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THE MYTHOLOGY OF THE OKLAHOMA INDIANS: A SURVEY OF THE LEGAL STATUS OF INDIAN TRIBES IN OKLAHOMA

F. Browning Pipestem*

and

G. William Rice**

Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished . . . What is not expressly limited remains within the domain of tribal sovereignty . . .*¹

Introduction

The nature of the federal government's role within the American federal system has changed significantly with the adoption of the "New Federalism" strategy or approach to the delivery of federal programs. New Federalism basically propounds a shift in the balance of governmental decision making away from the federal complex in Washington toward the exercise of these responsibilities on the local level by local general purpose government. The definition of "local general purpose government" includes within its meaning Indian tribal governments in Oklahoma, and a number of Indian tribes in Oklahoma receive and administer federal funds under this concept.

A more particular Indian version of the New Federalism concept was ushered into existence with the advent of the Indian Self-Determination and Education Assistance Act of 1975.² New Federalism and Indian self-determination both revolve around a political theorem that local initiatives and local decisions result in a more effective and accountable government.

New Federalism and Indian self-determination combined in the

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1. F. COHEN, *FEDERAL INDIAN LAW* 122 (1942) [hereinafter cited as COHEN] (emphasis added).

2. Pub. L. No. 93-638, 88 Stat. 2203 (Jan. 4, 1975).

Indian context put squarely into issue the legal and managerial capacity of tribal governments to assume effectively the substantial responsibilities involved in cooperatively developing policy and providing a broad range of governmental services. For instance, the capacity of tribal governments in Oklahoma to assume governmental decision-making responsibilities and to govern effectively in the context of the emerging federal system ultimately depends upon the vitality of tribal powers of self-government and jurisdiction to enforce tribal decisions.

In addition to the legal significance attached to enhancing the role of tribal government in the delivery of public sector services, a different facet of the same problem is presented in a managerial context and the necessity for an inventory of tribal powers becomes equally as apparent. The New Federalism and Indian self-determination governmental strategies require an unprecedented level of intergovernmental interaction. The building of tribal managerial capacity within this kind of environment essentially revolves around acknowledgment and awareness of governmental prerogatives, agendas, and flow of authority between entities. In other words, the various elements of government having specific responsibilities to discharge relative to tribal government and tribal constituencies cannot adroitly address the mutual problems inherent in the New Federalism and Indian self-determination approaches without tribal participation. Likewise, the fiscal restraints on tribal government, or better stated, the governmental poverty of most Indian tribes, dictates that tribal managers cannot manage in isolation from other government.

The effective manager in an intergovernmental context is one who knows the legal competence and institutional capacities of his own government and meshes these capacities with those being cooperatively managed or shared from the federal side. In situations where competing local governmental claims to authority occur, such as competing claims to civil and criminal jurisdiction over Indian country, it is essential, in order to avoid unintentional conflicts and denial of services, that tribal governing bodies, tribal planners, potential competitors for governmental authority over Indian country, and administrative personnel within federal agencies have a working knowledge of tribal governmental power.

The purpose of the following analysis is to provide a general survey of the political and governmental powers presently exercisable by Indian tribal governments in Oklahoma. The legal perspective adopted for these purposes is to apply the ordinary analytic framework regarding tribal legal status to the variety of

legal and factual circumstances presented by the status quo of Indian tribal governments in Oklahoma. The parameter of the ordinary analytic framework from which to view tribal powers at any given time was perhaps best stated by Felix Cohen, the noted authority on Indian law, reiterated here:

Each Indian tribe begins its relationship with the federal government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitation of tribal sovereignty rather than to determine its sources or its positive content.³

A review of the basic congressional enactments and other pertinent legal sources revealed at least two separate and legally significant patterns of legislative treatment. These two separate legal patterns began to take shape in 1890 with the creation of the Territory of Oklahoma.

Prior to 1890, the geographic area which later became the state of Oklahoma was known as the Indian Territory. The only governments operating in the Indian Territory prior to 1890 were the Indian tribal governments and the federal government. All of the Indian Territory by definition was "Indian country" for tribal governmental purposes. The date is important because Congress established the Territory of Oklahoma as a formally organized Territory of the United States on May 2, 1890, and defined the boundaries in the following manner:

That all that portion of the United States now known as the Indian Territory (except so much of the same as is actually occupied by the Five Civilized Tribes, and the Indian tribes within the Quapaw Indian Agency, and except the unoccupied part of the Cherokee Outlet), together with that portion of the United States known as the public land strip, is hereby erected into a temporary government by the name of the Territory of Oklahoma.⁴

With the creation of the Territory of Oklahoma, Congress began to cut two separate legal patterns, one for the Indian tribes

3. COHEN, *supra* note 1.

4. Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81 (1890).

in Oklahoma Territory and another for the Indian tribes in what remained of Indian Territory. The following analysis of tribal governmental powers is organized along the lines of the legal patterns cut by Congress and is divided into five time periods.

The pre-1890 period is governed primarily by treaty and by and large represents an era in which the Indian tribes in the Indian Territory operated indigenous tribal systems with little interference from other governments.

The 1890-1907 period is the most significant period for all of the tribes. During this period, the Territory of Oklahoma was established by the Congress; the allotment of tribal domains to individual Indians under the General Allotment Act of 1887 and special allotment acts relating to the Five Civilized Tribes and the Osages came during this period; Congress assumed political control of the Indian Territory and began the statutory dismemberment of the Five Civilized Tribes; and, in 1907, the state of Oklahoma was admitted into the Union.

The 1890-1907 period largely defined the previously mentioned legal patterns for the Indian tribes in the two territories. The Indian tribes in both territories entered this era as separate sovereigns which preexisted the Constitution. The legal status of the Indian tribes after this time period came to a close is the focus of the present inquiry. In other words, the tribes began the era in 1890 with a full cornucopia of powers; when the era ended in 1907, what powers had Congress limited, modified, or eliminated from the cornucopia?

Talton v. Mayes,⁵ a case out of this era involving the Cherokee Nation in the Indian Territory, determined that only Congress has plenary authority over the Indian tribes to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess. Basically, the majority of this survey of tribal powers is devoted to considering the legal aftermath of the actions of Congress affecting tribal governments during this period. The later periods, 1907-1934, 1934-1953, and 1953-present, represent a later sifting through or interpretation of Congress' actions from 1890 to 1907.

A general survey of tribal governmental powers should have been undertaken forty or fifty years ago. From then to now, the intellectual sifting process on legal principles and varying factual situations could have taken place, and we would have by now had the total definitive statement on tribal government in Oklahoma. A general survey is to print the outlines and chart the future ac-

5. 163 U.S. 376 (1896).

tivities. Department of the Interior Solicitor Margold, in his now classic legal opinion relating to tribal governmental powers astutely indicated both the utility and limitations of a general survey of tribal powers by stating:

The question of what powers are vested in an Indian tribe or tribal council by existing law cannot be answered in detail for each Indian tribe without reference to hundreds of special treaties and special acts of Congress. It is possible, however, on the basis of the reported cases, the written opinions of the various executive departments, and those statutes of Congress which are of general import, to define the powers which have heretofore been recognized as lawfully within the jurisdiction of an Indian tribe. My answer to the propounded question, then, will be general and subject to correction for particular tribes in the light of the treaties and statutes affecting such tribe wherever such treaties and statutes contain peculiar provisions restricting or enlarging the general authority of an Indian tribe.⁶

Source and Scope of Tribal Powers in General

A. From what source does an Indian tribe draw its charter as an entity with powers of self-government?

1. Inherent Charter

It is an established axiom of federal Indian law and a respected judicial doctrine reaching from the earliest days of the United States that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government.⁷ The "original natural rights" of self-government have been described as inherent rights, inherent in the tribal legal status because Indian tribes were possessed of these rights from time immemorial and as such, they are not derived from constitutional or statutory sources. One commentator succinctly described the unique legal status of Indian tribal governments in the following manner: "The Indian tribe is a unique component in our federal system of government. Unlike all our other governmental institutions, the tribe is not a creature of the Constitution of the United States, nor of the federal government created by the Constitution, nor of the states which created the Constitution."⁸

6. 55 I.D. 14, 17-18 (1934).

7. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

8. Dean, *The Consent of the Governed—A New Concept in Indian Affairs*, 48 N.D.L. REV. 533 (1972).

Because all of the Indian tribal governments in Oklahoma predate the United States Constitution, the tribal power to be self-governing cannot derive from an aspect of the national sovereignty delegated to the tribes by the Congress.⁹ Similarly, the organic law of the states cannot be the source of tribal powers because the Indian tribal governments predate the state governments. As separate sovereigns preexisting the Constitution and the states which created the Constitution, Indian tribes have the inherent power of regulating their internal and social relations. This concept, known generally as tribal sovereignty, is the cornerstone of tribal governmental powers.

The tribal right of self-government is perhaps the fundamental concept in the Indian law, and the tribal charter of authority to exercise these powers in written or unwritten form is inherent in the tribal legal status. Ultimately, the direct source of the inherent powers is the will of the people who are members of the tribe. Solicitor Margold, in defining the source of tribal powers, stated: "In point of form, it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case, the laws of the Indian tribe owe their force to the will of the members of the tribe."¹⁰

The source of tribal powers was clearly identified by the Supreme Court of the United States in a criminal case arising under Cherokee law in the Indian Territory. The issue in *Talton v. Mayes*¹¹ spoke directly to the inherent powers as the charter for tribal law. An indictment under Cherokee law was challenged as improper by the defendant for the reason that it did not meet the due process requirements of the fifth amendment. The Court held the fifth amendment inapplicable to tribal criminal actions, stating:

The case . . . depends upon whether the powers of local government exercised by the Cherokee nation are federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this Court have long since answered the former question in the negative

9. *United States v. Wheeler*, 435 U.S. 313 (1978).

10. 55 I.D. 14, 20 (1934).

11. 163 U.S. 376 (1896).

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 such rights are subject to the supreme legislative authority of the United States. . . . 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.¹²

This rule of law is a rule of general application applying equally to all Indian tribes in Oklahoma and across the nation.

The legal principles enunciated in *Talton* first found their judicial expression in the United States Supreme Court in the foundation case, *Worcester v. Georgia*.¹³ The opinion, written by Chief Justice John Marshall, involved a jurisdictional dispute between, on the one hand, the United States and the Cherokee Nation, and, on the other hand, the state of Georgia. Marshall found the state of Georgia's penal sanction against a missionary living among the Cherokee unconstitutional and an intrusion on the exclusive federal jurisdiction over Indian matters. Chief Justice Marshall set forth his now classic analysis of the legal status of tribal government *vis-a-vis* the federal and state governments as follows:

The Indian nations had always been considered as distinct, independent political communities . . . and the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state

The Cherokee nation, then, is a distinct political community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia 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 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

12. *Id.* at 382-84.

13. 31 U.S. (6 Pet.) 515 (1832).

United States. The act of the State of Georgia, under which the plaintiff in error was prosecuted, is, consequently void, and the judgment a nullity¹⁴

The Supreme Court in a later affirmation of the judicial doctrine announced in *Worcester*, stated in *United States v. Kagama*,¹⁵

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 Nations v. Georgia*, and in the case of *Worcester v. State of Georgia*. 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. [Citations omitted.]¹⁶

And in the same opinion, the Court described the status of the Indian tribes in the following manner:

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character

They 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 state within whose limits they resided.¹⁷

And, in *Native American Church v. Navajo Tribe*,¹⁸ the following passage aptly described the tribal status:

14. *Id.* at 559-60.

15. 118 U.S. 375 (1885).

16. *Id.* at 382.

17. *Id.* at 381.

18. 272 F.2d 131 (1959).

But as declared 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.¹⁹

The law governing Indian matters is essentially a shared federal and tribal responsibility to the exclusion of the various states. The power of state governments over Indian affairs conclusively rests upon delegation of responsibility from the United States Congress.

2. *Grants of Authority to Tribal Government*

Inherent in the plenary authority of Congress to alter, limit, or eliminate tribal powers is the authority to confer additional powers on tribal governments. These grants of authority represent a second source from which tribal powers are derived.

B. In general, what are the categorical powers of self-government exercisable by Indian tribes?

For the purpose of establishing parameters, the generally accepted inherent powers of tribal government have been authoritatively set forth by Solicitor Margold.²⁰ This treatment of tribal powers is extensively quoted below.

The inherent powers of self-government, unless terminated by law or waived by treaty, are:

1. *The Power of an Indian Tribe to Define its Form of Government.*

The power to adopt a form of government, to create various offices and to prescribe the duties thereof, to provide for the manner of election and removal of tribal officers, to prescribe the procedure of the tribal council and subordinate committees or councils, to provide for the salaries or expenses of tribal officers and other expenses of public business, and, in general to prescribe the forms through which the will of the tribe is to be executed.

2. *The Power of an Indian Tribe to Determine its Membership.*

To define the conditions of membership within the tribe, to prescribe rules for adoption, to classify the members of the

19. *Id.* at 134.

20. 55 I.D. 14 (1934).

tribe, and to grant or withhold the right of suffrage in all matters save those as to which voting qualifications are specifically defined by the Wheeler-Howard Act (that is, the referendum on the act, and votes on acceptance, modification, or revocation of constitution, bylaws, or charter), and to make all other necessary rules and regulations governing the membership of the tribe so far as may be consistent with existing acts of Congress governing the enrollment and property rights of members.

3. *The Power of An Indian Tribe to Regulate Domestic Relations.*

To regulate the domestic relations of its members by prescribing rules and regulations concerning marriage, divorce, legitimacy, adoption, the care of dependents, and the punishment of offenses against the marriage relationship, to appoint guardians for minors and mental incompetents, and to issue marriage licenses and decrees of divorce, adopting such state laws as seem advisable or establishing separate tribal laws.

4. *The Power of An Indian Tribe to Govern the Descent and Distribution of Property.*

To prescribe rules of inheritance with respect to all personal property and all interests in real property other than regular allotments of land.

5. *The taxing Power of An Indian Tribe.*

To levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the tribal jurisdiction, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

6. *The Power of An Indian Tribe to Exclude Nonmembers From Its Jurisdiction.*

To remove or to exclude from the limits of the tribal jurisdiction nonmembers of the tribe, excepting authorized government officials and other persons now occupying Indian country under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land or have dealings with tribal members, providing such acts are consistent with federal laws governing trade with the Indian tribes.

7. *Tribal Powers Over Property.*

To regulate the use and disposition of all property within the jurisdiction of the tribe and to make public expenditures for the benefit of the tribe out of tribal funds where legal title to such funds lies in the tribe.

8. *The Powers of An Indian Tribe in the Administration of Justice.*

To administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the federal courts.

