The assertion that tribal governments and courts are either functionally or inherently incapable of providing justice was also challenged.

The Gila River Community Court, as noted previously, has handled thousands of cases—Indian and non-Indians, without ever being challenged under the Indian Civil Rights Act.[46]

Mario Gonzales, the former chief judge of Rosebud Sioux, testified that he had many non-Indian cases and always leaned over backward to assure that justice prevailed.[47]

Gary Kimble, former counsel for his reservation at Fort Belknap, and currently a member of State legislature, indicated that some tribal governments and courts were unsophisticated, and needed support, but the same was true for their counterpart State courts.[48]

The view that whatever disabilities the tribal exercise of jurisdiction may suffer is not inherently different from other government, was echoed by Robert Burnett:

> [The] Court system of the tribe is as good as their * * * in fact, better * * * The rest of the system (excluding the State supreme court) is handled by people who certainly are easily influenced by political situations * * *[49]

The existence of jurisdictional power, however, does not necessarily mean its exercise. Chief Judge Owens of the Yakima Nation's court indicated that in his view jurisdiction over non-Indians concerning fishing was crucial and that he appreciated the cooperation he had received to date from the State Fisheries Department in their appearances in tribal court to testify against violators (non-Indians). He, however, did not think it was necessary to exercise jurisdiction over Toppenish, a predominantly non-Indian city within reservation boundaries.[50]

The Warm Springs Reservation indicates that while they have jurisdiction over non-Indians, they have not exercised such. This restraint is due to the excellent jurisdictional cooperation existing between the tribe and neighboring jurisdictions—State and local—the fact of jurisdiction, however, is basic to the maintenance of this relationship.[51]

Findings

One: Congress has not terminated tribal jurisdiction over non-Indians.

Two: The exercise of jurisdiction assumed by Federal Government or granted to the States is in most instances concurrent with that retained by the tribes.

Three: The issue of jurisdiction over non-Indians has generated much hostility and emotionalism in both the non-Indian community and Indian communities.

Four: The issue of jurisdiction over non-Indians is not appropriately addressed by jurisdictional legislation.

Five: The long-term solution to this political-emotional problem lies in returning to a situation where Indian reservations—containing sufficient land for development and tribal survival and growth—

[46] See Chapter V.
[47] South Dakota Transcript, at 344 et seq.
[48] Montana Transcript at 100–105.
[49] South Dakota Transcript at 265.
[50] Northwest Transcript at 664–665.
[51] For an expanded discussion of the Warm Springs situation, see chapter V, section A.

are owned and occupied almost exclusively by the individual Indian tribe.

Six: A number of tribes currently have programs to consolidate their land bases.

(*a*) These programs are meagerly funded.

(*b*) Many non-Indians have indicated a willingness to sell out and leave the reservation.

Recommendations

Congress should establish a long-term program for the re-purchase of non-Indian owned lands within reservation boundaries.

(*a*) There should be separate negotiations, under congressional charter, with each tribe and the non-Indian interests in that area to develop the components of each reacquisition plan.

(*b*) The role of the Federal Government in negotiations should be that of trustee with the duty to assure tribes the right to assess their needs and not a party of interest.

(*c*) Plans will by necessity vary, but could include:

(1) Expansion of reservation land bases.

(2) The provision of life-estate or similar devices for non-Indian interests, rather than immediate sale.

(3) Redefinition of reservation boundaries only with tribal consent.

(4) Exchange of lands where appropriate.

(5) Allocation of financial responsibility, and the provision of a variety of funding mechanisms.

(*d*) This process should not be used for any other purposes than land consolidation. It would be an unconscionable abrogation of the Nation's moral obligation to utilize this process to terminate any existing Indian rights.

e. An appropriate mechanism for such planning would be the establishment of a congressional commission authorized to institute negotiations, and report to Congress on a reservation-by-reservation basis, the negotiated plan:

(1) The Commission responsibility would be limited to facilitation and reporting to Congress on a case-by-case basis the plan achieved for each reservation.

(2) Congress should appropriate directly to tribes the necessary funds for planning and technical services.

D. Taxation

As with all analysis of the sovereign nature of tribal governments, the discussion takes its genesis from *Worcester* v. *Georgia*,[1] in which Justice Marshall referred to Indian tribes as distinct, independent, political communities which were, at once and the same time, domestic dependent nations. More recently, the U.S. Supreme Court referred to them as "unique aggregations possessing attributes of sovereignty over their members and their territory."[2] The nature and extent of those attributes, especially when in relation to local, State and Federal governments, has been a matter of increasing concern and litigation

[1] 31 U.S. (6 Pet.) 515 (1832).
[2] *United States* v. *Mazurie* 419 U.S. 544 577 (1975).

as the tribes begin to reassert their powers—including taxation—and gain control over their resources and destiny.[3] This comes at a time when State and local governments are searching for ever broader sources of revenue to meet the increasing demands of their ever rising costs and burgeoning bureaucracies. It is reasonable to expect, and not surprising to see, increased competition for the jurisdictional authority to exploit by taxation any potentially available resource. This is especially true on many Indian reservations where heretofore, underdeveloped land and resources are potential multi-million dollar generators of tax revenues.[4] Much of the legal analysis for this section is taken from or based upon a paper prepared for the Task Force by Daniel H. Israel, "Proposal for Clarifying the Tax Status of Indians," June 1976. For an excellent discussion of taxation, see Riehl, "Taxation and Indian Affairs" Manual on Indian Law (AILTP, 1976) West (ed.)

Although the special tax status of Indian nations and individuals is central to their special legal relationships with the United States, there have not yet been extended long-term efforts by Indian tribes to exercise their sovereign powers in the field of taxation. Likewise, until recently, there have not been concerted efforts by the Federal and State governments to generate tax revenues from individual Indians or tribal governments. There have been, however, examples of all of these in the past which provide guidelines for jurisdictional assessments of the future.

1. FEDERAL TAXATION OF INDIANS AND INDIAN PROPERTY

In resolving questions concerning the extent of Federal tax jurisdiction over Indians and Indian property, it is generally accepted that Federal tax statutes apply to Indians and Indian property unless such taxation is inconsistent with specific rights reserved either by treaty or Federal statute. Thus, while the United States has recognized that Indian tribes are not taxable entities [5] the courts have taken a case-by-case approach to determine whether general Federal taxing statutes should apply in a given case to Indian individuals or to Indian property. In *Choteau* v. *Burnett*,[6] and in *Superintendent of Five Civilized Tribes* v. *Commissioner*,[7] the U.S. Supreme Court ruled that Federal income statutes were designed to apply to each individual resident of the United States and to all income from whatever source, including income earned by an Indian. Nevertheless, the U.S. Supreme Court in *Squire* v. *Capoeman*,[8] exempted income derived directly from a trust allotment because of a provision in the applicable treaty exempting the land from taxation. The allotment exemption was followed in *Stevens* v. *Commissioner*,[9] involving the Federal taxability of income earned from allotments which had been acquired by gift or exchange from

[3] Israel, "The Reemergence of Tribal Nationalism", Indian Land Development Institute-Oil, Gas, Coal and Other Minerals, sponsored by the Rocky Mountain Mineral Law Foundation, April 1976.

[4] Estimated revenues from planned coal gasification plants on the eastern end of the Navajo Reservation have been placed at 264 5 million dollars at present New Mexico State tax rates. Goldberg, "A Dynamic View of Tribal Jurisdiction to Tax Non-Indians", unpublished draft, January 1976.

[5] Internal Revenue Rule 67–284, 1967 Cum Bull 55.

[6] 283 U.S. 691 (1931).

[7] 295 U.S. 418 (1935).

[8] 351 U.S. 1 (1956).

[9] 452 F.2d 741 (9th Cir. 1971).

other Indians, but was not followed in *Holt* v. *Commissioner*,[10] involving the Federal taxability of income earned by a member of an Indian tribe from leased tribal lands. *Big Eagle* v. *United States*,[11] *United States* v. *Hallam*,[12] *Commissioner* v. *Walker*,[13] and Rev. Rule 67–284,[14] each analyze under various circumstances whether an Indian exemption exists limiting Federal tax liability.

It can be generally concluded that individual Indians and their properties located off reservation are subject to general Federal tax statutes absent specific exemptions.[15]

The disparity in the holdings of Stevens and Holt are inconsistent with the general policy of the Federal Government to encourage and support Indian use and development of Indian held lands. Where an individual Indian leases tribally held land and is subject to taxation on income derived therefrom, such taxation may have the effect of depreciating the lease value of that land to the tribe. Such patterns of taxation also cloud clear understanding of the individual Indian and the tribe as to the exact tax implication and may tend to chill the aggressive development and use of such land by Indian people. Moreover, where an Indian entrepreneur is dealing with many parcels of land which have different tax status, the confusion over what is taxable and what is not, is potentially very confusing. A clear determination that income derived by an Indian from Indian held lands is not taxable would go far to encourage the use development, and support of a policy of Indian self-determination.

2. STATE TAXATION OF INDIANS AND INDIAN PROPERTY

In resolving questions concerning the extent of State jurisdiction over reservation Indians, it has been held that the sovereignty of Indian tribes, although no longer the sole determining factor, must still be considered because it provides a background against which the applicable treaties and Federal statutes must be read.[16] Given the existing Federal relationship between Indian tribes and the United States, State taxation over reservation Indians or property can only be sustained if authorized by an act of Congress. Moreover, such authorization must be specific and precise for the Supreme Court recognizes that "the special area of State taxation * * * within reservation boundaries" requires that a narrow construction be given to the scope and extent of State taxation authority.[17]

In *Bryan* v. *Itasca County*,[18] the Supreme Court disposed of the question reserved in *McClanahan*, "whether the grant of civil jurisdiction to the State conferred by section 4 Public Law 280 * * * is a congressional grant of power to the States to tax reservation Indians except insofar as taxation is expressly excluded by the terms of the statute," holding that there was no grant of authority to tax reserva-

[10] 364 F.2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967).

[11] 300 F.2d 765 (Ct. Cl. 1962).

[12] 304 F.2d 620 (10th Cir. 1962).

[13] 362 F.2d 261 (9th Cir. 1964).

[14] Which spells out in detail the position of the Internal Revenue Service on exemptions of Indian income from federal taxation.

[15] See Riehl, Taxation and Indian Affairs, *supra*.

[16] *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973); *Moe* v. *Confederated Salish and Kootenai Tribes*, — U.S. — 48 L Ed 2d 96 (April 27, 1976), U.S.L.W. 4535 (Apr. 27, 1976).

[17] See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973); *McClanahan* v. *Arizona State Tax Commission*, *supra*; *Moe* v. *Confederated Salish and Kootenai Tribes*, *supra*.

[18] — U.S. — 96 S.C. +2102 (June 14, 1976), No. 75–5027 (decided June 14, 1976).

tion Indians. Indeed, the holding in *Bryan* with respect to taxation means that Public Law 280 reservations will be treated no differently than non-Public Law 280 reservations. The court states that:

> * * * § 4(b) in its entirety may be read as simply a reaffirmation of the existing reservation Indian-federal government relationship in all respects save the conferral of state court jurisdiction to adjudicate private civil causes of action involving Indians. We agree with the Court of Appeals for the Ninth Circuit that § 4(b) is entirely consistent with, and in effect, is a reaffirmation of, the law as it stood prior to its enactment. *Kirkwood* v. *Arenas*, 243 F. 2d 863, 865–866 (1957)."

As the *Bryan* court points out, no decision of the Supreme Court had yet defined the State's power to levy a personal property tax on reservation Indians. In *Moe* v. *Confederated Salish and Kootenai Tribes*, the Supreme Court addressed this issue and held that the States are prohibited from such taxation, but the States were permitted to require Indian merchants to collect a tax assessed against non-Indians purchasing cigarettes from the Indian merchant. Thus, States lack authority to tax either Indian income earned on a reservation,[19] or Indian real and personal property located on a reservation, whether held in trust or not.[20]

State authority over Indian individuals and their property off the reservation is exempt only if a Federal statute or treaty specifically provides for an exemption. *Mescalero Apache Tribe* v. *Jones*, *supra*.

The decisions concerning on reservation retail operations, whether owned by an Indian or by a non-Indian licensed as an "Indian trader," have concluded that they are not subject to State taxation in its business transactions with Indians.[21] It is clear from Moe that the State's requirement of the Indian tribal seller to collect a tax validly imposed on non-Indians is permissible and does not frustrate tribal self-government as protected in *Williams* v. *Lee*, 358 (U.S. 217 (1959), or a run afoul of any preexempted Federal fields.[22]

State taxation of non-Indians engaging in businesses dealing with Indian property has been upheld either because an express Act of Congress authorized the tax,[23] or because it was found that the State tax would not significantly interfere with the right of the reservation Indians to govern themselves.[24]

The prime concern of the State of Washington is reflected by its chief executive, Governor Daniel Evans, in his statement to this task force contained in Northwest transcript exhibit 25 at page 6:

> It is the State's opinion that the tax question is perhaps the most serious one. The concern in this area is only over possible evasion of taxation by the non-Indians who reside off the reservation. The non-Indians residing on the reservation and intend to use the purchase on the reservation, perhaps could be allowed to make the purchases on reservation relatively free from the tax by the State.

[19] *McClanahan* v. *Arizona State Tax Commission*, *supra*.
[20] See *United States* v *Rickert*, 188 U.S. 432 (1903).
[21] *Moe* v. *Confederated Salish and Kootenai Tribes*, *supra*; *Warren Trading Post* v *Arizona Tax Commission*, 380 U.S. 685 (1965).
[22] *States* v. *McGowan*, 302 U.S. 535, (1938).
[23] *E.g.*, *British American Oil Producing Co.* v. *Board of Equalization*, 101 Mont. 268, 54 p.2d 117 (1936) For specific acts authorizing and prohibiting taxation of Indians or Indian property: Authorizing, 25 U.S.C. §§ 349, 329, 398, 399, 401, 608, 610b, 674 (1970); Prohibiting, 25 U.S.C. §§ 36, 233, 355, 409a, 416i, 465, 487c, 492, 501, 564c (1970). As compiled in note: "Taxation limitation of State authority over reservation Indians—two new Mexico cases", 3 Am. Ind. L. Rev. 486 n. 19 (1975).
[24] New Mexico cases, 43 Am. Ind. L. Rev. 468 n. 19 (1875).

Mr. Robert Pirtle testified on behalf of the Colville Tribe of Washington at those same hearings and commented that:

> The State of Washington recently adopted a tax rule, Rule 192. Now Tax Rule 192 is a fascinating piece of legal work. It defines reservation in such a way as to exclude all nontrust land on the reservation.
>
> * * * * * * *
>
> * * * any person with two weeks of law school would know that they (the State) have no jurisdiction.[25]

Mary Ellen McCaffree, director, department of revenue, took the position that:

> (The Department of Revenue has not initiated court proceedings against Indians; litigation has occurred from challenges by Indians to the Department's administration of State tax laws.) (Parenthesis in original).[26]

It is not known whether any litigation has been started over tax rule 192, but the position that the State as the hapless defendent over innocent assertions of jurisdiction raises serious questions about the State's position.[27]

The director of revenue provided a rough estimate of annual expenditures for "defense" of Indian lawsuits at $11,654 plus some additional costs incurred for "secretarial support service, fringe benefits and overhead" incidental to the fees paid a private attorney.

It is difficult to sort out exactly what is meant by "has not initiated court proceedings." Perhaps that means that the challenged tax is assessed and for those Indian people who don't pay, there are no judicial enforcement efforts undertaken, which leaves unaccounted for the entire administrative mechanism. Most taxes are individually assessed and most individuals pay rather than resist and undertake expensive litigation. In fairness, these are unknown, and the Washington State revenue department has been most cooperative with the investigations of this task force. But the burden imposed on individual Indians and tribes cannot be denied, especially when it is recognized that they usually have to resort to private attorneys at significant expense, while the entire force of the State stands behind the revenue department which has the staff of the State attorney general at its disposal.

For the State of Washington, two issues emerge:

(1) How to collect taxes from non-Indian purchasers from on-reservation Indian retailers and (2) the competitive advantage which may accrue to on-reservation Indian retailers from being beyond the reach of State sales taxes. The favorite example used by the State of Washington of the first concern is lost revenues from cigarette sales on reservations estimated at from $8 million to [28] $9,500,000.[29] State officials also estimate loss of revenues from cigarette sales on military reservations within the State in excess of $8 million. The State has not taken any legal actions against the Defense Department over that loss, although they claim to be negotiating.[30] Likewise, where Washington

[25] Northwest transcript at 593–94.
[26] Northwest transcript, exhibit 42.
[27] Many States were not sued over racial imbalance problems until recent times when rights long abused were finally asserted. No one seriously asserts that States in these situations were innocent victims of lawsuits. This is not to say that the exercise of tribal sovereign rights protected largely by Federal preemption are basically racial, but that the analogy of rights long ignored now asserted is striking.
[28] Northwest transcript at 291.
[29] Northwest transcript 42 at 3.
[30] Northwest transcript at 299–300.

residents make purchases in Oregon which has no sales tax, there are significant losses of revenues which the State of Washington has done little about.[31] The fair conclusion is that Indians are the prime focus.

