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# A CONSTITUTIONAL ANALYSIS OF THE CRIMINAL JURISDICTION AND PROCEDURAL GUARANTEES OF THE AMERICAN INDIAN

by

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# PREFACE

One of the difficulties associated with research is that no definite patterns emerge which can be used to unequivocally explain and clarify all that happened. This is most notably true respecting a constitutional analysis of the criminal jurisdiction and procedural guarantees of the American Indian. In these two areas of focus no easy generalizations can be made because an amicable, just, and responsible solution involved, and continues to involve, the dignity of a once numerous and powerful people, the legislative power of the states of the Union, the controlling power of the United States Constitution and laws, and the rights, liberty, and protection of American citizens. As a result of these conflicting jurisdictions and interests, the jurisdictional status of the American Indians and their territory, along with their constitutional procedural guarantees, has taken diverse patterns, and involved various solutions.

It would be easy in explaining these matters to develop a dramatic and emotional discourse, i.e., to write about "Indian heathenism," "savagism," or "a continent lost--a civilization won." Such an approach, however, would oversimplify what actually happened. It might easily obscure the fact that the jurisdictional status of the American Indians and their territory, along with their constitutional procedural guarantees, did not spring forth fully developed and conceptualized as did Pallas Athena (Minerva) from the head of Zeus. It is with the limitations associated with these thoughts that this study has been undertaken. The study is presented in the hope that it will contribute to the general understanding of the peculiar and complex jurisdictional and procedural status of the American Indians and their territory. To the author this study represents an analysis preliminary to continued study of the major patterns and problems characterizing the efforts of diverse cultures to resolve their criminal problems.

To a number of persons gratitude is due for the aid and guidance they so readily provide during the time this study was being conducted. Special acknowledgment is extended to Mrs. Evalena Dunn of the Syracuse University Law Library for the helpful advice and service she displayed while work was being done with legislative codes, court reports and digests. Appreciation is also extended to Miss Lillian Eckert and Miss Marion Mullen of the Syracuse University General Library for their guidance while working with public documents. To Mrs. Malvina Sherman grateful thanks is extended for the devotion and accommodation she put forth during the typing of this dissertation.

Foremost acknowledgement is reserved for the person instrumental for the commencement and completion of this study. Professor Spencer D. Parratt, who has served as faculty advisor on this study, has sacrificed both his time and energy during his analysis and reading of the issues and events presented in this dissertation. His suggestions have been invariably helpful and wise. During the course of this study, he has contributed the richness of his background of experience in the public service, his unusual capacity as a scholar and teacher, his perspective, sympathetic understanding and encouragement.



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## CHAPTER I

## INTRODUCTION: DESCRIPTION AND APPROACH TO THE STUDY

An American problem, and intermittently an economic, social and political issue of the first magnitude, is governmental policy toward minority groups. However, it is the writer's contention that some minority group problems, like the contemporary problems of racial segregation and religious discrimination, are so heavily charged with dramatic interest and emotion that they tend to overshadow others which have far less capacity to attract their fair share of merited discussion and analysis.

The American Indians, a small but growing group, have long been the objects of passive degradation. They are with minor exceptions the only minority group which is still "fair game" for caricaturization, jest, ridicule, and contempt. The illiterate American Negro of the past no longer appears on television and motion picture screens, but the savage, uncouth, and bloodthirsty aborigine receives increased cinemascope and television time and attention. Robert W. Oliver reasons that "No editor in his right mind would publish a cartoon exploiting a supposed characteristic of a racial or religious minority, with one exception: scarcely a week passes that some national magazine does not use an Indian as the subject of a cartoon or advertisement."[1]

One of the reasons for the American Indians' plight stems from the idea that the aborigines are quaint and diminishing survivors of once prolific generations. Therefore, in order to demolish this erroneous concept, along with presenting and clarifying others, a few paragraphs at the beginning of this study will be devoted to a very general description of the struggles, problems, and characteristics of the American Indians in their contacts with other peoples.

Actually, the American Indians are not a nationality or race on the road to the archives of extinction. In 1950 there were approximately 343,410 Indians within the continental United States.[2] And just ten years later (including the newly admitted states of Hawaii--472 and Alaska--14,444) the total had risen to 523,591.[3]

Other statistics portray the relationship of the American Indians to the urban-rural complex. As can be seen from Table 1, the American Indians

have not followed, like other minority groups, the migration to the metropolitan centers. Approximately 72 per cent of the American Indians live in units of less than 2,000 population. That is to say, while the nation has been undergoing urbanization, the American Indians have maintained, with minor exceptions, both their rural and sedentary idiosyncracies.

Table 1

American Indian Distribution: 1960

| Per Cent Distribution | 100% |
|---|---|
| Urban | 27.8 |
| a. Urbanized Areas | 16.2 |
| 1. Central Cities | 12.3 |
| 2. Urban Fringe | 3.9 |
| b. Other Urban | 11.6 |
| 1. Places of 10,000 or More | 5.4 |
| 2. Places of 2,500 to 10,000 | 6.2 |
| Rural | 72.2 |
| a. Places of 1,000 to 2,5000 | 4.3 |
| b. Other Rural | 67.9 |

Source: U.S. Bureau of the Census, Dept. of Commerce, 18th Decennial Census, United States Census of Population: 1960 (United States Summary).

It is also important to note that the American Indians are distributed very unevenly among the states of the Union. Eight states (Arizona, California, Montana, New Mexico, North Carolina, Oklahoma, South Dakota, and Washington) contain the bulk of the entire Indian population.

The half-million plus Indians who live in the United States have maintained with diminishing success and increased difficulty their tribal lands, autonomy, institutions, and beliefs; and in this connection, the problems of the Indians represent not exceptions to the movements and forces of history, but microcosms which are often ignored in the hustle and bustle of the twentieth century. To use some terms of ecology, the forces of "invasion" and "displacement" have been overrunning the Indians' civilization and removing them from their tribal lands. The Indians have been continually and persistently pushed by non-Indian settlers and supposedly developers from land they believe



Table 2

Total American Indian Population by State: 1960

| State | Total Population of State | Indian Population | Per Cent of Total Indian Population |
|---|---|---|---|
| Alabama | 3,266,740 | 1,276 | |
| Alaska | 266,167 | 14,444 | 6.4 |
| Arizona | 1,302,161 | 83,387 | 6.4 |
| Arkansas | 1,786,272 | 580 | |
| California | 15,717,204 | 39,014 | .2 |
| Colorado | 1,753,947 | 4,288 | .2 |
| Connecticut | 2,535,234 | 923 | |
| Delaware | 446,292 | 597 | .1 |
| District of Col. | 763,956 | 587 | .1 |
| Florida | 4,951,560 | 2,504 | .1 |
| Georgia | 3,943,116 | 749 | |
| Hawaii | 632,772 | 472 | .1 |
| Idaho | 667,191 | 5,231 | .8 |
| Illinois | 10,081,158 | 4,704 | |
| Indiana | 4,662,498 | 948 | |
| Iowa | 2,757,537 | 1,708 | .1 |
| Kansas | 2,178,611 | 5,069 | .2 |
| Kentucky | 3,038,156 | 391 | |
| Louisiana | 3,257,022 | 3,587 | .1 |
| Maine | 969,265 | 1,879 | .2 |
| Maryland | 3,100,689 | 1,538 | |
| Massachusetts | 5,148,578 | 2,118 | |
| Michigan | 7,823,194 | 9,701 | .1 |
| Minnesota | 3,413,864 | 15,496 | .5 |
| Mississippi | 2,178,141 | 3,119 | .1 |
| Missouri | 4,319,813 | 1,723 | |
| Montana | 674,767 | 21,181 | 3.1 |
| Nebraska | 1,411,330 | 5,545 | .4 |
| Nevada | 285,278 | 6,681 | 2.9 |
| New Jersey | 6,066,782 | 1,699 | |
| New Hampshire | 606,921 | 135 | |
| New Mexico | 951,023 | 56,255 | 5.9 |
| New York | 16,782,304 | 16,491 | .1 |

Continued

Table 2--Continued

| State | Total Population of State | Indian Population | Per Cent of Total Indian Population |
|---|---|---|---|
| North Carolina | 4,556,155 | 38,129 | .8 |
| North Dakota | 632,446 | 11,736 | 1.9 |
| Ohio | 9,706,397 | 1,910 | |
| Oklahoma | 2,328,284 | 64,689 | 2.8 |
| Oregon | 1,768,687 | 8,026 | .5 |
| Pennsylvania | 11,319,366 | 2,122 | |
| Rhode Island | 859,488 | 932 | .1 |
| South Carolina | 2,382,594 | 1,098 | |
| South Dakota | 680,514 | 25,794 | 3.8 |
| Tennessee | 3,567,089 | 638 | |
| Texas | 9,579,677 | 5,750 | .1 |
| Utah | 890,627 | 6,961 | .8 |
| Vermont | 389,881 | 57 | |
| Virginia | 3,966,949 | 2,155 | .1 |
| Washington | 2,853,214 | 21,076 | .7 |
| West Virginia | 1,860,421 | 181 | |
| Wisconsin | 3,951,777 | 14,297 | .4 |
| Wyoming | 330,066 | 4,020 | 1.2 |

Source: U.S. Bureau of the Census, Dept. of Commerce, 18th Decennial Census, United States Census of Population: 1960 (United States Summary).



to be their own. The acquisitive, materially minded non-Indians have shown little respect for the American aborigines who cling tenaciously and longingly to a beloved heritage. In the eyes of non-Indians, Indian lands and resources represent things to be developed and exploited--things of potential beauty, productivity, and fertility. To the aborigines tribal lands represent both a current, future, and an ancestral home. It is here that they, their children, and their progenitors were born; and it is hopefully here that they and their children will be allowed unmolestedly to attempt to preserve their heritage and "eke" out a subsistence. It is in this sense that they, like other United States citizens, have their memories and their loves; however, some things to them are worth more than smoke belching factories, congested interchanges, and gadgetary living.

More broadly, the Indians have long been reciprocal participants in the general forces of inequality and equality, nationalism, technology, and industrialization which are engulfing both the domestic and international scenes. For example the American Indians are only recently acquiring aspirations and showing increased demands of being equally integrated participants of the non-Indian society. However, these aspirations and demands represent to many Indians, unlike the current anti-colonial peoples of the world, the selection of a second best alternative. Historically, the Indians, like the anti-colonial peoples, have preferred self-direction, autonomy, and independence. Even today a very sizable proportion, if not most, of the Indians desire a continuance, at a non-reducible minimum, of their present unextinguished powers of local self-government. But contrary to the world surge and success for national autonomy, the Indians are to an increasing extent being integrated, controlled, and directed by the United States national and state governments, and in many respects without political, economic, and social equality. More specifically, the non-Indians are extending their institutions, technology, culture, beliefs, and laws over people who were, and in a large measure still are, strangers and aliens to the non-Indian ways of life. It is with the foregoing background, along with the fact that the American Negroes are demanding and receiving support for integration, that one must ask: Do the American people have an obligation to support the Indians in their desired and voluntary efforts of segregation and autonomy? Do the American people have an obligation to support the Indians in their desired and voluntary efforts to preserve their heritage and ancestral homes? Judgments on these questions should be withheld until the contents of this study have been digested.

It is in the above connection, i.e., the imposition of the non-Indian ways of life, that one of the most intriguing and important problems confronting both Indians and non-Indians has developed. It is the problem of providing the American aborigines with a rational and appropriate system of criminal law--a system that encompasses their wants, demands, and protections.

To many Indians, non-Indian law symbolizes: the restraints of an external and unknown code; the subjection of them to the responsibilities of rules and penalties of which they could have had little previous warning; and the judgment of them by standards made by others--standards which take no account of the conditions which should exempt them from their exactions, that is, their inability to understand them. Or somewhat differently, these Indians argue that Non-Indian law tries them not by their peers, the customs of their people, the law of their land, but by the people and standards of a race of whom they have only a limited conception. To the non-Indians the problem is viewed quite differently. They reason that separate legal considerations of Indian offenses were perhaps necessary several generations ago because the Indian culture was distinct, but not today. To a great extent, the aborigines have developed a culture much like that of the non-Indians. This cultural adaptation has come about through associating, working, and attending school with the non-Indians. And in this sense, the non-Indians argue that it is only a matter of fairness and protection that Indians, like non-Indians, should be subject to the same legal system. This type rationale is partially, and somewhat emotionally, captured in a statement made by ex-Senator Watkins of Utah when he argued that isolation of the Indians on reservations is detrimental in that it separates them from the benefits and protections of our society. He writes: "Firm and constant consideration for those of Indian ancestry should lead us all to work diligently and carefully for the full realization of their national citizenship with all other Americans. Following in the footsteps of the Emancipation Proclamation of ninety-four years ago, I see the following words emblazoned in letters of fire above the heads of the Indians--THESE PEOPLE SHALL BE FREE!"[4]

The importance of providing both Indians and non-Indians with an appropriate system of criminal law can be sensed from the following statistics. Table 3 broadens one's perspective as to the plight of Indians as "actual" and "potential" victims of criminal violations. It is obvious that the percentage increase in the number of arrests (both in city and rural areas) of Indians far exceeds the percentage increase for Whites and Negroes. Comparative race statistics for conviction and sentencing are not available.

Table 4 and 5 contrast and compare arrests by crime for Whites, Negroes, and Indians.

One of the two major purposes of this study will be to delineate criminal procedural guarantees, especially in relation to the federal Bill of Rights protections, of the American Indians. However, due to our somewhat unique structure of government, criminal procedural guarantees are inextricably connected with the second major purpose of this study, a delineation and answering of the jurisdictional questions. That is to say, the Indians' criminal procedural guarantees are largely premised upon whether the tribes, the national



Table 3

Percentage Increase in the Number of Arrests by Race

| City Arrests by Race: (Cities over 2,500) | 1953 | 1961 | Per Cent Increase |
|---|---|---|---|
| White | 1,270,466 | 2,424,631 | 98.46 |
| Negro | 481,095 | 1,073,491 | 123.13 |
| Indian | 32,084 | 79,716 | 148.46 |
| **City Arrests by Race: (Cities over 2,5000)** | **1960** | **1961** | **Per Cent Increase** |
| White | 2,320,635 | 2,424,631 | 4.48 |
| Negro | 1,064,814 | 1,073,491 | .81 |
| Indian | 71,662 | 79,716 | 11.23 |
| **Rural Arrests by Race:*** | **1960** | **1961** | **Per Cent Increase** |
| White | 308,589 | 382,735 | 24.03 |
| Negro | 50,201 | 67,458 | 34.38 |
| Indian | 7,584 | 14,186 | 87.05 |

Source: Uniform Crime Reports
*Rural arrest statistics by race are not available prior to 1960.

government, or the state governments have jurisdiction. The jurisdictional problem becomes even more complex when one senses that our concept of federalism[5] contemplates that two governments, that of the national and that of a state, will simultaneously exercise uncoordinated sovereign power over the people and territory of the fifty states of the Union. Viewing retrospectively the developments in national, foreign, state, and Indian relationships, the foregoing "federalism concept" leaves many questions unanswered and unexplained. The following questions--Who has criminal jurisdiction over Indians and Indian territory? and (2) To what criminal procedural guarantees are the American Indians entitled?--have plagued and puzzled government officials, legal scholars, etc. since before the founding of this great nation.

The importance and complexity of the criminal jurisdictional labyrinth can be illuminated from excerpts taken from two early judicial decisions:

Table 4

City Arrests by Race, 1961
(2,759 Cities over 2,500, population 75,553,307)

| | White number | White percent | Negro number | Negro percent | Indian number | Indian percent |
|---|---|---|---|---|---|---|
| Criminal homicide: | | | | | | |
| (a) Murder and nonnegligent manslaughter | 1,493 | .06 | 2,154 | .20 | 18 | .02 |
| (b) Manslaughter by negligence | 1,203 | .05 | 321 | .03 | 9 | .01 |
| Forcible rape | 2,922 | .12 | 3,075 | .29 | 18 | .02 |
| Robbery | 11,858 | .49 | 14,143 | 1.32 | 186 | .23 |
| Aggravated assault | 16,184 | .67 | 25,550 | 2.38 | 201 | .25 |
| Burglary--breaking or entering | 75,266 | 3.10 | 36,696 | 3.42 | 632 | .79 |
| Larceny--theft | 142,487 | 5.88 | 66,057 | 6.15 | 1,521 | 1.91 |
| Auto theft | 39,521 | 1.63 | 11,023 | 1.03 | 619 | .78 |
| Other assaults | 74,822 | 3.09 | 56,069 | 5.22 | 725 | .91 |
| Embezzlement and fraud | 25,737 | 1.06 | 5,439 | .51 | 117 | .15 |
| Stolen property; buying, receiving, etc. | 5,810 | .24 | 2.960 | .28 | 39 | .05 |
| Forgery and counterfeiting | 16,356 | .67 | 3,534 | .33 | 121 | .15 |
| Prostitution and commercialized vice | 10,597 | .44 | 9,573 | .89 | 85 | .11 |
| Other sex offenses (including statutory rape) | 29,680 | 1.22 | 11,006 | 1.03 | 228 | .29 |

Continued

Table 4 Continued

| | White number | White percent | Negro number | Negro percent | Indian number | Indian percent |
|---|---|---|---|---|---|---|
| Narcotic drug laws | 11,371 | .47 | 6,742 | .63 | 78 | .10 |
| Weapons: carrying, possessing, etc. | 14,908 | .61 | 17,598 | 1.64 | 150 | .19 |
| Offenses against family and children | 22,501 | .93 | 11,094 | 1.03 | 141 | .18 |
| Liquor laws | 64,691 | 2.67 | 27,550 | 2.57 | 1,514 | 1.90 |
| Driving while intoxicated | 133,491 | 5.51 | 25,152 | 2.34 | 1,876 | 2.35 |
| Disorderly conduct | 226,386 | 9.34 | 144,129 | 13.42 | 3,393 | 4.26 |
| Drunkenness | 995,331 | 41.05 | 328,741 | 30.62 | 59,740 | 74.94 |
| Vagrancy | 98,710 | 4.07 | 38,813 | 3.62 | 3,766 | 4.72 |
| Gambling | 17,630 | .73 | 53,155 | 4.95 | 21 | .03 |
| All other offenses | 307,620 | 12.69 | 126,583 | 11.79 | 3,697 | 4.64 |
| Suspicion | 78,056 | 3.22 | 46,334 | 4.32 | 821 | 1.03 |

Source: Uniform Crime Reports - 1961

Table 5

Rural Arrests by Race, 1961
(1,048 county agencies, population 29, 017,535)

| | White number | White percent | Negro number | Negro percent | Indian number | Indian percent |
|---|---|---|---|---|---|---|
| Criminal homicide: | | | | | | |
| (a) Murder and nonnegligent manslaughter | 672 | .18 | 447 | .66 | 20 | .14 |
| (b) Manslaughter by negligence | 658 | .17 | 108 | .16 | 6 | .04 |
| Forcible rape | 1,401 | .37 | 374 | .55 | 37 | .26 |
| Robbery | 2,814 | .74 | 1,008 | 1.49 | 73 | .51 |
| Aggravated assault | 5,768 | 1.51 | 2,814 | 4.17 | 144 | 1.02 |
| Burglary--breaking or entering | 25,422 | 6.64 | 3,702 | 5.49 | 497 | 3.50 |
| Larceny--theft | 28,681 | 7.49 | 5,033 | 7.46 | 595 | 4.19 |
| Auto theft | 8,448 | 2.21 | 872 | 1.29 | 344 | 2.42 |
| Other assaults | 16,738 | 4.37 | 4,179 | 6.19 | 350 | 2.47 |
| Embezzlement and fraud | 11,031 | 2.88 | 959 | 1.42 | 124 | .87 |
| Stolen property; buying, receiving, etc. | 1,768 | .46 | 287 | .43 | 42 | .30 |
| Forgery and counterfeiting | 6,244 | 1.63 | 660 | .98 | 173 | 1.22 |
| Prostitution and commercialized vice | 449 | .13 | 190 | .28 | 10 | .07 |
| Other sex offenses (including statutory rape) | 5,497 | 1.44 | 856 | 1.27 | 70 | .49 |

Continued



Table 5 Continued

| | White number | White percent | Negro number | Negro percent | Indian number | Indian percent |
|---|---|---|---|---|---|---|
| Narcotic drug laws | 3,096 | .81 | 539 | .80 | 4 | .03 |
| Weapons: carrying, possessing, etc. | 2,627 | .69 | 1,099 | 1.63 | 31 | .22 |
| Offenses against family and children | 14,865 | 3.88 | 3,429 | 5.08 | 298 | 2.10 |
| Liquor laws | 14,193 | 3.71 | 3,258 | 4.83 | 479 | 3.38 |
| Driving while intoxicated | 34,350 | 8.97 | 3,208 | 4.76 | 1,145 | 8.07 |
| Disorderly conduct | 24,153 | 6.31 | 6,360 | 9.43 | 1,120 | 7.90 |
| Drunkenness | 82,333 | 21.51 | 12,140 | 18.00 | 6,804 | 47.96 |
| Vagrancy | 8,115 | 2.12 | 1,262 | 1.87 | 209 | 1.47 |
| Gambling | 2,121 | .55 | 2,101 | 3.11 | 9 | .06 |
| All other offenses | 72,789 | 19.02 | 10,884 | 16.13 | 1,383 | 9.75 |
| Suspicion | 8,502 | 2.22 | 1,689 | 2.50 | 219 | 1.54 |

Source: Uniform Crime Reports - 1961

Worcester v. Georgia[6] and Caldwell v. State.[7]

The court in the Worcester case was confronted with the problem of determining whether the State of Georgia (an original state of the Union) should be allowed to exercise jurisdiction over Indian territory--territory located within the State of Georgia. Speaking for the majority of the court, Chief Justice Marshall wrote:

> This cause, in every point of view in which it can be placed, is of the deepest interest. The defendant is a state, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction . . . The plaintiff is a citizen of the state of Vermont, condemned to hard labor for four years in the penitentiary of Georgia; under color of an act which he alleges to be repugnant to the constitution, laws and treaties of the United States. The legislative power of a state, the controlling power of the constitution, and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.[8]

And in the same year a state court had this to say concerning a jurisdictional question of almost identical nature.

> The question of jurisdiction is one of the highest importance, in the various aspects in which it can be viewed. The authority of the States, whose limits include tribes of Indians, . . . has, for years, become a general, fruitful theme of declamation and eloquence--of remonstrance on one side, and of assertion of right on the other. By some no subject has been thought more worthy the attention of the politician and legislature, for the furtherance of civilization among the Indians, and the more regular government of their portion of the country; by others, none better suited to enlist the sympathy of the philanthropist, in defense of what is contended to be their exclusive right of empire. The gravity of the question, and the deep interest of the subject, are alike calculated to engage the enlightened reflections of the statesman, and the prejudices of the enthusiast; nor is it wonderful, however lamentable, in times of great political excitement, that the question should mingle in the schemes of party strife.
>
> Yet it may be hoped that this latitude of object and design, will be confined to those who are more at liberty to indulge private desires and prepossessions; that the legislative and executive departments of our governments (though exposed to party contests), have proceeded, and will continue to act, on similar subjects, with due regard to moral obligation, as well as political duty; and that the judiciary, more



> especially, whose situation may be more favorable to quiet research and cool reflection, and whose decisions are of the greatest consequence to the cause of justice, and the harmony of society, will be found capable of discharging their solemn functions, on this as well as other questions, from the dictation alone of profound reflection and included judgment.[9]

From the foregoing excerpts, one senses that criminal jurisdiction, along with concomitant procedural safeguards, over Indians and Indian territory has involved conflicting responsibilities through time of several sovereign jurisdictions--foreign, national, state, and the numerous Indian tribes. One may, though somewhat imprecisely, refer to this theoretical and/or actual dissemination of criminal authority as a vertical distribution, i.e., a dissemination of authority on an hierarchical basis.

Another concept of authority distribution which needs to be drawn to the attention of the reader before he can intelligently tackle the jurisdictional and procedural problems of the American Indians is the horizontal distribution. This concept was nicely, though somewhat cryptically, portrayed both in the Worcester and Caldwell excerpts. The "horizontal distribution of authority concept" refers to the dissemination of governmental authority among and within the legislative, executive, and judicial branches[10]--irrespective of whether this dissemination takes place at the tribal, state, national, or foreign levels.

One can easily see the implications of these two concepts (vertical and horizontal) when one attempts to locate the source, extent, and locus (loci) of criminal jurisdiction over Indians and Indian territory, or (2) when one attempts to delineate their criminal procedural guarantees. Mr. Justice Holmes grasped the significance of these implications when he wrote the following in a dissenting opinion. "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[11] It is the jurisdictional and procedural penumbras associated with the vertical and horizontal distribution of authority concepts that the present study will attempt to clarify. This clarification will be attempted primarily through an historical and contemporary analysis of judicial opinions--especially the opinions of the United States Supreme Court. However, it is important that the reader be cautioned at this juncture that there will be no attempt to analyze all the judicial decisions which may have given direction and body to the two major questions posed for this study. An attempt will be made to prudently locate and analyze: (1) only those cases which have given significant direction to the problem of distributing governmental authority, i.e., in relation to criminal jurisdiction and criminal procedural guarantees of the American Indians; and (2) those cases which hold potential promise of

giving direction. In short, an attempt will be made to circumvent an exhaustive and monotonous case by case analysis. Case by case analysis will be invoked as needed to clarify and portray current, existent, and potential trends. Cases will also be utilized to develop the extent and scope of these trends. Lastly, the rationale of the justices--as much as space, time, continuity, and readability permit--will be included.

However, before a judicial analysis of the questions associated with criminal jurisdiction and criminal procedural guarantees is undertaken, legislative landmarks and important terminology should be outlined and explained. The terminology will be explained immediately, whereas the next chapter will be devoted to the development and outlinging of the legislative landmarks.

The terminology--Indian tribe(s) and Indian nation(s)--is used generically and interchangeably throughout this study. The genericness and interchangeability of these two terms are stressed because much ambiguity and uncertainty is associated therewith. No attempt will be made to attach preciseness to their various uses, except to note that the use of this terminology in the data has some relationship to the progressive extinguishment of Indian sovereignty. Secondly, the terminology--Indian territory--has been used extensively throughout this study; and in this connection, the reader should understand that it has been used synonymously with the historically and currently imprecise and ambiguous terms Indian country, lands, and reservations.[12] A third problem with terminology is the use of the words Indian and non-Indian. During the early history of our country there was little need for a precise definition of what constituted an Indian. In those days everyone knew what an Indian was. However, as time passed interracial marriages became more frequent and Indian and non-Indian settlements intermingled, thus the legal and terminological difficulty. For the purposes of this study and relative clarity, the Census Bureau's definitions found in the footnotes of the early pages of this chapter should be accepted.[13]

FOOTNOTES

[1]"Legal Status of American Indian Tribes," by Robert W. Oliver, 38 Ore. L. Rev. 193 (1959).

[2]U.S. Bureau of the Census, Dept. of Commerce, 17th Decennial Census, 2 Characteristics of the Population 1-106 (1953). The race concept used by the Bureau of the Census included "persons of mixed white and Indian blood if enrolled on an agency or Reservation roll: if not so enrolled they should still be reported as Indian if the proportion of Indian blood is one- fourth



or more, or if they are regarded as Indians in the community where they live." Id. from Enumerator's Reference Manual, 1 General Characteristics 1-147 (1952).

[3]U.S. Bureau of the Census, Dept. of Commerce, 18th Decennial Census, United States Census of Population: 1960 (United States Summary) 1-144 (1960). The race concept used by the Bureau of the Census is "derived from that which is commonly accepted by the general public. It does not, therefore, reflect clear-cut definitions of biological stock . . ." Ibid.

[4]"Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person," by Arthur V. Watkins, 311 Annals 47, 55 (1957).

[5]For an article which challenges our historical concept of a federal system of government, see Lindsey Cowen's article "What is Left of the Tenth Amendment?" 39 N.C.I. Rev. 154-183 (1961).

[6]31 U.S. 515 (1832).

[7]3 Ala. Repts. 108 (1832).

[8]Worcester v. Georgia, 31 U.S. 515, 529 (1832).

[9]Caldwell v. State, 3 Ala Repts. 108 (1832).

[10]If the reader should by chance rebel against this classification of governmental authority, he should consult one, or all, of the following: Kenneth Culp Davis, Administrative Law Text, 1959, 617 pp.; Frank J. Goodnow, Policy and Administration, 1900, 270 pp.; Ralph Waldo, The Administrative State, 1948, 227 pp.

[11]Springer v. Phi pine Islands, 277 U.S. 189, 209 (1928).

[12]See Guity v. United States, 230 F.2d 481 (1956); Williams v. United States, 215 F.2d 1 (1954); cert. den. 348 U.S. 938 (1954); State ex rel. Irvine v. District Court, 125 Mont. 398 (1951); Application of Andy, 49 Wash. 2d 449 (1956), where the courts ruled that islands of fee patent land within the exterior boundaries of Indian reservations are embraced in the definition of Indian country, and national jurisdiction over crimes committed by or against Indians within such islands is the same as on lands within the reservations possessed by Indian title. And Application of Konaha, 131 F.2d 737, (1942); In re Fredenberg, 65 Fed. Supp. 4 (1946); Application of Denetclaw, 83 Arix. 299 (1958); State v. Begay, 63 N.M. 409 (1958), cert. den. 357 U.S. 918 (1958), where

the courts ruled that crimes committed by or against Indians on rights of way running through Indian reservations are within exclusive national jurisdiction. And see also definitions of "Indian country."

[13]For a relatively old decision which portrays the legal profession's attempt to define Indian, see Ex parte Pero, 99 F.2d 31 (1938).



## CHAPTER II

## ROLE OF CONGRESS: LEGISLATIVE LANDMARKS

The following, though by no means exhaustive, legislative landmarks portray Congress' historical and current "marks" on the unabating struggle to clarify or resolve the jurisdictional and procedural penumbras (criminal) associated with vertical and horizontal distribution of authority.

Prior to the colonization of the New World, the Indians were sovereign and self-governing nations. Since that time, however, trival self-government has been gradually and persistently extinguished. And in this connection, it is noteworthy that the United States Congress from its beginning, in various and fluctuating degrees, has continually and to an increasing extent asserted criminal jurisdiction over Indians and Indian territory, irrespective of the fact that Indian tribes were sovereign in the sense that the United States negotiated and concluded treaties with them until 1871. In this year Congress in an Indian appropriations act provided that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[1] With this enactment,[2] and especially if it is viewed in connection with a June 2, 1924, act,[3] an act which bestowed national (and state via the Fourteenth Amendment) citizenship upon all Indians who had not yet received citizenship,[4] it seems irrefutable that the Indian tribes lost, without representation, any sovereign powers they might have had prior to this time. And in this relationship, the present-day self-governing powers of Indian tribes are derived not from an unextinguished sovereignty, but from an unextinguished privilege of local self-governance. Thus legislative enactments must be looked to, not for the sources of or codes for tribal government, but for its limitations.

A statute of 1796, "An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers,"[5] portrays the early and limited extent of Congress' assertion of criminal jurisdiction over Indians and Indian territory. Sections 4 and 5 of this act provide that it shall be unlawful for non-Indians to enter Indian territory and there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians. Further, the act in section 14 makes it

unlawful for any Indian to cross into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy horses and property, or "commit any murder, violence or outrage, upon any such citizen, or inhabitant." Enforcement of this act, at least in the last analysis, was most crucially dependent upon the United States military. The 16th and 17th sections prescribe two distinct processes for the apprehension of violators. Section 16 provides that it shall be lawful for the military to apprehend any citizen, or other person, found in Indian territory, over and beyond the boundary line between the United States and the Indian tribes, in violation of any of the provisions or regulations of the act. Section 17 directs that if any person, charged with a violation of the act, shall be found within any of the United States, or their territorial districts, he shall be there apprehended by the military if and when directed by civil officers in authority.

The above provisions of this act were re-enacted by Congress on March 30, 1802.[6] Yet, the limited extent of Congress' assertion of criminal jurisdiction over Indians and Indian territory by the 1796 and 1802 acts came to an abrupt end on March 3, 1817.[7] On this date Congress passed "An Act to provide for the punishment of crimes and offenses committed within the Indian boundaries." This act asserts that if <u>any</u> Indian, or other person or persons, commit <u>within</u> Indian territory any offense, misdemeanor, or crime, which if committed in any territory under the sole and exclusive jurisdiction of the United States, would, by the laws of the national government, be punished, they shall, on being thereof convicted by a national court, suffer the like punishment. Further, the act, via an exception to the above, provides "That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary." This act was repealed on June 30, 1834, and revised and re-enacted in section 25 of the same statute. The language of this section reads: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: <u>Provided,</u> The same shall not extend to crimes committed by one Indian against the person or property of another Indian."[8]

Twenty years later on March 27, 1854,[9] Congress limited the scope of the immediately preceding section by legislating that nothing contained therein "shall be construed to extend or apply to said Indian country any of the laws enacted for the District of Columbia."

The provisions of the June 30, 1834, and March 27, 1854, acts continue to express general congressional policy concerning <u>national</u> criminal jurisdiction over Indians and Indian territory; and in this sense, it should be



noted that these acts preceded the 1871 act--an act which terminated national treaty relations with the Indians. For example in section 1152 of title 18 of the 1958 edition of the United States Code, the current law, except for certain notable amendments to which attention will shortly be directed, reads:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Actually, a complete and unified list of the places "within the sole and exclusive jurisdiction of the United States" has never been legislatively, executively, or judicially defined. The courts, however, in numerous cases, except for Indian lands in the original states, have persistently and unwaveringly held that Indian territory or country is within the sole and exclusive jurisdiction of the United States, i.e., provided Congress has not voluntarily divested itself in whole or in part of this jurisdiction.[10] Therefore, accepting the courts' rulings that Indian country[11] is within the sole and exclusive jurisdiction of the United States, the <u>general laws</u> (laws which are scattered through the various sections of the criminal code) of the national government <u>which apply</u> to territory within the sole and exclusive jurisdiction of the United States extend to Indian territory with the following exceptions: (1) crimes committed by one Indian against the person or property of another Indian; (2) crimes committed by an Indian who has already been punished for his crimes by the law of the tribe; (3) crimes over which exclusive jurisdiction is secured by treaty to a particular tribe;[12] and (4) crimes committed in Indian territory by one non-Indian against the person of another non-Indian.[13]

Stated positively, Congress has provided that the national courts, via the general laws of the national government which apply to <u>territory within</u> the sole and exclusive jurisdiction of the United States, havr jurisdiction over crimes committed in Indian territory under the following circumstances: (1) crimes committed by Indians against the person or property of non-Indians; (2) crimes committed by non-Indians against the person or property of Indians; and (3) crimes committed both by Indians and non-Indians which have no proprietary or personal victims.

From the preceding presentation, it is apparent that Congress has been reluctant about extending national criminal jurisdiction over Indians and Indian territory, especially over crimes committed by one Indian on the person or property of another Indian. This reluctancy was discarded, however, in section 9 of the Indian Appropriation Act of March 3, 1885,[14] a section which has become known as the Seven Major Crimes Act. In this section Congress provides that any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within Indian territory, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. This legislation was amended on March 4, 1909,[15] and June 28, 1932,[16] by adding the crimes of assault with a dangerous weapon, incest, and robbery. With the addition of these two amendments, the 9th section of the Indian Appropriation Act of 1885 represents current law,[17] and is commonly referred to as the Ten Major Crimes Act.[18] The present, revised, and complete text is found in section 1153 of title 18 of the 1958 edition of the United States Code. This section reads:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offense of rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offense of rape upon any female Indian within the Indian country, shall be imprisoned at the discretion of the court.
>
> As used in this section, the offense of burglary shall be defined and punished in accordance with the laws of the State in which such offense was committed.

Since providing for these ten exceptions to the provisions of section 1152 of title 18 of the 1958 edition of the United States Code, Congress has enacted another statute which can be questioned as to its applicability to Indian defendants. It became law on August 1, 1956,[19] and established the offenses of stealing and embezzling Indian tribal organization moneys, funds, credit, goods, etc. The language of this act reads:

> Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be



> misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or
>
> Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another--
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.
>
> As used in this section, the term 'Indian tribal organization' means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

Noticeable by absence from this statute is any express reference of its application to Indian defendants; and in this sense, it has long been a federal rule of statutory construction that legislative enactments do not apply to Indians unless so expressed as to clearly manifest an intention to include them.[20] Secondly, because there is no express reference of its application to Indian defendants, it would seem that section 1152 of title 18 of the United States Code concerning offenses committed within Indian territory by one Indian against the property or person of another Indian would preclude its application to Indians. Thirdly, no decisions have been located where an Indian, or anyone else, has been prosecuted for an alleged violation of this act. Counterpoised against the foregoing, however, is the fact that the legislative history of this enactment shows that it was the intent both of the Senate Judiciary Committee and the Secretary of the Interior that it be applied to Indian tribal officials.[21]

In addition to the foregoing provisions for the assertion by the national courts of criminal jurisdiction over Indians and Indian territory, the reader should know that the scope of section 1152 of title 18 of the United States Code has been extended by the judiciary, by Congress, or a combination of the two, to include: (1) national criminal laws which are applicable to all persons in the United States without regard to the exclusive national and jurisdictional status of the territory upon which the crime was perpetrated;[22] and (2) the provisions of section 13 of title 18 of the 1958 edition of the United States Code,[23] a section which applies to "any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . . .[24] This section is commonly referred to as the Assimilative Crimes Act, and reads as follows:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired [for the use of the United States, and under the exclusive or concurrent jurisdiction thereof], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punished if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.[25]

Indian territory has been held to be within the coverage of this act[26] except for a very slight possibility that treaties and enabling acts of particular states would preclude such a sweeping interpretation.[27] In this respect, the act penalizes, when committed within Indian territory, any act "which is not made penal by any laws of Congress," but which is an offense under the law of the state in which such territory is located. More specifically, the Assimilative Crimes Act bestows on the states of the Union legislative jurisdiction to define crimes within Indian territory while leaving unaffected national executive and national court jurisdiction to apprehend and punish perpetrators of actions proscribed by state legislatures.[28]

The extent to which Congress has been willing to give the state jurisdiction (legislative, executive, and judicial) over Indians committing crimes within Indian territory, until 1953, has been limited.

On February 8, 1887, Congress passed what has become known as the General Allotment Act.[29] This act contemplated that Indian territory would be allocated to particular Indians in tracts of 40, 80, or 160 acres, and the surplus would be purchased and sold to whites. Following allocation, the allotments were to be held in trust by the United States government for 25 years when they were to be patented in fee to these Indians or their heirs. The act further provides in section 6 that when all Indians of particular tribes or bands have received their allotments, "every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Nineteen years later, however, on May 8, 1906, the General Allotment Act was amended to defer the time period when Indian Allottees would become subject to state law.[30] This period was deferred until the allottees were actually issued, at the discretion of the Secretary of the Interior Department, the patents in fee. Although the 1887 policy of allotting tribal lands and issuing patents in fee to particular Indians was terminated[31] on June 18, 1934, by an act commonly referred to as the Indian Reorganization Act,[32] the Secretary continues to have authority to issue patents in fee to Indians who apply and prove themselves competent to manage their own affairs.[33] By authority of the preceding legislative maze, numerous patents in fee have been issued; thus making recipient Indians and their allotments subject to state



criminal and civil jurisdiction.[34] In actuality, however, the General Allotment Act and the above presented amendments do not confer much criminal jurisdiction on the states over Indians and patented in fee allotments. The reasons the states have not measurably increased their jurisdictions are beautifully captured in an opinion of the Acting Solicitor of the Department of the Interior. He writes:

> [C]omplexities and distinctions . . . have rendered the grant of State jurisdiction over Indians contemplated by the General Allotment Act largely ineffective . . . . State law-enforcement officers could not, after all, go around with tract books in their pockets, and being unable to distinguish a patent-in-fee Indian from a ward Indian, they did not commonly concern themselves with law violations by Indians, and the theoretical jurisdiction of the States thus fell into innocuous desuetude. Thus, when it has been desired to confer on particular States criminal or civil jurisdiction over Indians, it has been accomplished by general statutes conferring such jurisdiction, irrespective of the tenure by which Indians held their lands.[35]

Agitation for Congress to extend still further a state's jurisdiction over Indians and Indian territory resulted in the enactment on August 15, 1953, of Public Law 280.[36] Until this time, Congress continued its historical policy of exercising general criminal jurisdiction over offenses committed by or against Indians within Indian territory, except for those scattered areas where states had been granted criminal jurisdiction through special legislation. For example by special legislation on February 21, 1863, Congress gave every state and territorial government criminal jurisdiction over Winnebago Indians committing offenses within their boundaries;[37] and on June 3, 1940, the Kansans were given concurrent jurisdiction over offenses committed by or against Indians on Indian reservations within their borders.[38] Other examples where Congress has given states, via special legislation, either concurrent or exclusive jurisdiction over offenses committed by or against Indians on Indian territory are: The Devils Lake Reservation in North Dakota (concurrent) on May 31, 1946;[39] the Sac and Fox Reservation in Iowa (concurrent) on June 30, 1948;[40] the reservations of the State of New York (exclusive) on July 2, 1948;[41] as well as the Agus Caliente Reservation in California (exclusive) on October 5, 1949.[42] The above list is not exhaustive; other states exercise jurisdiction over Indians and Indian territory by virtue of legislation and judicial decisions.[43]

Under the August 15, 1953, act states are treated in three separate ways. Five states, where no constitutional or other impediments existed, were expressly, except for specified exclusions, transferred exclusive[44] criminal jurisdiction over offenses committed by or against Indians on Indian

territory within their respective borders. These five states are California, Minnesota, with the exception of the Red Lake Reservation, Nebraska, Oregon, with the exception of the Warm Springs Reservation, and Wisconsin with the exception of the Menominee Reservation. The act has since been amended: (1) to bring the Menominee Reservation under state jurisdiction;[45] and (2) to add to the list of states having exclusive jurisdiction the State of Alaska.[46] As to a second group of unspecified states, the act provides that they may acquire the same jurisdiction in such manner and at such time as the state legislatures may provide.[47] Acting pursuant to this authority the State of Nevada has acquired jurisdiction over all of the Indian territory within its borders.[48] And lastly, to a group of eight states,[49] the act gives congressional consent to acquire jurisdiction, provided that people thereof amend their state constitutions and statutes.[50] Acting pursuant to this authority the Washington legislature has directed the governor to extend criminal jurisdiction over Indians and Indian territory when tribal councils request such extension;[51] and the State of South Dakota has authorized the boards of county commissioners of the state's several counties to extend jurisdiction to Indian territory provided they negotiate a contract with the national government under which the latter would commit itself to reimburse the counties for the cost of law enforcement.[52] Since there is no legislative authority for the national government to conclude agreements of this nature, the South Dakota legislation is dormant. It is noteworthy that both the State of Washington and the State of South Dakota legislatively acquired or authorized jurisdiction over Indian territory without having first amended their constitutions which contain express disclaimers of jurisdiction over Indian lands.[53] Apparently, it is not necessary for this group of states to amend their constitutions because in State v. Paul the United States Supreme Court dismissed an appeal where this very point was at issue.[54] The pertinent language of the revised and amended August 15, 1953, enactment reads:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.
>
> State or Territory of
>
> Alaska..... All Indian country within the Territory.
> California.... All Indian country within the State.
> Minnesota.... All Indian country within the State, except the Red Lake Reservation.
> Nebraska.... All Indian country within the State.



> Oregon..... All Indian country within the State, except the Warm Springs Reservation.
> Wisconsin... All Indian country within the State.
>
> (c) The provision of sections 1152 and 1153 [of title 18 of the United States Code] shall not be applicable within the areas of Indian country listed in subsection (a) of this section.[55]

In addition to the above, Congress has extended criminal jurisdiction to the states in the following three areas: sanitary and health control; school attendance; and sale, introduction, and possession of intoxicants.

By the act of February 15, 1929, Congress directed the Secretary of the Interior, under such rules and regulations as he may prescribe, to permit the agents and employees of any state to enter Indian territory "for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or to enforce compulsory school attendance of Indian pupils, as provided by the law of the State."[56] This act was amended on August 9, 1946, and directs the Secretary, under rules prescribed by himself, to permit the agents and employees of any state to enter Indian territory "(1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application."[57]

On August 15, 1953, the states were ambiguously authorized by Congress to control the sale, introduction, and possession of intoxicants in Indian territory. The specific wording of the statute reads:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of [title 18 of the United States Code], shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.[58]

The United States Code Annotated gives no published judicial decisions concerning the interpretation of this statute; and furthermore, the legislative purpose of this act is not clear.[59]

Although a provision of a 1924 statute, a provision which conferred national and state citizenship on all Indians who had not yet received it, was referred to in an earlier paragraph, it is deemed necessary to conclude this chapter by quoting it verbatim. It reads: "All non-citizen Indians born within the territorial limits of the United States be and they are hereby, declared to be citizens of the United States.[60] The citizenship provision of this quotation further complicated the Indians' criminal status, both procedurally and jurisdictionally. It would seem that state and national citizenship per se would subject Indians to both state and national jurisdiction and entitle them to the procedural guarantees of the United States Constitution. The ambiguous effect of the bestowal of citizenship on Indians will be sensed and clarified in the remaining chapters of the study.

An analysis of the questions associated with criminal jurisdiction over Indians and Indian territory will now be undertaken. Criminal procedural guarantees will be given attention in chapters VII, VIII, and IX.

FOOTNOTES

[1]16 Stat. 544, 566.

[2]The right of Congress to legislate concerning Indians and Indian territory was constitutionally and unequivocally affirmed in United States v. Kagama, 118 U.S. 375 (1886).

[3]43 Stat. 253.

[4]Prior to 1924, Congress had conferred citizenship on individual tribes and classes of Indians by: (1) Treaties with Indian tribes (see Treaty of September 27, 1830, with Choctaws, 3 Stat. 333); (2) Special statutes (see Act of March 3, 1889, 5 Stat. 349); (3) General statutes naturalizing allottees of land (Act of February 8, 1887, 24 Stat. 388); (4) Other general statutes naturalizing women who married citizens (see Act of August 9, 1888, 25 Stat. 392); (5) Indian men who fought in World War I (see Act of November 6, 1919, 41 Stat. 350).

[5]1 Stat. 469.

[6]2 Stat. 139.

[7]3 Stat. 383.



[8]4 Stat. 729, 734.

[9]10 Stat. 269, 270.

[10]See Chapters IV, V, and VI of this study.

[11]Congress' definition of Indian country for the purposes of criminal jurisdiction is: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."--18 U.S.C. 1151 (1958).

[12]Felix S. Cohen in his Handbook of Federal Indian Law, 1942, p. 365, observes that there are no such treaty stipulations now in force.

[13]This exception to national jurisdiction was judicially recognized in United States v. McBratney, 104 U.S. 621 (1882). The McBratney and other related decisions will be presented in chapter VI subheading A.

[14]23 Stat. 362, 385.

[15]35 Stat. 1088, 1151.

[16]47 Stat. 336, 337.

[17]The Act of May 24, 1949, ch. 139, sec. 26, 63 Stat. 94, eliminated the provision that the crime of rape is to be punished in accordance with the law of the state where the offence was committed and in lieu inserted provision leaving punishment up to the discretion of the court.

[18]Petition of Carmen, 165 F. Supp. 942; aff'd 270 F.2d 809; cert. den. 361 U.S. 934; rehearing den. 361 U.S. 973 (1958).

[20]70 Stat. 792; 18 U.S.C. 1163 (1958).

[21]See Elk v. Wilkins, 112 U.S. 94, 100 (1884); Swatzell v. Industrial Commission, 78 Ariz. 149, 277 P.2d 244 (1954); Felix S. Cohen, Handbook of Federal Indian Law, 1942, pp. 172, 173. For a current decision which

possibly changes this principle as it applies to national jurisdiction, but not necessarily to state, see F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 115 (1960). In this decision, the court writes: "It is now well settled by many decisions of this court that a general statute in terms applying to all persons includes Indians and their property interests."

[21]See 3 U.S. Code Cong. and Admin. News, 1956, pp. 3841-3842; S. Rep. No. 3723, 84th Cong., 2d Sess. (1956). See also Williams v. Lee, 358 U.S. 217,220 (1959).

[22]See Bailey v. United States, 47 F.2d 702 (1931); Head v. Hunter, 141 F.2d 449 (1944); F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 115-116, 120-121 (1960); Navajo Tribe v. N.L.R.B., 288 F.2d 162, 164-165 (1961).

[23]62 Stat. 686.

[24]18 U.S.C. 7(3) (1958); 62 Stat. 683, 685.

[25]The insert is a transposement made by the author for the following: "as provided in section 7 of this title."

[26]Williams v. United States, 327 U.S. 711 (1942). See also United States v. Sosseur, 181 F.2d 873 (1950). This decision held that this act applies to an enrolled member of an Indian tribe charged with the offense of operating, contrary to the laws of Wisconsin, slot machines on an Indian reservation within the territorial boundaries of the state. And Guity v. United States, 230 F.2d 481 (1956).