9. *The Power of An Indian Tribe to Supervise Government Employees.*

To prescribe the duties and to regulate the conduct of federal employees, but only insofar as such powers of supervision may be expressly delegated by the Interior Department.²¹

10. *Power of Eminent Domain.*

Each Indian tribe, unless the power has been expressly terminated by Congress, has the power of eminent domain.

This power of sovereignty possessed by Indian tribes was discussed in *Seneca Constitutional Rights Organization v. George*.²² The issue arose when the Seneca Nation of Indians in New York engaged in planning to expand their industrial park to accommodate the location of a toy factory. Incident to these economic development efforts, the Seneca Council enacted an ordinance for the acquisition of property in connection with the expansion of the industrial park. The ordinance set forth the procedures to be followed in condemning land and vested jurisdiction over such proceedings in the tribal court. In discussing the status of the Seneca Nation, the court stated:

The Seneca Nation is a tribe of American Indians which antedates the State of New York. Like other tribes, the Seneca Nation is a quasi-sovereign entity possessing all the inherent rights of sovereignty except where restrictions have been placed thereon by the United States itself. There may be dispute over whether in certain circumstances an Indian tribe is an instrumentality of the federal government. But certainly an Indian tribe is not a state. Indeed an Indian tribe is not

21. *Id.* at 30.

22. 348 F. Supp. 51 (1972).

subject to the law of a state except so far as the United States has given its consent. [Citations omitted.]²³

The plaintiff, the Seneca Constitutional Rights Organization, challenged the tribal council and asserted that the Seneca Nation lacked the power of eminent domain. The Court rejected their argument, saying:

As previously noted, the Seneca Nation possesses all the inherent rights of sovereignty except where restrictions have been placed thereon by the United States. The power of eminent domain "is an incident of sovereignty, and . . . requires no constitutional recognition." It is an "offspring of political necessity; and it is inseparable from sovereignty, unless denied it by fundamental law."

[This] court has found no federal statute terminating the tribal power of eminent domain. Moreover, enactment of 25 U.S.C. § 1302(5), a violation of which the plaintiffs allege, indicates congressional recognition of the power. As was stated in *Kohl v. United States*, the imposition of a limitation on the power of eminent domain is "an implied assertion" of the existence of the power.

The conclusion that Indian tribes possess the power of eminent domain is reinforced by the view taken by the United States Department of the Interior. The Department is given broad authority over the conduct of Indian affairs, and the views of its official on the question of the powers of Indian tribes therefore carry weight. The Solicitor of the Department has concluded that an Indian tribe organized under 25 U.S.C. § 476 possesses the power of eminent domain. The reasoning of the opinion is applicable to the case of the Seneca Nation, whose constitutional organization antedates the enactment of 25 U.S.C. § 476, and who therefore do not come within the coverage of the section. [Citations omitted.]²⁴

The Congress has enacted general laws that apply to all tribal governments and define certain aspects of the federal-Indian relationship which results usually in an expansion of tribal power to act *vis-a-vis* the federal government. For example, the Indian Self-Determination and Education Assistance Act of 1975,²⁵ places In-

23. *Id.* at 56.

24. *Id.* at 60.

25. Pub. L. No. 93-638, 88 Stat. 2203 (1975), *codified at* 25 U.S.C. §§ 450-450n. (1970).

dian tribes, if they so choose, in a new and substantive position in the assumption of governmental functions and the overall administration of Indian affairs by creating a right to contract with the federal government to provide essential services to their own members. Another illustration of congressionally conferred tribal power is 25 U.S.C. § 48, which states: "Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe."

In fact, a major feature of the Indian Self-Determination and Educational Assistance Act, the provisions for federal employees who become tribal employees and yet retain federal benefits, had its beginning in early tribal contracting difficulties encountered by tribes and federal employees interested in utilizing Section 48 of Title 25 of the United States Code.

These powers of self-government are normally exercised by tribal governments pursuant to tribal constitutions or other governing documents and a tribal code setting forth the legislative enactments of the tribe in furtherance of these powers. In other words, tribal governments having authority over certain subject matter may enact tribal ordinances and promulgate tribal regulations to implement the substance of that power. The power of Indian tribes to administer justice within the tribal domain is derived from the substantive powers included in tribal sovereignty. For instance, the judicial power of the tribe being grounded on tribal sovereignty is coextensive with the tribe's legislative power. In general, the jurisdiction of tribal courts is limited to tribal matters, violations of the tribal criminal laws, and civil matters involving tribal members on property, and under the 1968 Civil Rights Act tribal criminal jurisdiction is limited to offenses punishable by no more than a \$500 fine or six months in jail.²⁶ Major crimes are tried in the federal court, and exclusive federal and tribal jurisdiction is maintained unless a state has assumed jurisdiction over Indian matters pursuant to congressional approval, usually through what is popularly referred to as "Public Law 280."²⁷ Oklahoma was not included in the original enactment of Public Law 280, and although the state has, until recently, asserted jurisdiction over most Indian matters, it has not formally followed the procedure

26. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968), *codified at* 25 U.S.C. § 1302 (1970).

27. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953).

set forth in Public Law 280 for assumption of jurisdiction. As recognized in the recent *Littlechief* decision,²⁸ the lack of a formal assumption of jurisdiction by the state pursuant to the only congressionally approved method is fatal to an assertion of state jurisdiction over the Indian country within Oklahoma.²⁹

C. General limitations on the scope or exercise of tribal powers

Tribal self-governing powers have been limited in their scope or their exercise in a number of ways. Since *Worcester v. Georgia*,³⁰ the national government has been vested by the Constitution with paramount authority over Indian affairs and through Congress exercises broad dominion over tribal matters. Implicit in this judicial doctrine is the recognition that Congress in its plenary role has the authority to limit, alter, curtail, or *expand* tribal powers of self-government. In addition, the tribe may self-impose limits on the exercise of its inherent powers, often unwittingly.

Not unlike the fashion in which supplementary powers are vested in tribal governments, limitations on the scope or exercise of tribal powers fall into several categories. First, there are limiting acts which are of general application, such as the Trader Regulation Acts,³¹ wherein the Commissioner of Indian Affairs is vested with exclusive authority to license and appoint traders with the Indian tribes. Another example is the Major Crimes Act,³² which extends the jurisdiction of the federal courts to the crimes of murder, manslaughter, rape, statutory rape, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny when committed by Indians within the Indian country.

Second, there are federal statutes that apply to particular tribes that limit or extinguish tribal powers. For instance, the Klamath Termination Act³³ terminated the federal relationship with the Klamath Tribe and also with the Modoc Tribe in Oklahoma. Other examples are the Oklahoma Organic Act and the Curtis Act, to be discussed in another section.

Third, the Indian Civil Rights Act of 1968,³⁴ the Indian Bill of

28. *State v. Littlechief*, 573 P.2d 263 (Okla. 1978).

29. *Id.* See also *Kennerly v. District Ct.*, 400 U.S. 423 (1971).

30. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

31. Act of Aug. 15, 1876, ch. 289, § 5, 19 Stat. 200, *codified at* 25 U.S.C. § 261 (1970).

32. 25 U.S.C. § 1153 (1970).

33. 25 U.S.C. §§ 564a-64w (1970).

34. Act of Apr. 11, 1968, Pub. L. No. 94-284, 82 Stat. 77 (1968).

Rights, limits the exercise of tribal sovereignty by making official tribal action subject to substantial parts of the Bill of Rights to the United States. This represents a radical limitation on tribal power. For instance, under the prior law enunciated in *Talton v. Mayes*,³⁵ the Supreme Court held that the fifth amendment was not applicable to the official criminal proceedings of the Cherokee Nation because the inherent sovereign powers of Indian tribes were not created by nor subject to the Constitution. Similarly, in the *Native American Church v. Navajo Tribal Council*,³⁶ the Court held that the first amendment was not applicable to the Navajo Tribe, and further that the federal court was without jurisdiction over tribal laws even though they might have some impact on forms of religious worship. This expression of prior law was grounded on the concept of original sovereignty. Whether appropriate or not, the advent of the Indian Civil Rights Act marks a fundamental limitation on tribal power.

Fourth, tribes may, by affirmative restrictions or inadvertent omissions, limit the scope and exercise of their tribal powers. For instance, a tribal constitution may affirmatively limit the tribal powers. Or the tribe may consciously decide not to exercise one of the fundamental tribal powers, such as maintaining a tribal judiciary, because of budgetary constraints. More commonly, tribal constitutional limitations on the exercise of tribal powers are due more to an omission or oversight rather than a deliberate sifting process. These omissions can arise because of many circumstances, such as lack of information or disinterest in tribal powers by the personnel involved in preparation of the document. In the Oklahoma context, Cohen stated:

Under this act a considerable number of the Oklahoma tribes have adopted tribal constitutions and obtained corporate charters.

These constitutions and charters differ in several respects from those adopted by tribes of other states. For one thing, the substantive powers of the tribe are set forth in the charters, rather than in constitutions. The constitutions are restricted to such topics as membership and tribal organization. Another important characteristic of the Oklahoma tribal constitution and charters is that none of them contain the broad police and judicial powers found in many other tribal documents.³⁷

35. 163 U.S. 376 (1896).

36. 272 F.2d 131 (10th Cir. 1959).

37. COHEN, *supra* note 1, at 455.

The clear implication of the above quoted passage is that the tribes in Oklahoma have taken too narrow a view of existing tribal powers.

In conclusion, Congress alone is vested with authority to alter or curtail tribal powers. (The states occupy no significant position in this structuring of powers without the consent of Congress.) Limitations on tribal power may happen only through (1) federal statutes of general application limiting all tribal governments unless exempted, (2) federal statutes specifically applicable to a particular tribe, and (3) through self-imposed limitations occasioned by affirmative determinations by the tribe not to exercise power, or by tribal inadvertence.

D. What is an Indian Tribe?

The question of whether an Indian tribe exists as a sovereign entity with governmental powers or as a voluntary association of persons sharing a common ethnic background, much like a non-profit corporation, was recently addressed by the federal courts at the Tenth Circuit Court of Appeals level and later by the United States Supreme Court in *United States v. Mazurie*.³⁸

In the Tenth Circuit, the court which also hears appeals of federal cases arising in Oklahoma, erroneously stated:

The issue is also raised on the fundamental question of the authority of the Government or of the Tribes to regulate the defendants' business in a way that a failure to conform constitutes a crime. As indicated above, we are concerned with a business operating at a fixed place and legal under Wyoming laws. This business would have also been legal, under the Government's theory, if defendants had a license from the Wind River Tribes. The Government has thus delegated to the Tribes the unrestricted power to determine whether the operation of defendants' business constitutes a federal crime or not

If the Government has the power to regulate a business on the land it granted in fee without restrictions, which we doubt, it cannot delegate the power above described to the Tribes. There is no theory of sovereignty or governmental subdivision which would support such a delegation.

The Tribes have the usual powers of an owner of land, to the extent of such ownership, over those using their lands.

38. 419 U.S. 544 (1975), *rev'g* 487 F.2d 14 (10th Cir. 1973).

This power is often confused with some elements of sovereignty when large tracts are involved, and when only the relationship between a Tribe and the Government is examined. The decisions relating to the sovereignty of certain tribes are in the context of relationships between a Tribe and the federal or state government

The tribal members are citizens of the United States. It is difficult to see how such an association of citizens could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization. The situation is in no way comparable to a city, county, or special district under state laws. There cannot be such a separate "nation" of United States citizens within the boundaries of the United States which has any authority, other than as landowners, over individuals who are excluded as members.

...
The purported delegation of authority to the tribal officials contained in 18 U.S.C. § 1161 is therefore invalid. Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located.³⁹

A unanimous Supreme Court, speaking through Justice Rehnquist, reversed the lower court, and on the "voluntary association" versus governmental entity status of Indian tribal governments, unequivocally stated:

This Court has recognized limits on the authority of Congress to delegate its legislative power Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, they are "a separate people" possessing "the power of regulating their internal and social relations"

Cases such as *Worcester* and *Kagama*, surely establish the proposition that Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations," and

39. 487 F.2d at 18-19.

they thus undermine the rationale of the Court of Appeals' decision . . . [Citations omitted.]⁴⁰

Indian tribes' power as governments is the most basic element of Indian law. Virtually all of the federally recognized Indian tribes in Oklahoma have been determined to "perform substantial governmental functions" as a prerequisite to entitlement for the general revenue sharing funds authorized under the state and local Assistance Act of 1972.⁴¹

*Review of Significant Legal Events Affecting
Tribal Powers by Geographic Area and Time Periods*

A. The Treaty Period, Pre-1890

The designations of "eastern Oklahoma tribes" and "western Oklahoma tribes" are more than a mere geographical description, and the designations are more than a mere categorical description of the tribes served by the Bureau of Indian Affairs Area Offices in Anadarko and Muskogee. These designations flow from the differing legal status of these general groupings of tribes after the Indian Territory was divided into two separate governmental areas, the formally organized Territory of Oklahoma and the unorganized Indian Territory. At least two separations of thought are necessary. One relates to geographical separation because of different legal treatment of the tribal governments after 1890 in Oklahoma Territory and Indian Territory. The second relates to a separation of the legal concepts of *power* to govern and the *area* in which these powers may be exercised.

The Territory of Oklahoma came into being in 1890 pursuant to the Oklahoma Organic Act.⁴² The total purpose for the formation of the Oklahoma Territory was to provide a government for the non-Indian settlers within the Territory of Oklahoma after the land run of 1889. It was not intended that the Indians were to become subject to the territorial government.⁴³ Congress accorded the Indian tribal governments in the Oklahoma Territory one kind of legal treatment, and the Indian tribal governments in the Indian Territory an almost entirely different legal treatment.

The Indian tribal governments in the Indian Territory were left intact by Congress' actions prior to 1890. However, the period of

40. *United States v. Mazurie*, 419 U.S. 544 (1975).

41. Pub. L. No. 92-512, 86 Stat. 919 (1972).

42. Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81 (1890).

43. 21 CONG. REC. 2176 (1890).

1890-1907, including such significant legal events as the creation of the Territory of Oklahoma, the Dawes Commission formation to individualize the tribal holdings of the Five Civilized Tribes, the extension of the laws of Arkansas over the Indian Territory, the Curtis Act in 1898 abolishing the existing tribal courts of the Five Civilized Tribes, the 1906 Act providing for the dissolution of the tribal governments of the Five Civilized Tribes and, finally, the admission of Oklahoma into the Union, brought into serious question the continued national existence of the various Indian tribes in what remained of the Indian Territory. In the Oklahoma Territory, with minor exceptions, the pattern emerged as a severe diminishment of the tribal land base, ordinarily known as Indian country, with only minor extinguishment of tribal governmental powers or structures.

