribal Government in Modern Perspective

Modern tribal government can trace its inception, although not its fruition, back to the New Deal administration of Franklin Delano Roosevelt. When the federal government finally awakened to the fact that the Indian allotment policy had been a failure, resulting in the loss of a substantial portion of the Indian land estate and the impoverishment of the people, Congress, at the urging of the president and the secretary of interior, Harold Ickes, initiated a new Indian policy by enacting the Indian Reorganization Act of 1934 (IRA, 48 State. 984). Part of the catalytic force behind this measure was the 1928 Meriam Report, which described the failure of the federal government to provide for Indians....

The Indian Reorganization Act became important because it directed national policy from a deliberate effort to extinguish tribal governments and customs to a goal of establishing self-government and providing it with sufficient authority and powers to represent the reservation population in a variety of political and economic ventures. The act did not enumerate the powers of the new governments established under its provisions. Indeed, Felix S. Cohen noted that "the act of June 18, 1934 had little or no effect upon the substantive powers of tribal self government. ... [It] did bring about the regularization of procedures of tribal government and modification of the relations of the Interior Department to the activities of tribal government" (Cohen, pp. 129–130).

The IRA, then, signaled an attitudinal change toward Indians and tribal governments. It provided an opportunity to revitalize tribal govern-

ments that had been submerged by the failure of either the legislative or the executive branches of the federal government to articulate the proper relationship that in fact existed between the Department of Interior and the Bureau of Indian Affairs in their trustee capacity and the tribal governments, which, for better or for worse, were the successors to the gatherings of chiefs and headmen who had signed the treaties on behalf of their nations three-quarters of a century before. In addition to terminating the destructive allotment system, the IRA afforded tribes an opportunity to organize for their common welfare and to adopt written constitutions that would be formally approved by the secretary of the interior and that granted them status as federally chartered corporations.

The tribes who agreed to accept the provisions of this act could employ their own legal counsel (with the approval of the Secretary of the Interior) and even issue charters of incorporation for business purposes. More important, the act established a special fund from which the secretary of interior could make loans to tribally chartered corporations for economic development purposes. Tribal members were extended the opportunity to vote on whether or not they wanted to participate in the benefits and accept the responsibilities of the IRA, but this vote was to be a one-time opportunity. If a majority of the tribe voted against participation, it could not reconsider this decision at a later date. Tribes had two years to accept or reject the IRA. Within that period 258 elections were held; 181 tribes accepted the terms of the act while 77 tribes registered a negative vote. Even these provisions were significantly vague. The act read that the Indians on every reservation could vote on this opportunity and in some cases, indeed a substantial number of cases, there was more than one tribe living on the reservation in question. Consequently, we derive the new "consolidated" or "confederated" tribal names from the elections held under this act and these bodies then assumed the political status their predecessor entities once possessed. Thus, out of these IRA elections we find the Three Affiliated Tribes of the Fort Berthold Reservation, who formerly were the Mandans, Gros Ventres, and Arickaras; the Confederated Salish and Kootenai of the Flathead Reservation; and the Confederated Colville Tribe, which was formerly a large number of Indian bands occupying that reservation.

Another difficulty involved with the act concerned the sequence in which the elections were to be held. The Secretary of Interior was authorized under the IRA to transfer federal surplus and submarginal lands to the use of Indians who were landless. Once these lands were transferred, and this case occurred with some frequency in California, an election could be held by those Indians who moved onto the land to adopt the
provisions of the IRA and to approve a constitution. The question subsequently arose whether a tribe had to have land before it could adopt a constitution or whether a constitution could be approved with the idea of receiving a transfer of land. While these questions did not seem pressing at the time, over the years, as new groups were considered for recognition by the Interior Department, they became major barriers for small groups of Indians achieving federal status and joining in the benefits conferred by the act. Some Indian scholars believe that this question has never been satisfactorily handled in the decades since the IRA has become a reality.

When the Indian Reorganization Act was passed in 1934, the first impression was that it would bring about a monumental change in Indian affairs. While there was little new substantively in the act that could not be found in miscellaneous solicitor's opinions or memos of the Interior Department rulings, the act did lay the foundation for a resurrection of tribal government and power. The bureaucratic stranglehold and paternalistic orientation of the BIA were substantially modified. Administrative centralization was replaced by decentralized power in tribal governments. Once these initial positive changes had become institutionalized, however, continuing efforts to reform the bureaucratic stance of the government toward the tribes declined and a mass of additional, sometimes conflicting, opinions and memos accumulated to handicap the tribes in their further development efforts.