[27]See Chapter VI subheading A. Also F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 115-116, 120-121 (1959).

[28]For an informative discussion of the implications of the Assimilative Crimes Act see 70 Harv. L. Rev. 685-698 (1957).

[29]24 Stat. 388.

[30]34 Stat. 182.

[31]For important exceptions and amendments see 25 U.S.C. 331, 475 (1958). Also 25 C.F.R. c. 1, app.

[32]48 Stat. 984; 25 U.S.C. 461 (1958).



[33]36 Stat. 855, as amended by 45 Stat. 161 and 48 Stat. 647; 25 U.S.C. 372 (1958). See also 25 C.F.R. c. 1, app.

[34]For specific and technical exceptions to this general statement see Patents in Fee, 61 I.D. 298, 302-303 (1954). See also the provisions of section 1151, 18 U.S. C. (1958).

[35]Patents in Fee, 61 I.D. 298, 304 (1954).

[36]67 Stat. 588.

[37]12 Stat. 658.

[38]54 Stat. 249.

[39]60 Stat. 229.

[40]62 Stat. 1161.

[41]62 Stat. 1224.

[42]63 Stat. 705.

[43]For example see the Revised Statutes of Maine, ch 25, 321-337 (1954). See also Associate Justice McLean's concurring opinion in Worcester v. Georgia, 31 U.S. 515, 580 (1832). He writes: "In some of the old states, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the powers of self-government, the laws of the state have been extended over them, for the protection of their persons and property." Also Associate Justice Johnson's dissenting opinion in Fletcher v. Peck, 10 U.S. 87, 146-147 (1810).

[44]Anderson v. Gladden, 293 F.2d 463; cert. den. 368 U.S. 949 (1961).

[45]68 Stat. 795.

[46]72 Stat. 545.

[47]Section 7 of this act reads: "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided

for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."--76 Stat. 588, 590.

[48]Nevada Revised Statutes, title 16, ch. 194, 194.030, 194.040 (1961).

[49]The statute does not specify the states to which it refers, but the eight states to which it applies are mentioned in the House and Senate reports. See 2 U.S. Code Cong. and Admin. News, 1953, p. 2414. The eight states are: Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.

[50]Section 6 of this act reads: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."--67 Stat. 588, 590.

[51]Washington Sess. Laws, ch. 240 (1957); now codified in R.C.W. 37.12.

[52]Sess. Laws of South Dakota, ch. 319, 1 (1957); Supplement to South Dakota Code of 1939, ch. 65.08, 65.0805, 65.0809 (1960).

[53]Washington Constitution, Art. 26, par. 2; South Dakota Constitution, Art. 22, par. 2, Art. 26, par.18.

[54]361 U.S. 898 (1959).

[55]18 U.S.C. 1162 (1958); 67 Stat. 588; 68 Stat. 795; 72 Stat. 545. The insert is the work of the author.

[56]45 Stat. 1185.

[57]60 Stat. 962; 25 U.S.C. 231 (1958). For cases decided under this statute see In re Colwash, 356 P.2d 994, (1960); State ex rel. Adams v. Superior Court for Okanogan, Juvenile Court Session, 356 P.2d 985 (1960).

[58]67 Stat. 586. The insert is the work of the author.



[59]See 2 U.S. Code Cong. and Admin. News, 1953, pp. 2399-2401, for the legislative history and purpose of the act.

[60]43 Stat. 253.

CHAPTER III

CONSTITUTIONAL LANGUAGE AND

PRE-CONSTITUTIONAL RELATIONS

A. Policy of the Colonial Powers in Respect to the Indians:

The position of the American Indians has pivoted historically on the basis of two factors: their political and legal status either as individuals or as tribes; and their rights to the lands occupied by them.

Thus only by reviewing the theoretical and legal relations between the various governments (both the European discovering nations and the American governments) and the numerous Indian tribes found on the North American Continent can the complicated and puzzling rules governing criminal jurisdiction over Indians and Indian territory be seen to make sense. Therefore, prior to an extended analysis of the judicial decisions, the writer will probe and articulate some of the theoretical concepts and legal provisions having applicability to the question of criminal jurisdiction.

The discovery of the American continent by Columbus in the last quarter of the fifteenth century focused the attention of the great powers of Europe on the New World. This focus reflected the European countries' love for glory, gain, and dominion. As a result of Columbus' historic discovery, the European powers early conducted further explorations. These explorations were conducted primarily for the purposes of locating and exchanging precious metals and products of the new world for whatever was least valuable and attractive in the old. Almost immediately these mercantile interests were followed with plans and efforts of colonization; and in this respect, one must remember that when the first settlers from Europe arrived upon the North American continent, they were presented with an Indian problem. Secondly, boundary disputes among the European discoverers were not wanting for attention. Because of the imminent possibilities of open conflict, the European governments immediately sought to rationalize agreeable principles of international law. Thereupon a consensus facit legem evolved, though not necessarily among the Indian tribes, which hewed to the idea that discovery of territory, followed by possession, vested in the sovereigh discoverer title to all of the territory in question. Thus European titles to the North American Continent were founded on the right of discovery, a right which all the major powers of Europe held to be just and sufficient.[1] Two eminent scholars,



Justices Story and McLean, have captured most beautifully the motives and rationale underlying the discovery and possession principle. Justice Story in his Commentaries writes:

> The European nations found little difficulty in reconciling themselves to the adoption of any principle, which gave ample scope to their ambition, and employed little reasoning to support it. They were content to take counsel of their interests, their prejudices, and their passions, and felt no necessity of vindicating their conduct before cabinets, which were already eager to recognize its justice and its policy. The Indians were a savage race, sunk in the depths of ignorance and heathenism. If they might not be extirpated for their want of religion and just morals, they might be reclaimed from their errors. They were bound to yield to the superior genius of Europe, and in exchanging their wild and debasing habits for civilization and Christianity they were deemed to gain more than an equivalent for every sacrifice and suffering. The Papal authority, too, was brought in aid of their great designs; and for the purpose of overthrowing heathenism, and propagating the Catholic religion, Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.[2]

Justice McLean further clarifies and adds additional dimensions. He writes:

> The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted. And it is equally clear, that the range of nations or tribes, who exist in the hunter state, may be restricted within reasonable limits. They shall not be permitted to roam, in the pursuit of game, over an extensive and rich country, whilst in other parts, human beings are crowded so closely together as to render the means of subsistence precarious. The law of nature, which is paramount to all other laws, gives the right to every nation, to the enjoyment of a reasonable extent of country, so as to derive the means of subsistence from the soil. In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice to their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration. . . . At no time has the sovereignty of the

country been recognized as existing in the Indians, but they have always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.[3]

From the foregoing excerpts, one must conclude that discovery of the North American Continent by the European nations was considered to have given to the government by whose subjects or authority the discovery was made, an absolute title to the country, except for a possible possessory right[4] of occupancy in the natives, or more precisely, the tribes. Even the right of occupancy was subject to extinction. Also the discovering nation claimed the right to regulate for itself, in exclusion of all other powers, the relations that were to exist between their own government, foreign governments, private citizens, and the Indians. The eminent James Kent reminds us that all the major powers of Europe (Spain, France, Holland, and Britain) recognized the preceding principles. Furthermore, he states that the United States adopted the same principles. He writes: "The rights of the British government within the limits of the British colonies, passed to the United States by the force and effect of the act of independence . . . ."[5] Charles K. Burdick makes a similar, though importantly different observation. He writes: "After the Revolution the rights of the Crown or of its grantees devolved upon the States . . ."[6]

Assuming acceptance of the above rationale, at least as to the ultimate dominion of the soil being in the discovering country, one must ask oneself, Did the discovering nations, and later the independent colonies, states, and the national government, ever claim either de jure and/or de facto criminal jurisdiction over the Indians? Logic forces one to believe that the discovering nations, and later the newly organized American governments, theoretically believed that criminal jurisdiction over Indians and Indian territory was at least a dormant, though in most, if not all, cases a futuristic, possibility. Professor Willoughby adds verification to this reasoning when he comments: "From the first settlement of the American colonies the Indians were treated as alien peoples outside the control of domestic laws. No attempt was made to interfere with their domestic affairs or systems or self-government, except to endeavor to keep out the agents of other European powers who might engage them in foreign alliance."[7] Following a similar vein of thought Ulrich Bonnell Phillips asserts that the colonial governments adopted the theory that Indian tribes were independent communities having the rights, powers, and characteristics of sovereign nations; and that during the Revolution and Confederation periods, the central government adhered to this theory. However, he observes that "public opinion, following the arguments of the state



governments which were involved in Indian problems, reverted to the original European conception that the relations of the tribes to civilized nations were merely those of dependent communities without sovereignty and without any right to the soil but that of tenants at will."[8] In brief, the relations of the Indians to the various early governmental units, in terms of sovereignty, waxed and waned according to domestic and international crises. Yet, underlying the political, social, and economic upheavals, one cannot but sense a deeply embedded "dependent community" type relationship. Whatever one concludes, there seems to be no evidence that the European nations, and later the colonies, attempted to extend their criminal laws to the Indians.

The conflict between the colonies and the mother country further complicates the criminal jurisdictional question. Even if one were to unequivocally accept the argument that Great Britain had both de jure and de facto authority, either through or on behalf of the colonies (chartered, proprietary, and royal), to extend criminal jurisdiction over Indians and Indian territory, one must ask oneself: What effect did the Revolution, and later the formation of the Union, have in relation to criminal jurisdiction over Indians and Indian territory? Did the Revolution, or subsequent events, leave this jurisdiction with the colonies (later the 13 states), the national government, or the Indian tribes?

Attention will now be centered on the language of the major legal documents of the period. This attention will be focused with an eye to locating the actual, or potential, locus, or loci, of criminal jurisdiction over Indians and Indian territory.

B. A Preview of Legal Provisions:

The policy of centralized control over the Indians was early attempted by the British government. In 1763 the British government proclaimed that trade with the Indians was to be open only to those who procured a license from the Crown, and that all other matters of Indian relations, including the purchase and settlement of Indian lands, were to be controlled by the Crown. There is nothing in the 1763 Proclamation, however, which suggests an attempt to extinguish Indian domestic rule. At most the Proclamation provides for the capture [illegible] Indian lands), arrest, and trial of criminal fugitives from the colonies. The immediate background of this Proclamation was Pontiac's Rebellion, and its provisions were designed to be of a temporary character. The pertinent language of this Proclamation reads:

> And we do further expressly enjoin and require all officers whatever, as well military as those employed in the management and direction of Indian affairs within the territories reserved as aforesaid, for the use

> of the said Indians, to seize and apprehend all persons whatever who, standing charged with treasons, misprisions of treason, murder, or other felonies or misdemeanors, shall fly from justice and take refuge in the said territory, and to send them under a proper guard to the colony where the crime was committed of which they shall stand accused, in order to take their trial for the same.[9]

Just three years prior to the issuance of the 1763 Proclamation, the Honorable Benjamin Franklin made before the British Ministry some engaging comments on "A Plan for the Future Management of Indian Affairs." This plan provided that in trading with the Indians no credit was to be given them beyond fifty shillings, because no higher debt was to be made recoverable. In protest against this proposed provision Franklin wrote:

> The Indian trade, so far as credit is concerned, has hitherto been carried on wholly upon honor. They have among themselves no such thing as prisons or confinement for debt. This article seems to imply, that an Indian may be compelled by law to pay a debt of fifty shillings or under. Our legal method of compulsion is by imprisonment. The Indians cannot and will not imprison one another; and, if we attempt to imprison them. I apprehend it would be generally disliked by the nations, and occasion breaches . . . . It seems to me, therefore, best to leave that matter on its present footing; the debts under fifty shillings as irrecoverable by the law, as this article proposes for the debts above fifty shillings. Debts of honor are generally as well paid as other debts. Where no compulsion can be used, it is more disgraceful to be dishonest. If the trader thinks his risk greater in trusting any particular Indian, he will either not do it, or proportion his price to his risk.[10]

In Benjamin Franklin's remarks there is an implied belief that theoretically the British Crown could have provided for the extension of criminal and civil jurisdiction over the Indians, but because of impracticality it would be unwise.

The policy of centralized control of Indian affairs was one which was destined to further efforts. The first inter-colonial action looking to a unified management of Indian affairs was taken in July, 1775. In this year the Second Continental Congress resolved "That the securing and preserving the friendship of Indian Nations, appears to be a subject of the utmost moment of these colonies."[11] In furtherance of this policy, the Continental Congress provided for the establishment of three Indian departments with commissioners in each "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."[12] These excerpts portray that two of the more significant purposes



of the Continental Congress were to preserve peace and friendship with the Indians, and to prevent them from entering the conflict on the British side. To carry out this policy three departments staffed with commissioners were established. There is nothing on the part of the Continental Congress which suggests an intention, or even a thought, to extend criminal jurisdiction to Indians and Indian territory. The work of the Continental Congress expresses not an interest in extending criminal jurisdiction, but in gaining the Indians' pacification and support.[13]

Just one year later in the Declaration of Independence, the colonies charged the British King with having "endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."

Under the Articles of Confederation, Congress was given the "sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated."[14] Thus Congress was in a position to make, with ambiguous--though important--reservations, rules "regulating the trade and managing all affairs" with the Indians, at least with respect to Indians occupying the unclaimed public domain--domain outside the thirteen original states. Thus arise the questions: Is the foregoing language an indication that the original states retained, or ever exercised, a legal right to extend criminal jurisdiction over the whole of their territory and people? Does the language encompass an intention to convey to the National Congress criminal jurisdiction over the public domain? Implicit in these two questions is the assumption that the states could legally exercise criminal jurisdiction over Indians and Indian territory, at least within their borders. This does not necessarily follow, however, without what some people have claimed to be serious, practical, and theoretical reservations. These people argue that the force of logic, setting aside the serious practical implications, is just as strong for positing criminal jurisdiction with Congress, the Indian tribes, or both. Their arguments hew to the idea that the Revolution was fought as a unit; and therefore, any right to exercise criminal jurisdiction over the Indians which Great Britain might have possessed passed to the new, though at times tenuous, national government which has never ceased to function.[15] Secondly, there are doubts as to whether the Indians' rights to domestic, and even foreign, rule were ever extinguished--either theoretically or in actuality.

We turn now to the culminating document--the Constitution of the United States. What does the Constitution say, or imply, concerning national and state criminal jurisdiction over Indians and Indian territory? Before one looks at the Constitution, the reader must be cautioned that anything the

Constitution provides rests on the tenuous assumption that the original states, or the conventions which ratified the United States Constitution, had de facto and/or de jure criminal jurisdiction over Indians and Indian territory. This follows from the almost[16] uncontrovertible phenomenon that the national government is one of powers delegated by the states.

The Constitution establishes little regarding the legal status of Indians. Only three provisions in the Constitution refer directly to the Indians. Article I, section 2, clause 3 reads: "Representatives and direct Taxes shall be apportioned among the several states which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."[17] This phrase was never more explicitly defined. The second provision of the Constitution which makes reference to the Indians is Amendment XIV, section 2. This section reads: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."[18] If anything, these two references imply, and rather strongly, that the states both assumed and retained jurisdiction over Indians and Indian territory within their borders. The third direct constitutional reference is the commerce clause. The commerce clause gives Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[19] Note that the language giving Congress power to regulate commerce with foreign nations and Indian tribes is identical. Thus only with difficulty could one reason that Congress was given power under the commerce clause to exercise criminal jurisdiction over Indians and their country.

All three of these provisions leave untouched the general field of governmental authority to assert criminal jurisdiction over Indians and Indian territory. Prior to the adoption of the Constitution, the numerous Indian tribes, or nations, were treated as independent political communities in terms of domestic governance. Therefore, one would assume, unless otherwise indicated, that the framers, along with the ratifying states, intended that this would continue to be their status, at least insofar as the general government (a government of delegated powers) was concerned.

Another theory which merits mention is the idea that the national government is not a government of delegated powers only. Concerning governance of the American Indians, the national government, following the successful conclusion of the American Revolution, fell heir to the Crown's powers over Indians and Indian territory. More will be said about this theory in a later portion of the study.

There are a number of other provisions of the Constitution which



encompass potential authority or power for the governance of the numerous Indian tribes and their territory. They are: The treaty power,[20] the exclusive power of the national government to dispose of and govern its property and territory,[21] the taxing and spending for the common defense and general welfare powers,[22] and the peace and war powers.[23]

In the light of preceding thoughts, one must admit that the Constitution left the status of the American Indians, like so many other matters, indefinite. Alfred H. Kelly and Winfred A. Harbison reason that "by implication the Indians were almost outside the constitutional system. They were denied citizenship, exempted from taxation, and not counted in the apportionment of representation and direct taxes."[24] Charles K. Burdick, also speaking of potential national powers over Indians and Indian territory, states: The constitutional provisions "leave untouched the general field of constitutional power to deal with Indian affairs, and it has been necessary for the Supreme Court to build up here a very considerable body of unwritten constitutional law."[25]

With these observations, the immediately following three chapters will be preoccupied with an analysis of the landmark decisions--decisions which have been concerned with the dissemination of criminal jurisdiction over Indians and Indian territory. The first topic to receive attention will be the question of criminal jurisdiction over Indians and Indian territory in the original states. As W. G. Rice, Jr. says, "the reservations within the bounds of the original thirteen states, having a different history, are probably subject to a different legal regime . . . ."[26]

## FOOTNOTES

[1] Johnson v. McIntosh, 8 Wheaton 543, 572-573 (1823). In this decision Chief Justice Marshall speaking for the court writes: "on the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the

law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right which no Europeans could interfere. It was a right which all asserted for themselves and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them." See also Worcester v. Georgia, 31 U.S. 515, 545-549 (1832).

[2]Joseph Story, Commentaries of the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution, Vol. I, 1833, pp. 6-7.

[3]Worcester v. Georgia, 31 U.S. 515, 579-580 (1832). For an earlier, but similar, view see Monsieur de Vattel's The Law of Nations, ed. by Joseph Chitty, 1876, pp. 34-36. Vattel's work was first published in 1758.

[4]For a recent case which hews to the idea that the Indian tribes have not a possessory right, but possibly only a possessory privilege, see Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

[5]James Kent, Commentaries on American Law, Vol. 3, 2d ed., 1832, p. 380. This treatise provides the reader with a well documented discussion of early relations with the Indians (pp. 378-400), especially in relation to the law governing title to their land. See also the Treaty of Paris of January 14, 1784. The result of this treaty was that the sovereignty over the territory embraced within the several states, together with the title to land not previously granted, passed to the several states and/or the United States, subject to the possessory right of the Indians over the lands which they occupied. This treaty can be found in Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers 1776-1909, compiled by William M. Malloy, Vol. I, pp. 586-590, Washington Government Printing Office, 1910.

[6]Charles K. Burdick, The Law of the American Constitution, 1929, p. 317.



[7]Westel Woodbury Willoughby, The Constitutional Law of the United States, Vol. 1, 2d edition, 1929, p. 379.

[8]Georgia and State Rights, Amer. Hist. Assoc., Annual Report, Vol. 2, 1901, p. 43.

[9]Annual Register, Vol. 6, 1763, pp. 212-213.

[10]Jared Sparks, The Works of Benjamin Franklin, Vol. 4, 1837, pp. 204-205.

[11]Journals of the Continental Congress, Vol. 2, p. 174.

[12]Id. at 175-176.

[13]See Continental Congressional Indian Policy: 1775 to 1781, by Nelson M. Hoffman (unpublished masters thesis) library of the University of Kansas, 1947, pp. 156; also The Indian Policy of the Continental Congress: 1775-1783, by Lillian Catchell (unpublished masters thesis) library of the University of Alabama, 1935, pp. 75; and also State Judiciary Committee, S. Rep. No. 261, 41st Cong. 3d Sess.

[14]Articles of Confederation, Art IX, par. 4.

[15]State v. Foreman, 8 Yerg. (Tenn.) 256, 300 (1835); see also Senate Judiciary Committee, S. Rep. No. 268, 41st Cong. 3d sess.; and Worcester v. Georgia, 31 U.S. 515 (1832). The pertinent language of the Worcester decision can be found in chapter IV of this study. For an informative interpretation of the Worcester decision see Niles' Weekly Register (XXXXII, p. 24).

[16]See the preceding paragraph.

[17]Italics mine.

[18]Italics mine.

[19]United States Constitution, Art. I, Sec. 8, cl. 3.

[20]The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."--Art. 3, sec. 2, cl. 2. See also Art. 1, sec. 10, cl. 1, which reads: "no State shall enter into any Treaty . . ."

[21]"Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State."--Art. 5, sec. 3, cl. 2. James Madison wrote concerning the latter portion of this clause: "The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the western territory sufficiently known to the public." --James Norton, The Constitution of the United States Its Sources and Its Application, 1952, p. 166. At the time the Constitution was drafted, Georgia and North Carolina had not ceded to the national government their western lands. These thoughts have important significance when one analyzes criminal jurisdiction over Indians and Indian territory both within the original and new states.

[22]"Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."--Art. I, sec. 8, cl.1.

[23]"Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."--Art. I, sec. 8, cl. 11. One must also include under this general category the President's power of commander-in-chief. This clause reads: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States."--Art. 2, sec. 2, cl. 1.

[24]Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development, 1948, p. 301.

[25]Charles K. Burdick, The Law of the American Constitution, 1925, p. 313.

[25]"The Position of the American Indian in the Law of the United States," by W.G. Rice, Jr., 16 J. Comp. Leg. and International Law, 80 (1934).



## CHAPTER IV

## CRIMINAL JURISDICTION OVER INDIANS AND INDIAN TERRITORY WITHIN THE ORIGINAL STATES

The thirteen original states early had their peculiar Indian problems. Some of them did not fail to attempt to extend criminal laws and jurisdiction over Indians and Indian territory.[1] In fact Indians were early indicted and convicted in state courts of violations of state criminal law, both "on" and "off" Indian reservations.[2] However, during this early period great doubt and uncertainty existed not merely as to whether the aborigine could be subjected to the jurisdiction of the state and national governments, but whether indeed he could be subjected to any law at all. This doubt and uncertainty had by no stretch of the imagination been extinguished as late as 1826. In this year on February 3, the United States Secretary of War in material submitted to the chairman of the Committee on Indian Affairs declared that United States and Indian relations are so "peculiar" that "it is extremely difficult to refer to any well settled principles by which to ascertain the extent of our authority over them."[3] Further, the Secretary, after stating that the Indians were consistently denounced as heathens and denied the rights, privileges, and protections of civil society, declared that both our ancestors and European nations disposed of them according to their "pleasure" and "will". Immediately following the use of this forceful language, the Secretary makes qualifications by noting that from the establishment of the federal government, the Indians were regarded as independent people who could negotiate and conclude treaties for the relinquishment of the usufruct of their lands, except as they had been denied the exercise of this right as it respects other nations and individuals. Continuing and enlarging upon his exceptions, the Secretary makes the following and important statement concerning Congress' authority to provide for the exercise of criminal jurisdiction over Indians and Indian territory. "And beside regulating their trade, congress went so far as to punish, by the decisions of our own courts, for offences committed within or without their own territories. In forbearing to go further, it is left to conjecture, whether it arose from a want of authority, or the expediency of exercising it."[4] The Secretary is most likely referring to the provisions of the March 30, 1802, Intercourse Act--"An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."[5] The 16th and 17th sections of this act prescribe two distinct processes for the apprehension and punsihment of violators. First, it provides that it shall be lawful for the United

States military to apprehend any citizen, or other person,[6] found in the Indian country, over and beyond the boundary line between the United States and the Indian tribes, in violation of any of the provisions or regulations of the act. Following apprehension by the military, the military is directed to convey the alleged violator by the nearest, safest, and most convenient route to the civil authority--civil authority in one of the three next adjoining states, or districts--of the United States. Here the alleged violator was to be proceeded against. This process was adopted specifically for the arrest of the trespasser upon Indian territories, on the spot, and in the act of committing certain proscribed offenses. But, because this process applied national action to places where the civil process of the law had, at best, doubtful course, it was committed entirely to the United States military to arrest the offender; and, after bringing him within the reach of the jurisdiction of the courts, deliver him into custody for trial. The second process of the act directs that if a person, charged with a violation of the provisions or regulations of the act, is found within any of the states, or their territorial districts, he shall be there apprehended and tried in the same manner as if such crime or offense had been committed within such state or district. Thus the violator was amenable to the provisions of the act only after his offense had been consummated, and when he had returned within the civil jurisdiction of the Union. This process, in the first instance at least, was merely of a civil character, but like the first process could have been enforced by the aid of the military. Military aid was most likely provided because enforcement of this act could have involved, indeed it did involve, jurisdictional conflicts among individuals, the states, the Indian tribes, and the national government. For example President John Quincy Adams in a message to the Senate and House of Representatives on the 5th of February, 1827, concerning enforcement of this act wrote:

> Happily distributed as the sovereign powers of the people of this Union have been between this General and State Governments, their history has already too often presented collisions between these divided authorities with regard to the extent of their respective powers. No instance, however, has hitherto occurred in which this collision has been urged into conflict of actual force. No other case is known to have happened in which the application of military force by the Government of the Union has been prescribed for the enforcement of a law the violation of which has within any single State been prescribed by a legislative act of the State. In the present instance, it is my duty to say that if the legislative and executive authorities of the State of Georgia should persevere in acts of encroachment upon the territories secured by a solemn treaty to the Indians, and the laws of the Union remain unaltered, a super-added obligation even higher than that of human authority will compel the Executive of the United States to enforce the laws and fulfil the duties of the nation by all the force committed for that purpose to his



> charge. That the arm of military force will be resorted to only in the event of the failure of all other expedients provided by the laws, a pledge has been given by the forbearance to employ it at this time. It is submitted to the wisdom of Congress to determine whether any further act of legislation may be necessary or expedient to meet the emergency which these transactions may produce.[7]

It is interesting to note that President Adams in the foregoing quotation appealed to Congress rather than to the courts--implying that the problem is political and not legal.

From the preceding paragraphs, it is necessary to conclude that the principles on which the Indians' criminal status rests did not spring forth fully developed and conceptualized as did Pallas Athena (Minerva) from the head of Zeus.

The first United States Supreme Court case having relevance to criminal jurisdiction over Indians and Indian territory within the original states was Fletcher v. Peck.[8] In Fletcher v. Peck a corrupted legislature of the State of Georgia by statute granted a large tract of land (Yazoo lands), land taken from the Indians, to a group of speculators for a nominal fee. The speculators thereafter divided the land into small tracts and resold the land at huge profits. A succeeding Georgia legislature repealed the previous legislature's authorization. Thereupon, the Supreme Court of the United States was asked to pass on the initial right of the state legislature to dispose of the land, and on the effect of the repealing statute.[9] In the disposition of the case, the Supreme Court dwelled upon the sanctity of the right of contract, a right guaranteed by the federal Constitution.[10] The court recognized the right of the state to make the initial sale, but held the repealing act unconstitutional--unconstitutional because it violated the provisions of the federal contract clause, and abridged natural right principles. That is to say, the succeeding legislature had no right to disturb the newly acquired property rights of "innocent third parties."

Within the course of this opinion, remarks were made that have more than a casual relation to the question of state criminal jurisdiction over Indians and Indian territory. Chief Justice Marshall, speaking for the court, made the following statements concerning Georgia's right to Indian lands within the state. "It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it . . . ."[11] Further, it is the court's opinion "that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[12]

Associate Justice Johnson in a dissenting opinion in the case, but on the same general subject, and after stating that the issue before the court was "more fitted for a diplomatic or legislative than a judicial inquiry," wrote:

> The correctness of this opinion will depend upon a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states: others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside: others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes of the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then one nation be said to be seised of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple estate may be held in reversion, but our law will not permit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was anything more than a mere possibility, it certainly was reduced to that state when the state of Georgia ceded, to the United States, by the constitution, both the power of preemption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.[13]

In terms of criminal jurisdiction over Indians and Indian territory these two opinions tend to portray opposite approaches. Marshall's, or the majority opinion, gives substantial strength to the argument that the State of



Georgia could extend criminal jurisdiction to the Indians and Indian territory within the state. This is an especially weighty argument when one considers the voidness of the United States Constitution as to the governance of Indians. The logic of this argument is premised on the theory that a state's jurisdiction extends to the whole of its territory.[14]

On the other hand, Associate Justice Johnson's opinion leads one to the conclusion that the Indians, of Georgia at least, retained a quasi-sovereignty. A sovereignty which the State of Georgia had no right to breach. He posits the "authority of extinguishment" of the Indians' national sovereignty with the national government, via the treaty and war powers.

Resentment of the Supreme Court's decision in Fletcher v. Peck had scarcely died down when new controversies claimed both the states' and the nation's attention. In the Niles' Weekly Register[15] of February 10, 1827, one finds the following entry: "It will be recollected that, a short time ago, some persons in Georgia or Florida were murdered by Seminole Indians--the governor of the former intimated to the legislature, that the tribe was embodied and prepared for war; and the governors of both Georgia and Florida ordered out a military force to protect the inhabitants of the state and territory . . ." With these introductory remarks, and with an obvious intention to clarify the legal relationship of the Indians to the state and national governments, the entry continues by observing that even though the conditions of the Indians are peculiar, they have a modified sovereignty over the lands which they inhabit, and this unextinguished sovereignty can only be severed "to" or "through" the national government or its agents. This right, according to the entry, seems to be "expressly" delegated, and it "has been so construed" by the numerous treaties, to the national government via the commerce and treaty provisions of the Constitution; and in this connection, the Indian tribes, in every respect, are to be treated "with as foreign nations." Following this development of the legal relationship of the Indians to the state and national governments, the entry concludes with this oracular foresight. "It is now proposed by some of the states, and the first time seriously thought of, we believe, to extend the civil and criminal jurisdiction of these states over territories not ceded by the Indians; and the time has apparently arrived when some measures must be adopted to bring about a decisive understanding on the subject." The time had arrived because the Georgia legislature on December 19, 1829, enacted legislation extending criminal jurisdiction over the Cherokee territory. The act also incorporated the land of the Cherokee Nation into the territory of the State, and annulled all laws as well as the constitution of the newly formed Cherokee Nation. The criminal portion of the act reads: "And be it further enacted, That all the laws, both civil and criminal of this state, be, and the same are hereby extended over said portions of territory respectively, and all persons whatever, residing within the same . . . be subject and liable to

the operation of said laws, in the same manner as other citizens of this state . . . ."[16]

Soon after this enactment, one George Tassels, an Indian of the Cherokee Nation, was indicted, convicted, and sentenced to be hanged for the murder of another Cherokee Indian within the territory occupied by the Cherokee tribe of Indians in the State of Georgia.[17] Specifically, and more importantly for the purposes of this study, the Hall Superior Court of Georgia ruled that Indians are not constitutional objects of the treaty making power of the national government. Contrarily, the court held that Indians are wards of the state within whose boundaries they are located, and that any attempt by them to make treaties with the United States, without the consent of the state, is simply void.

This case arose on an indictment found under the previously mentioned 1829 statute. Defendant's counsel, in protest, entered a plea questioning Georgia's extension of criminal jurisdiction over the Cherokee Nation. He contended that the 1829 act was unconstitutional, and therefore null and void. He argued that the Cherokee Indians by various treaties negotiated with the national government, beginning with the treaty of Hopewell, had been considered an independent sovereign state. Therefore, Indians committing crimes within Cherokee territory could not be subjected to the criminal laws of the State of Georgia because the Constitution of the United States declares all treaties made, or to be made, the supreme law of the land. And that the treaty of Hopewell, although being of an anterior date to the Constitution, was clearly recognized and intended to be given validity by the United States Constitution.[18] Counsel for defendant further pleaded that Cherokee sovereignty was explicitly and undeniably recognized by that portion of the Hopewell treaty which acknowledged the right of the Cherokee Nation to declare war against the United States.

By way of reply, Mr. Trippe, solicitor general of the western circuit, cited Kent's Commentaries, Vol. 3, to show that Indian tribes had been considered inferior, dependent, and in a state of pupilage to the whites. He placed much stress on the 1802 articles of cession and agreement between the State of Georgia and the United States. The solicitor alleged that these articles provided for the relinguishment by the United States to the State of Georgia all her rights to the land lying east of the tract ceded by the State of Georgia to the United States. He denied the inference drawn from the treaty of Hopewell by contending that it, along with other treaties cited by defense counsel, was void. They were void because the national government had no right to treat with Indians within the limits of the State of Georgia, except upon the single subject of commerce--the only power granted the national government in the Constitution.



The court answered the above allegations by holding that the relation between the State of Georgia and the Cherokee Indians turns upon the principles established by Great Britain toward Indian tribes, i.e., "Whatever right Great Britain possessed over the Indian tribes, is vested in the State of Georgia, and may be rightfully exercised."[19] This right "is ably elucidated in the decision of the Supreme Court, in the case of Johnson v. McIntosh, 8 Wheat. Repts. 543, part of which, this convention will transcribe in this decision."[20]

The court having quoted extensively from the opinion of the United States Supreme Court in Johnson v. McIntosh, along with Fletcher v. Peck, remarked that these cases determined that titles to Indian lands cannot be conveyed immediately and directly from Indians to individuals, and that a state is seised in fee of "lands within its chartered limits, notwithstanding the land may be in the occupancy of the Indians, and that such grants are good and valid, and cannot be questioned in courts of law . . . . The decision, that the State of Georgia was seised in fee of the Yazoo lands, was not the result of any treaty but the legal consequence of the right acquired by the European nations, upon their first discovery of any part of the American continent.[21] Continuing, the court writes:

The State of New York, as late as the year 1822, vested in their courts exclusive criminal jurisdiction of all offences committed by Indians within their reservations; other States have followed the example in a greater or less degree, and every thing has gone on quietly; but so soon as the State of Georgia pursues the same course, a hue and cry is raised against her, and a lawyer residing near 1000 miles from her borders has been employed to controvert her rights and obstruct her laws, and who has not been ashamed to say that he has been able to find no authority which justifies a denial to the Cherokee Nation of the right of a sovereign, independent State. Yet by the decision of the Supreme Court, which cannot be unknown to that gentleman, every acre of land in the occupancy of this sovereign, independent Cherokee Nation, is vested in fee in the State of Georgia . . . . The convention, from the view which the authorities previously presented furnish, can discover no legal obstacle to the extension of the laws over the territory now in the possession of the Cherokee Indians. If any obstacle to that extension exist, it must be sought for in those treaties which have been negotiated between the Cherokee Indians and the United States. But here a preliminary question is presented. Are the Indian tribes within the limits of the United States, legal objects of the treaty making power? It has been shown in the preceding part of this decision, that they have not been considered legal objects of a declaration of war. It has also been shown that by all the departments of the government, they have not been treated as a sovereign, independent State, in the regulation of its commerce. Can

any further evidence be required, that the Indian tribes are not the constitutional objects of the treaty making power? It is presumed not. It seems to be self-evident that communities which have been determined not to be objects of a declaration of war, cannot be the objects of the treaty making power, and that treaties have actually been made with them. This is admitted. But it may be safely contended that a construction put by the President and Senate on that part of the Constitution, which grants the treaty making power, is not entitled to as much weight as a construction placed upon other parts of the Constitution by all the departments of the government, entirely inconsistent with that placed upon the treaty making power, by only two of the departments which had concurred in that construction . . . .

The rights and relations of those tribes had been unalterably fixed long before the treaty making power created by the Constitution of the United States existed, and it was not competent for that power, when rightfully exerted, to alter or change those rights and relations. The rights of the Indians to the soil upon which they lived, was that of occupancy only, the fee being vested in the State of Georgia. Any attempt to change the right of occupancy into a fee, would have invaded the seizin in fee declared to be vested in Georgia by the Supreme Court of the United States, and would have been null and void. Again, the relations existing between the Cherokee Indians and the State of Georgia were those of pupilage. No treaty between the United States and the Cherokees could change that relation, could confer upon them the power of independent self-government. If there are any clauses in any of the compacts between the United States and the Cherokee Indians (miscalled treaties) which give to those Indians the right of independent self-government, they are simply void, and cannot, and ought not to be permitted to throw any obstacle in the way of the operation of the act of Georgia, extending jurisdiction over the country in the occupancy of the Cherokee Indians. . . .

The obstacle which induced the State of Georgia to forbear the exercise of the rights which Great Britain, as the discovering nation had authority to exercise over them, and which, vested in Georgia, no longer exists, if the Cherokees or their counsel are to be believed. The State of Georgia is empiriously called upon to exercise its legitimate powers over the Cherokee territory. Indeed, it seems strange that an objection should now be made to that jurisdiction. That a government should be seized in fee of a territory, and yet have no jurisdiction over that country, is an anomaly in the science of jurisprudence; but it may be contended that, although the State of Georgia may have the jurisdiction over the Cherokee territory yet it has no right to exercise jurisdiction over the persons of the Cherokee Indians who reside upon the territory of which the State of Georgia is seized in fee. Such distinction would present a more strange anomaly, than that of a government having no



jurisdiction over territory of which it was seized in fee. This convention holds it to be well established, that where a sovereign state is seized in fee of territory, it has exclusive jurisdiction over that territory, not only on the surface and everything that is to be found in that surface, but as Sir William Blackstone defines, a title in fee simple to lands, that it extends not only over the surface, but "usque and coelum," etc. Now the right of the tenant in fee could not be less extensive than that of the power granting the fee. The seizin in fee, therefore, vests not only the surface, but the bowels of the earth, and through the air about the earth, as far as the air can be appropriated to the use of man, or even "usque and coelum" as the maxim has it. If seizin in fee vests in the tenant not only the surface, but extends to the center downwards, is to limit the right of jurisdiction? . . .

This convention deems it a waste of time to pursue this examination. It has satisfied itself . . . . that independent of the provision of the state constitution claiming jurisdiction over its chartered limits, that the State of Georgia had the right in the year 1829, to extend its laws over the territory inhabited by the Cherokee Indians, and over the Indians themselves; that said act of 1829, is neither unconstitutional, nor inconsistent with the rights of the Cherokee Indians.[22]

Because of objection both to the conviction and the court's reasoning, Tassels' case was appealed to the United States Supreme Court, and the court thereupon directed Georgia to appear and make answer.[23] The arrogant and peremptory tone of Marshall's order aroused a smoldering hostility. To the people of Georgia the sacred sovereignty of the state hung in the balance. Governor Gilmer, who had recently succeeded to the office, quipped that Marshall's order would be "disregarded; and any attempt to enforce such order will be resisted with whatever force the laws have placed at my command."[24] Furthermore, he reasoned that "If the judicial power thus attempted to be exercised by the courts of the United States, is submitted to, or sustained, it must eventuate in the utter annihilation of the state governments, or in other consequences not less fatal to the peace and prosperity of our present highly favored country."[25] The Georgia Assembly unequivocally supported the Governor. In a resolution adopted in 1830, the Assembly declared that the right to define and punish crimes against the peace and dignity of the state "is an original and necessary part of sovereignty which the State of Georgia has never parted with."[26] In short, the Georgia Assembly viewed Justice Marshall's order as "a flagrant violation"[27] of states' rights, and commanded Governor Gilmer and all other officers "to disregard any and every mandate and process that has been or shall be served upon him or them, purporting to proceed from the Chief Justice or any associate justice . . . for the purpose of arresting the execution of any of the criminal laws of this State."[28] More boldly still, the Assembly "authorized and required" the Governor "to resist and repel any and

every invasion from whatever quarter, upon the administration of the criminal laws of this State,"[29] with all the force and means placed at his command. The order of the Supreme Court was thereupon ignored and Tassels was executed according to the verdict of the state tribunal.[30] In response to Tassels' execution, Ex-President John Quincy Adams penned[31] that the Constitution, laws, and Treaties of the United States are "prostrate in the State of Georgia . . ." And to his question: "Is there any remedy for this state of things?", he answers--"None". The reasons Ex-President Adams could find no remedy was that President Andrew Jackson was "in league with the State of Georgia. He will not take care that the laws be faithfully executed. A majority of both Houses of Congress sustain him in this neglect and violation of his duty. The arm refuses its office; the whole head is sick, and the whole heart faint." Following these caustic remarks, Ex-President Adams concludes with the ominous and oracular observations that the Georgia precedent "will be imitated by other States" without regard to the national interests. Further, as the legislative and judicial branches fail to enforce the rulings of the judiciary, "it is not improbable that occasions may arise in which the Judiciary will fail in turn to sustain them. The Union is in the most imminent danger of dissolution from the old inherent vice of confederacies, anarchy in the members. To this end one-third of the people is perverted, one-third slumbers, and the rest wring their hands with unavailing lamentations in the foresight of evil which they cannot avert. This ship is about to founder."[32]

Just two days prior to Tassels' execution on December 24, 1830, the Georgia legislature enacted a statute which extended still further the state's jurisdiction over Cherokee territory. The provision of this act which was to become memorialized undertook to prohibit any white person (except males under twenty-one, authorized agents of the United States and state governments, and women) from residing on Cherokee territory after March 1, 1831, except by special permission of the Governor. Shortly thereafter a landmark case (a case which arose from a violation of the December, 1830, enactment) reached the United States Supreme Court. This was the case of Cherokee Nation v. Georgia.[33]

The question upon which this case turned was whether the Cherokee tribe, a tribe known as the Cherokee Nation, was a sovereign and independent state or nation[34] that could maintain an original suit in the United States Supreme Court against the State of Georgia. It is a familiar rule of international law that a state cannot be sued without its consent. This rule, however, is modified by the United States Constitution. The United States Constitution provides that the "judicial power shall extend to all . . . . Controversies between two or more States . . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[35] A subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a state



shall be a party. This clause reads: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."[36] Relying on the "original" and "interstate" suit clauses, counsel[37] for the Cherokee Nation filed a bill in the United States Supreme Court and moved for a temporary injunction, along with a subpoena, to restrain the State of Georgia from enforcing certain laws within the territory alleged to belong to the complainants. Counsel alleged that the execution of these laws would annihilate the Cherokees as a political society; and that their execution would seize for the use of Georgia, the Cherokee lands which had been assured to the Cherokees by the United States in solemn treaties. Also the Cherokees compose a foreign state--a state owing no allegiance (except to their own government) to the United States, the several states, potentates or princes. This case brought into sharp focus the relationship of Indian tribes to foreign governments, state governments, and the national government. The case was not, however, disposed of on its merits. The court held (two justices writing separate but concurring opinions[38] and two justices dissenting[39]) that the Indian tribes, more particularly the Cherokees, were neither domestic nor foreign states within the meaning of the Constitution, and therefore the court lacked jurisdiction. Chief Justice Marshall, spokesman for the majority of the court, said:

> The counsel have shown conclusively that they are not a State of the Union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say be a foreign state. Each individual being foreign, the whole must be foreign.
>
> This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term "foreign nation" is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. The Indian Territory is admitted to compose part of the United States. In all our maps, geographical treaties, histories and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians, and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which

preceded the Constitution, "to send a deputy of their choice, whenever they think fit, to Congress." Treaties were made with some tribes by the State of New York under a then unsettled construction of the confederation, by which they ceded all their lands to that State, taking back a limited grant to themselves, in which they admit their dependence. Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet, it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility. These considerations go far to support the opinion that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states.[40]

The court concludes with this important statement:

> A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the State denies. On several of the matters alleged to the bill, for example on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee Nation, this court cannot interpose, at least in the form in which those matters are presented.
>
> That part of the bill which respects the land occupied by the Indians and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The



> propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.[41]

This decision clarified two basic problems associated with any attempt to assert criminal jurisdiction over Indians and Indian territory. The court ruled that Indian tribes, although occupying a semi-independent position which enabled them both to govern themselves and to make treaties with the United States, were neither states of the Union nor foreign states. The court further declared that they were, owing to their peculiar conditions, "wards," "pupils," and "domestic dependent nations" "completely under the sovereignty and dominion of the United States." Lastly, the majority opinion contains the suggestion that the attempted exercise of jurisdiction by the State of Georgia over the territory and people of the Cherokee Nation was an unconstitutional exercise of power, but that the question of right was not properly before the court. Thus the court was unwilling, unwilling possibly because of President Andrew Jackson's views and the demonstrated hostility of Georgia, to attempt to "control the legislation of Georgia, and to restrain the exertion of its physical force."[42] President Jackson informed the people of the United States in his first annual message to Congress on December 8, 1829, that "if the General Government is not permitted to tolerate the erection of a confederate State within the territory of one of the members of this Union against her consent, much less could it allow a foreign and independent government to establish itself there . . . ." Continuing, he writes: "Actuated by this view of the subject, I informed the Indians inhabiting parts of Georgia and Alabama that their attempt to establish an independent government would not be countenanced by the Executive of the United States, and advised them to emigrate beyond the Mississippi or submit to the laws of those States."[43] And addressing the Indians in August, 1830, President Jackson, after pleading with them to retire across the Mississippi River, said:

> Brothers, listen:--to these laws, where you are, you must submit; --there is no preventive--no other alternative. Your great father cannot, nor can congress, prevent it. The states only can. What then? Do you believe that you can live under those laws? That you can surrender all your ancient habits, and the forms by which you have been so long controlled? If so, your great father has nothing to say or to advise. He has only to express a hope, that you may find happiness in the determination you shall make, whatever it may be.[44]

It might be appropriate at this juncture, because of the complexity and technicality of the Cherokee and later decisions, to say a few words concerning the national treaty power. The Constitution provides that the

President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[45] To many the word "treaty" imparts both a contemporary and future relationship between the United States and sovereign foreign governments. Because of this customary connotation, the Cherokee decision provides ample opportunity for considerable confusion. It is especially confusing when one is reminded that until 1871 relationships with the various Indian tribes were continuously established through treaties, i.e., except relations between these "domestic dependent nations" and nations other than the United States. In that year Congress abolished treaty making with the Indians. The language reads: "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[46] With this enactment, though belatedly, the national government's supposingly historical authority over Indians via the treaty power became more firmly settled. In this statute Congress struck down, or admitted to be unconstitutional, this avenue for extending jurisdiction over Indians and Indian territory. Therefore, if one were to assume that Indian treaties "prior" and "after" the Cherokee decision were nothing more than "sugar coated" legislation,[47] then one could reasonably argue that criminal jurisdiction over Indians was early and legally attempted.[48] A treaty as early as 1785 contained a type of extradition arrangement whereby the tribes promised to deliver any Indian robbing or murdering a white to the nearest military post to be punished by the laws of the United States.[49] Whatever the true significance of the 1871 enactment, it is apparent that congressional abandonment of Indian treaty-making was an acknowledgement of the waning tribal status from a position of substantial autonomy to one of nearly complete subjection. Or in slightly different language, a recognition that future national governance of Indians would be by unilateral legislation, and not by bilateral negotiation.

Other facets of the treaty power which have "peculiar," yet "important," ramifications when considered in the light of the Cherokee decision are: treaties and statutes are of equivalent rank, hence posterior in tempora, potior in jure;[50] enactments of states have no validity as against valid treaties.[51] These facets become very important when considered in relation to "sugar coated" Indian treaties. That is to say, a condonence of the "sugar coated" rationale must assume a legislative power in Congress over Indians and Indian territory. This is especially intriguing when one realizes that many of the Indian treaties were negotiated by the original states, both before and after the adoption of the 1789 Constitution.[52]

Focusing again on the 1831 Cherokee decision, i.e., with the knowledge of the complexity raised by the immediately preceding discussion, it is



evident that this decision raised, but left unanswered, the following questions: (1) would the decision void any further attempt to deal with the Indians by treaty? (2) would anterior-Cherokee Nation v. Georgia treaties, at least since the adoption of the 1789 Constitution, be declared null and void? (3) assuming the treaty power to be an inappropriate source of authority, which governmental unit, or units (national, state, or tribal), could exercise criminal jurisdiction over Indians and Indian territory? and (4) by what source, or sources of authority could criminal jurisdiction be exercised over the Cherokee Indians and their country?

These questions, along with the same Georgia statutes that were challenged for their constitutionality in the Cherokee decision, were further and more fully considered in the case of Worcester v. Georgia.[53] As will be recalled, the challenged statutes in the Cherokee decision asserted authority and jurisdiction over the territory and members of the tribe of Indians known as the Cherokee Nation. The statute which was especially considered in this decision prohibited white persons from residing within the limits of the Cherokee Nation without a license or permit from the governor. Further, the act provided that persons controvening the foregoing provision would "be guilty of a high misdemeanor, and upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term of not less than four years."[54]

Worcester,[55] a white clergyman and authorized missionary of the American Board of Commissioners for Foreign Missions, had received authority from President Jackson to visit the Cherokee Indians with the purposes of instructing and converting them to the Christian religion. While so pursuing his objectives, he was arrested, indicted, and convicted by the Superior Court of the County of Gwinnett in the State of Georgia for having violated the aforementioned statute, and was thus sentenced to imprisonment in the penitentiary for a term of four years.