There is great emphasis by the State of Washington on the "inequity" of delivering services and collecting relatively few taxes. It should not escape notice that the State undertook jurisdiction over many of the areas voluntarily and such jurisdiction is a double-edged sword. The State of Washington's testimony is capsuled in one statement to the effect that:

> The thrust of our position * * * is that the benefits deriving or occurring to the Indian people [from tax exempt status] are not commensurate in dollars with the revenue loss being suffered by the state.[32]

Revenues expended in this area so often cited as support for services delivered to Indians are also viewed by Indians as support for State agency invasions on Indian individual and sovereignty rights. Thousands of Indian children have been and are today removed from Indian homes by State social service agencies. These children are placed outside of the natural homes by adoption and foster placement: many never to return to their culture or heritage. The rate of this practice is grossly disproportionate to the population representation of Indian people.[33] The State of Washington, for example, placed over 80 percent of Indian foster placements in non-Indian homes.

One witness described case histories of four children from one family taken under State jurisdiction from the Colville Indian Reservation, while in foster care, over $12,500 of these children's money was turned over to the State of Washington by the Bureau of Indian Affairs. That witness indicated the case history to be one of many such cases.[34] The point is that services are not always viewed as useful nor are they exclusively a cost to the State. Likewise, States derive revenues from sources other than traditional tax structures where Indians are involved. Dennis Karnopp, tribal attorney for the Warm Springs Reservation in Oregon, pointed out:

> Some people talk about we provide this service for you Indians and you don't pay taxes and that kind of thing. And we're fond of pointing out that the biggest taxpayer in Jefferson County [Oregon] is Portland General Electric which has two hydroelectric projects on the Deschutes River. And that River is the boundary of the reservation and thats the tribe's water rights and that one end of the dam is on the reservation, and half of the dam, at least, and half of the reservoir is on the reservation and would not have been there at all if the tribe had not consented to it. And, secondly, as a practical matter, the tribe is the biggest employer in Jefferson County.[35]

As indicated, State possessory interest taxes have been upheld as not being a significant interference with the right of reservation Indians to govern themselves.[36] An analysis of the economic impact on the value of the lease could not but conclude that it is reduced once the tax is applied. The reasoning that it is not a direct tax on the Indian is difficult to square with economic realities. The application of such a tax is also inconsistent with an overall policy to encourage Indian economic growth and support. Again, tribal resources are siphoned off in costly litigation where Federal help is not forthcoming in this clash between a State and a tribe.[37]

[31] Northwest transcript at 312–14.
[32] Northwest transcript at 324.
[33] See the "Child Custody" section of this report.
[34] Northwest hearings at 553; Northwest exhibit No. 21. It is believed that this practice is widespread but is presently diminishing.
[35] Northwest hearings at pp. 254–55; See also Report of Task Force One, American Indian Policy Review Commission, for a discussion of other areas.
[36] *Agua Caliente Band of Mission Indians* v. *County of Riverside, supra.* Southern California, vol. II at 44.

The representative of the department of revenue from Washington State does not believe litigation is helpful in the final resolution of these matters:

> * * * the position of the Department of Revenue * * * is that [tax disputes] will never be satisfactorily resolved in the courts in a manner equitable to all concerned. That the more of these court actions that go on, the more legal fees are down the drain as far as both the Indian people and the state are concerned. And the real answer lies in effective Congressional actions that takes care of the Indian needs and spreads the cost of taking care of Indian needs over the entire population of the United States rather than plunking it out of the states.[38]

Litigation is not the most efficient means of clarifying these matters, and they clearly would benefit from congressional clarification. The implicit notion that exclusion of State taxation should be removed in favor of nationwide support ignores, however, the conditions under which the State of Washington accepted statehood; that is, constitutional disclaimer of jurisdiction over Indian country. Such a view accepts the benefits of all of the land and resources accruing to the State and its citizens through Washington State Indian land cessions without accepting the responsibilities. This is not to say that the Federal Government does not have an overall responsibility with respect to Indian people, but this is in addition to, not instead of, those responsibilities, be they by limitation or otherwise, of the various States to their Indian citizens.[39]

There are other areas as yet unresolved in the area of State taxation, such as on-reservation business ventures entered into jointly between Indians and non-Indians. Tribes and individual Indians making business decisions or comprehensive economic plans must do so without reasonable certainty as to the tax consequences. Under the present state of the law, an on-reservation joint venture may result in State taxation of the non-Indian portion absent either an act of Congress prohibiting the tax or a finding that such a tax significantly interferes with the self-government interests of the reservation Indians. This would almost certainly require a case-by-case determination to discern the extent of the tribal interests by examining such things as whether the tribe has established its own tax. Certainly, in such a situation both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions which would have significant effect on tribal self-government.[40]

It is difficult to project the impact of a tribally imposed tax on non-Indians where the State has also assessed a valid tax. The court in *Moe* rejected the notion that the requirement on the tribal seller to collect the State's tax and thereby assist the State in preventing avoidance of the tax by a non-Indian is distinguishable from the situation where the tribe has taxed. The court felt that competitive advantage enjoyed by the tribal seller was dependent on the non-Indian purchaser's willingness to flout the State's tax law. Thus, the State's pro-

[37] Southern California, vol. II at 44.
[38] Northwest hearings at 325.
[39] See Report of Task Force One, American Indian Policy Review Commission.
[40] *McClanahan* v. *Arizona State Tax Commission, supra,* at 179; *Williams* v. *Lee,* 358 U.S. 217 (1959).

tected interest expressed in *Williams* v. *Lee*, *supra*, is still operative with respect to activities of non-Indians in Indian country. If the tribe would lose revenues as a result of an ability of sellers to survive as a result of "double taxation"—that is, the tribes and the States—the collection might then be an impermissible interference.

3. TAXATION BY INDIAN TRIBES

Authority exists for tribes to impose taxes on Indians and non-Indians within their reservations.[41] Even though such authority has existed for years, tribes are just now beginning to realize the need to impose tribal taxes over reservation ventures in order to support increasing tribal governmental activities. Past reluctance to enter the field of taxation may be traceable to uncertainty as to tribal powers in this area.

As noted previously, the assertion of tribal taxation alone, however will not assure tribes of expanded governmental revenues. The value of tribal taxation is significantly diminished if State taxation is not at the same time prevented, for it is clearly not in the interest of Indian tribes to have Indian and non-Indian businesses on their reservation subjected to both State and tribal taxation. Such a result will inevitably deter non-Indian financial and management involvement and diminish the success of tribal enterprise designed to attract non-Indian purchasers.

At present, no cases hold that tribal powers of taxation are limited. However, as has been pointed out, only a small number of tribes have entered the field, some tribal constitutions carry barriers to such exercises over non-Indians and there is relatively little knowledge concerning the implementation and administration of such taxing provisions in most tribes.[42]

At present, there are few limitations on powers of tribes to tax non-Indians. Potential areas of concern which may account for some tribes reluctance to enter this area warrant comment. Examples of Federal limitations may include:

1. Lack of specific congressional enactment which define the area;
2. Where tribal ordinances or constitutional amendments are subject to Bureau of Indian Affairs or Secretary of the Interior's approval, influence may be exerted to impose certain restrictions as a condition for approval;
3. Application of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* including:
   (*a*) Whether equal protection requires nondiscriminatory taxation of Indians and non-Indians and, if so, to what extent; and

[41] *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89th (8th cir. 1956); *Buster* v. *Wright*, 135 F. 947 (8th cir. 1905), appeal dismissed, 203 U.S. 599 (1906); *Morris* v. *Hitchcock*, 21 App. D.C. 556 (1903) aff'd 194 U.S. 384 (1903); *Maxey* v. *Wright*, 545 W. 807, aff'd 105 F. 1003 (8th cir. 1900). Indian Reorganization Act, 25 U.S.C. sec. 476; and *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th cir. 1958).

[42] Israel and Smithson, "Indian Taxation, Tribal Sovereignty and Economic Development", 49 N.D.L. Revision 267 (1973). Moreover, the considerations in taxation of non-Indians presents serious issues that suggest careful planning in moving into this area. See, e.g. Goldberg, "A Dynamic View of Tribal Jurisdiction to Tax Non-Indians, supra, Note 4, for a particularly thoughtful and comprehensive article on this subject.

   (*b*) Whether taxation on non-Indians who have no right of participation in tribal governments raises due process considerations.
4. Collateral influence in the Secretary of the Interior's power to approve leases and provisions contained therein vis-a-vis tribal taxation.

Each area has double edged considerations, but the better view consistent with sovereignty, Federal pre-emption, and policies supportive of Indian development and self-sufficiency is an unaltered power of tribes to tax. Other approaches appear to proceed on operative assumption of tribal incompetence or inability of tribal governments to exercise self-constraint. Moreover, general applications based on isolated indiscretions ignore individual differences in degrees of sophistication, as prevalent in Indian country as in comparisons of other units of government.

Potential limitations may also arise from conflicts between tribal interests and the protectable interests of the State.[43] At present, there is no congressional authorization for State taxation on reservations to the exclusion of the tribe. It would appear that State taxation powers are not pre-emptive of tribal powers.[44] The power of the State upheld in *Moe* was to require an Indian retailer to assist the State in preventing non-Indian avoidance of a valid State tax. The court specifically noted that there was nothing in that requirement which interfered with reservation Indian tribal self-government. Had the store been a tribal store operated by an individual Indian, the analysis may have been different. At least two separate impacts require examination under such circumstances.

First, the absence of a tribal tax assessed at a retail outlet does not of itself lead to the conclusion that this is not a tribal government revenue resource. Where the proceeds from such enterprises are used to support tribal services such a situation amounts to a "tax" at the other end.[45] The "tax" in that situation may be included in the purchase price.

Second, any competitive advantage derived by the tribe would be consonant with its governmental function to encourage and support enterprise on that reservation. Failure to derive revenues from a sales tax may only reflect a tribal determination to produce revenues from alternative sources.[46] For example, the retail outlet may be on tribally leased land which derives added lease value from the ability to provide an outlet free of State taxation.

The ability of tribes to preempt State taxation may be their single most effective tool for the generation of revenues and the continued viability of their governments. Such an approach would require affirmative action by tribes and would lay a strong foundation for resisting State taxation as an incursion on tribal governments.

Much of the discussion has been around retail outlets. Far more important is protection of reservation resources and the revenues derivable therefrom. Activities peculiarly related to the reservation such as

[43] See *Moe* v. *Confederated Salish and Kootenai Tribes*, *supra*.

[44] See e.g., *United States* v. *Mazurie*, *supra*. There was in that case a federal statute providing for tribal controls.

[45] Northwest hearings, at p. 245.

[46] Oregon, for example, collects no sales taxes.

mineral extraction, timber, commercial fishery and others require greater protection from State taxation so that tribal governments may reap the full benefits from their exploitation. Tribal taxation should not only preempt State taxation, but these resources and the activities surrounding their exploitation should be beyond the reach of outside taxes altogether.

The effect of taxation surrounding these resources cannot but affect their value to the tribes. Exclusive taxing authority in the tribe would allow great latitude in how best to arrange for exploiting the resources. The ability to provide tax exemption would be an integral part of the economic plans to develop the reservation and provide much needed revenues for tribal governments without forcing them into the traditional forms utilized by the surrounding governments.

Findings

(*a*) Governmental status and powers of Indian tribes has been repeatedly recognized and affirmed by the Congress, the executive branch, and the courts.

(*b*) The economic stability, development and growth of reservation Indians is seriously affected by taxation or potential taxation of State and Federal Governments.

(*c*) The ability of tribal governments to exercise taxing authority to the exclusion of State taxation is an important source of revenues for the support of tribal governments and its ability to deliver services.

(*d*) Income levels of Indian people and relative development of reservation resources is generally much below that of neighboring non-Indian communities and the ability to offer tax advantages to non-member enterprise is an important factor in encouraging development and enterprise on reservations which can derive significant benefits to tribal governments and their members.

(*e*) Present taxation laws are confusing and uncertain and present significant unresolved areas which tend to discourage aggressive development due to uncertain tax consequences.

(*f*) Indian tribes and individuals are increasingly becoming involved in litigation in certain areas of taxation and continued assertions of questionable State and Federal taxing authority will continue to impose substantial litigation burdens on Indian tribes and individuals.

(*g*) State and local governments view tax exempt status of reservation Indians as a serious drain on State and local revenues where these governments provide services to such Indians.

(*h*) There do not appear to be exact figures for the total costs incurred by States and local governments for the delivery of services to reservation Indians; or for the amount of taxes contributed when such Indians or their tribes do pay State or local taxes; or for funds received by States or local governments from Federal sources as a result of having Indian lands, resources of people within their relative taxing or service areas.

Recommendations

(*a*) Tribal governments should enjoy the same tax exclusions, benefits and privileges generally granted to State and local governments with respect to Federal taxation.

(*b*) Tribal governments and individuals should be exempt from State and Federal taxation where the economic stability, development and growth of reservation Indians would be adversely affected thereby.

(*c*) When a tribal tax is imposed within the reservation it should act to the exclusion of any inconsistent State tax which would be applicable to the same person or activity where the development of reservation lands or resources is involved. Taxation here would include the offering of an exemption for the purposes of encouraging development or enterprise which benefit the tribe or its members.

(*d*) Tribal governments or individual Indians should not be taxable from income derived from any lands held in trust by the U.S. Government, nor should any tax be applicable to the leasing of such lands by any Indian or non-Indian.

(*e*) Where an Indian or tribe prevails in litigation to resist the application of taxation by the State or Federal Government there should be a statutory provision for attorney fees to that individual Indian or Indian tribe.

(*f*) There should be extensive investigations into the exact costs incurred by State and local governments for the delivery of services to reservation Indians and into the revenues received either directly from such Indians or their tribes and from other sources which are derived as a result of having Indian people, lands or resources within the relative taxing or service areas.

E. Land Use Controls [1]

The area of land use controls is an extremely sensitive and important one. The importance of which unit of Government determines the limitations or restrictions on the use of land areas cannot be overemphasized. Significant disputes between tribal and local governments have begun to emerge in various forms. The impact on Indian and non-Indian citizens within reservation boundaries forms the basis for some of the most stimulating testimony gathered by the task force.

From the earliest encounters, it was clear that the Indian and non-Indian cultures held significantly different views concerning their relative use and relationships to the land. Western Europeans had an extremely well defined body of law based on clear cut notions of individual ownership with an entire array of rights and responsibilities. Tribal cultures, by and large, held land communally and shared benefits and burdens.

One of the most significant principles imported by the early European arrivals was the concept of "discovery" which carried with it the right in the "discovering" nation to claim title to the land notwithstanding the presence of aboriginal peoples. As part of their mission in the New World, these "discovering" nations carried the sacred responsibility to "civilize" and Christianize the natives found on the land, and rights these people had were subject to the superior authority of the conquering Europeans.[2]

[1] The limitations on time and resources available for the entire investigation did not allow for the necessary research and preparation required for full and definitive coverage of this area. The parameters and limits of the Federal, State, and tribal jurisdictional interplay are therefore addressed only as specific testimony or documentation relate to them.

[2] For a good discussion of the historical basis of European and Indian claims, see LeBlond, "Compensable Rights In Original Indian Title," unpublished paper for Prof. Ralph Johnson, U. of Washington School of Law, June 1971.

Justice Marshall attempted to describe the relative rights of the holders of original title and the successors to the title taken by the discovers in *Johnson* v. *McIntosh*.[3] It was there pointed out that the original occupants of the land have a "legal and just claim to retain possession of it and to use it according to their own discretion." Moreover, only the Federal sovereign could enter into agreements with the original Indian owners for the acquisition of the land, all other sovereigns and individuals being precluded.[4]

The principle in *Johnson* v. *McIntosh* is that the rights to which the newly united colonies succeeded was the right to be the exclusive agent to treat with Indian tribes, known and unknown, for the acquisition of land. This right is one held relative to other sovereigns and was not founded in any inability of the original possessor to dispose of their lands as they chose,[5] and extended only to "such lands as the natives were willing to sell." [6] The ultimate fee was held to be in the United States while the Indians owned a perpetual right of possession which could not be extinguished without their consent.[7]

At the same time, a separate concept of law was developing which found its expression in *United States* v. *Kagama*.[8] The Indian tribes subjected to dealings with the United States had been placed in a position of dependency, had become "wards of the nation," and as a result, the United States acquired a duty of protection.[9] This duty arose as well from promises contained in treaties and such a duty carried with it the power "necessary to their protection." [10]

In response to extreme pressure from whites for access to Indian lands and mineral riches, Congress passed the General Allotment Act of 1887.[11] Designed to "civilize" Indians by, at one and the same time, enforcing upon them individual ownership of land and encouraging an agrarian way of life, it also made available vast quantities of unallotted land. These unallotted lands were declared "surplus" and through various enactments, were opened up to non-Indian purchase and settlement.