The political damage that had been inflicted upon tribal governments for so many decades in the past could not be undone overnight. The traditional forms of tribal government had been dormant for too long and much of the religious undergirding of the informal customs had been badly eroded. The format that emerged under the 1934 Act was almost a carbon copy of the structured, legalistic European form of government. Since tribal governments were floundering, the Bureau of Indian Affairs seized the initiative and drafted a model constitution that could be used by tribes as a starting point for their written documents. This model constitution in most cases became the final product, which should not be surprising since Congress in passing the IRA required that all constitutions be approved by the Secretary of the Interior before becoming operational (25 U.S.C. 476), and homogeneity rather than usefulness consequently became the virtue.

Secretarial approval of constitutions, by-laws, selection of legal counsel, and most tribal resolutions proposing land use and civil and criminal codes was in effect a veto power on the activities of the newly formed tribal governments. In some instances these restrictions were necessary. It was difficult if not impossible, for example, for reservation Indians to check
the question submitted could adopt a more activist role in pushing for recognition for small groups with the idea of eventually achieving a status similar to that of the BIA. This idea has never been fully realized.

In 1934, the first shift in Indian policy to accept the idea that the Interior Department's role was to promote the health, education, and well-being of the tribes, rather than control or manage them, was a significant change. This role was to be achieved through grants and the establishment of tribal councils. This shift in policy was a recognition of the need to support the tribes' continued existence and self-governance.

The efforts to revitalize tribal governments continued with limited success throughout the 1930s and 1940s. Although the exercise of power by tribal governments took on the appearance of increasing sophistication, these developments came at the expense of certain tribal traditions and informal customs that had served the communities well for nearly three-quarters of a century. Indians, consciously or not, adopted the whites' legalistic perspective on government. The 1950s, however, posed a significant threat in tribal development. The Eisenhower administration initiated a policy of "termination," initially discussed during the early years of the Truman administration, designed to eliminate the reservations and assimilate the Indians into the mainstream of the white social and economic systems. Termination was a contemporary version of allotment since it divided the tribal assets on a per capita basis and then required the individual tribal members to forfeit their federal rights to services and supervision. The Bureau of Indian Affairs, as it had during the allotment days, played a major role in terminating the tribes and selling off the tribal land estates.

In the overall scheme of things, however, the Eisenhower "termination" policy was but a momentary, though totally destructive, digression from the continuing resurgence of tribal government development. In the two decades following the Eisenhower years, tribes were once again placed in a position to seize the initiative that had begun in the 1930s to exercise self-governing powers. The social programs of the 1960s, the New Frontier and the Great Society social welfare legislation, enabled the tribal governments to be sponsors of federally funded programs, and tribal governments rapidly expanded to take advantage of these opportunities. Soon each tribe had developed its own massive bureaucracy to deal with the multitude of programs for which it was eligible. Although the IRA had enabled tribes to charter organizations for the purpose of economic
development, few tribes had any experience in operating complicated subsidiaries. The first thought of many tribes during the 1960s was to designate the tribal council as the housing authority, the economic development corporation, and even sometimes the school board. But it was quickly apparent to both tribes and the federal funding agencies alike that this kind of institutional response was fraught with complications. Consequently, HUD, EPA, and other federal agencies required tribal councils to charter separate housing authorities and nonprofit development corporations. One of the major problems to arise in these efforts to develop subsidiary institutions was the fact that many programs needed to provide in-kind matching grants and materials and the tribal council had control of and responsibility for tribal property and income. In order to make certain that their people derived every possible service and program for which they were eligible, tribal governments were burdened with responsibilities far in excess of anything conceived during the IRA's formative years.

Self-Determination: Reallocating Control and Funding from the Bureau of Indian Affairs to Tribal Governments

In 1975, Congress adopted another very important law—the Indian Self-Determination and Education Assistance Act (Public Law 93-638). This act transferred significant amounts of control and funding from the Bureau of Indian Affairs and other federal agencies to tribes as "subcontractors" to open and manage their own service agencies and programs. These service agencies and providers included everything from tribal government divisions such as courts, to tribal social services and counseling services to hospitals. The act also provided for a demonstration project for some tribes to assume complete control (known as "compacting tribes") over all their federal funds and services. There have been serious problems with the implementation of the act. One of its inherent contradictions has been the simultaneous reinforcement of the federal trust responsibility to tribes that requires federal oversight and control of the funding to tribes, while at the same time seeking to promote tribal independence and self-determination as subcontractors or compacters.