Worcester in his plea to the United States Supreme Court alleged: (1) that he had received authority to proselyte among the Indians from the President of the United States, and that this authority had not been countermanded;[56] (2) that the Georgia laws were ultra vires, and therefore unconstitutional, because they violated treaties between the Cherokee Nation and the national government--treaties which according to the Constitution compose a part of the supreme law of the land; (3) that the Georgia laws are unconstitutional because they impair the obligation of the various contracts formed by and between the Cherokee Nation and the national government; (4) that the Georgia laws are unconstitutional because they interfere with, and attempt to control and regulate intercourse with the Cherokee Nation, which, by the federal Constitution, belongs exclusively to the national congress; and (5) that the Georgia laws are repugnant to the statute of the national government, passed in March, 1802,

entitled, "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."[57]

In the opinion of the court, Associate Justice McLean wrote a separate but concurring opinion,[58] and Associate Justice Baldwin wrote a dissent,[59] Chief Justice Marshall reviewed the history of the aborigines, and the relations of the colonies and the Confederation to the various tribes that occupied the country at the time of its discovery. He then concluded:

> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states;* and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Is this the rightful exercise of power, or is it usurpation?
>
> While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our Revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these United Colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe: offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principle, Congress assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The Confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.
>
> Such was the state of things when the Confederation was adopted . . . This instrument also gave the United States in Congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the states: provided, that the legislative power of any state within its own limits be not



> infringed or violated . . . ."
>
> The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the Confederation, are discarded.
>
> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.* The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense . . . .
>
> The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States. . . .
>
> [The Georgia acts] are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; trespassing on it; and recognize the pre-existing power of the nation to govern itself. They are in hostility with the acts of Congress for regulating this intercourse, and giving effect to treaties.[60]

The Worcester decision, especially when analyzed in relation to the Cherokee Nation v. Georgia decision, is very complex. The court in the Worcester decision tersely declared that the "laws of Georgia can have no force"

or effect within the territory of the Cherokee Nation, and that the "citizens of Georgia have no right to enter" the Cherokee territory except with "the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress." At this juncture ambiguity takes the upper hand, and one immediately asks the question: Did the court intend to limit the rule of law laid down in this decision to the Cherokee tribe within the State of Georgia, or was it intended to have application to other tribes both "inside" and "outside" the original states? Without extinguishing what may be termed "academician doubts," one must remind the reader that Marshall's words (quoted extensively above) appear after comments on several Indian treaties, and following a discussion of a congressional enactment of 1819.[61] This 1819 statute provided for the civilization of all the Indian tribes adjoining frontier settlements. Furthermore, Marshall made rather extensive comments on the historical relationships between the Indians, the colonies, and the discovering nations. Whatever the genericness of the case, and the author believes that the rules of law developed in this case were intended for general application,[62] one cannot help but analyze the Worcester case in relation to the Cherokee Nation v. Georgia decision.

The court in the Cherokee decision ruled that the Indian tribes, and again more specifically the Cherokee Nation of Georgia, were neither foreign states nor states of the Union, but "domestic dependent nations." This decision, therefore, gives meaning to the "vertical distribution of authority concept" developed in the opening chapter of this study. That is to say, the Indian tribes were no longer conceived of as foreign nations, if they ever were; and secondly, the door to direct negotiations between the Indians and foreign nations had been theoretically and legally closed.

The Cherokee decision, however, except for ambiguous dicta[63] left unanswered questions concerning criminal relationships between the Indians, the national government, and the states. These relationships were met head-on in the Worcester decision. However, due to the unique and particular facts of this case, the "vertical distribution of authority concept" remained shrouded in uncertainties. As will be recalled, Worcester's counsel, inter alia, pleaded that Georgia's laws abridged the national intercourse act of 1802. An enactment alleged to have viability via regulation of commerce with the several Indian tribes. The court in declaring the acts of Georgia unconstitutional wrote: "the Cherokee Nation is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . The whole intercourse between this nation is by our Constitution and laws, vested in the Government of the United States."[64] Because of the court's language, one cannot refrain from asking: Does the exercise of national criminal authority over Indians and Indian territory depend solely on the commerce clause? If so one might logically argue that the clause ("commerce



. . . with the Indian tribes") gives the national government no more criminal authority over Indians and Indian territory than the national government can exercise over foreign nations. This argument, almost of necessity, follows because the commerce clause reads: Congress shall have power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[65] There is some doubt in the decision, however, for the argument that the national government's authority over Indians and Indian territory rests solely on the commerce clause. Referring to the early European explorers of North America, Marshall asks: "Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific, or rightful dominion over the numerous people who occupied it?"[66] He then answers: "But power, conquest, war, give rights, which after possession, are conceded by the world; and which can never be controverted by those on whom they descend."[67] Later Marshall declared that the necessities of our situation gave "Congress . . . the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States."[68]

Another ambiguity, closely allied with the foregoing concepts, is the question of "a rightful property in the soil." As will be recalled, the court in Fletcher v. Peck, via strongly worded dicta, declared that the State of Georgia was seized in fee of the Indian territory within the state. In Cherokee Nation v. Georgia the court stated that the land occupied by the Indians is "completely under the sovereignty and dominion of the United States." The court's use of the word "United States" left the relationship between the national government and the states, at least the original, unclarified. This ambiguity was extinguished, however, in the Worcester decision. In this decision the court declared: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."[69] These comments force to the fore some unique relationships. If the Indian tribes are, on the one hand, independent powers with whom the national government could execute treaties,[70] and on the other, independent powers with only an "occupancy" right to their territory, one is forced to accept the concept of a land-lord-tenant relationship between sovereign nations.[71] Even if one assumes that the various Indian tribes are not land-lord-tenant sovereigns, one is still confronted with the problem of determining whether the original states, the national government, or both, have criminal jurisdiction over them. Just because Indian territory is owned by the general government does not extinguish a possible state jurisdiction.[72] The states may still exercise criminal jurisdiction over territory owned by the general government, or even a foreign government; but it would be much harder to substantiate state criminal jurisdiction over territory "completely" separated from the states.

Another intriguing facet of the foregoing decisions, a facet which is given inadequate attention, centers on that clause of the Constitution which reads: "New states may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."[73]

It is obvious that the foregoing clause has more than an incidental relation to the Fletcher, Worcester, and Cherokee decisions. As will be recalled, Georgia, claiming to be sovereign within her boundaries, extended laws to Indians and Indian territory. Thereupon, the Indians, claiming sovereignty for themselves, petitioned the United States Supreme Court for protection. The question presented was whether the court "should" or "could" sustain, against Georgia's consent, the erection of a confederate or foreign state within her boundaries. The court answered by saying that Indian nations, more specifically the Cherokee Nation, were neither states of the Union nor foreign states, but "domestic dependent nations." Clarification of "domestic dependent nations," especially in relation to criminal jurisdiction over Indians and Indian territory, was left ambiguous. Criminal jurisdiction over Indians and Indian territory within the original states becomes even more ambiguous when one is reminded that Marshall's order[74] reversing Worcester's conviction was ignored. Governor Lumpkin, a gentleman imbued with the states' right spirit, instead of obeying the decision bluntly refused to release Worcester. It was at this time that President Jackson was said to have remarked, "John Marshall has made his decision: now let him enforce it!"[75] Governor Lumpkin reported to the Georgia legislature that the decision was an attempt to "prostrate the sovereignty of this state in the exercise of its constitutional criminal jurisdiction,"[76] and that he would oppose the usurpation with positive resistance. His exact words read: "I have . . . been prepared to meet this usurpation of federal power, with the most prompt and determined resistance, in whatever form its enforcement might have been attempted, by any branch of the federal government."[77] The press of the day also carried articles which favored the use of force to inhibit enforcement of Marshall's order.[78] It was not until two years later that Worcester and his companions, having sought a pardon from the Governor, were released. In their first application, they made the tactless error of saying that there had been no change in their views "in regard to the principles on which we have acted."[79] To this, the Governor was highly offended and very much displeased. He thought that their position was an insult to the sovereignty of the state, and became more determined to hold them in confinement.[80] The desperate missionaries thereupon wrote from the Milledgeville prison, apologizing, and at long last were released by Governor Lumpkin with the words that Samuel A. Worcester and Elizur Butler, "have made known to me, that they have



instructed their counsel, William Wirt and John Sergeant, esquires, to prosecute the case which they had thought fit to institute before the supreme court of the United States, against the state of Georgia, no further: But have concluded 'to leave the question of their continuance in confinement to the magnanimity of the state.' I . . . order that they be forthwith discharged."[81]

The gravity of the situation (Georgia's ignoring of Supreme Court orders)[82] is portrayed by Chief Justice Marshall. The following is a portion of a letter he wrote to his colleague, Justice Story, following the Worcester decision. "I yield slowly and reluctantly to the conviction that our constitution cannot last. I had supposed that north of the Potowmack a firm and solid government competent to the security of rational liberty might be perserved. Even that now seems doubtful. The case of the south seems to me to be desperate. Our opinions are incompatible with the united government even among ourselves. The union has been prolonged thus far by miracles. I fear they cannot continue."[83]

In brief, the Worcester decision, especially in relation to the original states, did not settle with finality and clarity the question as to the criminal relationship of Indians and Indian territory to state legislation and jurisdiction. Neither did it unequivocally dispose of uncertainties which shrouded a potential national criminal authority.[84] One can with little difficulty reason that the Georgia statutes were in conflict with treaties between the Indians and the national government, treaties which, if validly negotiated and ratified, are the supreme law of the land. Such reasoning would suffice to exclude state jurisdiction; but, under a strict construction of the United States Constitution, it would be difficult to locate anything the national government could do to Indian tribes not at war, except to regulate their commerce.

Because of this complexity and the remaining ambiguities, several more cases will be presented. These cases were selected on the basis of three objectives: (1) a more comprehensive presentation of issues (constitutional and other); (2) a fuller clarification of the distinctions which "do" and "may" exist between the original and new states; and (3) a realization that criminal jurisdiction (as a constitutional question) over Indians and Indian territory in the original states remains to the present day shrouded with uncertainties.

The first case to be presented is a Tennessee case.[85] One may with good cause ask: Why is a Tennessee case being presented with cases which concern themselves with criminal jurisdiction over Indians and Indian territory in the original states? The answer is that it gives the reader a comprehensive view of the constitutional issues as seen from a state perspective; and secondly, the case falls somewhere between the following two conceptual

patterns: Criminal jurisdiction over Indians and Indian territory within the original states; and criminal jurisdiction over Indians and Indian territory in states other than the original. Thus the case portrays beautifully, though to be sure without definitive answers, the purgatory characteristics.

The Supreme Court of Tennessee in this case, via an elaborate and extensive opinion, repudiated the power of Congress to form treaties with the Indians which would give the general government power to govern them. Secondly, the court held that the commerce clause does not give Congress general authority to punish crimes committed by or against Indians. In short, the Tennessee court held that the State of Tennessee had legal authority to extend its criminal laws over the Indians and Indian territory within its borders.

The facts were: Defendant, indicted for the murder of John Walker, pleaded that the crime was committed within the Cherokee Nation, and therefore beyond the rightful jurisdiction of the courts of Tennessee--beyond the jurisdiction of the courts of Tennessee because the Tennessee act of 1833 extending the criminal jurisdiction of the state over Cherokee territory was unconstitutional. The defendant pleaded that he was a resident, member, and native of a sovereign and independent Nation. He further pleaded that John Walker, the victim, was also a member, native, and resident of the same nation, and that the crime, if committed by him at all, was committed within the territorial limits of the Cherokee Nation, a Nation with full powers to try said offense. In this sense, the laws of Tennessee could be given no effect in the Cherokee territory.

The court summarized its elaborate and extensive opinion with the following terse and concise language:

> 1st. That the right to subdue and govern infidel savages found in countries newly-discovered by christians pertained to the first christian discoverer. By this rule the Indians found on this continent, the Cherokees inclusive, were allowed no political rights, save at the discretion of the European power that colonized the country. Such is the international law as declared by papal authority, such is the common and national law as declared in Calvin's case, and such the only possible rule that could be observed by our ancestors; that the colonial charter of Charles II rightfully conferred sovereign power to govern all the people abiding within its limits, and which the courts of the colony would not disregard in cases of Indian culprits, after 1729, had, and exercised at discretion, the same authority, and by the Revolution it devolved on the state of North Carolina.
>
> 2d. But, waiving this ground, we have the right at our election to exercise sovereign power over the Cherokee country, and to govern all



> residing there, by the right of conquest. This is evidenced by the treaty of 1730, by that of 1783 with Great Britain, but especially by the treaty of Hopewell. We won the sovereignty from Great Britain and from her ally, the Cherokees, when the country was conquered to the east bank of the Mississippi in the war of the Revolution. This right devolved on North Carolina, and, after our separation from the mother state, remained an unimpaired power, by compact, in the Southwest Territory, and then in the state of Tennessee.[86]

Before continuing with the court's summary, it should be noted that the court's "purgatory" rationale for conclusion number two is that North Carolina (an original state of the Union) on April 2, 1790, ceded to the national government the soil and sovereignty to a large tract of western land--land which later formed the State of Tennessee. However, the court reminds the reader that the cession was made upon various conditions. Conditions, argues the court, to which the national government agreed. The fourth condition declared: "that the territory to ceded shall be laid-out and formed into a state or states, containing a suitable extent of territory, the inhabitants of which shall enjoy all the privileges, benefits, and advantages set forth in the ordinance of the late Congress, for the government of the western territory of the United States." The ordinance for the government of the western territory of the United States was passed in July, 1787, and declares: "for the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district." The court thereupon concludes that the new state, Tennessee, "For the punishment of crimes . . . . had by a compact with Congress [attained], as a condition on which the country was ceded, jurisdiction over all parts of the territory."[87]

The last three summary statements of the court read:

> 3d. The treaty-making power, as exercised with Indian tribes, cannot deprive a state of a part of the jurisdiction it once possessed. The power is not over, but under, the Constitution, and, like others, restrained by the instrument giving it existence. It cannot, in times of peace, cede away to a people independent of the state a part of its territory and sovereignty. If a part could be ceded the whole might, and the state be extinguished. The right to destroy one state would be equal as to all. The states are emphatically the basis of the Union and federal Constitution; to extinguish them is to extinguish the Constitution--to leave it nothing to operate upon.
>
> 4th. Congress has no power to make a new state of the Union, of parts of other states, without the consent of the legislature of the states concerned; it has no power to erect an independent sovereignty not of the Union, of parts of states, with or without their assent; and to

maintain the Cherokee government in its independent form by acts of Congress would be the establishment of a form of government unknown to the Constitution and in violation thereof, because no conferred power authorizes legislation that dissevers the states. Nor can the treaty power and the power to legislate combined do the same thing. If the treaty of Hopewell or of Holstein authorizes Congress to legislate excluding the jurisdiction of the states from the Indian territory, than the treaty is a constitution as between the Cherokee Nation and the federal government, to which the states of the Union are no parties; the treaty, and acts of Congress grounded on its authority, are superior to, and destructive of, the Constitution, so far as this guarantees to every state a republican form of government, and sovereignty to the whole extent of its limits. Congress can have no created authority aside from the Constitution.

5th. Congress has power to regulate commerce with foreign nations, and among the several states, and within the Indian tribes. Grounded on this power laws have been passed to punish every grade of crime committed within the Indian limits, operating equally on whites and Indians. If authority exists for the exercise of this highest of jurisdictions, it must for all purposes and to every extent, at discretion; and, as the same construction must rule through the sentence, if the power to regulate commerce authorizes legislation for the punishment of all crimes, and the assumption of general jurisdiction over Indian nations, by the same clause may the same jurisdiction be exercised over every state of the Union at the discretion of Congress. There is no escape from this conclusion. That no such power exists in reference to the states will be admitted, and that none such exists in relation to the Indians follows.[88]

Because of the divergent and highly informative nature of the concurring and dissenting opinions to this case, the author feels a necessity for their inclusion.

Mr. Justice Green in a separate and concurring opinion summarizes his arguments and rationale thus:

> In truth, we are only to look at the actual state of things, and, if we find them such as to demand the interposition of our jurisdiction, however produced, we ought not to be deterred by abstract theories, but, like practical men, act upon the necessities of the case as they exist.
>
> Upon the whole, I am of opinion--
>
> 1st. That our ancestors, by discovery, had a right to take, occupy, and exclusively enjoy a part of the extensive territories of which the Indians were in no particular want.
>
> 2d. That they had not the right to deprive the Indians of all the lands they inhabited, nor to subdue them to their authority and jurisdiction,



otherwise than as hereinafter stated.

3d. That they acquired, by discovery, an exclusive right to extinguish the aboriginal right of occupancy to the whole extent of the country discovered.

4th. That this exclusive right to extinguish the Indian right of occupancy, together with the right (growing out of the former) to the fee simple of the soil, authorized, from the necessity of the case, the exertion of a partial control of, and jurisdiction over, the Indian tribes, in a national capacity, so as to prevent them from trading with, or selling lands to other civilized nations or their subjects.

5th. That after a treaty had been made with an Indian tribe, and a boundary prescribed for them, the lands within that boundary could not rightfully be acquired but by a voluntary cession from them, or as the result of a conquest over them produced by a just and necessary war provoked by them.

6th. That jurisdiction over them personally cannot be rightfully assumed, unless their peculiar condition shall render it necessary for the preservation of order and the suppression of crime, and then to such extent only as the necessity of the case may require.

7th. That such necessity exists at this time for the operation of the act of 1833.[89]

Mr. Justice Peck wrote a dissent. His wording is:

> An argument from some unknown hand, which has gone its round in the papers, and from which most of the debates in favor of state rights, in this particular, have been based, assumes that, because the Constitution of the United States extends no farther than to give power to Congress to regulate "commerce" with the Indian tribes, this grant of power does not include within it the grant of power to exercise jurisdiction over those tribes . . . .
>
> For it may be true that the clause, "Congress shall have power to regulate commerce with foreign nations and among the several states, and with Indian tribes," will, of itself, not communicate the power to pass a law giving to the federal judiciary jurisdiction.

However, he continues:

> [T]he power may be communicated under the clause, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . ." I am aware it has been denied that the Treaty of Hopewell [entered into on March, 1785, by authority of the Articles of Confederation] is in force,

for it is assumed that the treaty of Hopewell was abrogated by the war which succeeded it; still, if in subsequent treaties it was recognized, or any part of it, for so much it would be revived and kept in force.

I assume that the treaties with the Cherokees are treaties within the meaning of the federal Constitution . . . .

It is enough for me to know that the Cherokees are protected by treaty stipulation in the exercise of their usages and customs, and against intrusion upon the territory alloted them. It is impossible to tolerate the enforcement of an act of assembly, by our mandates and officers, beyond those limits, without violating the treaties we have been considering . . .

My answer is that between conflicting mandates the treaty is the highest, and the act, being subordinate, must yield; and certainly it becomes the stronger when consistent with the fact.[90]

The complexity and ambiguities presented by the preceding cases, one may reasonably argue, indeed eminent scholars have argued, were given clarity in United States v. Kagama.[91] This decision, a decision originating in California, encompasses some of the most articulate statements explanatory of state and national criminal jurisdiction over Indian and Indian territory. It upheld the constitutionality of congressional legislation on offenses between Indians committed on an Indian reservation. The court held: "It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection."[92] It may be reasonably questioned whether the court intended the principle laid down in this decision to be applicable to all the states, especially the original. Therefore, because the case arose not in one of the original states, a compulsion exists to say a few more words in this relationship. The Kagama decision will receive a more extended analysis in a later portion of the study.

Even if the previously discussed Worcester decision is interpreted as being prohibitive of state criminal jurisdiction over Indians and Indian territory within the original states, objectivity requires one to take cognizance of the fact that the decision was not carried into effect. Georgia both theoretically and actually defied the Supreme Court. This defiance was partially resolved by a change of circumstances. The change of cricumstances was an outgrowth of the New Echota Treaty which was concluded by the national government with the Cherokee Nation in Georgia on the 29th day of December, 1835.[93] This treaty provided the Cherokee Nation with indemnity for all of their lands east of the Mississippi, for removing west of the Mississippi to territory now within Oklahoma, and for past wrongs inflicted upon their people. But, contrary to the spirit of the treaty, a considerable number of the Cherokee people did not follow the tribe to its newly designated home. A remnant of



the Cherokee Nation remained behind in North Carolina and continued to occupy a portion of the old hunting grounds of the tribe. Here a new tribal government was established on a reservation granted to them as a state corporation by the state. Because of these peculiar phenomena, one is almost of necessity forced to ask: Did these Indians, along with Indians of similar circumstances,[94] become subject to state jurisdiction?[95] Before Justice McLean's answer is given to this question, the reader should again be reminded that the Worcester decision, along with being ambiguous, was openly and successfully flouted. Thus two closely related, but different, questions are associated with criminal jurisdiction over Indians and Indian territory within the original states. They are: First, have the original states ever been denied, at least successfully, either theoretical or actual criminal jurisdiction over Indians and Indian territory; and secondly, what effect do changed circumstances (with or without tribal and/or national approval) play? Associate Justice McLean and most likely the majority of the Worcester court, would have disposed of the second question thus: He reasons, via a concurring opinion to this decision, that when the Indians become incapable of self-government, either by moral degradation or a reduction of their numbers, it would "undoubtedly" be in the power of a state government to extend to them the aegis of its laws. Under such circumstances the agency of the general government, "of necessity," must cease. Continuing, he concludes: "The point at which this exercise of power by a state would be proper, need not now be considered; if, indeed, it be a judicial question . . . . The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary . . . . It is a question, not of abstract right, but of public policy."[96]

The Supreme Court, as far as can be ascertained, has never given a definitive answer to either of the above questions. In fact, the court has both refused to review and evaded decisions sustaining state jurisdiction. In order to acquaint the reader with the court's refusal and evasiveness techniques, cases from the State of New York will be analyzed. These cases represent the most exhaustive judicial analysis of the legislative and jurisdictional role of the original states over Indians and Indian territory. In short, these cases represent the law in its present state of judicial development.

Just ten years after the Kagama decision of 1886, a civil controversy[97] developed in New York State. This controversy, Seneca Nation of Indians v. Christy,[98] presented the United States Supreme Court with an opportunity, if not an obligation, to clarify the jurisdictional question. The court evaded the issue, however. This controversy centered on an action of ejectment brought by the Seneca Nation (under a New York statute) against Harrison B. Christy in New York courts to recover possession of a certain tract of land taken from the Cattaraugus Indian Reservation. The Seneca Nation's plea was rejected (both by a New York trial court and the New York Court of Appeals) on the basis

of a 20 year limitation provision in a New York statute of limitations. The Seneca Nation thereupon petitioned, via a writ of error, the Supreme Court of the United States for a hearing. In their petition they charged that their land had been taken contrary to the federal Constitution and the Indian intercourse Act of 1802. In answer to the Seneca Nation, and in support of the New York courts, the Supreme Court answered: "The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the court of appeals, that it could only be brought and maintained 'in the same manner and within the same time as if brought by citizens of the state in relation to their private individual property and rights.' Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make Federal questions of the correct construction of the act and the bar of the statute of limitations."[99] In this decision there is a strong intimation that because the Indians voluntarily submitted to the state courts, the Supreme Court should not, indeed it did not, overrule the state court's decision. In short, the court seems to be penalizing the Seneca Nation for exhausting state juridical procedures. This does not answer the jurisdictional question, however, Had the Indian Nation not "availed" itself of the state courts would the court have decided the case differently?

Two federal district court cases (one civil and one criminal), decided after the Christy decision, which met the jurisdictional question head-on are in conflict. The first case to be presented is United States ex rel. Lynn v. Hamilton et al.[100] This case was never appealed beyond the district court level. The second case is United States ex rel. Pierce v. Waldow.[101] This case was appealed to the United States Supreme Court, and was there known as United States ex rel. Kennedy v. Tyler.[102] Both of the district court decisions will be presented in order that the jurisdictional issues may be more fully delineated.

In United States ex rel. Lynn v. Hamilton et al.[103] Wilford Kennedy and Nelson Hare, tribal Indians of the Seneca Nation and living on the Cattaraugus Reservation, were charged, arrested, and imprisoned for violation of a Conservation Law of the State of New York. They were fishing with a net in the Cattaraugus Creek, within the boundaries of the Cattaraugus Reservation, without a license. Following imprisonment, they petitioned a district court, via a United States attorney, for a writ of habeas corpus. In response to the petition, the district court answered: "the New York state Conservation Law does not apply to tribal Indians living on reservations within the territorial limits of the state."[104] The court's rationale (rationale premised on treaty and "wardship" powers) for refusing New York jurisdiction is partially captured in a headnote to the case. The headnote reads: "Though states have frequently denied the exclusive power of the federal government over Indians living under tribal conditions in reservations within the borders of the state,



the federal government has and exercises such power; the federal government alone having made treaties with the Indian tribes before they became weakened."[105] In addition, and in response to a principle developed in Cusick v. Daly,[106] an important New York State case decided three years earlier, the court states:

> It might be claimed that a state may exert its authority over tribal Indians, except as to those major crimes specifically mentioned in section 328 of the United States Criminal Code, on the theory that, there being no express inhibition against the state, Congress by inaction has tacitly authorized it so to act. This is a doctrine well recognized and often applied to cases which involve questions of interstate commerce, and even to other matters. It is predicated upon the theory that where the states have original jurisdiction over a subject, but by adopting the federal Constitution, granted to the federal government power to deal with that subject, the jurisdiction of Congress is not exclusive until Congress has, by appropriate legislation, exercised its power.
>
> This doctrine was applied in the case of Manchester v. Massachusetts, 139 U.S. 240 . . . where the Supreme Court upheld the right of the state, in the absence of federal legislation upon the subject, to control the menhaden fisheries in Buzzards Bay, a place concededly within the admiralty and maritime jurisdiction of the United States. It has never been applied to matters which, from necessity, rest exclusively with the federal government--for example, the power to coin money, establish post offices, declare war, etc. The application of this principle to the government of Indian tribes has never found support in the decisions of the courts, but the doctrine was alluded to in the opinion of Judge Werner in the Daly case, supra. No support for such a contention can be found in the opinion of Mr. Justice Miller in the Kagama Case. If the Indian tribes are wards of the federal government and owe no allegiance to any state, and if the power over the Indian tribes rests with the federal government because it exists nowhere else, and if from necessity there can be no divided authority, then the jurisdiction of Congress must be exclusive.[107]

The district court case which hews to a contrary point of view is United States ex rel. Pierce v. Waldow.[108] This case also arose in the State of New York. In this case one Mr. Patterson, a Seneca Indian residing on the Cattaraugus Indian Reservation, died possessed of houses and lands within the reservation. His widow, a white woman, and several of his children survived him. The deceased "left a last will and testament, naming Alice Patterson executrix, which was admitted to probate by the surrogate of Erie county, and letters of testamentary granted."[109] Thereupon Pierce, an Indian, began suit in the Peacemakers' Court, a court of the Cattaraugus Indian Reservation,

alleging that "Patterson's widow and children were not members of the Seneca Nation, and were not entitled to inherit the real estate of the deceased under certain tribal customs."[110] The executrix in response to Pierce's actions appeared in the Peacemakers' Court and objected to its jurisdiction. The Peacemakers' Court ignored the objection and decreed that the disputed lands be surrendered to Ely S. Pierce and Sylvester J. Pierce. The executrix thereupon petitioned the Supreme Court of the State of New York for relief. This court responded by granting a temporary writ of prohibition, requesting that the Peacemakers' Court show cause why the writ should not be absolute. The Peacemakers' Court ignored the request, and disobeyed the writ. Thereafter the Reservation Marshall and Pierce, for carrying out the Peacemakers' decree, were held in contempt and committed to jail. They thereupon petitioned a federal district court for a writ of habeas corpus alleging that the state cannot exercise any sovereignty over the lives and property of their people. More specifically, they alleged that they were Seneca Indians "and their detention was in violation of their rights under treaties with the Seneca Nation; that both the Indians and their lands in question were outside the sovereignty of the state and, consequently, of the jurisdiction of its courts; and that by their arrest and detention they were denied the due process of law guaranteed by the Fifth Amendment of the Constitution of the United States."[111] The district court, although ruling against plaintiffs, answered: "I feel confident that the mere issuance of the writ will not be regarded as an inappropriate interference with the authority of the state court, especially as Indians primarily are wards of the nation, and when restrained of their liberties by state process, a discretionary right exists, growing out of the relationship, to inquire into the cause thereof and to discharge them if the evidence so warrants. . . ."[112] Continuing, the court writes the following concerning the evidence: "In behalf of the relators it is pleaded that they have no money to bear the costs and expenses of proceedings for their protection in the state courts; that they are wholly unable to give bonds required on appeal; and furthermore, that by treaty relations (Ft. Stanwix) in force between the Seneca Nation and the government they are assured of the protection of the federal courts."[113]

Following these opening remarks, the court then stated its reasons for ruling against plaintiffs: "Until Congress points out a different course, I conceive it to be my duty to follow the repeated decisions of the state tribunals, including the highest court of the state, on questions involving the civil affairs of the Seneca Indians on the Cattaraugus reservation, which by long acquiescence on their part have become rules of property within their state."[114]

Here we find the court both following the Cusick intimation and ruling (via explicit language) that the Cattaraugus Indians are "wards" of the national government--wards irrespective of a decision as to the seised in fee status of



Indian lands within the state. The court allowed state regulation because Congress had not "pointed out a different course," and because of a historical acquiescence on the part of the Indians and of Congress. The district court's decision was appealed, and the case reached the United States Supreme Court in 1925. In the United States Supreme Court the name of Frank M. Tyler was substituted for William F. Waldow. The substitution was apparently made because Tyler, during the interim, had succeeded Waldow as Sheriff of Erie County. Thus the case is known in the United States Supreme Court Reports as United States ex rel. Kennedy v. Tyler.[115] Here also the court, like the district court, raised but did not decide whether the State of New York had authority to legislate regarding its tribal Indians. The decision does, however, rule that the New York courts can exercise, at least initially, and until the litigant has exhausted his pocketbook, jurisdiction over the Cattaraugus Indians and their lands. The relevant portion of the court's decision reads:

> We are asked to enter upon a review of these matters and of the historical relations of the Indians to the Nation and to the State of New York from a time long anterior to the adoption of the federal Constitution. The conclusion we have reached makes this unnecessary. It is enough for the present purposes to say that the State of New York, as early as 1849, at the request of the Indians, assumed governmental control of them and their property, passed laws creating and defining the jurisdiction of the peacemakers' courts, administered these laws through its courts, and that Congress has never undertaken to interfere with this situation or to assume control. Whether the state judicial power extends to controversies in respect of the succession of Indian lands within the boundaries of the state, whether the peacemakers' court in the exercise of its jurisdiction is subject to the authority of the state supreme court, whether the subject matter of these controversies and proceedings was one exclusively within the control of the national government and beyond the authority of the state, are all questions which, under the circumstances recited, it is peculiarly appropriate should in the first instance be left to be dealt with by the courts of the state. In so far as they involve treaty or constitutional rights, these courts are as competent as the federal courts to decide them. In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him
> . . . .
> It is hardly necessary to say that this case presents no such exceptional and imperative circumstances. The state courts proceeded under laws passed in response to the request of the Indian Nation of which contemners are members, --laws which apparently for the greater part of a

century had not been seriously challenged as impeding the authority of the federal government. Under these conditions, contemners, deliberately having taken the risk of setting at defiance the judgment of the state court, must look for redress, if they are entitled to any, to the appropriate and authorized appellate remedies. They are not entitled to relief in a federal court by the writ of habeas corpus.[116]

It is important to note, even though this was a civil contempt case, that this decision was uttered some thirty-nine years after the Kagama decision. The court implies that Indians and Indian territory are subject to national legislation and jurisdiction, and that acquiescence, or silence, on the part of Congress is sufficient to allow the Indians to submit to state legislation and jurisdiction. Even if the court's implication, a tenuous implication in relation to the original states, could unquestionably be accepted, one must ask: What are the jurisdictional rights of the individual Indian? Does tribal acquiescence a priori result in acquiescence by the Individual Indian? Is acquiescence on the part of the tribe necessary? In short, could not the state exercise legislative, executive, and judicial jurisdiction over Indians and Indian territory within the state until Congress expresses a contrary desire, irrespective of tribal and individual desire?

The most recent decision, and the decision which expresses the Supreme Court's latest thoughts in relation to legislative, executive, and judicial authority over Indians and Indian territory within the original states, is New York ex rel. Ray v. Martin.[117] In this case the petitioner, a white man, was sentenced in 1939 to life imprisonment by a New York State court for the murder of another white man in the City of Salamanca. Salamanca is within the Allegheny Indian Reservation. He thereupon petitioned a New York State county court for a writ of habeas corpus.[118] He alleged that since the Indian reservation was under the exclusive jurisdiction of the United States, the State courts lacked jurisdiction to try and convict him. The County Court of Wyoming County heard the case and ordered the writ dismissed. He henceforth petitioned both the Appellate Division of the Supreme Court and the Court of Appeals for an Identical writ. These two courts affirmed the county court's dismissal. Petitioner thereupon petitioned the United States Supreme Court and was granted certiorari. Mr. Justice Black delivered the opinion of the court. He wrote:

> In United States, v. McBratney, 104 U.S. 621, this Court held that the State courts of Colorado, not the Federal courts, had jurisdiction to prosecute a murder of one non-Indian by another committed on an Indian reservation located within that State. The holding in that case was that the Act of Congress admitting Colorado into the Union overruled all prior inconsistent statutes and treaties and placed it "upon an



equal footing with the original States . . ."; that this meant that Colorado had "criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute reservation"; and that consequently, the United States no longer had "sole and exclusive" jurisdiction of the Reservation, except to the extent necessary to carry out such treaty provisions which remained in force. That case has since been followed by this Court[119] and its holding had not been modified by any act of Congress. The question this case presents is whether New York, which is one of the original States, has jurisdiction to punish a murder of one non-Indian upon the Allegany Reservation of the Seneca Indians located within the State of New York . . . .

We think that the rule announced in the McBratney case controlling and that the New York Court therefore properly exercised its jurisdiction. For that case and others which followed it all held that in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. Petitioner claims that the McBratney case differs from this proceeding in several respects. First, he contends that Colorado could exercise greater powers over its Indian reservations than New York can by virtue of the enabling act which admitted Colorado into the Union, a similar enactment being lacking here since New York is one of the original states.[120] As we have seen, the Colorado enabling act was held in the McBratney case to put Colorado "upon an equal footing with the original States," and to repeal earlier legislation and treaties inconsistent with the enabling act. The fact that Colorado was put on an equal footing with the original states obviously did not give it any greater power than New York . . . .

This brings us to petitioner's further contention that certain Federal statutes specifically grant the United States exclusive jurisdiction over the Seneca Reservation. He points out that the laws of the United States make murder a crime "if committed in any Place within the sole and exclusive jurisdiction of the United States . . ."; 18 U.S.C. 452; that 2145 of the Revised Statutes, 25 U.S.C. 217, makes this murder statute applicable to "Indian country"; and contends that the Seneca Reservation is Indian country, and that consequently New York has no jurisdiction to punish a murder committed on that Reservation. The cases following the McBratney case adequately answer petitioner's contentions concerning 2145, even if we assume, what we need not decide, that the Seneca Reservation is Indian country within the meaning of the statute. While 2145 of the Revised Statutes has been held applicable in territories to crimes between whites and whites which do not effect Indians.[121] the McBratney line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding 2145.[122] See also New York v. Dibble. How. 366.

Petitioner further contends that the McBratney rule is not applicable here because exercise of state jurisdiction over non-Indians at Salamanca would violate the Treaty of 1794, 7 Stat. 44. We can find no language in that Treaty that lends itself to such interpretation. The Treaty was one of peace and friendship between the United States and the Indians. It provided against private revenge or retaliation on account of injuries done by individuals on either side. Such injuries were to be reported by each nation to the other with a view of having the nation to which the individual offender belonged take "such prudent measures . . . as shall be necessary to preserve . . . peace and friendship unbroken." This procedure was to be followed until Congress made "other equitable provision for the purpose." This latter language, upon which the petitioner most strongly relies as imposing a duty upon the United States to exercise jurisdiction over the whole Reservation to the exclusion of the State, even as to offenses committed by whites against whites, cannot properly be interpreted as the petitioner asks. The entire emphasis in treaties and Congressional enactments dealing with Indian affairs has always been focused upon the treatment of the Indians themselves and their property. Generally no emphasis has been placed on whether state or United States courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly effect the Indians. Neither the 1784 Treaty nor any other requires a holding that offenses by non-Indians against non-Indians disturbing the peace and order of Salamanca are beyond New York's power to punish.[123]

The preceding excerpt, if one assumes that the national government has exclusive jurisdiction over Indians and Indian territory, strongly implies that it takes a positive statement by Congress, at least in states other than the original, to divest the national government of its authority over Indians and Indian territory. In this sense, the excerpt leaves ambiguous the extent of the original states' jurisdiction over Indians and Indian territory within their borders. An indication as to the extent of the original states' jurisdiction over Indians and Indian territory can be grasped from the Court's condonment of the statement that Colorado's "enabling act was held in the McBratney case to put Colorado "upon an equal footing with the original states.'" If one could accept the court's language literally, it would be possible to analyze Colorado cases to determine the extent of an original state's jurisdiction over Indians and Indian territory. The decision does destroy, however, the idea that the national government has sole and exclusive jurisdiction over Indian territory within the states. Statehood per se gives the states jurisdiction to prosecute crimes committed within Indian territory by non-Indians against the person or property of other non-Indians, and supposedly jurisdiction of crimes committed by non-Indians which have no proprietary or personal victims, provided the offenders do not "directly affect Indians," or that treaties and legislation have not provided otherwise.



Because the United States Supreme Court in the Martin case leaves crucial questions to implication, it might be advantageous to quote from the New York Court of Appeals in the same case. This language will portray current thinking, problems, and potential trends as seen by the highest court in one of the original states. The language is as follows:

> Before our Federal Constitution was adopted, those Seneca lands were within the bounds of the State of New York. The Allegany Reservation was, accordingly, not created by the Federal Government out of United States Government lands within the State, and was never at any time territory of the United States . . . .
>
> By Federal Constitutional provision (art. 1, 8) and perhaps ex necessitate, . . . the Indian tribes have always been to some degree dependents of the Government of the United States and their members have been wards of that Government, receiving its care and protection . . . . The power of Congress over the Indians and their tribal affairs and domains is paramount and of a most sweeping character . . . . The courts of this State, as well as the Federal courts, have consistently recognized that this paramount power in Congress is applicable to the affairs of the Six Nations within New York State. . . . But, while the tribal Indians, being wards of the National Government, are not generally amenable to State laws nevertheless the lands in any State occupied by Indians is still part of the State unless expressly excluded therefrom . . . . The exclusive control of the Federal Government over Indians extends only so far as is required by the pupilage of the wards and has to do only with government and protection of the Indians themselves. . . . Congress may exercise that jurisdiction by legislating concerning crimes committed by Indians or against Indians within a reservation . . . .But that jurisdiction over the Indians has nothing at all to do with the transactions of white men among themselves not effecting the persons or property of Indians, on or off a reservation. Accordingly, it has been held in many State and Federal decisions, and apparently never until now questioned, that to oust the criminal courts of a State from jurisdiction over crimes committed by a non-Indian against a non-Indian, more must be shown than the single fact that the crime was committed on an Indian reservation . . . . To allocate jurisdiction over such crimes to the Federal courts, there must be shown some treaty or act specifically so commanding . . . . The reason is simply this: the original thirteen States and those later admitted into the Union on an equal basis with the original thirteen, have general criminal jurisdiction over all non-Indian persons within the State limits, including Indian reservations . . . . Even as to Indians, the National Government's exclusive jurisdiction of the crimes over which it has by statute assumed jurisdiction, applies only to Indians living "in their tribal relations."[124]

In conclusion one must admit that the Indians in the original states have a peculiar history. And because of their peculiar history, the Supreme Court has refused to use opportunities to unequivocally clarify the outer ambits of legislative and jurisdictional authority of the original states over Indians and Indian territory within their boundaries.

FOOTNOTES

[1]Laws of the State of New York, 45th sess., ch. 204 (1822)--"Be it enacted by the People of the State of New York, . . . That the sole and exclusive jurisdiction, of trying and punishing all and every person, of whatsoever nation or tribe, for crimes and offences committed within any part of this state, except only such crimes and offences as are or may be cognizable in courts depriving jurisdiction under the constitution and laws of the United States, of right belongs to, and is exclusively vested in the courts of justice of this state, organized under the constitution and laws thereof." See also Jackson v. Goodell, 20 Johns. (N.Y.) 187-193 (1822). And "Report and Remonstrance of the Legislature of Georgia," S. Doc. No. 98, 21st Cong., 1st sess., (March 8, 1830).

[2]Laws of the State of New York, 45th sess., ch. 204 (1822). "And whereas it has been represented, that Soo-nongize, otherwise called Tommy Jemmy, an Indian of the Senaca tribe, has been indicted for the murder of Caugh quaw tough, an Indian woman of the same tribe, which murder is alleged to have been committed within the Seneca reservation, in the county of Erie. And whereas it is further represented, that the said alleged murder was committed under the pretence of authority derived from the councils of the chiefs, sachems, and warriors, of the said tribe; and under the then existing circumstances, it is deemed by the legislature expedient to pardon him: Therefore,

II. Be it further enacted, That the said Soo-non-gize, otherwise called Tommy Jemmy, be, and he is hereby fully and absolutely pardoned of and from the said felony."

See also In re Peters, 2 Johnson's Cases (N.Y.) 344-345 (1801). In this case George Peters, a Brothertown Indian, was convicted of the murder of his wife, also a Brothertown Indian. The murder was perpetrated in the village of Rome. The brothertown Indians resided in the town of Paris. The court in a per curiam decision held: "The Brothertown Indians are not a distinct nation or tribe. They come from New England, and settled under the jurisdiction of this State. They have never claimed or exercised any criminal jurisdiction among themselves . . . . They are not, in this respect, like some of the Indian tribes within this State, whose situation is peculiar, and who, as to offences committed by the individuals within their tribes against each other, have claimed and exercised a criminal jurisdiction. But without giving an



opinion what would be the case with respect to other Indians, we think that the Brothertown Indians are clearly subject to our laws, and to the jurisdiction of this court."

And State v. Tassels, Dud. (Ga.), 229-238 (1830), it was held that Indians were not constitutional objects of the treaty and war making powers of the United States, but were "wards of the state within whose boundaries they were domiciled.

And also Niles' Weekly Register (XXXV, p.151).

[3]Niles' Weekly Register (XXX, p. 24).

[4]Ibid.; italics mine.

[5]2 Stat. 139. See also 1 Stat. 469.

[6]The provisions of this act were never intended to be applied to offenses committed by Indians within Indian territory.

[7]James D. Richardson, A Compilation of the Messages and Papers of the Presidents, Vol. 2, 1907, pp. 372-373.

[8]10 U.S. 86 (1810). For a later but informative case see Clark et al. v. Smith, 38 U.S. 195, 201 (1839), where the court writes that "the colonial charters, a great portion of the individual grants by the proprietary and royal government, and a still greater portion by the states of this Union after the Revolution, were made for lands within the Indian hunting grounds. North Carolina and Virginia, to a great extent, paid their officers and soldiers of the revolutionary war, by such grants; and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these states but others. The ultimate fee (encumbered with the Indian right of occupancy) was in the crown previous to the Revolution, and in the states of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power, and respected by the Courts until extinguished; when the patentee took the unencumbered fee. So this Court, and the state Courts, have uniformly, and, often, holden." In support of this statement the court cites Fletcher v. Peck and Meigs et al. v. McClung's Lessee, 13 U.S. 11 (1815).

[9]For an account of the origin of the contests over the Indian lands in Georgia, see Ulrich Bonnell Phillips, "Georgia and State Rights," Amer. Hist. Assoc., Annual Report, Vol. 2, 1901, p. 39.

[10]Art. I, sec. 10 of the United States Constitution provides that "No State shall . . . pass any Bill of Attainder, expost facto law, or Law impairing the Obligation of Contracts."

[11]Fletcher v. Peck, 10 U.S.87, 142 (1810).

[12]Id. at 143-143.

[13]Fletcher v. Peck, 10 U.S. 87, 146-147 (1810).

[14]The essence of this argument is captured in State v. Tassels, Dud, (Ga.) 229, 236 (1830). This decision will receive an extended treatment later. See also Joseph H. Beale, The Conflict of Laws, Vol. 2, 1935, 425.1, 426.1.

[15](XXXI, pp. 369-370).

[16]Niles' Weekly Register (XXXXVIII, pp. 54-55, 328-329).

[17]State v. Tassels, Dud. (Ga.), 229 (1830).

[18]The United States Constitution reads (Art. VI, cl. 2); "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made (italics mine), under the Authority of the United States, shall be the supreme Law of the Land . . . "

[19]State v. Tassels, Dud. (Ga.) 229, 231 (1830).

[20]Ibid.

[21]Id. at 233.

[22]State v. Tassels, Dud (Ga.) 229, 234-238 (1830). Italics mine.

[23]"To the state of Georgia, greeting: You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden, at Washington, on the second Monday in January next, pursuant to a writ of error, filed in the clerk's office of the superior court of the state of Georgia for Hall county, in the county of Hall, wherein George Tastle, alias George Tasseles, alias George Tassel, alias George Tassle, alias George Tasslle, is plaintiff in error, and the state of Georgia is defendant in error, to show cause, if any there be, why judgment rendered against the said George, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable JOHN MARSHALL, chief justice of the said supreme court of the United States, this 12th day of December, in the year of our Lord, 1830. (Signed) J. Marshall, ch. just. of the U.S. "--Niles Weekly Register (XXXIX, p. 338).



[24]Niles' Weekly Register (XXXIX, p. 338). For a general, informative, and concise statement of Georgia's position concerning the exercise of jurisdiction (civil and criminal) over Indians and Indian territory within her boundaries, see "Report and Remonstrance of the Legislature of Georgia," S. Doc. No. 98, 21st Cong., 1st sess. (March 8, 1830).

[25]Ibid.

[26]Ibid.

[27]Ibid.

[28]Niles' Weekly Register (XXXIX, p. 338).

[29]Ibid.

[30]Id. at 353.

[31]Memoirs of John Quincy Adams, Vol. 8, 1876, pp. 262-263.

[32]Niles' Weekly Register (XXXIX, p. 353).

[33]30 U.S. 1 (1831).

[34]In 1827 the Cherokees adopted a written constitution and proclaimed themselves an independent state. See Niles' Weekly Register (XXVIII, pp. 328, 329, and XXXIII, p. 73).

[35]United States Constitution, Art. III, sec. 2.

[36]Ibid.

[37]For verbatim and personal accounts of "why", and upon what "bases," Counsel pleaded the Cherokee cause see Niles' Weekly Register (XXXIX, pp. 69-70, 81-86).

[38]Associate Justice Johnson in presenting his views favoring the dismissal of the suit stated that the case was "one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal." (30 U.S. 28) Taking a somewhat different approach, Justice Baldwin concurred in the dismissal on the ground that the Indians could not appear as plaintiffs before the Supreme Court. Having first presented an extensive survey of the negotiations with the Indians, he concluded that from colonial times the colonies and states had exercised the rights of sovereignty over the territory occupied by

the Indians. Therefore, the Supreme Court was not to be regarded as having authority or jurisdiction to reverse a principle on which all governments had acted for fifty-five years. (Id. at 31-47).

[39]Associate Justice Thompson wrote a dissenting opinion to which Associate Justice Story concurred. Justice Thompson argued that the United States Supreme Court had original jurisdiction and should have heard and determined the case. He wrote in support of his argument: "And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or not, I am unable to perceive any sound and substantial reason why the Cherokee Nation should not be so considered. It is governed by its own laws, usages and customs; it has no connection with any other government or jurisdiction, except by way of treaties entered into with like form and ceremony as with other foreign nations. And this seems to be the view taken of them by Mr. Justice Johnson in the case of Fletcher v. Peck, 6 Cranch, 146; 2 Peter's Cond. Rep. 308. In speaking of the state and condition of the different Indian nations, he observes, 'that some have totally extinguished their national fire, and submitted themselves to the laws of the States; others have by treaty acknowledged that they hold their national existence at the will of the State within which they reside; others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia, among which are the Cherokees. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people; and the uniform practice of acknowledging their right of soil by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their rights of soil'. . . .

If we look to the whole course of treatment by this country of the Indians from the year 1775 to the present day, we dealing with them in their aggregate capacity as nations or tribes, and regarding the mode or manner in which all negotiations have been carried on and concluded with them, the conclusion appears to me irresistible that they have been regarded by the executive and legislative branches of the government not only as sovereign and independent, but as foreign nations or tribes, not within the jurisdiction nor under the government of the States within which they were located. This remark is to be understood, of course, as referring only as such as live together as a distinct community, under their own laws, usages and customs; and not to the mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country; their national character extinguished, and their usages and customs in a great measure abandoned; self-government surrendered; and who have voluntarily, or by the corce of circumstances which surrounded them, gradually become subject to the laws of the States within which they are situated. Such, however, is not the case with the Cherokee Nation. It retains its usages and customs and self-



government, greatly improved by the civilization which it has been the policy of the United States to encourage and foster among them. All negotiations carried on with the Cherokees and other Indian nations have been by way of treaty, with all the formality attending the making of treaties with any foreign power. The journals of Congress, for the year 1775 down to the adoption of the present Constitution, abundantly establish this fact. And since that period such negotiations have been carried on by the treaty-making power, and uniformly under the denomination of treaties.