This policy of opening Indian lands for non-Indian settlement without the required consent of tribal members guaranteed by treaty was first challenged in *Lone Wolf* v. *Hitchcock*.[12] The Supreme Court held the treaty provisions to be political questions beyond the judicial enforcement powers of the court. Whatever questions that may raise as to what is right or moral, the law holds that the unilateral and unprovoked abrogation of a treaty provision was within the plenary powers of the Congress to administer Indian affairs. Such power is not, however, absolute, and is subject to some constitutional restrictions.[13]

[3] 21 U.S. (8 Wheat.) 543 (1823).
[4] 25 U.S.C. sec. 177 is the present codification of the Indian Trade and Intercourse Act which is taken from the last in a series of such acts passed from 1802 to 1834; Cohen at 73; see Blunt, "A Historical Sketch of the Formation of the Confederacy" (1823), for an historical discussion of the Confederacy of the original thirteen Colonies and the development of the final acknowledgment that only the central government could deal with Indians and unclaimed territories.
[5] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).
[6] *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).
[7] *Mitchell* v. *United States*, 34 U.S. (9 Pet.) 761 (1835).
[8] 118 U.S. 375 (1885).
[9] Ibid at 384.
[10] Id.
[11] 24 Stat. 388. Now codified at 25 U.S.C. sec. 331 and still on the books, the policy of allotting Indian lands was repealed with the passage of the Indian Reorganization Act; 25 U.S.C. sec. 341, *et seq.*
[12] 187 U.S. 553 (1903).
[13] *United States* v. *Creek Nation*, 292 U.S. 103 (1938).

As a result, Indian land holdings were reduced by nearly 90 million acres from 1887 to 1934. More important for discussion here is that vast quantities of land within the boundaries of Indian reservations were now in non-Indian hands. The opening of the lands to settlement by non-Indians did not in itself disestablish the boundaries of that reservation nor the powers of the tribal governments over those territories.[14] The courts have held that each act must be looked to for the wording of the act and the circumstances surrounding its passage to determine the intent of Congress, as treaty rights must be expressly abrogated and cannot be abrogated by implication.[15]

There are four classes of land to be found within the boundaries of many reservations: (1) tribally held trust land; (2) Indian-held trust allotments; (3) Indian and non-Indian-held fee patent land; and (4) lands under the control of Federal instrumentalities such as the Corps of Engineers. Over this pattern of land, controversies of governmental control arise.

1. THE FEDERAL GOVERNMENT

In 1947, Congress authorized provisions to arrange for the taking of the heart of the Fort Berthold Reservation to establish the Garrison Reservoir flood control project. The legislation [16] provides for the negotiation of a contract between the United States and the Three Affiliated Tribes to approve by the majority of adult members of the tribes and enact into law by Congress. The contract was negotiated and signed by representatives of the U.S. Army Corps of Engineers and the Three Affiliated Tribes of Fort Berthold Indian Reservation on May 20, 1948. The final provision stated:

ARTICLE XV

This contract shall not become effective until it has been ratified by a majority of the adult members of the Tribes, by the Council of the Tribes, and on behalf of the United States by the enactment into law by the Congress.[17]

The Three Affiliated Tribes were organized under the Indian Reorganization Act and had adopted a constitution and bylaws on March 11, 1936. As with any complicated give and take negotiation, the governing body of the Three Affiliated Tribes conducted the negotiations, were privy to what was gained for what was conceded, and had a more complete understanding of the contract as a whole. Nonetheless, when Congress enacted the actual legislation for the taking, the council was left out of the approval process which called for only the approval of a majority of the adult members of the tribe.[18]

The effects of establishing the reservoir in the heart of the reservation and scattering the Fort Berthold people in five directions is reviewed in a letter appearing in the Minot Daily approximately 20 years ago. The writer concludes that the action destroyed a community and a way of life for which traditional notions of compensation, so familiar to the dominant culture, were inappropriate and insufficient to the people of the three affiliated tribes. [19]

[14] *Seymour* v. *Superintendent*.
[15] *DeCoteau* v. *District County Court*.
[16] Public Law 80-296, July 31, 1947.
[17] Midwest Transcript, exhibit 4.
[18] 63 Stat. 790, Oct. 29, 1949, Midwest transcript, exhibit 10.
[19] Midwest transcript, exhibit 6.

Today, the Fort Berthold people find themselves in a struggle with the Federal Government in the form of the Corps of Engineers. There are a number of specific issues concerning the use and control of land within the boundaries of the reservation surrounding the reservoir. The issues are outlined in a memorandum of a meeting held between the tribe and representatives of the corps held on August 27, 1974 and include: (1) the return of lands taken for flood control which are not needed for that purpose (five specific areas are identified); (2) the adjustment of use allocation on project land to allow for more interim grazing; (3) land leased to the State of North Dakota Department of Game and Fish; (4) range management allocations; (5) the future taking of land which has now become shoreline due to erosion; (6) protection of gravesites encroached upon by erosion of shoreline. [20]

Over return of designated lands, the corps has taken a firm position opposing such return. [21] Although the corps has administrative power to return the lands, it claims only Congress has such responsibility, which it opposes Congress doing. Congress has returned similar lands of Van Hook Township to Mountrail County. [22]

In approximately 1960, the corps sold the 13 lots of previously Indian held lands acquired for flood control to non-Indians and then built a public recreation site in the same area, Mahto Bay. These lots were sold with no right-of-way across Indian land which is the only access. Due to abuse of the land, the tribe has closed the access and there is, of course, conflict. [23] Whether that conflict stems from the sale of originally held Indian lands or from the failure to secure right-of-way, it is traceable to the actions of the U.S. Government within the boundaries of an Indian reservation. [24] The corps is now offering lands for bid within the reservation boundaries, not previously Indian owned, which the tribe feels is in conflict with the law and their best interests. [25] The corps disagrees. [26]

The tribe asserts the continued right to exercise hunting and fishing rights guaranteed by treaty and as yet not expressly extinguished. Moreover, the tribe claims jurisdiction over all areas within the boundaries of the reservation, including areas taken by the corps. [27] The corps rejects both of these contentions. [28]

The list goes on and further particulars are unnecessary to demonstrate the difficulty created around the use of land between the corps and the tribe. The corp's representative views the taking of the land as a complete diminishment of the reservation to the extent taken and the passing of the act as authority to take still further lands. Likewise, the corps sees no difference in the taking of tribal lands as compared to private lands and sees no special trust responsibility toward Indians, viewing it as residing solely within the Department of the Interior.[29]

[20] Midwest transcript, exhibit 1, memo of Aug. 27, 1974.
[21] Ibid, letter of Nov. 7, 1975, to Senator Burdick.
[22] Midwest transcript, exhibit 9, at 65.
[23] Midwest transcript at 244–49 and 435–36.
[24] Midwest transcript exhibit 1, telegram of Mar. 16, 1976.
[25] Midwest transcript exhibit 1, letter of Aug. 22, 1975, telegram of Mar. 16, 1976.
[26] Midwest transcript at 67–68, 77–80, 86–89, 115–118; Midwest exhibit 1 and 2 and letters of Mar. 17, 18, and 19, 1976.
[27] Ibid at 25.
[28] Midwest transcript exhibit 1, letters of Mar. 17, 18, and 19, 1976.
[29] See generally Midwest transcript 59–118; Midwest exhibits 1 and 2.

The economic impact on the tribe is significant. The incident over Mahto Bay alone has cost $10,000 in attorneys' fees. [30] Continued and largely unproductive negotiations consume much time and resources of tribal leaders and personnel. At times, the corps is unresponsive to requests to negotiate, even when made by a U.S. Senator.[31] There is a recognition that in a conflict situation, one or the other most likely has to retain private counsel.[32] Experience indicates it will probably be the tribe. It costs the corps nothing to refuse to negotiate and to oppose and obstruct the attempts to return land. It costs the tribe a great deal, especially in the context of far more limited resources.

2. FEDERAL, STATE, AND TRIBAL INTERPLAY

The Aqua Caliente Band of Mission Indians and the city of Palm Springs have long been at odds over the jurisdictional powers to regulate land use. The issue is important to all concerned as the area is economically very lucrative.

In 1949, Congress passed a law [33] providing for the application of the laws of the State of California and its political subdivisions to the Aqua Caliente Reservation. The legislation originally was to provide for the straightening of a street to facilitate the development of Indian land and, as such, received Indian consent and support. As enacted, however, the law included the jurisdiction section without even so much as knowledge on behalf of the tribe. [34]

During the 1960's, the city of Palm Springs zoned the land including Indian-held trust lands. The tribe filed suit against the city to enjoin the application of those zoning laws. The tribe and the city entered into a stipulated judgment which was never approved by the Secretary of the Interior. However, the Secretary did agree to apply the city's zoning provisions with seven exceptions to trust lands. [35]

The tribe has again filed suit and is still in litigation over the power to zone. [36] Witnesses indicate that they receive little or no help from the Federal Government in this struggle and, in fact, actions taken by the Secretary of the Interior have been detrimental to their position. [37]

The city of Palm Springs and the Aqua Caliente Tribe estimated the cost of litigation over these matters since 1965 to be approximately $250,000 each. [38] The tribe's portion of this is paid out of tribal funds from various revenue sources. The city also pays from its revenue sources, one of which is moneys from the possessory interest tax collected from Indian land. [39]

There are more particulars, but the thrust is that tripartite governmental action has been detrimental to the status and economic well-

[30] Midwest transcript at 435.
[31] Midwest exhibit 1, letter of Nov. 7, 1975.
[32] Midwest transcript at 107–07.
[33] 63 Stat. 205, October 1949.
[34] Southern California transcript, vol. II at 51–53; exhibit 18; vol. I at 83–84; and vol. II at 39–41.
[35] Southern California transcript, vol. II at 37.
[36] Ibid, at 36 and following.
[37] Southern California, vol. II at 43.
[38] Southern California transcript, vol. II at 54; and exhibit 18.
[39] Southern California transcript, vol. II at 54–55; see *Aqua Caliente Band of Mission Indians Tribal Council* v. *City of Palm Spring*, 347 F. Supp. 42 (C.D. Cal. 1972).

being of the Aqua Caliente Tribe. Laws passed by Congress have been piecemeal and have done more to confuse and undermine the needs and development of the tribe than to facilitate them. Moreover, such legislation has been passed without the tribe's consent and, in one case, without their knowledge as to a significant jurisdiction provision.

3. STATE CONTROLS ON TRIBAL LAND

Within the State of California, several conflicts over land-use powers have been to court for resolution. Until recently, these courts have not generally accepted Indian views on the limitations of State powers to regulate the use of reservation land in States where Public Law 280 is operative.[40] The Ninth Circuit Court of Appeals recently decided *Santa Rosa Band of Indians* v. *Kings County*,[41] and in a well-reasoned opinion, rejected earlier opinions which gave a narrow interpretation to the "encumbrance" exception contained in Public Law 280. The *Santa Rosa* Court offers a number of alternative reasons why the State and local governments are without jurisdiction to enforce zoning and building codes. The reasoning falls under three general rationales: (1) local laws are not the laws of general application with the State contemplated by Public Law 280; (2) application of 25 C.F.R. section 1.4 and the "encumbrance" limitation in Public Law 280 independently and taken together are a bar to State regulation of Indian trust land use; and (3) application of State land-use ordinances which have the effect of frustrating the administration of Federal programs are "inconsistent" with such Federal statutes and are therefore impermissible.

The importance of the *Santa Rosa* reasoning is the policy expressed that:

> Suffice it to say that application of State or local zoning regulations to Indian trust lands threatens the use and economic development of the main tribal resource—here it even handicaps the Indians in living on the reservation—and interferes with tribal government of the reservation.[42]

The court also refused, when confronted with ambiguous instances, to strain to implement the now rejected assimilationist policy behind the passage of Public Law 280. This reasoning was approved in *Bryan* v. *Itasca County*,[43] where the U.S. Supreme Court in striking down a State tax on a reservation Indian also recognized the "devastating impact on tribal governments that might result from an interpretation of section 4 [of Public Law 280] as conferring upon State and local governments general civil regulatory control over reservation Indians [citations omitted]. * * * Present Federal policy appears to be returning to a focus upon strengthening tribal self-government. [Citations omitted.]" [44]

The *Santa Rosa* court criticized the reasoning of previous holdings which limited use of tribal land by allowing application of local jurisdiction through a narrow reading of the "encumbrance" limitation in Public Law 280, but said:

> As we read "encumbrance" it is directed consonant with the flavor of the word's narrow legal meaning, at traditional land use regulations and restrictions directed against the property itself, and does not encompass regulations of activity which only accidentally involve the property. Rincon [*Band of Mission Indians* v. *County of San Diego*, 324 F. Supp. 371, 376–77, (S.D.Cal. 1971)].[45]

That court also recognized that:

> * * * subjecting a reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually proven Indians' priorities, or may in fact be in economic competition with the Indians and seek under the guise of general regulations, to channel development elsewhere in the community. And even where local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.[46]

Certainly what is said of State and local jurisdiction for those States exercising jurisdiction under Public Law 280 must follow a *fortiori* for non-Public Law 280 States. Indian tribes may have, and often do, a significant need for land uses which do not comport with local non-Indian priorities. The continued viability and development of tribal resources would be better left to the unhampered design of those people to fashion their own destiny.

4. TRIBAL CONTROLS OF LANDS WITHIN RESERVATION BOUNDARIES

The control of land use by tribal governments over tribally held and individual allotted land, subject to some Federal imitations,[47] is clear. Tribal control over non-Indian lands is less clear. As noted previously, past congressional policy and legislation have created various land patterns within reservation boundaries. Tribal attempts to implement uniform land use regulations largely designed to protect reservation resources have met with some opposition. The emergence of tribal governments as responsible and assertive governing entities is seen by one observer as related to three series of events evolving over the past decade:

> * * * [F]irst, a significant change by the Congress the Executive, and the Supreme Court toward increased protection of Indian rights; second, a substantial increase in the amount of federal monies provided directly to the tribes designed to free tribes from their historical dependence on the United States; third, a number of courageous and successful actions undertaken by tribes on their own initiative often against overwhelming non-Indian opposition, which have inspired other tribes to take direct protective action.[48]

As these tribal governments emerge, they will come into potential conflict with Federal, State and local governmental agencies as many already have.[49] Clear guidelines for expeditious resolution are needed which do not undercut the viability of the tribal governments. Potential conflicts may have affected the ability of tribes to plan and move definitively for the development, exploitation and protection of reservation resources.

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[40] See Boldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA. 535, 584 89 (1975).
[41] 532 F.2d 655 (9th Cir. 1975).
[42] No. 74–1565, Slip Op. at 19 (C.A. 9, Nov. 3, 1975).
[43] — U.S. — 96 S. Ct. 2120, (June 14, 1976).
[44] *Ibid*, Slip Op. at 15 n. 14.
[45] *Santa Rosa Band of Indians* v. *Kings Co.* CA 9, Nov. 3, 1975, *supra*, at 19 n. 19.
[46] *Ibid*, Slip Op. at 13.
[47] E.G. 25 C.F.R. § 1.4.
[48] Israel. "The Reemergence of Tribal Nationalist," (1975).
[49] See e.g., Northwest transcript at 199–201, 170–71, 175–77 (Yakima Nation and Yakima County); Northwest transcript at 224–25 (Colville Tribes and Okanogan County); Northern California transcript at 90–103, 106–09 (Desecration of sacred grounds and cemeteries in California); Aqua Caliente Tribe and city of Palm Springs, previously discussed; The Affiliated Tribes of Fort Berthold and Corps of Engineers, previously discussed; Oneida Tribe and Oneida Co., Great Lakes transcript, vol. I and 31

Beyond conflicts with local governmental agencies, there was significant testimony offered by non-Indian fee patent residents on Indian reservations. Testimony was often highly emotional in its content with continuous appeals to constitutional rights and reflected bitterness against the U.S. Government for the manner in which these lands were made available for purchase.

> Our problems arise because the United States government created a two-headed monster. The problem of the Indian, on and off the reservation, has long been recognized. What has not been recognized is the equally serious problems of the fee patent landowners.
>
> * * * * * * *
>
> The same government body that allowed the Indian people to sell their fee patent land allowed us to buy it. We are both victims, but there is one difference. The Indians have never trusted the BIA or the federal government. Unfortunately, we did.
>
> The rip-off of the fee patent land owner in America rivals anything you can dig up about Watergate.[50]

The thrust of that testimony and testimony by other fee patent owners [51] was that they purchase land either without knowledge that the land was within reservation boundaries or that they believed that the powers of the tribal governments on those reservations had been extinguished.

There was an appeal for assimilationist policies which would recognize that the treaties were "a mistake" and that there should be no right of succession to rights for present-day Indian people from treaties made over 100 years ago.[52] More serious were the objections raised to exercises of tribal control in zoning, taxation, and criminal laws over nonmembers who have no right of representation in those Indian governments.

Nonmember residents of reservations do have those rights guaranteed in the Indian Civil Rights Act of 1968.[53] Moreover, non-Indians which make up the vast majority of nonmembers on reservations, are the beneficiaries of the policies passed by Congress which placed such lands in their hands.[54] Any notion that Indian people received adequate compensation for those lands does not require refutation here. If nonmembers are in a position of loss of property without due process of law, then they must look at the body which occasioned that loss—the United States Congress.

Remedies available to nonmember fee patent owners should not come at the expense of tribal entities which were subjected to such policies without their consent and, often, over their objections.[55] Such limitations may have the effect of stifling the very forward movements so long promised and so long sought after by Indian people and tribal governments.

Findings

(*a*) The area of land-use controls within Indian reservations is complex and unclear and may work to the detriment of all concerned

[50] Northwest transcript at 107–08.
[51] Northwest transcript at 7 and following.
[52] Northwest transcript at 11, 43–44.
[53] 25 U.S.C. 1302. *et. seq.*
[54] General Allotment Act. *supra.*
[55] *Lone Wolf* v. *Hitchcock*, *supra.*

in present and future efforts to develop and protect the land and other resources of Indian people.

(*b*) Past policies and enactments of Congress have had and continue to have significant adverse effects on the use and development of land within the boundaries of Indian reservations.