In other words, the Indian tribal governments in the Oklahoma Territory, in terms of legal authority to govern, experienced little diminishment by the major legal events of the era, but the land area within which these governmental powers are exercisable—Indian country—was severely limited by the allotment and cession agreements entered into by and between the Indian tribes and the United States.

In contrast, Indian tribes within the Indian Territory (eastern Oklahoma) were stripped of specific governmental structures and functions leaving the Indian country subject to their jurisdiction relatively intact. In other words, the land area within which the Indian Territory tribes could exercise their governmental powers experienced little diminishment in the allotment process, but much of their existing governmental structure was specifically abolished or rendered ineffective by Congress.

Any consideration of the governmental authority of the Indian tribes of Oklahoma as they exist today thus demands a basic understanding of the sequential legal events leading to the formation of the state of Oklahoma.

Period Prior to 1890

Prior to 1890, thirty-three Indian tribes had been settled within the geographical area which would become the state of Oklahoma. These tribes, removed from all across the United States, retained all the governmental power and authority of Indian tribes in general.⁴⁴ There were no competitors for governmen-

44. See *United States v. Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); Act of May 2, 1890, ch. 182, §§ 12, 29, 30, 26 Stat. 81 (1890).

tal power because no organized territorial government existed, and the body of the area was Indian country as defined in an 1834 Act as "that part of the United States west of the Mississippi" not within certain states "to which Indian title has not been extinguished."⁴⁵

The Indian tribes presently in Oklahoma, in their recognized capacity as domestic, dependent nations,⁴⁶ exercised undiminished tribal power over undiminished Indian country prior to 1890. In 1889, the "unassigned lands" comprising that area around what is now Oklahoma City, were opened to entry and settlement. The area was soon flooded with white settlers and the demands for some form of government for these non-Indian residents resulted in the passage of the Oklahoma Organic Act.⁴⁷ Within seventeen years, the state of Oklahoma would be admitted into the Union. The legal effect on tribal governments of the statutes which paved the way to statehood is of controlling importance in determining the current legal status of these Indian tribes.

B. The Critical Era—1890-1907

The period from 1890-1907 is the most legally significant, yet analytically vague, era for Indian tribal governments within the state of Oklahoma. The attitude of state officials about this era, over the years, is perhaps best expressed by a 1953 letter from Johnston Murray, Governor of Oklahoma, replying to a suggestion by Orme Lewis, Assistant Secretary of the Interior, that the Governor meet with the Indian tribes in Oklahoma regarding state assumption of civil and criminal jurisdiction over Indian country in Oklahoma pursuant to Public Law 280.⁴⁸ Governor Murray stated:

When Oklahoma became a State, all tribal governments within its boundaries became merged in the State and the tribal codes under which the tribes were governed prior to Statehood were abandoned and all Indian tribes, with respect to criminal offenses and civil causes, came under State jurisdiction.

Therefore, Public Law No. 280 will not in any way affect the Indian citizens of this State.

45. *Bates v. Clark*, 95 U.S. 204 (1877).

46. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

47. Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81 (1890).

48. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953).

Although this perspective can only be characterized as an expression of faith, the state of Oklahoma has regarded Governor Murray's viewpoint as the final comment on the "Oklahoma Indians." The noncritical acceptance of this view by federal officials and others involved in the affairs of the Indian tribes residing in Oklahoma has resulted in stunted, ineffective tribal governments which currently exercise only a fraction of the governing authority with which they are vested.

Contrasting the simplistic view of Governor Murray is that of the prime authority in the field of Indian law, Felix Cohen, who has stated that, "The laws governing the Indians in Oklahoma are so numerous that analysis of them would require a treatise in itself."⁴⁹ The American Indian Policy Review Commission found it impossible to devote the necessary time to this study and suggested a separately funded congressional study to develop a rational policy for the Indian tribes in Oklahoma.⁵⁰

Each of the Indian tribes in Oklahoma exercised all the power and authority of a dependent, domestic nation prior to 1890, thus being on an equal or superior footing with the general status of Indian tribes across the United States. At this point, the only competitor of the tribe in the field of governing power was the federal government, whose power, when it chose to exercise it, was shortly to become recognized by the Supreme Court as plenary.⁵¹

Beginning in 1890, the Oklahoma Enabling Act⁵² established a second competitor for the governing authority of a portion of these Indian tribes, *i.e.*, Oklahoma Territory. The Oklahoma Enabling Act carved Oklahoma Territory out of the "Indian Territory" by providing:

That all that portion of the United States now known as the Indian Territory, except so much of the same as is actually occupied by the Five Civilized Tribes, and the Indian tribes within the Quapaw Indian Agency, and except the unoccupied part of the Cherokee Outlet, together with that portion of the United States known as the Public Land Strip [Oklahoma Panhandle] is hereby erected into a temporary government by the name of the Territory of Oklahoma . . . ,

and further: "whenever the interest of the Cherokee Indians in the

49. COHEN, *supra* note 1, at 455.

50. FINAL REPORT TO AMERICAN INDIAN POLICY REVIEW COMM'N, FEDERAL, STATE AND TRIBAL JURISDICTION 120 (1976).

51. Lone Wolf v. Hitchcock, 187 U.S. 552 (1903).

52. Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81 (1890).

land known as the Cherokee Outlet shall have been extinguished and the President shall make proclamation thereof, said outlet shall thereupon, and without further legislation, become a part of the Territory of Oklahoma."⁵³ Congressional action thus created a distinction which would later have important legal significance between the balance of the Indian tribes in what is now the state of Oklahoma, and the Cherokee, Creek, Choctaw, Chickasaw, Seminole, Quapaw, Seneca, Ottawa, Wyandotte, Modoc, Cayuga, Peoria, and Miami tribes.

Although the lands of the Quapaw subagency and Five Civilized Tribes were officially designated as Indian Territory, no territorial government was created which embraced their lands.⁵⁴ Thus, it is these tribes, and only these tribes, which were subject to the later legislation affecting the Indian Territory.

The lands of the balance of the tribes in what is now Oklahoma, the Kansas (Kaw), Absentee Shawnee, Wichita, Caddo, Delaware, Kiowa, Comanche, Apache, Cheyenne, Arapaho, Citizens Band Pottawatomie, Fort Sill Apache, Kickapoo, Otoe-Missouria, Iowa, Pawnee, Ponca, Tonkawa, Sac and Fox, and the Osage, were encompassed in the newly created Territory of Oklahoma. It was these tribes, then, for which a second direct competitor for governmental power was created by the Organic Act.

1. Oklahoma Territory Tribes

The first 28 sections of the Enabling Act ordain and establish the government for the Territory of Oklahoma, while the balance of the Act contains provisions applicable to what was designated as Indian Territory. Both the face of the Act and its legislative history indicate that the establishment of Oklahoma Territory was not meant to compromise the governing authority of the tribes located therein to any significant degree. The first section of the Act contains the familiar proviso:

Provided, That nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the Government of the United States to make

53. *Id.* at 82.

54. *Id.*, § 29.

any regulation or to make any law respecting said Indians, their lands, property, or other rights which it would have been competent to make or enact if this act had not been passed.⁵⁵

Other than this proviso, the only section of the Act dealing with Indian rights and the powers of tribal government is Section 12, originally drafted as Section 8 of the bill. Originally the section was much more restricted in the class which was granted access to the federal courts, limiting access only to members of the Indian tribes.

In its final form, Section 12 provided:

That jurisdiction is hereby conferred upon the district courts in the Territory of Oklahoma over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Territory of Oklahoma, and any citizen or member of one tribe or nation who may commit any offense or crime in said Territory against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment in the Territory as he would be if both parties were citizens of the United States; and any person residing in the Territory of Oklahoma, in whom there is Indian blood, shall have the right to invoke the aid of courts therein for the protection of his person or property, as though he were a citizen of the United States: *Provided*, That nothing in this act contained shall be so construed as to give jurisdiction to the courts established in said Territory in controversies between Indians of the same tribe, while sustaining their tribal relations.⁵⁶

This section is unique in its approach to the jurisdictional status of the territory. All other jurisdictional statutes of the period delineated the territorial limits of federal and tribal jurisdiction by limiting such jurisdiction to the reservation,⁵⁷ (later changed to "Indian country"),⁵⁸ or to Indian country.⁵⁹ Generally, if an Indian against Indian offense or transaction occurs outside Indian country, no special Indian interest is involved, and Congress has not

55. *Id.*, § 1.

56. *Id.*, § 12.

57. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (1885).

58. Act of July 10, 1957, Pub. L. No. 85-86, 71 Stat. 277 (1957).

59. Act of July 9, 1832, ch. 174, § 34, 4 Stat. 564; Act of Mar. 15, 1864, ch. 33, 18 Stat. 29; Act of Feb. 27, 1877, ch. 69, 19 Stat. 244, now codified at 18 U.S.C. § 1154.

reserved federal jurisdiction over the subject matter, then the territorial or state court has jurisdiction over the subject. Section 12 is unique in that while it provides an opportunity for actions involving members of different tribes to be litigated in the federal court, it is not mandatory and jurisdiction was withheld over all matters involving members of the same tribe, not merely while in the Indian country, but *while sustaining their tribal relations*. The legislative history of the Act supports the proposition that the territorial government was not designed or meant to have any effect on the governing authority of the tribes located within the territory. Congressman Mansur clearly stated the intent of the Act thus:

I challenge any gentleman on this floor—I care not who he is—to take any one of the first 24 sections of this bill and show where it touches a red man at all. I repeat, for I would like to have it understood, that the first 24 sections of this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first 24 sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation Now, as to every Indian reservation within the whole limits of the Indian Territory as now organized, we say expressly that those first 24 sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that, as to every Indian tribe and as to the land of every Indian tribe, none of these 24 sections which apply to white people shall operate.⁶⁰

In 1890, at the time of these debates, none of the Indian tribes in the territory had been allotted, and all of the tribes enjoyed classical reservation status. Thus, Congressman Mansur's remarks indicate that the Act was intended to provide a government for those white persons legally within the area and to leave the reservations completely under the control of the tribes. The white persons legally within the area were concentrated around present-day Oklahoma City in the unassigned lands which had been opened by the run of 1889, and in the Panhandle. That the territorial effect of the government being established was limited to these "opened areas," is stated in the record:

Mr. Mansur: The whole effect, then, of our legislation is simply to take out of the existing condition a certain small

60. 21 CONG. REC. 2176 (1890).

territory, 2,000,000 acres in one place [lands opened by the run of 1889] and a little more than 3,000,000 acres in No Man's Land [the present Oklahoma Panhandle], in all less than 6,000,000 acres, and to put this much territory under the control of white men when their Territorial Legislature shall be organized. . . .

Mr. Oates: Will the gentlemen kindly state the number of square miles embraced in this Territory?

Mr. Mansur: There are between 22,000,000 and 23,000,000 acres⁶¹

The balance of the area, the approximately 17,000,000 acres of the Indian reservations was intended to remain under the control of the federal government and the tribes. Any argument that this Act extinguished the reservation status enjoyed by any of the tribes physically embraced in Oklahoma Territory, that their governmental authority was infringed, or that the Territory of Oklahoma acquired jurisdiction over them was explicitly rejected:

Mr. Mansur: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?

Mr. Turner: But I suggest to the gentleman that this is no longer a reservation, but a Territory.

Mr. Mansur: But I desire to remind the gentleman that, as this bill expressly declares, *This Territorial government or organization is not for any Indian reservation whatever: it does not apply to Indian reservations.*⁶²

The Enabling Act taken in the sense most destructive of tribal jurisdiction within the Oklahoma Territory resulted in no diminishment of the tribal land base or change in reservation status. The Indian country subject to the jurisdiction of the tribes in western Oklahoma was not at all changed by the Act. Likewise, the governing authority of the tribes in western Oklahoma was left completely intact. Even presuming the most adverse interpretation of Section 12 (originally Section 8), this section simply extends to those of Indian blood a nonmandatory right to appeal to the federal courts to protect their persons or property when the dispute involved only members or citizens of different tribes or nations. The jurisdiction thus granted to the federal courts *vis a vis* the tribal court is analogous to federal diversity jurisdiction *vis a*

61. *Id.*

62. 21 CONG. REC. 2104 (1890) (emphasis added).

vis the state courts, taking no power or jurisdiction away from the tribe, but simply allowing nonmembers and noncitizens to appeal to the federal courts if the individual concerned felt that he would be better protected there. The effect of Section 12 is described by Congressman Hooker as he proposed an amendment opening the federal courts to anyone of Indian blood:

It was said in debate the other day by the gentleman from Illinois [Mr. Springer] that the Indians themselves had given their assent to this proposition. As I understand from them their assent was given by their attorneys, to the proposition that any Indian embraced in the Territory of Oklahoma might appeal, as a citizen of the United States would appeal, to the courts, thus established for protection or for the determination of his rights. *It was not intended to apply nor was the concession made as to any tribe . . .*

There will be Indians embraced in the Territory under the 8th section [now Section 12], probably, and if the courts are established and this bill passes, they will have the right when they hold relations with the Indian tribes under their law . . . *It does not refer to the tribes, but to such Indians as may be there and to white citizens who hold relations with the Indians, and they ought to be allowed to invoke the protection of the courts.*⁶³

2. *The Allotment Acts*

The most catastrophic event of the era affecting the jurisdiction or power of tribes in western Oklahoma was the allotment in severalty of the lands of the various tribes. With the possible exception of the Osage Nation, the allotment acts had no detrimental effect on the authority or power of the tribal governments to govern. The allotment acts, rather, impacted on the territorial area over which the tribal government could exert its influence.

There were two basic methods by which the common holdings of the reservations were allotted in severalty. One such method was to allot the tribes under the provisions of the General Allotment Act.⁶⁴ The Otoe and Ponca tribes were allotted under the provisions of this Act, and many other tribal allotments of the various tribes in western Oklahoma were, by special allotment agreements, held "in trust for the allottees, respectively, for the

63. 21 CONG. REC. 2177 (1890) (emphasis added).