What is a treaty as understood in the law of Nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties. And where is the authority, either in the Constitution or in the practice of the government, for marking any distinction between treaties made with the Indian nations and any other foreign power? They relate to peace and war; the surrender of prisoners; the cession of territory; and the various subjects which are usually embraced in such contracts between sovereign nations."--(30 U.S. 57-60).

[40]Cherokee Nation v. Georgia, 30 U.S. 1, 16-18 (1831). Italics mine.

[41]Id. at 20. Italics mine.

[42]Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831).

[43]James D. Richardson, A Compilation of the Messages and Papers of the Presidents, Vol. 2, 1907, pp. 457-458. Art. 4, sec. 3, of the United States Constitution reads: "New States may be admitted by the Congress into this Union; but no new State, shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the congress."

[44]Niles' Weekly Register (XXXIX, pp. 67-68.

[45]United States Constitution, Art. II, sec. 2, cl. 2.

[46]16 Stat. 566 (1871). This statute has more than a casual relation to the horizontal distribution of authority concept spoken of earlier, and in this connection the statute raised a constitutional issue that was laid to rest in United States v. Kagama, 118 U.S. 375 (1886).

[47]It has been said of the period 1829-71 that it "may be characterized as the period of compulsory emigration under the form of consent by voluntary treaty."--"Indians and the Law," by Austin Abbott, 2 Harv. L. Rev. 167, 171

(1888). One federal court declared that the 1871 act changed only the method of governing Indian tribes and not the relation of the tribes to the national government.--Ex Parte Morgan, 20 Fed. Rep. 298 (1883). And Heinrich Krieger states in his article "Principles of the Indian Law and the Act of June 18, 1934," 3 Geo. Wash. L. Rev. 279, 292-293 (1934-35), that "It is the lack of any superior authority over both parties that, from the beginning, made impossible a true international relation between a civilized nation and inferior, aboriginal tribes. The word 'treaty' . . . is not at all accurate when used in the Government's relations to the Indians.

[48]See Chapter II of this study.

[49]Treaty with the Wyandot, Delaware, Chippewa, and Ottawa, January 21, 1785. 7 Stat. 16, 17. The specific language of the treaty reads: "If any Indian or Indians shall commit a robbery or murder on any citizen of the United States, the tribe to which such offenders may belong, shall be bound to deliver them up at the nearest post, to be punished according to the ordinances of the United States."

[50]In Whitney v. Robertson, 124 U.S. 190, 194 (1887), the Court states: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other . . . . [I]f the two are inconsistent, the one last in date will control the other . . . ." See also Moser v. United States, 341 U.S.41, 45 (1951).

[51]Clark v. Allen, 331 U.S. 503 (1947); United States v. Belmont, 301 U.S. 324 (1936); Hamilton v. Univ. of California, 293 U.S. 245 (1934).

[52]Felix S. Cohen, Handbook of Federal Indian Law, 1942, p. 420, n. 24; IV Lincoln's, Constitutional History of New York, 1906, p. 171; United States v. Boylan, 265 Fed. Rep. 165 (1920).

[53]31 U.S. 515 (1832).

[54]Id. at 523.

[55]Worcester was only one of a party of Presbyterian missionaries, headed by Elizur Butler and himself, who were arrested, convicted, and sentenced to four-year terms in prison.

[56]It is interesting to note that the President has the following powers which may have more than a casual relation to Worcester's case. These po powers are: "He shall have Power, by and with the Advice and Consent of the



Senate, to make Treaties, provided two thirds of the Senators present concur." United States Constitution, Art. II, sec. 2, cl. 2. And "he shall receive Ambassadors and other public Ministers." Id. at sec. 3, cl. 1.

[57]2 Stat. 139.

[58]Justice McLean writes: "In the executive, legislative and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with right which constitute them a state, or separate community--not a foreign, but a domestic community--not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation . . . .

Much has been said against the existence of an independent power within a sovereign state; and the conclusion has been drawn, that the Indians, as a matter of right, cannot enforce their own laws within the territorial limits of a state. The refutation of this argument is found in our past history. That fragments of tribes, having lost the power of self-government, and who lived within the ordinary jurisdiction of a state, have been taken under the protection of the laws, has already been admitted. But there has been no instance, where the state laws have been generally extended over a numerous tribe of Indians, living within the state, and exercising the right of self-government, until recently. Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that state, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But even the state of New York has never asserted the power, it is believed, to regulate their concerns, beyond the suppression of crime . . . .

When Georgia sanctioned the constitution, and conferred on the national legislature the exclusive right to regulate commerce or intercourse with the Indians, did she reserve the right to regulate intercourse with the Indians within her limits? This will not be pretended . . . .

The residence of Indians, governed by their own laws, within the limits of a state, have never been deemed incompatible with state sovereignty, until recently. And yet, this has been the condition of many distinct tribes of Indians, since the foundation of the federal government. . . . .

But the inquiry may be made, is there no end to the exercise of this power over Indians, within the limits of a state, by the general government? The answer is, that, in its nature, it must be limited by circumstances. If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a state would be proper, need not now be considered; if, indeed, it be a judicial question. Such a question does not seem to arise in this case. So long as treaties and laws remain in full force, and apply to Indian nations, exercising

the right of self-government, within the limits of a state, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional. The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . . It is a question, not of abstract right, but of public policy."--(31 U.S. 515, 583-593)

[59]Justice Baldwin stated that in his opinion the record was not properly returned upon the writ of error; and ought to have been returned to the state court, and not by the clerk of that court. As to the merits of the case, he said, his opinion remained the same as was expressed by him in the case of the Cherokee Nation v. Georgia."--(31 U.S. 515, 596).

*But see Marshall's opinions in Johnson v. McIntosh, 8 Wheaton 543 (1823), and Fletcher v. Peck, 10 U.S. 87, 142-143 (1810).

*But see Marshall's opinion in Cherokee Nation v. Georgia, 30 U.S. 1, 16-18 (1831). The court decided in this case that Indian tribes were neither domestic nor foreign states; therefore, following the common connotation attached to treaties, one could with "little" or "no " distortion argue that treaties with Indian tribes are unconstitutional. In short, the concept of our nation executing a treaty with another group within the former's sovereign territorial limits may seem a bit incongruous. Marshall seems to disagree with this incongruousness, however.

[60]Worcester v. Georgia, 31 U.S. 515, 557-562 (1832). Italics mine.

[61]3 Stat. 516 (1819).

[62]The problem evolves, however, when one realizes that the rules of law developed by the case are not always clear.

[63]Marshall wrote in the Cherokee decision: "for example on the laws making it criminal to exercise the usual powers of self-gove rnment in their own country by the Cherokee Nation, this court cannot, at least in the form in which those matters are presented."--Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831).

[64]Worcester v. Georgia, 31 U.S.515, 561 (1832).

[65]United States Constitution, Art. I, sec. 8, cl. 3. Italics mine.

[66]Worcester v. Georgia, 31 U.S. 515, 543 (1832). Italics mine.



[67]Ibid.

[68]Id. at 558.

[69]For a detailed analysis of ownership of Indian lands in the several states see A. James Casner's book American Law of Property, Vol. 3, 1952 ed., sec. 12. 16-12.23. Italics mine.

[70]The author is assuming that treaty negotiation connotates relationships between two, or more, sovereign and independent nations.

[71]The author is fully aware of the fact that the court in the Cherokee decision referred to the Indian tribes as "domestic dependent nations." But, if one were to follow this line of reasoning, the treaty power would connotate relationships both between "domestic dependent" and completely sovereign nations. The author is quick to admit that there needs be no inconsistency in this connotation--sovereignty is never absolute.

[72]For example a good portion of the territory within the western states is owned by the national government, but this does not per se extinguish state criminal jurisdiction over this area.

[73]United States Constitution, Art. IV, sec. 3.

[74]"It is the opinion of this court, that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samual A. Worcester to hard labor in the penitentiary of the state of Georgia, for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties and laws of the United States, and ought, therefore, to be reversed and annulled."--31 U.S. 515, 562 (1832).

[75]The comment is probably apocryphal because Worcester had received authority to proselyte among the Indians from President Jackson. But, see Horace Greeley, The American Conflict, Vol. I, 1886, p. 106. Greeley makes this comment concerning the above quotation. "I am indebted for this fact to the late Governor George N. Biggs, of Massachusetts, who was in Washington as a member of Congress when the decision was rendered." Also, Ulrich Bonnell Phillips, Georgia and State Rights, Amer. Hist. Assoc., Annual Report, Vol. II, 1901, p. 80. And also John Spencer Bassett's Life of Andrew Jackson, Vol. II, 1910, pp.690-691. Bassett writes: "It is not sure that the words were actually uttered, but it is certain, from Jackson's views and temperament, that they might have been spoken."

[76]Niles' Weekly Register (XXXXIII, p. 206).

[77]Ibid.

[78]Id. at (XXXXII, p. 78).

[79]Id. at (XXXXIII, p. 419).

[80]Ibid.

[81]Ibid., pp. 382-383.

[82]Georgia ignored the Supreme Court both in the Tassels and Worcester decisions. For interesting accounts of the Worcester episode in the struggle for power between the state and national governments see Albert J. Beveridge, The Life of John Marshall, in United States History, Vol. I, 1928, ch. 19. The legality of the Worcester decision, in most respects, however, has come to be accepted as valid law. In Williams v. Lee, 79 S. Ct. 269, 270 (1959), the court writes: "Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester the broad principles of that decision came to be accepted as law." For a limitation of the Worcester decision see New York v. Dibble, 62 U.S. 366 (1858). In this case the State of New York had enacted a statute making it unlawful for any person other than an Indian to settle on land belonging to the tribes within that state, and providing for the ejectment of intruders. The defendant relied heavily upon Marshall's words describing Indian territory as "completely separated" from the states, and argued that the state had no power to prosecute this trespass. But the Supreme Court upheld this exercise of state jurisdiction in terms of the police power. See also New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).

[83]Massachusetts Hist. Soc. Proceedings, 2d ser., XIV, 352.

[84]A theory which would, but not of necessity, support virtually unlimited criminal authority of the national government over the Indians and their territory, especially if one assumes the states are excluded, had been advanced only a year earlier in the Cherokee Nation v. Georgia case. In this decision Marshall wrote: The Indians' "relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for releif to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."--30 U.S. 1, 17-18 (1831). This was dictum, however, because the only question the case

presented was whether the Cherokees could sue the State of Georgia in a federal court.

[85] State v. Foreman, 8 Yerg. (Tenn.) 256 (1835). This case was never appealed from the Tennessee court to the federal courts.

[86] State v. Foreman, 8 Yerg. (Tenn.) 256, 335-336 (1835).

[87] Ibid., p. 302. The insert is the work of the author.

[88] State v. Foreman, 8 Yerg. (Tenn.) 256, 335-338 (1835).

[89] State v. Foreman, 8 Yerg. (Tenn.) 256, 352-353 (1835).

[90] Ibid., pp. 356-357, 364-365.

[91] 118 U.S. 375, 383-384 (1886).

[92] Ibid., pp. 383-384. The reader should note that national territorial ownership does not seem to be an essential element for determining national jurisdiction.

[93] 7 Stat. 478-487.

[94] See for example the Brothertown Indian case on page 68.

[95] The treaty implied that they would be required to subject themselves to the laws of the various states. The relevant portion of the treaty reads: "Such heads of Cherokee families as are desirous to reside within the States of No. Carolina, Tennessee, and Alabama subject to the laws of the same . . . ." 7 Stat. 478, 483.

[96] Worcester V. Georgia, 31 U.S. 515, 593 (1832). Italics mine.

[97] A civil case is included because it is difficult to separate civil jurisdiction from criminal. This is especially meaningful if one assumes that a state's criminal jurisdiction is co-extensive with its territory, and that the State of New York is seised in fee of the Indian territory within its border.

[98] 162 U.S. 283 (1896). See also the recent controversy of F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960). In this case the court held that "Under 21 of the federal Power Act, certain lands purchased and owned in fee simple by the Tuscarora Indian Nation and lying adjacent to a natural power site on the Niagara River may be taken for the storage reservoir of a

hydro-electric power project, upon payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress in the Act of August 21, 1957, 71 Stat. 401."

[99]Seneca Nation of Indians v. Christy, 162 U.S. 283, 289 (1896). Italics mine.

[100]233 Fed. Rep. 685 (1915).

[101]294 Fed. Rep. 111 (1923).

[102]269 U.S. 13 (1925).

[103]233 Fed. Rep. 685 (1915). In terms of a general jurisdictional orientation over Indians and Indian territory, this decision is terse and informative.

[104]Ibid., p. 691.

[105]Ibid., p. 685.

[106]In this case Relator, a Tuscarora Indian, was incarcerated in Niagara County jail, pending trial under an indictment found in this court charging him with assault in the first degree. The assault was committed on the person of another Tuscarora Indian on the Tuscarora reservation. Relator claimed that his detention was illegal under section 328 of a congressional Act of March 4, 1909 (35 Stat. 1151), which reads: "All Indians committing against the person or property of another Indian or other person any of the following crimes, namely--murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny . . . within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." In response to Relator's allegation, the court said: "Notwithstanding the numerous authorities cited on the brief of the learned counsel for the relator to sustain the general position that such crimes, committed on Indian reservations, are exclusively within the jurisdiction of the United States courts, I am of the opinion that the state of New York has jurisdiction over criminal offenses committed by Indians upon the person of other Indians within the limits of the Tuscarora reservation, so called. The Tuscarora Indians came originally from North Carolina, and acquired their lands by purchase from the Seneca Nation of Indians and the Holland Land Company. It does not appear



that, as in the case of the Western Indians, the United States government ever settled them on such lands or set the same apart for their use."--138 N.Y.S. 817 (1912). The reader should note that the court places emphasis on territorial transference and ownership. The Kagama decision, however, explicitly stated that the national government had jurisdiction because Indian tribes are "wards of the nation."

[107]United States ex rel. Lynn v. Hamilton et al., 233 Fed. Rep. 685, 689 (1915).

[108]294 Fed. Rep. 111 (1923).

[109]Ibid., p. 112.

[110]United States ex rel. Pierce v. Waldow, 294 Fed. Rep. 111, 112 (1923).

[111]United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 15-16 (1925).

[112]United States ex rel. Pierce v. Waldow, 294 Fed. Rep. 111, 113 (1923). Italics mind.

[113]Ibid.

[114]Ibid., p. 117. Italics mine.

[115]269 U.S. 13 (1925).

[116]United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 18-19 (1925). Italics mine.

[117]326 U.S. 496 (1946).

[118]A previous petition in the Federal courts had been denied because relief had not first been sought in the New York State courts. 54 F. Supp. 218; 141 F.2d 300.

[119]The Court here cites Draper v. United States, 164 U.S. 240 (1896); United States v. Ramsey, 271 U.S. 467, 469 (1926); Donnelly v. United States, 228 U.S. 243, 271 (1913); and United States v. Kagama, 118 U.S. 375, 383 (1886).

[120]The argument is usually reversed. The original states argue that they have greater power than the "new states" over Indians and Indian territory within their borders.

[121]The Court here cites In re Wilson, 140 U.S. 575 (1891); and Pickett v. United States, 216 U.S. 456, 458 (1910).

[122]The Court here remarks: "In Donnelly v. United States, supra, 228 U.S. at p. 270, this Court pointed out that the provisions contained in 2145 of the Revised Statutes were first enacted as 25 of the Indian Intercourse Act of June 20, 1834, 4 Stat. 729, 733. This means the statute was in effect at the time of the McBratney decision. Yet, significantly, the Court did not even find it necessary to mention it."

[123]New York ex rel. Ray v. Martin, 326 U.S. 496, 497-501 (1946). This decision has been consistently followed: See Williams v. United States, 327 U.S. 711, 714 (1946); Williams v. Lee, 358 U.S. 217, 220 (1959). Both of these cases were initiated in the State of Arizona, however. The underlining in the Martin case is the work of the author.

[124]People ex rel Ray v. Martin, 294 N.Y. 61, 66, 69-70 (1945).



# CHAPTER V

## JURISDICTION OF CRIMES COMMITTED IN UNITED STATES TERRITORY

The convention which framed the Constitution of the United States, in view of the territory already possessed and the possibility of acquiring more, provided Congress in Art. 4, section 3, with express authority to govern territories. The exact words of the Constitution are: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Pursuant to this grant of authority Congress has established territories from the public domain, provided for the government of them (usually by an elective legislative and an appointive executive and judiciary) until they were ready for statehood, and admitted them to the Union upon their presenting satisfactory constitutions for a republican form of government. Yet, irrespective of these actual happenings, i.e., when one attempts to delineate criminal jurisdiction over Indians and Indian territory, the following two questions arise: Does the national government have sole and exclusive criminal jurisdiction over Indians and Indian territory found within the public domain? What effect does statehood have on criminal jurisdiction over Indians and Indian territory found within newly admitted states? This portion of the study will be devoted to answering the first of these questions. The second question will be given attention in the following chapter.

The first United States Supreme Court case of vital significance to be presented is Ex parte Lane.[1] Here the court held that the courts of the United States may be given criminal jurisdiction over the public domain--land not within a state or organized territory; in this case the land was Indian territory. It follows, therefore, via an irrefutable syllogism (because organized territorial governments are creatures of the national government), that Congress may also give federal courts criminal jurisdiction (in whole or in part; original or appellate) over organized territorial governments. A definition of the term "organized territorial government" will be given in the facts of the case.

The prosecutor in the Ex parte Lane case alleged that Charles Mason Lane, defendant, had used force of arms on Frances M. Skeed, a female under the age of sixteen. He was thereupon indicted for carnally and unlawfully knowing a female under the age of sixteen years--a crime against the peace and dignity of the national government. At the time the indictment was found,

Oklahoma, the site of the crime, was not a territory, reasoned the court, with an organized system of government in the sense in which Congress had defined territories in the act of February 9, 1889.[2] Upon the above indictment, and under a plea of not guilty, a trial was consummated in the District Court of the United States in and for the District of Kansas. At this trial the defendant was found to be guilty; and the court ordered the defendant imprisoned in the Kansas penitentiary for a period of five years. Defendant thereupon addressed a petition to the original jurisdiction of the United States Supreme Court for a writ of habeas corpus. The question presented to the court, along with the court's answer and reasoning, is given in the following excerpt from the opinion.

> [T]here is really but one question out of the several grounds of relief sought in this case that is a proper subject for this court. By the act of Congress approved February 9, 1889, . . . under which defendant is indicted and convicted it is provided; "That every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact, in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction; . . . shall be guilty of a felony . . . ."
>
> The offence with which the petitioner is here charged is alleged in the indictment to have been committed within that part of the Indian territory commonly known as Oklahoma, and it is alleged in the indictment that this is a district of country under the exclusive jurisdiction of the United States and within the jurisdiction of the District Court of Kansas. The counsel for prisoner contend that this is a territory within the exception of the act of Congress of 1889; that therefore this act does not apply to the case; and that, there being no other act of Congress punishing a party for carnal and unlawful knowledge of a female under the age of sixteen years, the court was without jurisdiction to try or to sentence the prisoner. But we think the words "except the territories" have reference exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system . . . . It is this class of governments, long known by the name of Territories, that the act of Congress excepts from the operation of this statute, while it extends it to all other places over which the United States have exclusive jurisdiction . . . .
>
> At all events, the court had jurisdiction of the prisoner, and it had jurisdiction both of the offence of rape and of carnal knowledge of a female under sixteen years of age.[3]



One finds in the above reasoning, although focused primarily on congressional intent and statutory construction, that the "United States have exclusive jurisdiction" over that portion of the "Indian territory," or public domain, having no organized form of non-Indian government. It should be drawn to the attention of the reader, however, that there was no indication in the opinion or facts of the case as to whether the defendant or the victim was an Indian.[4]

In an earlier United States Supreme Court case, United States v. Dawson,[5] it was decided that the national government has authority to define and punish crimes committed in territory occupied by Indians outside the boundaries of any state. It should be noted, however, that a literal and isolated reading of this case may, though erroneously as the Roger case (a case presently to be delineated) will portray, provide an argument for limiting national authority to the definement and punishment of crimes committed by whites, or to cases where a white person is a party (defendant or victim).

The essential facts of the Dawson case are: By congressional enactment, act of June 30, 1834, it was provided in section 24 that all that part of the Indian country west of the Mississippi River (bounded on the north by certain lands assigned to the Osage Indians, west by the Mexican possessions, south by the Red River, and east by the west boundary lines of the Territory of Arkansas and the State of Missouri) should be annexed to the territorial government of Arkansas for the sole purpose of carrying the other provisions of the act into effect. The following section, section 25, provided that so much of the laws of the United States as provides for the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country, provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian. Later (June, 1844) Congress by enactment transferred the above jurisdiction to the Circuit Court of the United States for the District of Arkansas. The following month (July, 1844) it was alleged that a murder was committed in the Indian country. Thereupon an indictment was found by a grand jury (April, 1845) in the Circuit Court of the United States for the District of Arkansas against defendant. Six years later (March, 1851) Congress by enactment erected nine of the western counties in the territory of Arkansas, along with the Indian country designated in the 1834 act, into a new judicial district. This enactment further provided that the judge of the new district should have jurisdiction of all causes of action, civil and criminal, except appeals and writs of error which are cognizable before a circuit court of the United States. Additional facts and the questions raised by the case are: (1) whether the United States had jurisdiction to prosecute and convict James L. Dawson, a white man, charged with the felonious killing of Seaborn Hill, another white man, on July 8, 1844, in Creek Nation territory--territory west of Arkansas, and which composed a part of the Indian territory annexed to the Judicial district of Arkansas by the congressional act of June 17, 1844;

and (2) "Can the District Court of the United States for the Western District of Arkansas take jurisdiction of the case aforesaid, upon the indictment aforesaid, so found in the year 1845, in said Circuit Court for the District of Arkansas?"[6]

The court answered the above questions with this short and terse statement: We do not find "any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to effect it in respect to such cases, nor has it, in our judgment, necessarily operated to deprive them of it."[7] Mr. Justice McLean wrote a dissent to the majority opinion. He dissented, however, on grounds other than Congress' right to provide for the prosecution and punishment of crimes committed in Indian territory.

In United States v. Rogers[8] the court held, in relation to territory occupied by the Cherokee Indians not within the boundaries of one of the states, that Congress may by law define, prosecute, and punish criminal offenses committed thereupon--no matter whether the offender be a white man or an Indian.

This case reached the United States Supreme Court on a certificate of division from the Circuit Court of the United States from the District of Arkansas. More specifically, in 1845 a grand jury of the aforesaid circuit court indicted William S. Rogers for the murder of Jacob Nicholson. He was indicted under section 25 of the federal act of 1834. The relevant portion of the act reads: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country; provided, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian."[9]

Other important facts of the case are: Both Rogers and Nicholson were alleged in the indictment to be white men and not Indians. The crime was perpetrated in Indian territory west of the State of Arkansas--an area statutorially defined to be within the aforestated circuit court jurisdiction. The defendant, in a special plea against the indictment, averred that he, having been a citizen of the United States long before the offense charged is supposed to have been committed, voluntarily moved to the Cherokee country and made it his home without any intention of returning to the United States. Further, he pleaded that he incorporated himself with the Cherokee tribe as one of them, and was so treated, recognized, and adopted by the said tribe; and, via proper authority, he exercised all the rights and privileges of a Cherokee Indian. By these events he claimed to have become a citizen of the Cherokee Nation, and therefore, was within the true intent and meaning of the exception of the act of 1834. In addition defendant pleaded that the



victim, Jacob Nicholson, had in a like manner become a Cherokee Indian. Therefore, he also was an Indian within the true intent and meaning of the legislative exception. Following this line of reasoning, Rogers alleged that the court had no jurisdiction to cause him, the defendant, to make further answer to the said indictment. The court answered defendant thus:

> [W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to [Congress'] authority, and where the country occupied by them is not within the limits of one of the states, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian. Consequently, the fact that Rogers had become a member of the tribe of Cherokees is no objection to the jurisdiction of the court, and no defence to the indictment, provided the case is embraced by the provisions of the act of Congress of the 30th of June, 1834, entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers'
>
> By the twenty-fifth section of that act, the prisoner, if found guilty, is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso, which is that the provisions of that section 'shall not extend to crimes committed by one Indian against the person or property of another Indian.' And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned . . . . [T]he exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally . . . .
>
> Whatever obligation the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.[10]

There were no dissents to the Rogers decision. Secondly, the Rogers decision is still good law, and has been cited many times to lend credence and validity to Congress' sole and exclusive jurisdiction over United States territory (both organized and unorganized) and people therein.[11] More specifically, the national government has sole and exclusive authority to define, prosecute, and punish criminal acts committed in United States territory, and that this authority is capable of extension to both Indians and non-Indians.[12]

The race or status of the parties to a crime (citizen, alien, white, Indian, etc.) is unimportant for purposes of determining the scope and extent of

the national government's criminal jurisdiction over United States territory. The crucial elements for determining criminal jurisdiction are: (1) whether the crime was perpetrated within United States territory (organized, unorganized, or Indian territory); (2) whether the latent and exclusive authority of the national government has been extended by statute to define action which constitutes crimes when committed within United States territory;[13] and (3) what provision (or provisions), either explicitly or by necessary implication, has Congress made for dividing criminal jurisdiction within United States territory between states, territorial governments, the several Indian tribes, and/or the national government.

Before this chapter is concluded, it should be noted that the rules of law, along with the reasoning, developed in the foregoing cases are partial and incomplete. Later chapters of the study will add verification and validity to the concepts developed in this chapter.

FOOTNOTES

[1] 135 U.S. 443 (1890).

[2] 25 Stat. 658.

[3] Ex parte Lane, 135 U.S. 443, 446-448 (1890).

[4] Earlier state cases which lend credence and validity to the jurisdictional answer in Ex parte Lane are United States v. Bear, 3 Dak. 34 (1882); United States v. Knowlton, 3 Dak. 74 (1882); and Pickett v. United States, 1 Idaho 523 (1874).

[5] 56 U.S. 467 (1853).

[6] United States v. Dawson, 56 U.S. 467, 468 (1853).

[7] United States v. Dawson, 56 U.S. 467, 487 (1853).

[8] 45 U.S. 567 (1846).

[9] United States v. Rogers, 45 U.S. 567, 570-571 (1846).

[10] United States v. Rogers, 45 U.S. 567, 572-573 (1846). The substitution of "Congress" for "their" was made by the current writer.



[11] See Cherokee Tobacco v. United States, 78 U.S. 616, 619 (1871). The court in this case said: "In the U.S. v. Rogers, 4 How., 572, Chief Justice Taney, also speaking for the court, held this language: 'It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, Congress may, by law punish any offense committed there, no matter whether the offender be a white man or an Indian.' Both these propositions are so well settled in our jurisprudence that it would be a waste of time to discuss them or to refer to further authorities in their support. There is a long and unbroken current of legislation and adjudications, in accordance with them, and we are aware of nothing in conflict with either. The subject, in its historical aspect, was fully examined in Johnson v. McIntosh, 8 Wheat., 574." And see also United States v. McBratney, 104 U.S. 621, 623 (1881); Ex parte Crow Dog, 109 U.S. 556, 560 (1883); Elk v. Wilkins, 112 U.S. 94, 100 (1884); Berman v. Parker, 348 U.S. 26 (1954). In this latter case the court ruled that Congress may enact laws relating to the public peace, health, safety, morals, and comfort of the territories and the District of Columbia in the same manner and to the same extent that the state legislatures may act within their respective territorial limits.

[12] See United States v. Kagama, 118 U.S. 375, 379, 380 (1886). In this case the court, after observing that the Indians were within the geographical limits of the United States, said: "The soil and the people within these limits are under the political control of the government of the United States, or the States of the Union. There exist within the broad domain of sovereignty but these two . . . ." Continuing, this "power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else."

[13] Whether the provisions of a particular act are applicable to a given territory depends upon the character and aim of the act.--Puerto Rico v. Shell Co., 302 U.S. 253 (1937). The cases selected for presentation in this chapter also portray this idea.

## CHAPTER VI

## JURISDICTION OF CRIMES COMMITTED "BY" OR "AGAINST" INDIANS WITHIN BOUNDARIES OF STATES ADMITTED TO THE UNION AFTER 1789

The past two chapters of this study have been preoccupied with the criminal jurisdiction of the national and state governments over Indians and Indian territory within the original states, and with the national government's sole and exclusive authority over United States territory, and persons therein, outside state boundaries. Concerning criminal jurisdiction over Indians and Indian territory, these two areas of focus leave many jurisdictional questions unanswered and unexplained. Yet, it should be noted that the preceding cases have given body and direction to much of the juristic and legislative structure of Indian criminal law which will be developed and analyzed under the topics which follow. This is especially true when applied to states admitted to the Union after 1789. It is the problems associated with these states which will be given primary, though not exclusive, emphasis in this chapter. The present chapter will be devoted to a consideration of the following concepts and their related ramifications: (1) criminal jurisdiction over crimes committed within Indian territory within state boundaries; and (2) criminal jurisdiction over crimes (by or against Indians and Indian property) committed within a state, but not within Indian territory.

### A. Jurisdiction of Crimes Committed within Indian Territory Within State Limits

The question of criminal jurisdiction over Indians and Indian territory upon the admission of new states into the Union has been given considerable prominence. Because of the unique problems associated with the admission of new states into the Union, it will be a major purpose of this chapter to focus attention on the rationale, along with the decisions, of both national and state tribunals in relation to jurisdictional controversies and their solutions.

The first case in this relationship which merits consideration is Caldwell v. State.[1] In this case it was decided that if a state is admitted to the union without any reservation of the jurisdiction of the national government over the Indian lands, treaties between the national government and Indians are of no



avail to prevent the state from extending its criminal laws over Indian territory to punish a crime there committed by a white man against an Indian.

Other state decisions concerned with the exception of national jurisdiction upon the admission of new states into the Union are Painter v. Ives, Marion v. State, Millar v. State, and State v. Doxtater. These cases are of interest because they depict principles and rationale in the formulative stages.

In the Painter v. Ives[2] and Marion v. State[3] cases it was decided that the national government abrogated its jurisdiction over general criminal offenses committed within Indian territory within the State of Nebraska when Nebraska was admitted to the Union. In the Painter decision the court, after having recognized that the state of Nebraska had been admitted into the Union on an "equal footing with the original States", writes:

> Now it is only within those particular places mentioned in the sixteenth subdivision of section eight, article one, of the federal constitution ["To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress;"] that Congress can provide general police regulation for the government of the people. All other places are within the exclusive control of the state government, to whose legislation we look for the punishment of all ordinary crimes and misdemeanors. From this it would seem clear that at the date of our admission into the Union, every portion of territory within the prescribed boundaries of the state, the Indian reservations included, become subject to its laws, and that for the punishment of all ordinary crimes, such as that under consideration, resort could alone be had to state laws, administered by the proper state courts.[4]

Attention will now be given to Millar v. State.[5] In this decision the court held that the Kansas lands (lands known as the Delaware Indian Reservation), so far as the metering of justice to persons not of the Delaware tribe is concerned, form an integral part of the state and county within whose boundaries they are included.

The extent of state criminal jurisdiction over crimes committed on Indian lands within the boundaries of a state was given wide coverage in State v. Doxtater.[6] This decision is also important because it provides an abridgment of state and federal decisions prior to 1879. Because of its comprehensiveness, a sizable segment of the decision will be quoted.

The court ruled in this decision that the criminal jurisdiction of a state, when not restricted by treaties, or by the act admitting the state to statehood, and except as the state may be restrained by Congress' authority to regulate commerce, extends to all members of the tribes within the territorial boundaries of the state. The court writes:

> It seems that from these provisions of the treaties made, and the opinions of the judges of the supreme court and attorney general of the United States, and the general course of legislation respecting the Indian tribes, it is conclusively to be inferred that, in the absence of any treaty or stipulation, the United States, as to those tribes not within any state, have full jurisdiction to pass laws for their government in both civil and criminal matters. United States v. Rogers, 4 How., 567. As to those who reside within the limits of any of the states, they, like all other inhabitants or residents, or persons found within the boundaries of such states, must be subject to the laws thereof, unless by some treaty with the United States they are exempted from its jurisdiction, or by the provisions of the constitution of the United States they are subject to the jurisdiction of laws of the state.
>
> Unless the jurisdiction of the state over the territory occupied by the Indians within its boundaries is prohibited by the act admitting the state into the Union, or by some existing treaty with the Indians occupying such territory at the time of its admission, there does not seem to be any authority in congress to pass laws for the government or control of such Indians, or to prohibit the states from passing such laws, except the provision of the constitution which authorizes congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . . [I]t never has been contended that under this provision congress had the power to pass laws generally for the punishment of crimes committed on these reservations, either by the Indians or by other persons . . . .
>
> That, whilst the Indian reservations are within the limits of the United States, although within an organized territory of the United States, congress may assume a general jurisdiction over the reservations and the Indians thereon, when not prohibited by treaty stipulation, is affirmed in the case of United States v. Bailey, supra. On page 237 the court says: "But the act under consideration asserts a general jurisdiction for the punishment of offenses over the Indian territory, though it be within the limits of a state. To the exercise of this jurisdiction within a territorial government there can be no objection; but the case is wholly different as regards Indian territory within the limits of any state. In such case the power of congress is limited to the regulation of commercial intercourse with such tribes of Indians that exist as a distinct community, governed by their own laws, and resting for their protection on the faith of the treaties and the laws of the Union. Beyond this the power of the



> federal government, in any of its departments, cannot be extended."
>
> Under the territorial government of Wisconsin, it was not disputed but that the courts of the United States could punish a crime committed by a tribal Indian, even when committed upon the Indian territory. . . . If the power to punish the Indians for crimes whilst existing in tribes, was vested in the United States, then that power passed to the state when it was admitted to the Union (unless, as before stated, some treaty with the United States prevented the exercise of such jurisdiction), under the tenth amendment to the constitution of the United States, which provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[7]

Continuing:

> The courts of the states of New York, North Carolina, Tennessee, Arkansas, Kansas, Alabama and Georgia, and the circuit court of the United States for the seventh and eighth circuits, hold that the states, unless prohibited by treaties made with the United States, or by some reservation made in the act admitting the state into the Union, have jurisdiction to extend their criminal laws over the tribal Indians and their reservations situate within their boundaries.[8]

With the foregoing remarks, the court holds that state jurisdiction, if not restricted by existing treaties, by the act admitting a territory to statehood, or by Congress' authority to regulate commerce, extends to all persons and places within its borders, including Indians and Indian reservations.

Some of the more important lower federal court decisions, even though many of them were cited as precedents in the preceding state cases, will now be tersely and concisely presented. They will be presented in chronological order.

An early federal circuit court case was United States v. Bailey.[9] The issue underlying this controversy was Congress' authority to define and punish crimes committed by white people within an Indian reservation in the State of Tennessee. The court held that Congress has no authority over general crimes committed by one white man against another within an Indian reservation.

Just one year later in United States v. Cisna,[10] a United States Circuit court held that a state may punish its own citizens for offenses committed within Indian territory. In this case defendant, a white citizen of Ohio, was indicted under a federal statute for stealing a horse from the Wyandott Indian Reservation in the State of Ohio. The horse belonged to Henry Jocko, a native

and member of the Wyandott Indian tribe. To the indictment defendant filed a demurrer alleging that the federal court had no jurisdiction. In the process of sustaining defendant's demur, the court wrote:

> Has not the state jurisdiction to punish offences committed by its own citizens within the Wyandott reserve? Of this, I can entertain no doubt. Ever since the state government has been organized, it has had power to punish its own citizens for offences committed within its limits; whether within an Indian territory or not; and if there be no constitutional prohibition, the state has power to punish its own citizens for offences committed beyond its own limits. The laws of a state cannot operate extra-territorially; but having jurisdiction over its own citizens, the legislature if not prohibited by the constitution, could make certain acts committed by them beyond its own limits, and without the limits of any organized government, an offence. No process could be issued to arrest an offender beyond the state boundaries, but if he comes voluntarily within the state, he would subject himself to its jurisdiction . . . .
>
> The jurisdiction of the federal government over the Indian territory within a state, under the most favorable circumstances for the exercise of the power is limited to the mere purposes of trade, and cannot prevent a state from punishing its own citizens for offences committed within such territory. The exercise of this power by a state, would not be incompatible with the exercise of power vested in the federal government. There are many offences, such as counterfeiting the gold and silver coin of the country, the notes of the Bank of the United States, etc. which are punishable as well under the laws of the state as those of the Union.[11]

It is important to note the strong language in the above excerpt to the effect that even if the national government has sole and exclusive jurisdiction over the Indian territory, the states can prosecute their citizens for crimes committed therein, provided the offender is arrested within "state boundaries." Such reasoning raises automatically the question of double jeopardy if either the national government or the Indians also prosecute the offender.

Some 28 years later in United States v. Ward,[12] a case originating in Kansas, the circuit court ruled that when a state is admitted into the Union on an equal footing with the original states, and without a reservation of jurisdiction over crimes committed within its territory, the state has jurisdiction to define and punish crimes committed by white men against white within Indian country.

The admission of a state into the Union, so held a circuit court in



United States v. Stahl,[13] does not abrogate the national government's criminal jurisdiction over lands of Indian tribes having treaties with the national government which exempt them from state jurisdiction. The pertinent language of the decision reads that Kansas was admitted to statehood by a congressional enactment which placed her "on an 'equal footing with the original states in all respects.' This act . . . excepts from its [Kansas'] jurisdiction any territory which, by treaty with Indian tribes, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory, and declares that it shall not be included within said state."[14]

In Ex parte Sloan[15] a United States circuit court ruled that after a state, in this case Nevada, has received admittance into the Union on an equal footing with the original states, the fact that land within its boundaries, the fee of which is in the national government, is set apart as an Indian reservation will not itself suffice to give a federal court jurisdiction to try a person for a murder committed within the limits of the reservation, i.e., provided the land included in the reservation became a part of the state without any reservation of criminal jurisdiction in favor of the national government. Under circumstances of this nature, this case decided, the national government can exercise criminal jurisdiction only by cession from the state, except as Congress has constitutional authority delegated to it under the commerce, protection of the mail, taxing, spending, etc. clauses.

In some of the cases concerned with the right of the states to extend criminal jurisdiction over Indians and Indian territory, treaties have been ruthlessly overridden. The holding in United States v. Berry,[16] however, adheres to a more conservative principle. In this case the court held that an existing treaty (a treaty giving the United States criminal jurisdiction of offenses committed in Indian territory) is not repealed simply by a statute admitting a state into the Union on an equality with the original states. Similarly, an existing treaty is not repealed where the act of admittance fails to reserve the rights covered by the treaty. But, continues the court, "without resting upon this proposition, let us inquire whether the enabling act upon its face ought to be construed as repealing the treaty of March 2, 1868, and as, therefore, depriving the United States of the power of fulfilling the solemn obligation imposed upon them by said treaty."[17] In answer to this query, the court reasons: To uphold Colorado's jurisdiction.

> . . . it would be necessary to show that congress, in the Colorado enabling act, expressly declared that jurisdiction of the state of Colorado for the purpose of enforcing its criminal laws, shall extend to all the territory within the exterior boundaries of said state. Such language would . . . have repealed, by necessary implication, so much of the

pre-existing treaty as placed the Ute reservation within the jurisdiction of the United States. But no such language is employed by congress in the enabling act . . . . The people of the territory were to form for themselves a state government, which was to be admitted into the Union on an equal footing with the original states. Does it necessarily and invariably follow from this language that the state should exercise jurisdiction over every foot of territory within its boundaries. I think not. The language is general, and is not necessarily in conflict with an exception in a special case created by some previous law.[18]

A circuit court in United States v. Bridleman gave additional credence to the Berry decision. In this case, a case originating in Oregon, the court ruled that mere admission of a state into the Union will not abrogate an existing treaty giving the national government jurisdiction over an Indian reservation. This, said the court, is so even if the state is admitted without a reservation of the authority of Congress over Indian reservations. And secondly, even if the act of admittance abrogated pre-existing treaties which reserved criminal jurisdiction to the national government, Congress' authority would continue to extend to the punishment of crimes arising from intercourse between Indians and whites.

Because the Bridleman case has more than a casual relation to the extent of Congress' criminal authority over Indians and Indian territory under the commer clause, this case will be given additional attention.

The defendant, a white man, was charged with feloniously taking and carrying away from the Umatilla Indian Reservation in the State of Oregon a blanket valued at two dollars. The blanket was the property of Shick-Shuck, an Indian, who belonged to the Umatilla tribe and lived upon said reservation. By way of defense, defendant alleged that the federal courts had no jurisdiction. He argued that the congressional act of February 14, 1859, admitting Oregon into the Union "on an equal footing with the other states in all respects whatever" ousted the federal courts of jurisdiction. Contrarily, the prosecutor prayed for federal jurisdiction because of a federal treaty (June 9, 1855, 12 Stat. 945) and two legislative enactments (acts of June 30, 1834, 3 Stat. 733 and June 5, 1850, 9 Stat. 437). The legislative enactments, argued the prosecutor, made applicable in the Indian country "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States."

The sequence and facts surrounding the treaty can be perceived from the following quotation:

On June 9, 1855, a treaty was made with the Walla-walla, Cayuse,



Umatilla, and other tribes and bands of Indians in Oregon and Washington territory, by which the reservation in question was set apart for the exclusive use of the Indians in consideration of their ceding their rights to a large extent of country . . . .

On February 14, 1859, . . . the state of Oregon, with exterior boundaries, including the Umatilla reservation, was "received into the Union on an equal footing with the other states in all respects whatever," without a proviso or provision concerning the Indians or Indian reservation therein.

On March 9, 1859, the treaty was ratified by the senate, and on April 11th it was proclaimed by the president.[20]

With full knowledge of the above facts and arguments, the court answered the jurisdictional question thus:

It is admitted that the power of congress to provide for the punishment of an act, as a crime, is limited to the subjects and places peculiar to the national government. Its power to do so arises from the locality of the act in question, when it is committed in a place within the exclusive jurisdiction of the United States, as its territories, forts, arsenals, etc.; and from the subject, when the punishment is imposed as a means of carrying into execution or enforcing any of the powers expressly granted to congress by the constitution--as the power to lay and collect taxes, to borrow money, to regulate commerce, etc.

The act of 1834, as a regulation of trade and intercourse with the Indian tribes in the "Indian country," . . . was within the power of congress, both on the ground of locality and subject--such "Indian country" being without the limits of any state, and therefore within the exclusive jurisdiction of the United States; and the intercourse with Indians being a subject within its jurisdiction generally. And as, when the act was extended over Oregon, on June 5, 1850, the latter was still a territory, the right to do so rested upon the same grounds--the power of congress over the locality and the subject.

But when Oregon was admitted into the Union--February 14, 1859--the power of congress over the Indian tribes in Oregon, or the intercourse between them and others, so far as it depended on the locality, was gone, unless, and so far as, it may have been saved by the operation of the treaty of June 9, 1855, establishing the Umatilla reservation. But the jurisdiction which was not dependent upon locality--the jurisdiction which arises out of the subject--the intercourse between the inhabitants of the state and the Indian tribes therein--remained as if no change had taken place in the relation of the territory to the general government . . . .

But congress has the power to legislate upon the subject of intercourse with Indian tribes, wherever they exist, irrespective of state

lines or governments; and this provision against larceny by the parties to this intercourse, being well calculated to preserve the peace between them and prevent it from resulting in the shedding of innocent blood and cruel and devastating Indian wars, is as convenient and necessary to that end as any other than can be suggested. If congress can punish the defendant for buying Shick-Shuck's blanket--trading for it--why not for stealing it?[21]

Continuing, the court holds:

> But there is another ground upon which the jurisdiction of the United States to punish this offence may be safely placed. The ratification of the treaty of June 9, 1855, on March 9, 1859, took effect by relation from the date of its signing, so that it was in full force when the state was admitted . . . . Like every other treaty made by the authority of the United States, this one was and is the supreme law of the land . . . . By it the Umatilla reservation was set apart for "the exclusive use" of the tribe of Indians to which Shick-Shuck belongs, and no white person was to be permitted "to reside upon the same" without the permission of the United States given by its superintendent and agent. In my judgment the effect of this treaty was to make the act of 1834 applicable thereto, except as otherwise provided therein, so that it became and is, to all intents and purposes, "Indian country," within the meaning of that phrase as used in that act and the Revised Statutes.
>
> The admission of the state into the Union, with this reservation established within its exterior lines, did not and could not have the effect to abrogate or modify this treaty. The act of admission is silent upon the subject, and admitting that the treaty might be repealed by an act of congress . . . there is no reason to believe that congress intended by such act to affect it in any way.[22]

The court concludes with this statement:

> Assuming, then, that the Umatilla reservation exists as established by the treaty, it is still "Indian country," set apart by law for the "exclusive use" of the Indians, and all crimes committed within it, by a white man upon an Indian, and vice versa, and made punishable by the laws of the United States, are within the jurisdiction of the federal courts for this district.[23]

Another circuit court decision, when considered in the light of the fact that the national government has sole and exclusive jurisdiction over United States territory, which merits attention is United States v. Partello.[24] In this case the court strongly implied that a state may be required, on its



admittance to the Union, to cede criminal jurisdiction to the national government over lands occupied by Indians. This, argued the court, would then give the national government authority to define and punish crimes committed by one white person against another within such Indian lands. This may appear to be a very loose decision. How could the future state of Montana agree to cede something that they never possessed? The case was argued on a very fine point, and therefore the paradox. Defendant conceded to the national government jurisdiction over such Indian lands as far as the Indians are concerned, but argued that the national government has no jurisdiction over white men committing crimes against other white men within an Indian reservation. Mere admittance to the Union relinquishes to a state the national government's jurisdiction over crimes committed by whites against whites on an Indian reservation within a state, except where the national government requires the new state to cede this jurisdiction to the national government.[25]

The last lower federal court decision to be presented at this juncture is United States v. Ewing.[26] In this case the court held that where an enabling act admitting a state into the Union provides that all lands held by Indian tribes within the state shall be under the absolute jurisdiction and control of Congress, the federal courts have jurisdiction of larceny committed within Indian territory by a white man against an Indian. In this case the court wrote:

> The reservations and provisions found in the act creating the territory of Dakota and the state of South Dakota, whereby there is reserved to the United States the absolute jurisdiction and control over the Indian lands, were unquestionably included . . . . to [continue] power and control of the United States over the Indian country, such continued power and control being necessary to enable the United States to discharge its treaty obligations and duties to the Indians. It is argued by counsel that the reservation of absolute jurisdiction and control over the Indians contained in the omnibus act is to be confined to the mere matter of the ownership of the title and control of the right of taxation, but such limited construction is not admissible . . . . It thus appearing that the United States has by treaty assumed the duty of protecting the persons, property, and lands of the Indians on the reservation in question, and has reserved for these purposes the absolute jurisdiction and control over the reservation, it follows that the same is within the exclusive jurisdiction of the United States, and that, therefore, the provisions of section 5356 of the Revised Statutes are applicable thereto, which declare it to be an offense against the laws of the United States for any one to steal the property of another within any place within the exclusive jurisdiction of the United States.[27]

The relevant United States Supreme Court cases will now be given attention. These decisions will have more significance and meaning after

having delineated on an historical basis the landmark state and lower federal decisions. Secondly, they will clarify most of the uncertain distinctions left by the preceding cases.

The Supreme Court of the United States in 1882 gave credence to some of the principles developed in the foregoing decisions in United States v. McBratney.[28] In this decision the court held that when a state is admitted into the Union without any exception of jurisdiction over Indian reservations within its boundaries, the state acquires jurisdiction over white persons within such reservations, and the national government has no jurisdiction to prosecute crimes committed within Indian reservations, unless so far as may be necessary to carry out such provisions of its treaties with the Indians as remain in force. And if the treaty contains no conditions for the punishment of crimes committed by white men against white men within Indian reservations, the national government has no jurisdiction to do it.

More specifically, the issue in this case was whether the "Circuit Court of the United States sitting in and for the District of Colorado has jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute Reservation in said District, and within the geographical limits of the State of Colorado."[29] The court disposed of the issue thus:

> But the act of Congress of March 3, 1875, C.139, for the admission of Colorado into the Union, authorized the inhabitants of the Territory "to form for themselves out of said Territory a State government, with the name of the State of Colorado; which State when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever;" and the act contains no exception of the Ute Reservation or of jurisdiction over it . . . .
>
> The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing Treaty which are clearly inconsistent therewith . . . . Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. . . . The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain



> in force. But that treaty contains no stipulation for the punishment of offenses committed by white men against white men . . . .
>
> The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians.[30]

This decision has been consistently followed except for state criminal jurisdiction over Indians who have attained state citizenship. This exception will be delineated after certain other important facets of criminal jurisdiction over Indians and Indian territory within state boundaries have been presented.