(*c*) Continuing conflicts with Federal agencies require substantial expenditures of tribal funds to clarify or resist adverse actions or rulings of such agencies.

(*d*) Application of State or local land-use controls, directly or indirectly, have serious adverse effects on the ability of reservation Indians to formulate and implement comprehensive and beneficial development and protection of Indian resources.

(*e*) There is a need to provide tribal governments with the resources and assistance necessary to develop comprehensive plans for reservation development and control.

(*f*) Nonmembers of Indian governments holding fee patents on lands within reservation boundaries may have been misled by the congressional policies or the representations of Federal agencies when purchasing land within reservation boundaries.

Recommendations

a. The present scheme of Federal land use laws must be clarified and simplified to provide reliable guidelines consistent with reservation Indian control over the development and protection of Indian resources.

b. Past enactments of Congress which work to the detriment of reservation development and land use and are not in furtherance of a necessary and compelling public policy (e.g., recreational use of land and water appurtenant to flood control projects) should be amended to clearly reflect a paramount interest in the Indian tribe of that reservation.

c. Where Indian people or tribal governments find themselves in conflict with Federal agencies over land use, there should be appropriations for obtaining private counsel; provision for attorney fees against such agency where the Indian individual or tribe prevail; and resolution in favor of Indian tribe's request for Federal intervention into lawsuits on their behalf.

d. Indian tribal regulation of land use within reservation boundaries should be preemptive of any State or local control over both trust and fee patent lands where the purpose of such regulation is in furtherance of a scheme to development or protect reservation land or resources.

e. Federal appropriations should be made directly to tribal governments for the development of comprehensive plans for land use and resource protection and development.

f. Where nonmembers of Indian governments holding fee patents on lands within reservation boundaries are adversely affected by valid land use regulations and have obtained land within reservation boundaries as a result of misleading congressional policies, or actions of Federal agencies, there should be congressional provision for compensation from Federal sources.

F. Oklahoma

It was the intention of the task force to do a special report on the special section on the State of Oklahoma. As Felix Cohen observed:

> The laws governing the Indians of Oklahoma are so numerous that analysis of them would require a treatise in itself.[1]

[1] Cohen, "Handbook of Federal Indian Law," ch. 15.

We have found it impossible to devote the necessary time to this important task. For this we apologize to those tribes and Indian people who our cursory investigations indicate are desperately in need of assistance.

The situation in Oklahoma has been well reviewed in task force 1's reports on Oklahoma by Mr. Kevin Gover. There is nothing in that report with which this task force does not most heartily agree.

Three things clearly emerged from the hearings and documentation accumulated from and about the situation there.

1. There is a definite need to clarify jurisdictional relationships of the tribes which includes a clear recognition that Oklahoma tribes do enjoy "reservation status."
2. The exclusion of those tribes from the full extension of the Indian Reorganization Act of 1934 has had a deleterious and demoralizing affect on the people and the tribes.
3. There is an overwhelming need for a separately authorized congressional study to develop a rational and benefical policy for the Indian tribes of Oklahoma.

V. THE EXERCISE OF JURISDICTION BY INDIAN JUSTICE SYSTEMS

A. Background

Much has changed in the manner and form of tribal government operation since the arrival of Western European institutions on the American Continent. Some of the change has been evolution, produced by the tribes themselves; the greater change, however, has been imposed upon the tribes by the direct and indirect operation of the U.S. Government. At their present level of development, few tribal institutions correspond to any traditional form or style. What modes of government Indian tribes would have developed to meet the demands of the changing centuries without the persuasive presence of the Federal Government is not known; what options are open to the tribes other than these Western modes can only be speculated upon.

In the first several hundred years of contact, those tribes that were not destroyed by disease and war were, for the most part, able to retain their traditional governing modes. Divergence was substantial: ranging from the sophisticated confederacy of the Iroquois—a precursor of the Federal system—to informal systems of communal consensus. To characterize all Indian tribes by any single generalization as too many observers have been wont to do, is factually misleading. Several general observations about Indian systems of government, in contrast to Western systems, however, are pertinent. Most Western governments are formalized institutions with voluminous sets of laws and regulations, largely related to private property concepts. Indian tribes and societies generally did not consider private property as central to a government's relationship to citizens; communal property concepts are far more prevalent in tribal societies than are individual property concepts. Because of this, theft within tribes was "virtually unknown." The comments of the first Commission of Indian Affairs are instructive both as to the Indian system and non-Indian rejection of that system:

> The absence of "meum" and "tuum" in the general community of possessions, which is the grand conservative principle of the social state, is a perpetual cause of the "vis inertiae" of savage life * * *[1]

Rather than the representative style typical of Western governments, tribal societies were often governed by communal systems of chiefs and elders. Leadership was often earned by performance or acknowledgement, and rested upon consensus and theological grounds for exercise. Many different systems existed for resolving disputes and maintaining order. Some tribes had warrior societies which functioned as enforcement mechanisms, other tribes utilized community pressure to enforce norms: scorn is said to have been an extremely

[1] Quoted in Hagan, "Indian Police and Judges," at 7 (1966).

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effective method of enforcement. Imprisonment was unknown, and restitution, banishment, and death were the major retributive sanctions utilized.

Some tribes, notably those known as the Five Civilized Tribes, specifically adopted Western-style institutions for governance in the late 18th and early 19th century; these tribes, however, were the exceptions.

The first three-quarters of the 19th century wreaked havoc on those tribal governing bodies that survived the non-Indian presence on the continent. Removal, continuous war, and the reservation era reduced most tribes to de facto wards of the Government. Traditional food supplies—buffalo and others—were gone. Tribes were forced, oftimes brutally, into reservations, numbers and strength were depleted, and pure survival from starvation placed tribes at the mercy of the Government dole.[2] This dole was used as a frequent weapon by Indian agents to enforce the policy of the moment.

At this point in history, several factors merge creating new mechanisms for tribal governance which would eventually evolve, albeit contrary to the motives of the creators, into institutions for the maintenance of tribal sovereignty.

A major struggle for power occurred in the 1870's and 1880's between the civilian and military authorities for control over Indian reservations. The civilian authorities, supported by many church organizations, sought ways to control the reservations without reliance on military troops. Aside from simple bureaucratic competition, opposition to military authority was based primarily on the military tendency to settle all matters by extermination. The presence of soldiers also caused problems such as the:[3] "inevitable demoralization of intemperance and lewdness which comes to a reservation from a camp of soldiers."

In addition to the power dispute, there was a growing assimilation fever among the so-called friends of the Indians who felt that law and order was a necessary component in their job of "civilizing" the Indians; to educate; to Christianize; and to transform the Indian economy from a subsistence hunting-fishing, gathering, and trapping system to a Western-style farming economy. A system of laws was felt necessary because:

> They cannot live without law. We have broken up, in part, their tribal relationships, and they must have something in their place.[4]

One final factor strongly influenced the development of federally controlled Indian police and courts. This was the desire by Indian agents, as part of the assimilation process, to further erode and undercut the remaining power and authority of the traditional leaders and the systems they represented.

Commissioner of Indian Affairs Price in 1881 referred to the recently created system as: "* * * a power entirely independent of the Chiefs. It weakens, and will finally destroy, the power of tribes and bands."[5]

[2] *Ibid.*, Hagan at 6, Indian agents are referred to "as the local representative of the U.S. and fount of all favors."
[3] *Id.*, quoting Indian agent Edward P. Smith (1875), at 6.
[4] *Id.*, quoting Bishop Whipple's advice to President Lincoln, at 9. Hagan also comments "But what was to be gained by destroying the concept of communal ownership if the new property owner had no legal machinery to protect his right" at 5.
[5] *Id.*, at 79.

The development of Indian police and Indian courts under the auspices of the Indian agent was the result of these factors. The major experiment credited with being the foundation for the almost universal use of Indian police and courts occurred on the San Carlos Apache Reservation in 1873. Agent John P. Clum, observing the sporadic use of Indian scouts and groups to control other Indians, institutionalized the system by creating an Indian "police force." After demonstrating the effectiveness of this force, including the capture of Geronimo, Clum was able to oust the Federal military from San Carlos. Indian police forces were soon created for the Chippewas (Wisconsin), Blackfeet, Sioux and Assiniboins, Kiowas, Comanches, and Wichitas. By 1890, there were Indian police at nearly all the agencies.[6]

During this same period, the Indian court was also being developed.[7] R. H. Milroym, the Indian agent at Yakima, set up five judicial districts on the reservation from which judges were to be elected, and an appellate system with the agent at the top was created. In 1883, with the approval of the Secretary of the Interior, the Commissioner of Indian Affairs authorized the creation of Courts of Indian Offenses. He also created a set of substantive and procedural rules under which the courts were to operate. By 1890, two-thirds of the agencies had established Courts of Indian Offenses.

Both the Indian police and the Courts of Indian Offenses have suffered a mixed history.[8] Inadequacy of funding has always been a significant problem; it was not until 5 years after their creation that Congress provided any funds for the courts, and then to a very meager degree. Neither the Indian police nor the courts were successful in eradicating the influences of traditional Indians or Indian custom, as some of the assimilationists had hoped. Instead, the combination provided a curious mixture of Western-style law and tribal custom. The Indian police and Courts of Indian Offenses exercised jurisdiction over Indians and non-Indians. In the early days of Western expansion, the breed of whites settling on or near Indian reservations created much trouble for the Indians. The famous "hanging" Judge Parker described these newcomers to reservation areas as: "a class of men * * * who revel in the idea that they have an inherent natural right to steal from Indians."[9]

In some areas, in fact, non-Indians caused the principal problems for Indian police and courts. In western Oklahoma, much of the Indian police effort was directed at removing non-Indian livestock from Indian lands.

The status of the Courts of Indian Offenses within the jurisdictional framework was unclear, and when potential test cases arose, the Department of the Interior generally avoided the test rather than meeting the issue.

Congress did meet the issue finally in 1934 when the Indian Reorganization Act (IRA)[10] was passed providing a system for restablishing tribal governments. The act provided for federally chartered institutions with constitutions and court systems. Although at the time of

[6] *Id.*, at 27–43.
[7] Of course the Five Civilized Tribes, the New York Indians, the Osage, the Pueblos and Eastern Cherokees all had their own justice systems.
[8] See generally, BIA, Bureau of Law Enforcement, "Indian Law Enforcement History."
[9] Hagan, *supra* at 53.
[10] 25 U.S.C. § 461, *et seq.*

passage the IRA was perceived as a major shift in Federal policy favoring tribal self-determination and ending the erosion of tribes and their land bases, it also provided a distinctly western model of government for the tribes. With assistance from the Department of the Interior, tribes were to draft their own constitutions, establish their own courts and codes of laws. In practice, most tribes using the IRA model either adopted the old system, which had become known as 25 CFR courts [11] and law and order codes, or adopted their own codes and courts closely modeled on 25 CFR.

Of major importance to an understanding of tribal courts in terms of present day isues and operations is the 1968 Indian Civil Rights Act,[12] which extended certain U.S. constitutional type protections to the operations of tribal governments and courts. The act also congressionally limited the penalties that could be imposed by tribal courts to 6 months' imprisonment and a $500 fine, or both.

B. The Current Justice Systems

In addition to preexisting tribal systems and 25 C.F.R. systems, many tribal governments have created justice systems pursuant to their inherent sovereignty, and under the auspices of the Indian Reorganization Act.[13] In 1976, there are 117 operative tribal courts in Indian country. This represents an increase of 32 courts since 1973 when there were 85.[14] In 1973, Indian tribal courts handled approximately 70,000 cases; although this caseload has increased, no current figures are available. These courts and the other components of the justice system are faced with herculean tasks and responsibilities. A 1974 survey conducted by the Bureau of Indian Affairs indicated that crime rates—predominantly alcohol related—on Indian reservations were significantly higher than in rural America.[15]

The 117 Indian justice systems vary considerably from one another in both design and effectiveness. Like their non-Indian counterparts, Indian court judges are both appointed and elected.[16] There is no uniform standard, but as a general rule, most tribal judges are not attorneys.[17] At least one tribe requires applicants for judicial positions to pass an oral and written test on the tribe's constitution and laws.[18] Indian tribal courts function in both criminal and civil matters. In some areas, both the judicial and police functions are contracted from neighboring non-Indian communities.[19] In at least one area, a non-Indian government contracts law enforcement services from a tribal police department.[20] Some tribes provide extensive representation for indigent persons in tribal court; others provide none. Police services may be provided by entirely tribal police, by BIA officers, or by a combination of BIA and tribal police. Tribal appellate systems also vary greatly. On some reservations, there is no appellate court system. Where tribes utilize 25 C.F.R. Courts of Indian Offenses, appeals follow through the Department of the Interior. Some tribes have their own appellate court systems; [21] others use judges from neighboring tribes for special appeals.[22] The tribal council may also constitute itself as the final tribal appellate system.[23]

Any generalization about tribal courts and law enforcement systems is therefore vague by definition. These are evolving institutions responding to tribal and community needs and operating at various levels of sophistication. Contrary to the views of some, there does not appear to be anything inherent in tribal justice systems that makes them any less capable than their non-Indian counterparts in dispensing justice.

However, one strong criticism of tribal government that occurred in the 1950's and used as a rationale for allowing States to assume jurisdiction in Indian country (Public Law 280) was the perceived inadequacy and the non-professional level of tribal justice systems.

As one observer has pointed out:

> If jurisdiction was (transferred) because of inability to administer criminal and civil jurisdiction in the early 1950's, it should have been foreseen that such capabilities would someday be developed . . .[24]

In fact, such capabilities have been and continue to be developed. There are currently many institutions and programs that aid in this process that did not exist in the 1950's. The Indian lawyer, a rare phenomenon formerly, is being found in increasing numbers. It is presently estimated that whereas there were only approximately 20 Indian lawyers several decades ago, currently, the number has grown to between 150 and 180 and at least another 100 Indian students are enrolled in law school.[25] The American Indian lawyers training program, which runs a number of training and support programs for Indian law students and lawyers, has played a significant role in this development. The National American Indian Court Judges Association now exists, and under Federal funding, provides resources, materials and training to Indian court judges. Among its publications are a five-volume work on "Justice and the American Indian," and a handbook on "Child Welfare and Family Law and Procedural Manual." Other public and private resources, although insufficient for the totality of the need, are also available, such as the Native American Rights Fund, and the various Indian legal services programs.

1. ISSUES

(a) *Capabilities*

That tribal justice systems are seen as evolving institutions is reflected in the fact that many tribes have just completed or are cur-

[11] 25 CFR contains all the elements for the Bureau-created courts.
[12] 25 U.S.C. § 1301 *et seq*
[13] 25 U.S.C. § 461.
[14] Source: National American Indian Court Judges Association.
[15] Memorandum to the Commissioner of Indian Affairs from T. Krenzke, director, Office of Indian Services, March 13, 1975.
[16] E.g., on Gila River, judges are elected at large for 3-year terms. Southwest transcript at 18. On Papago, judges are appointed by the council for 2-year terms. Southwest transcript at 119.
[17] The majority of non-Indian judges at the J.P. level nationwide are not lawyers. *North v. Russell*, U.S. 96 S. Ct. 2709 (1976) upheld the use of such judges in a case involving the conviction and sentencing of a person by a judge with a high school education but without any judicial training so long as there was the right of appeal to a court with a lawyer judge.
[18] Mojave-Apache, southwest transcript at 257.
[19] Ak-Chin Indian Reservation uses a county judge for its tribal court judge. Interview report.
[20] Nespelem, Wash., contracts police services from the Colville tribal police department, northwest transcript, exhibits, affidavit of members of Nespelem City Council.
[21] Yakima Nation, northwest transcript at 659.
[22] The Papagos have used Judge Rhodes from Gila River.
[23] Conceptually this is similar to the English system where the House of Lords is the court of last resort. This process is used by the Yankton Sioux Tribe, midwest transcript at 144–45.
[24] Letter from Douglas Nash, counsel to the Umatilla Reservation to Donald R. Wharton, task force No. 4.
[25] Source: American Indian lawyers training program.

rently undertaking major revisions of constitutions, bylaws, and law and order codes.[26] Thurman Trosper of the Flathead Reservation expressed the view that judicial systems are essentially new to many tribes as is the non-Indian concept of justice; they are operating quite well in view of their brief experience and are expected to develop a high level of sophistication.[27]

The critical reviews tribal courts receive are varied. MOD, an organization opposed to tribal jurisdiction over non-Indians, as previously indicated, does not think much of tribal court systems in Montana.[28] The assistant area director for the BIA, Portland, Oreg., however, stated:[29]

> While they may not be trained in the law and the relationship to Anglo-Saxon law, I do not know a tribal judge who doesn't know due process . . .

Albert Renie, the Acting BIA Superintendent at Flathead, also felt that the Flathead court made sure that everyone's rights were protected, pointing out that non-Indian business persons use the Court for debt collection.[30]

There are criticisms of tribal justice systems from within the Indian community. Severt Young Bear, a councilman from the Pine Ridge Reservation, was severely critical of one "breakdown" of law on Pine Ridge. He attributed part of the problem to the role the Federal Government played in violating the tribal constitution by dealing solely with the chairman and ignoring the legally constituted governing body of the Oglala Sioux, the tribal council. Another problem has been the multiple exercise of criminal jurisdiction on Pine Ridge—by the FBI, the BIA, the U.S. marshals, state police and various "vigilante" type groups. Notably excluded in that exercise is the tribal government.[31] An important footnote to the Pine Ridge story and the issue that has been raised in some quarters about the Indian capacity for self-government, is that Oglala Sioux people in a popular election in 1976, turned out of office the tribal chairman for Pine Ridge under whose regime most of the problems occurred.