64. Act of Feb. 8, 1887, ch. 199, 24 Stat. 388 (1887).

period of 25 years, in the manner and to the extent provided for in the [General Allotment Act].”⁶⁵

The General Allotment Act did not speak to the governing power of the tribe. The General Allotment Act is a property act and only speaks to which sovereign (tribe or state) will have jurisdiction over the allottees and allotted property. Section 6 of the Act provided:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and 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: and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.”⁶⁶

For many years it was thought that this Act subjected the allottees to the jurisdiction of the state or territory as soon as the trust patents had issued and this view was adopted by the United States Supreme Court.⁶⁷ However, this viewpoint was called into question⁶⁸ and finally overruled in *United States v. Nice*.⁶⁹ In *Nice* the Supreme Court stated that the actions of Congress and the Executive Branch after the passage of the Act had clearly indicated that the federal government had intended to retain jurisdiction until the title to the allotments had been vested in the allottees in fee simple. That the provisions of the General Allotment Act neither terminated the reservations nor subjected the allottees to state jurisdiction was emphasized by the 1906 amendment to the General Allotment Act, more commonly known as the Burke Act:

Sec. 5. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee 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; . . . Provided further, That until the issuance of fee simple patents all allottees to whom trust patents shall

65. Act of Mar. 3, 1891, ch. 543, 26 Stat. 989 (1891) (Cheyenne and Arapahoe Allotment Agreement).

66. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (1887).

67. *In re Heff*, 197 U.S. 488 (1905).

68. *Rice v. Olsen*, 324 U.S. 786 (1945).

69. 241 U.S. 601 (1915).

hereafter be issued shall be subject to the exclusive jurisdiction of the United States.⁷⁰

Thus, the provisions of the General Allotment Act has no effect on the *power* of the tribes to govern and only subjects the allotments to state jurisdiction once the land is taken out of trust status and the title is vested in the allottee in fee simple absolute. Therefore, the individual allotment agreements of the various tribes must be considered in the attempt to determine the limitations which may or may not have been imposed on the tribes.

With the exception of the Osages, research reveals no allotment agreement between the United States and any tribe in western Oklahoma (Oklahoma Territory) which modifies or limits the powers of the tribal governments. However, the territory in which these powers could be exercised was, at least in some cases, drastically altered. The allotment agreements of the western tribes can be broken down into four basic categories. These categories are:

A. Allotment and Cession agreements (wherein the tribe did) cede, convey, transfer, relinquish and surrender forever and absolutely without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands embraced in the following described tract of country⁷¹

B. Allotment and Cession Agreements with exceptions: There shall be excepted from the operation of this agreement a tract of land . . . [which] . . . shall belong to said Iowa Tribe of Indians in common so long as they use the same . . . for their . . . Tribe⁷²

That in addition to the allotment of lands to said Indians as provided for in this agreement, the Secretary of the Interior shall set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing lands to be selected by the Secretary of the Interior⁷³

C. Allotment Agreements with limited cessions: Sec. 2. All

70. Act of May 8, 1906, ch. 2348, § 5, 34 Stat. 182 (1906) (emphasis added).

71. Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1022 (1891) (Cheyenne and Arapahoe Allotment Agreement, art. I).

72. Act of Feb. 13, 1891, ch. 165, 26 Stat. 749 (1891) (Iowa Allotment Agreement, art. V).

73. Act of June 6, 1900, ch. 813, 31 Stat. 672 (1900) (Allotment Agreement with the Comanche, Kiowa, and Apache, art. III).

lands belonging to said Kansas and Kaw Tribes of Indians located in the Territory of Oklahoma, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof, in acres, as follows . . . Sec. 7. There shall be set aside and reserved from selection or allotment one hundred and sixty (160) acres of land, including the school and agency buildings, to conform to the public survey, which said one hundred and sixty (160) acres of land said tribe cedes to the United States.⁷⁴

D. *Allotments in severalty without cessions*: Sec. 2. That all lands belonging to the Osage Tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows⁷⁵

Although the effect of these four types of allotment proceedings is anything but clear, the following generalizations can be made, subject to revision as the distinct circumstances surrounding the allotment and the legislative history of the particular acts affecting the various tribes impact on the wording of the acts.

As to those tribes without allotment agreements allotted under the provisions of the General Allotment Act, the tribal power and authority were left totally intact. However, the reservation boundaries of the Otoe, Missouriia, and Ponca reservations were abolished by a specific statute in 1904.⁷⁶ Thus, the territorial jurisdiction of these tribes is now limited to areas where the nature of the area, the relationship of the inhabitants of the area to the tribe and the federal government, and the practice of government agencies toward the area establish it as a dependent Indian community,⁷⁷ and to all the allotments which are still held in trust by the United States.⁷⁸

As to those tribes with allotment and cession agreements, the tribal power and authority were left intact. There has, however, been no definitive pronouncement by Congress or the Supreme

74. Act of July 1, 1902, ch. 1361, 32 Stat. 636 (1902) (congressional ratification of an agreement of the Kansas Tribe among themselves).

75. Act of June 28, 1906, ch. 3572, 34 Stat. 539 (1906) (Osage Allotment Act. Although land was sold to non-Indian interests under the Act, it contained no cession or reservation disestablishment language.)

76. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 218 (1904).

77. 18 U.S.C. § 1151(b) (1970); *United States v. Martinez*, 442 F.2d 1022 (10th Cir. 1971).

78. 18 U.S.C. § 1151(c) (1970); *State v. Littlechief*, 573 P.2d 267 (Okla. 1978).

Court as to the reservation status. The reservation of the Oklahoma Kickapoo Tribe was determined to be extinguished within the meaning of the statutes requiring the consent of the Secretary of the Interior to the use of rights of way across Indian reservations for electric lines.⁷⁹ Additionally, the Kiowa, Comanche, Apache, and Cheyenne-Arapaho reservations have been judicially determined to be extinguished by the Tenth Circuit Court of Appeals in the cases of *Tooisgah v. United States*⁸⁰ and *Ellis v. Page*.⁸¹ Since the reasoning of the circuit court has been undermined by the recent Supreme Court rulings, a Supreme Court determination on an individual basis will be necessary to finally determine the issue. The question for each of the allotment and cession tribes will be whether the surrounding circumstances and legislative history establish an intent on the part of Congress to continue the reservation status in a manner sufficient to overcome the cession language which was determined to be "precisely suited to [extinguishment]."⁸³

However, *DeCoteau v. District Court*⁸⁴ establishes that notwithstanding reservation extinguishment and abolition of the reservation boundaries, the federal government and the tribe retain exclusive jurisdiction over the allotments until Indian title (trust status) is extinguished. The Court stated: "It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities."⁸⁵

Thus, even should the reservation extinguishment issue be finally determined adversely to the tribe, the tribe will retain full governmental power and authority over the dependent Indian communities associated with the tribe and all trust allotments including rights of way running through them.⁸⁶

The governing authority of those tribes which have specific areas of land excepted from the operation of their allotment agreements is the same as that of the other tribes in western Oklahoma. Likewise, the area within which they can exercise their governing authority is subject to the same considerations re-

79. *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206 (1943).

80. 186 F.2d 93 (10th Cir. 1951).

81. 351 F.2d 250 (10th Cir. 1965).

82. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District Ct.*, 420 U.S. 425 (1975).

83. *DeCoteau v. District Ct.*, 420 U.S. 425, 445 (1975).

84. *Id.*

85. *Id.* at 428.

86. 18 U.S.C. § 1151 (1970).

garding allotments as listed in the paragraph directly above. However, the allotment agreements of these tribes present one further issue which apparently has not been previously litigated. This issue is the effect of the provisions of the allotment act excepting certain tribal lands from operation.

This question has never been squarely presented to a court. However, under the common rules of statutory construction, it would appear that the particular areas reserved from the cession would constitute a diminished Indian reservation.⁸⁷ Thus, the tribes would retain jurisdiction over these diminished reservations notwithstanding the legal status of the current landowner as Indian or non-Indian or the status of the land as trust or nontrust.⁸⁸

One of the greatest ironies in the saga of the allotment of the tribes in the Territory of Oklahoma may be that of the Kansas or Kaw Tribe. The Kaw essentially allotted themselves by drafting an allotment agreement and submitting it to Congress. The draft as approved by Congress,⁸⁹ simply calls for a division of the tribal land and funds. There is no general cession language anywhere within the Act, the only cession to the United States being a specific cession of the 160-acre tract upon which the school and agency buildings were located. Under the rule for determining whether a reservation is extinguished, propounded by the Supreme Court in *DeCoteau*, the reservation boundaries clearly remained intact, with the exception of the 160-acre tract, after the allotment. The irony is that the Kaw, in the aftermath of the allotment era, retain jurisdictional authority over their reservation and yet there appear to be no allotments remaining in trust status, and the tribe only owns 20 acres of land. However, it should be emphasized that this result is *not* due to any oversight or mistake on the part of Congress. It is simply the result of a congressional policy to provide for the allotment of the tribes within the Territory of Oklahoma.

The circumstances surrounding the Osage Nation have combined to produce a unique legal entity among the Indian tribes in Oklahoma. From 1881, the Osage had governed themselves by a written constitution and laws. The constitution of the Osage Nation was ordained and established pursuant to the inherent governing power of the Great and Little Osages and provided for a tripartite government with a legislative, executive, and judicial branches. The legislative power was vested in the National Coun-

87. *Seymour v. Superintendent*, 368 U.S. 351 (1962).

88. 18 U.S.C. § 1151(a) (1970); *DeCoteau v. District Ct.*, 420 U.S. 425, 427 n.2 (1975).

89. Act of July 1, 1902, ch. 1361, 32 Stat. 636 (1902).

cil, the executive power in the Principal Chief, and the judicial power was vested in a supreme court.⁹⁰ The laws of the Osage Nation were codified in 18 articles covering such topics as Estates and Administrators, Attorneys, Crimes and Punishments, Sheriffs, Intermarriage With and Jurisdiction Over White Men, Civil Procedure, and Taxation.⁹¹ Self-government under this constitution and laws continued until 1900. Then, in one of the most absolutely amazing documents rescued from the oblivion of the allotment era, the Department of the Interior, by administrative fiat, abolished the constitutional Osage tribal government.⁹²

The report of the Commissioner stated:

Abolishment of the Osage Tribal Government

A crisis in Osage governmental affairs was reached in the election of tribal officers in 1898. After a bitter factional controversy, and after an investigation had been conducted by Inspector McLaughlin, the Department, on February 21, 1899, decided the contest in favor of Black Dog, representing the full-blood element as principal chief, and Ma shah ke tah, the candidate of the progressive or mixed-blood party, as assistant principal chief. The Osages, however, became involved in another dispute over the election of members of the national council, which was only settled by the Department order of January 18, 1900, recognizing twelve members as having been duly elected and constituting a quorum of the council, leaving three vacancies to be filled by that body.

These and other considerations impelled the office, on February 21, 1900, to recommend the issuance of a Departmental order abolishing the Osage national government, excepting the national council and the offices of principal chief. Such an order was issued March 30. May 19, the office recommended the abolishment of the national council which was ordered by the Department May 21, 1900.

The principal causes that led to the abolition of the Osage tribal government were: (1) Acrimonious disputes between the two factions over elections; (2) entire absence of harmony between the Osage tribal officers and the Indian agent in the administration of tribal affairs; (3) the selection of ignorant men as officeholders, and (4) the profligate use of moneys received from permit taxes.

90. Constitution and Laws of the Osage Nation, arts. III-IV (1890) reprinted in *Constitution and Laws of the American Indian Tribes*, XXXI.

91. *Id.*

92. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 173 (1900).

The tribal government was abolished after the conditions had been fully investigated by a special Indian agent and after the facts developed in his investigation had been carefully considered by this office and the Department. It was determined upon as the wisest step to take, in view of the tangle into which the affairs of the Osage Nation had gotten. It has resulted in the reduction of expenses and consequently a considerable saving to the tribe in the amounts heretofore expended for salaries of a long list of tribal officials.

The Osage constitution provided that the National Council was to be the judge of the qualifications of its members, determine its own rules of procedure, choose its own officers, and that "the returns of the elections for Principal Chief shall be sealed up and directed to the President of the National Council, who shall open and publish them in the presence of the Council assembled. The person having the highest number of votes shall be Principal Chief"⁹³ From the offhand manner in which the Commissioner indicates that the Department "decided the contest" and settled the later dispute "by the Department order," it seems clear that the Bureau of Indian Affairs was completely comfortable in interfering with the constitutional processes of the Osages. With no authority of law, the Commissioner proceeded not only to bypass the constitutional government of the Osages, but to terminate its activities. The principal causes of this action might well be translated as

(1) two elections hotly contested by the Republican and Democratic parties necessitating a recount; (2) a very strong sense of self-determination on the part of the Osage leadership; (3) true democracy at work by placing men in office who represent the view of the Osage citizens as opposed to that of agents of the United States; (4) the Commissioner's personal tax revolt within Osage country.

This situation—abolition of a constitutional tribal government by administrative fiat without legal foundation—was described by a federal district judge as "bureaucratic imperialism" in the recent case of *Harjo v. Kleppe*,⁹⁴ involving a similar situation with the Creek Nation.

This *ultra vires* action of the Commissioner remained in effect from 1900 until 1906. During this period, the Principal Chief was

93. Constitution and Laws of the Osage Nation, arts. III-IV (1890).

94. 420 F. Supp. 1110, 1130 (D.C. Cir. 1977).

the only spokesman of the Osage National Council recognized by the Department. However, in the 1906 Osage Allotment Act, Congress provided for the election of a Principal and Assistant Principal Chief and an eight-member tribal council as follows:

Sec. 9. That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined.⁹⁵

It is clear that the statutory tribal council was organized to control the commonly held tribal mineral estate.⁹⁶ A recent case, *Logan v. Andrus*,⁹⁷ held that the action of the Secretary of the Interior in 1900 abolishing the tribal government was illegal, thus confirming the 1881 Osage constitution and the laws passed pursuant thereto as the governing law within the Osage Nation. It is then apparent that the Section 9 statutory tribal council, as successors to the constitutional tribal council, have retained the powers delegated to it by Congress as well as those inherent powers delegated to the tribal council by the Osage constitution.

As noted above, the Osage reservation was simply allotted with no land cessions made to the United States. While numerous cases hold that such areas as Osage allotments⁹⁸ and public highways within Osage County⁹⁹ remained Indian country after the allot-

95. Act of June 28, 1906, ch. 3572, § 9, 34 Stat. 539 (1906).

96. See 71 Stat. 471 (1957), amending 34 Stat. 545 (1906) and 45 Stat. 1481 (1929). See also H. REP. No. 965, at 1 (Aug. 1, 1957), 85th Cong., 1st Sess.

97. 457 F. Supp. 1318 (10th Cir. 1978).

98. *United States v. Ramsey*, 271 U.S. 467 (1926).

99. *Townsend v. United States*, 265 F. 519 (8th Cir. 1920).

ment act and the admission of Oklahoma into the Union, no judicial determination has been made regarding the present existence of the Osage Reservation.¹⁰⁰ Under the present test expounded by the Supreme Court in *DeCoteau* and *Kneip*,¹⁰¹ there is no reason to believe that the Osage Reservation has been diminished or extinguished. Clearly, all Osage allotments still restricted and all of the Osage villages, such as Grey Horse, continue to be Indian country.¹⁰² For the Osage Tribe, this era marked the end of major federal legislation which affected tribal government. The other tribes within the Territory of Oklahoma would be markedly aided in exercising their governmental functions by a series of congressional acts beginning in the 1930's.