The two most recent United States Supreme Court decisions, criminal that is, which cite McBratney as controlling are New York ex rel. Ray v. Martin,[31] a case originating in New York, and Williams v. United States,[32] a case originating in Arizona. In the Martin case the court wrote that the McBratney decision held that Colorado courts, not federal courts, have jurisdiction to indict and convict "a murder of one non-Indian by another committed on an Indian reservation located within that State. The holding in that case was that the Act of Congress admitting Colorado into the Union overruled all prior inconsistent statutes and treaties and placed it 'upon an equal footing with the original states. . . .'"[33] Following these remarks, the Martin court continues by stating that the placing of Colorado upon an equal footing with the original states signified that Colorado had been given criminal jurisdiction over her citizens and other non-Indians throughout all of the territory within her boundaries, including Indian territory. Consequently, the national government ceased to have sole and exclusive jurisdiction over Indian country, "except to the extent necessary to carry out such treaty provisions which remain in force. That case, United States v. McBratney, has since been followed by this Court and its holding has not been modified by any act of Congress."[34] And in the Williams case, a case where a married white man was convicted in a federal court for having had sexual intercourse with an unmarried Indian girl within the Colorado Indian Reservation in Arizona, the court holds that "the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians."[35] The Williams decision is important in another respect, however. The court, having reaffirmed the McBratney principle, went on to say that "the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as against one who is an Indian."[36] The question as to whether states could exercise jurisdiction over whites committing crimes against Indians or their property on Indian reservations within a state was not decided in the McBratney case, indeed it was not before the court. It is just because of the uncertainty left by the McBratney decision that the cases which follow it,

culminating in the Williams case,[37] are important. In short, the effect of the McBratney decision and the Draper decision, a case decided 15 years after McBratney, was that the state courts, and not the federal courts, had jurisdiction over crimes committed within Indian reservations by non-Indians against other non-Indians where the state had been admitted into the Union on an equal footing with the original states,[38] provided one could find no treaties or laws to the contrary. The effect of this principle, according to the 1902 House of Representatives' Judiciary Committee was that: "As the law now stands . . . offenses committed by half breeds or white persons, whether upon an Indian or other person, are not cognizable by the Federal courts and generally go unpunished. This state of the law is causing serious conditions of disorder within these Indian reservations."[39] Some of the uncertainty and chaos sensed by this committee was given clarification in 1913. In this year the United States Supreme Court declared in Donnelly v. United States[40] that it was satisfied that crimes "committed by or against Indians are not within the principle of the McBratney and Draper cases," and that this same principle applies "with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood."[41]

The United States Supreme Court has also ruled that a clause in an enabling act which merely provides that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States" does not deprive the state courts of such exclusive jurisdiction over crimes on Indian reservations not committed by or against Indians.[42]

A few words will now be devoted to the exception to the McBratney principle. As will be recalled, the court rules in the McBratney decision that Colorado upon admission to the Union on an equal footing with the original states "acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation." The Indians at this time were not citizens of the State. Thus this element of the McBratney decision remained to plague the courts when Indians acquired state citizenship. In Apapas v. United States[43] the United States Supreme Court met the state citizenship problem head on. The relevant issue and facts, along with the decision, of the case are concisely depicted in the following language.

> In substance the proposition concerning the treaty is this: that as the ancestors of the accused prior to the termination of the war with Mexico were citizens of Mexico, and became by the treaty citizens of the United States and of the State of California, they were therefore not amenable to prosecution in the courts of the United States for the crime of murder committed within the State of California, however much they may have



> susceptible of being prosecuted for such crime in an appropriate state court. But assuming, for argument's sake, the premise based on the treaty to be sound, and disregarding for brevity's sake the fact that the accused were tribal Indians leading a tribal life, and living on a tribal reservation under the control of the United States, the deduction based on the premise is so absolutely devoid of merit as not in any real sense to involve the construction of the treaty. We so say because the prosecution was for murder committed by Indians on an United States Indian Reservation and therefore was for a crime against the authority of the United States, expressly punishable by statute ( 328, Penal Code), and within the cognizance of the courts of the United States, without reference to the citizenship of the accused, as settled by a long line of authority . . . .[44]

In short, citizenship does not abrogate national jurisdiction, nor does it per se give the states jurisidction.[45] The Apapas decision is especially important when viewed in the light of the fact that after June 2, 1924, all Indians became citizens of the national government,[46] and consequently, by virtue of the Fourteenth Amendment, citizens of the states wherein they reside.[47] Secondly, the decision is important when viewed in relation to the Kagama decision--a decision which will be presented shortly. And lastly, it should be noted that the Apapas decision has been consistently followed.

What conclusions can one draw from the presentation thus far? First, crimes perpetrated within Indian territory within a state, by non-Indians against other non-Indians or their property,[48] are subject to state jurisdiction, unless national jurisdiction is provided for by treaty with an Indian tribe or by the enabling act admitting the state into the Union. In brief, the intent and/or language of treaties and enactments must provide for, or require, a retention of national jurisdiction.[49] The type of language or criteria for determining retention of national jurisdiction is not adequately developed by the cases, however. A second principle is that the burden of proof, in terms of the national government's divestiture of its potential and actual[50] jurisdiction over crimes committed by or against Indians and their property, is more stringent than proof for the exercise by a state of criminal jurisdiction over crimes committed by non-Indians against non-Indians or their property within Indian territory. That is to say, crimes committed within an Indian reservation with a state by or against Indians and their property are subject to actual and potential national jurisdiction, unless divestiture is expressly provided for by treaty, by the enabling act admitting the state into the Union, or by later congressional acts. And here also, the type of language or criteria for determining divestiture of national jurisdiction is not sufficiently developed by the cases. A third principle which is important, but which has received inadequate attention is: can Congress withdraw jurisdiction once it has been given? This question is

important because it hews closely, indeed it may be, a constitutional issue. It would be preposterous to assume that a later Congress could or would withdraw statehood, but could it withdraw criminal jurisdiction from a state over Indians and Indian territory once it has been given in an enabling act, or even by later treaties and legislation? In the New York ex rel. Ray v. Martin case the court in speaking of the McBratney principle said that the principle "has not been modified by any act of Congress."[51] Here there is a strong intimation that Congress could modify it. A second question, a question inextricably connected to the preceding, is: assuming the national government has sole and exclusive authority over Indian territory, and more intriguingly and specifically over Indians irrespective of their territorial situs, can the national government, without a constitutional amendment, divest itself of a delegated power?[52]

Attention will now be centered on another facet of jurisdiction of crimes committed within Indian territory within state limits. The foregoing discussion has been directed primarily to a delineation of jurisdiction over crimes where at least one party to the crime was a non-Indian. The question of jurisdiction over crimes committed by one Indian against another Indian or Indian property has received only limited attention. This question will now be considered.

The policy of the national government for a long time was to leave the Indians jurisdiction of crimes committed by one Indian on the person or property of another of the same tribe, and accordingly, the United States Supreme Court has consistently held that the federal courts have no jurisdiction of such crimes.[53] This policy was extended, however, only to Indians by race. A white person or negro who is adopted into a tribe is not thereby exempt from the responsibility to the criminal laws of the national[54] and state governments.[55] This policy of leaving to the Indians jurisdiction of crimes committed by one Indian on the person or property of another of the same tribe was changed, however, by what has become known as the Seven Major Crimes Act of 1885.[56] This legislation has since been amended on March 4, 1909,[57] and June 28, 1932.[58] These two amendments increased the list of crimes by Indians against the person or property of another Indian or any other person which is subject to exclusive[59] federal court jurisdiction to ten. The proscribed coverage of the 1885 act and its amendments (Ten Major Crimes Act) is as follows: any Indian who commits against the person or property of another Indian or any other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the national government. And by the act of August 1, 1956,[60] Congress apparently[61] added an



eleventh crime, the crime of stealing and embezzling Indian tribal organization moneys, funds, credit, goods, assets, etc. to the list of such crimes within the exclusive jurisdiction of the federal courts. Another important statute concerning criminal jurisdiction over Indians and Indian territory was passed by Congress in 1953. In this year Congress enacted Public Law 280.[62] The effect of this act is to give certain designated states (California, Minnesota, Nebraska, Oregon, Alaska, and Wisconsin), with minor exceptions, criminal jurisdiction over all offenses committed or rising on Indian territory, and permits the remaining states, with or without the consensus of the Indians, to assert jurisdiction at their pleasure.[63]

The problem of state and national jurisdiction of crimes committed by one Indian against another Indian or his property on an Indian reservation within a state reached a nationwide climax in Ex parte Crow Dog.[64] In this case Crow Dog, a native of the Choctaw tribe, had bludgeoned to death one of his fellow tribesman with a hunting knife. Thereupon a federal court attempted to convict Crow Dog, but a conviction of first degree murder was reversed by the United States Supreme Court because there was no legislation giving federal courts jurisdiction over crimes committed by Indians against Indians on reservations. It had previously been held by the United States Supreme Court that state courts had no jurisdiction to prosecute crimes committed by or against Indians on Indian reservations. Thus, the result of the Supreme Court's reversal was that Crow Dog could not be prosecuted, except by the Choctaw tribe.[65] The court's decision raised a storm of protest; and it was probably because of this protest that the United States Congress passed the Seven Major Crimes Act of 1885. This act provided, inter alia, that all Indians committing within the limits of an Indian reservation the crime of murder shall be subject to the same laws and tried in the same courts as are all other persons committing said crimes within the exclusive jurisdiction of the national government. This grant of jurisdiction to the federal courts was constitutionally sustained in the case of United States v. Kagama.[66]

Because of the articulateness of the Kagama decision, alone with its informativeness, it will receive an extensive summarization. The reader should note that this summarization has not been limited to the question under discussion, but includes court principles and rationale which have been discussed in preceding portions of this study.

The Kagama case reached the United States Supreme Court through a certificate of division of opinion from the circuit court of the United States for the District of California. The questions certified arose on a demurrer to an indictment. The indictment charged that Kagama, an Indian murdered Iyouse, another Indian, at Humboldt County, in the State of California, within the boundaries of the Hoopa Valley Reservation. The questions certified to the United

States Supreme Court were two: (1) whether the provisions of the act of 1885, an act making it a crime for an Indian to commit murder upon another Indian within Indian territory situated wholly within the boundaries of a state of the Union, are constitutional and valid law of the national government; and (2) whether the federal courts have authority or jurisdiction "to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong?"[67]

Having raised the above questions, the court proceeds directly to their analysis. The court, conceiving of these questions as inextricably connected, writes:

> The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."
>
> This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.[68]

Continuing, however, the court states that the commerce clause does give us some insight as to the framers intended relation of the Indian tribes to the national government. In pursuing this argument, the court states:

> The commerce with foreign nations is distinctly states as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three clauses of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations."[69]

In further substantiation of its premise that the Indian tribes are not to be conceived of as independent and sovereign nations, the court summarized the



Cherokee Nation v. Georgia case. This case, the court reminds us, was brought under the original jurisdiction of the United States Supreme Court--a jurisdiction which extends to suits between a state and foreign states, and to cases where a state is a party. In the Cherokee case it was conceded that the State of Georgia came within the Supreme Court's original jurisdiction, but held that the Cherokees were not a state or nation within the meaning of the Constitution. And continuing, by way of agreement with the court in the Cherokee case, the court ruled that these "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two."[70]

With these general, but important, statements, the court turns to an analysis of the national government's authority over territories. It concludes:

> [T]his power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else. Murphy v. Ramsey, 114 U.S. 15, 44.[71]

In further support of this assertion, the court quotes John Marshall in American Ins. Co. v. Canter, 1 Pet. 511, 543 (1828). In this case John Marshall wrote: "The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." As if delivering the final and clinching blow, that is, in terms of the national government's sole and exclusive authority over territories and inhabitants therein, the court quotes from a second case--the case of United States v. Rogers. In the Rogers case the court wrote that the territory within which the crime is charged to have been perpetrated "is a part of the territory of the United States, and not within the limits of any particular State. It is true it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority."[72] Continuing, the court asserts, the Indians have always been

> regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far

not brought under the laws of the Union or of the State within whose limits they reside.

Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of the Cherokee Nation v. Georgia, 5 Pet. 1, and in the case of Worcester v. State of Georgia, 6 Pet. 515, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable resume of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.[73]

And lastly, before the court explicitly answers the second question raised by defendant, the court has this to say by way of reconciling the earlier Ex parte Crow Dog case with the preceding reasoning.

The case of Crow Dog, 109 U.S. 556, in which an agreement with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in this case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State.[74]

The court next directs its attention to a most crucial question: does national authority extend to individual Indians and Indian territory within states? The court holds:

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food.



Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen . . . .

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because of the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[75]

This decision abrogates much of the ambiguousness which is indicated in the earlier cases as to the rights of states over Indians and Indian territory when no restrictions upon such rights are contained in the acts admitting them into the Union. In short, the Supreme Court upheld national authority or power over Indians and Indian territory on the basis that the National government is charged with a responsibility of caring for the Indian people somewhat like that of a guardian for his ward, i.e., the existence of the duty implies the existence of the authority. Furthermore, the decision strongly implies, if not explicitly states, that seisin in fee of Indian territory, by either the states or the national government, seems to be only one element, and not necessarily a crucial element, to be given consideration for determining criminal jurisdiction over Indians and Indian property. Thirdly, the court found that the enabling act and treaties associated with this case indicated a reservation of criminal legislation and jurisdiction to the national government. Fourthly, the Kagama decision made it clear that an Indian, and not necessarily a tribal Indian, committing any of the designated crimes in the 1885 act within the Indian country is subject to the jurisdiction of the federal courts.[76]

As to offenses not proscribed by congressional enactment, and except where Congress has given states jurisdiction, the tribes remain sovereign. In United States v. Quiver,[77] a case representative of this principle and current law, the court ruled that "the relations of the Indians, among themselves--the conduct of one toward another--is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise."[78]

Another closely related concept which merits attention before leaving this portion of the study has reference to jurisdiction of crimes (crimes which are a breach of both national and state criminal codes) committed by or against

Indians within Indian reservations with a state. Is national jurisdiction, or that of the tribe, exclusive, except where Congress expressly legislates to the contrary? In Williams v. Lee[79] the United States Supreme Court wrote: "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive [as against state jurisdiction]. Donnelly v. United States, 228 U.S. 243, 269-272; . . . Williams v. United States, 327, U.S. 711."[80] Because the extent of state jurisdiction over Indians and Indian territory is cursorily, though excellently, summed up by this case, another quotation will be taken from the decision. The court writes:

> Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned. See Felix v. Patrick, 145 U.S. 317, 332; United States v. Candelaria, 271 U.S. 432. See also Harrison v. Laveen, 67 Ariz. 337, 196 p.2d 456. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. E.g., New York ex rel. Ray v. Martin, 326 U.S. 496. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. Donnelly v. United States, 228 U.S. 243, 269-272; Williams v. United States, 327 U.S. 711. Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Cf. Utah and Northern Railway v. Fisher, 116 U.S. 28.[81]

In conclusion of this portion of the study, one should note that there has evolved a theory, a theory which has received legal validation, on the extent of state jurisdiction over the definition and prosecution of criminal offenses within Indian territory within a state. This theory, a theory which seems to have gained initial expression with the Worcester v. Georgia decision of 1832, holds that the states have only such jurisdiction as the national government has expressly[82] conferred, except for offenses committed by non-Indians against other non-Indians and their property (statehood seems to be sufficient to bestow this jurisdiction), and provided that state action does not infringe "on the right of reservation Indians to make their own laws and be ruled by them."[83] Or looking at the jurisdictional question from another vantage point, one may conclude that criminal jurisdiction of the Indian tribes over offenses committed within Indian territory is plenary as to offenses



committed by Indians against Indians, non-Indians, or their property, i.e., provided it has not been limited by the national government.[84] It is interesting to note that early cases, notably the state and federal cases presented in this chapter, hewed to a different theory. These cases held that the states had criminal jurisdiction over both Indians and Indian territory within a state unless Congress specifically, by treaty or legislation, exempt Indians and Indian territory from state jurisdiction. Irrespective of this early theory concerning state jurisdiction over Indians and Indian territory, the courts have consistently held that Indian tribes have no criminal jurisdiction over offenses committed by non-Indians against other non-Indians or their property within Indian territory.[85] Concerning the right of Indian tribes to assert criminal jurisdiction over non-Indians committing offenses against Indians or their property within Indian territory there seems to be more doubt. On this subject Felix S. Cohen in his Handbook of Federal Indian Law (1942 ed., page 148) writes: "attempts of tribes to exercise jurisdiction over non-Indians, although permitted in certain early treaties, have been generally condemned by the Federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody." The only authority Cohen cites in support of this statement is Ex parte Kenyon.[86] In this decision Kenyon, a white widower of a Cherokee woman, petitioned a federal circuit court for a writ of habeas corpus. His petition was in response to conviction and imprisonment by a Cherokee court for the crime of larceny--stealing a horse. The horse belonged to his dead Indian wife whose estate had not been probated. Kenyon took the horse to Kansas where he pledged it to secure a debt, only to reclaim it and convert it to his use. All of this took place in the State of Kansas; the decision is not clear, however, as to how the Cherokee authorities took Kenyon into custody. Kenyon's petition for a writ of habeas corpus was granted: (1) because federal courts have power to grant the writ of habeas corpus within Cherokee territory; (2) because the acts for which Kenyon was convicted were committed outside the territorial jurisdiction of the Cherokee Nation; and (3) because Cherokee jurisdiction is limited to Indian defendants, and if Kenyon was an Indian by adoption, he ceased to be one upon removing to Kansas. Six years later, however, in Elk v. Wilkins[87] the Kenyon decision, and thus Cohen's statement, would seem to have been limited.[88] In the Wilkins decision the court held that two alone (Kenyon's acts were committed outside the territorial jurisdiction of the Cherokee Nation) was sufficient to show that Kenyon was entitled to be released from custody.

### B. Criminal Jurisdiction Over Crimes Committed by Indians Within a State, But Not Within Indian Territory

In the light of the language and reasoning of the Kagama decision, a decision which has never been overruled nor formally limited, one would be

prone to dispose of the questions associated with this topic by saying that the national government may exercise criminal jurisdiction over tribal and non-tribal Indians just because they are Indians, irrespective of whether they are within or without Indian territory. This national authority, an authority which owes its existence to the need of special protection and welfare, cannot be limited to the tribal or reservation Indians but must include all Indians who, following the development of Indian law, are in need of special protection. In fact, the United States Supreme Court has ruled that national guardianship is independent of the state of tribal allegiance. Concerning a few scattered Indian farmers, long since separated from their tribes, but not living among whites or on an Indian reservation, the Supreme Court declared that the duty of protection and the power derived therefrom extended to these individual Indians.[89] Following this line of rationale, one could find reasonable cause for national pre-emption of criminal jurisdiction over crimes (by or against Indians and Indian property) committed within a state, whether within or without Indian territory.

However, because the preceding decisions have been primarily preoccupied with offenses committed by Indians upon other Indians and/or non-Indians and their property within the boundaries of Indian territory, it is appropriate that a few pages be devoted to cases which are directly concerned with crimes committed by or against Indians and Indian property outside Indian territory within a state.

A landmark decision in this area is Ward v. Race Horse.[90] Yet, in order to understand the many questions associated with this topic, it is important to begin by presenting a few of the earlier decisions. These decisions should acquaint the reader with the various distinctions drawn by the courts for the purpose of upholding state jurisdiction.

The first case which merits consideration is a case decided as early as 1801. In the Peters' Case, a New York decision, it was held that the criminal jurisdiction of a state extends to an Indian residing within its limits who has no tribal relations. The court writes:

> The Brothertown Indians are not a distinct nation or tribe. They came from New England, and settled under the jurisdiction of this state. They have never claimed or exercised any criminal jurisdiction among themselves. . . . [T]hey have never been considered or treated as an independent tribe. They are not, in this respect, like some of the Indian tribes within this state, whose situation is peculiar, and who, as to offences committed by the individuals, within their tribes, against each other, have claimed and exercised a criminal jurisdiction. But without giving any opinion what would be the case with respect to other Indians,



> we think that the Brothertown Indians are clearly subject to our laws, and to the jurisdiction of this court.[91]

A second case is Hunt v. State.[92] In this case a Kansas court held that when Indians are off their reservations within the boundaries of a state, they are as much subject to the laws of the state as other persons, and may be punished by the state for crimes there committed against each other.

In this case the specific question before the court was whether "Indians may kill Indians, outside of Indian reservations, . . . without incurring any responsibility to the laws of the state of Kansas, because they belong to a tribe or nation of Indians having treaty relations with the United States."[93] The court ruled on this question by stating that:

> If such were indeed the law, it would be a matter of grave concernment to the population of many of our counties bordering on or including Indian reservations within their defined boundaries, but we are of opinion that . . . such Indian tribe cannot claim for its members any greater privileges or immunities than an European nation--say France, for example, having treaties with the United States and represented by its minister plenipotentiary at Washington, the United States being in like manner represented by a minister plenipotentiary at Paris . . . .
>
> By the law of nations, ambassadors, other public ministers and consuls are exempt from responsibility to the local law; and, having considered these exceptional cases . . . "the doctrine is general that our laws bind alike all persons, natives, or foreigners, found within our territory . . . ."
>
> Evidently this is the law. Every civilized nation claims and exercises the right to maintain order and punish crime within its territorial limits. We think the Weas, Piankeshaws, Kaskaskias and Peorias will have to abide by the same rule . . . that has so long governed in the case of the English, French, Spanish, and Portuguese nations, beyond the sea.[94]

A third case is United States v. Sa-Coo-Da-Cot alias Yellow Sun.[95] Here a federal circuit court ruled that Indians are amenable to state laws for any crimes committed by them against white persons off their reservations and within the territorial limits of the states, provided there is no valid statute of Congress or treaty to the contrary. The court's specific language reads:

> [I]t seems impossible to hold that this court has jurisdiction in this case without necessarily implying that the courts of the state have not; and if they have not, then we decide that the state of Nebraska has not the power to make her ordinary criminal statutes coextensive with the state limits, and enforce them against all persons living or found therein.

Such power we are not prepared to deny to the state, in the absence of some conflicting treaty stipulation or valid act of Congress.

No statutes, other than those noticed, have been referred to by counsel, as giving the court jurisdiction in the present case, and these we hold do not confer it . . . .

But if it be conceded that under the power of peace and war, to make treaties, and to regulate commerce with Indian tribes (Worcester v. Georgia, 6 Pet. 515), congress could, in the absence of reserved right to do so, withdraw Indians living within the limits of a state entirely from state jurisdiction and the reach of its criminal laws and process for offenses against its citizens committed off a reservation, it would seem most improbable that such a power would ever be exercised. We have seen that, in point of fact, congress has not undertaken to exercise it, and therefore this court, which can take cognizance only of offenses created by some act of congress, has no jurisdiction of the crime charged in the indictment.[96]

Another federal circuit court case which has relevance to the topic under view is In re Wolf.[97] This case originated and was decided in the District of Columbia. The circuit court ruled that the Supreme Court of the District of Columbia has jurisdiction of an offense committed by one Indian upon another Indian or Indian property when committed outside the Indian country. In the words of the court:

When a crime is committed by an Indian, although such crime may be against the person or property of another Indian, if committed outside the Indian country, the Indian is like any other person as far as the criminal laws of the nation or the states are concerned. In a case where he has committed a crime against such laws, he is by them a forensic citizen, subject to the jurisdiction of the courts which administer them. Our laws govern all. They bind and protect all. They bind and protect alike all persons,--natives, foreigners, and those whose status to the United States may be one of alienage.[98]

A fifth case is State v. Newell.[99] In this decision the Supreme Court of Maine ruled that all Indians of Maine, irrespective of the status of the Indians in the West, are punishable for killing game contrary to the form, letter, and spirit of a state statute enacted for the preservation of game animals.

Here Peter Newell, a native member of the passama-quoddy tribe of Indians, was indicted for unlawfully killing two deer. On arraignment he pleaded guilty unless the court should find a lawful right to do the act charged by reason of certain treaties. His only plea of defense was that he was an



Indian of the Passamaquoddy tribe. The court answered defendant thus:

Whatever the status of the Indian tribes in the west may be, all the Indians, of whatever tribe, remaining in Massachusetts and Maine, have always been regarded by those states and by the United States as bound by the laws of the state in which they live . . . . Their position is like that of those Cherokees who remained in North Carolina. It was said of them by the United States supreme court, in Cherokee Trust Funds, 117 U.S. 288, . . . that they were inhabitants of North Carolina and subject to its laws . . . .

We do not find that the federal government ever, by statute or treaty, recognized these Indians as being a political community, or an Indian tribe, within the meaning of the federal constitution. . . .

They are as completely subject to the state as any other inhabitants can be.[100]

The next case, People v. Ketchum,[101] holds that state courts have jurisdiction to try an Indian for the murder of another Indian when it does not appear that defendant was a member of any tribe with which the national government had treated, and it does appear that he had lived among whites for several years prior to the commission of the crime. The specific language of the court is:

Here it does not appear that the defendant is a member of any tribe of Indians, having a chief and tribal laws, nor that the tribe of which has ancestors may have been members was ever recognized or treated with by the government. On the contrary, it appeared that he had lived among the whites for several years. He had his own cabin, and about three acres of land around it, which he cultivated, and on which he raised vegetables . . . .

In our opinion the court below had jurisdiction to try the case, and the judgment and order should be affirmed.[102]

The many questions and distinctions raised by the preceding cases were given partial clarification in Ward v. Race Horse,[103] a United States Supreme Court decision. In this case the court ruled that crimes committed by Indians within a state, and not upon a reservation, are in general cognizable in the state courts.

The important facts of this case were that the national government on July 3, 1868, entered into a treaty with the Shoshones and Bannock tribes of Indians by which the Indians agreed to accept and settle upon certain reservations, and the national government agreed that the Indians should have "the right to hunt on the unoccupied lands of the United States so long as game may

be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[104]

A few days after the consummation of the treaty on July 25, 1868, Congress passed an act to provide a temporary government for the Territory of Wyoming, within which the Bannock Reservation was located, with a provision "That nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[105]

Twenty-two years later (July 10, 1890) Wyoming was admitted into the Union with the following language: "That the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever."[106]

The legislature of Wyoming on July 20, 1895, passed legislation of which regulated the killing of game within the state. In October, 1895, the Uninta County prosecutor filed an information against Race Horse, an Indian of the Bannock tribe who resided on the Fort Hall Indian Reservation (a reservation created by the national government in 1869), for killing seven elk which was in violation of a Wyoming game law; the offense took place off the reservation, but within the State of Wyoming.

The "sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein referred to, within the limits of the State of Wyoming in violation of its laws."[107]

The court, with Mr. Justice Brown, writing a dissent,[108] wrote:

> That 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,' is elementary. Fong Yue Ting v. United States, 149 U.S. 698; The Cherokee Tobacco, 11 Wall. 616. In the last case it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. Of course the settled rule undoubtedly is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. Cope v. Cope, 137 U.S. 682, and authorities there cited. But in ascertaining whether both statutes can be maintained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction,



by which both laws can coexist consistently with the intention of Congress. United States v. Sixty-seven Packages Dry Goods, 17 How. 85; District of Columbia v. Hutton, 143 U.S. 18; Frost v. Werrie, 157 U.S. 46. The act which admitted Wyoming into the Union, as we have said, expressly declared that the State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.

In Pollard v. Hagan, 3 How. 212 (1845), the controversy was as to the validity of a patent from the United States to lands situated in Alabama, which at the date of the formation of that State were part of the shore of the Mobile River between high and low water mark. It was held that the shores of navigable waters and the soil under them were not granted by the Constitution to the United States, and hence the jurisdiction exercised thereover by the Federal government, before the formation of the new State, was held temporarily and in trust for the new State to be thereafter created, and that such State when created, by virtue of its being, possessed the same rights and jurisdiction as had the original States. And, replying to an argument based upon the assumption that the United States had acquired the whole of Alabama from Spain, the court observed that the United States would then have held it subject to the Constitution and laws of its own government. The court declared, p. 229, that to refuse to concede to Alabama sovereignty and jurisdiction over all the territory within her limits would be to 'deny that Alabama has been admitted into the Union on an equal footing with the original States' . . . .

In Withers v. Buckley, 20 How. 84 (1857), it was held that a statute of Mississippi creating commissioners for a river within the State, and prescribing their powers and duties, was within the legitimate and essential powers of the State. In answer to the contention that the statute conflicted with the act of Congress which authorized the people of Mississippi Territory to form a constitution, in that it was inconsistent with the provision in the act that 'the navigable rivers and waters leading into the same shall be common highways, and forever free, as well to the inhabitants of the State of Mississippi as to other citizens of the United States,' the court said (p. 92):

> 'In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it

could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee v. Hagan, 3 How. 223.'

A like ruling was made in Escanaba Company v. Chicago, 107 U.S. 678 (1882), where provisions of the ordinance of 1787 were claimed to operate to deprive the State of Illinois of the power to authorize the construction of bridges over navigable rivers within the State. The court, through Mr. Justice Field, said (p. 683): 'But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people.'

And it was further added ( p. 688):

'Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them . . . . Equality of the constitutional right and power is the condition of all the States of the Union, old and new.'

In Cardwell v. American Bridge Company, 113 U.S. 205 (1884), Escanaba Company v. Chicago, supra, was followed, and it was held that a clause in the act admitting California into the Union, which provided that the navigable waters within the State shall be free to citizens of the United States, in no way impaired the power which the State could exercise over the subject if the clause in question had no existence. Mr. Justice Field concluded the opinion of the court as follows (p. 212):

'The act admitting California declares that she is admitted into the Union on an equal footing with the original States in all respects whatever.' She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original States possessed over such waters within their limits.'

A like conclusion was applied in the case of Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, where the act admitting the State of Oregon into the Union was construed.

Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the



United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the State of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that State into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting.

The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the States. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, buy, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission. Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a

Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. But the argument goes further than this, since it insists that, although by the treaty the hunting privilege was to cease whenever the United States parted merely with the title to any of its lands, yet that privilege was to continue although the United States parted with its entire authority over the capture and killing of game. Nor is there force in the suggestion that the cases of the Kansas Indians, 5 Wall. 737, and the New York Indians, 5 Wall. 761, are in conflict with these views. The first case (that of the Kansas Indians) involved the right of the State to tax the land of Indians owned under patents issued to them in consequence of treaties made with their respective tribes. The court held that the power of the State to tax was expressly excluded by the enabling act. The second case (that of the New York Indians) involved the right of the State to tax land embraced in an Indian reservation, which existed prior to the adoption of the Constitution of the United States. Thus these two cases involved the authority of the State to exert its taxing power on lands embraced within an Indian reservation, that is to say, the authority of the State to extend its powers to lands not within the scope of its jurisdiction, whilst this case involves a question of whether where no reservation exists a State can be stripped by implication and deduction of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States. To refer to the limitation contained in the territorial act and disregard the terms of the enabling act would be to destroy and obliterate the express will of Congress.

For these reasons the judgment below was erroneous, and must, therefore, be reversed.[109]

This case disposes of many of the questions associated with crimes committed by or against Indians and their property off a reservation with a state. That is to say, new states have criminal jurisdiction over crimes



committed by or against Indians and their property to the same extent as the original states. This is so because the court ruled that the equal footing doctrine disposes of any differences created by treaties and/or enabling legislation between the new and original states.

Crucial questions which received insufficient attention in the Race Horse decision are: What is the nature and extent of Congress' criminal authority over Indians because they are Indians? Is Congress' authority over Indians, an authority which was articulated in United States v. Kagama, limited to crimes committed within Indian reservations within a state? The case of Organized Village of Kake v. Egan[110] is important in relation to these questions. This is a recent case (1962) which both follows and enlarges upon the Race Horse decision. The facts and issue were: appellants (Indians) sought reversal of a decision of the Supreme Court of Alaska which restrained them from operating fish-traps in southeastern Alaska (not on any reservation) contrary to the Alaska anti-fish-trap conservation law. In response to appellants' request, the United States Supreme Court declared that "decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law . . . ."[111] Further, "State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country."[112] And continuing, the court writes that even where hunting and fishing rights are reserved

> by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, Ward v. Race Horse, 163 U.S. 504 . . . . [S]tate regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in Williams v. Lee. Nor have appellants any fishing rights derived from federal laws. . . . Congress has neither authorized the use of fish-traps . . . nor empowered the Secretary of the Interior to do so.[113]

The Race Horse and Egan decisions lend strong support to those who would reason that doubts associated with the right of the states to exercise criminal jurisdiction over Indians (even reservation Indians) committing crimes off the reservation within a state have been resolved in favor of the states. Yet, for a decision, a decision which has never been overruled nor formally limited, which holds that national legislation may be enacted to protect Indians and Indian property off an Indian reservation, but within the territorial limits of a state, see United States v. McGowan.[114] In this case the Supreme Court of the United States ruled that the national government has

authority to pass such laws and authorize such measures as may be necessary to give the Indians full protection in their property and persons, regardless of where they may be situated within the territory of the United States. The court writes: "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out."[115] Continuing, and quoting with approval from United States v. Ramsey,[116] the court states: "'Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States . . . .'"[117] Further, Nevada is not deprived of her sovereignty by a national prohibition against taking intoxicants into an Indian colony, a colony exterior to Indian territory but within state boundaries, and that the national government "does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only effect the operation, within the colony, of such state laws as conflict with the federal enactments."[118]

What can one conclude concerning criminal jurisdiction over crimes committed by or against Indians and Indian property off Indian reservations within the boundaries of a state? First, there is strong, if not uncontrovertible, legal support in favor of state jurisdiction, unless and until Congress expressly directs otherwise, or until a state's exercise of criminal authority unduly conflicts with Congress' guardianship authority.[119] Secondly, Congress' authority, even where expressly exercised, is limited to a special jurisdiction, whereas the states' jurisdiction is general. For example Congress' authority is limited to commerce jurisdiction, guardianship and/or protection jurisdiction, and possibly jurisdiction inextricably connected with the national government's war, peace, and treaty powers. These latter avenues for national jurisdiction are manifestations of the lingering, though literally extinguished, international position of the American Indians.

A few recent state cases should add further understanding and support to the above conclusions.

The first case to be presented is In re Holy-Elk-Face v. State.[120] It manifests a strong intimation in favor of state criminal authority until Congress expressly directs otherwise. In this case a North Dakota juvenile commissioner brought action to terminate parental authority over minor children because of alleged immoral conduct and neglect of such children. The Indian parents were not residents of any reservation, and the incidents of which the juvenile commissioner protested occurred exterior to Indian territory and within the territorial limits of the state. The North Dakota Supreme Court in upholding state jurisdiction said:

> We have been unable to find any federal statute and none has been pointed out to us indicating any intention on the part of Congress to exercise federal authority over the relationship between Indian parents and Indian children not residing within the boundaries of a reservation or in Indian country. Neither does there appear to be any tribal law affecting the situation now before us. A court of the state is not powerless to prevent by appropriate and available civil action the continuation of the crimes of the parents committed within the exclusive territorial jurisdiction of the court.[121]



Another state case is Buckman v. State.[122] In this case Buckman, an Indian and a member of the Fort Belknap Indian Community, was convicted and imprisoned for forgery. Thereupon Buckman petitioned the court for a writ of habeas corpus alleging that the courts of Montana have no jurisdiction over offenses committed by Indian wards irrespective of the locus in quo. The court answered petitioner thus: "In State v. Youpee, 103 Mont. 86, . . . an Indian was charged with committing statutory rape in a town located five miles from the reservation. This court held that as to crimes committed by Indians within this state, but without the bounds of 'Indian Country,' it is within the jurisdiction of this state to try and punish such Indians."[123]

And in Anderson v. Britton[124] the Oregon Supreme Court held in a habeas corpus proceeding that "It is clear that the power over Indians, as such, is not so inherently federal as necessarily to exclude the states, because Indians outside 'Indian country' are subject to the general criminal laws of the states."[125]

From the preceding paragraphs of this chapter, one should note that there has evolved two different theories, theories which have received legal validation, on the extent of state criminal jurisdiction over Indians, Indian property, and Indian territory within a state. The first of these theories applies to crimes committed by or against Indians and Indian property within Indian territory within a state. The second, except for previously noted exceptions, to crimes committed by or against Indians and Indian property off Indian territory within a state. The first theory, a theory which seems to have gained initial expression with the Worcester v. Georgia decision of 1832, holds that the states have only such jurisdiction as the national government has conferred.[126] The other that the states have all jurisdiction which Congress has not taken away,[127] either expressly or by pre-empting the field with its own legislation. These two conclusions are valid except for (1) certain ambiguous legal limitations associated with the original states (these limitations were discussed in an earlier portion of the study, and (2) possible, and only possible, limitations (limitations which will now be examined) placed on Congress' guardianship and/or protection authority. From certain foregoing decisions of this study, it is obvious that an Indian (or Indian tribes) is placed under

special congressional authority (notably congressional guardianship and protection) not solely because he is an inhabitant of certain territory, but because he is a person who, for racial reasons, is in need of the benefits of special authority.[128] For this reason, Indian law is tainted with racism, and there is no way out of the situation by accepting the proposition of a territorial authority. This is unequivocally so if one assumes a special congressional authority over Indians residing within a state, but exterior to Indian territory. In short, the idea that Congress can constitutionally pre-empt, or even exercise concurrent, jurisdiction over crimes by or against Indians and Indian property committed within a state, but outside Indian territory, because of authority over Indians per se would seem to run into constitutional difficulties. Recent decisions have held that legislation on the basis of race only is unconstitutional. Litigation premised on the racial and/or color issue has been especially fecund at the state level.[129] At the national level cases are more sparse, but the same principle seems to have applicability to the national government. A landmark case having application to the national government is Bolling v. Sharpe.[130] This case arose in the District of Columbia and involved a question as to whether Congress and its agents could establish racially segregated public schools. The Negro petitioners alleged that they were refused admission to a public school attended by white children solely because of their race, and that such segregation deprived them of due process of law under the Fifth Amendment. The court answered petitioners thus:

> Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect . . . . As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race . . . . And in Buchanan v. Warley, 245 U.S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law . . . .
>
> Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.
>
> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.[131]



It is highly uncertain as to the effect, if any, the Bolling v. Sharpe principle has or will have on the national government's guardianship or protective authority as it relates to the American Indians. This uncertainty is highly acute when analyzed in the light of the language and history of the first and fifth sections of the Fourteenth Amendment. The language of the first section reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And in the language of the fifth section: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The fifth section of this Amendment is especially interesting when viewed in relation to state and national decisions which have interpreted the language of the first section. That is to say, many Fourteenth Amendment decisions have declared state action unconstitutional because of discrimination (and a sizable portion of these have been decided on the basis of racial discrimination), and not because of overprotection of a minority. Thus the fifth section of the Fourteenth Amendment (a section which may or may not be interpreted to be neutral in terms of race) may be sufficient to authorize Congress to protect and/or give guardianship to the American Indians off reservations within the several states.

## FOOTNOTES

[1] 3 Ala. Rep. 103 (1832). This is an elaborate, informative, and extensive decision.

[2] 4 Neb. 122 (1875).

[3] 16 Neb. 358 (1884); 20 Neb. 235 (1886).

[4] Painter v. Ives, 4 Neb. 122, 128 (1875). Insertion and italics mine.

[5] 2 Kan. 174 (1863).

[6] 47 Wis. 278 (1879).

[7] State v. Doxtater, 47 Wis. 278, 292-293 (1879).

[8] Ibid., p. 294.

[9] 24 Fed. Cas. No. 14, 495 (1834).

[10]25 Fed.C as. No. 14, 795 (1835).

[11]25 Fed. Cas. No. 14, 795 (1835). The Indians were not at the time of this decision citizens of the state. Italics mine.

[12]28 Fed. Cas. No. 16, 639 (1863).

[13]27 Fed. Cas. No. 16, 373 (1868).

[14]Ibid.

[15]22 Fed. Cas. No. 12, 944 (1877).

[16]4 Fed. Rep. 779 (1890).

[17]United States v. Berry, 4 Fed. Rep. 779, 786 (1880).

[18]Ibid., pp. 790-791. Italics mine.

[19]7 Fed. Rep. 894 (1881).

[20]United States v. Bridleman, 7 Fed. Rep. 894, 897-898 (1881).

[21]United States v. Bridleman, 7 Fed. Rep. 894, 898-900 (1881). Italics mine.

[22]Ibid., p. 902. Italics mine.

[23]United States v. Bridleman, 7 Fed. Rep. 894, 903 (1881).

[24]48 Fed. Rep. 670 (1891).

[25]Although not directly in point, see Ward v. Race Horse, 163 U.S. 504 (1896), for an extensive discussion of the "equal footing doctrine" and its ramifications in terms of state jurisdiction. This decision will be presented in subheading B of this chapter.

[26]47 Fed. Rep. 809 (1891).

[27]Ibid., pp. 813-814.

[28]104 U.S. 621 (1881).



[29]Ibid., Italics mine.

[30]United States v. McBratney, 104 U.S. 621, 623-624 (1881). There were no dissents to this decision. Italics mine.

[31]326 U.S. 496 (1946).

[32]327 U.S. 711 (1946).

[33]New York ex rel. Ray v. Martin, 326 U.S. 496, 497 (1946).

[34]Ibid., pp. 497-498. It is interesting to note that the court implies that Congress could modify this ruling, at least in states other than the original. The underlining and the insertion (United States v. McBratney) are mine.

[35]Here the court cites New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896). Italics mine.

[36]Williams v. United States, 327 U.S. 711, 714 (1946). Note that the court's language strongly implies that the jurisdiction of the federal courts is exclusive. Italics mine.

[37]See also Williams v. Lee, 358 U.S. 217, 220, a civil case decided in 1959. In this case, after stating that state courts have been allowed to try non-Indians who committed crimes against each other on an Indian reservation, the court states: "But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. For example, Congress has granted to the federal courts exclusive jurisdiction upon Indian reservations over 11 major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts."

[38]There is reason to question whether Congress could admit a state into the Union on any other basis than an "equal footing with the original states," that is, especially in terms of state jurisdiction of crimes committed by non-Indians against non-Indians or their property. For cases which have specific relevance in this relationship see Ward v. Race Horse, 163 U.S. 504 (1896), and United States v. Ramsey, 271 U.S. 467 (1926).

[39]H.R. Rep. No. 2704, 57th Cong., 1st sess., p. 1.

[40]228 U.S. 234, 271-272 (1913).

[41]See United States v. Ramsey, 271 U.S. 467, 469 (1926). In this case the court said: "The authority of the United States under 2145 to punish crimes occurring within the State of Oklahoma, not committed by or against Indians, was ended by the grant of statehood. United States v. McBratney, 104 U.S. 621, 624; Draper v. United States, 164 U.S. 240. But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before, Donnelly v. United States, 228 U.S. 243, 271, in virtue of the long-settled rule that such Indians are wards of the nation in respect of whom there is devolved upon the Federal Government 'the duty of protection, and with it the power.' United States v. Kagama, 118 U.S. 375, 384." And see also United States v. Pelican, 232 U.S. 442, 445 (1914), where the court declared: "The authority of Congress to deal with crimes committed by or against Indians upon the lands within the reservation was not affected by the admission of the State of Washington into the Union . . . ."

[42]United States v. Kagama, 118 U.S. 375, 383 (1886). In this case the court speaking of an 1885 enactment, an enactment making certain crimes committed by Indians against Indians or their property within Indian reservations within the state subject to federal court jurisdiction, said: "It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there." See also Organized Village of Kake v. Egan, 7 L. ed. 2d 573, 579 (1962). Here the court writes: "the retention of 'absolute' federal jurisdiction over Indian lands adopts the formula of nine prior statehood Acts. Indian lands in Arizona remained 'under the absolute jurisdiction and control' of the United States; . . . yet in Williams v. Lee, 358 U.S. 217 . . . we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government. The identical language appears in Montana's admission act, . . . yet in Draper v. United States, 164 U.S. 240, . . . the court held that a non-Indian who was accused of murdering another non-Indian on a Montana reservation could be prosecuted only in the state courts . ... Draper and Williams indicate that 'absolute' federal jurisdiction is not invariable exclusive jurisdiction." The Egan case, a criminal case against Indians arose in Alaska for operating fish-traps in southeastern Alaska contrary to the Alaska anti-fish-trap conservation law.

[43]233 U.S. 587 (1914).

[44]Apapas v. United States, 233 U.S. 587, 589-590 (1914). See also United States v. Nice, 241 U.S. 591, 598 (1916), where the court said: "Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection." And Hallowell v. United States, 221 U.S. 317, 324 (1911), where the



court wrote: "the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people."

[45]See Williams V. Lee, 358 U.S. 217, 220 (1959). The crucial language of this decision will be given later (pages 120-121).

[46]43 Stat. 253. The relevant portion of this act reads: "All non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States."

[47]The 14th Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." An elaborate discussion of whether the Indians as citizens of the United States became citizens of the states wherein they reside is given in Porter v. Hall, 34 Ariz. 308, 271 Pac. 411 (1928).

[48]The decisions discussed above are concerned with crimes of non-Indians against the persons of other non-Indians, but they are undoubtedly also applicable: (1) to crimes by non-Indians against the property of other non-Indians, and (2) to non-Indian offenses where there are no proprietary or personal victims.

[49]It is interesting to note that the "equal footing doctrine," that is, new states being admitted to the Union on an equality with the original, has more than a casual relationship to the present jurisdictional question. For a case which is closely, but not directly in point, see Ward v. Race Horse, 163 U.S. 504 (1896). This case will be presented later in the study.

[50]For a description of the national government's actual jurisdiction of crimes committed by or against Indians within Indian territory see chapter II of this study. Actual jurisdiction means that Congress has legislatively defined specific activities as constituting crimes against the national government.

[51]326 U.S. 496, 498 (1946).

[52]For evidence which hews to the idea that national authority over Indians and Indian territory is not delegated see chapter IV of this study. And for a decision which holds that the national government can constitutionally divest itself of authority over Indians and Indian territory without a constitutional amendment see Anderson v. Gladden, 293 F.2d 463 (1961). Also Anderson v. Britton, 212 Or. 1 (1957), cert. den. 356 U.S. 962 (1958).

[53]Donnelly v. United States, 228 U.S. 243 (1913); Lucas v. United States, 163 U.S. 612 (1896); Ex parte Crow Dog, 109 U.S. 556 (1883); United States v. Rogers, 45 U.S. 567 (1846); Smith v. United States, 151 U.S. 50 (1894).

[54]See Alberty,v. United States, 162 U.S. 499 (1896), and United States v. Rogers, 45 U.S. 567, 573 (1846). In the Rogers decision the court said: "we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned . . . . [T]he exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally . . . ."

[55]See the preceding paragraphs of this chapter.

[56]23 Stat. 362, 385.

[57]35 Stat. 1088, 1151.

[58]47 Stat. 336, 337.

[59]It is significant that Congress, even after passage of the 1885 act and its amendments, has not eliminated tribal jurisdiction over crimes committed by one Indian on the person or property of another except in the case of the specifically enumerated crimes. And even in the case of the specifically enumerated crimes it was not unequivocally clear that the purpose of the 1885 act and its amendments was to deprive the tribes of jurisdiction, i.e., rather than to give the federal courts concurrent jurisdiction. Whatever may have been Congress' intent, the effect seems to have been to give the federal courts exclusive jurisdiction. See Petition of Carmen, 165 F. Supp. 942, aff'd. 270 F.2d 809; cert. den. 361 U.S. 934, rehearing den. 361 U.S. 973 (1958), where the court held that federal courts have exclusive jurisdiction over crimes enumerated in the Ten Major Crimes Act when they are committed by an Indian within Indian country. See also Seymour v. Schneckloth, 346 P.2d 669; 55 Wash. 2d 109, on remand 369 P.2d 309, reversed on other grounds 368 U.S. 351 (1959). It should be noted that the Petition of Carmen case is important in another respect. It is further important in that it decided that an Indian defendant could not waive in a state trial court his right to be tried in federal court under the Ten Major Crimes Act since such right is not a mere procedural one. For a parallel case see Wesley v. Schneckloth, 346 P.2d 658, 55 Wash. 2d 90 (1959).

[60]70 Stat. 792.



[61]See chapter II of this study.

[62]67 Stat. 588; 18 U.S.C. 1162 (1958).

[63]See chapter II of this study for the act's specific provisions and exceptions. The constitutionality of this act was challenged but upheld in Anderson v. Britton, 212 Or. 1 (1957), cert. den. 356 U.S. 962 (1958).