(b) Training and funding

The ability to operate a justice system is often dependent on the training of the personnel and the financial resources of the system.

An extensive system now exists for the training of both Indian police officers and tribal court judges. The Bureau of Indian Affairs runs a police academy at Brigham, Utah for the training of BIA and tribal police officers. A significant limitation, however, is that tribes must finance the officers' travel to and from training. In addition to this training, some tribal police departments provide supplemental training. Chief Johnson of the Colville tribal police department indicated that his officers receive more training than do the deputies in the local sheriff's department.[32] Tribal police also are often recruited from the ranks of non-Indian police departments. The Suquamish

[26] E.g., San Carlos Apache, southwest transcript, at 320, 321 Nez Perce, northwest transcript at 697–700; Gila River, southwest transcript at 76; Flathead, Mont. transcript at 88; Winnebago, midwest transcript at 431–32; Minnesota Chippewas, Great Lakes transcript at 162; and Oneida, Great Lakes transcript at 36.
[27] Montana transcript at 30.
[28] See Chapter II, and Chapter V, Section E.
[29] *Ibid*, at 142.
[30] *Ibid*, at 57–58.
[31] Midwest transcript at 614.
[32] Northwest transcript at 96.

tribal police include several county officers and a former Pennsylvania highway patrolman.[33]

The training provided for tribal judges usually comes through the National American Indian Court Judges Association. In the 1975–76 year, 199 persons participated in tribal court training sessions. In 1974–75, 127 persons participated in training sessions. These training sessions have been conducted for the past 6 years, and generally cover criminal law and family law.[34] The training sessions are conducted in regional centers for several days each month. Non-formalized on-site training is being provided via national programs, although some courts informally train new judges on-site. Some of the limitations of the existing program as indicated by judges include an inability to attend because of work load and a desire for more extensive training.

Funding for justice systems comes from several different sources. The Bureau of Indian Affairs, through contracts with tribes and direct services, expended approximately $24 million in the 12-month period ending in June 1976. Of this, approximately $3.5 million was spent on administrative expenses; $11.5 million in direct services; and $8 million in contracts to tribes; the remainder went to the training academy.[35] LEAA made grants totaling $4,691,000 to tribes out of its discretionary funds and another $900,000 out of LEAA's total block grant budget of $900 million went to law enforcement agencies in areas where tribes and substantial urban Indian populations are located. It is not known what part of these funds went to tribal law enforcement systems.[36]

In addition to these Federal moneys, substantial tribal resources are expended for law enforcement systems. For example, the Colville Tribe spent $347,000 of its own funds,[37] (BIA provided $21,800) for law enforcement this past year. The Yakima Nation spent $471,225 (BIA provided $69,400). Warm Springs estimates its expenses at $450.000—five to six times as much as the BIA spends ($79.400) on the Warm Springs law and order program. The Navaho Nation's tribal expenditures are close to $1 million[38] (BIA provides $465,000). All tribes indicated the need for more resources to support and effectively utilize law enforcement systems. Funds in some areas are being used in creative ways. The Warm Springs Tribe, in cooperation with the State of Oregon, has "a work release program" for criminal offenders. The Yakimas have started an Alcohol Detoxification Center. The unmet needs, are however, substantial. The problems of small tribes in this area are overwhelming, particularly small tribes in Public Law 280 States which receive little or no Federal financial assistance.[39] Of the 481 federally recognized tribes, 326 have resident populations of 350 or less. Many of these tribes do not even have the funds to support the bare rudiments of tribal government, much less additional moneys to support sophisticated justice systems. On the Campo Reservation in southern California, a $10,000 tribal development grant enabled the tribe, for the first time, to set up a basic record

[33] *Ibid.*
[34] Source: National American Indian Court Judges Association.
[35] Source: Division of Law Enforcement Services, BIA.
[36] Source: Indian Desk, LEAA.
[37] Northwest transcript at 617.
[38] Northwest transcript at 692.
[39] *Ibid*, at 262

keeping system.[40] Other small reservations relate similar stories of basic unmet needs.[41]

(c) *Coordination and cooperation*

Because the legal status definition of Indian tribes is not clearly understood or accepted by many non-Indian local governments, the cooperation and coordination often felt to be important to effective law enforcement is generally based on personal relationships rather than on legal principles. This problem of definition permeates such issues as the recognition of tribal court decrees, cross-deputization agreements, and extradition procedures.

On the Flathead Reservation there is currently no cross-deputization agreement with the sheriff's department. Bill Morigeau, a Flathead councilman, stated that such an agreement existed several years ago but was withdrawn by the sheriff, apparently because of the political climate which Councilman Morigeau attributed to MOD.[42] The Suquamish similarly complained that they have not received cooperation from the county police authorities.[43] The Colville tribal police department enjoys cross deputization arrangements with some but not all of its neighboring non-Indian governments.[44] Wayne Ducheneau, chairman of the Cheyenne River Sioux, indicated that no formal arrangements for cross-deputization exist, but that "some sheriffs are pretty good fellows and you can get along with them."[45] The situation in Gila River is similar; tribal officials and the county sheriff have an excellent working relationship and no current problems exist. If the sheriff were to change, however, the tribe felt the relationship could change.[46]

Tribal courts are technically not entitled to "full faith and credit" as they are not States in the constitutional sense. Some state courts have extended such recognition to tribal court decrees;[47] the practice is not universal, however, and is a particular problem with respect to non-Indian law enforcement officers refusing to serve process or other papers for tribal courts.[48]

One particular problem of coordination and cooperation relates to the relationship between the tribal law enforcement apparatus and BIA law enforcement and agency personnel. Tribes do not select the BIA officers as they do their own police officers, and the BIA officers' loyalty is, by definition at least, divided between the tribe and the bureau. BIA agency personnel do not necesarily feel they are obligated to follow an order from a tribal court.

Judge Rhodes of Gila River ordered several BIA police to be stationed at the tribal detention facility. The BIA superintendent took the position that the court has no authority over the BIA's administrative operations; he finally did comply out of "courtesy," maintaining that he is not bound to follow the tribal court.[49] Since BIA operations

[40] Southern California transcript at 83.
[41] See *e.g.*, Pauma, southern California transcript at 9; Pala, southern California transcript at 471; Kaweenaw Community (Michigan) Great Lakes transcript, at volume II, 35.
[42] Montana transcript at 67.
[43] Northwest transcript at 86.
[44] *Ibid.* at 610.
[45] Midwest transcript at 356.
[46] Southwest transcript at 821.
[47] Oregon, northwest transcript at 246–47, and Maryland, in *Wakefield* v. *Little Light*, 276 Md. 333, 347 A.2d 228 (1975).
[48] Northwest transcript at 432–33.
[49] Southwest transcript at 70–71. Of note, this superintendent was the acting superintendent at the time of the extraordinary problems on Pine Ridge in 1974–75. Although that does not impute any wrongdoing to him, it raises questions about what the lack of cooperation may lend to problems.

permeate many areas of reservation life, including the crucial area of child custody, its subservient relationship to the tribal court needs to be definitely stated. The potential conflict between the BIA and the tribe is not necessarily cured when a tribe contracts law enforcement services from the Bureau. The Mohave Apache tribe contracted and ran its own law enforcement program for approximately four years at a constant funding level. The tribe turned law enforcement back to the Bureau because of tight funding and inflationary pressure. Shortly thereafter, the BIA was able to provide the service at double the funding level.[50]

C. Indian Civil Rights Act

The Indian Civil Rights Act of 1968 [51] is the major congressional statement concerning how tribal governments and court systems are to operate. Generally, it applies to tribes whose constitutional standards for operations are similar but not identical to those contained in the "Bill of Rights" and the 14th amendment. Knowledge of the act and the cases arising under it are necessary to an understanding of the current status of tribal courts and governments.

1. LEGISLATIVE HISTORY AND BACKGROUND

In 1959, *Williams* v. *Lee*,[52] and *Native American Church* v. *Navajo Tribal Council* [53] reaffirmed tribal sovereignty but denied remedies to individuals, both Indian and non-Indian, aggrieved by actions of tribal governments. The *Native American Church* case, in particular, is credited with spurring the preliminary investigation by Senator Ervin's Subcommittee on Constitutional Rights into dealing with abridgment of individual rights by tribal governments. In that case, a Federal court let stand a tribal ordinance banning the use of peyote, which was used by members of the Native American Church in religious ceremonies, on the ground that the free exercise of religion guarantees of the first amendment was not applicable to the Navajo tribal government.

In addition to the *Native American Church* case, Senator Ervin also cited reports from preliminary investigations of his own staff and reports by the Fund for the Republic,[54] and the Department of the Interior's task force on Indian affairs,[55] as factors in his decision to hold hearings on Indian civil rights.[56]

All these reports advanced the thesis that deviations from U.S. constitutional rights by tribal governments, although constitutionally permissible, were improper and required eventual correction.[57]

Hearings were held in Washington and in various Western States between 1961 and 1968. Testimony showed that 117 of the 247 organized tribes operated under constitutions providing some protection for

[50] Southwest transcript at 216.
[51] 25 U.S.C. 1301.
[52] 358 U.S. 217 (1959).
[53] 272 F.2d 131 (10th Cir. 1959).
[54] Fund for the Republic, report of the commission on the rights, liberties, and responsibilities of the American Indian (W. Brophy, and G. S. Aberle, editors, 1961), at 44.
[55] Task force on Indian affairs, a program for Indian citizens (1961).
[56] 107 Congressional Record 17121 (1961).
[57] Burnett, a historical analysis of the 1968 "Indian Civil Rights Act," 9 Harv. J. Leg. 557 (1972), at 576 [hereinafter Burnett].

individual civil rights, while 130 did not,[58] and 188 tribes were not organized under any tribal constitution.[59]

The principal problem areas for tribal courts in applying due process guarantees were the right to counsel, the right to remain silent, the right to trial by jury, and the right to appeal.[60] According to one writer, the central reason for denial or abridgment of rights was that most tribes lacked resources to allocate for law enforcement.[61] It was pointed out that:[62]

> Prohibition of trained lawyers made possible the continued functioning of the tribal court system with untrained judges and without prosecutors. Compulsory testimony of defendants eased the costly burden of police investigations. Eliminating the jury or shifting it to the appeals level relieved pressure on court budgets. Redundancy of judges at the trial and appeals levels and ad hoc appointments of laymen for appealed cases produced similar savings. Despite strivings toward professionalism and the acceptance in principle by many tribal courts of due process requirements, budgetary restrictions made infringement of these rights unavoidable.

Testimony at the hearings showed that the 6,000-member Pima-Maricopa Tribe spent only $4,500 a year on court and police operations.[63]

Throughout the hearings, the major area of concern to the tribes was violation of Indian civil rights by Federal, State, and local authorities and the failure of BIA to provide adequate financing and services to the tribes. One writer has described the position of the Department of the Interior and BIA in the hearings in the following way:[64]

> Throughout the debate sparked by Senator Ervin's proposals, the attitude of the Department of the Interior and of the BIA remained consistent. When vital organizational interests, such as reputation and control, were not involved and when a commitment of resources was not required, they proved to be cooperative. But when confronted with the limitation of their responsibilities or influence or when pressed for a commitment to additional tasks, they resisted even if the interests of the Indian people were compromised.

The Indian Civil Rights Act of 1968 was originally proposed as S. 961 in 1965.[65] It provided that any tribe exercising its powers of self-government would be subject to the same constitutional protections, with the exception of the equal protection requirement of the 14th amendment, imposed on the Federal Government by the Constitution. The Department of the Interior and BIA objected to the impact that full constitutional rights would have on tribes and proposed an alternative bill requirement which contained limited guarantees.[66]

Tribal reaction to the proposed legislation was described as varied. Most tribes echoed the sentiments of the Mescalero Apaches who were sympathetic to the purposes of the bill but deemed it premature because the tribes were not psychologically or financially prepared for it.[67] The Hopis said they already provided protections afforded by the

[58] Hearings on constitutional rights of American Indians before the Subcommittee on the Judiciary, 87th Cong., 1st sess., pt. 1 (1961), at 121 [hereinafter 1961 hearings, pt. 1].
[59] 1961 hearings, pt. 1, at 166.
[60] Burnett, at 579.
[61] Id. at 581.
[62] Id. at 581.
[63] 1961 Hearings, pt. w. at 367–68.
[64] Burnett, at 602. See Burnett at 589–602 for a discussion of the position of the Department of the Interior and BIA with regard to specific legislative proposals.
[65] 111 Congressional Record 1784 (1965).
[66] Hearings on S. 961–968 and S. J. Res. 40 before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st sess. 2 (1965) at 318–19 [hereinafter cited at 1965 hearings].
[67] Burnett, at 589, citing 1965 hearings at 325.

Constitution in their own constitution,[68] and the Crow said they felt the people of their tribe were satisfied with the system and meant to keep it unchanged.[69] The Pueblos, however, rejected the bill of rights proposal completely. After the act was passed, they sought special exemption, had bills for exemption introduced, but only in Congress, and succeeded in obtaining a special hearing before the Ervin subcommittee in New Mexico.[70] At those hearings, a Pueblo spokesman stated:[71]

> Our whole value structure is based on the concept of harmony between the individual, his fellows, and his social institutions. For this reason, we simply do not share your society's regard for the competitive individualist. In your society, an aggressive campaigner is congratulated for his drive and political ability. In Pueblo society, such behavior would be looked down upon and distrusted by his neighbors. Even the offices themselves, now so respected, would be demeaned by subjecting them to political contest. The mutual trust between governors and governed, so much a part of our social life, would be destroyed.

2. SUMMARY OF PROVISIONS OF INDIAN CIVIL RIGHTS ACT

Provisions of the Indian Civil Rights Act of 1968 are similar to the guarantees of various amendments of the Constitution in language, but most have been changed to in part reflect the special tribal situation. Even where language is identical, the history of the legislation makes it clear that the act is to be read against tribal context and does not necessarily incorporate all the guarantees of the Constitution and cases under it.

In general, the act provides that any tribe, in exercising the powers of self-government, cannot:

(1) Make or enforce laws prohibiting the free exercise of religion, or abridging freedom of speech, press, or assembly. There is no prohibition of an establishment of religion.[72]

(2) Violate the protection against unreasonable search and seizure and warrantless searches and seizures of person or property.[73]

(3) Place a person in double jeopardy.[74]

(4) Violate the protection against self-incrimination.[75]

(5) Take property without just compensation.[76]

(6) Deny a person the right to a speedy public trial, confrontation of witnesses, and the right to counsel at his own expense. There is no right to free court-appointed counsel.[77]

(7) Impose excessive bail, inflict cruel and unusual punishment, or impose any penalty or punishment greater than imprisonment for 6 months or a fine of $500 or both for conviction of one offense.[78]

(8) Deny any person the equal protection of the law or deprive any person of liberty or property without due process of law.[79]

[68] 1965 Hearings at 325.
[69] 1965 Hearings at 234.
[70] Burnett at 614.
[71] Hearings on S. 211 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st sess., 1969.
[72] 25 U.S.C. 1302(1).
[73] 25 U.S.C. 1302(2).
[74] 25 U.S.C. 1302(3).
[75] 25 U.S.C. 1302(4).
[76] 25 U.S.C. 1302(5).
[77] 25 U.S.C. 1302(6).
[78] 25 U.S.C. 1302(7).
[79] 25 U.S.C. 1302(8).

(9) Pass any bill or attainder or ex post factor law.[80]

(10) Deny any person accused of offense punishable by imprisonment, the right, upon request, of a jury trial of not less than 6 persons.[81]

The only remedy contained in the act provides for obtaining a writ of habeas corpus in Federal court to test the legality of detention by order of a tribe.[82]

3. SCOPE OF INTERVENTION BY FEDERAL COURTS

(a) Legislative history of habeas corpus provision

Testimony before the Ervin subcommittee indicated that appellate procedures in tribal courts are not effective. One writer described the subcommittee's findings as follows:[83]

> Appellate procedures were similarly attenuated. Among many tribes, such as the Navajo, the court of appeals was comprised of all the trial judges sitting together as a panel. Tribes with only a single judge devised more ingenious procedures; for example, the Shoshone-Bannock system provided trial by jury on appeal, while the Pima-Maricopa tribal council appointed two laymen when the need arose to serve with the tribal judge on a three-member appeals board.