If you are a tribal citizen, or live on or near a tribal reservation, you may be more familiar with this act as the source of your tribe's annual federal "638" or "contract" or "compact" funds. Each year, your tribal council passes a resolution prioritizing its most important budget requests (or negotiates a compact for compacting tribes). The BIA and your tribe then negotiate which items on the list will be funded and how much funding the tribe will receive for each item. Because these 638 funds are often a primary source of funds for stand fron
In an address he gave in 1970, President Richard Nixon announced a new direction for federal Indian policy. He repudiated the policy of termination dating from the 1950s, and also rejected initiatives from the 1960s “War on Poverty” that had enlarged federal bureaucratic management and oversight. Instead, he gave his support to policies that would support tribal self-determination and self-governance.

Congress endorsed this new policy direction in 1975 with passage of the Indian Self-Determination and Education Assistance Act (Public Law 93-638). This act enabled Indian nations to make contracts with the federal government for the purpose of taking over a share of the administrative responsibilities and resources previously handled by the BIA. Contracts under the Self-Determination Act have affected education, law enforcement, forest management, and many other functions on reservations.

Partly to calm Indian nations’ fears of termination, the Act specifically preserved the federal trust responsibility and the Federal–Indian relationship. What this meant in practice, however, is that the BIA retained some control over which contracts received funding. The tribes submitted lists of contracts to be funded in priority order, and the BIA made decisions based on those lists. Furthermore, when contracted activity involves federal trust resources such as land, timber, fish, or water, the BIA must approve all decisions made by the contracting tribe.

Implementing the Self-Determination Act has been hampered by resistance from the BIA, which has stood to lose power and jobs. Another problem with the act has been the bureaucratic burden that has accompanied each contract. Because these contracts put Indian nations in the position of carrying out administrative responsibilities of the federal

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government, a host of federal laws and regulations regarding civil rights, employment, labor, and other matters have to be followed, and several layers of BIA officials have to oversee compliance. Tribal bureaucracies have had to grow to keep up with all the rules and requirements.

Critics of the self-determination policy have complained that it did not achieve any meaningful transfer of power from the federal government to the Indian nations. For example, according to George Esber, "In essence, the United States is agreeing to legal compliance with the self-determination policy by granting Indian participation in Anglo activities. This is not equivalent to the governance of Indian affairs as Indian undertakings." Nonetheless, the Self-Determination Act at least moved federal policy in the direction of greater autonomy for Indian nations, and handed tribes some significant resources to use for redevelopment.

To remedy some of the problems associated with contracting under the Self-Determination Act, Indian nations led a reform effort that produced amendments to the act in 1988 authorizing the Tribal Self-Governance Demonstration Project. Under this project, twenty (later thirty) Indian nations went beyond contracting for specific BIA services, and received large blocks of federal funds to manage themselves. Self-governance "compacts" between the federal government and participating Indian nations authorized these nations to move money among programs, prioritize spending, redesign services, and be responsible for their own choices. Funding for the compacts was allocated from existing BIA funds, with reference to amounts the tribe would have received absent the agreement. To qualify for participation in the Self-Governance Demonstration Project, Indian nations had to develop a spending plan and demonstrate sound fiscal management and a history of successful administration or prior 638 contracts. As in the Self-Determination Act, Congress reaffirmed and continued its trust responsibility within the new funding framework.

The self-governance initiative received strong support from tribal leaders. According to Professor Robert Porter, "The Indian nations appreciated the negotiated and respectful manner in which Congress was withdrawing the BIA from their daily affairs. While the project preserved the trust responsibility, it allowed the Indian nations to develop governmental competence without fear of losing federal funds." Self-governance policy unquestionably put more money with fewer bureaucratic restrictions in the hands of tribal governments. Most important, it defined the federal—tribal relationship on the basis of mutual consent as reflected in compacts.

In 1994, Congress passed the Tribal Self-Governance Act, which established the self-governance policy on a permanent basis. Under this per-
permanent legislation, up to twenty additional tribes may join the compacting process in any given year, and compacts may include Interior Department programs outside the BIA, such as national parks on or near reservations. The federal government's trust responsibility remains in the form of an annual "trust evaluation," in which the secretary of interior checks to see if any trust assets, such as land or water, are in imminent jeopardy. If such conditions exist (for example, if a tribe clear-cuts its own forest), the secretary can unilaterally reassert federal responsibility. The terms of the trust evaluation are established in the compact itself, however, giving the Indian nations a greater measure of control over how it is conducted. It is not an easy matter to reconcile the federal government's ongoing treaty and other trust obligations with a true policy of self-determination for Indian nations.