[64]109 U.S. 556 (1883). Before this time it was uniformly held that the federal courts had no jurisdiction of crimes committed by one Indian against another Indian (or his property) of the same tribe. See United States v. Saunders, 27 Fed. Cas. No. 16,200 (1847); United States v. Rogers, 45 U.S. 567 (1846).

[65]The non-Indian populace were not always pleased with the administration of criminal justice by the Indian tribes. This dissatisfaction is captured as early as 1846 in a message to the Senate and House of Representatives by President James K. Polk. He states: "Such a modification of the existing laws is suggested because if offenders against the laws of humanity in the Indian country are left to be punished by Indian laws they will generally, if not always, be permitted to escape with impunity . . . .For years unprovoked murders have been committed, and yet no effort has been made to bring the offenders to punishment." --James D. Richardson, A Complication of the Messages and Papers of the Presidents 1789-1902, Vol. 4, 1907, p. 430.

[66]118 U.S. 375 (1886). There were no dissents to this opinion, and it has been cited as controlling in numerous cases. In short, the general principles developed and/or ratified in this opinion are still good law. See also United States v. Thomas, 151 U.S. 577 (1894).

[67]United States v. Kagama, 118 U.S. 375, 376 (1886).

[68]Ibid., pp. 378-379. Italics mine.

[69]United States v. Kagama, 118 U.S. 375, 379 (1886).

[70]Ibid., p. 380. Italics mine.

[71]United States v. Kagama, 118 U.S. 375, 380 (1886).

[72]United States v. Rogers, 45 U.S. 567, 571-572 (1846).

[73]United States v. Kagama, 118 U.S. 375, 381-382 (1886).

[74]United States v. Kagama, 118 U.S. 375, 382-383 (1886).

[75]Ibid., pp. 383-385. This decision, Austin Abbott reminds us, marks the "final and conclusive establishment of the Legislative power over Indians as individuals . . . ."--"Indians and the Law," by Austin Abbott, 2 Harv. L. Rev. 167, 173 (1888-1889).

[76]The Kagama decision, almost of necessity, forces one to ask: Who has jurisdiction of non-tribal Indians who commit crimes within an Indian reservation? There are no United States Supreme Court decisions directly in point, but a state court held in People ex rel. Schuyler v. Livingstone, 123 Misc. 605 (1924), that a non-tribal Indian may be subjected to the criminal jurisdiction of state courts for crimes committed within an Indian reservation within a state where the crime committed is not one of the crimes enumerated in the United States Criminal Code, or more specifically, the 1885 Act and its amendments. In this case the defendant, who had lived on the Onondaga Indian Reservation, off and on, for about thirty years, was convicted and imprisoned in the Onondaga Penitentiary, New York, for the crime of assault. She assaulted Rundel Jones, a white boy, upon the highway which passes through the Onondaga Reservation. Defendant alleged that the imprisonment was "unlawful for the reason that she is an Indian, and the crime for which she was convicted was committed within the confines of an Indian reservation, and, therefore, that the courts of this state have not jurisdiction to punish her . . . ." In response to defendant's allegation, the court answered: "It has been held that one who is not a tribal Indian is just as amenable to the criminal laws of the state for an offense committed on the reservation as it the offense had been committed anywhere else in the state. State v. Campbell, supra. . . . The relator was not a member of the Onondaga tribe, but a mere sojourner upon their reservation. The offense which she committed was not against an Indian, but against a white person, a citizen of the state of New York. I, therefore, hold that the court had jurisdiction in the case and that the relator was properly imprisoned by virtue of the conviction."

The State v. Campbell case, 55 N.W. 553 (1893), held that one who is not a tribal Indian is just as amenable to the criminal code of the state for an offense committed within an Indian reservation as if the offense had been committed anywhere else in the state. And secondly, where the state is not restricted by treaty or by the act admitting a state into the Union, and except so far as restricted by Congress' authority to regulate commerce with Indian tribes, the criminal jurisdiction of the state extends over the territorial limits of an Indian reservation, so as to apply to all persons therein who are not tribal Indians under the care of the United States.

[77]241 U.S. 602 (1916).



[78]Ibid., pp. 605-606. The right of Indian self-government has been tested in many cases. See for example Ex parte Crow Dog, 109 U.S. 556 (1883); United States v. Kagama, 118 U.S. 375 (1886); Talton v. Mayes, 163 U.S. 376 (1896); Jones v. Meehan, 175 U.S. 1 (1899); Buster v. Wrights, 203 U.S. 599 (1906); Cherokee Nation v. Journeycake, 155 U.S. 196 (1894); Turner v. United States and Creek Nation, 248 U.S. 354 (1919).

[79]358 U.S. 217, 220 (1959).

[80]Ibid.

[81]Williams v. Lee, 358 U.S. 217, 219-220 (1959).

[82]Elk v. Wilkins, 112 U.S. 94, 100 (1884); Swatzell v. Industrial Com., 78 Ariz. 149 (1954). It is a principle of national statutory construction that general laws of Congress do not apply to Indians unless so expressed as to clearly manifest an intention to include them. However, for a decision which doubtfully changes this principle see F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 115 (1960). In this decision the court writes: "it is now well settled by many decisions of this court that a general statute in terms applying to all persons includes Indians and their property interests."

[83]Williams v. Lee, 358 U.S. 217, 220 (1959).

[84]See chapter II of this study. Also Carpenter v. Shaw, 280 U.S. 363 (1930), and Squire v. Capoeman, 351 U.S. 1 (1956), where it was held that doubtful expressions in acts of Congress relating to Indians are to be resolved in favor of the Indians.

[85]See preceding paragraphs of this chapter.

[86]14 Fed. Cas. No. 7,720 (1878).

[87]112 U.S. 94, 108 (1884).

[88]See also United States v. Rogers, 45 U.S. 567, 572-573 (1846), in chapter V of this study.

[89]Cramer v. United States, 261 U.S. 219 (1923). See also Perrin v. United States, 232 U.S. 478, 482 (1914), where the United States Supreme Court held: "The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of

any doubt. It arises in part from the clause in the Constitution investing Congress with authority 'to regulate commerce with foreign nations, and among the several States, and with Indian tribes,' and in part from the recognized relation of tribal Indians to the Federal Government. . . . These Indian tribes are the wards of the Nation. They are communities dependent on the United States . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.' United States v. Kagama, 118 U.S. 375, 383." And also United States, v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876).

[90] 163 U.S. 504 (1896).

[91] 2 Johns Cas. 344-345 (1801).

[92] 4 Kan. 60 (1866).

[93] Ibid., p. 65.

[94] Ibid., p. 67.

[95] 27 Fed. cas. No. 16,212 (1870).

[96] United States v. Sa-Coo-Da-Cot alias Yellow Sun, 27 Fed. Cas. No. 16,212 (1870).

[97] 27 Fed. Rep. 606 (1886).

[98] In re Wolf, 27 Fed. Rep. 606, 610 (1886).

[99] 84 Me. 465; 24 Atl. Rep. 943 (1892).

[100] Ibid., pp. 943-944.

[101] 73 Cal. 635 (1887).

[102] Ibid., p. 639.

[103] 163 U.S. 504 (1896).

[104] 15 Stat. 673, 674-675.



[105] 15 Stat. 178.

[106] 26 Stat. 222.

[107] Ward v. Race Horse, 163 U.S. 504, 507 (1896).

[108] Mr. Justice Brown's pertinent language reads: "Conceding at once that it is within the power of Congress to abrogate a treaty, or rather that the exercise of such power raises an issue, which the other party to the treaty is alone competent to deal with, it will be also conceded that the abrogation of a public treaty ought not to be inferred from doubtful language, but that the intention of Congress to repudiate its obligation ought clearly to appear . . . .

Not doubting for a moment that the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance. If the position of the court be sound, this treaty might have been abrogated the next day by the admission of Wyoming as a State, and what might have been done in this case might be done in the case of every Indian tribe within our boundaries. There is no limit to the right of the State, which may in its discretion prohibit the killing of all game, and thus practically deprive the Indians of their principal means of subsistence.

I am not impressed with the theory that the act admitting Wyoming into the Union upon an equal footing with the original States authorized them to impair or abrogate rights previously granted by the sovereign power by treaty, or to discharge itself of burdens which the United States had assumed before her admission into the Union. In the cases of the Kansas Indians, 5 Wall. 737, we held that a State, when admitted into the Union, was bound to respect an exemption from taxation which had been previously granted to tribes of Indians within its borders, because, as the court said, the State of Kansas 'accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of the treaties and laws of Congress, and their property is withdrawn from the operation of state laws.'

It is true that the act admitting the State of Kansas into the Union contained a proviso similar to that in the act erecting a government for the Territory of Wyoming, viz.: 'That nothing contained in this said constitution respecting the boundaries of said State shall be construed to impair the rights of person or property now pertaining to the Indians of said Territory, so long as such rights shall remain unextinguished by treaty with such Indians.' In this particular the cases differ from each other only in the fact that the

proviso in the one case is inserted in the act creating the Territory, and in the other in the act admitting the Territory as a State; and unless we are to say that the act admitting the Territory of Wyoming as a State absolved it from its liabilities as a Territory, it would seem that the treaty applied as much in the one case as in the other. But however this may be, the proviso in the territorial act exhibited a clear intention on the part of Congress to continue in force the stipulation of the treaty, and there is nothing in the act admitting the Territory as a State which manifests an intention to repudiate them. I think, therefore, the rights of these Indians could only be extinguished by purchase, or by a new arrangement with the United States."--Ward v. Race Horse, 163 U.S. 504, 517-520 (1896).

[109] Ward v. Race Horse, 163 U.S. 504, 509-516 (1896). Italics Mine.

[110] 7 L. ed. 2d 573 (1962). For a representative sample of state decisions (decisions concerned with jurisdiction over crimes committed by Indians within a state, but not within Indian territory) decided between the Race Horse and Egan decisions see: Pablo v. People, 23 Colo. 134, 46 Pac. 636 (1896); State v. Spotted Hawk, 22 Mont. 33, 55 Pac. 1026 (1899); State v. Johnny, 29 Nev. 203, 87 Pac. 3 (1906); Kennedy v. Becker, 215 N.Y. 42, 109 N.E. 116 (1915). All of these decisions upheld state jurisdiction, but for various reasons.

[111] Organized Village of Kake v. Egan, 7 L. ed. 2d 573, 583 (1962). Italics mine.

[112] Ibid.

[113] Ibid., p. 584.

[114] 302 U.S. 535 (1938).

[115] Ibid., p. 538.

[116] 271 U.S. 467, 471 (1926).

[117] United States v. McGowan, 302 U.S. 535, 539 (1938). Italics mine.

[118] Ibid.

[119] Congress' guardianship authority over Indians as members of a specific race will be further examined in later paragraphs.



[120] 104 N.W. 2d 308 (1960).

[121] In re Holy-Elk-Face v. State, 104 N.W. 2d 308, 318 (1960). Italics mine.

[122] 366 P. 2d 346 (1961).

[123] Ibid.

[124] 318 P. 2d 291 (1957).

[125] Anderson v. Britton, 318 P. 2d 291, 300 (1957). Italics mine.

[126] For a possible exception to this theory see the Organized Village of Kake v. Egan decision (7 L. ed. 2d 573, 583) where the court implies that the states may have limited jurisdiction of crimes committed by or against Indians and Indian property within Indian territory within a state. The court writes: "decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law . . . . State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation."

[127] And as noted earlier, the area of Congressional action or discretion is confined within narrow limits, so narrow in fact that one wonders whether it is meaningful, significant, or wise to talk about Congress' criminal authority over Indians, that is, as distinguished from other United States citizens.

[128] See also United States v. Thomas, 151 U.S. 577, 585 (1894); Donnelly v. United States, 228 U.S. 243, 269 (1913); Browning v. United States, 6 F. 2d 801, cert. den. 269 U.S. 568 (1925).

[129] For a few of the more important cases see Brown v. Board of Education, 347 U.S. 483 (1954); Shelly v. Kraemer, 334 U.S. 1 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[130] 347 U.S. 497 (1954).

[131] Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

# CHAPTER VII

## THE NATIONAL GOVERNMENT'S PLENARY AUTHORITY OVER INDIANS: THEIR CRIMINAL PROCEDURAL GUARANTEES

The major purpose of the foregoing chapters of this study has been to provide the reader with a clearer understanding of the criminal jurisdictional relationships of the Indians and their territory to foreign nations, the national government, the states, and tribal governments. These jurisdictional relationships were conceptualized early in the introductory chapter as a vertical distribution of authority. The development through judicial decisions of the vertical distribution of authority concept concerning criminal jurisdiction over Indians and Indian territory touched rather lightly the horizontal distribution of authority concept which was also defined in the introductory chapter. Therefore, because the following chapters of this study will be concerned primarily with the criminal procedural guarantees of the American Indian as expressed in the federal Bill of Rights, one cannot ignore the horizontal distribution of authority concept; this concept is concerned with the dissemination of governmental authority among and within the legislative, executive, and judicial branches, irrespective of whether the dissemination takes place at the national, state, or tribal levels. The horizontal and vertical distribution of authority concepts are important because the American Indian's criminal procedural guarantees are inextricably connected, and to a large extent determined, by the utilization and dissemination of authority among and within levels of government. Or looking at the same conceptual patterns from a different perspective, the purpose of the following chapters will be directed toward a clarification and delineation of the scope and extent of governmental powers (national, state, and tribal) as they effect the criminal procedural guarantees (as expressed by the federal Bill of Rights) of the American Indian. These governmental powers can be divided into two categories: the positive and the paradoxical. The first category has reference to areas of authority where the governments (state, national, and/or tribal) can either protect or restrain the Indians in their procedural guarantees; the second has reference to areas of authority where governments are forbidden to enter.

In order that the above concepts will be visualized in their inextricableness and true significance, a few of the more important and general



principles delineated in the foregoing chapters of the study demand recapitulation.

The first case which merits a recapitulation is Cherokee Nation v. Georgia. In this case the court dismissed the Cherokee claim to national independence and sovereignty by declaring that Indian tribes "may, more correctly, perhaps be denominated domestic dependent nations . . . . Their relation to the United States resembles that of a ward to his guardian." This decision disposed of the idea that the Indian tribes were independent and sovereign nations in the sense that Great Britain and France are independent and sovereign nations, but left ambiguous the relationship of the Indians to the state and national governments. Resolution of this relationship received partial clarification, however, in Worcester v. Georgia. In this decision the court wrote: "The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . ." By these two decisions the criminal status of the American Indian (both tribally and individually) was fundamentally, though not elaborately, determined. More precisely, in the disposition of later cases, the Indians' criminal status received increased elaboration. His criminal status rested more and more, and with less ambiguity, within the sole and exclusive jurisdiction (at least the potential jurisdiction), of the national government. Secondly, the cases which follow Worcester are fecund via clarifying horizontal distribution of authority relationships.

One of the leading, if not the leading, decisions regarding dissemination of governmental authority over Indians (tribal and individual) and Indian territory was handed down by the United States Supreme Court in United States v. Kagama. The court wrote in this case: The Indian tribes

> . . . were, and always have been regarded as having a semi-independent, position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State in whose limits they resided. . . . These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely on their daily food. Dependent on their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power . . . . The

> power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The Kagama decision adds clarification and finality, both legally and theoretically, to many of the problems associated with a vertical dissemination of criminal authority over Indians. Secondly, the Kagama decision unequivocally rules that the national government's authority over Indians is not limited to tribes, but can be exercised in terms of both prosecuting and protecting individual Indians. Thirdly, the Kagama decision explicitly rules that the national government has authority over Indians because they are Indians. Lastly, the decision, by declaring the congressional enactment in question constitutional, adds clarification and meaning to the horizontal distribution of authority concept. It is to the horizontal dissemination of authority over Indians and Indian territory at the national level that the remaining paragraphs of this chapter will be devoted. These paragraphs will have important significance in terms of delineating the American Indians' criminal procedural safeguards at the national, state, and even tribal jurisdictions.

The horizontal dissemination of authority over Indians and Indian territory at the national level can be attacked through an analysis of the following two questions. What is the extent of Congress' guardianship or wardship authority over Indians and Indian territory in relation to the other branches of the national government? What type of paradoxical powers, specifically in relation to an Indian's criminal procedural guarantees (federal Bill of Rights protections), do and/or must the national branches of government enforce? As a partial resolution of these two questions, attention should be first directed to the March 3, 1871, Act. This Act provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[1] As explained earlier, the international relations between the various Indian tribes and foreign nations were superseded, at least theoretically (and in most cases in actuality), by actual developments. Nevertheless, the President, with the consent and advice of the Senate, had continued to conclude treaties with the Indian tribes. It was the purpose of the Act of 1871 to formally divest the executive branch and the Indians of their historical treaty responsibilities and characteristics. Or somewhat differently, the purpose of the Act was to place the governance of Indians and Indian affairs into the hands of Congress, as entirely a matter of legislation.[2] The purpose of this Act leads one to ask: to what extent have the governance and protection of Indians and Indian affairs become entirely a matter of Congress?



The United States Supreme Court focuses attention and light on this question in Stephens v. Cherokee Nation.[3] In this case the court wrote "that Congress possesses plenary power of legislation in regard to [Indian tribes], subject only to the Constitution of the United States."[4] Just four years later, however, in the case of Lone Wolf v. Hitchcock,[5] the United States Supreme Court left the already ambiguous Stephens' principle shrouded in doubt. The disposition of this case centered on Congress' legal right to authorize the Secretary of the Interior, contrary to tribal desire, to execute leases affecting lands owned by certain Indian tribes. More specifically, Lone Wolf, in behalf of certain Kiowa, Comanche, and Apache Indians, argued that these tribes were vested with legal interest to certain tribal lands held in common within the reservation. A legal interest which could not be abridged by legislative act in any other mode than that specified in the Medicine Lodge Treaty of 1867, and that as a result of the said treaty stipulation the interest of the Indians to certain disputed lands fell within the protection of the Fifth Amendment of the Constitution of the United States, and such interest (indirectly at least) came under the control of the judicial branch of the government. The court answered thus:

> The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.
>
> Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. . . . But in none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians . . . .
>
> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations ... the legislative power might pass laws in conflict with treaties made with the Indians.[6]

Continuing, the court concluded with this thought:

> In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.[7]

The court's extreme principle of refusing to examine or rule on actions of Congress proved incapable of satisfying the Indians, later courts, or constitutional theory.

In the case of Perrin v. United States[8] the United States Supreme Court added clarification to the Lone Wolf decision by saying that Congress' "plenary authority" over Indians and Indian relations does not necessarily imply that Indians occupy a position of "plenary dependency" in relation to the national legislature. In this decision the court, after noting that Congress' authority or power for dealing and adopting measures for the Indians' protection is contingent only to the presence of the Indians and their status as wards of the national government, held that Congress' authority over Indians and Indian relations "does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis . . . ."[9] On the other hand, continues the court, "it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts."[10]

The limitation placed on Congress' plenary authority over Indians and Indian relations, as indicated in the Perrin decision, received further condonence in United States v. Alcea Band of Tillamooks.[11] In this decision Chief Justice Vinson observed that "That power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."[12]

Unfortunately, the role of the national government, and more specifically the federal judiciary, as a protector of Indian criminal procedural rights has never been adequately recorded. This statement becomes especially meaningful when one becomes cognizant of the fact that the foregoing decisions were primarily preoccupied with Congress' authority or power over Indian tribes and not over individual Indians.[13] Yet, as one looks at the foregoing decisions in relation to other early and current decisions concerned with the restraining effect of the federal Bill of Rights on the executive, judicial, and legislative branches of the national government, one would, with only



superficial insight, most likely conclude that the American Indian is entitled to all the federal Bill of Rights protections. Mr. Felix S. Cohen speaking in this relationship writes:

> If an Indian is accused of counterfeiting he is entitled to a jury trial, just as any other citizen would be. There is no special Indian question involved in the case. The fact that one of the parties in a case is an Indian does not raise a question of Indian rights. In this paper, therefore, we shall not attempt to treat the rights which Indians share with all their fellow citizens, such as the right of free speech, the right of jury trial for federal offenses . . . .[etc.].[14]

Mr. Cohen strongly implies that the American Indian is entitled to the federal Bill of Rights protections because he is an United States citizen. Before attention is directed to the validation or refutation of this argument, a few words will be directed to other possible avenues for giving the American Indian the protection of the federal Bill of Rights, that is, at least against national action or prosecution. These avenues center on what may be referred to as the territorial status of the American Indian.

Serious questions have arisen concerning the extent and scope of national authority over territories. In the United States Constitution, Art. 4, sec. 3, one reads: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In relation to this section the United States Supreme Court on several occasions ruled that: in the United States territories, Congress has complete dominion and sovereignty, national and local; and in this respect, Congress has full legislative power over all subjects upon which a State legislature might legislate within its boundaries.[15] The principle which could be easily deducted from these decisions is that the national government has the same authority as the states for determining the criminal procedural guarantees of an Indian defendant. However, before one adopts the preceding rationale, one should be cognizant of the fact that the Constitution places various prohibitions upon the actions of the national government. By the express language of some of these prohibitions, they limit the authority of the national government only in respect to the several states. Such instances are: "No Tax or Duty shall be laid on Articles exported from any State,"[16] and "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[17] And the express language of at least one prohibition limits the authority of the national government everywhere within its jurisdiction. For example see the United States Constitution, Amendment Thirteen; section I, which reads: "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." Other prohibitions expressly apply

only within the United States. For instance, "all Duties, Imposts and Excises shall be uniform throughout the United States."[18]

The great majority of the prohibitions upon the national government does not, however, expressly state, or clearly show, to what territory they are applicable. This includes all the first nine amendments which constitute the federal Bill of Rights.

It is almost too obvious to mention that all the constitutional prohibitions (most specifically the federal Bill of Rights protections) upon the actions of the national government apply within the territorial jurisdiction of the several states. This is elemental because this was the principal object in placing them in the Constitution.[19] Yet, in terms of Indian territory, territory which may or may not fall within the territorial jurisdiction of the several states,[20] one may conjure grave doubts as to the applicability of the constitutional prohibitions to the national government. The federal Constitution is silent as to both the acquisition of new territories and the extension of the Constitution over them. Many people have been under the impression that the Constitution casts a mantle of protection over people (and not necessarily limited to United States citizens) domiciled or visiting within United States territory. There is nothing in the Constitution, and little in the interpretation of it, to confirm this impression, however.[21] The United States Supreme Court decisions on this subject have not been altogether harmonious. Some of the court's decisions are based on the theory that the Constitution does not apply to the territories without congressional legislation. Other cases, arising from territories where such legislation has been enacted, contain language which would justify the inference that congressional legislation is unnecessary. These decisions imply that the Constitution takes effect immediately on the cession of the territory to the United States.[22] And the opinions of United States Supreme Court justices have differed as to the scope and effect of application of the federal Constitution to the territories and territorial possessions. Some of the justices argue that the Constitution applies ex proprio vigore to all territory possessed by the United States, whether incorporated as a part thereof or not, and regardless of any action on the part of Congress; other justices have taken the view that the Constitution does not apply as a limitation on Congress in governing the territories until it is extended thereto by legislative enactment.[23]

Can a distinction be drawn as to the applicability of the Constitution between territories which are and which are not incorporated as a part of the United States? In partial answer to this question, the court ruled in Balzac v. Porto Rico[24] that inhabitants of incorporated territory are entitled to constitutional protections. Earlier the court (Rasmussen v. United States) had ruled that congressional acts "purporting to extend the Constitution" to incorporated territory are "declaratory merely of a result which existed



independently by the inherent operation of the Constitution."[25]

The preceding cases, although clarifying some issues, leave unanswered and raise some thorny questions in terms of unequivocally delineating the criminal procedural guarantees of the American Indian who commits a crime within Indian territory. First, did the court in the Balzac case intend to make the federal Bill of Rights protections applicable to all governments (or only the national) in incorporated territories?[26] It is highly unlikely that this was the intended meaning of the decision.[27] Indeed, the state governments of the Union, which have jurisdiction over incorporated territory, are not required to comply with all of the federal Bill of Rights protections. A second question raised by the preceding cases is concerned with whether Indian territory, especially that within the confines of the continental United States, is incorporated territory. A third, who determines when a territory becomes incorporated?

Rasmussen v. United States[28] is one of the most articulate, concise, and comprehensive United States Supreme Court decisions having reference to the applicability of the United States Constitution to United States territories.

In this case defendant was indicted and convicted under Alaska territorial law of keeping a disreputable house. In protest of the verdict and judgment, defendant alleged that he had been denied a trial by jury. Defendant had been tried in accordance with a provision of the Alaska code, a code adopted by Congress, which provided for a trial by a jury of six. Therefore, the question was whether Congress had power to deprive "one accused in Alaska of a misdemeanor of trial by a common law jury, that is to say, whether the provision of the act of Congress in question was repugnant to the Sixth Amendment to the Constitution of the United States."[29] In opposition to defendant's allegation, the prosecutor, although not disputing the obvious and fundamental truth that the Constitution of the United States is dominant where applicable, argued (1) that Alaska was not incorporated into the United States, and therefore the Sixth Amendment did not control Congress in legislating for Alaska, and (2) that "even if Alaska was incorporated into the United States as it was not an organized territory, therefore the provisions of the Sixth Amendment were not controlling on Congress when legislating for Alaska."[30] The court resolved the allegations of both defendant and prosecutor with the following words:

> It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is

inappropriate and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express commands of the Sixth Amendment.

This brings us to the second proposition, which is--

2. That even if Alaska was incorporated into the United States, as it was not an organized Territory, therefore, the provisions of the Sixth Amendment were not controlling on Congress when legislating for Alaska.

We do not stop to demonstrate from original considerations the unsoundness of this contention and its irreconcilable conflict with the essential principles upon which our constitutional system of government rests. Nor do we think it is required to point out the inconsistency which would arise between various provisions of the Constitution if the proposition was admitted, or the extreme extension on the one hand and the undue limitations on the powers of Congress which would be occasioned by conceding it. This is aid, because, in our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions . . . .

The argument by which the decisive force of the cases just cited is sought to be escaped is that as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore the decisions must be taken to have proceeded alone upon the statutes and not upon the inherent application of the provisions of the Fifth, Sixth, and Seventh Amendments to the District of Columbia, or to an incorporated Territory. And, upon the assumption that the cases are distinguished from the present one upon the basis just stated, the argument proceeds to insist that the Sixth Amendment does not apply to the territory of Alaska, because section 1891 of the Revised Statutes only extends the Constitution to the organized Territory, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the Territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution.[31]

Another closely related concept which merits presentation in



connection with the Rassmussen decision has reference to Congress' authority to withdraw constitutional protections, especially criminal procedural guarantees, once they have been extended by legislation to United States territories. In several cases[32] the United States Supreme Court has held that where Congress has extended by legislation the Constitution to a territory, it cannot thereafter withdraw the provision. And it follows, under the "inherent operation" principle, that the same result would follow although Congress has not expressly extended the Constitution to incorporated territory.

From the foregoing discussion, it is undeniably true that Indians when prosecuted by the national government and its agents for crimes committed within incorporated territory, and unincorporated territory where Congress expressly provides, are entitled to the federal Bill of Rights protections.[33] Secondly, Indians are entitled to these protections not solely on the basis of United States citizenship, but because they are inhabitants of incorporated territory to which the protections of the federal Bill of Rights extend.

Inhabitants (Indian and other) of unincorporated territory, when prosecuted by the national government and its agents, may be entitled to part, at least, of the federal Bill of Rights protections irrespective of congressional action. In Dorr v. United States,[34] a case originating in the Philippines, an unincorporated territory, the court writes that while cases have sustained[35] the authority of Congress "to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union, the exercise of the power expressly granted to govern the territories is not without limitations."[36] This case presented the question whether, in the absence of congressional legislation expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method had been made by the accused and denied by the courts established in the islands. The court answered this question by saying that trial by jury is not a fundamental limitation placed on the territorial authority of the United States to govern unincorporated territories. Earlier in Dred Scott v. Sandford,[37] a case involving the protection to be given to a slave-holder who had brought his slaves into a territory and who relied upon the Constitution to protect him from expropriation, Mr. Justice Curtis (dissenting opinion) speaking of Congress' constitutional right to make laws for the governance of United States territories asks: "what are the limits of that power?" To his own question he answers that "in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."[38] The majority opinion in Dred Scott also ruled that

certain fundamentals embodied in the United States Constitution apply to territories and cannot be abridged by Congress. Chief Justice Taney (speaking for the majority of the court), in examining the question as to the national government's authority to acquire territory outside the original limits of the United States and what powers it may exercise therein over person or property of a citizen of the United States, made the following statement: "There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; . . ."[39] Taney further held in this case that citizens who migrate to a territory cannot be ruled as mere colonists, and that while Congress had the power of legislating over territories until states were formed from them, it could not deprive a citizen of his property merely because he brought it into a particular territory of the United States, and that this doctrine applied to slaves as well as to other property. Hence, it followed that the act of Congress which prohibited a citizen from holding and owning slaves in territories north of 36 degrees 30 minutes (known as the Missouri Compromise) was unconstitutional and void, and the fact that Scott was carried into such territory, referring to what is now known as Minnesota, did not entitle him to his freedom. This decision supports the idea that fundamental rights go with United States citizenship, but not with Homo sapienship per se. For a case which could possibly be interpreted to hew to the idea that certain fundamental rights are inextricably connected with Homo sapienship, the reader is directed to the case of Morman Church v. United States.[40] In this decision the court writes that in legislating for the territories Congress doubtlessly "would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."[41] This idea is given additional credence in Downes v. Bidwell.[42] In this decision, after the majority opinion quoted with approbation the preceding excerpt from the Morman Church case, Mr. Justice White in a concurring opinion wrote:

> Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the Territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature



> that they cannot be transgressed, although not expressed in so many words in the Constitution.[43]

And for a recent decision which further clarifies the above principle, the reader is directed to Reid v. Covert.[44] In this decision both Justices Frankfurter and Harlan in concurring opinions acknowledge the fundamental rights test. Justice Frankfurter writes on page 53:

> The "fundamental right" test is the one which the Court has consistently enunciated in the long series of cases . . . dealing with claims of constitutional restrictions on the power of Congress to "make all needful Rules and Regulations" for governing the unincorporated territories. The process of decision appropriate to the problem led to a detailed examination of the relation of the specific "Territory" to the United States. This examination, in its similarity to analysis in terms of "due process," is essentially the same as that to be made in the present cases in weighing congressional power to make "Rules for the Government and Regulation of the land and naval Forces" against the safeguards of Article III and the Fifth and Sixth Amendments.

In short, Justice Frankfurter is arguing that the fundamental rights test acts as a shield of protection to inhabitants of unincorporated territories, and to personnel of the land, air, and naval forces.[45] It can reasonably be presumed that Justice Frankfurter would extend this test, at an absolute minimum, to Indians and Indian territory.

From the several preceding decisions, it is evident that the limitations placed on Congress are in general those which guarantee or secure fundamental rights, and these may be rights associated with United States citizenship,[46] although not necessarily limited thereto. Thus, following a liberal application of the fundamental rights concept, one can extrapolate and argue that the fundamental rights spoken of include, at an irreducible minimu, those criminal procedural rights which have been found to be fundamental in the due process clauses of the Fifth and Fourteenth Amendments. This extrapolation is partially premised on the unclarified argument that the Fourteenth Amendment due process clause and the Fifth Amendment due process clause are identical in meaning, and that they include some of the criminal procedural guarantees found in the other amendments of the federal Bill of Rights.

From the preceding discussion one can conclude that the criminal procedural rights of the American Indians (Indians living and committing crimes within Indian territory), when prosecuted by the national government and its agents, turn on whether Indian territory is incorporated, whether Congress

has extended the Constitution's criminal procedural guarantees to unincorporated territories, and to fundamental rights (fundamental rights which restrain positive national action) which are intrinsic because of United States citizenship and Homo sapienism.

Territories of the United States have been classified as incorporated when they become a part of the United States,[47] and unincorporated if they have not been made a part of the United States, that is, as distinguished from territory which merely belongs to the United States.[48]

These classifications are important in attempting to delineate the criminal procedural guarantees of the American Indian. They raise the following questions: How does territory become incorporated and thus a part of the United States? Is Indian territory within the fifty states incorporated?

The first question is answered in Balzac v. Porto Rico.[49] In this case the court ruled that incorporation into the Union may not be assumed without express declaration or an implication so strong as to exclude any other view. However, the court continues by stating that in the absence of other and countervailing evidence a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands, may be properly interpreted to mean an incorporation of it into the Union. The court's exact language is:

> Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference. Before the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important, or at least it was not fully understood and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference from various legislative acts; but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.[50]

Attention will now be focused on the question as to whether the American Indian (because of the incorporation classification) is entitled to the federal Bill of Rights protections when prosecuted by the national government and its agents.[51] It seems that this question has become moot in terms of actual prosecutions before federal judicial tribunals. It is assumed that federal jurisdiction entitled the American Indian to the procedural guarantees embodied in the federal Bill of Rights. Therefore, the crucial historical question has been to establish federal jurisdiction, i.e., as opposed to state



and tribal. Yet, irrespective of historical actualities, the legal disposition of the issue remains open and undecided. No cases have been located which direct themselves to a consideration of the applicability of the "incorporation-unincorporation test" to Indian territory.

Up to this point in the presentation, if Mr. Cohen's previously quoted statement is rejected, one would have to conclude that the Indian's argument in favor of being protected by all of the Bill of Rights protections (when prosecuted by the national government and its agents) is rather ambiguous, if not tenuous. Because of this uncertainty, a pursual of the Bill of Rights protections guaranteed to an individual because he is an United States citizen will be undertaken.

A landmark case in this relationship is Reid v. Covert.[52] This decision was concerned with: (1) the constitutional power of Congress to provide for trial of civilian dependents (citizens of the United States) accompanying members of the armed forces abroad by court-martial in capital cases; and (2) whether the provisions of Article III and the Fifth and Sixth Amendments, which require that crimes be tried by a jury after indictment by a grand jury, protect civilian, American citizen dependents when they are tried by the American Government in foreign lands for offenses committed therein. The relevant facts of this case were: Two ladies (civilian, dependent, American citizen wives accompanying the military forces in Great Britain and Japan) were convicted by court-martial for murdering their military personnel husbands. The United States Supreme Court, after concluding that civilian dependents charged with capital offenses are not subject to court-martial, answered the second question thus:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government. It was recognized long before Paul successfully invoked his rights as a Roman citizen to be tried in strict accordance with Roman law . . . .[53]
>
> . . . . . .
>
> This court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States.[54] While it has been suggested that

only those constitutional rights which are "fundamental" protect Americans abroad,[55] we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. .

. . . . . .

The Court's opinion last Term also relied on the "Insular Cases" to support its conclusion that Article III and the Fifth and Sixth Amendments were not applicable to the trial of Mrs. Smith and Mrs. Covert.[56] We believe that reliance was misplaced. The "Insular Cases," which arose at the turn of the century, involved territories which had only recently been conquered or acquired by the United States. These territories, governed and regulated by Congress under Art. IV, Sec. 3 had entirely different cultures and customs from those of this country. This Court, although closely divided,[57] ruled that certain constitutional safeguards were not applicable to these territories since they had not been "expressly or impliedly incorporated" into the Union by Congress. While conceding that "fundamental" constitutional rights applied everywhere, the majority found that it would disrupt long-established practices and would be inexpedient to require a jury trial after an indictment by a grand jury in the insular possessions.[58]

The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship . . . . The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there . . . .[59]

. . . . . .

The fact that Toth was arrested here while the wives were arrested in foreign countries is material only if constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him. As we have said before, such a view of the Constitution is erroneous. The mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them.[60]



Justice Black delivered this opinion to which Justice Warren, Douglas, and Brennan concurred. Justice Frankfurter wrote a separate concurring opinion, the relevant portion which reads:

> The "fundamental right" test is the one which the Court has consistently enunciated in the long series of cases . . . dealing with claims of constitutional restrictions on the power of Congress to "make all needful Rules and Regulations" for governing the unincorporated territories. The process of decision appropriate to the problem led to a detailed examination of the relation of the specific "Territory" to the United States. This examination, in its similarity to analysis in terms of "due process," is essentially the same as that to be made in the present cases in weighing congressional power to make "Rules for the Government and Regulation of the land and naval Forces" against the safeguards of Article III and the Fifth and Sixth Amendments.[61]

In this excerpt Justice Frankfurter concurs with the majority opinion not in the sense that a United States citizen (civilian) is entitled to all the Bill of Rights protections against national governmental action in foreign lands, but that he is entitled to certain fundamental rights. Mr. Justice Harlan also wrote a separate but concurring opinion. He desired to draw a distinction between capital and minor offenses, i.e., in terms of allowing trial by the military. In terms of the application of the Bill of Rights protections to civilian, citizen dependents committing crimes on foreign soil, he would follow Justice Frankfurter's "fundamental rights test." Mr. Justice Whittaker took no part in the decision, and Justices Clark and Burton in a dissent argued for the adequacy of the incorporation-unincorporation principle.

Just three years after the Covert decision in Kinsella v. Singleton,[62] The United States Supreme Court was again presented with an identical legal and factual situation, except for the fact that this case involved a criminal act of a non-capital nature (involuntary manslaughter). In this case the prosecution, not questioning the validity of the Covert decision, claimed that it did not cover acts of a non-capital nature, and therefore should not be controlling in the case under review. The Supreme Court, speaking through Justice Clark who had previously dissented in the Covert decision, answered: "In truth the problems are identical and are so intertwined that equal treatment of capital and noncapital cases would be a palliative to a troubled world . . . . We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not constitutionally permissible.[63]

This decision, unlike the Covert decision, was rendered by a clear-cut majority (Justices Clark, Warren, Douglas, Black, and Brennan). The

two outright dissenters were Justices Harlan and Frankfurter. They dissented not because of the application of the Bill of Rights protections to civilian, citizen dependents, but because "Nothing in the supplemental historical data respecting courts-martial which have been presented in these cases persuades me that we would be justified in holding that Congress' exercise of its constitutional powers in this area was without a rational and appropriate basis, so far as noncapital cases are concerned.[64] In brief, their decision turned on a liberal-conservative interpretation of Congress' authority under Article I, sec. 8, cl. 14, of the Constitution which reads: Congress shall have power "To make Rules for the Government and Regulation of the land and naval Forces."

Two other justices (Whittaker and Stewart) dissented in part and concurred in part. As concerns the application of the Bill of Rights protections to civilian, citizen dependents committing crimes abroad (when prosecuted by the United States Government), they wrote:

> Our recent decision in Reid v. Covert, 354 U.S. 1, makes clear that the United States Constitution extends beyond our territorial boundaries and reaches to and applies within all foreign areas where jurisdiction is or may be exercised by the United States over its citizens--that when the United States proceeds against its citizens abroad '[i]t can only act in accordance with all the limitations imposed by the Constitution.' 354 U.S., at 6.[65]

The Singleton decision, therefore, especially when read in connection with the Covert decision, provides almost unequivocal legal verification of the idea that the Bill of Rights protections restrain the national government in the prosecution of United States citizens--irrespective of geographical location. And because the American Indians are United States citizens, they are entitled to the Bill of Rights protections.

FOOTNOTES

[1] 16 Stat. 544, 566.

[2] Heinrick Krieger in his article "Principles of the Indian Law and the Act of June 18, 1934," 3 Geo. Wash. L. Rev. 279, 285 (1935), questions the degree to which the Act, at least initially, accomplished its purpose. He writes: "a long time after the passage of the law, the Government of the United States, through Congress, made numerous agreements with the Indian tribes, in form and contents scarcely different from the former treaties."



[3] 174 U.S. 445 (1899).

[4] 174 U.S. 445, 478 (1899). Italics mine.

[5] 187 U.S. 553 (1903).

[6] Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566 (1903).

[7] Ibid., p. 568. Similarly, the court declared just one year earlier in Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902): "We are not concerned in this case with the question whether the act of June 28, 1898 . . . is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and not one for the courts."

[8] 232 U.S. 478 (1914).

[9] Ibid., p. 486.

[10] Ibid.

[11] 329 U.S. 40 (1946). This case was taken to the Supreme Court a second time in 1951. See United States v. Alcea Band of Tillamooks, 341 U.S. 48.

[12] Ibid., p. 54. See also United States v. Klamath Indians, 304 U.S. 119, 123 (1938), where the court after stating that Congress has plenary authority or power to manage and conduct the affairs of a tribe added: "that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others."

[13] However, for cases following a similar principle and having specific reference to rights of Individual Indians see Choate v. Trapp, 224 U.S. 665 (1912), and Turner v. Fisher, 222 U.S. 204 (1911).

[14] "Indian Rights and the Federal Courts," by Felix C. Cohen, 24 Minn. L. Rev. 145, 146 (1940).

[15] See Simms v. Simms, 175 U.S. 162, 168 (1899); United States v. McMillan, 165 U.S. 504, 510 (1897); El Paso & N.E.R. Co. v. Gutierrez, 215 U.S. 87 (1909); First Nat. Bank v. Yankton County, 101 U.S. 129, 133 (1880).

[16]United States Constitution, Art.I, sec. 9, cl. 5.

[17]Ibid., cl. 6.

[18]Ibid., sec. 8, cl. 1.

[19]In addition one may reasonably argue that the Constitution (in all its provisions of authority and restraints) was intended to apply to the territory included within the Northwest Territory. However, in terms of application to territory acquired after the ratification of the Constitution, the argument would be less tenable.

[20]See the earlier chapters of this study.

[21]See Dorr v. United States, 195 U.S. 138, 149 (1904): Balzac v. Porto Rico, 258 U.S. 298 (1922); Hawaii v. Mankichi, 190 U.S. 197 (1903).

[22]See Rassmussen v. United States, 197 U.S. 516 (1905); Downes v. Bidwell, 182 U.S. 244 (1901); and cases cited within these two decisions.

[23]See Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Interstate Commerce Commission v. United ex rel. Humboldt S.S. Co., 224 U.S. 474 (1912); Church of Jesus Christ of L.D.S. v. United States, 136 U.S.1 (1890); Rassmussen v. United States, 197 U.S. 516 (1905). And also Frederic R. Coudert's article "The Evolution of the Doctrine of Territorial Incorporation," 26 Colum. L. Rev. 823-850 (1926).

[24]258 U.S. 298, 306-307 (1922). The language of this decision which is of special significance for the purposes of this study reads: "If it was intended to incorporate Porto Rico into the Union by this act, which would ex proprio vigore make applicable the whole Bill of Rights of the Constitution to the Island . . . ."

[25]Rassmussen v. United States, 197 U.S. 516, 526 (1905); see also Capital Traction Co. v. Hof., 174 U.S. 1 (1899).

[26]Indeed, one may argue that incorporation in and of itself excludes the possibility of any additional governments, except governments and their officials acting as agents of the national government, that is, unless statehood is bestowed upon the territory.

[27]It is a general rule of public law, recognized and acted on by the United States, that whenever political jurisdiction and legislative authority



over any territory are transferred from one nation or sovereign to another, the municipal or domestic laws of the country continue in force until abrogated or changed (Does incorporation bring about the abrogation?) by the new government or sovereign. For a substantiation of this assertion see the earlier portions of this study. Also Downes v. Bidwell, 182 U.S. 244 (1901).

[28]197 U.S. 516 (1905).

[29]Rasmussen v. United States, 197 U.S. 516, 519 (1905).

[30]Ibid., pp. 519, 525.

[31]Ibid., pp. 525-526 (1905).

[32]Downes v. Bidwell, 182 U.S. 244, 271 (1901). In this case the court wrote: "where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith." And see Thompson v. Utah, 170 U.S. 343 (1898); Springville v. Thomas, 166 U.S. 707 (1897); American Pub. Co. v. Fisher, 166 U.S. 464 (1897).

[33]Balzac v. Porto Rico, 258 U.S. 298, 306-307 (1922), is the most forthright in this relationship. The court wrote in this decision: If Congress "intended to incorporate Porto Rico into the Union by this act, which would ex proprio vigore make applicable the whole Bill of Rights of the Constitution to the Island, why was it thought necessary to create for it a Bill of Rights and carefully exclude trial by jury? In the very forefront of the act is this substitute for incorporation and application of the Bill of Rights of the Constitution."

[34]195 U.S. 138, 142 (1904).

[35]See Downes v. Bidwell, 182 U.S. 244 (1901), and cases therein cited.

[36]Dorr v. United States, 195 U.S. 138, 142 (1904).

[37]60 U.S. 393 (1856).

[38]Dred Scott v. Sandford, 60 U.S. 393, 614 (1856).

[39]Ibid., p. 446.

[40]136 U.S. 1 (1890).

[41]Ibid., p. 44.

[42]182 U.S. 244, 268 (1901).

[43]Ibid., pp. 290-291.

[44]354 U.S. 1 (1957).

[45]United States Constitution, Art. I, sec. 8, cl. 14.

[46]For lower federal courts which hew to a similar theory see: In Arroyo v. Puerto Rico Transp. Authority, 164 F.2d 748, 750 (1947), the court wrote: "the due process clause of the Fifth Amendment is applicable ex proprio vigore to Puerto Rico." See also Thornberg v. Jorgensen, 60 F.2d 471, 473 (1932), where the court ruled that the federal constitutional provisions prohibiting impairment of contract (Const. Art. I, sec. 10), and requiring due process (Const. Amend. 5), extend to outlying territories, in this case the Virgin Islands. And see also United States ex rel. Lequillou v. Davis, 115 F. Supp. 392, revd. on oth. grds., 212 F.2d 681 (1954).

[47]Balzac v. Porto Rico, 258 U.S. 298 (1922); Territory of Alaska v. Troy, Collector of Customs for the District of Alaska, 258 U.S. 101, 110 (1922). The court wrote in the latter case: "Alaska has been incorporated into and is part of the United States, and the Constitution, so far as applicable, is controlling upon Congress when legislating in respect thereto." See also Rassmussen v. United States, 197 U.S. 516, 525 (1905), where the court writes: "the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit . . . ."

[48]Laguana v. Ansell, D.C. Guam, 102 F. Supp. 919, affd., C.A. 212 F.2d 207, cer. den. 348 U.S. 830 (1954); Govt. of Guam v. Hatchett, 212 F. 2d 767, cer. dism. 348 U.S. 801 (1955).

[49]258 U.S. 298 (1922). See also Dorr v. United States, 195 U.S. 138, 143 (1904); Dowdell v. United States, 221 U.S. 325, 332 (1911); Rassmussen v. United States, 197 U.S. 516, 520, 535 (1905); Kinsella v. Krueger, 351 U.S. 470, 474 (1956). And the majority opinion written by Mr. Justice White in Downes v. Bidwell, 182 U.S. 244 (1901).

[50]Ibid., p. 306.

[51]Notice that the phrase "and its agents" has been used. This phrase leads to the question: Are tribal governments considered to be agents of the national government? If they are, then they like the national government are



restrained in their actions by the federal Bill of Rights, that is, provided Indians and Indian territory within state limits are not ruled to fall under state jurisdiction. This question will be deferred for later discussion.

[52]354 U.S. 1 (1957).

[53]Reid v. Covert, 354 U.S. 1, 5-6 (1957).

[54]Ibid., pp. 8-9. See, e.g., "Balzac v. Porto Rico, 258 U.S. 298, 312-313 (Due Process of Law); Downes v. Bidwell, 182 U.S. 244, 277 (First Amendment, Prohibition against Ex Post Facto Laws or Bills of Attainder); Mitchell v. Harmony, 13 How. 115, 134 (Just Compensation Clause of the Fifth Amendment); Best v. United States, 184 F.2d 131, 138 (Fourth Amendment); Eisentrager v. Forrestal, 84 U.S. App. D.C. 396, 174 F.2d 961 (Right to Habeas Corpus), rev'd on other grounds sub nom. Johnson v. Eisentrager, 339 U.S. 763; Turney v. United States, 126 Ct. Cl. 202, 115 F. Supp. 457, 464 (Just Compensation Clause of the Fifth Amendment)."

[55]Ibid., pp. 8-9; "Dorr v. United States, 195 U.S. 138, 144-148."

[56]Ibid., pp. 12-14; "Downes v. Bidwell, 182 U.S. 244; Hawaii v. Mankichi, 190 U.S. 197; Dorr v. United States, 195 U.S. 138; Balzac v. Porto Rico, 258 U.S. 298."

[57]Ibid.; "Downes v. Bidwell, 182 U.S. 244, the first of the 'Insular Cases' was decided over vigorous dissents from Mr. Chief Justice Fuller, joined by Justices Harlan, Brewer, and Peckham, and from Mr. Justice Harlan separately. The four dissenters took the position that all the restraint of the Bill of Rights and of other parts of the Constitution were applicable to the United States Government wherever it acted. This was the position which the Court had consistently followed prior to the 'Insular Cases.' See, e.g., Thompson v. Utah, 170 U.S. 343; Callan v. Wilson, 127 U.S. 540."

[58]Ibid.; "Later the Court held that once a territory becomes 'incorporated' all of the constitutional protections become 'applicable.' See, e.g., Rassmussen v. United States, 197 U.S. 516, 520-21."