Again, the principal reason for these appellate procedures was lack of resources. Appointment of laymen and panels of trial judges saved the tribe the cost of paying for a second level in its judicial system.[84]

As a remedy for denial or abridgment of the right of appeal, the original bill provided for appeals of criminal convictions from tribal courts to Federal district courts, and expanded the scope of review to include trial de novo. The effect was to integrate "criminal justice on the reservation directly into the existing Federal system and reduce the Indian courts to a 'screening role'." [85]

The tribes' reaction has been described as follows:[86]

> Many tribes, while not opposed to S. 962's authorization of appeals of criminal convictions from tribal courts to federal district courts, objected to the bill's provision for trial de novo in the district court because it would severely restrict the functions of the tribal courts. The Pima-Maricopa claimed that law enforcement on the reservation would suffer as a result. The United Sioux Tribes expressed opposition because Indians could not afford to pay for the legal representation needed in federal court, and the American Civil Liberties Union called for absolute right to appointed counsel not provided by the 1964 Criminal Justice Act. The Mescalero Apache suggested that cases be remanded to the tribal courts upon a finding of error. The Fort Belknap attorney concurred, urging that this procedure would serve as a training device and improve the quality of the tribal courts. The attorney warned, however, that S. 962 like S. 961, would impose an impossible financial burden for review by federal courts and almost certainly would require the tribes to keep fuller court records, use proper procedures, and hire prosecutors.
>
> The Department and the BIA were opposed to S. 962. The Department had appellate jurisdiction over Courts of Indian Offenses and was unwilling to surrender it. It suggested that the district courts should be empowered to review reservation court decisions only upon the full exhaustion of the administrative remedy. But the Department's insistence on retaining a role in the tribal justice system contradicted its earlier testimony to the effect that the Solicitor's office had received no appeals from Courts of Indian Offenses. It became clear to Subcommittee counsel that the Department was fighting for a nominal power only, and had never regarded its appellate role with commitment.

As finally enacted, the act dropped the trial de novo provision and provided that the privilege of writ of habeas corpus would be available to any person in Federal court to test the legality of his detention by order of an Indian tribe.[87] According to one commentator:[88]

> Senator Ervin apparently was convinced by arguments of many tribal attorneys and United States attorneys that trial de novo under S. 962 would put an intolerable strain on the district courts, already suffering from a chronic overload of cases.

Furthermore, the habeas corpus provision did little more than enact the ninth circuit's decision in *Colliflower* v. *Garland*[89] and *Settler* v. *Yakima Tribal Court*,[90] which, prior to the act, found that a Federal district court could issue writs of habeas corpus over both tribal courts and Courts of Indian Offenses, since these courts functioned as Federal agencies created by the BIA and were governed by the BIA's model code of Indian offenses.

(b) Expansion of jurisdiction under 28 U.S.C. 1331(a) and 28 U.S.C. 1343(4)

Following enactment of the Indian Civil Rights Act, the "chronically overloaded" Federal courts were hit with actions charging violations of the act. In most cases, the relief sought was equitable or money damages rather than the habeas corpus remedy provided for in the act. Courts quickly rejected the limited role of habeas corpus set forth in the statute for them and established a trend to take jurisdiction of all claims under the act, regardless of whether detention was involved, and to grant equitable and money damage relief in appropriate cases against tribes, tribal governing bodies, tribal court judges, and other tribal officials.[91]

The principal vehicles for this expansion of jurisdiction have been 28 U.S.C. 1331(a) [Federal question jurisdiction where the jurisdictional minimum of $10,000 is met] and 28 U.S.C. 1343(4) [providing jurisdiction for relief under any act of Congress providing for the protection of civil rights]. The first reported cases under the act, *Dodge* v. *Nakai*,[92] and *Spotted Eagle* v. *Blackfeet Tribe*,[93] found jurisdiction under these statutes. In *Dodge*, a white legal services lawyer sought an injunction and money damages for exclusion from the reservation under order of the tribal council. He charged violations of 25 U.S.C. 1302(1) [free speech guarantees] and 25 U.S.C., section 1302(8) [due process rights]. In *Spotted Eagle*, the action was by tribal members against the Blackfeet Tribe to enjoin use of the tribal jail; to nullify the tribal law and order code; to require tribal judges to grant persons within their jurisdiction all rights enjoyed by defendants in State and Federal courts; plus other rights [such as the right to treatment rather than imprisonment for alcoholics], not

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[80] 25 U.S.C. 1302(9).
[81] 25 U.S.C. 1302(10).
[82] 25 U.S.C. 1303.
[83] Burnett at 580–51, citing 1961 hearings, pt. 2, at 366 and 1963 hearing at 826 and 862.
[84] *Id.* at 581.
[85] *Id.* at 593. Burnett believed that Ervin's view of Indian civil rights was strongly colored by the experience of the Lumbees and Cherokees with constitutional form of government in North Carolina. Burnett at 574–76.
[86] Burnett at 593–94.
[87] 25 U.S.C., sec. 1303.
[88] Burnett at 240, note 240.
[89] 342 F.2d 369 (9th cir. 1965).
[90] 419 F.2d 486 (9th cir. 1965).
[91] Ziontz, "In Defense of Tribal Sovereignty: An Analysis of Individual Error in Construction of the Indian Civil Rights Act," 20 S.D.L. Rev. 1 (1975), at 21 [hereinafter cited as Ziontz].
[92] 298 F. supp. 26 (D. Arizona 1969).
[93] 301 F. supp. 85 (D. Montana 1969).

uniformly enjoyed by the general public; and for actual and punitive damages. Both courts found the power to exercise jurisdiction under 28 U.S.C. 1331(a). The *Spotted Eagle* court, however, refused jurisdiction for plaintiff's failure to meet the $10,000 minimum.

(c) *Exhaustion of tribal remedies or limitation on Federal court intervention*

Exhaustion of tribal remedies is required as a matter of comity in furtherance of the Federal policy of preserving the unique sovereign and cultural identity of the tribes. *Janis* v. *Wilson.*[94] The requirement, however, is not inflexible. Case-by-case balancing is required, weighing the need to preserve cultural identity of the tribes by strengthening tribal courts against the need to immediately adjudicate the deprivation of individual rights. *O'Neal* v. *Cheyenne River Sioux Tribe.*[95] This general exhaustion requirement is unnecessary if, on balance, the merits for exhaustion might threaten constitutional guarantees of equal protection and due process. *Rosebud Sioux Tribe* v. *Driving Hawk.*[96]

In *O'Neal*, tribal members operated a ranch on the reservation on grazing land leased from the tribe with cattle purchased through a loan from the tribe. When the tribe foreclosed the loan and repossessed the cattle, the ranchowners brought an action for damages and an injunction under the due process provision of 25 U.S.C. 1302(8) and under the taking without just compensation provision of 25 U.S.C. 302 (5). The district court dismissed for failure to exhaust tribal remedies, and the eighth circuit affirmed, rejecting plaintiff's position that since the purpose of the legislation was to give Indians the constitutional rights enjoyed by other Americans. Congress did not intend to require exhaustion of tribal remedies. The circuit court, however, viewed the Indian Civil Rights Act as seeking to protect and preserve the rights of individual Indian persons and that this was best done by maintaining Indian culture and strengthening tribal governments. In this regard, the exhaustion was consistent with the statute. The court then found that plaintiffs had two actions available to them in tribal courts.

In *Janis* v. *Wilson*,[97] the executive committee of the Oglala Sioux Tribal Council fired several members of a community health program because they had participated during regular work hours in public demonstrations advocating the overthrow of the tribal government. Plaintiffs brought an action charging violations of their right to free speech and association under 25 U.S.C. § 1302(1) and due process under 25 U.S.C. Section 1302(8).

The court found that further resort to tribal administrative remedies was not required but remanded to the district court to give plaintiffs an opportunity to show that resort to the tribal judiciary would also be futile. Similar to *O'Neal*, plaintiffs had argued that the tribal court was subservient to the executive committee which had fired them, that it had no jurisdiction over the tribe in an original action, and that it did not have appellate jurisdiction over decisions by the tribal personnel evaluation committee.

At least one court has found that nonexistence of tribal procedures for handling internal political disputes, not specifically provided for

[94] 521 F.2d 724 (8th cir. 1975).
[95] 482 F.2d 1140 (8th cir. 1973).
[96] 534 F. 2d. U.S. 2709 (8th Cir., March 5, 1976).
[97] 521 F.2d 724 (8th cir. 1975).

in the tribal constitution, does not justify immediate intervention by the Federal courts, since the council could promulgate and enforce ordinances and set up enforcement agencies. *McCurdy* v. *Steele.*[98] The case involved alleged violations of the Goshute tribal constitution with respect to candidate qualification, election results certification, and procedures for removal from office. While this decision favors the protection of tribal sovereignty intent of the act, its practical effect in an election dispute case is questionable since the party expected to provide rules by which the dispute will be settled is usually a party to the dispute, and can influence the outcome through the rules adopted or through the appointments made to any independent body assigned to resolve the dispute.[99]

The ninth circuit, in *United States ex rel Cobell* v. *Cobell*,[100] affirmed a district court's finding that a father who sought enforcement of a State custody order against a tribal court which had granted a temporary restraining order barring custody, lacked meaningful remedies in the trial court because the tribal judge's order had not contained an invitation to participate in the appellate processes and the judge had stated that only a Federal court order would cause him to rescind his action. The ninth circuit determined that the State had jurisdiction over custody of the children incidental to its jurisdiction over the parent's divorce and that the tribal law and order code had disclaimed jurisdiction over marriage, divorce, and adoption in favor of the State. The circuit court interpreted this as a relinquishment of jurisdiction over custody incident to divorce and rejected any concurrent jurisdiction in the tribal court over the case.

(d) *Lack of justiciable issue*

The only case declining Federal review to discuss this ground for refusing jurisdiction over a dispute was *McCurd* v. *Steele*,[101] which also found a failure to exhaust tribal remedies. On the lack of a justiciable issue, the court found that the tribal elections board had not certified a winner or determined whether contested, write-in ballots were valid under the tribal constitution and bylaws. Such a decision relating to the mechanics of a tribal election was an internal political matter which the tribe had to decide before there could be a controversy in a justiciable form over which the Federal court could exercise jurisdiction.

4. SOVEREIGN IMMUNITY OF TRIBE FROM SUIT

A court cannot take jurisdiction over an action brought against a government which has sovereign immunity from suit.[102] Because of their status as dependent sovereigns with authority over their internal affairs, absent qualification by treaty or Federal statute, tribes possess the immunity from suit of any sovereign. *United States* v. *United States Fidelity and Guarantee Co.*[103] This immunity is coextensive

[98] 503 F.2d 653, 656 (10th cir. 1974).
[99] See: *Rosebud Sioux* v. *Driving Hawk*, upholding the district court's appointment of a "special master" from the tribe to hear evidence on election disputes after finding that further attempts to exhaust tribal remedies would be futile.
[100] 503, F.2d 790 (9th cir. 1974) *cert. denied*, sub. nom. *Sharp* v. *Cobell*, 421 U.S. 999 (1975).
[101] 503 F.2d 653 (10th cir. 1974).
[102] 395 U.S. 1 (1969); 312 U.S. 584 (1941).
[103] 309 U.S. 506 (1940).

with that of the United States,[104] and may not be waived except by express language; general jurisdiction statutes are not sufficient. *Thebo* v. *Choctaw Tribe*.[105]

After passage of the Indian Civil Rights Act, courts took jurisdiction of cases and either ignored the sovereign immunity from suit issue or found a waiver of immunity without discussing the basis for their decision. But in *Loncassion* v. *Leekity*,[106] the court faced the issue and held that while the act did not, in so many words, provide for waiver of immunity or for suits against the tribe, it did imply a waiver since that was the only way suits could be enforced. The court also found a waiver in the terms of the tribe's contract with the BIA for police services which provided for tribal liability for suits by persons against tribal responsibility for liability insurance. This reasoning violates the principle that there should be no implied waiver of immunity from suit. Even if an "overwhelming implication" test is used, there is not such a degree of evidence in the legislative history of the act to support such a finding. Furthermore, a finding of waiver of immunity rests on another questionable finding of federal courts: that habeas corpus was not the exclusive basis for their exercising jurisdiction. Finally, in finding a waiver by contract terms, the court ignored the established rule that waiver required a treaty or act of Congress for Indian tribes.

Following *Loncassion*, other courts have also implied a waiver of immunity.[107] Only *O'Neal* v. *Cheyenne River Sioux Tribe*,[108] citing an immunity from suit provision in the tribal code, found that the tribe had sovereign immunity from suit. Although *Daly* and *Brown* were decided within 2 months after the decision in *O'Neal*, neither was mentioned in finding that the tribe's immunity from suit was abrogated by the Indian Civil Rights Act. One reason for this discrepancy may be in the type of relief sought. *Daly* and *Brown* were reapportionment cases in which the relief sought was equitable, while *O'Neal* was an action for wrongful taking of property which involved equitable relief and a claim for $50,000 actual and $1 million punitive damages.

A memorandum requested by the United States Supreme Court in connection with a pending petition for *certiorari* in *Thompson* v. *Tonasket*,[109] was prepared for guidance of the Justice Department in 1974.[110] The memorandum criticized the *Johnson* and *Loncassion* line of cases as violative of the doctrine requiring express waiver of sovereign immunity laid down in *Edleman*, *Thebo*, and *Adams*. The memorandum also argued that if Federal courts had jurisdiction over 25 U.S.C. Section 1302 cases, suits could be brought against tribal officials for violations of the act but the tribes themselves were immune from suit.

[104] 453 F.2d 152 (9th cir. 1971).
[105] 66 F. 372 (8th cir. 1895).
[106] 334 F. Supp. 370 (D.N.M. 1971).
[107] See *Johnson* v. *Lower Elwha Tribal Community*, 484 F. 2d 200 (9th cir. 1973); *Brown* v. *United States*, 486 F. 2d 648 (8th cir. 1973); *Daly* v. *United States*, 483 F. 2d 700 (8th cir. 1973).
[108] 482 F.2d 1140 (8th cir. 1973).
[109] 187 F.2d 316 (9th cir. 1973).
[110] Memorandum of Law and Accompanying letter from Kent Frizzell, U.S. Dept. of Interior, to Lawrence G. Wallace, Dep. Solicitor General, U.S. Dept. of Justice, May 22, 1974, cited in Ziontz at 44

The memorandum reasoned by analogy to the sovereign immunity of the States under the 11th amendment and the qualified immunity for officials provided for in *Scheuer* v. *Rhodes*.[111] Furthermore, the memorandum stated that waiver of sovereignty for tribes posed dangers to Federal policy of self-government and, more importantly, posed serious danger to the parallel Federal aim of aiding tribes in achieving economic independence not depleting limited tribal resources, since the tribes would be forced not only to pay money judgments in various instances, but also, in a much broader range of instances, to expend substantial funds to employ or retain tribal counsel. Finally, the memorandum argued that the 25 U.S.C. 1303 habeas corpus remedy was the only remedy available under the act. This is an important aspect of the argument against waiver of sovereignty immunity since if jurisdiction were limited to habeas corpus, there would be no sovereign immunity problem. A subsequent Justice Department memo agreed that neither 28 U.S.C. 1343(4) nor the ICRA had the effect of waivering sovereign immunity from suit by tribes who were protected, just as the States were immune under the 11th amendment and the United States under the sovereign immunity principle.[112]

5. CASES BY SUBJECT MATTER

(a) *Free exercise of religion, freedom of speech, press and assembly*

(1) *Free Exercise of Religion.*—A prime factor in the Ervin subcommittee's decision to hold hearings on deprivations of Indian civil rights was the decision in *Native American Church* v. *Navajo Tribal Court*.[113] In that case, the Tenth Circuit held that the First Amendment guarantee of the right to free exercise of religion was not applicable to the Navajo Tribal Government, since both the First and 14th amendments were restrictions on Federal and State, but not on tribal government. The decision let stand a tribal ordinance banning the use of peyote which was used by members of the Native American Church in religious ceremonies.[114]

At hearings by the Ervin subcommittee, church members complained of police harassment and employment discrimination by both tribal and BIA officials.[115]

The *Native American Church* case illustrated the paradox created by the interaction of Anglo-American culture and government with that of the tribes. Religious practices, which often antedate modern Navajo tribal government, were outlawed and church members forced to resort to civil rights actions, themselves an infringement on tribal sovereignty if successful, to gain acceptance of what was once an accepted traditional religious practice of the tribe.