Questions

1. Which U.S. policy do you think had the most harmful effect on tribal governments?
2. Why did Congress abandon treaty making with Indian tribes? Do you think the abandonment of treaty making was harmful to tribal governments?
3. How did the Office of Indian Affairs further the erosion of tribal sovereignty?
4. Do you think that the General Allotment Act had an impact on the internal legal systems of tribal governments? Why or why not?

In Your Community

1. Research the following questions about your tribe's history of contact with the United States:
   - Was your tribe removed or placed on a reservation?
   - Was the land of the tribe allotted?
   - Does the tribe have a constitution that was written following the Indian Reorganization Act?
   - How have these policies affected the way the tribe currently operates its government?
2. Research the following issues about your contemporary tribal government:
   - Is your tribe a "contracting tribe" or a "compacting tribe"?
   - What does a typical annual "Tribal Priority Allocation" request include for your tribe?
How much federal government supervision or control comes with the 638 funds?

**Glossary**

*Abrogated:* Abolished by authority.

*Allotment:* The Allotment Act (also known as the Dawes Act) authorized the U.S. president to allot (divide) portions of reservation land to individual Indians.

*Blood feud:* A feud in which members of the opposing parties murder each other.

*Cession (ceded):* Yield or surrender, give up ownership or responsibility.

*Doctrine of discovery:* The legal theory that the Europeans gained title to the land in North America because they “discovered” the land.

*Domestic dependent nations:* A legal status describing tribal nations that retain some sovereignty but are also dependent on the United States for guidance and protection.

*EPA:* Environmental Protection Agency.

*HUD:* Housing and Urban Development.

*Individualistic:* Relating to the character of persons as individuals rather than as members of a community.

*Paternalistic:* Like a father; benevolent but intrusive.

*Ratified:* Formally approved by authority.

*Self-determination:* Sovereignty; the right of Native American tribes to make their own laws and be governed by them.

*Trust relationship:* A special legal relationship between the United States and Indian tribes, in which the U.S. government has a duty to protect and oversee affairs pertaining to tribes.
Suggested Further Reading

Books


Articles


Notes

CHAPTER 6

Introduction to Tribal Courts

THE REMAINDER of this book focuses more specifically on tribal justice systems, including the history and development of those systems (especially tribal courts), the changing scope of tribal power and authority in both criminal and civil law, and the use of nonadversarial and traditional forms of dispute resolution in many tribal justice systems across Indian country. The excerpts included in this text attempt to strike a balance between unique tribal legal heritages and the mandates of U.S. law. The effort to strike this balance is being made, in large part, out of a recognition that real tribal sovereignty only comes when tribal peoples realize that the effects that settler colonialism have wrought on tribal peoples mean that they cannot return to an idealized precolonial past when their communities lived harmoniously according to their traditions without the social ills they face today. Though clearly Euro-American colonization has done incredible violence to the Native peoples of the Americas (and not just them), it is also likely that no human society has ever been entirely without conflict, violence, and other kinds of social problems, including precolonial tribal societies. That being said, though we believe it important to acknowledge both that precolonial tribal society was not perfect and that the history and contemporary consequences of colonization have done incredible violence to tribal nations, we are not saying that tribal nations have thus given up their right and capacity to govern themselves and to live by the norms, structures, and practices that derive both from their unique histories and their current conditions. As a result, the texts excerpted in this chapter, and in the whole of this text, are committed to the view that the
fundamental, shared rights and capacities of contemporary tribal nations to self-determination require their striking a balance between their unique histories and traditions and those acquired during their long (and ongoing) experience with settler colonialism, and working to incorporate both into the norms, structures, and practices that make up the legal systems governing their communities today.

As the Hopi Appellate Court held,

The customs, traditions and culture of the Hopi Tribe deserve great respect in tribal courts, for even as the Hopi Tribal Council has merged laws and regulations into a form familiar to American legal scholars, the essence of our Hopi law as practiced remains distinctly Hopi. The Hopi Tribe has a constitution, ordinances, and resolutions, but these Western forms of law codify the customs, traditions and culture of the Hopi Tribe, which are essential sources of our jurisprudence.

As you read the different excerpts, ask yourself: Do the authors pay attention to how different tribal justice systems have tried to strike a balance between Anglo-American legal practices and tribes’ unique history, traditions, and legal heritage? If so, how have these balances been achieved and maintained over time? What aspects of Anglo-American law do tribal courts usually adopt, and what aspects of their own tribal legal heritage do they usually turn to? Do all tribal justice systems make the same exact balance, or do they each adopt and keep different aspects of the Anglo-American and their own legal heritages?