[59]Ibid.

[60]Ibid., pp. 32-33.

[61]Ibid., p. 53.

[62]361 U.S. 234 (1960).

[63]Kinsella v. Singleton, 361 U.S. 234, 249 (1960).

[64]Ibid., U.S. 258 (1960).

[65]Ibid., p. 261.



CHAPTER VIII

# CRIMINAL PROCEDURAL RIGHTS OF INDIANS UNDER STATE JURISDICTION: THE APPLICATION OF THE FEDERAL BILL OF RIGHTS TO THE STATES

This chapter will be concerned with the historical and contemporary application of the federal Bill of Rights to the states. It is evident that an extensive and thorough analysis of this problem would require much more time and effort than can be devoted in this study; therefore, an attempt will be made to summarize only the general characteristics and trends, leaving a delineation of specific details to some future scholar.[1] The purpose of this chapter will have been attained if the reader gains a general understanding of the criminal procedural guarantees an Indian would be entitled if he were subjected to state jurisdiction.

The seeds of controversy which have been associated with the federal Bill of Rights were sown early in our history. With the Declaration of Independence, the tie that bound the colonies to the British Crown was soon to be severed. In short, existing and potential uniformity, even the formal framework for attaining uniformity, was given a severe wrench. Some of the results of this wrench, especially in terms of the criminal procedural protections an individual is entitled, can be seen in Barron v. Baltimore.[2] This case presented the question of the application of a provision of the federal Bill of Rights to a state. In the process of making street improvements, the City of Baltimore destroyed the commercial use of a wharf. Subsequently, Barron, the owner of the wharf, sought damages from the City of Baltimore. The owner's request was upheld in the Baltimore County Court, and the City appealed. On appeal the Maryland Court of Appeals reversed and held that the owner was entitled to no awards of damage. The wharf owner thereupon appealed to the United States Supreme Court where he contended that the Maryland judgment violated that provision of the Fifth Amendment which reads: "nor shall private property be taken for public use, without just compensation." That provision, Barron argued, being in favor of the liberty of the citizen, should be so construed as to restrain the legislative power of a state (and thus the City of Baltimore), as well as that of the United States.

Chief Justice Marshall asserted that the argument was "not of much difficulty." The Bill of Rights, he said, do not apply to state action, but only

to national. The federal Constitution, Marshall wrote,

> . . . was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on powers, if expressed in general terms, are naturally and, we think, necessarily applicable to the government created by that instrument. They are limitations of power granted in the instrument itself; not of distinct governments formed by different persons and for different purposes.[3]

By a long series of decisions, the argument which hews to the idea that the federal Bill of Rights was intended to be applied to the states, as well as the national government, has been consistently rejected.[4] The court has as late as 1958 reaffirmed the Barron decision in Knapp v. Schweitzer.[5] The questions raised in this decision were (1) whether the national government may, or still more precisely, whether the national government and its agents "can" use the state governments and their agents to circumvent the Bill of Rights protections, and (2) whether federal Bill of Rights guarantees apply directly to the states. In this decision the court writes:

> Petitioner does not claim that his conviction of contempt for refusal to answer questions put to him in a state proceeding deprived him of liberty or property without due process of law in violation of the Fourteenth Amendment; that such a claim is without merit was settled in Twining v. New Jersey, 211 U.S. 78. His contention is, rather, that, because the Congress of the United States has in the exercise of its constitutional powers made certain conduct unlawful, the Fifth Amendment gives him the privilege, which he can assert against either a State or the National Government, against giving testimony that might tend to implicate him in a violation of the federal Act . . . .
>
> The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation.
>
> The choice of this form of federal arrangement was the product of a jealous concern lest federal power encroach upon the proper domain of the States and upon the rights of the people. It was the jealous concern that led to the restrictions on the National Government expressed by the first ten amendments, colloquially known as the Bill of Rights. These provisions are deeply concerned with procedural safeguards



> pertaining to criminal justice within the restricted area of federal jurisdiction. They are not restrictions upon the vast domain of criminal law that belongs exclusively to the States . . . . Plainly enough the limitations arising from the manner in which the federal powers were granted were limitations on the Federal Government, not on the States. The Bill of Rights that Madison sponsored because others anxiously desired that these limitations be made explicit patently was likewise limited to the Federal Government . . . .[6]

The foregoing paragraphs give one a limited insight to the ubiquitous demand for national protection against alleged abuses of state power. Another dimension to this demand became especially important after the Civil War. During this period the former confederate states were charged with having denied freedmen the protections for life, liberty, and property tendered whites under state constitutions and laws. In an attempt to rectify this denial the United States Congress passed legislation which was thought to be doubtful constitutionally. This doubt eventually led to the proposal and ratification of the Fourteenth Amendment. And the Fourteenth Amendment raised anew the question as to whether the provisions of the federal Bill of Rights were thereby made applicable to the states. The first section of the Fourteenth Amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first case to interpret the Fourteenth Amendment did not present the question of the application of a specific guarantee of the federal Bill of Rights to the states. It is an interesting conjecture, however, whether state power would have been vindicated had such been the case. This decision, known as the Slaughter-House Cases,[7] involved the constitutionality of a Louisiana statute which had the effect of destroying the business of certain New Orleans butchers by conferring a monopoly of the business of slaughtering cattle on a single corporation. The plaintiffs claimed that they were denied one of the "privileges or immunities of citizens of the United States" protected from state abridgment by the Fourteenth Amendment. The court ruled by a 5-4 decision that whatever privileges or immunities were included the privilege of following the butcher calling was not one of them. This privilege, said the court, is a privilege of state (not United States) citizenship. Thus the prohibition of the calling by Louisiana was therefore inoffensive to the privileges and immunities clause of the Fourteenth Amendment. If state prohibition of the butcher calling failed to abridge the privileges and immunities clause of the Fourteenth Amendment, how about state abridgment of the federal Bill of Rights protections? Are the federal Bill of Rights guarantees protected privileges and immunities which the states are forbidden to abridge? The United

State Supreme Court was soon to answer these questions in the negative.

In case after case, beginning with Walker v. Sauvinet (each case presenting the question as to a different protection),[8] the court held that the protections of the federal Bill of Rights are not among "the privileges or immunities of citizens of the United States." The process seems to have been completed in a series of cases decided from 1887 to 1908 in which the court time and time again rejected efforts to persuade it that the federal Bill of Rights protections in their entirety came within the protected privileges or immunities.[9]

The foregoing thoughts have been primarily concerned with the "incorporation theory," that is, the theory that the Fourteenth Amendment was intended to make all of the federal Bill of Rights protections applicable to the states.[10] This view was early expressed in O'Neil v. Vermont by Justices Harlan, Brewer, and Field. It was also espoused in 1947 by Justice Black (along with Justice Douglas) in his famous dissent in Adamson v. California.[11] Justice Black argues in this dissent that in the earlier cases the Court fell into the error of failing to consult the history of the Fourteenth Amendment. He reasons that the framers of the Fourteenth Amendment intended to incorporate the federal Bill of Rights protections within its provisions. He writes:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.[12]

Two other justices (Murphy and Rutledge) in the Adamson case shared this view, but stated that they would go even further than Justices Black and Douglas. Their reasoning is as follows:

> I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision of the Bill of Rights.[13]



It should be noted that the incorporation theory as expressed in the above opinions has failed to command the support of a majority of the court.

The rejection of the above "incorporation theory," along with a discarding, at least temporarily, of the privileges and immunities clause, has not closed every door in the Fourteenth Amendment for extending the federal Bill of Rights protections to the states. The court has shown both a willingness and a reluctance to open a door through the due process clause. During the last thirty-eight years especially, the court has opened the door to admit some of the federal list. Moreover, the court has failed (intentionally and/or otherwise) to find a terminus door stop. True, it has been argued that the application to the states of a Bill of Rights protection is not made "because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."[14] In other words, there is an insistence, other than the "incorporation theory," that the due process clause of the Fourteenth Amendment is infused with "an independent potency" not resting upon the Bill of Rights.[15] However, following this vein of reasoning, it should be noted that the language of the two due process clauses (Fifth and Fourteenth Amendments) are identical. Thus, it could reasonably be argued that certain provisions of the federal Bill of Rights are surplusage, that is, unless one assumes that the due process clauses are infused with different independent potencies.

A third process for applying the Bill of Rights protections against the states has been explained by Mr. Justice Cardozo. In 1937 he described a process whereby the court had applied certain Bill of Rights protections against the states. In this year he wrote that certain Bill of Rights protections "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . . [T]he process of absorption has had its source in the belief that neither liberty nor justice would exist if [those protections] were sacrificed."[16] The criteria by which judgments have been rendered in the past, i.e., as to which Bill of Rights protections should be applied to the states, or conversely, which should not, are neither precise nor definitive. The court early gave a hint as to the elusiveness of the "incorporation," "absorption," and "independent potency" processes. In Twining v. New Jersey the court wrote: "Few phrases of the law are so elusive of exact apprehension as [due process of law]. This court has aways declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."[17]

Historically, considerations of our federal structure of government have proved to be a real obstacle to the free application of either the

"absorption" and/or the "independent potency" processes. Decisions rejecting a uniform application of the Bill of Rights protections to both the state and national governments have usually turned on whether a uniform application would be inconsistent with "the full power of the state to order its own affairs and govern its own people . . . ."[18] Where this challenge has been successfully met, the court has said of that specific Bill of Rights protection that it is "of the very essence of the scheme of ordered liberty,"[19] or that it is included among "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"[20] or that it is among those personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[21]

How many of the specifics of the federal Bill of Rights have been held to be absorbed and/or incorporated by the due process clause of the Fourteenth Amendment? Or possibly more precisely,[22] how many have been applied to the states because of the "independent potency" of this clause.

By one or more of the above tests all of the protections of the First Amendment have been held to apply to state governments and their agents. This constitutional about-face has taken place in a series of decisions handed down over the last thirty-eight years. As recently as 1922 the United States Supreme Court held in Prudential Ins. Co. v. Cheek: "But, as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' or the 'liberty of silence.'"[23] Beginning in 1925,[24] the court in several decisions has extended against state action the First Amendment's protections for religion,[25] speech,[26] press,[27] assembly,[28] and petition.[29] Occasionally, members of the Supreme Court have suggested that certain protections of the First Amendment may be secured by the Fourteenth Amendment less broadly than they are secured by the First,[30] but these suggestions have never persuaded a substantial minority of the court.

Besides application of the First Amendment protections against the states, only four other specific protections of the federal Bill of Rights have been held to restrain state action. The due process clause of the Fourteenth Amendment has been held to apply to the states the Fifth Amendment's requirement that "just compensation" shall be paid for private property taken for public use. In Chicago, B. & O. R. Co. v. Chicago[31] the court ruled: "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment . . . ." It is intriguing to note that the court in this case imposes on the states, though through the Fourteenth Amendment, the very Fifth Amendment



protection that Marshall in Barron v. Baltimore held did not apply.

Another protection of the federal Bill of Rights which has been applied to the states via the Fourteenth Amendment due process clause is the Sixth Amendment's requirement that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In Gideon v. Wainwright[32] petitioner Gideon was convicted and sentenced to serve five years imprisonment for having broken and entered a poolroom with intent to commit a misdemeanor. In disapproval of the conviction and sentence Gideon petitioned, in forma pauperis, the United States Supreme Court for a writ of habeas corpus alleging that a state court had denied him the Sixth Amendment's protection (assistance of counsel) in violation of the Fourteenth Amendment. In response to Gideon's plea, the court (Mr. Justice Black delivering the opinion) held that the Sixth Amendment to the federal Constitution is made obligatory on the states by the Fourteenth Amendment. The court's exact language reads:

> We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.[33]

A third protection of the federal Bill of Rights which has been applied to the states by the due process clause of the Fourteen Amendment is the Eighth Amendment's requirement that "cruel and unusual punishments" shall not be inflicted. In Robinson v. California[34] a California statute had made it a criminal offense for a person to "be addicted to the use of narcotics." Under this statutory provision appellant Robinson was convicted. He thereupon petitioned the United States Supreme Court for a review alleging that the statute is repugnant to the Fourteenth Amendment of the United States Constitution. In an opinion by Justice Stewart the court held that the California statute inflicted a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The court's language reads:

> [I]n the light of contemporary human knowledge, a law which made a criminal offense of [narcotic addiction] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments . . . .
>
> We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.[35]

Finally, the Fourteenth Amendment due process clause applies to the states the Fourth Amendment's protection against unreasonable searches and seizures. After holding as recently as 1914 that the Fourth Amendment was not directed against state officials,[36] the court in Wolf v. Colorado held that "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[37]

The foregoing analysis exhausts the applications of the various federal Bill of Rights protections against the states and their agents via the Fourteenth Amendment. The considerations of federalism have thus far overridden the arguments in favor of further extension of the federal Bill of Rights protections. It may seem peculiar that some of the federal Bill of Rights protections should not be regarded as among "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[38] Whatever the peculiarity, a series of cases has delineated many provisions of the Bill of Rights which are not applicable, via the Fourteenth Amendment, against the states by the "absorption," the "incorporation," or the "independent potency" processes.

The second Amendment (regarding the right to bear arms), for all practical purposes, does not bind the states. The court held in Presser v. Illinois[39] that:

> The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government . . . .
>
> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security.

No decision has been located concerning interpretation and application of the Third Amendment, an amendment which provides certain protections against governmental quartering of troops.

The protections of the Fifth Amendment (grand gury indictment,[40] double jeopardy,[41] and self-incrimination[42]) do not apply to state action. This is not to say, however, that the Fourteenth Amendment is not made effective against the states by the "independent potency" of its due process clause. The



"independent potency" of the Fourteenth Amendment due process clause established a uniform standard among the states though somewhat less stringent than the standards of the above provisions of the Fifth Amendment.

That the protections of the Seventh Amendment regarding jury trials in civil cases[43] and of the Eighth Amendment regarding excessive bail and/or fines and cruel and unusual punishment[44] do not apply to the states seem well settled.

And lastly, the Ninth and Tenth Amendments, being reservations for the benefit of the states and/or the people, have apparently given no occasion for raising the question whether they are made applicable against the states by the Fourteenth Amendment.[45]

By way of articulating the foregoing presentation, one can conclude that it becomes necessary for the court to determine, whenever a particular protection enumerated in the federal Bill of Rights is claimed as constitutionally protected against state infringement, whether that protection is sufficently basic and important to be considered "of the very essence of the scheme of ordered liberty," or that it is included among "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," or that it is among those personal immunities "so rooted in the traditional and conscience of our people as to be ranked as fundamental."

The foregoing analysis has been concerned with: (1) the extent to which the federal Bill of Rights protections have been extended directly or indirectly (Fourteenth Amendment) to the states, and (2) the processes and criteria by which these protections "have" or "may" be applied, notably through the Fourteenth Amendment due process and privileges and immunities clauses.

Conspicuous by absence from the foregoing presentation and conclusions is an analysis of the Fourteenth Amendment's equal protection clause, that is, in terms of making applicable to the states specific Bill of Rights protections. One would assume on a first reading of this clause, and in the light of what has already been said, that it has little if any relevance to the topic under analysis. However as will be perceived, it too is implicated. For a state cannot, consistently with the federal Constitution, deny a citizen accused of crime the right to the assistance of counsel, if he can afford to pay his lawyer.[46] This raises a question: What about a state's obligation under the equal protection clause to provide counsel for the indigent, ignorant, and mentally ill? Justice Douglas, although speaking of the "independent potency" of the Fourteenth Amendment due process clause, vividly portrays the inextricable association between the due process clause and the equal protection

clause. He writes in a concurring opinion, an opinion to which Justice Brennan agrees, that,

> The result of our decisions is to refuse a State the power to force a person into a criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant to due process. The need of counsel is the same, whatever the economic status of the accused. If due process requires that a rich man who wants a lawyer be allowed the opportunity to obtain one before he is tried, why should not due process give the same protection to the accused who is indigent? Even penniless vagrants are at times caught in a tangle of laws that only an astute lawyer can resolve, as our decisions show.[47]

And to demonstrate that Justice Douglas' rationale in McNeal v. Culver has important constitutional ramifications in terms of the Fourteenth Amendment's equal protection clause, the reader is directed to an earlier case. In Griffin v. Illinois[48] the court held that a state may violate the due process and equal protection clauses if the state fails at its expense to provide a convicted indigent defendant with a transcript of the trial proceedings for purposes of appeal.

In conclusion and in response to the indefiniteness associated with the processes and criteria utilized by the court for applying the Bill of Rights protections to the states, one is reminded of comparable indefiniteness associated with early (and even current) equity law. That is to say, equity relief was said to be as variable as the length of the chancellor's foot.

## FOOTNOTES

[1]For a few of the more informative works already completed in this area see David Whittingham's article "The Bill of Rights: A Limitation on The Several States or the Federal Government?" 2 William and Mary L. Rev. 437-474 (1960); William Winslow Crosskey's book Politics and The Constitution in The History of the United States, Vol. I, 1953, pp. 1049-1118; Charles Fairman's article "Does the Fourteenth Amendment Incorporate The Bill of Rights?" 2 Stan. L. Rev. 5-139 (1949); Stanley Morrison's article "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 140-173 (1949); Charles Warren's article "The New 'Liberty' Under the Fourteenth Amendment," 39 Harv. L. Rev. 431-465 (1926); Horace E. Flack's book "The Adoption of the Fourteenth Amendment, 1908, p. 285.



[2]32 U.S. 243 (1833).

[3]Barron v. Baltimore, 32 U.S. 243, 247 (1833).

[4]By 1900 the applicability of the Bill of Rights to the states had been rejected in cases involving claims based on virtually every provision in the first eight amendments. See, e.g., Amendment 1: Permoli v. New Orleans, 3 How. 589, 609 (free exercise of religion), (1845); United States v. Cruikshank, 92 U.S. 542, 552 (right to assemble and petition the government), (1875); Amendment 2: United States v. Cruikshank, supra, at 553 (right to keep and bear arms); Amendment 4: Smith v. Maryland, 18 How. 71, 76 (no warrant except on probable cause), (1855); Spies v. Illinois, 123 U.S. 131, 166 (security against unreasonable searches and seizures), (1887); Amendment 5: Barron v. Baltimore, 7 Pet. 243, 247 (taking without just compensation), (1833); Fox v. Ohio, 5 How. 410, 434 (former jeopardy), (1847); Twitchell v. Pennsylvania, 7 Wall. 321, 325-327 (deprivation of life without due process of law), (1868); Spies v. Illinois, supra, at 166 (compulsory self-incrimination); Eilenbecker v. Plymouth County, 134 U.S. 31, 34-35 (presentment of indictment by grand jury), (1890); Amendment 6: Twitchell v. Pennsylvania, supra, at 325-327 (right to be informed of nature and cause of accusation); Spies v. Illinois, supra, at 166 (speedy and public trial by impartial jury); in re Sawyer, 124 U.S. 200, 219 (compulsory process), (1888); Eilenbecker v. Plymouth County, supra, at 34-35 (confrontation of witnesses); Amendment 7: Livingston's Lessee v. Moore, 7 Pet. 469, 551-552 (right to trial in civil cases), (1833); Justices v. Murry, 9 Wall, 274, 278 (re-examination of facts tried by jury), (1869); Amendment 8: Pervear v. Massachusetts, 5 Wall. 475, 479-480 (excessive fines, cruel and unusual punishments), (1866). For an article which develops this history see Charles Warren's "The New 'Liberty' Under the Fourteenth Amendment," 39 Harv. L. Rev. 431-465, (1926). And for early state decisions, that is, prior to Barron v. Baltimore, see Territory of Orleans v. Hattick, 2 Martin's Reports 87 (1811); Benthorp v. Bourg, 4 Martin's Reports 97 (1816); Maurin v. Goodwin, 5 Martin's reports 432 (1818); People v. Goodwin, 18 Jonson's Reports 187 (1820); Barker v. The People, 3 Cowen's Reports 686 (1824); Linvingston v. City of New York, 8 Wendell's Reports 85 (1831); Murphy v. The People, 2 Cowen's Reports 815 (1824); In re Smith, 10 Wendell's Reports 449 (1833); State v. Moore, 1 Mississippi (Walker's Reports) 134 (1823); Reed v. Rice, 2 J.J. Marshall 44 (1829); James v. The Commonwealth, 12 Sergeant and Rawle's Reports 220 (1825); Huntington v. Bishop, 5 Vt. 182 (1832).

[5]357 U.S. 371 (1958).

[6]Knapp v. Schweitzer, 357 U.S. 371, 374-378 (1958). And the Schweitzer decision has been cited with approval as late as 1961 in Cohen v. Hurley, 366 U.S. 117, 118, 129.

[7] 83 U.S. 36 (1872).

[8] 92 U.S. 90 (1875); United States v. Cruikshank, 92 U.S. 542 (1875); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252, 263-268 (1886).

[9] In re Kemmler, 136 U.S. 436, 448 (1890); McElvanine v. [illegible]ish, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323, 332 (1892); Maxwell v. Dow, 176 U.S. 581 (1900); Twining v. New Jersey, 211 U.S. 78 (1908); and Spies v. Illinois, 123 U.S. 131 (1887). See also Stanley Morrison's article "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 140-173 (1949).

[10] 144 U.S. 323, 337, 366 (1892).

[11] 322 U.S. 46, 68 (1947). See also Mr. Justice Black's article "The Bill of Rights," 35 N.Y.U.L. Rev. 865-881 (1960).

[12] Adamson v. California, 332 U.S. 46, 48, 68, 71-72 (1947). For contrary views see the findings of Charles Fairman in his article "Does the Fourteenth Amendment Incorporate The Bill of Rights?" 2 Stan. L. Rev. 5-139 (1949). Also Horace E. Flack's book The Adoption of the Fourteenth Amendment, 1908, p. 285.

[13] Ibid., p. 124.

[14] Twining v. New Jersey, 211 U.S. 78, 99 (1908).

[15] Adamson v. California, 332 U.S. 46,66 (concurring opinion by Justice Frankfurter), 1947.

[16] Palko v. Connecticut, 302 U.S. 319, 326 (1937).

[17] 211 U.S. 78, 99-100 (19[illegible]8).

[18] Twining v. New Jersey, 211 U.S. 78, 106 (1908).

[19] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[20] Hurtado v. California, 110 U.S. 516, 535 (1884).

[21] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).



[22] One can reasonably argue that both the absorption and incorporation theories have been permanently laid to rest. For a recent decision which gives credence to this rationale see Knapp v. Schweitzer, 357 U.S. 371 (1958). The language of this decision was quoted early in this chapter.

[23] 259 U.S. 530, 543 (1922).

[24] The court through strongly worded dictum wrote in Gitlow v. New York, 268 U.S. 652, 666, that "For present purposes we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

[25] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The court held: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

[26] West Virginia State Board of Ed. v. Barnett, 319 U.S. 624, 633 (1943). The court held: "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of a kind the State is empower to prevent and punish."

[27] Near v. Minnesota, 283 U.S. 697, 707 (1931). The court held: "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

[28] Dejonge v. Oregon, 299 U.S. 353, 364 (1937). The court held: "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution . . . . The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental . . . . The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions--principles which the Fourteenth Amendment embodies in the general terms of its due process clause."

[29]Bridges v. California, 314 U.S. 252, 277 (1941). The court held: "Indeed, the Supreme Court of California recognized that, publication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States Government, a right protected by the First Amendment." See also Edward Dumbould's book The Bill of Rights and What it Means Today, 1957, pp. 133-135. Mr. Dumbould presents a very informative analysis of what he refers to as the incorporation of the First Amendment into the Fourteenth.

[30]In Beauharnais v. Illinois, 343 U.S. 250, 288 (1952), Mr. Justice Jackson wrote in a dissent: "The assumption of other dissents is that the 'liberty' which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the literal and identical 'freedom of speech or of the press' which the First Amendment forbids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not 'incorporate' the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not." See also Roth v. United States, 354 U.S. 476, 505-506 (separate opinion of Justice Harlan), (1957); Smith v. California, 361 U.S. 147, 169 (separate opinion of Justice Harlan), (1959).

[31]166 U.S. 226, 241 (1896). One of the more recent decisions in this relationship is Griggs v. Allegheny County, 7 L. ed. 2d 585-586 (1962). In this decision the court held that the "noise, vibrations, and fear caused to the occupants of a house located near a county airport by constant and extremely low overflights interfere with the use of the owner's property so as to amount to a 'taking' in the constitutional sense, of an air easement for which compensation must be made."

[32]9 L. ed. 2d 799 (1963).

[33]Gideon v. Wainwright, 9 L. ed. 2d 799, 804 (1963).

[34]370 U.S. 660 (1961).

[35]Ibid., pp. 666-667.

[36]Weeks v. United States, 232 U.S. 383, 398 (1914). The court held in this decision: "As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies."

[37]Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). As recently as June of 1961 the court reaffirmed the Wolf principle in Mapp v. Ohio, 367 U.S. 643, 655. The court's language reads: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." See also Justice Black's concurring opinion (Justice Douglas agreeing) to Marcus v. Search Warrant, 367 U.S. 717, 738 (1961). He writes: "It is my view that the Fourteenth Amendment makes the Fourth Amendment applicable to the States to the full extent of its terms, just as it applies to the Federal Government."

[38]See Charles Warren's article "The New 'Liberty' Under the Fourteenth Amendment," 89 Harv. L. Rev. 431-465 (1926), for an exploitation of this peculiarity.

[39]116 U.S. 252, 265 (1886).

[40]In Hurtado v. California, 110 U.S. 516, 538 (1884), the court held: "we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceedings by information . . . is not due process of law." See also Gains v. Washington, 277 U.S. 81, 86 (1928).

[41]In Palko v. Connecticut, 302 U.S. 319, 328 (1937), the court held: "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? Herbert v. Louisiana, supra. The answer surely must be 'no'."

[42]The court held in Adamson v. California, 332 U.S. 46, 53-54 (1947), that "We reaffirm the conclusion of the Twining and Palko cases that protection against self-incrimination is not a privilege or immunity of national citizenship . . . . [Secondly], the due process clause does not protect . . . the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment."

[43]See Walker v. Sauvinet, 92 U.S. 90, 92 (1875), where the court ruled: "A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge." And see also Hawkins v. Bleakly, 243 U.S. 210, 216 (1917). In this case the court held: "Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth

Amendment."

[44]See In re Kemmler, 136 U.S. 436, 446 (1890), where the court held: "It is not contended, as it could not be, that the Eighth Amendment was intended to apply to the States . . . ."

[45]See Bennett B. Patterson, The Forgotten Ninth Amendment, 1955, pp. 41-42, where he argues that "unenumerated" natural rights recognized by the Ninth Amendment must be protected against state and national governments alike.

[46]See Chandler v. Fretag, 348 U.S. 3, 9 (1954), where the court held: "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified." See also Powell v. Alabama, 287 U.S. 45, 68-69 (1932). In this case the court held that "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

[47]McNeal v. Culver, 365 U.S. 109, 118 (1961).

[48]351 U.S. 12, 17-19 (1956). In this decision the court wrote: "Both equal protection and due process emphasize the central aim of our entire judicial system--all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court . . . .' Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. . . ."



## CHAPTER IX

## JURISDICTION OF COURTS AND CONSTITUTIONAL STATUS OF INDIANS AND INDIAN GOVERNMENTS

From the foregoing chapters, one senses that the Indians' right of self-government is a right which has been--though grudgingly and at times by ignorance--persistently considered by writers, the United States Supreme Court, the national Congress, and federal administrators. The most basic of all Indian rights, it represents what might be appropriately referred to as the Indians' last defense against national bureaucratic and state governance. It represents a last defense, or at least a collectivist form of defense, because the states have been given by legislative and judicial pronouncements (continually and persistently) increased authority over Indians and Indian territory, and because the United States Congress is increasingly occupied in the political forum with more pressing national and international affairs. The domestic relations of members of Indian tribes within this loose framework are subject to the jurisdiction and laws (unwritten and written) of the tribes. And further, the findings of this study make it clear that federal criminal legislation on the subject of Indian domestic relations has tended to cover only a few particulars.

One of the earlier and well-articulated descriptions of the doctrine of tribal self-government was penned by Mr. Justice Van Devanter in the case of United States v. Quiver.[1] This case was initiated through a federal prosecution for adultery in the United States District Court for South Dakota. Both individuals involved were Sioux Indians and the offense was alleged to have been committed on one of the Sioux reservations. The prosecution was authorized on the theory that Congress by section 3 of the statute of March 3, 1887,[2] had terminated the original tribal control over Indian domestic relations. The issue was: did this statute, which applied to all areas within the exclusive jurisdiction of Congress, apply to the conduct of Indians on an Indian reservation? The United States Supreme Court held that it did not.

Because Mr. Justice Van Devanter's description in this case is so illuminating, and because it continues (accords with the above discussed self-government principle) to be representative of current thinking and the law, a relevant portion of it is worth quoting:

At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian Intercourse Acts of May 19, 1779, c. 30, 1 Stat. 469, and of March, 1802, c. 13, 2 Stat. 139, provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other; and the act of June 30, 1834, c. 161, 25, 4 Stat. 729, 733, while providing that "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country," qualified its action by saying, "the same shall not extend to crimes committed by one Indian against the person or property of another Indian." That provision with its qualification was later carried into the Revised Statutes as 2145 and 2146. This was the situation when this court, in Ex parte Crow Dog, 109 U.S. 556, held that the murder of an Indian by another Indian on an Indian reservation was not punishable under the laws of the United States and could be dealt with only according to the laws of the tribe. The first change came when, by the act of March 3, 1885, c. 341, 9, 23 Stat. 362, 385, now 328 of the Penal Code, Congress provided for the punishment of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny when committed by one Indian against the person or property of another Indian. In other respects the policy remained as before . . . .

We have now referred to all the statutes. There is none dealing with bigamy, polygame, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers.[3]

The rationale for tribal self-government has been premised on a general and international rule of public law that whenever legislative and political jurisdiction over any territory are transferred from one sovereign to another, the municipal laws of the country continue in force until abrogated or changed by the new government or sovereign.[4] Tribal self-government has also received support from the theory that representation in a law making body is a condition to validity of legitimate capacity. Under this theory, a local non-voting group would, ipso facto, be outside legislative reach. More precisely, and in slightly different language, the right of self-government is not something granted to the various Indian tribes by any act of Congress. It is rather an unextinguished and original right.[5] This doctrine of tribal self-government has been applied to an unfolding series of new



problems in scores of cases that have come before the United States Supreme Court and the inferior federal courts. Because of the focus of this study, attention will be centered, with minor and interrelated exceptions, on one problem area--the extent of tribal self-government in the area of criminal procedural law.

The extent and conclusiveness of this unextinguished and original right (especially as it relates to the criminal procedural protections of the federal Bill of Rights) was put to a decisive test in the case of Talton v. Mayes.[6] This case raised the question as to whether the self-government powers of the Cherokee tribe (powers which as the court noted were not derived from treaties of the United States or from statutes enacted by Congress) are subject to the limitations which the United States Constitution imposes on the national government, the state governments and their agents. The defendant in this case was convicted on a charge of murder (committed within Cherokee territory within the State of Arkansas), in a Cherokee court, and sentenced to be hanged. Both the defendant and the victim were Cherokee Indians. The decision turned, inter alia, on the general question: whether the conviction of a murderer in a tribal court was lacking in "due process" for the reason that the person convicted had not been indicted by a grand jury (defendant was indicted by a Cherokee grand jury consisting of only five persons) in the usual manner of common law courts. More specifically, defendant alleged that the Fifth and Fourteenth Amendments apply to purely local tribal legislation, and thus require a grand jury organized in accordance with their provisions. The court in answering defendant's question begins by citing the decision of Barron v. Baltimore.[7] As will be recalled, the court ruled in the Barron v. Baltimore decision that the protections of the federal Bill of Rights are prohibitions on the national government and not the states. Following citation of the Barron ruling, the court observes that the outcome of this case is crucially dependent on whether the powers of government exercised by the Cherokee nation are national powers established by and derived from the Constitution of the United States, "and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this court have long since answered the former question in the negative."[8]

The court next quotes with approval portions of several United States Supreme Court opinions[9] concerned with the extent and scope of Indian self-government and sovereignty. It is interesting, as will be more fully perceived when the court's language is quoted concerning the application of the Fourteenth Amendment to Indian tribes, no note that the court quoted with approval that portion of the Kagama decision (118 U.S. 375, 381)

which held that Indians always have been regarded as having a semi-independent position when "they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the law of the Union, or of the State within whose limits they resided."

Continuing the court rules:

> True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all rights are subject to the supreme legislative authority of the United States. Cherokee Nation v. Kansas Railway Co., 135 U.S. 641, where the ca cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had as sole object to control the powers conferred by the Constitution on the National Government. The fact that the Indian tribes are subject to the dominant authority of Congress, and that their powers of local self government are also operated upon and restrained by the general provisions of the Constitution of the United States, completely answers the argument of inconvenience which was pressed in the discussion at bar. The claim that the finding of an indictment by a grant jury of less than thirteen violates the due process clause of the Fourteenth Amendment is conclusively answered by Hurtado v. California, 110 U.S. 516, and McNutly v. California, 149 U.S. 645.[10]

This was an unanimous decision delivered by Mr. Justice White, except for a dissent by Mr. Justice Harlan to which he wrote no opinion.

As concerns the application of the Fifth Amendment to tribal governments, the court speaks unequivocally; but as to the application of the Fourteenth Amendment, the court seems to be engaging in intellectual circumlocution. If the court intended to follow the Kagama assertion that Indian tribes are not states of the Union, that is, not states of the Union in terms of common parlance and understanding, and thus not restricted by the due process clause of the Fourteenth Amendment which applies only to state action, then why the reference to the state cases of Hurtado and McNulty? Because the court engages in circumlocution in this decision, one must



admit that doubts remain as to the application of the Fourteenth Amendment to tribal actions. These doubts remain because of the following questions: (1) Did the court rule, or intend to rule, that the framers and ratifiers of the Fourteenth Amendment broadened the common parlance and understanding of the word "state" in this instrument to include Indian tribes? or (2) Did the court rule, or intend to rule, that Indian tribes are not states in common and legal parlance, and therefore are not restrained by the provisions of the Fourteenth Amendment? Before further clarification of the application of the Fourteenth Amendment is attempted, it should be made clear that Talton v. Mayes does not necessarily and unequivocally mean that the Indian tribes are in no sense subject to the Constitution of the United States. Early in this study, and re-emphasized in the Talton v. Mayes opinion, it has been noted that the Constitution both explicitly and implicitly refers to the Indians.[11] An intriguing example, and possibly an example with more than a casual relationship to the topic under discussion, of the application of the Constitution to tribal action can be found in In re Sah Quah,[12] a case decided in a federal district court for the district of Alaska. In this decision the court ruled that slavery became absolutely illegal with the passage of the Thirteenth Amendment. The Thirteenth Amendment reads: 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The rule of law of the In re Sah Quah decision was given United States Supreme Court sanction in United States v. Choctaw Nation and the Chickasaw Nation.[13] By this decision the court ruled that the Thirteenth Amendment, from the date of its proclaimed ratification on December 18, 1865, prohibited the existence of slavery within the United States or any place subject to its jurisdiction, and that by the force of that instrument the slaves (persons of African descent) of the Chickasaw Nation became free, and thereafter possessed the same rights incident to all other freedmen (persons of African descent who were now citizens of the United States) relative to life, liberty, and property.

Whether an Indian could claim, as against tribal action, any of the criminal procedural guarantees of the federal Bill of Rights via the "duly convicted" language of the Thirteenth Amendment remains to be seen. The disposition of criminal procedural cases under this clause are sparse.

In the light of the preceding discussion, the question--what restrictions are there upon the administration of tribal criminal justice?--remains partially open. The Talton decision, at least so far as the Fifth Amendment is concerned, and most likely in terms of all of the federal Bill of Rights protections, makes it clear that purely tribal governance is not directly subject to the limitations of the federal Bill of Rights. Concerning the application of the limitations of the Fourteenth Amendment to tribal action, one must admit that there remains an unextinguished penumbra. As a result of this penumbra

a systematic look at the Fourteenth Amendment, associated cases, and studies should be helpful.

The portion of the Fourteenth Amendment which merits our attention is section I. It reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This section merits attention only if it can be shown that it has application either to individual Indians or Indian tribal governments.

Whether the Fourteenth Amendment is applicable to Indians or Indian tribes can be initially resolved by looking at the scope and coverage of that instrument's citizenship provisions. It was early concluded that Indians, though being nationals of the United States, are not United States citizens, notwithstanding the traditional legal doctrine of jus soli. Early thinking concerning the citizenship status of Indians is provided by Caleb Cushing, then Attorney General of the United States. Because Attorney General Cushing's statements preceded a full determination of the citizenship question, either by legislation or adjudication, and because they preceded the formulation and ratification of the Fourteenth Amendment by approximately 12 years, it will be informative to quote from one of his opinions. He writes:

> The fact . . . that Indians are born in the country does not make them citizens of the United States.
>
> The simple truth is plain, that the Indians are the subjects of the United States, and therefore are not, in mere right of home-birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government.
>
> This distinction between citizens proper, that is, the constituent members of the political sovereignty, and subjects of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law. (See Puffendorf, De Jure Nature, lib. vii, cap. ii, s) . . . .
>
> Not being citizens of the United States by mere birth, can they become so by naturalization? Undoubtedly.
>
> But they cannot become citizens by naturalization under existing general acts of Congress. (ii Kent's Com., p. 72)



> Those acts apply only to foreigners, subjects of another allegiance. The Indians are not foreigners, and they are in our allegiance, without being citizens of the United States. Moreover, those acts only apply to "white" men . . . .
>
> Indians, of course, can be made citizens of the United States only by some competent act of the General Government, either a treaty or an act of Congress.[14]

In April, 1870, two years after ratification of the Fourteenth Amendment, the Senate Committee on the Judiciary was instructed by resolution to inquire into and report to the Senate the "effect of the Fourteenth Amendment to the Constitution upon the Indian tribes of the country; and whether by the provisions thereof the Indians are not citizens of the United States, and whether thereby the various treaties heretofore existing between the United States and the various Indian tribes are, or are not annulled."[15] The Committee stated the issue and reported its findings with these statements:

> That in the opinion of your committee the fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States, and does not annul the treaties previously made between them and the United States. The provisions of the amendment material to this question are as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States wherein they reside . . . . Representation shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."
>
> The question is whether the Indians "are subject to the jurisdiction" of the United States, within the meaning of this amendment, and the answer can only be arrived at be determining the status of the Indian tribes at the time the amendment was adopted . . . .
>
> It is worthy of mention that those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, "and subject to the jurisdiction," and that such has been the universal understanding of all our public men since that amendment became a part of the Constitution. And in the opinion of your committee, the second section of the amendment furnishes conclusive evidence of this fact, and settles the question. It provides "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." . . .

During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause "three-fifths of all other persons" is wholly omitted; but the clause "excluding the Indians not taxed" is retained.

The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. They were excluded by the original constitution, and in the same terms are excluded by the amendment from the constituent body, the people . . . .

For these reasons your committee does not hesitate to say that the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the fourteenth amendment, "subject to the jurisdiction" of the United States; and, therefore, that such Indians have not become citizens of the United States by virtue of that amendment.

Fourteen years after submission of the Senate's Committee on the Judiciary report, the legal question as to the application of the citizenship clause of the Fourteenth Amendment to Indians and Indian tribes formally reached the United States Supreme Court in the case of Elk v. Wilkins.[16] In this decision, an action brought by an Indian against the registrar of one of the wards of the City of Omaha for refusing to register him as a qualified voter, the court followed the conclusions and rationale of the Committee on the Judiciary by declaring:

> The persons declared to be citizens are "All persons born or naturalized in the United States and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance . . . .
>
> Indians, born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes, an alien though dependent power, although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the 1st section of the 14th Amendment, than the children of subjects of any foreign government born within the domain of that government; or the children, born within the United States, of ambassadors or other public ministers of foreign nations.[17]



From the foregoing one senses that Indians in their entitlement to United States citizenship stand in a rather peculiar and anomalous position; the court holds that they are not citizens of the United States via the Fourteenth Amendment because they are not "completely" subject to the jurisdiction of the United States, although Indian tribes are "alien" and "dependent" powers.

During our early history they were dealt with as foreign nations, and treaties were made with them in that capacity. Yet, as the result of later developments Congress assumed authority to legislate with regard to them, but as long as they continued to owe allegiance to tribal organizations, or more precisely, as long as Congress refused to provide them with United States citizenship, they were held not to be "subject to the jurisdiction" of the United States so as to make them citizens by birth by force of the Fourteenth Amendment. This was so even though an Indian voluntarily left his tribe and established residence among white citizens in a state and adopted the habits of "civilized" life. In short, the citizenship provisions of the Fourteenth Amendment were not to affect directly either the status of individual Indians or tribal governments.

Yet, even with the immediately preceding conclusion, a thorough analysis of the application of the Fourteenth Amendment to Indians or Indian tribes requires the presentation of the most current lower federal court decisions. These decisions further clarify or redefine, or make an attempt to clarify or redefine, the extent of the direct application of the federal Bill of Rights to tribal action. It is reasonably clear from these decisions that purely tribal action is not directly subject either to the federal Bill of Rights protections or the restraints of any of the Fourteenth Amendment provisions. The first case to add validity to these conclusions is Toledo v. Pueblo de Jemez.[18] In this case some United States citizens and Protestant members of the Pueblo de Jemez community of New Mexico sued in a federal district court alleging that tribal officials had prevented them from building a church, holding church meetings in their homes, burying their dead in the community cemetery, and using the tribal threshing facilities because of their religion, thus abridging their right of religion as protected by the United States Constitution and the Civil Rights Act of 1871.[19] Secondly, they pleaded that New Mexico's incorporation of the Pueblo Tribe had placed the tribal officials under color of state law, thus making tribal action subject to the protections of the Fourteenth Amendment. The court dismissed their pleadings thus:

> At least since the Sandoval decision in 1913, it has been clear that the Pueblos do not derive their governmental powers from the State of New Mexico. It has, indeed, been held that the powers of an Indian tribe do not spring from the United States although they are subject to

the paramount authority of Congress. Talton v. Mayes . . . . Consequently, there is no basis for holding that the conduct of the defendants of which plaintiffs complain was done under color of state, law, statute, ordinance, regulation, custom or usage.[20]

Issues similar to those in the Toledo case have been raised repeatedly. In this respect, four additional cases (cases which represent the law in its current state of development) will suffice to portray the legal relationship of purely tribal action to the guarantees of the federal Bill of Rights and the protections of the Fourteenth Amendment. These cases will be presented in their chronological order.

The first of these four cases is Martinez v. Southern Ute Tribe.[21] The Martinez case turned upon an action to obtain a declaration from a federal district court in Colorado that plaintiff was a member of the Southern Ute Tribe of Indians. Plaintiff was one-half or more degree of Ute Indian blood because she was the daughter of a one John Green who was a full-blooded Indian. Plaintiff had also been a member of the defendant Ute Tribe. She was a member from her birth until 1950 when she was excluded from the reservation and denied tribal rights and privileges. On the basis of these facts, plaintiff alleged that she was denied tribal membership (and resulting tribal rights and privileges) by unlawful acts of the defendant tribal council, and that this denial deprived her of due process of law contrary to the Fifth Amendment to the United States Constitution. In addition to this general pleading, plaintiff alleged tribal membership: (1) because tribal membership in her case was protected by federal statutes--statutes which authorized the Ute Tribe to distribute funds to its members;[22] and (2) because the Secretary of the Interior, under another statute,[23] had included her name on a tribal membership roll. Because the specific facts of the case are important, it should be noted that Congress by statute[24] provided that the Southern Ute Tribe on the Southern Ute Reservation could "organize for its common welfare and to adopt an appropriate constitution and bylaws to be approved by the Secretary of the Interior, who upon petition of a requisite number of Indians could issue a charter of incorporation."[25] In compliance with the above provisions, the Ute Tribe on November 1, 1938, was issued a charter of incorporation. Article II, sections 1, 2, and 3 of the Constitution and Bylaws (charter) of the tribe provided that membership of the Southern Ute Tribe of the Southern Ute Reservation shall consist of the following:

> Section 1. (a) All persons duly enrolled on the 1935 census of the Southern Ute Reservation; provided, That rights of participation shall depend upon the establishment of legal residence upon the reservation;
> (b) All children of members, if such children shall be of 1/2 or more degree of Ute Indian blood.



> Section 2. The Council shall have power to pass ordinances, subject to the approval of the Secretary of the Interior, covering the adoption of new members.
> Section 3. No person shall be adopted into the Southern Ute Tribe unless he is of Indian blood and has resided upon the reservation for a probationary period to be determined by the Council.[26]

In the light of the above facts and provisions, and in response to plaintiff's pleas, the court writes: "to sustain jurisdiction, it must be shown that the right of plaintiff to membership in the defendant tribe, a corporation, is found in or based upon the Constitution, laws or treaties of the United States."[27] In answer to this jurisdictional question, the court rules:

> It is apparent that the . . . right of membership alleged by the plaintiff is not a right created by any constitution, law or treaty of the United States, but by the Constitution of the Southern Ute Tribe which precisely defines the Tribe's membership, and within which defined status the plaintiff, by her complaint alleges her inclusion. Certainly, the Tribe's Constitution cannot be classified as a law or treaty of the United States, and even if the corporate Charter be considered as falling in such category, it does not create any right of membership, but merely recognizes the status of membership as defined in the approved and existing Constitution.[28]

Even if one accepts the doubtful validity of the court's above and general statement that the alleged right of tribal membership is not a right created by any "constitution, law or treaty of the United States," it is not easy to dispose of the connected and crucial idea that the tribal council (via the statutory methods for the attainment of a charter of incorporation, and the charter's provisions) and the Secretary of the Interior represent arms or agencies of the national government to which the Fifth Amendment to the Constitution would apply. The court disposed of this rationale and logic by summarily ruling:

> It is next alleged that the acts of the council members in depriving the plaintiff of her membership in the Tribe was contrary to the due process clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment is, of course, a limitation only on the Federal Government . . . . It was held by the United States Supreme Court in Talton v. Mayes, supra, that the powers of local government exercised by the Cherokee nation are not controlled by the Fifth Amendment to the Constitution. This ruling was made on the ground that the autonomous nature of the Cherokee nation had always been recognized . . . .

As to the autonomy of the defendant Tribe, suffice it to say that by its Charter of Incorporation the Tribe was created a body politic, and in the preamble to its approved Constitution it is set forth, that "We, the Southern Ute Tribe of the Southern Ute Reservation, in Colorado, in order to exercise the rights of self-government, to administer our tribal resources, do ordain and establish this Constitution." From which has been said, it is hardly conceivable that the Tribe's council be deemed a mere arm or agency of the Federal Government to which the Fifth Amendment to the United States Constitution would apply.[29]

Plaintiff and counsel, having rejected the taionale, logic, and ruling of the above district court, petitioned and received an appeal decision from the United States Court of Appeals for the Tenth Circuit on November 15, 1957.[30] The circuit court in disposing of the "agency" rationale, and thus the application of the Fifth Amendment to the tribal council, wrote:

It is . . . clear that the Due Process clause of the Fifth Amendment does not apply to the activities of the tribe or corporation for, although the Interior Department has ruled that for certain purposes Indian tribes are to be regarded as agencies of the federal government (Op. sol. I. D., M. 29156, June 30, 1937; Op. Sol. I.D., M. 27810, December 13, 1934), the doctrine that an Indian tribe is not a federal instrumentality within the various statutory and constitutional restrictions upon federal instrumentalities has not been changed since it was laid down in Talton v. Mayes, supra.

Plaintiff argues, ignoring the purpose of the 1934 Acts to retain the tribal organization through incorporation, that because the corporation is organized under the laws of the United States membership rights are inherently a federal question. Although originally incorporation under federal law was sufficient to invoke the jurisdiction of the federal courts as raising a federal question, see 14 A.L.R. 2d 1017, such an interpretation was effectively curtailed by the enactment of 28 U.S.C.A. 1349: "The District courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." . . . The order of dismissal for want of jurisdiction was proper and the judgment of the trial court is affirmed.[31]

Following affirmation by the circuit court of the district court decision, the plaintiff and counsel petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court denied this petition in 356 U.S. 960 (1958). The Supreme Court denied a second petition by plaintiff and counsel for a rehearing and motion for leave to amend complaint on June 23, 1958.[32]



The second case for presentation is Barta v. Oglala Sioux Tribe of Pine Ridge Reservation.[33] This case represents action brought by the Oglala Sioux Tribe of Indians to recover taxes alleged to be due the tribe. Defendants were lessees of certain tribal trust lands within the Pine Ridge Indian Reservation (home of the Oglala Sioux Tribe of Indians) located within the State of South Dakota. The Oglala Sioux Tribal Council by resolution imposed a license tax on non-members of the tribe leasing trust lands on the reservation. The defendants having refused to pay the tax, the Oglala Sioux Tribe initiated legal action which resulted in a decision in their favor at the federal district court level. The defendants thereupon appealed, alleging, inter alia, that a "tax on the use of Indian trust lands imposed by an Indian tribe on non-members of the tribe violates the Fifth and Fourteenth Amendments to the Constitution."[34]

In answer to the above allegation, the court ruled that the Fourteenth Amendment "places limitations on legislative actions by the states . . . . The Indian tribes are not . . . states and these Constitutional limitations have no application to the actions, legislative in character, by Indian tribes. Neither may the Fifth Amendment be invoked as against any legislative action of the Indian tribes. Talton v. Mayes . . ."[35]

Unhappy with the above decision, the defendants petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court denied this petition in 358 U.S. 932 (1959).