As a result of this and other testimony, S. 961, the original Ervin proposal for an Indian bill of rights included a provision which would have incorporated the first amendment guarantees of free exercise,

[111] 94 S.Ct. 1683 (1974).
[112] Memorandum for the United States as *amicus curiae*, *Thompson* v. *Tonasket*, 487 F.2d 316 (9th cir. 1973) *cert. denied*, 95 S Ct. 132 (1974).
[113] 272 F.2d 131 (10th cir. 1959).
[114] See also, *Toledo* v. *Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954). Action charging infringement of religious freedom of Protestants in a Catholic pueblo dismissed by Federal court for lack of jurisdiction.
[115] 1961 Hearings, pt. 2, at 467–68.

and nonestablishment, of religion. In response to testimony that the prohibition against establishment would disintegrate the theocratic tribes, such as the Pueblos, the final version contained only the free exercise guarantee.[116]

As noted previously, prior to the Indian Civil Rights Act, Federal courts did not have to distinguish between the requirements of nonestablishment and free exercise because, where they overlapped, they were mutually reinforcing. After the ICRA, courts had to respect establishment of religion to the point of allowing tribal government involvement in religious practices which result in psychological pressures on the individual to conform while at the same time assuring the individual's right to free exercise. The practical effect of the free exercise clause in a theocracy, it was suggested, should be to proscribe only overtly coerced involvement in community practices or overt prohibition of divergent practices.[117] For example, members of the Native American Church testified that they were prohibited from using communal grazing areas by tribal authorities because of their religious beliefs.[118]

There have been no reported cases charging violations of the free exercise of religion provisions of the Indian Civil Rights Act.[119] Significantly, in 1965, prior to the passage of the act, the Navajo Tribal Council amended its peyote ordinance to permit members of the Native American Church to use peyote in connection with their religious practices and passed a tribal bill of rights.[120]

(b) Freedom of speech

Although free speech is an unquestioned right under the U.S. Constitution, it has not been so in Indian culture.[121] Historically, tribes have been homogenous communities which have traditionally suppressed open internal conflict or partisanship, thus full protection for free speech could undermine cultural value.[122]

The first case under the Indian Civil Rights Act gave a graphic illustration of this conflict between tribal and non-Indian concepts of free speech. In *Dodge* v. *Nakai*,[123] the principal plaintiff was a non-Indian lawyer (Mitchell) who was director of a Navajo OEO legal services program (DNA). He became the center of a dispute between the Navajo Tribal Council and the legal services program over the independence of DNA from the council. Efforts by the tribal council to renegotiate DNA's contract and remove Mitchell as director were rejected by DNA's board of directors. In the middle of the dispute, representatives of the Department of the Interior came to the reservation to explain the recently enacted Indian Civil Rights Act. At a meeting with a council advisory committee, a council member asked

[116] Comment: "The Indian Bill of Rights and the Constitution Status of Tribal Governments," 82 Harv. L. [hereinafter cited as Harvard note] Rev. 1344, 1359 (1969). 1965 Hearings at 18, 21, 221; Staff of Subcommittee on Constitutional Rights of Senate Committee on the Judiciary, 89th Cong., 2d sess. Constitutional Rights of the American Indian (com. print 1966).
[117] Harvard note at 1364–65.
[118] 1961 Hearings at 98.
[119] 25 U.S.C. 1302(1).
[120] Ziontz, at 7, note 22.
[121] It can be argued that legal protection of first amendment free speech rights have only been afforded up to the point where it becomes dangerous to the majority view of society. At that point, courts have often stepped in to "protect" the community from dangerous outside speech. In this sense then, Anglo-American concepts of free speech may be only relatively different from those of the tribes but not absolutely.
[122] Fretz, "The Bill of Rights and American Indian Tribal Governments," 6 Nat. Res. J. 581, 609–610.
[123] 298 F. Supp. 26 (D. Ariz. 1969).

whether the statute would prevent the tribe from evicting a person from the reservation. Mitchell, who was present, allegedly laughed in a scornful manner and was admonished. The next day, he was confronted by a council member, struck, and told to leave the council chambers. In subsequent action, the committee passed a resolution excluding him from the reservation. Mitchell then sued to enjoin enforcement of the order and asked for $10,000 in damages in Federal district court.

On the merits, the court recognized the tribe's power over persons under treaty provisions, but said that the Indian Civil Rights Act had imposed new responsibilities on the tribe with respect to the manner in which it could exercise its governmental powers and the objectives it could pursue. Assuming the laugh was as described by the tribe, the court said, exclusion for that reason was unlawful as lacking in due process under 25 U.S.C. 1302(8) and as abridging freedom of speech under 25 U.S.C. 1302(1). Attempts by the tribe to remove Mitchell as director for DNA for his role in a school dispute was abridgment of freedom of speech granted to both the lawyer and his clients. The *Dodge* court case shows a failure to apply its free speech test in a cultural context. Implicit in the decision is a value judgment based on Anglo-American models.[124] Furthermore, the decision points up possible problems created by Senator Ervin's late amendment of the ICRA to cover all persons rather than tribal members alone.

One commentator has argued that free speech guarantees should not prohibit tribes from excluding nonmembers from the reservation for political agitation as in the *Dodge* case,[125] because cultural autonomy is not compatible with political pressure from outside. Unfortunately, the irony, as in the free exercise of religion situation, is that some tribal governments have, through their organization under the IRA and Federal support, solidified power and abused the rights of dissident persons, both members and nonmembers. One Federal action may now require further Federal intrusion to remedy the ill, but the risk is that the remedy will only lessen tribal sovereignty without curing the ill. For example, in two cases arising on the Pine Ridge Reservation of the Oglala Sioux, *Janis* v. *Wilson*,[126] and *Means* v. *Wilson*,[127] dissident tribal members relied on the ICRA to fight employment discrimination and election irregularities by the tribal governments in power. In *Means*, plaintiff was an unsuccessful candidate for tribal council president who charged the incumbent president, council, and election board with election irregularities in violation of his right to a fair election under various sections of the act including section 1302(1).

c. Equal protection

The Indian Civil Rights Act of 1968 provides that no tribe exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of the law.[128] This requirement was not contained in initial legislative proposals but was added later in

[124] See Ziontz at 48–52.
[125] See also 1961–63 Senate hearings 120–21, 149 1965 Senate hearings 265; 1968 House hearings 94–99. In 1965, a Catholic priest was excluded from the Isleta Pueblo for attacking tribal religion, refusing sacraments to those participating in tribal customs, and advocating political reforms and changes in the government structure.
[126] 521 F 2d 724 (8th cir. 1975).
[127] 522 F.2d 833 (8th cir. 1975).
[128] 25 U.S.C., Section 1302(8).

response to substitute legislation recommended by the Department of the Interior at subcommittee hearings on the bill.[129]

As proposed by the Interior Department, equal protection guarantees would be extended only to members of the tribe. Senator Ervin redrafted S.961 to include the equal protection guarantee but expanded it to apply to any person including members of the tribe.[130]

The inclusion of an equal protection guarantee raised the question of whether alleged violations are to be tested by Indian or by Anglo-American constitutional standards.[131] Courts have generally held that the act's equal protection guarantees must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom.[132] Thus, the desirability of preserving unique tribal cultures and the continued validity of tribal governments counsels great caution in applying traditional principles of construction to Indian tribal governments.[133] At a minimum, equal protection in a tribal context requires that existing tribal law be applied with an even hand rather than being arbitrarily enforced in some cases and not in others.[134] In applying this test in cases involving legislative reapportionment, membership in the tribe for voting purposes, enrollment, residency requirements, and fair elections, courts have tended to modify traditional equal protection concepts to fit particular tribal customs or special tribal governmental purposes to the extent that those customs or purposes do not resemble those of Anglo-American culture and government.[135]

(1) *Legislative reapportionment.*—Equal protection guarantees posed two problems for tribes in regard to their governing bodies. In some tribes, the governing body was appointed rather than elected. For example, the Pueblos are theocracies whose council and governor are generally appointed by a nonelected group of religious leaders called Caciques. In some cases, this arrangement has been modified to allow the members to vote for candidates for tribal office chosen by the Caciques who continue to exercise veto powers through their religious influence.[136] This was seen to create possible problems with requirements of an election under a republican form of government.[137] On the other hand, where tribes did elect officials, equal protection created possible requirements that the council be elected by people from equal population districts.[137a]

The problem of appointed rather than elected councils appears to have been resolved by the holding in *Groundhog* v. *Keeler*,[138] that nothing in the Indian Civil Rights Act or its history indicated any intent to require that a tribe select its leaders by elections. Legislative apportionment in tribes with elected councils, however, has created problems as courts have applied the one-man, one-vote standards of *Baker* v. *Carr*.[139] One case has held that in light of the quasi-sovereign

[129] Summary Report of the Constitutional Rights of American Indians of the Senate Subcommittee on Constitutional Rights, of the Senate Judiciary Committee 89th Cong., 2d sess., at 9–10.
[130] Burnett, at 602, note 239.
[131] Harvard note at 1360.
[132] *Martinez* v. *Santa Clara Pueblo*, 420 F. supp. 5, 18 (D.N.M. 1975).
[133] *Means* v. *Wilson*, 522 F.2d 833, 842 (8th cir. 1975).
[134] *Martinez* v. *Santa Clara Pueblo*, *supra*
[135] *Means* v. *Wilson*, *supra*.
[136] See *Martinez* v. *Santa Clara Pueblo*, *supra*.
[137] Harvard note at 1361.
[137a] Harvard note at 1360, noting that equal population has been deliberately departed from on reservations occupied by more than one tribe but only one council.
[138] 442 F.2d 674, 682 (10th cir. 1971).
[139] 369 U.S. 186 (1962).

status of tribes, they are entitled to determine the extent to which the franchise is to be exercised in tribal election, absent explicit congressional legislation to the contrary.[140] Nevertheless, in *White Eagle* v. *One Feather*,[141] an action was brought to enjoin a general tribal election and require reapportionment of election districts of the Standing Rock Reservation. The court held that 25 U.S.C. 1302(8) included the one-man, one-vote principle, but reversed the district court's injunction because of insufficient evidence of population distribution. Noting that the tribe had established voting procedures paralleling those found in Anglo-American culture, the court said:[142]

> Here, then, we have no problem of forcing an alien culture, with strange procedures, on this tribe. What the plaintiffs seek is merely fair compliance with the tribe's own voting procedures in accordance with the principles of *Baker* v. *Carr*, *supra*, and subsequent cases.

The eighth circuit in two subsequent cases, followed *White Eagle* in laying down a rule that the one-man, one-vote principle of equal protection under the 14th amendment is applicable to the tribes under 25 U.S.C. 1302(b), where the tribe has adopted election procedures analogous to those found in Anglo-American culture.[143]

In *Daly*, the court found that in designing their apportionment plan and election rules, the Crow Creek Sioux were entitled to set requirements they found appropriate so long as they were uniformly applied in all districts, but in this case, the variations between the number of eligible voters per council member far exceeded those allowed State legislatures. Reapportionment was ordered based on tribal population rather than eligible voters, with appropriate amendments of the tribal constitution and recommendations for inclusion of periodic review of apportionment provisions.[144] Reapportionment on the basis of either population or qualified voters is permitted where the tribal constitution specifies the basis for apportionment.[145] This was not the case in Daly where the constitution was silent on the basis for apportionment, and the court applied population as the preferable standard.[146]

(2) *Fair election practices.*—Federal courts have been called upon to act as mediators of election disputes among opposing factions in the same tribes. It is questionable whether such intervention was intended by the Indian Civil Rights Act, and courts have exercised a sometimes stated presumption against interference in tribal election matters.[147]

The leading case involving tribal election irregularities was *Means* v. *Wilson*.[148] Means and his supporters sued Wilson, the incumbent council president and election winner, the Oglala Sioux Tribal Council, and the tribal election board for election irregularities in violation of their right to a fair election under 25 U.S.C. 1301(2), 1302(1), and 1302(8), as well as other Federal statutes barring private conspiracies depriving a person of the equal protection of the law. The eighth circuit held that the standard for setting aside a tribal election had to be at least as

[140] *Wounded Head* v. *Tribal Council of the Oglala Sioux Tribe*, 507 F. 2d 1311 (8th cir. 1975).
[141] 487 F.2d 1311 (8th cir. 1973).
[142] *Id.* at 1314.
[143] *Daly* v. *United States*, 483 F.2d 700, 701–02 (8th cir. 1973); *Brown* v. *United States*, 486 F.2d 658, 661–62 (8th cir. 1973).
[144] *Daly* v. *United States*, *supra* at 707.
[145] *Brown* v. *United States*, *supra*.
[146] See also *St. Marks* v. *Canan*, Civ. No. 2928 (D. Mont. Jan. 1971). Reapportionment required in election of at-large member of Chippewa-Creek Tribal Council.
[147] But, see DeRairmer "The Indian Civil Rights Act of 1968, and the Pursuit of Responsible Tribal Self Government," 20 S.D.L. Rev. 59 (1975) (Arguing that there are situations in which tribal government at least deserves respect.)
[148] 522 F.2d 833 (8th cir. 1975).

restrictive as that applied in non-Indian local election cases under the Constitution. This required that an intentional depreviation or interference with the right to vote or participate in governmen be found, and the court found a basis for the claim against the election board.

In *Luxon* v. *Rosebud Sioux Tribe of South Dakota*,[149] a member of the Rosebud Sioux brought an action for declaratory relief and an injunction against enforcement of a provision in the tribal constitution which disqualified any employee of the Public Health Service or Department of the Interior from the candidacy for tribal council, charging violations of the equal protection section of 25 U.S.C. section 1302(8). The eighth circuit decided the case on jurisdictional ground and remanded to the district court which held that the plaintiff's disqualification, solely on the basis of his employment with PHS, was a denial of equal protection and ordered a new election with his name on the ballot.

One writer has questioned the decision in *Luxon* as operating against strong tribal interest in excluding certain employees from public office, arguing that given the relationships between BIA and PHS personnel and tribal members dependent on them for services, such persons would be in a strong position to grant favors.[150] Such exclusions are also partially explained by tribal hostility and mistrust of Federal officials as outsiders and oftentimes adversaries.

(3) *Age and residency requirements for voting.*—The 26th amendment has been held not to be applicable to tribal elections; the equal protection clause of the Indian Civil Rights Act also does not limit a tribe's power to fix 21 as the voting age in tribal elections.[151] In that case, one 18-year-old and one 19-year-old were prevented from voting. The court also said that the 1970 Voting Rights Act was not applicable to tribes under the Indian Civil Rights Act because tribes were neither States nor political subdivisions of the State.[152]

Absentee voting by off-reserveration tribal members has raised questions of violations of equal protection under 25 U.S.C. section 1302(8). No cases have dealt with the issue yet, but a letter from the Associate Solicitor (March 31, 1972) advised the Department of Justice against instituting litigation regarding prohibitions of absentee voting by off-reservation voters who had lived for at least 1 year on the reservation, but did not at the time of voting. The Associate Solicitor termed this view incorrect and stated that the Supreme Court's decision on voter residency in *Dunn* v. *Blumstein* need not necessarily affect tribal election requirements, especially where a majority of the members resided off the reservation. In such cases, off-reservation votes could terminate the tribe's status as a landed sovereign.

(4) *Enrollment and membership in the tribe.*—Equal protection guarantees in the Indian Civil Rights Act create special problems because of the common use of minimum percentage of Indian ancestry to determine membership in the tribe, voting eligibility, and right to inherit property. A complete prohibition on racial distinctions be-

[149] 455 F.2d 698 (8th cir. 1972).
[150] Ziontz at 51.
[151] *Wounded Head* v. *Tribal Council of Oglala Sioux Tribe of the Pine Ridge Reservation*, 507 F. 2d 1079 (8th cir. 1975).
[152] See also Memo. Solicitor, M–36840 (Nov. 9, 1971) to the same effect but nothing that definitions of "adult Indian" in Federal laws and regulations had been changed from 21 to 18 years old.

cause of equal protection requirements would destroy the tribe since it would have to accept any outsider who wanted membership.[153] If enough people exercised the "right" to join the tribe, in time this would dilute the tribe's culture and deplete its limited resources.

Prior to the Indian Civil Rights Act, courts had ruled that tribes had complete authority to determine all questions concerning their own membership as a necessary incident to their sovereign status.[154] Courts have generally remained sensitive to the critical importance of maintaining tribal culture through control of membership under the Indian Civil Rights Act but this control is no longer absolute, and there is some indication that courts will be willing to interfere where the classification is not based in traditional tribal custom or law.

Most cases involving equal protection challenges to membership classifications based on blood quantum or some other criteria have required that the equal protection guarantee of the Indian Civil Rights Act be read against the backdrop of tribal sovereignty, law, and custom. For example, in *Martinez* v. *Santa Clara Pueblo*,[155] the court refused to invalidate a tribal membership ordinance which denied membership to children of female, but not male, members of the pueblo who had married non-members, where the classification attacked was one based on criteria traditionally employed by the tribe in considering membership questions.

The Tenth Circuit, in *Slattery* v. *Arapahoe Tribal Council*,[156] declined to rule on whether tribal enrollment procedures were subject to equal protection and due process requirements under 25 U.S.C. section 1302(8) because the complaint did not disclose sufficient facts to show that the ordinance had been applied in a discriminatory manner. Denial of membership for insufficient blood quantum under the ordinance itself, which was not questioned at all, was not found to be violative of equal protection or due process. The ordinance challenged enrollment denied to the children of an Arapahoe woman and a non-Indian man because they did not have the required one-fourth blood quantum. The mother argued that the ordinance was applied arbitrarily. This distinction between the challenge to the ordinance as against a challenge to its application is important because *Slattery* is often distinguished on its facts, due to the insufficient complaint, as not barring Federal court intervention in enrollment cases for equal protection violations. Following *Slattery*, the Assistant Solicitor's letter (June 30, 1972) considered whether, in light of that case, the Department of Interior should abandon its previous position that the equal protection provision of the Indian Civil Rights Act applied to enrollment criteria. The letter concluded that *Slattery* should not deter the Department from continuing to assert that tribal ordinances, even enrollment ordinances, had to meet the strictures of equal protection under the act. *Slattery* was distinguished as limited to its facts and turning on the insufficiency of the complaint.[157]

[153] Harvard Law Note at 1361–62.
[154] See *Martinez* v. *Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915 (10th cir. 1957).
[155] 402 F. Supp. 5 (D.N.M. 1975).
[156] 453 F.2d 278 (10th cir. 1971).
[157] See also letter of the Assistant Secretary of the Interior (Feb. 25, 1971) to the Shoshone Business Council in which he disapproves a proposed resolution of the Council which contained an enrollment provision similar to the one in Martinez as a violation of equal protection.

The Department of Interior's position on applying equal protection requirements to enrollment criteria is based on an early Solicitor's opinion, which followed passage of the act, in which a provision of the Jicarilla Apache tribal constitution placing more restrictive membership requirements on illegitimate children than other persons was considered.[158]

The Indian Civil Rights Act was viewed as placing equal protection restrictions on the tribe's former complete authority to determine questions of membership. Denial of rights to illegitimate persons to membership was considered to be not a rational exercise of governmental power in the deterrence of illicit conduct and not based on an essential requirement of the tribe. The opinion then suggests that there would be no equal protection problem were the tribe to establish a rebuttable presumption that an illegitimate child possessed no more than one-half the blood quantum shown for his mother or father on the tribal membership roll, since the Solicitor viewed blood quantum as an essential requirement of the tribe.