We begin by looking at the history of tribal courts and how changing concepts and policies about the relationship between Anglo-American law and Native America’s unique legal heritages have influenced the development of tribal justice systems over time. First, we will review the creation of Courts of Indian Offenses as explored by Vine Deloria Jr. and Clifford Lytle. The Courts of Indian Offenses are the predecessors of many tribal courts in operation today, but among a few tribes they are still the only working courts.

We will read an excerpt of the “Rules of Indian Courts” prepared in 1892 by then commissioner of Indian affairs, Thomas J. Morgan, in which, as you will see, tribal ceremonial practices, customs, and traditions were explicitly prohibited, prohibitions that were to be enforced by Indian Courts. The excerpt here is taken from a Report to the House of Representatives in the U.S. Congress as part of a larger report on the efforts by the Bureau of Indian Affairs to execute the plans of tribal land allotment and the assimilation of tribal citizens into non-Native U.S. society, plans that were part of the
dominant federal policies for addressing tribal nations during this period. As you can see from these examples, the first courts operating in Indian country were clearly not meant to protect and promote the sovereignty and unique legal status of tribal nations.

Next we have an article by Christine Zuni that reviews the historical development of modern tribal courts. And finally we will review a U.S. Supreme Court case from 1896 in which the Cherokee Nation court system was recognized as a logical extension of Cherokee sovereignty.

This brief history will reveal how the adversarial-style dispute resolution system of Anglo-American legal traditions was first introduced in Indian country primarily as a means to control and oppress, rather than actually serve, tribal nations. We will see, however, that in many instances, the tribal citizens called to be judges of these courts found ways to rely on their customs and traditions to resolve disputes, even when they were forbidden to do so. We will see also how tribal courts were introduced as acts of self-government by some tribes, often in an effort to remedy the problems caused by Courts of Indian Offenses. This review will set the stage for the next several chapters, which consider the operation of tribal courts today and the continued importance of relying on each tribe's unique legal heritage in the resolution of contemporary disputes.

**COURTS OF INDIAN OFFENSES**

*Vine Deloria Jr. and Clifford M. Lytle*

During the early part of the nineteenth century when Indians were being pushed westward to the reservations, law and order in Indian country was controlled by the military. At this time, the Bureau of Indian Affairs was a part of the Department of War. In 1849, with the creation of the Interior Department, the Bureau of Indian Affairs was transferred to this new department and Indian affairs were placed under civilian control. The military still continued to exercise some police functions on the isolated frontiers, but, in general, law and order was a responsibility of the Indian agents...

Courts of Indian Offenses most probably began with the appeal by disputing chiefs to the agent as arbiter of problems that could not be resolved in the traditional tribal manner. . . . On some reservations the early councils were both judicial and legislative and exercised, after the influence of the chiefs had declined, executive powers also. Courts of Indian Offenses mark the first evolution away from one body holding all three political powers in its hands to the tripartite arrangement we see on many reservations today.

The development of the Indian police also played a critical role in this movement toward independent institutions. Unable to rely upon the traditional chiefs to carry out their instructions, many of which were arithmetical to the old people, the agents early began to enroll Indians as agency policemen. This new group enabled the agent to control the Indians without having to rely upon the presence of federal troops, which in many cases might have created an unpleasant incident or a war. Although the rise of Courts of Indian Offenses certainly indicated the increasing application of the white laws over the Indians, they were not wholly without respect among the Indians. Manuelito, one of the most respected and beloved of the Navajo war chiefs, served for a time as an Indian policeman and performed duties in a Court of Indian Offenses.

The allotment policy considerably increased the need for the Courts of Indian Offenses. In order to break up the traditional family groupings on many reservations, allotments were deliberately mixed so that family members might have their lands scattered all over the reservations. The idea behind this bureaucratic hodgepodge was to encourage the younger generation to move away from the elders and to begin farming on their own. The result of the application of the idea was that it became difficult if not impossible for communities that were dependent on tribal customs to conduct some of their ceremonies because the clan or family was so dispersed. The Courts of Indian Offenses then served to provide them with some forum in which a modicum of justice could be realized. Subsequent sale of allotments and the settling of white purchasers within the reservation borders made it virtually impossible to do anything except rely on these courts for redress.