3. Indian Territory Tribes

An understanding of the status of the Five Civilized Tribes prior to 1890 is critical to an understanding of the final result of the legislation of this period dealing with the Indian Territory. Prior to 1890, the Five Civilized Tribes had occupied a leadership position in the struggle for tribal self-determination. During the 1800's, for example, the Cherokee Nation repeatedly resorted to the federal courts in attempts to prevent or limit incursion upon its authority by the state or federal government.¹⁰³ The Cherokee Nation, now in Oklahoma, was described as a "domestic dependent nation" by Chief Justice Marshall in *Cherokee Nation v. Georgia*.¹⁰⁴ The constitutional governments of the Five Civilized Tribes prior to the 1890-1907 era affirmatively exercised all the inherent powers of internal self-government as a matter of right, resisting any intrusion into their internal self-government by the state or federal governments, willingly acquiescing only in federal control of their foreign relations.

These governments have been recognized as well organized, effective sovereigns:

They maintained complete governments They had their own schools, their own legislative assemblies, their own

100. *DeCoteau v. District Ct.*, 420 U.S. 425 (1975).

101. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

102. *United States v. Ramsey*, 271 U.S. 467 (1926); 18 U.S.C. § 1151(b)(c) (1970).

103. These well-known cases, in chronological order were *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) *The Cherokee Tobacco*, 78 U.S. 616 (1871); *Cherokee Nation v. Southern Kansas R.R.*, 135 U.S. 641 (1890); *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

104. 30 U.S. (5 Pet.) 1 (1831).

courts. And they did the job well. Under all the conditions they made a record which would have been creditable to any municipality or state in this country.¹⁰⁵

The Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of Congress, they then exercised within a definite territory the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts; and each district was provided with a judge.¹⁰⁶

This long heritage of legal resistance to incursions by the state or federal governments into the internal affairs of the Five Civilized Tribes was in marked contrast to the domination of the tribes in western Oklahoma by the military. While the tribes in western Oklahoma were attempting to overcome the effects of their recent seventy years of warfare, thus lacking a long tradition of politico-legal battles, the wars of the Five Tribes occurred primarily between the years of 1520-1780. In the period between 1780 and 1890, the Five Civilized Tribes had become well versed in politico-legal battles. The problem presented to the United States by the two groups of tribes was basically different: the western tribes had retained their lands by the gun; the Five Civilized Tribes were retaining theirs by the law book.

The enactments of the 1890-1907 era intended to prepare the area for statehood took on a different character on opposite sides of the state. In Oklahoma Territory, the land base was limited through the allotment and cession agreements, reducing the land holdings of the tribes to a level manageable by the federal government and opening the balance to non-Indian settlement, while leaving the tribal governmental powers intact. In the Indian Territory, restrictions were placed on the internal governing mechanisms of the tribes, thus reducing their governmental activities to a manageable level for the federal government while leaving the tribal land base intact. Thus, the allotment process of the Five Civilized Tribes and the tribes of the Quapaw Agency was very similar in most respects to the allotment process of the Kansas (Kaw) and the Osages. Under the test propounded in

105. *Hearings Before the Comm. on Indian Affairs*, S. 2047, 74th Cong., 1st Sess., 10 (1935).

106. *Turner v. United States*, 248 U.S. 354 (1919).

DeCoteau,¹⁰⁷ there appears to be no legal reason for the presumption that the acts of the 1890-1907 era extinguished the reservation boundaries of the Indian Territory tribes.

In the Indian Territory, the Oklahoma Organic Act of 1890¹⁰⁸ expanded the jurisdiction of the United States court created in 1889 to include jurisdiction over crimes and controversies between members or citizens of different Indian tribes or nations. Section 36 of the Act provided:

That jurisdiction is hereby conferred upon the United States court in the Indian Territory over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Indian Territory, and any citizen or member of one tribe or nation who may commit any offense or crime against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment in the Indian Territory as he would be if both parties were citizens of the United States. And any member or citizen of any Indian tribe or nation in the Indian Territory shall have the right to invoke the aid of said court therein for the protection of his person or property as against any person not a member of the same tribe or nation as though he were a citizen of the United States.

This section is analogous to Section 12 of the act opening the courts of the Territory of Oklahoma to the citizens or members of the Indian tribes located there. There is no reason to suppose that Sections 12 and 36 do not have the same effect, namely, making the federal courts available to litigants of different tribes or nations on a nonmandatory basis very similar to diversity jurisdiction for citizens of different states. Sections 29, 30, and 31 of this act defined the jurisdiction of the United States court in the Indian Territory to preserve fully the exclusive tribal jurisdiction over members of the same tribe or nation.

The Act of June 7, 1897,¹⁰⁹ applicable only in the Indian Territory, represents a radical shift in congressional mood from allowing the Indian tribes to retain tribal jurisdiction over Indian matters toward divestment of tribal jurisdiction. The 1897 Act states:

107. 420 U.S. 425 (1975).

108. Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890).

109. Act of June 7, 1897, ch. 3, 30 Stat. 62 (1897).

"Provided further", That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil cases in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by an person in said Territory, and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes: and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts.¹¹⁰

This 1897 Act appears to have conferred civil and criminal jurisdiction on the United States courts in the Indian Territory over all persons regardless of race, in addition to placing the laws of Arkansas and the United States in force throughout the Indian Territory.¹¹¹

The Act of June 28, 1898,¹¹² applicable only in the Indian Territory and commonly referred to as the Curtis Act, continued the trend set by the 1897 Act and apparently abolished the tribal courts then existing in the Indian Territory and rendered the existing tribal laws unenforceable in the United States courts.

That on the first of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all such civil and criminal causes pending in any court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.¹¹³

110. *Id.* at 83.

111. *Id.*

112. Act of June 28, 1898, ch. 517, 30 Stat. 495 (1898).

113. 30 Stat. 504, § 28 (1898).

And Section 26 of the Curtis Act states: "That on and after the passage of this Act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."¹¹⁴

A 1909 federal appellate court decision, *Hays v. Bassinger*,¹¹⁵ held that tribal courts continued to be vested with a limited jurisdiction, and this decision is supported by a more careful analysis of specific allotment agreements. For example, the Seminole allotment agreement, passed on July 1, 1898,¹¹⁶ two days after the Curtis Act and therefore controlling, states in the portion of the agreement defining the jurisdictional status of the area:

The United States Courts now existing, or that may hereafter be created, in Indian Territory shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation, or use of real estate owned by the Seminoles, and to try all persons charged with homicide, embezzlement, bribery, and embracery hereafter committed in the Seminole country, without reference to race or citizenship of the persons charged with such crime; and any citizen or officer of said nation charged with any such crime, if convicted, shall be punished as if he were a citizen or officer of the United States, *and the courts of said nation shall retain all the jurisdiction which they now have, except as herein transferred to the courts of the United States.*¹¹⁷

And further: "When this agreement is ratified by the Seminole Nation and the United States the same shall serve to repeal all the provisions of the Act of Congress approved June seventh, eighteen-ninety seven, in any manner affecting the proceedings of the general council of the Seminole Nation."¹¹⁸ This single example illustrates the compelling need for an extensive individualized research in any attempt to determine specific tribal rights from the general legislation. From the Allotment Agreement, it appears that the Seminole Tribal Court of 1898 is still a viable legal entity.

The Act of April 28, 1904,¹¹⁹ further adversely affected the jurisdiction of tribal governments in the Indian Territory. This Act in pertinent part states:

^{114.} *Id.*

^{115.} 168 F. 221 (1909).

^{116.} Act of July 1, 1898, ch. 542, 30 Stat. 567 (1898).

^{117.} *Id.* at 569 (emphasis added).

^{118.} *Id.*

^{119.} Act of Apr. 25, 1904, 33 Stat. 573 (1904) (additional United States judges in Indian Territory).

All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedman, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlement of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise . . . ¹²⁰

The Act of April 26, 1906, ¹²¹ entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory . . .," was purportedly designed to liquidate the interests of the Five Civilized Tribes, but Section 28 of the Act seemingly indicates that the result of all the previously discussed enactments serve not to extinguish tribal governments but only to render unenforceable the existing laws of those tribes or nations and to vacate certain tribal governmental offices.¹²² Section 28 provides:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided*, further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or by any officer thereof, shall be of any validity until approved by the President of the United States.¹²³

By the 1906 Act, the tribal existence and tribal governments were continued in full force and effect, provided that (1) the tribal legislature should not remain in session more than thirty days in one year, (2) no act, ordinance, or resolution of the tribal legislature would be valid until approved by the President of the United States, and (3) no contract affecting tribal land or expen-

120. *Id.*

121. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 (1906).

122. *See* Harjo v. Kleppe, 420 F. Supp. 1110 (D.C. Cir. 1976).

123. 34 Stat. 137, 148 (1906).

diture of tribal funds would be valid until approved by the President of the United States.¹²⁴ It should be noted that these restrictions, with approval power resting in the Secretary of the Interior, apply equally today to almost every Indian tribe in the United States.

Section 26 of the Curtis Act¹²⁵ declaring the tribal laws unenforceable in the federal courts seemingly is referring to the tribal laws in existence in 1898, and is not applicable to future enactments of the tribal legislature as provided for in the allotment agreements and the 1906 Act cited above. These laws, rendered unenforceable in the federal courts also, were not abolished or repealed. They simply are without a forum for their enforcement. In practical terms, this fact is significant if these tribal governments are to be restored along traditional lines. While the existing courts and tribal taxes were abolished, the power and authority of the tribe to establish and maintain a court and taxes apparently were *not* abolished. The effect of this Act is simply to require presidential approval of any new court or tax structure. Apparently, the tribal powers of self-government and the judicial legislative authority of these Indian tribes continued beyond this series of limiting congressional enactments except where specifically extinguished by federal law.¹²⁶

In reviewing the various acts,¹²⁷ of this period, it is important to

124. *Id.*

125. Act of June 28, 1898, ch. 517, 30 Stat. 495 (1898).

126. This view is amply supported by *Morris v. Hitchcock*, 194 U.S. 384 (1904), in which the validity of an act of the Chickasaw Nation, passed in 1902 and approved by the President, was unsuccessfully challenged. The Supreme Court, speaking through Justice White, at p. 393 stated: "Viewing the Curtis Act in light of the previous decisions of this court and the dealings between the Chickasaws and the United States, we are of the opinion that one of the objects occasioning the adoption of that act by Congress, having in view the peace and welfare of the Chickasaws, was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventive of arbitrary and injudicious action."

More recently, the District Court of the District of Columbia ruled in the case of *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C. Cir. 1976), that despite the general intentions of Congress in the late nineteenth and early twentieth centuries ultimately to terminate the tribal government of the Creek Nation and an elaborate statutory scheme to do so, the termination was never statutorially accomplished and the government was in fact specifically continued. The Court went on to hold that the Creek National Legislature of the 1867 constitution was still the source of power to make appropriations from tribal funds and that any other method was illegal. The Court stated at page 1143: "As the foregoing discussion makes clear, under the 1867 constitution and the relevant federal law, the expenditure of tribal funds which the federal defendants now make and permit to be made under the authority of the Principal Chief may not be legally made without the assent of a Creek National legislature."

127. See acts cited at notes 108, 109, 112, 119, and 121, *supra*.

note that the final result contained in the 1906 Act—providing for federal approval of major tribal political actions (statutes, ordinances, or resolutions) and contracts or expenditures of tribal funds—is presently standard operating procedure for day-to-day tribal operations throughout the United States.¹²⁸ However, when compared to the operating procedure of the Five Civilized Tribes in 1895, today's standard operating procedure represents an extremely serious limitation on tribal government. For instance, in any contemporary discussion of tribal sovereignty and powers of self-government, the Navajo Nation is normally cited as the standard of an Indian tribe possessing full tribal powers to which particular tribal circumstances can be compared for validation.¹²⁹ The legislative enactments and the contracts for expenditures of the Navajo Nation involving tribal lands or funds must be approved by the Secretary of the Interior or such actions have no validity.¹³⁰

The tribal governments of the Five Civilized Tribes exercised unlimited civil and criminal jurisdiction over all persons and property within their tribal domains and they generally administered their affairs without federal approval as a requisite for valid action. They occupied the position as the standard for comparison of full tribal powers as fully in the nineteenth century as the Navajo Nation does in the twentieth century, with the exception that tribal actions were not "subject to approval of the Secretary of the Interior." Therefore, it is important that the present premises about tribal government, as compared to the actual exercise of tribal powers by the Five Civilized Tribes prior to Oklahoma statehood, should be taken into account in reaching conclusions about tribal powers that survived the congressional limitation imposed upon these tribes. In other words, the tribal powers exercised by the Five Civilized Tribes were apparently more extensive than what are, at present, generally recognized as full tribal powers exercised by the Indian tribes throughout the United States. It is quite possible that, other than those statutes specifically extinguishing tribal powers, such as the limit of thirty days as a yearly legislative session, the net effect of previously cited congressional acts was to reduce the tribal governments of the Five Civilized Tribes from a loftier status more akin to that of an enclave at international law, such as the Vatican City or Luxembourg, to that of a present-day Indian tribe.

It has been generally assumed that the tribal governments of the

128. See 25 C.F.R. §§ 72-1(b), 11.1(e).

129. *United States v. Wheeler*, 435 U.S. 313 (1978).

130. 25 C.F.R. § 121.22(b).

Indian tribes in the Indian Territory were dissolved. From this survey, it is apparent that these tribal governments have tribal powers more substantial than previously assumed. The determination of the exact scope of these powers will, of course, depend upon a more precise study of the special acts and pronouncements regarding each particular tribe than can be accomplished in this survey.

The Oklahoma Enabling Act provided the statutory mechanism for the admission of Oklahoma as a state.¹³¹ Through this Act, the inhabitants of the Territory of Oklahoma and the Indian Territory were authorized to adopt a constitution and become the state of Oklahoma, provided, "that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."¹³²

The proposed constitution was required to contain a disclaimer clause.¹³³ The disclaimer clause provides:

That the people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States¹³⁴

The disclaimer clause, as part of the constitution, was adopted by the people of Oklahoma in an irrevocable ordinance accepting the terms and conditions of the Enabling Act on April 22, 1907. This disclaimer clause has not been amended or repealed.

Summary

The close of the 1890-1907 era ended the era of special legisla-

131. Act of June 16, 1904, ch. 3335, 34 Stat. 267 (1904).

132. *Id.* at 267 (§ 1).