The Interior Department has also applied this "essential requirement of membership" standard to void membership provisions for sex discrimination and residency requirements. The Assistant Secretary of the Interior, in a letter (February 23, 1972), considered several provisions of the constitution and bylaws of the Colusa Indian Community in California which governed the adoption into the band of persons of one-half or more Indian blood related by marriage or descent to members of the band who had resided in the community for at least 2 years prior to application for membership. This residency requirement was held to be valid and not in violation of 25 U.S.C. Section 1302(8), but another section which excluded an Indian wife of a non-Indian husband from eligibility into the band was held to be impermissible sex discrimination, as was a third section which provided for loss of membership by a female member who married a nonmember.

One Federal district court has held that loss of membership by a Colville woman through marriage to a Canadian Indian was not a Federal question over which the court had jurisdiction.[159]

(d) Due process

Strict application of the full panoply of due process safeguards which have developed under the Constitution creates significant problems for many tribes for a variety of reasons. First, lack of resources, both financial and technical makes it impossible for all but the most affluent tribes to provide the necessary hearings and notice required by procedural due process concepts. Second, informality in tribal governments is often the rule. Most tribes have not adopted a bureaucratic mentality.[160] Third, a traditional cultural value makes the good of the community primary rather than the rights of the individual. In this context, fairness in the procedures used to reach the communal end has a different meaning than that usually applied to constitutional due process guarantees.

Cases charging due process violations have arisen most often with regard to enrollment or membership and election disputes. At a minimum, 25 U.S.C. Section 1302(8) requires that certain aspects of procedural due process, principally notice and a hearing, must be observed in granting or denying benefits of tribal membership.[161]

The right to procedural due process under 25 U.S.C. 1302(8) has also been upheld where a tribe divided the possessory land holdings of a member's father and assigned the land to another member.[162] In a case not decided on the merits by the eighth circuit because of failure to exhaust remedies, the district court found that due process requirements of 25 U.S.C. 1302(8) were met where tribal employees, terminated for political activity against the tribal government during work hours, were given a post-termination hearing. No pretermination hearing was required by due process, the court ruled.[163]

Most due process cases have involved election disputes. In *Solomon* v. *LaRose*,[164] five electees to the Winnebago tribal council challenged the right of the incumbent tribal council to exclude them from council seats in violation of the tribal constitution and bylaws and due process guarantees of 25 U.S.C. 1302(8). The court, in granting a temporary injunction, stated that:[165]

> Due process is more than requiring that a government's decision be based upon national evidentiary basis and that certain concomitants of procedural safeguards be observed, but entails the overriding notion that government must operate within the bounds of the instrument which created it.

The danger of the *Solomon* case is its implicit view that Federal courts will interpret the governing documents of a tribe according to Anglo-American standards.[166]

In *Luxon* v. *Rosebud Sioux Tribe*,[167] the court dismissed for lack of jurisdiction an action which challenged on due process and equal protection grounds a provision of the tribe's constitution which disqualified any employee of the PHS or Department of the Interior from candidacy for tribal council.[168] The ninth circuit has recently upheld a tribal 1-year residency requirement for candidates seeking public office as not in violation of due process or equal protection guarantees.[169]

Another critical area involving due process guarantees is that of exclusion from the reservation. When the Indian Civil Rights Act was passed, it was felt that due process requirements, coupled with the prohibition of bills of attainder, could create problems for tribal governments which sought to exclude persons from the reservation, especially where there were functionally separate tribal courts.[170] The first case under the act realized this fear. In *Dodge* v. *Nakai*,[171] the court overturned the order of a subcommittee of the tribal council excluding a nonmember attorney from the reservation. In doing so, the court stated that due process required governmental entities to utilize reasonable means in seeking to achieve legitimate ends. Banishment was

[158] Op. Dep. Soc. M-36793 76 I.D. 353 (1969).
[159] *Hein* v. *Nicholson*, Civ. No 3459 (D. Wash. Nov. 30, 1971).
[160] Zlontz, at 47.

[161] See *Martinez* v. *Santa Clara Pueblo*, 402 F. Supp. 5 (D.N.M. 1975).
[162] *Crow* v. *Eastern Band of Cherokees, Inc*., 506 F.2d 1231 (4th cir. 1974).
[163] *Janis* v. *Wilson*, *supra*, note 94.
[164] 355 F. Supp. 715 (D. Neb. 1971).
[165] *Id*. at 723.
[166] See, also *Williams* v. *Sisseton Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194 (D.S.D. 1975).
[167] *Luxon* v. *Rosebud Sioux Tribe*, 455 F.2d 698 (8th cir. 1972).
[168] Zlontz argues that this type of disqualification represents a legitimate tribal interest in light of tribal sovereignty.
[169] *Howlett* v. *The Salish and Kootenai Tribe of the Flathead Reservation*, civ. Civ. No. 75-1478, 529 F.2d 233 (Jan. 22, 1976) (9th cir. Jan. 22, 1976).
[170] Harvard note at 1365
[171] 298 F. Supp. 26 (D. Arizona 1969).

found to be a severe remedial device, and nonmembers on the reservation were found to be entitled to the assurance that they would not be subject to summary ejection from their homes and place of employment because of the disfavor of a ruling segment of the tribe. One commentator has argued that due process requirements in such cases should be less stringent for tribal members than for nonmembers because when the traditional interest of the tribe in controlling its membership and territory is weighed against individual interest, exclusion means a greater loss of benefit, similar to banishment from one's country, to a member than a nonmember. [172]

(*e*) *Property disputes*

A leading case in this area is *Crow* v. *Eastern Band of Cherokee Indians, Inc.*, 127 506 F.2d 1079 (4th Cir. 1975). A Cherokee tribal member brought an action charging violation of equal protection and due process guarantees of 25 U.S.C. 1302(8) by the tribal government in dividing her father's possessory land holding and assigning it to others. The fourth circuit held that under the ICRA the plaintiff was entitled to procedural due process incident to the property division, as well as an even handed application of tribal customs, tradition and any formalized rules relative to tribal land. Federal courts, however, do not have power to go beyond due process to rule on the merits since there was nothing in ICRA which swept aside Indian sovereignty over property law. If there were, it would conflict with the policy of the Indian Reorganization Act. The circuit court observed the district court had not taken into account the communal nature of Cherokee land ownership and appeared to be applying Anglo-American real property principles which were incompatible with the fact that Indian lands belonged to the tribe or community, rather than to individuals severally or as tenants in common. Indian customs and traditions were to be used as guides rather than the technical rules of common law.

The *Crow* holding is consistent with ICRA policy favoring tribal sovereignty and statements by the Ervin subcommittee that the ICRA was not intended to apply full equal protection and due process guarantees and the attendant dislocations in too quickly subjecting tribal governments to a sophisticated legal structure.

In *Johnson* v. *Lower Elwha Tribal Community*, 128 484 F.2d 200 (9th Cir. 1973), plaintiff challenged revocation of his land assignment without meaningful opportunity for a hearing by the tribal council as a violation of equal protection and due process. While the case was decided on jurisdictional grounds, *Johnson* contains a footnote discussion of the meaning of due process under 25 U.S.C. 1302(8) in which the court stated that:

> There may be some provision of the Indian Civil Rights Act that under some circumstances may have a modified meaning because of the special historic nature of particular tribal customs or organization. However, this is not one of them.

As support for its position, the court quotes a reaction from the Ervin subcommittee hearing which says, with certain exceptions, the same limitations and restraints as those imposed on the U.S. Government by the Constitution are to be imposed on tribal governments ex-

[172] Harvard note at 1365–66.

ercising powers of self-government. The *Johnson* court says this view supports its finding that the clear intention of the subcommittee was that due process requirements be interpreted in the same manner as is applied to the United States or individual States. The court also noted that the tribal constitutions provide that members may not be denied rights or guarantees, including due process, enjoyed by citizens under U.S. Constitution.

One court has recognized that tribes have the power of eminent domain. In *Seneca Constitutional Rights Organization* v. *George*, 130 348 F. Supp. 51 (D.N.Y. 1972), plaintiff sought to prevent the Seneca Nation from signing or implementing an agreement with a corporation which wished to locate a factory in an industrial park to be developed by the Nation. Among his claims for relief, the plaintiff charged that the Seneca Nation lacked the power of eminent domain. The court held that the Nation had eminent domain power as an inherent right of sovereignty except where restrictions were placed on it by the United States and that 25 U.S.C. 1302(5) was a Congressional recognition of the power of eminent domain.

(*f*) *Criminal procedures and ordinances*

(1) *Attorney cases.*—It has been held that 25 U.S.C. 1302(6), guaranteeing the right to defense counsel in one's own defense, prohibits a tribal judge and chief of police from denying an Indian the right to retain a professional defense attorney in his own defense.[173] Another court reasoned that professional attorneys were necessary to protect the habeas corpus power granted by the Indian Civil Rights Act. Such cases have generally rejected tribal arguments that 25 U.S.C. 1302(6) requirements are satisfied by permitting fellow tribesmen to represent plaintiffs in court.[174] These cases illustrate a realized fear of the tribes at the hearings on the Indian Civil Rights Act: introduction of professional attorneys into informal tribal settings and the inequality of resources where a tribe is too poor to employ professional counsel.

(2) *Jury trial.*—In *Low Dog* v. *Cheyenne River Sioux Tribal Court*,[175] the court struck down a provision of the tribal code which required a $17 fee and a cash bond in order for a defendant to obtain a jury trial *de novo* on appeal of a conviction in tribal court. The court also found that the defendant was entitled to be informed of his right to appeal and a free jury trial. Furthermore, any sentence following conviction by jury on appeal could not exceed sentence received in the lower court and credit had to be given for pretrial confinement and confinement pending appeal. In *Claw* v. *Armstrong*,[176] a Federal district court ordered the tribal preparation of a procedure for granting jury trials in trial court under the 25 U.S.C. 1302(10) guarantee of the right to trial by jury of not less than six persons. The free jury trial requirement can be serious because of its potential impact on poor tribes.

(3) *Revocation of probation.*—Due process does not require a hearing before a trial court before revocation of suspended sentence for violation of parole.[177]

[173] *Claw* v. *Armstrong*, Civ. No. C–2307 (D. Colo. Aug. 7, 1970).
[174] *Towersap* v. *Ft. Hall Indian Tribal Court*, Civ. No. 4–70–37 (D. Idaho Dec. 28, 1971).
[175] Civ. No. 69–21 C (D. S. Dak. Mar. 14, 1969).
[176] Civ. No. C–2307 (D. Colo. Aug. 7, 1970).
[177] *Richards* v. *Pine Ridge Tribal Court*, Civ. No. 70–74W (D. S. Dak., June 13, 1970).

(4) *Imprisonment for inability to pay fine.*—An indigent member of the Papago Tribe was jailed for inability to pay a fine imposed on conviction for theft. Defendant petitioned for writ of habeas corpus under 25 U.S.C. 1303, arguing that the Supreme Court's decision in *Tate* v. *Short*, 401 U.S. 395 (1971) holding that a person could not be imprisoned for inability to pay a fine was binding on tribal court through the equal protection clause of 25 U.S.C. 1302(8). The court granted the writ, declaring confinement unlawful but did not expressly hold that *Tate* was incorporated in 25 U.S.C. 1303(8).[178]

(5) *Unreasonable search and seizure.*—The right of persons to be secure in their persons, houses, papers, and effects against unreasonable search and seizure is contained in 25 U.S.C. 1302(2). The leading case, *Loncassion* v. *Leekity*,[179] concerns the shooting by a Zuni tribal police officer of a member of the Pueblo who was attempting to escape arrest for drunkenness. The member brought an action for damages under 25 U.S.C. 1302(2) and 25 U.S.C. 1302(8) charging that the officer was intentionally or grossly negligent and that the tribe was negligent in hiring and training the officer. The court held that the right to be free from excessive injurious force, arbitrarily inflicted, was among the rights protected under the Indian Civil Rights Act provisions on due process and unreasonable search and seizure.

Loncassion should also be noted for its finding that damages were allowable under the Indian Civil Rights Act, even though the statute makes no provision for them, because courts have the power to adjust remedies where Federal rights have been invaded. The court rejected sovereign immunity from suit for the tribe based on the statute and on finding a waiver in the terms of a contract between the Pueblo and BIA, whereby the tribe set up a law enforcement program and agreed to be liable for damages or injury to persons or property, attorney's fees and liability for damages or injury to persons or property, attorney's fees, and liability insurance for suits brought for wrongful conduct by tribal officers. The court allowed plaintiff's claim for damages resulting from the Pueblo's negligence in hiring and training its officers under the agreement with the BIA. Furthermore, the court applied *Bivens* v. *Six Unknown Named Agents*,[180] to hold the individual officer liable for violations of 25 U.S.C. 1302(2).

Loncassion has far reaching implications for tribes attemping to exercise sovereign powers. With limited financial resources, tribes may nevertheless be faced with large damage actions for injuries caused by tribal employees. The legal cost in defending against suits of this kind and the cost of insurance could also be prohibitive. Thus, at the same time Federal policy is encouraging tribes to expand their areas of responsibilities, the unavailability of financial support is operating to cut back the expansion. Finally, the effect of individual liability on tribal officers will harm recruitment of qualified personnel. Federal support for training tribal officers is limited.

The Indian Civil Rights Act of 1968 has also been used as the basis for a State court holding that the act did not create power in a tribal government to issue search warrants. In *State* v. *Railey*,[181] a Zuni tribal court had issued a search warrant. Evidence seized pursuant to

[178] In re Pablo, Civ. No. 72-99 (D. Ariz., July 21, 1972).
[179] 334 F. Supp. 370 (D. N. Mex., 1971).
[180] 403 U.S. 388 (1971).
[181] 87 N.M. 275, 532 P.2d 204 (1975).

the warrant was admitted into evidence against the defendant at his trial in State court and conviction resulted. On appeal, the New Mexico appellate court overturned the conviction and ordered a new trial on the ground that the evidence was inadmissible in State court, since the tribe did not have power to issue search warrants. The provision in the Indian Civil Rights Act[182] prohibiting warrantless searches and requiring probable cause did not create power in the tribal government to issue search warrants. Using a rationale often employed by Federal courts in interpreting the act, a prohibition against warrantless searches and seizures of persons or property provision of habeas corpus for unlawful detention would be meaningless if no power in the tribal government to issue warrants existed.

Furthermore, the tribe does not draw its power to issue warrants from the Indian Civil Rights Act, but from its tribal sovereignty.

Findings

One: Tribal Justice systems—police and courts—are evolving institutions.

Two: The design and structure of most existing tribal justice systems have been explicitly or implicitly imposed on tribes by the Federal Government.

Three: There is a significant need for tribal flexibility in the redesign and restructuring of these justice institutions.

Four: The Federal courts, through the Indian Civil Rights Act and 28 U.S.C. 1331(a) have become intimately involved in the functioning of tribal governments.

Five. The closer tribal governments come to non-Indian modes of government in structure and functioning—as opposed to any traditional systems—the closer they are held to American constitutional standards.

Six: Because of colonial status of many tribal economies, the financial burden must be borne by the Federal Government.

Seven: Tribal justice systems with proper funding are capable of, and are, providing effective delivery of services to all persons subject to their jurisdiction.

Recommendations

One: Congress should appropriate significant additional moneys for the maintenance and development of tribal justice systems.

(*a*) Funding should be channeled directly to tribes.

(*b*) Funding should specifically provide for making tribal courts, courts of record.

(*c*) This funding should provide tribes with the opportunity to revise existing systems in order to develop systems of their own choosing.

Two: Congress should provide for development of tribal appellate court systems.

(*a*) Appellate systems will vary from tribe to tribe and region to region.

(*b*) The development of appellate systems will require tribal experimentation and time.

[182] 25 U.S.C. 1302(2)

(*c*) Congress should, by statute, recognize such appellate systems as court systems separate from State and Federal systems.

Three: Tribal court decisions should be entitled to "full faith and credit" by State and Federal courts.

Four: When tribal appellate systems—be they by individual tribes or multitribal—are firmly operative, the Federal court's role in review of their decisions should be limited exclusively to "writs of habeas corpus."

VI. FINDINGS AND RECOMMENDATIONS

A. General

FINDINGS

One: There is throughout all levels of American society substantial ignorance and much misinformation concerning the legal-political status of Indian tribes and the history of the unique relationship between the United States and Indian tribes.

Two: This ignorance and misinformation, particularly when found among all levels of government—Federal, State and local—has significant negative impact on Indian tribes.

RECOMMENDATIONS

One: Congress should require mandatory training concerning Indian history, legal status and cultures of all government employees administering any Federal program or State or local program funded in whole or in part by Federal funds.

Two: Congress should allocate sufficient resources so that a comprehensive program of Indian education for non-Indians can be conducted; such program should include:

(*a*) An evaluation of the history and civics curricula utilized by elementary, secondary, higher education institutions.

(*b*) The identification of gaps and inaccuracies in such curricula.

(*c*) The provision of model curricula which accurately reflects Indian history, tribal status and Indian culture.