In 1883 the Courts of Indian Offenses were made a regular part of the Bureau of Indian Affairs activities on the reservations. The status of these courts was never very clear since Congress frequently did not appropriate sufficient funds to make them effective, and they were described, in the only case to deal directly with their legality, *United States v. Clapox*, 35 Fed. 575 (D.C. Ore. 1888), as "mere educational and disciplinary
instrumentalities by which the Government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." One commentator, Rice, suggested that the Courts of Indian Offenses "derive their authority from the tribe, rather than from Washington," but this attempted justification has never become a popular explanation because of the documented abuses of Indians in these courts by the agents.

These courts have become known as CFR courts since they operated under the written guidelines as set down in the Code of Federal Regulations. But when surveying the literature concerning their operation it is difficult to determine whether they were really courts in the traditional jurisprudential sense of either the Indian or the Anglo-American culture or whether they were not simply instruments of cultural oppression since some of the offenses that were tried in these courts had more to do with suppressing religious dances and certain kinds of ceremonials than with keeping law and order. The sacred Sioux ceremony of "keeping the soul," eloquently described in The Sacred Pipe by Black Elk to Joseph Epes Brown, which was basically a condolence rite, was banned by these courts on the Dakota reservations to the consternation of the people.

Although the CFR courts were staffed by Indian judges, they served at the pleasure of the agent, not the community. The Indian agent appointed his judges as a patronage exercise, which rewarded the Indians who seemed to be assimilating while depriving the traditional people of the opportunity to participate in this vital function of the community. Even though the judges invested a good deal of energy and prestige in serving on these courts, too frequently the ultimate decision rested with the Indian agent, who often acted as though the people had no right to understand the reasoning behind his arbitrary decisions. Interestingly, there was never any real statutory authority for the establishment of the CFR courts and their illegitimacy was rationalized under general powers that were lodged in the office of the commissioner of Indian affairs. At its zenith, the CFR court system was operating on about two-thirds of all reservations. With the authorization of the IRA corporate form of tribal government, all but a few tribes assumed judicial functions as a manifestation of self-government and rid themselves of this hated institution. Since these courts did not have the sanction of the whole tribal community, even the most beneficial parts of their operations have been eyed with suspicion by Indians and historians alike.
RULES FOR INDIAN COURTS

Thomas J. Morgan*

Offenses: For the purpose of these regulations the following shall be deemed to constitute offenses, and the judges of the Indian court shall severally have jurisdiction to try and punish for the same when committed within their respective districts.

a) Dances, etc.—Any Indian who shall engage in the sun dance, scalp dance, or war dance, or any other similar feast, so called, shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days or by imprisonment for not exceeding ten days; and for any subsequent offense under this clause he shall be punished by withholding his rations for not less than ten nor more than thirty days, or by imprisonment for not less than ten nor more than thirty days. . . .

c) Practices of medicine men.—Any Indian who shall engage in the practices of so-called medicine men, or shall resort to any artifice [sic] or device to keep the Indians of the reservation from adopting and following civilized habits and pursuits, or shall adopt any means to prevent the attendance of children at school, or shall use any arts as a conjurer to prevent Indians from abandoning their barbarous rites and customs, shall be deemed to be guilty of an offense, and upon conviction thereof, for the first offense shall be imprisoned for not less than ten nor more than thirty days: Provided that for any subsequent conviction for such offense the maximum term of imprisonment shall not exceed six months. . . .

Misdemeanors

That if an Indian refuses or neglects to adopt the habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant and guilty of a misdemeanor, and shall, upon the first conviction thereof, be liable to a fine of not more than five dollars, or to imprisonment.

LEGAL HISTORY OF TRIBAL COURTS

Christine Zuni*

A. General Overview

The history of tribal dispute resolution predates both state and federal courts. This history is as different from the history of state and federal courts as the Indian culture and value system are different from the dominant culture and its value system. The history of tribal court is dominated by the federal-tribal relationship.

While it may be said that all tribes have their own unique history, generally the history of the development of tribal court systems is similar. In addition to the tribal court systems that we will speak of, several tribes, including several of the Pueblos of New Mexico, operate entirely within a “traditional” system. A mirror to reflect the Anglo-American jurisprudence model, whether in whole or in part, is missing; it has never been there. Under such tribal systems the methods and the ends of dispute resolution differ. In the case of non-traditional tribal courts, federal law interjected Anglo-American laws and concepts irrespective of the difference between traditional law and Anglo-American law and the gulf between the two. Recognizing that a gulf exists is the first step towards understanding the impact Anglo-American law and its concepts of justice has had on native peoples. This sobering recognition is also instrumental to comprehend the challenges facing modern day tribal court systems, structured in the Anglo-American mode, struggling to remain relevant to, or at least respectful of, native social and political thought. Interestingly, a similar challenge faces traditional systems, as they seek to maintain traditional aspects of their systems, while “modernizing” their operations to meet increased and changing demands. External mandates premised on the Anglo-American jurisprudential model of justice press on these systems as well.