133. *Id.* at 269 (§ 3).

134. *Id.* at 270, presently OKLA. CONST. art. I, § 3.

tion which cast the distinction between Oklahoma Territory and Indian Territory. Any special legislation regarding the tribes in either Oklahoma Territory or Indian Territory after this date reflects only insignificant modifications of the legal patterns previously set out, or relates specifically to the many facets of individual land tenure occasioned by the allotment process affecting each major grouping of tribes. The next major legislative enactments bearing upon tribal government in Oklahoma did not take place until 1934 and 1936 with the passage of the Indian version of the Roosevelt administration's New Deal, the Indian Reorganization Act of 1934, and its Oklahoma supplement in 1936, the Oklahoma Indian Welfare Act.

As a result of the special legislation of this era, it was assumed that the tribes were winding down and would shortly go out of business. Research into the rights and powers of the tribes stopped, and tribal governments became less and less important as the Bureau of Indian Affairs began to usurp and dominate the legitimate functions of the tribal governments or to veto their exercise. The research for this survey indicates that this assumption was wrong and that, as a general rule, the powers of the tribal governments in the state of Oklahoma survived the allotment era to the extent that these powers survived in Indian tribes generally. The idea that the Indian tribes in Oklahoma are somehow abnormal yields to closer analysis. Extensive research is necessary on a tribe-by-tribe basis to determine the exact legal status and powers of the tribes in the Indian Territory.

C. 1907-1934—The Quiet Aftermath

The period subsequent to Oklahoma statehood was a time of inactivity for tribal governments. The Curtis Act and severe constraints imposed by agency fiat had curtailed the freedom of action formerly enjoyed by the tribal governing bodies. The tribal court system, where it had existed, was replaced with secretarial Courts of Indian Offenses, and in time, even these ceased to operate. The tribal police were supplanted by the non-Indian agency forces.

The cases considered by the courts consisted almost exclusively of actions to define the rights of individual Indians. Mineral leases and probate of Indian estates dominated the court dockets. Litigation to define tribal rights was almost nonexistent.

The Supreme Court did, however, render a decision in a criminal case which established a fundamental concept necessary to tribal jurisdiction in the state of Oklahoma. In *United States v.*

Ramsey,¹³⁵ the Court found that Indian country did exist in Osage County on those lands allotted within the reservation. The Court considered the issue of whether allotments made by restricted fee patents and allotments made by trust patent were jurisdictionally distinguishable and found the distinction unpersuasive. The Court found that the wording of the congressional act¹³⁶ established that all allotted Indian lands irrespective of allotment in trust or in fee should be considered as Indian country so long as the United States possessed a supervisory interest.

Although there were territorial areas which could be delineated as Indian country within Oklahoma, the exercise of tribal authority within such areas was largely nonexistent. The extremely limited powers of tribal governments which were assumed to exist during this period were most closely akin to those that might be exercised by a nonprofit corporation. The analogous privileges that a tribe and a nonprofit corporation might possess would include tax exemption for the organization and its income, and the ability to hold tax-exempt land.¹³⁷

The period subsequent to statehood was a period of dormancy. There was no particular effort on the part of Congress to make further depredations in the area of tribal sovereignty. With the exception of the Bureau of Indian Affairs, the tribes were largely ignored by the federal and state governments.

D. 1934-1953—*The Revitalization of Tribal Government*

The decade of the 1930's was marked by two significant congressional acts which dramatically altered the treatment accorded Indian tribes.¹³⁸

The Indian Reorganization Act (IRA) was specifically designed to reverse the trend established by the enunciated purpose of the allotment acts. The allotment policy had been promulgated with the purpose of breaking up tribal assets into individual holdings, disestablishing traditional tribal governments, and suppressing Indian customs and laws. The IRA was established as a countervailing force to the assimilationist policy of the allotment acts and, as well, by the combination of its provisions, a means of providing reinforcement for tribal government. The provisions of the IRA

135. 271 U.S. 467 (1926).

136. Act of Jan. 30, 1897, ch. 109, 29 Stat. 506 (1897).

137. See 18 OKLA. STAT. § 851 (1971).

138. The Indian Reorganization Act (IRA), Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934), and its supplement, enacted about two years later, the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, ch. 576, § 12, 25 U.S.C. § 503 (1970).

provided protection for the then existing land base and for expansion of that land base through purchase of additional acreage. The tribal organization was to be further reinforced by economic programs which would provide federal loans and the capability of business incorporation. The Act also provided for the infusion of Indians into the white-dominated regulatory agencies.¹³⁹

The Act positively reaffirmed the tribal governments by providing for the adoption of constitutions and bylaws for unorganized tribes by which the tribes could revitalize their tribal governments. Section 16 recognized the power to organize as an inherent right and later recognized the powers of inherent sovereignty possessed by the tribes in the absence of explicit withdrawal of particular powers by congressional act or treaty by stating: "Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe"¹⁴⁰ This section of the Act recognized the power of the tribe to obtain nonagency counsel and to establish the fees (subject to secretarial approval) to be paid for those services. Section 16 further recognized the viability of tribal government by providing that such tribal organizations were empowered to negotiate with federal, state, and local officials and to veto any proposed sale of trust lands held for the tribe. The tribe was also made a party to the secretarial appropriations procedure by a requirement that the tribe be informed of all proposed budget requirements affecting the tribe.¹⁴¹

Another provision of the Act provided the tribes adopting constitutions with the means of establishing a tribal corporate entity. By plebescite, subsequent a requested secretarial charter, the tribe could achieve corporate power to operate a business, acquire, hold or dispose of property, and to have such powers as may be necessary for a lawful business venture.¹⁴²

By the terms of the Act, twenty-eight designated tribes of Oklahoma were precluded from participation in some of the programs.¹⁴³ The extension of the trust periods, restrictions on transfer of Indian lands and purchase of new lands were made inapplicable. Also withheld from the Oklahoma tribes were the provisions pertaining to tribal constitutions and corporate charters. The

139. Act of June 18, 1934, ch. 576, § 12, 48 Stat. 984, 986 (1934).

140. *Id.*, § 16, 48 Stat. at 987.

141. *Id.*

142. *Id.* at § 17.

143. *Id.*, 48 Stat. at 986 § 13.

Oklahoma tribes were excluded from the provisions of the Act at the request of Senator Elmer Thomas. The Senator's rationale for this request centered on a mistaken assumption that because no reservations existed in Oklahoma the language of the Act would have required the tribes to resume reservation status before the provisions could be applicable.

The Oklahoma Indian Welfare Act (OIWA),¹⁴⁴ extended the provisions of the IRA to the Oklahoma tribes and provided for some significant additional features. In addition to the provisions of the IRA, the OIWA provided for the formation of local Indian cooperatives for credit administration, production marketing, consumer protection, and land management. Embodied in the Act were the IRA provisions for constitutions and charters for corporate activity. The provisions for acquisition of land for Oklahoma Indians were also included. Although other provisions of the IRA were not specifically included, the ninth section of the OIWA explicitly repeals all acts or parts of acts inconsistent with the OIWA. Therefore, those sections of the IRA precluded from application by Section 13 of the IRA would, subsequent to the OIWA, be applicable to Oklahoma tribes.¹⁴⁵ Such a reading of Section 9 of the OIWA would, in fact, give Oklahoma Indians all the benefits accruing under the IRA in addition to those enumerated in the OIWA.

The combined force of these two acts provided a potent tool for the assertion of tribal governmental powers. Heretofore, it has been a common assumption that because of Section 13 the IRA had no relevance for the tribes of Oklahoma. This assumption is clearly erroneous. Although specific paragraphs were excluded from application to Oklahoma tribes in the Indian Reorganization Act, the balance of the Act, including Indian preference for federal employment, did apply as of the time it became law.

The Oklahoma Indian Welfare Act followed the IRA and extended each of the features from which the Oklahoma tribes had been excluded. Two sections within the body of the Act specifically addressed the excluded provisions. Chartered Oklahoma tribes may "enjoy any other rights or privileges *secured* to an organized Indian tribe under the Act of June 18, 1934 [IRA]"¹⁴⁶ These provisions were thereby incorporated into the OIWA and were secured to the Indian tribes of Oklahoma. The Act expressly repealed the provisions of other acts which are inconsistent with

144. Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967, 25 U.S.C. § 503 (1970).

145. *Id.*

146. *Id.*

the provisions of the OIWA.¹⁴⁷ The OIWA by its charter provisions provided an optional form of government for the tribes. The land acquisition feature of the Act provided a source of income for the tribal government. Operating in the alternate form, the tribe can exercise "any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma"¹⁴⁸

By its operation, the OIWA is superior to the IRA because under the OIWA, the tribes have both the basic provisions of the IRA and the added features of the OIWA.¹⁴⁹ Regardless of the benefits which might accrue to a tribe organized under these acts, very little actual usage has been made of the more potent provisions. In western Oklahoma all tribes except the Otoe-Missouria are organized under OIWA constitutions. However, only a small number of these tribes have taken the next step and obtained a corporate charter. Even those who have charters have not established a full selection of IRA powers. Those without an IRA/OIWA formula constitution have unnecessarily limited tribal powers and inhibited tribal growth potential.

One particularly interesting feature of the OIWA was the provision for incorporation by reference of the IRA rights and privileges and the implications of that provision for the reassertion of tribal governmental powers.¹⁵⁰ If Congress had extinguished one of the inherent attributes of tribal sovereignty and then, by a later act, conferred on the tribes the power to create the extinguished inherent attribute by statute, the tribe could use these derived powers as a source to replace the lost inherent power.¹⁵¹

The IRA/OIWA also introduced the interesting concept of organizing an Indian tribe as a corporate body.¹⁵² The corporate powers of the tribe are analogous to those exercised by a municipal corporation. As such, a tribal corporation has the power to establish ordinances for the regulation of the in-

147. *Id.* at § 9, 49 Stat. at 1968.

148. *Id.* at § 3, 25 U.S.C. at § 503.

149. 61 I.D. 82. Martin White, Solicitor for the Department of the Interior: "The powers which may be granted to an Indian tribe under the Indian Reorganization Act of June 18, 1934, have been incorporated by reference . . . into the Oklahoma Indian Welfare Act."

150. Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967, 25 U.S.C. § 503 (1970).

151. An example might be a tribal court system established by virtue of the inherent sovereignty of the tribe. Congress has the power to abolish such courts by exercise of its plenary authority to deal with the tribes. But Congress also has the power to enhance the authority of the tribe and might by a legislative act create the authority for a tribe to act in an area previously withdrawn from its jurisdiction. Thus, even though a tribal court may have been abolished, the constitutional and charter provisions of the IRA/OIWA grant authority for a tribe to define its organizational context, which would include the reassertion of tribal judicial powers.

152. 49 Stat. 1967, § 3, and 48 Stat. 984, 988, § 17.

corporated area; the power to provide services for the populace to include police and a court system; the power to tax; to obligate the corporate body; and to contract for procurement of goods, services, and facilities.¹⁵³ While this municipal analogy may be seen as generally valid, it fails with respect to one particular point. The entire scope of the power of a municipality is based on a delegation of power from the state sovereign. On the other hand, the power of an Indian tribe to govern is inherent and exists because of the historical sovereignty of the tribe, which predates both the Constitution and the formation of the states. The powers of the tribe are restricted only by the limitations imposed by Congress on the exercise of these powers.

Tribes have shown little indication of an effective exercise of these confirmed powers. In a historical perspective, the American Indian tribes were almost uniformly subjected to extreme political and cultural pressure.¹⁵⁴ The impact of this pressure on the tribal organizations in Oklahoma was extreme. In effect, the tribes withdrew from an active exercise of tribal powers and allowed the BIA to perform their governmental functions.¹⁵⁵

After the passage of the OIWA, the next significant act related

153. 55 I.D. 15 (1934).

154. Of particular impact was the diminution of the land area under tribal control. In Oklahoma this trend was particularly pronounced during the period 1890 to 1906. The trend was apparent in Oklahoma in two forms, generally corresponding to the areas of Oklahoma Territory and Indian Territory as delineated in the Organic Act, 26 Stat. 81. In Oklahoma Territory the diminishment took the form of loss of land, while in Indian Territory the loss was evidenced by a congressional restriction of tribal powers. An example of the former would be the Kiowa, Comanche, and Apache which, at the beginning of the era, exercised jurisdiction over an area in excess of 1 million acres but, by the end of the period, the area under the tribes' control had shrunk to approximately 3,000 acres—a contraction of the area under their tribal power in excess of 90%. However, the mechanisms of the tribal government remained intact. The latter method of diminution may be illustrated by the case of the Cherokee Nation. By the provisions of two acts passed in 1898 and 1906, respectively, Congress, at least by the verbiage of the acts, abolished the existing Cherokee courts, rendered the nation's laws unenforceable, the officers of the tribe without authority, and finally terminated the existing tribal taxes. However, the existing reservation boundaries appear to have remained intact.

155. The question then arises that if the area available for exercise of tribal power is reduced, do the powers cease to exist or do they retain their original character, simply being utilized on a smaller scale? The question can be treated by using the analogy of a municipal government. If a large city were reduced drastically in size, the impact on government would be equally as extreme as that experienced by the Indian tribes. Nevertheless, the change in size would not alter the functions to be performed by the government nor its power to perform as a government, only the scope of its functioning. It is equally so with an Indian tribe. The only really significant change in either case would be the reduction of service necessitated by the reduction in tax base. The municipality would continue to operate based on its state-granted charter. The Indian tribe continues to operate on its charter drawn from its inherent powers, powers which are derived directly as a delegation of authority from the Indian people.

to disposition of allotted lands of Indians dying intestate and without heirs.¹⁵⁶ Congress provided that all such lands which had been originally allotted from a reservation would escheat to the tribe of the holder or to its successor. This Act may be viewed as a confirmation by Congress of the sovereignty of the tribes because, by the Anglo-American common law, land can only escheat to a sovereign, and provisions of the Act specifically provide for escheat to the tribal entity. The Act may also be seen as a recognition by Congress of the continuing viability of the tribal organization and as an endorsement of the tribal governmental function and position in the governmental hierarchy. Subsequent sections of the Act further provided that if the allotment of such Indian was from the public domain, such land would escheat to the United States, and that the Act was not applicable to the Five Civilized Tribes.¹⁵⁷

The period produced two significant cases which purportedly defined the existence of Indian country within the state of Oklahoma. In *Ex parte Nowabbi*,¹⁵⁸ the Oklahoma Court of Criminal Appeals was asked to determine if the state had jurisdiction to prosecute an Indian who had killed another Indian on allotted lands of the Choctaw Nation. The court considered that the case turned on the determination of whether Indian country existed in Oklahoma and if, in fact, the allotted lands constituted such country. The court considered the rationale of *Ramsey*,¹⁵⁹ but distinguished this case based on a proviso to the 1906 amendment to the General Allotment Act.¹⁶⁰ The verbiage of the amendment had reserved exclusive jurisdiction over allotment lands to the United States, but the proviso had excluded those lands formerly within Indian Territory. Thus, the court decided that the proviso was intended to exclude the allottees in the Indian Territory from the federal jurisdiction which the amendment was designed to confirm. In this analysis the court was clearly wrong. The Choctaw allotment on which the crime in question had been committed was established by the workings of the Curtis Act,¹⁶¹ as were all other allotments within the former Indian Territory. The General Allotment Act¹⁶² had no relevance for these particular lands and certainly an amendment to that Act was immaterial to the question at

156. Act of Nov. 24, 1942, ch. 640, § 1, 56 Stat. 1021, 25 U.S.C. § 373a (1970).

157. 25 U.S.C. § 373b, c (1970).