The third case, Native American Church of North America v. Navajo Tribal Council,[36] involves an action to enjoin enforcement of an ordinance adopted by the Navajo Tribal Council making it an offense to introduce a bean known as peyote used by plaintiff church in connection with and as a part of its religious ceremonies. It was alleged by plaintiffs that the Navajo Tribal Council's ordinance was void because it violated both the church's and the members' rights under the First, Fourth and Fifth Amendments to the United States Constitution. In another cause of action, plaintiffs sought damages from Sam Garnez and Joe Duncan. Regarding Garnez, "it was alleged that he entered Shorty Duncan's house where religious ceremonies were being conducted, without a warrant, and thus deprived them of their liberty and right of worship without due process of law." In regard to Joe Duncan, "it was alleged that he, acting as a judge of the Navajo court, denied Duncan the opportunity to secure counsel or to demand a jury trial, found him guilty of violating the ordinance and assessed penalties."[37]

The court, after stating that "In our view, not all of these grounds need to be discussed or considered in arriving at a decision of the case,"[38] wrote:

No case is cited and none has been found where the impact of the First Amendment, with respect to religious freedom and freedom of worship by members of the Indian tribes, has been before the court. In Talton v. Mayes . . . the court held that the Fifth Amendment did not apply to local legislation by the Cherokee nation. In Barta v. Oglala Sioux Tribe of Pine Ridge Reservation . . . the court held that neither the Fifth nor the Fourteenth Amendments had any application to action, legislative in character, of Indian tribes imposing a tax on the use of Indian trust land, and in Toledo v. Pueblo de Jemez . . . the court held that deprivation of religious liberties by tribal government could not be redressed by action under the Civil Rights Act . . .

The First Amendment applies only to Congress. It limits the powers of Congress to interfere with religious freedom or religious worship. It is made applicable to the States only by the Fourteenth Amendment. Thus construed, the First Amendment places limitations upon the action of Congress and of the States. But as decided in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress. No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.[39]

Plaintiffs to this case did not petition the United States Supreme Court for a hearing. Thus, it must remain an interesting conjecture as to whether the Supreme Court would have granted a hearing.

A more recent circuit court decision which follows the ruling of the Native American Church case is Oliver v. Udall.[40] The facts and issues of these two cases are related, but importantly, different. This decision raised a question as to the constitutionality of the Secretary of Interior's approval of a resolution of the Navajo Tribal Council which adopted as a tribal law regulations of the Department of the Interior including an ordinance banning the sale, use, or possession within the Navajo country of the bean known as peyote. Or differently, can the Navajo Tribal Council's action be treated as "federal" action (federal action because of the Secretary's



approval of the tribal resolution), and thus subject to constitutional restrictions? The court's language which is important for the purposes of this study reads:

> Appellants, no doubt, would want us to say with respect to the Secretary's 1959 approval of the Tribal action that the Secretary, in effect, has unlawfully, in violation of appellants' First Amendment rights, prohibited the free exercise of religion by these appellants. But the Secretary has done no more than approve action which the Navajo Tribe was entitled to take . . . .
>
> It is our view that the Secretary's approval of the tribal action in 1959 was entirely in keeping with abstinence from federal intervention in the internal affairs of an Indian tribe which the law clearly requires. The Secretary had simply recognized the valid governing authority of the Tribal Council.[41]

The Supreme Court of the United States denied petitioners certiorari on this case on February 18, 1963, in 83 S. ct. 720. This case articulates the close, though apparently distinguishable, connection between "federal" and "tribal" action. The closeness of this connection can further be seen: (1) by the fact that the Secretary of the Interior can "approve" proposed tribal constitutions,[42] remove members of tribal councils,[43] prevent the transfer of Indian funds,[44] strike members from tribal rolls,[45] manage their lands,[46] etc., and (2) by the fact that Congress has enacted and repealed a welter of laws dealing with the Indians.[47]

With the presentation of the foregoing evidence, it is possible to make some statements concerning whether tribal governments and courts are subject to the limitations of the federal Bill of Rights. Or differently, whether individuals tribal Indians affected adversely by tribal action are entitled to the Bill of Rights protections. The preceding decisions have grappled with one of two methods by which tribal Indians, and even non-Indians, attempted to meet alleged injustice directed at them by tribal governments. This method is premised on constitutional rights of immunity and protection for tribal Indians from tribal government action. The second method, a method which received attention in preceding chapters,[48] requires the tribal Indian to give up that status that subjects him to oppression. That is to say, if he is a member of a tribe that uses oppressive measures (measures contrary to the federal Bill of Rights protections), he may give up his tribal citizenship. He does this by voluntarily leaving his tribe to establish residence off the reservation among non-Indian and state citizen inhabitants. His right to voluntarily leave the reservation is given almost irrefutable validity by the fact that all Indians were declared by statute of 1924[49] to be citizens of the United States; citizens of the United States,[50] at least within the boundaries of the United States, cannot be restricted in their geographical locomotion.[51]

It is the first method, however, which presents Indians seeking criminal procedural protection from tribal action with the most difficulty. The evidence of this and preceding chapters hold that if the action of tribal governments is "federal" or "state" action, Indians have criminal procedural rights which are constitutionally protected. Contrarily, if action of tribal governments is purely tribal, Indians have no criminal procedural rights which are constitutionally protected, that is, via direct application of the federal Bill of Rights protections and the Fourteenth Amendment guarantees to tribal governance. These constitutional rules of law have been formulated because of three characteristics associated with American tribes of Indians. They are: (1) The American Indian tribe possesses, at least initially, all the powers of any sovereign state; (2) Conquest, discovery, negotiation, "right of every section of the human race to a reasonable portion of the soil," and "Christian" responsibility have rendered the American Indian tribe subject to the legislative power of the United States Congress and, in essence, terminated the tribe's powers of sovereignty, that is, its powers to negotiate and conclude treaties with foreign nations, but did not by itself affect the internal powers of local self-government;[52] (3) The internal powers of self-government are subject to qualification by treaties and by express legislation of Congress, but, except as expressly qualified, full powers of internal self-government were and are vested in the Indian tribes and their duly constituted organs of government.

In conclusion of this chapter, ti will be noted that the doctrines of unextinguished tribal sovereignty and tribal action (action not being controlled directly or unduly influenced by treaties of the United States, statutes enacted by Congress, or national bureaucratic action) are not directly subject to the limitations which the federal Bill of Rights and the Fourteenth Amendment impose upon the national and state governments. It has been held that these limitations apply only to arms or agencies of the national and state governments. The Constitution is binding upon Indian tribes "only where it expressly binds them, or is expressly made binding by treaty or some act of Congress." In short, the federal Bill of Rights and the Fourteenth Amendment do not give specific protections against acts of mobs, private corporations, religious orders, voluntary associations, or tribal governments and their officials, except possibly as the authority of these groups is derived "in part from Government's thumb on the scales."[53]

FOOTNOTES

[1]241 U.S. 602 (1916).



[2]24 Stat. 635. That section provides: "That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years."

[3]United States v. Quiver, 241 U.S. 602, 603-605 (1916).

[4]Murray v. Gerrich & Co., 291 U.S. 315 (1934); Downes v. Bidwell, 182 U.S. 244 (1901); Chicago & Pacific Railway Co. v. McGlinn, 114 U.S. 542 (1885).

[5]See Worcester v. Georgia, 31 U.S. 515 (1832); Ex parte Crow Dog, 109 U.S. 556 (1883); Jones v. Meeham, 175 U.S. 1 (1899); Cherokee Nation v. Journeycake, 155 U.S. 196 (1894); Turner v. United States & Creek Nation, 248 U.S. 354 (1919); Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927). For one of the more recent decisions which follows the above rule and rationale see Kake Village v. Egan, 369 U.S. 60, 72 (1962).

[6]163 U.S. 376 (1896).

[7]32 U.S. 243 (1833).

[8]Talton v. Mayes, 163 U.S. 376, 382-383 (1896).

[9]Cherokee Nation v. Georgia, 5 Pet. 1, 16 (1831); Worcester v. Georgia, 6 Pet. 515, 559 (1832); Kagama v. United States, 118 U.S. 375 (1886).

[10]Talton v. Mayes, 163 U.S. 376, 384 (1896). Italics mine.

[11]See the following portions of the United States Constitution: Art. 1, sec. 2, cl. 3; Art. I, sec. 8, cl. 3; Amendment XIV, sec. 2. Also chapter III of this study.

[12]31 Fed. Rep. 327 (1886).

[13]193 U.S. 115 (1904).

[14]7 Op. Atty. Gen. 746, 749-750 (1856).

[15]Senate Judiciary Committee, Rep. No. 268, 41st Cong., 3d sess.

[16]112 U.S. 94 (1884).

[17]Elk v. Wilkins, 112 U.S. 94, 101-102 (1884). See also United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).

[18]119 F. Supp. 429 (1954).

[19]17 Stat. 13; 42 U.S.C.A. 1903.

[20]Toledo v. Pueblo de Jemez, 119 F. Supp. 429, 432 (1954). This case was cited as controlling in Native American Church v. Navajo Tribal Council, 272 F.2d 131 (1959).

[21]151 F. Supp. 476 (1957).

[22]25 U.S.C.A. s162, 162a, 163, 477, 676.

[23]28 U.S.C.A. s. 1331.

[24]Statute of June 18, 1934, 48 Stat. 984, as amended by Act of June 15, 1935, 49 Stat. 378; 25 U.S.C.A. s.478-478b.

[25]Martinez v. Southern Ute Tribe, 151 F. Supp. 476, 478 (1957).

[26]Ibid.

[27]Ibid., pp. 477-478.

[28]Ibid., p. 478. Italics Mine.

[29]Martinez, v. Southern Ute Tribe, 151 F. Supp. 476, 479 (1957).

[30]Martinez v. Southern Ute Tribe, 249 F.2d 915 (1957). This same circuit court later denied a rehearing on December 17, 1957.

[31]Ibid., pp. 919, 921.

[32]Martinez v. Southern Ute Tribe, 357 U.S. 924. For a later but connected circuit court decision with the same litigant and apparently the same issues see 273 F.2d 731 (1960). See also 12 A.L.R. 2d 5; 13 A.L.R. 2d 390; 14 A.L.R. 2d 992, for annotations on frivolous and merited jurisdiction assertions.

[33]259 F.2d 553 (1958).

[34]Ibid., p. 555.

[35]Ibid., pp. 556-557.



[36]272 F.2d 131 (1959).

[37]Ibid., p. 132.

[38]Ibid., p. 134.

[39]Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 134-135 (1959). Italics mine. See also Dicke v. Cheyenne-Arapaho Tribes, Inc., 304 F.2d 113, 115 (1962), where the court ruled: "Again and recently this court has held that federal court jurisdiction does not lie in a matter of controversy between Indians and the Tribe unless jurisdiction is expressly conferred by congressional enactment,' Native American Church, etc. v. Navajo Tribal Council, 10 cr., 272 F.2d 131 at 133." And Barnes v. United States, 205 F. Supp. 97, 100 (1962).

[40]306 F.2d 819 (1962).

[41]Ibid., pp. 822-823. Italics mine.

[42]48 Stat. 987, 25 U.S.C.A. s. 476.

[43]United States ex rel. Brown v. Lane, 232 U.S. 598 (removal without hearing or notice), (1914).

[44]Mott v. United States, 283 U.S. 747, 751 (1931).

[45]United States ex rel. Lowe v. Fisher, 223 U.S. 95 (1912).

[46]48 Stat. 985, 25 U.S.C.A. s. 464.

[47]See the following: Act of March 3, 1819, c. 85, 3 Stat. 516; Act of July 9, 1832, c. 174, 4 Stat. 564; Act of June 30, 1834, c. 161, 4 Stat. 734, provision for the Bureau of Indian Affairs. Further, the Bureau of Indian Affairs has provided for intra-tribal courts and a reservation code for the enforcement of law in those tribes "in which traditional agencies for the enforcement of tribal law and customs have broken down for which no adequate substitute has been provided under Federal or State law."--25 C.F.R. 161 et seq. Act of March 3, 1817, c. 92, 3 Stat. 383, provision for the punishment of crimes committed in Indian territory. Act of March 3, 1847, c. 66, 9 Stat. 203, authorized payment of moneys due tribes to individuals rather than tribal officers (this in effect substituted the judgment of federal officials for that of tribal governments on the question of tribal membership for disposition of funds). Act of March 27, 1854, c. 26, sec. 3, 10 Stat. 269, recognized the right of Indians to punish their own offenders. Act of March 3, 1885, c. 341,

sec. 9, 23 Stat. 362, 385, provided for federal criminal punishment for Indians committing certain offenses. Act of June 14, 1862, c. 101, 12 Stat. 427; General Allotment Act, Act of Feb. 8, 1887, c. 119, 24 Stat. 388, 25 U.S.C.A. s. 331 et seq., providing for regulation of allotments. Act of March 3, 1883, c. 141, sec. 2, 22 Stat. 582, 25 U.S.C.A. s. 155, provided for the trusteeship of Indian moneys for the benefit of the tribe. Act of July 13, 1892, c. 164, 27 Stat. 120, provided for the education of Indian children. Act of June 25, 1910, c. 431, 36 Stat. 855, established administrative powers in the Commission and Secretary of Interior concerning leases of Indian lands, and administration of estates of allotees. Act of June 24, 1924, c. 233, 43 Stat. 253, bestowed United States citizenship on Indians. Act of June 18, 1934, c. 576, 48 Stat. 984, 25 U.S.C.A. s. 461 et seq., prohibited further allotment of Indian lands and provided for the maintenance of tribal integrity through incorporation. Act of August 15, 1953, c. 505, 67 Stat. 588, 28 U.S.C.A. s. 1360, wherein jurisdiction of the states of California, Minnesota, Nebraska, Oregon, and Wisconsin over criminal and civil causes within Indian territory was recognized. This Act, however, preserved tribal customs and ordinances not in conflict with state law. The act further gave United States consent for those states inhibited by their enabling acts and constitutions to pass amendments providing for the assumption of jurisdiction over civil and criminal causes concerning Indian affairs.

[48]See especially chapter VI, subheading B, of this study; see also chapter VIII.

[49]43 Stat. 253, 8 U.S.C.A. s 3.

[50]State citizenship is acquired automatically via the Fourteenth Amendment by residing within a state.

[51]See Colgate v. Harvey, 296 U.S. 404 (1935); United States v. Wheeler, 254 U.S. 281 (1920); Maxwell v. Dow, 176 U.S. 581 (1899); Slaughter-House Cases, 16 Wall. 36 (1872); 14 L.R.A. 579 (annotation).

[52]Is this a working definition of "colonialism"? Why does Congress have legitimate power over Indians, but Portugal's government illegitimate power over its colonies wrested by conquest?

[53]American Communications Association v. Douds, 339 U.S. 382, 401 (1950).



# CHAPTER X

## CONCLUSIONS AND AREAS FOR FURTHER STUDY

Since the national government derives its sovereignty, at least theoretically, from powers delegated to it by the states and the people thereof, one would assume that the Constitution of the United States forms the basis for national criminal jurisdiction over Indians and Indian territory. However true this assumption may be in relation to the national government's limited criminal jurisdiction over states and non-Indian inhabitants therein, it is totally inadequate for explaining the national government's historical and contemporary jurisdiction over Indians and Indian territory. During the period of the formulation and ratification of the federal Constitution, the original states, and thus the conventions which ratified the United States Constitution, had only limited jurisdiction over Indians and Indian territory. And it is probably because of this lack of jurisdiction over Indians and Indian territory that the framers and ratifiers of the Constitution provided little in that document via the explicit governance of the American aborigines and their lands. Only three provisions of the Constitution refer directly to the Indians,[1] and these provisions leave untouched the general field of national authority to assert criminal jurisdiction over Indians and Indian territory. The legal status of the Indians must, therefore, be considered not as originating in the Constitution, but as having its roots in international law and power politics. This observation is undisputable from the decisions and evidence of the preceding chapters of this study.

In consideration of the criminal jurisdictional question, the United States Supreme Court has continually upheld the exclusive (potential and discretionary) jurisdiction of the national government over Indians and Indian territory, but with inconsistent and ambiguous explanations of its conclusions concerning the sources of national authority. The section of the United States Constitution concerning commerce with the Indian tribes is clearly inadequate to give the national government general criminal jurisdiction over Indians and Indian country; the judicial decisions and evidence of this study recognize this inadequacy. The fact that the Indian tribes had been considered initially (and even late in this nation's history) as independent nations with whom treaties could be and were made suggests that the criminal governance of Indian relations rested on international negotiation, economic persuasion, and even force. And in these relationships, the United States Constitution gave the various branches of the national government the authority to negotiate and

conclude treaties,[2] to acquire territory and provide for its governance,[3] to conduct war,[4] and to tax and spend for the nation's welfare.[5] In consequence it was early held in Worcester v. Georgia[6] that the sole external power and authority of governing the Indians lay with the national government. As time passed, and as the Indians lost their position of sovereign strength, the international status of the Indians was gradually extinguished. Yet, as late as 1871, national control over Indians was exercised, at least predominantly, outwardly, and theoretically, by means of treaties, taxing and spending, and show of force. In this year an act of Congress forbade further dealings with the Indians by the treaty-making power. Henceforth, Congress legislated directly and openly for the Indians (though predominantly situated within state boundaries) on a variety of non-commercial subjects, including the punishment of crime. This authority was upheld on the ground that the national government had gradually gained exclusive control, or at least potential and discretionary control, over Indians and Indian territory through its war, treaty, and territorial sovereignty powers. Along with this gradual extinguishment of tribal sovereignty, and as the Indians became less of a menace to the materially acquisitive whites, a feeling arose that the Indians had been treated unjustly and that it was incumbent on the national government to accord them some measure of protection, along with "helping" them adjust to the "civilization" that had grown up around them. In partial response to this benevolent spirit, a spirit that was and is frequently used as a sham, the court articulated what had been until 1886 a gradually developing new source of national authority over Indians. The benevolent spirit philosophy, and the resultant national power, is captured in the Kagama decision of 1886.[7] The court ruled in this decision that the authority of the national government over "these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." The court further ruled that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." As to American Indians generally, then, the view that the national government possesses in effect a new power--a power to regulate Indians--has been judicially, administratively, and legislatively articulated and accepted. The constitutionality of this racially tinged power, especially in the light of recent decisions and domestic and international unrest, would seem to be doubtful. However, even if this doubtful authority were declared unconstitutional, the national government has acquired ample authority and power, via the aforementioned sources, to govern both criminally and civilly Indians and Indian territory.

The preceding discussion, and especially chapters I through V of this study, have developed and added meaning and complexity to the sources of the national government's exclusive, though in many respects dormant, criminal



authority over Indians and Indian territory. The preceding contents of this study have also developed the areas in which the national government has both precisely and ambiguously divested itself of criminal jurisdiction over Indians and Indian territory by allowing the states to assume jurisdiction. The study has not, however, developed and delineated the principles of law and the rationale for determining what constitutes Indian territory or country for the purposes of national, state, and tribal jurisdiction. A legal definition of what constitutes Indian country has both constitutional and legislative implications. And in this sense, criminally accused Indians (non-Indians also) and prosecuting governments (national, state, and tribal) are caught in the quagmire of jurisdictional ambiguity. Jurisdictional ambiguity resulting from an imprecise definition of Indian country has two aspects: (1) Accused Indians (non-Indians also) and prosecuting governments (national, state, and tribal) are at a loss as to which, if any, of their criminal codes apply because of the disputed nature of the territory where the crime was perpetrated; (2) The criminal procedural protections these governments may be required to provide litigants may vary with the locus in quo of the crime; that is to say, both jurisdiction and criminal procedural protections are crucially dependent on whether the crime was committed within Indian country. The quagmire associated with the imprecise definition of Indian country reaches utter confusion when one realizes that state and national territorial (civil and criminal also) integrity, national bureaucratic rules and regulations, judicial decisions (national, state, and tribal), and tribal government dignity, if not survival, are all involved in the struggle to define (legislatively, judicially, administratively, and constitutionally) Indian territory for purposes of criminal prosecution. In short, the imprecise legal definition of Indian territory for criminal definement and prosecution is a manifestation of how pressures--government bureaucracy, economic considerations, military attitudes, religious and benevolent reflections, and politics--have contributed to the lack of just, democratic, and responsible Indian criminal law. It is in this area that additional research and legal clarification are urgently required. By describing the evolution of the concept of "Indian country" or territory as a legal jurisdiction, one sets the stage for an understanding and solution of the causes of criminal jurisdictional difficulties (and resulting criminal procedural guarantees) in relation to a rational and responsible Indian criminal code.

Another area which this study has not developed is the legal definition of an "Indian" for criminal prosecution. Actually, in the light of the evidence of this study, it would seem that a legal definition of Indian is not required, indeed a legal definition of Indian for criminal definement and prosecution would seem to be unconstitutional. Yet, as long as national statutes and judicial opinions are constitutionally allowed to make criminal distinctions on the basis of race, there remains an urgent need for a precise legal definition of Indian. Historically, the lawmakers saw no need (constitutionally or legisla-

tively) to unambiguously and legally define what they meant by an Indian. In the early period of our history, everyone knew what an Indian was. Yet, as history was written, inter-racial crimes and mixed marriages became more frequent. In this sense blood lines have blurred and courts are confronted with the difficult, though important, task of determining for purposes of jurisdiction (and also criminal procedural guarantees) the nationality of both the criminal perpetrator and the victim. At present the question as to whether defendant, the victim, or both are Indians is a matter which can only ultimately be settled in federal courts (or by national legislation if one accepts the tenuous idea that Congress can legislate on a racial basis) as a question both of fact[8] and law. Sometimes the definition of Indian has been determined by federal law,[9] sometimes by Roman law,[10] and sometimes by common law rules.[11] While these methods for defining an Indian may have worked historically, and in individual cases, they certainly are not adequate in our contemporary society.

The fact that the Indians' legal status did not originate in the Constitution (but in international law and power politics) presents an additional problem of providing Indians with a just and responsible system of criminal law. More precisely, the vestiges of the Indians' primeval legal status raise the problem as to the extent to which the United States Constitution controls tribal governments and provides individual Indians with criminal procedural, and even substantive, protections. In this connection it was shown in chapter VIII how uncertain an Indian would be as to his criminal procedural and substantive rights if he were prosecuted by a state, and the procedural and substantive guarantees an Indian is entitled when prosecuted by the national government (chapter VII) are only slightly more certain. In addition to the uncertainty of his constitutional guarantees when prosecuted by these two governments, an Indian is subjected to the discrimination which is commonly associated in our society with minority groups--indeed an Indian's discrimination may be greater because he has been historically, and in a large measure still is, a stranger and alien to the non-Indian ways of life. It is not to the protections and discrimination associated with these two governments (state and national), however, that the remaining paragraphs will be directed. They will be directed, primarily, to the difficulty of providing Indians with a rational and appropriate system of criminal law because of the Indians' unextinguished and original right of self-government. As will be recalled, the international status of the Indians was gradually extinguished, and the Indians, along with their territory, became subject to the exclusive jurisdiction of the national government. This jurisdiction was upheld on the ground that the national government had gradually gained exclusive jurisdiction, or at least potential discretionary jurisdiction, over Indians and Indian territory through its war, treaty, and territorial sovereignty powers. The extent of the Indians' non-extinguished right of self-government is well articulated in the Native American Church of North



America case.[12] In this decision the court held that "Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have been required to surrender them" by the superior authority of the national government. This opinion represents current law and embodies a national domestic policy toward Indians which has been insignificantly changed since Chief Justice Marshall declared it in 1832 in the case of Worcester v. Georgia.[13] In this decision Marshall declared that Indian tribes are dependent sovereigns that are not subject to the laws of the national and state governments, or the jurisdiction of their courts, unless expressly made so by Congress. The constitutionality of this doctrine has been repeatedly challenged--though unsuccessfully. It has been challenged on the basis that the United States Constitution is the supreme law of the land, and that it is binding on Indian, state, and national governments alike. The extent to which the United States Constitution has limited the Indians' unextinguished and original right of domestic self-government, especially as it relates to the criminal procedural(and substantive) protections of the federal Bill of Rights and the guarantees of the Fourteenth Amendment, were developed in chapter IX of this study. The conclusions of this chapter were that neither the federal Bill of Rights nor the Fourteenth Amendment apply directly to purely tribal action. However, when one looks at the conclusions of chapter IX in relation to the evidence (administrative, legislative, judicial, and other) of the entire study, one would be apt to conclude that several factors are inconsistent with the Indians' unextinguished and original right of domestic self-government. Or differently, one is apt to conclude that these factors are of such importance that they ex proprio vigore make applicable against tribal governments, if not the protections of the Fourteenth Amendment, the guarantees of the federal Bill of Rights.

One of the most important of these factors is the fact that all Indians are both state and national citizens. The basic doctrine that citizens retain rights against the government as well as rights of access to the government has come to be a widely shared article of the American political faith. A superficial following of this rationale, however, could lead one to conclude that an Indian prosecuted by a tribal government would be entitled to all the federal Bill of Rights protections, if not also the guarantees of the Fourteenth Amendment. Counterpoised against this widely shared article of faith, however, is another of equally wide acceptance. It is the doctrine that the American system of governance encompasses a plurality of governments operating over the same area and the same people, and that these governments are not limited by the Constitution in identical ways. For example the states (or the people therein) in the formation of the Union gave up sovereignty by delegating to the national government the powers of war, peace, treaty-making, etc. The states retained, however, "The powers not delegated to the United

States by the Constitution nor prohibited by it to the States." In this sense the states, even though they govern citizens of both the state and national governments, retain a degree of sovereignty in connection with criminal definement and prosecution. The degree of state sovereignty as it relates to the federal Bill of Rights protections and the Fourteenth Amendment guarantees was developed in chapter VIII. It is in this same sense that the Indian governments are immune from the limitations of the Fourteenth Amendment and the federal Bill of Rights. In short, the American doctrine of a plurality of governments operating over the same area and the same people has thus far overridden the idea that state and national citizens are entitled to all of the Fourteenth Amendment and Bill of Rights protections, irrespective of whether they are prosecuted by state, national or tribal governments. The doctrine of tribal immunity from the above constitutional protections is given additional weight when one realizes that Indians may have been declared involuntarily to be state and national citizens. This, however, is a slender reed when one realizes that most of the non-Indians in the United States have never been privileged to declare formally that they desire state and national citizenship.

A second factor which seems to be inconsistent with tribal sovereignty (domestic self-government), and thus immunity from the limitations of the Fourteenth Amendment and the federal Bill of Rights, is found in the Indian Appropriation Act of March 3, 1871.[14] The relevant portion of this act reads: "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ." It is true that it would have been difficult for Congress in this excerpt to have made it more clear that the Indian tribes are no longer independent and sovereign powers. However, if one reads this provision literally and in terms of congressional intent, along with its relation to congressional, administrative, and judicial policy since and before that time, it is quite obvious that this act did not intend to, nor did it literally, limit Indian domestic sovereignty. Here again a parallel can be drawn between the state governments and the Indian governments. The states gave up entirely their international sovereignty, but not domestic. The Indians gave up voluntarily neither domestic nor international sovereignty. Yet, the extinguishment of their international sovereignty is not beyond dispute. The Indians' unextinguished domestic sovereignty (powers of local self-government), however, has never been completely extinguished, although unlike the states this sovereignty could be extinguished by congressional legislation. In this sense the Native American Church of North America ruling[15] that Indian tribes have "a status higher than that of states" is incorrect. This ruling is correct, however, and without inconsistency, in terms of the limitations the Fourteenth Amendment and the federal Bill of Rights place on purely tribal governance.



A third factor, and a factor encompassing most, if not all, of the arguments in favor of making tribal governance or action subject to the limitations of the Fourteenth Amendment and the federal Bill of Rights, which seems to be inconsistent with the unextinguished tribal right of domestic self-government is represented by Congress' exclusive legislative authority over Indians and Indian territory.[16] This factor is inconsistent only because an erroneous connotation is customarily, and incessantly attempted to be, placed on the phrase--Congress' exclusive legislative authority over Indians and Indian territory. It was never intended (legislatively, executively, judicially, or otherwise) by this phrase that the national government has totally extinguished all vestiges (both domestic and international) of Indian sovereignty. In terms of Indian domestic governance, the phrase--Congress' exclusive authority over Indians and Indian territory--should be interpreted indeed it has been to mean that the national government has an exclusive potential and discretionary authority over Indians and Indian territory. This potential and discretionary authority is exclusive as to Indian, state, and foreign governments.[17] Again, a true understanding of this authority, as well as the Indians' unextinguished right of domestic self-government, can be gained by placing the states, the Indians, and the ruling of the Native American Church of North America case[18] into juxtaposition. In this decision, it will be recalled, the court held that "Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have been required to surrender them" by the superior authority of the national government. The Indians' powers of local self-government have never been completely extinguished, although unlike the states this sovereignty could be extinguished by Congress or its agents. In this sense the Native American Church of North America ruling that Indian tribes have "a status higher than the states" is incorrect. This holding is correct, however, and without inconsistency, in terms of the limitations the Fourteenth Amendment and the federal Bill of Rights place on purely tribal governance. Another analogy between the Indians' unextinguished right of domestic self-government and the reserved sovereignty of the states can be drawn with the assistance of a statement by Chief Justice Chase in Texas v. White.[19] In this decision Chief Justice Chase wrote: "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States." This statement used as an analogy is correct, and without inconsistency, as to the non-alienableness from the Union of both Indian and state territory. It is incorrect in the sense that Indian territory and Indian tribal governments do not compose indestructible components of an indestructible Union. Lastly, unextinguished tribal self-government is not inconsistent with Congress' exclusive authority over Indians and Indian territory because it is a rule of international law (a rule to which the national government subscribes) that whenever legislative and political jurisdiction over any territory are transferred from one sovereign to

another, the municipal laws (substantive and procedural) of the country continue in force until abrogated or changed by the new government or sovereign.[20] Therefore, because tribal governments exercise an unextinguished right of local self-government, they are not arms or agents of the national government when they are acting within this scope of authority.[21] It is the allowable scope of this unextinguished tribal right of self-government that creates substantive and procedural difficulties for Indians being prosecuted by tribal, state, and national governments or their agents.

Because this study has been limited to a constitutional analysis of criminal jurisdiction and procedural guarantees of the American Indian, it should be emphasized that it represents only a building block in terms of providing Indians with a just and responsible system of criminal law. Additional studies of Indian anthropoloty, sociology, politics, and economics, along with a comparison of these explorations with similar studies from other cultures, should contribute to a completed structure of understanding. This structure should provide the social scientist with a fertile field for the testing of theories of social, political, and economic change, of cultural adaptation, of individual fulfillment, etc. To the American policy makers, this structure should provide evidence, knowledge, and impetus for the establishment and accomplishment of even loftier goals. To the student and policy makers of international affairs, the structure should offer valuable experience (negative and positive) as to legal and cultural contrasts between highly industrialized and "underdeveloped" societies. And to American citizens, the structure should prove helpful in providing both Indian and non-Indian citizens with a just, responsible, and rationale system of criminal law.

In conclusion, the findings of this study make it clear that the providing of Indians with a rational and appropriate system of criminal law has made little progress since Chief Justice Marshall rendered his famous decision of Worcester v. Georgia in 1832. Indeed, it is only the direction, the intensity of the struggle, and the forms of the jurisdictional, procedural, and substantive confusion which have changed since 1832.

FOOTNOTES

[1]United States Constitution, Art. I, sec. 8, cl. 3: Art. I, sec. 2, cl. 3; Fourteenth Amendment, sec. 2.

[2]United States Constitution, Art. 3, sec. 2, cl. 2.

[3]Ibid., Art. 5, Sec. 3, cl. 2.



[4]Ibid., Art. I, sec. 8, cl. 11.

[5]Ibid., Art. I, sec. 8, cl. 1.

[6]31 U.S. 515 (1832).

[7]118 U.S. 375, 384 (1886).

[8]Lucas v. United States, 163 U.S. 612 (1896); Halbert v. United States, 283 U.S. 753 (1931).

[9]Alberty v. United States, 162 U.S. 499 (1895); United States v. First Nat. Bank, 234 U.S. 245 (1914).

[10]United States v. Sanders, 27 Fed. Case. No. 16,220 (1847).

[11]Ex parte Reynolds, 20 Fed. Cas. No. 11, 719 (1879); United States v. Ward, 42 Fed. Rep.320 (1890); Ex parte Pero, 99 F.2d 31 (1938).

[12]272 F.2d 131, 134 (1959). For the specifics of this non-extinguished right of self-government, the reader is directed to the main body of this study, especially chapters II and IX.

[13]31 U.S. 214 (1832).

[14]16 Stat. 544, 566.

[15]272 F.2d 131, 134 (1959).

[16]For the specific limitations to this authority see the main body of this study, especially chapter VII.

[17]See chapters I-VI of this study.

[18]272 F.2d 131, 134 (1959).

[19]74 U.S. 227, 237 (1869).

[20]See chapter VII of this study. Also Murry v. Gerrich, 291 U.S. 315 (1934); Downes v. Bidwell, 182 U.S. 244 (1901); Chicago & Pacific Railway Co. v. McGlinn, 114 U.S. 542 (1885).

[21]See chapter IX of this study.

# BIBLIOGRAPHY


## Digests of Cases and Case Law

Abbott New York Digest 2d, Vol. 12 (1954; supplements),"Indians."

American Digest System, "Indians."

American Jurisprudence, Vol. 27 (1940; supplements), "Indians."

Complete Digest of all Lawyers Reports Annotated, Vol. 5 (1925), "Indians."

Corpus Juris Secundum, Vol. 42 (1944; supplements), "Indians."

Federal Digest, Vol. 33A (1950; supplements), "Indians."

Modern Federal Practice Digest, Vol. 27 (1960; supplements), "Indians."

Ruling Case Law, Vol. 14 (1916; supplements), "Indians."

Shepard's United States Citations.

United States Supreme Court Digest (Annotated), Vol. 8 (1949; supplements), "Indians."

## Collection of Statutes, Regulations, and Treaties

Code of Federal Regulations (1958; cumulative supplements), esp. Title 25, "Indians."

Kappler, Charles J. (comp.), Indian Affairs: Laws and Treaties, Vol. 1 (1904) (Laws to Dec. 1, 1902); Vol. 2 (1904) (Treaties); Vol. 3 (1913) (Laws to Dec. 1, 1913); Vol. 4 (1929) (Laws to March 4, 1927).

Laws of the State of New York, esp. 45th sess. ch. 204 (1822).

Malloy, William M. (comp.), Treaties, Conventions, International Acts, Protocols, and Agreements, Vol. 1 (1776-1909); Vol. 2 (1776-1909); Vol. 3 (1910-1923).





McKinney's Consolidated Laws of New York (Annotated) (1950; cumulative supplements), esp. Vol. 25, "Indian Law."

Nevada Revised Statutes, esp. Title 16, ch. 194 (1961).

Revised Statutes of Maine, esp. ch. 25 (1954).

Sess. Laws of South Dakota, esp. ch. 319 (1957); Supplement to South Dakota Code of 1939, esp. ch. 65.08 (1960).

United States Code (1958; cumulative supplements), esp. Title 18, ch. 53, "Indians."

United States Code Annotated (1928; cumulative supplements), exp. Title 25, "Indians."

United States Code Annotated (1950; cumulative supplements), esp. Title 18, ch. 53, "Indians."

United States Code Congressional and Administrative News.

United States Statutes at Large.

Washington Sess. Laws, esp. ch. 240 (1957).

## Periodical Literature

Abbott, Austin. "Indians and the Law," 2 Harv. L. Rev. 167-179 (1888-1889).

Abbott, George W. "The American Indian, Federal Citizen and State Citizen," 20 Fed. B.J. 248-254 (1960).

Barker, Robert W. "The Indian Claims Commission--The Conscience of the Nation in its Dealings with the Original American," 20 Fed. B.J. 235-239 (1960).

Barnes, Richard L. "Constitutional Law: Applicability of Constitutional Limitations to Indian Tribal Government," 16 Okla. L. Rev. 94-97 (1963).

Barney, Ralph A. "Some Legal Problems Under the Indian Claims Commission Act," 20 Fed. B.J. 235-239 (1960).

Benge, William B. "Law and Order on Indian Reservations," 20 Fed. B.J. 223-229 (1960).

Bennett, Elmer F. "Federal Responsibility for Indian Resources," 20 Fed. B.J. 255-262 (1960).

Black, Hugo L. "The Bill of Rights," 35 N.Y.U.L. Rev. 865-881 (1960).

Brown, Ray A. "The Indian Problem and the Law," 39 Yale L.J. 307-331 (1930).

_____. "The United States of America's New Departure in Dealing with its Native Population," 18 J. Comp. Leg. 129-132 (1936).

Carr, Allen L., and Johnson, Stanley M. "Extent of Washington Criminal Jurisdiction over Indians," 33 Wash. L. Rev. 289-302 (1958).

Cohen, Felix S. "Indian Rights and the Federal Courts," 24 Minn. L. Rev. 145-200 (1940).

_____. "The Spanish Origin of Indian Rights in the Law of the United States," 31 Geo. L. J. 1-21 (1942).

Cowen, Lindsey. "What is Left of the Tenth Amendment?" 39 N.C.L. Rev. 145-183 (1961).

Crow, John C. "Indians--Civil--Actions--Jurisdiction of State Courts," 24 Mo. L. Rev. 562-567 (1959).

Davis, Laurence. "Criminal Jurisdiction over Indian Country in Arizona," 1 Ariz. L. Rev. 62-101 (1959).

Dozier, Edward P., Simpson, George F., and Yinger, Milton. "The Integration of Americans of Indian Descent," 331 Annals 158-165 (1957).

Fairman, Charles. "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5-139 (1949).

Farge, Oliver La. "Termination of Federal Supervision: Disintegration and the American Indians," 331 Annals 41-46 (1957).

Flinckinger, Samuel J. "The American Indian," 20 Fed. B.J. 212-216 (1960).



Gunther, Gerald. "Governmental Power and New York Indian Lands--A Reassessment of a Persistent Problem of Federal-State Relations," 8 Buffalo L. Rev. 1-26 (1958-1959).

Haas, Theodore H. "The Legal Aspects of Indian Affairs from 1187 to 1957," 331 Annals, 12-22 (1957).

Hadley, J. Nixon. "The Demography of the American Indians," 331 Annals 23-30 (1957).

"Indian Tribes and Civil Rights," 7 Stan. L. Rev. 285-292 (1955).

Koons, Melvin E. "Jurisdiction over Indian Country in North Dakota," 36 N. Dak. L.Rev. 51-62 (1960).

Kreiger, Heinrich. "Principles of the Indian Law and Act of June 18, 1934," 3 Geo. Wash. L. Rev. 279-308 (1935).

Lazarus, Arthur Jr. "Indian Rights Under the Federal Power Act," 20 Fed. B.J. 217-222 (1960).

L.M.G. "Indians--Jurisdiction of State Laws," 9 N.Y. U.L.O. Rev. 498-500 (1931-1932).

McNickle, D'Arcy. "Indian and European: Indian White Relations from Discovery to 1887," 331 Annals 1-11 (1957).

Morrison, Stanley. "Does the Fourteenth Amendment Incorporate the Bill of Rights," 2 Stan. L. Rev. 140-173 (1949).

Oliver, Robert W. "The Legal Status of American Indian Tribes," 38 Ore. L. Rev. 193-245 (1959).

Peterson, Helen L. "American Indian Political Participation," 331 Annals 116-126 (1957).

Phillips, Ulrich B. Georgia and States Rights, Amer. Hist. Assoc., Annual Report, Vol. II, 1901, p. 360.

Pound, Cuthbert W. "Nationals Without a Nation: The New York State Tribal Indians," 22 Colum. L. Rev. 97-102 (1922).

Reid, John P. "Conflict and Injustice: A Discussion of Francis Paul Prucha's 'American Indian Policy in the Formative Years,'" 39 N. Dak. L. Rev. 50-70 (1963).

Rice, W.G. Jr. "The Position of the American Indian in the Law of the United States," 16 J. Comp. Leg. 78-95 (1934).

Richards, Clinton G. "Federal Jurisdiction over Criminal Matters Involving Indians," 2 S.D.L. Rev. 48-58 (1957).

Sonosky, Marvin J. "Oil, Gas, and Other Minerals on Indian Reservations," 21 Fed. B. J. 230-234 (1960).

Van Alstyne, William W., and Karst, Kenneth L. "State Action," 14 Stan. L. Rev. 3-58 (1961).

Vogt, Evon Z. "The Acculturation of American Indians," 331 Annals 137-146 (1957).

Warren, Charles. "The New 'Liberty' Under the Fourteenth Amendment," 39 Harv. L. Rev. 431-465 (1925-1926).

Watkins, Arthur V. "Termination of Federal Supervision: The Removal of Restrictions Over Indian Property and Person," 331 Annals 47-55 (1957).

Whittingham, David. "The Bill of Rights: A Limitation on the Several States or the Federal Government?" 2 William and Mary L. Rev. 437-459 (1960).

Wise, Hennings C. "Indian Law and Needed Reforms," 12 A.B.A.J. 37-40 (1926).

Zimmerman, William Jr. "The Role of the Bureau of Indian Affairs Since 1933," 331 Annals 31-40 (1957).

Books

Adams, Charles F. (ed.). Memoirs of John Quincy Adams. Vol. 8, J.B. Lippincott and Co., 1876.

Anderson, William. The National Government of the United States. New York: Henry Holt and Co., 1946.

Andrews, James DeWitt. American Law; a treatise on the Jurisprudence, Constitution and Laws of the United States. Chicago: Callaghan and Co., 1900.



Beale, Joseph H. The Conflict of Laws. Vol. 2, Baker, Vooris and Co., 1935.

Black, Henry C. Handbook of American Constitutional Law. Minn.: West Publishing Co., 1897.

Boutwell, George S. The Constitution of the United States at the End of the First Century. D.C. Heath And Co., 1895.

Burdick, Charles K. The Law of the American Constitution. New York: G.P. Putnam's Sons, 1922.

Casner, James A. American Law of Property. Vol. 3, Boston: Little, Brown and Co., 1952.

Catchell, Lillian. The Indian Policy of the Continental Congress: 1775-1783. (unpublished masters thesis) Library of the University of Alabama, 1935.

Cohen, Felix S. Handbook of Federal Indian Law. City of Washington: United States Government Printing Office, 1942.

Cooley, Thomas M. A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union. 2 vols., Boston: Little, Brown and Co., 1927.

Crosskey, William W. Politics and the Constitution. Vol. 2, University of Chicago Press, 1953.

Davis, Kenneth C. Administrative Law. Minn.: West Publishing Co., 1959.

Dockstader, Frederick J. (comp.). The American Indian in Graduate Studies. New York Museum of the American Indian, Heye Foundation, 1957.

Farrand, Max. The Records of the Federal Convention of 1787. 4 vols., New Haven: Yale University Press, 1937.

Flack, Horace E. The Adoption of the Fourteenth Amendment. Bobbs-Merrill, 1955.

Goodnow, Frank F. Politics and Administration. Macmillan, 1900.

Greeley, Horace. The American Conflict. Vol. 1, O.D. Case and Co., 1886.

Haines, Charles G. The Role of the Supreme Court in American Government and Politics 1789-1835. Berkeley: University of California Press, 1944.

Hall, James P. Cases on Constitutional Law (with supplement). Minn.: West Publishing Co., 1926.

_____. Constitutional Law. Chicago: LaSalle Extension University, 1925.

Hand, Learned. The Bill of Rights. Harvard University Press, 1958.

Harmon, George D. Sixty Years of Indian Affairs: Political, Economic, and Diplomatic 1789-1850. Chapel Hill: University of North Carolina Press, 1947.

Hodge, Frederick W. (ed.). Handbook of American Indians north of Mexico. 2 vols. City of Washington: Government Printing Office, 1907-1910.

Hoffman, Nelson M. Continental Congressional Indian Policy: 1775-1781. (unpublished masters thesis) Library of the University of Kansas, 1947.

Justice: 1961 United States Commission on Civil Rights Report. Vol. 5, City of Washington: United States Printing Office, 1961.

Kelly, Alfred H., and Harbison, Winfred A. The American Constitution, Its Origin and Development. New York: W.W. Norton and Co., Inc., 1948.

Kent, James. Commentaries on American Law. 4 Vols., 2d ed., O. Halsted, 1832.

Kilpatrick, James J. The Sovereign States. Chicago: Henry Regnery Co., 1957.

Lincoln, Charles Z. The Constitutional History of New York. Vol. 4, Rochester: The Lawyers Co-operation Publishing Co., 1906.

Loram, C.T., and McIlwraith, T.F. (eds.). The North American Indian Today. Toronto: The University of Toronto Press, 1943.

Massachusetts Hist. Soc. Proceedings, 2d ser., XIV.

Meriam, Lewis, et al. (Brown, Ray A., and Others). The Problem of Indian Administration. Baltimore: John Hopkins Press, 1928.



Miller, Samuel F. Lectures on the Constitution of the United States. Banks and Brothers, Law Publishers, 1893.

Mooney, James. The Aboriginal Population of America North of Mexico. City of Washington: The Smithsonian Institution, 1928.

Patterson, Bennett B. The Forgotten Ninth Amendment. Bobbs-Merrill, 1955.

Peters, Richard. The Case of the Cherokee Nation against the State of Georgia; Argued and Determined at the Supreme Court of the United States, January Term 1831. Philadelphia: John Grigg, 1831.

Prucha, Francis P. American Indian Policy in the Formative Years. Harvard University Press, 1962.

Richardson, James D. A Compilation of the Messages and Papers of the Presidents. Vols. 2 & 4. Bureau of National Literature and Art, 1907.

Rogge, O. John. The First and the Fifth. New York: Thomas Nelson and Sons, 1960.

Rutland, Robert A. The Birth of the Bill of Rights. Chapel Hill: University of North Carolina Press, 1955.

Scott, E.H. (ed.). Journal of the Constitutional Convention., kept by James Madison, Chicago: Albert, Scott and Co., 1893.

Sparks, Jared. The Works of Benjamin Franklin. Vol. 4, Boston: Tappan, Whittemore, and Mason, 1839.

Story, Joseph. Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution. Boston: Hillard, Gray and Co., 1833.

Vattel, Emmerich de. The Laws of Nations; or, principles of the law of nature, applied to the conduct and affairs of nations and sovereigns. ed. by Joseph Chitty, T. & J.W. Johnson and Co., 1876.

Waldo, Dwight. The Administrative State. New York: Ronald Press Co., 1948.

Warren, Charles. The Making of the Constitution. Boston: Little, Brown and Co., 1928.

_____. The Supreme Court in United States History. 2 vol., Boston: Little, Brown and Co., 1923.

Public Documents

Annual Register, Vol. 6, 1763, and Vol. 71, 1829.

Articles of Confederation.

Documents Illustrative of the Formation of the Union of the American States. City of Washington: Government Printing Office, 1927.

H. Doc. No. 46, 16th Cong., 1st sess. (1820).

H. Rep. No. 2704, 57th Cong., 1st sess. (1902).

Journals of the Continental Congress (Library of Congress ed.).

Niles' Weekly Register, esp. (XXV-L).

S. Doc. No. 47, 16th Cong., 1st sess. (1820).

S. Doc. No. 98, 21st Cong., 1st sess. (1830).

S. Ex. Doc. No. 34, 33d Cong., 1st sess. (1854).

S. Rep. No. 268, 41st Cong., 3d sess. (1870).

S. Rep. No. 367, 43d Cong., 1st sess. (1874).

S. Rep. No. 1686, 86th Cong., 2d sess. (1960).

S. Rep. No. 2723, 84th Cong., 2d sess. (1956).

South Dakota Constitution. Esp. Art. 22, par. 2, and Art. 26, par. 18.

Uniform Crime Reports for the United States. J. Edgar Hoover, Director, Federal Bureau of Investigation, U.S. Dept. of Justice, Wash. 25, D.C.



U.S. Bureau of the Census, Dept. of Commerce, 17th Decennial Census, 2 Characteristics of the Population, 1-196 (1953).

U.S. Bureau of the Census, Dept. of Commerce, 18th Decennial Census, United States Census of Population: 1960 (United States Summary) 1-144 (1960).

END