B. History

Prior to 1871, when treaty-making with tribes ended, the federal policy was one of respect for tribal self-government and traditional forms of

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tribal justice. Congress recognized this right through treaties. Tribes retained sole jurisdiction over Indians and concurrent jurisdiction over criminal conduct by non-Indians. In *Worcester v. Georgia*, the United States Supreme Court ruled that the state of Georgia had no jurisdiction over Indians within Indian country, unless Congress expressly authorized it. There was no limitation on tribes in terms of their ability to use traditional forms of judgments, i.e., restitution, banishment, and death.

From 1871 to 1934 the federal policy was to end tribal self-governance. This was the period in which the General Allotment Act was enacted and Indian lands were divided into individual holdings, with the remainder opened to settlement, and Indians subjected to state law. In 1883, Courts of Indian Offenses were created to replace tribal forums of justice. The purpose of these courts was to "educate" and "civilize" the tribes. The imposition of agency-appointed chiefs, judges, and law enforcement officers served to weaken traditional tribal law and procedure. In 1885, Congress passed the Major Crimes Act, to extend federal court jurisdiction over felony criminal offenses committed by Indians on Indian reservations. Congress was spurred by *Ex Parte Crow Dog* in which Crow Dog, the accused murderer of Spotted Tail (both Brule Sioux), was convicted of murder in the First District Court of Dakota, Dakota Territory, and sentenced to death. The Supreme Court found the district court to be without jurisdiction, finding Crow Dog was subject to the jurisdiction of his tribe and not to the United States or its general laws. The traditional remedy included reconciliation and an ordered gift. In *Talton v. Manzana*, the Court found that the Bill of Rights under the United States Constitution, providing protections for criminal defendants, did not apply to tribal criminal proceedings. This was the precursor to the Indian Civil Rights Act of 1968. The effect of this period was the weakening of traditional governments and law, as well as the loss of 90 million acres of tribal land to non-Indians from the date the General Allotment Act was passed to 1934.

From 1934 to 1953, the federal policy sought to restore tribal self-governance, which included the creation of tribal courts. The Indian Reorganization Act (IRA) was passed by Congress in 1934 to accomplish this purpose. Under the Act, tribes could adopt written constitutions. Model constitutions were provided and contained provisions whereby tribal councils could create tribal courts to replace Courts of Indian Offenses. Many tribes adopted these model constitutions. Not all tribes which organized under the IRA adopted constitutions and a number of tribes did not organize under the IRA. The model constitutions and model codes limited criminal jurisdiction of tribal courts to minor offenses, subjected laws and ordinances to Interior Department approval, and limited sentencing
powers of tribal courts to a maximum period of six months' imprisonment for criminal offenses.

From 1953 to 1968, the federal policy was to terminate the federal trust responsibility and transfer jurisdiction to states. One purpose of the policy was to eliminate tribal courts. Although most tribes and their court systems survived termination, tribal councils were discouraged from efforts to develop more effective tribal courts. The structure of courts remained unchanged and tribes were forced to bear greater funding burdens. Congress also passed Public Law 280 which allowed state courts to assume criminal and civil jurisdiction over Indians within Indian country without tribal consent. Williams v. Lee upheld tribal court jurisdiction in non-Public Law 280 states over civil disputes by non-Indians and Indians within Indian country. Tribal court criminal jurisdiction remained limited. Yet, federal jurisdiction under the Major Crimes Act and the General Crimes Act was not vigorously exercised. The tribal codes developed by the Interior Department and adopted by tribes remained basically unchanged since 1934.

In 1968, the Indian Civil Rights Act (ICRA) was passed and the federal policy of recognizing tribal powers of self-government, including the authority to establish court systems for administering justice, was once again reaffirmed. The Indian Civil Rights Act, however, provided no federal funding to enable tribes to restructure or improve their court systems. Moreover, it permitted federal courts to review by writ of habeas corpus the legality of detention by order of an Indian tribe. The Act required tribal courts to afford criminal defendants many of the basic due process rights made applicable to federal and state courts under the United States Constitution. It placed requirements on tribal self-government which reflect Anglo-American principles of justice. The Act also limits the sentencing power of tribal courts for criminal offenses to one year or a $5,000 fine upon conviction.