158. 60 Okla. Crim. 111, 61 P.2d 1139 (1936).

159. *United States v. Ramsey*, 271 U.S. 467 (1926).

160. Act of May 8, 1906, ch. 2348, 34 Stat. 182, 25 U.S.C. § 349 (1970).

161. Act of June 28, 1898, ch. 517, 30 Stat. 495 (1898).

162. Act of Feb. 8, 1887, ch. 199, § 6, 24 Stat. 390 (1887).

hand. If the court had followed the provisions of the controlling Curtis Act, it would have found that the United States retained jurisdiction over allotment land excepting only those specific areas where a delegation had been made to the state by an act of Congress.¹⁶³

The second case which addressed the question of the existence of Indian country was *Tooisgah v. United States*.¹⁶⁴ The facts of the case indicate that Tooisgah was an Indian convicted of killing another Indian on a Kiowa, Comanche, Apache allotment. The conviction was appealed to the Tenth Circuit on the issue of the propriety of state jurisdiction over the criminal indictment. The court found that state jurisdiction was proper, but only because of the peculiar circumstances of the case. The offense was committed in 1941 under the laws defining Indian country at that time¹⁶⁵ and providing federal jurisdiction over the crime of murder.¹⁶⁶ In 1941, the offense must have been committed "on or within an Indian reservation" to establish federal jurisdiction. The definition of Indian country was completely revised in 1948 and allotments were specifically added to those areas defined as Indian country.¹⁶⁷ Judge Murrah, writing the opinion of the court, recognized in particular this difficulty and acknowledged that if the case had been decided under the later law the court would have found the allotment to be "Indian country" and, therefore, within federal jurisdiction.¹⁶⁸

The problem presented by these cases is the progeny which they have sired. Due to badly referenced headnotes later cited by the courts, *Tooisgah*, in actuality a reservation disestablishment case, has been taken to mean something entirely different from what Judge Murrah stated. He wrote:

We find it unnecessary to decide whether the trust allotments in question might have been construed as "Indian Country" under 217 or 548 when the offense was committed, since we are convinced that Congress did not intend to use the terms "Indian Country" and "within the limits of any . . . reservation" synonymously when it came to relax the

163. *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 217 U.S. 467 (1926). An example of such delegation might be found in 35 Stat. 312, 25 U.S.C. § 355 (1970), wherein the laws of descent and distribution of the state of Oklahoma were made applicable to the members of the Five Civilized Tribes.

164. 186 F.2d 93 (10th Cir. 1950).

165. U.S. REV. STAT. 2145 (1878), now codified at 18 U.S.C. § 1152.

166. Act of Mar. 4, 1909, ch. 321, § 328, 35 Stat. 1151 (1970).

167. Act of June 25, 1948, ch. 645, 18 U.S.C. § 1151 (1970).

168. *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950).

limitations imposed upon 217 by 218. When the legislative scheme is considered in its historical setting, we think it of controlling significance that instead of employing the familiar term "Indian Country", with its broad and flexible definition to delineate federal jurisdiction, Congress chose language carefully designed to recognize the sovereign jurisdiction of a state, unless the offense was committed on a place set apart for the government of the Indians as a tribe. *The deliberate choice of the phrase "within any Indian reservation under the jurisdiction of the United States Government" indicates, we think, a Congressional disposition to restrict federal jurisdiction to organized reservations lying within a state.*

In the reenactment of 548 as Section 1153, Title 18 U.S.C.A., Congress substituted "Indian Country" for "on [or] within any Indian reservation", thus conferring federal jurisdiction over the enumerated crimes when committed in Indian Country, as defined in Section 1151 of the Revised Criminal Code.

*But judging federal jurisdiction here under the words of the statute when the offense was committed, we are now constrained to hold that when the reservation was dissolved and tribal government broken up, the allotted lands lost their character as lands "within any Indian reservation." Nor did they retain or acquire a character and identity peculiar to a separate Indian reservation. We therefore hold that the court lacked jurisdiction over the offense. The order is accordingly reversed and the cause remanded with directions to vacate the judgment and dismiss the indictment.*¹⁶⁹

Both *Tooisgah* and *Nowabbi* are essentially legal fossils, relics of a past state of the law with no continuing application today.¹⁷⁰

The period beginning in 1934 was characterized by the governmental formulation of policies designed to enhance the exercise of tribal sovereignty. These policies sought a revitalization of tribal government and a reinvestiture of the tribes with governmental functions. This "New Deal" for the Indian tribes was in effect an externally imposed renaissance for tribal organization. The tribes were initially reticent with respect to the reconstructive, or, in

169. *Id.* at 99 (emphasis added).

170. *State v. Littlechief*, 573 P.2d 267 (Okla. Cr. 1978). See *DeCoteau v. District Ct.*, 420 U.S. 425 (1975).

some instances, novel provisions of the tribal reorganization acts. The provisions of these acts did, however, encourage the exercise of tribal powers and the assumption of responsibility for tribal progress and prosperity.

E. 1953-Present—Termination to Self-Determination

In the year 1953, a radical change occurred in the congressional policy concerning Indian tribes. The policy change was achieved through the efforts of a small but very active group in Congress who denied the traditional policy of Congress in preserving the legal identity of the Indian tribes. The group advocated in its stead a policy of assimilation of Indians into the dominant culture and termination of the legal status of the tribes.

The initial manifestation of the assimilationists' policy was in the form of a House Resolution.¹⁷¹ The resolution established a goal of dissolving tribal governments and the federal-Indian relationship thereby rendering Indians subject to the same laws as other citizens. The resolution targeted four states for elimination of tribal organizations and five individual tribes in other states for termination. It further required the Secretary of the Interior to make proposals for laws necessary to accomplish this end.

By the provisions of the first termination act, the Menominee Indian Tribe of Wisconsin ceased to exist as a federally recognized entity.¹⁷² The Act established that all property of the tribe would be turned over to a corporation established for the purpose of managing those assets. All services furnished to the tribe by federal agencies were ended. The rolls were to be closed and members of the tribe were precluded in participation in federal Indian services. The Act removed the members of the tribe from the protection of federal Indian statutes and made the tribal members subject to "the laws of the several states."¹⁷³

Four Oklahoma tribes were subjected to termination under bills passed into law in 1956 and 1957. Under these bills, the Wyandotte,¹⁷⁴ the Peoria,¹⁷⁵ the Ottawa,¹⁷⁶ and the Modoc¹⁷⁷ were terminated from federal recognition. Each of these tribes was re-

171. H.C.R. 108, proclaimed on Aug. 1, 1953, 67 Stat. B132.

172. Act of June 17, 1954, ch. 303, 68 Stat. 25 (1954).

173. *Id.*, § 10.

174. Act of Aug. 1, 1956, ch. 843, § 1, 70 Stat. 893, 25 U.S.C. §§ 791-810 (1970).

175. Act of Aug. 2, 1956, ch. 881, §§ 1-6, 70 Stat. 937, 25 U.S.C. §§ 821-26 (1970).

176. Act of Aug. 3, 1956, 70 Stat. 963, 25 U.S.C. §§ 841-53 (1970).

177. Act of Aug. 13, 1954, ch. 732, §§ 1-26, 68 Stat. 718-23, *codified in* 25 U.S.C. § 564-64w (1970).

moved from federal recognition under provisions almost identical to those of the Menominee. In each instance, the tribes were summarily removed from the protection of federal statutes and the laws of the state were made applicable to both the tribe and its members. The acts relegated these Oklahoma tribal organizations to operation as associations under state law and denied the tribe access to the services that had formerly been furnished by the Quapaw subagency. The tribes were left without means of exercising inherent powers and without official governmental bodies for administration of tribal affairs.

The termination policy as enumerated in House Concurrent Resolution 108 had tragic consequences for the affected tribes. In 1975 the American Indian Policy Review Commission appointed a Task Force on Terminated and Nonfederally Recognized Indians to study the effect of termination. The Task Force concluded:

The Task Force has determined that the termination acts were passed by Congress under very uncommon and questionable circumstances. The legislation was acted upon in haste, with little debate, as the handwork of a small number of legislators employing tactics which would not be duplicated today. The Task Force must conclude that the legislation was not given the proper consideration and reflected the efforts of legislators intent on the passage of the legislation at a time when it appeared that nothing else was working to "solve the Indian problem" and at a time when the Bureau of Indian Affairs appeared at its worst. The Task Force concludes that termination was another experiment, however ill conceived and destructive, with no controls and no provisions for reversal.

Termination was not initiated by the Indians, was not adequately understood by them and was, for the most part, not consented to by them . . . The Task Force can only conclude the Bureau of Indian Affairs and the Congress made the selections for the participants in the experiment.

The years since termination show that it has not had a positive effect on the lives of the Indians and has indeed made life more difficult for them. Termination has resulted in the loss of tribal lands and the disintegration of tribal society, has weakened tribal organization and placed cultural identity in jeopardy, has left those most in need, the young, the old, the sick without adequate programs to help them, has eliminated special federal services and rights as Indians and has resulted in exploitation of tribal members . . . The

Bureau of Indian Affairs and the Secretary of the Interior has in some cases, seriously mismanaged the trust assets of the members of tribes undergoing termination. The Executive Branch has, in some cases, failed to follow the substantive and procedural dictates of termination acts

Termination was a bad experiment, one which should not be repeated and one which should be rectified. In every instance where the point was raised, there has been overwhelming Indian response against termination and in favor of restoration of tribes.

The courts have repeatedly held that Congress has plenary power over Indian affairs; however, with that power must also come responsibility. The Congress and the Executive Branch of the United States Government has played with the lives of the Indian people through the termination experiment and such experiment has been a failure.¹⁷⁸

In the recommendation portion of the report, the Task Force proposed numerous policy revisions for immediate implementation to offset the effect of the termination policy on Indian tribes and for ultimate reversal of the policy by means of a restoration act.

The reversal of the termination trend reached full force in 1973 with the restoration of the Menominee Tribe to federal recognition.¹⁷⁹ The Act restored "all rights and privileges of the tribe which may have been diminished or lost" under the Termination Act of 1954.¹⁸⁰ The Act called for the election of a Menominee Restoration Committee to supervise the implementation of the Act. Among the committee's responsibilities was the conduct of an election of the general tribal membership for the purpose of approving a constitution and bylaws as provided for in the Indian Reorganization Act of 1934. The committee was also charged with the responsibility for the conduct of a general election for the purpose of electing the tribal officials. The enactment of the Menominee Restoration Act constituted an acknowledgment by Congress of the fallacy of the termination theory. This Act has been followed by additional legislation designed to accomplish restoration for other tribes disestablished during the era of political expediency in the 1950's.

178. FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMM'N, TERMINATED OR NONFEDERALLY RECOGNIZED INDIANS (1976).

179. Menominee Restoration Act, Pub. L. 93-197, ch. 25, § 103, 87 Stat. 770 (1973).

180. Act of June 17, 1954, ch. 303, § 1, 68 Stat. 250, 25 U.S.C. §§ 891 *et seq.* (1970).

The second major assimilationist program was the extension of state, criminal, and civil jurisdiction to the Indian country.¹⁸¹ The law provided for immediate assumption of jurisdiction by five states and a sixth was added by subsequent amendment.¹⁸² The Act also provided for optional Public Law 280 jurisdiction in other states to be effected by enactment of necessary constitutional amendments (to revoke disclaimer clauses) and statutory authorization for jurisdiction.

The Act contained serious flaws from its inception. There was no provision in it for any delegation to the states of the power to tax the Indian trust lands. The states were therefore left without a tax base to pay for the expenses of the assumed jurisdiction. The tribal sovereignty and ability to exercise inherent governmental powers was subordinated to state jurisdiction without provisions even for formal consultation, much less approval by the affected tribes. Last, there was no provision for retrocession of jurisdiction to the United States, if the arrangement proved unworkable once the state assumed jurisdiction. However, Congress provided for retrocession of jurisdiction in 1968,¹⁸³ and a federal court in *United States v. Brown*¹⁸⁴ held that the Secretary of the Interior could validly accept a retrocession jurisdiction. In actuality this often proved to be the case as states found that the exercise of the new-found power was expensive and often caused a severe strain on already overtaxed local enforcement agencies.

In spite of the discussed shortcomings of the Act, it was viewed by the assimilationists as further means of demeaning the tribal authority through disassociation of the federal government from Indian affairs. In retrospect, this Act, too, was conceived and executed in haste without proper cognizance for the responsibilities of Congress to the Indian peoples.¹⁸⁵

Oklahoma, as with the balance of the states of the Union, was included as one of these states which could assume jurisdiction as an optional state by the constitutional amendment/statutory enactment process. Johnston Murray, who was governor of the state at the time of the inception of Public Law 280, was contacted by the Assistant Secretary of the Interior and queried concerning the possibility of Oklahoma assuming jurisdiction. In a letter, Mr. Murray responded to the effect that since Indian country had been

181. Act of Aug. 15, 1953, ch. 505, §§ 1-7, 67 Stat. 588, 18 U.S.C. § 1162 (1970).

182. 18 U.S.C. § 1162 (1970).

183. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 79, 25 U.S.C. § 1323.

184. 334 F. Supp. 536 (D. Neb. 1971).