From 1968 to the present, Congressional policy has been to promote tribal self-government and increase funding for court operations. However, many courts are currently operating on tribal and federal funds which are not nearly comparable to similarly situated state courts. Tribal courts are under-funded and under-staffed because many tribes lack funds to adequately supplement federal funds to assist courts with the development of the court system and expanded tribal jurisdiction. Recent U.S. Supreme Court decisions have taken criminal jurisdiction over non-Indians and non-member Indians from tribal courts at a time when both live, work, and are routinely present on reservations. Criminal jurisdiction over non-member Indians was restored by Congressional amendment to
the Indian Civil Rights Act in 1992. Some tribes prosecute major crimes listed under the Major Crimes Act due to the lack of federal enforcement.

The United States Supreme Court recently found a tribal court lacked jurisdiction over a civil dispute between non-Indians in Indian country. Many tribes have amended their tribal codes, moving away from the Code of Indian Offenses and the IRA model codes, but some still employ codes whose major criminal and civil provisions have not changed since they were first adopted under the IRA.

In 1993, President Clinton signed tribal courts legislation into law. The legislation provided for federal appropriations to be made available to tribal courts for their exclusive use. Tribes still await these appropriations.

A central proposition in federal Indian law governing tribal nations, and hence tribal judicial systems, is that Indian nations retain vestiges of their original sovereignty and therefore have residual authority to govern their own affairs. Their sovereign qualities were initially recognized by the federal government when it negotiated treaties with Indian nations as it did with other foreign nations. Thus, the power to establish and maintain tribal judicial systems is an inherent, retained power that was never surrendered.

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**TALTON V. MAYES**

**United States Supreme Court***

[The appellant was prosecuted in Cherokee tribal court for murder. He challenged his conviction in federal court, claiming that the Cherokee court did not comply with the U.S. Constitution.]

By treaties and statutes of the United States the right of the Cherokee nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized. And from this fact there has consequently been conceded to exist in that nation power to make laws defining offences and providing for the trial and punishment of those who violate them when the offences are committed by one member of the tribe against another one of its members within the territory of the nation....

* 163 U.S. 376 (1896).
The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this court have long since answered the former question in the negative.

The existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.

Questions

1. How were non-Indian methods of dispute resolution introduced into tribal governments?
2. What was the origin of the Courts of Indian Offenses?
3. According to Deloria Jr. and Lyle, why were the Courts of Indian Offenses really just “instruments of cultural oppression” rather than courts serving tribal people?
4. According to the readings, did all tribal people “hate” the Courts of Indian Offenses, or did some actually work for them? Why do you think such respected leaders as Manuelito in the Navajo worked as Indian judges in these courts?
5. Were you surprised by the “Rule for Indian Courts” as established in 1892? What was the intent of those rules?
6. In *Talton v. Mayes*, the U.S. Supreme Court recognized that the Cherokee nation has the power to “make laws . . . and provid[e] for the trial and punishment of those who violate them . . . .” However, the case also reminds us that the Cherokee nation is “subject to the paramount authority of the United States.” Are these two notions contradictory? How does the U.S. Court recognize tribal courts today?
Introduction to Tribal Courts

In Your Community

1. Was your tribe under the control of a Court of Indian Offenses?
2. Does your tribe or nation currently have its own court system? When was it created?
3. Check the date of its creation with Zuni's general history of tribal court development. According to Zuni, what was the leading federal Indian policy at the time your tribe or nation's court was created?

Glossary

Adversarial: Opposite sides or interests.

Anathema: Something that is intensely disliked.

Anomalous: Out of the ordinary.

Appropriations: A legislature's setting aside for a specific purpose a portion of money raised by the government; a governmental taking of land or property for public use; taking something wrongfully.

Arbiter: A person chosen to decide a disagreement.

Code of federal regulations: The compilation of all their rules and regulations put out by federal agencies.

Dispute resolution: To resolve a disagreement between persons about their rights or their legal obligations to one another.

Jurisprudence: Legal philosophy.

Modicum: Small, moderate amount.

Nonadversarial: Not opposed or not having opposing interest against.

Patronage: The privilege of some public officials to give out jobs on their own discretion, without going through civil service.

Settler colonialism: A type of colonization in which the actions by colonizing governments and populations are intended to permanently take indigenous lands and erase indigenous political identities.
Tripartite: Divided into three parts.

Writ of habeas corpus: A judge's order requiring that someone holding a person bring that person to court.

Suggested Further Reading

Books


Articles


Note