185. Menominee Restoration Act, Pub. L. 93-197, ch. 25, § 103, 87 Stat. 770 (1973).

abolished in Oklahoma and the tribal governments dissolved (an erroneous assumption), all Oklahoma citizens were subject to the same laws and there was no need for Oklahoma to assume Public Law 280 jurisdiction.¹⁸⁶ No further action was ever taken to assert Public Law 280 jurisdiction in Oklahoma.¹⁸⁷

A significant alteration in the legal relationship of the individual to the tribe and between the tribe and federal government occurred with the passage of the Civil Rights Act of 1968. Title II of that Act is commonly referred to as the Indian Bill of Rights. Indians were guaranteed certain rights similar to those protected by the first ten amendments of the United States Constitution in their relationship to the tribe.¹⁸⁸

Significant variations from the Bill of Rights are found in certain subsections of the Civil Rights Act. While guaranteeing *freedom* of religion, the Act does not prevent a tribe from *establishing* a tribal religion or even being governed by a tribal religious body.¹⁸⁹ An accused may retain counsel to assist with defense efforts, but if the individual so chooses, he must bear the expense.¹⁹⁰ The punishment that may be imposed by the tribe is limited to six months in jail and/or a \$500 fine.¹⁹¹ The right to jury trial is guaranteed, but with the added proviso that juries may consist of six or more persons.¹⁹² The Act further provides a right of habeas corpus hearing in federal court for any person detained by an Indian tribe to test the validity of that detention.¹⁹³

The Secretary of the Interior is directed to draft a model code to govern courts of Indian offenses. That code must assure that the individual charged before such court is provided with the same rights, privileges, and immunities as would be available before a federal court. The title further provides that the code must insure

186. See Letters from Oklahoma Governor Johnston Murray to Assistant Secretary of the Interior Orme Lewis (1953), discussed in text at notes 48-49, *supra*.

187. *State v. Littlechief*, 573 P.2d 267 (Okla. Cr. 1978).

188. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 202, 82 Stat. 77, 25 U.S.C. § 1302 (1970). The rights protected include free exercise of religion, freedom of speech and assembly; freedom from unreasonable search and seizure and from warrant except upon probable cause; no double jeopardy; no self-incrimination; no seizure of private property without compensation; speedy trial is guaranteed, as are the rights to be informed of accusations and compulsory process; freedom from cruel and unusual punishment and excessive bail; equal protection and due process under the law; and *ex post facto* laws and bills of attainder are prohibited.

189. 25 U.S.C. § 1302(1) (1970).

190. 25 U.S.C. § 1302(6) (1970).

191. 25 U.S.C. § 1302(7) (1970).

192. 25 U.S.C. § 1302(10) (1970).

193. Act of Apr. 11, 1968, Pub. L. No. 90-284 § 203, 82 Stat. 78, 25 U.S.C. § 1303 (1970).

that an accused is informed of his rights under the United States Constitution. The directive concludes with the provisions that the code will establish proper qualifications for judges of the court of Indian offenses and provide for the establishing of educational classes for training of these judges.¹⁹⁴

The Act significantly revised Public Law 280 and rectified most of the serious complaints registered against it. The Act now provides for retrocession by the state when the exercise of jurisdiction under Public Law 280 is found to be impractical.¹⁹⁵ A special election must be held for the members of an affected tribe to vote via a referendum to determine if assumption of jurisdiction by the state is acceptable to the Indian people.¹⁹⁶

The provisions of the 1968 Civil Rights Act announced a marked change in congressional attitude toward the Indian people and their tribal organizations and a restoration of the traditional role of Congress as guardian and protector of the Indians. Implicit in this Act is a recognition of the continued viability of tribal governmental functions and the exercise of inherent tribal powers. Implicit also in this Act is the imposition of limited restrictions on these inherent powers within the context of Anglo-American common law.¹⁹⁷

In 1975, Congress enacted the Indian Self-Determination Act.¹⁹⁸ By the terms of that Act the Indian tribes can contract with the federal government to assume responsibility for services normally performed for the tribe by the Departments of the Interior or Health, Education and Welfare.¹⁹⁹ The Act provides that the departments may, under specified circumstances, refuse to approve contract offers. When such offers are rejected, the tribe must be notified in writing within sixty days of the objection and the department must, to the extent practicable, assist the tribe in overcoming the objection.²⁰⁰ The departments must hold hearings on proposed regulations which will affect services to Indians and provide for an appellate procedure for reconsideration of rejected contract offers. The Act further provides for grants to Indian tribes for improvement of tribal government, improvement of the capacity of the tribal government to participate in contract ac-

194. *Id.*, 25 U.S.C. § 1311 (1970).

195. *Id.* § 403, 82 Stat. 79, 25 U.S.C. § 1323 (1970).

196. *Id.* § 406 82 Stat. 80, 25 U.S.C. § 1326 (1970).

197. *Martinez v. Santa Clara Pueblo*, 436 U.S. 49 (1978).

198. Indian Self-Determination Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203, 25 U.S.C. § 450 (Supp. 1975).

199. 25 U.S.C. §§ 102(a), 103(a) (1970).

200. 25 U.S.C. § 102(b) (1970).

tivities under the Act, and for purchase of land necessary for either of these purposes.²⁰¹

The Indian Self-Determination Act was designed to facilitate participation by the tribes in providing services required for the functioning of the tribe. Participation in the municipal-type services needed by the tribe provides experience for the tribal organization as a functioning government. The tribal government is thereby strengthened and given practical experience in the exercise of powers inherent in the tribe.

Two cases were decided in the period after 1953 which significantly affected the exercise of tribal powers. In *DeCoteau*²⁰² the Supreme Court considered the question of the existence of Indian country within the former boundaries of a reservation. The Court found that Indian country exists in a checkerboard fashion on those areas of land which were allotted to Indians and which are still held in trust for them by the United States government. The Court found that this Indian country was still subject to federal and tribal jurisdiction to the exclusion of the state government. The Court stated: "It is common ground here that Indian conduct occurring on the trust allotments is beyond the state's jurisdiction, being instead the proper concern of tribal or federal authorities."²⁰³ The Court, however, also found that the ceded land within the former boundaries of terminated reservations did not constitute Indian country and that the state had properly asserted jurisdiction in those areas.²⁰⁴

In the case of *Harjo v. Kleppe*,²⁰⁵ the District Court of the District of Columbia considered whether the Creek constitutional provisions for the appropriation of tribal funds survived the operation of the Curtis and Five Civilized Tribes acts. The Creek Nation, under an 1867 constitution, had established a National Council and had invested that council with, among other duties, the responsibility for expenditure of tribal funds. The Creek legislature was rendered ineffective by acts and policies of the Bureau of Indian Affairs but was never expressly terminated, nor was the Creek Nation constitution nullified by Congress. The main point of contention of the case was the release by the Secretary of the Interior of tribal funds to the Principal Chief of the tribe and the Principal Chief's authority to expend those funds

201. 25 U.S.C. § 104 (1970).

202. *DeCoteau v. District Ct.*, 420 U.S. 425 (1975).

203. *Id.* at 428.

204. *Id.*

205. *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C. Cir. 1976).

without authorization by the Creek legislature. The plaintiffs in the action were duly qualified electors of the Creek Nation and Allen Harjo was an elected representative of Fish Pond Tribal Town. These individuals sought to force the Principal Chief to act in accordance with the 1867 constitution. The court held that the Creek constitution was in effect and was the proper source of the authority for the tribal government notwithstanding many years of bureaucratic suppression of the tribal legislature by the Bureau of Indian Affairs. The court upheld the right of the National Council to direct and control the expenditure of these funds.

This case upheld the current exercise of tribal powers by a constitutionally mandated tribal government of one of the Five Civilized Tribes. The ancient tribal constitutions are therefore a sufficient and proper document for the present delineation of the governmental roles and the present exercise by the Five Civilized Tribes of inherent tribal powers.

The period defined in this subsection was an era of convulsive change in the federal Indian policy. The 1950's were the nadir of the Indian policy. The powers inherent in the tribes were completely ignored and the exercise of congressional and bureaucratic power resembled most closely a totalitarian regime. By the end of the period, there had been a complete shift in policy. The beginning of the decade of the 1970's found the tenor of both the executive and legislative branches completely reversed. The shift in the 1970's to legislation supportive of tribal autonomy was as much a positive factor as the termination policy had been a negative one. The change greatly enhanced the ability of the tribes to independently exercise tribal powers and provided the tribes with wider areas of responsibility and administrative competence.

Conclusion

The Indian's right of self-government is a right which has been consistently protected by the courts, frequently recognized and intermittently ignored by treaty-makers and legislators, and very widely disregarded by administrative officials. That such rights have been disregarded is perhaps due more to lack of acquaintance with the law of the subject than to any drive for increased power on the part of administrative officials.²⁰⁶

The most basic principle of Indian law, the principle that Indian tribes retain all governing authority which has not been expressly

206. COHEN, *supra* note 1, at 122.

limited by Congress,²⁰⁷ is perhaps the principle which has been most widely disregarded by administrative officials in their relationship with the Indian tribes in Oklahoma. Administrative officials, operating in a constitutional and administrative system which depends upon delegated power for its very existence, are understandably uneasy with the concept that tribal governments can exercise government functions in the absence of express congressional recognition or delegation of the power to exercise those functions.²⁰⁸ Yet, from before the existence of the United States as a Republic, the Indian tribes have been recognized as "distinct, independent, political communities,"²⁰⁹ qualified to exercise governmental functions by reason of their inherent sovereign powers, not by virtue of a delegation of authority from the United States.²¹⁰

The creation of a United States government which claimed a right of ultimate title to the soil occupied by the Indian tribes simply resulted in the creation of a competitor for the inherent authority then exercised by the Indian tribes.²¹¹ As the United States grew in stature, the treaties and statutes of Congress became the sources of limitation on the original tribal powers, yet those powers not so limited remained within the domain of the tribes.²¹² This was the exact situation which existed within what was to become the state of Oklahoma prior to 1890. The Indian tribes within the area and the United States federal government were the only competitors for governmental authority, and the Indian tribes generally exercised all the powers of a sovereign except as expressly limited by treaty or act of Congress.

The period encompassing the years 1890 to 1907 represent the creation by the Congress of another entity, the state of Oklahoma, designed to exert governing authority within the same general area. This entity became a third competitor for governing authority. Thus, the scope of the tribal right to self-government can be defined by describing the allocation of governing authority between the tribal, federal, and state governments. During this era, a profusion of statutes were enacted which were designed to grant authority to the new state and to limit the application of the authority of the tribes. This period, then, is the most legally significant period in the allocation of the governmental prerogatives between these three levels of government. In the

207. *Id.*

208. *Id.*

209. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

210. *Id.*

211. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823).

212. COHEN, *supra* note 1.

years following this era, Indian tribes in Oklahoma were generally subjected only to those additional limitations imposed upon all Indian tribes throughout the United States.

The confusion which resulted from this profusion of statutes paving the way for Oklahoma statehood had disastrous consequences for the exercise of governing authority by the tribal governments. The state of Oklahoma and the federal agencies charged with protecting Indian interests within the state began to operate on assumptions which had severe legal consequences on the Indian tribes' right to self-government.²¹³ In effect, administrative interpretation, rather than judicial construction became the force behind the decisions affecting the allocation of governing authority. Indian tribes attempting to exercise their rightful prerogatives soon learned the importance of administrative interpretation by the application to those tribes of the administrative "golden rule," or in other words, "we got the gold—we make the rules."²¹⁴ The case against Indian tribal governments in Oklahoma has been so overstated that tribal prerogatives sustainable in law are ignored as a matter of policy. Slogans about "Oklahoma Indians" and "Oklahoma tribal governments" have created an attitude sustained by inertia that hinders and frustrates due recognition of tribal governing powers.²¹⁵

An illustration of the situation described is readily found in considering the long overdue recognition of tribal law and order powers. From this survey, it can be affirmatively shown that Indian country criminal jurisdiction exists in Oklahoma.²¹⁶ *DeCoteau* affirmed the position that an Indian tribe's jurisdictional powers are not dependent upon reservation status.²¹⁷ One of the supposed impediments to tribal jurisdiction in Oklahoma, the *Tooisgah* case, is not reflective of the present-day law.²¹⁸ Tribal

213. Examples of such assumptions include: "There are no reservations in Oklahoma [and therefore no viable tribal governments]"; "The Indian tribes were dissolved at statehood"; "allotments in severalty and the granting of citizenship eliminated the tribal status."

214. For a judicial review of an exercise of administrative power in this fashion, see *Logan v. Andrus*, 457 F. Supp. 1318 (10th Cir. 1978); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C. Cir. 1976). A HUD official made this statement at a meeting of the United Tribes of Oklahoma and Kansas at the Southgate Motor Inn in Oklahoma City, Okla., Mar. 15, 1979.

215. See note 213 *supra*.

216. 18 U.S.C. § 1151 (1970); *Kennerly v. District Ct.*, 400 U.S. 424 (1971); *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978); *C.M.G. v. State*, 50 OKLA. B.A.J. 1016 (May 12, 1979), *reh. denied*, July 23, 1979.

217. *DeCoteau v. District Ct.*, 420 U.S. 425 (1975).

218. *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950); *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978).

jurisdiction over its members was expressly confirmed and reserved to the tribes by the Oklahoma Organic Act of 1890²¹⁹ and the Oklahoma Enabling Act of 1906.²²⁰ The supposition that the state of Oklahoma assumed jurisdiction over Indian country without complying with the statutory requirements of Public Law 280²²¹ and without amending the state constitution has been shown to be clearly erroneous.²²² With the exception of *DeCoteau*²²³ and *Littlechief*,²²⁴ the legal situation has been unfolding for a significant period of time. Yet, in 1975, a federal agency concluded:

Under this statute, [18 U.S.C. § 1152] any offense against general laws of the United States committed within Indian

219. Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890).

220. Act of June 16, 1906, ch. 3335, 34 Stat. 267 (1906).

221. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953).

222. *Kennerly v. District Ct.*, 400 U.S. 424 (1971); *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978); *C.M.G. v. State*, 50 OKLA. B.A.J. 1016 (May 12, 1979), *reh. denied*, July 23, 1979. See 25 U.S.C. §§ 1321, 1322, 1326 (19-970). The procedure outlined in these statutes must be explicitly followed for the state to acquire jurisdiction. *Kennerly v. District Ct.*, *supra*. This 1968 amendment to Pub. L. 83-280 (1953), requiring tribal consent to the application of state law within the Indian country was enacted to assure that the state assumption of jurisdiction was undertaken with the consent of those to be governed thereby: "Fifteen years ago, the Congress gave to the States authority to extend their criminal and civil jurisdictions to include Indian reservations—where jurisdiction previously was in the hands of the Indians themselves.

"Fairness and basic democratic principles require that Indians on the affected lands have a voice in deciding whether a state will assume legal jurisdiction on their land." Message of President Johnson, 114 CONG. REC. 5520 (1968).

"Perhaps the most significant change to be accomplished by this legislation would be to amend Public Law 280, which for 15 years has hung like the sword of Damocles over Indian tribes who have had no voice in the acquisition by States of civil and criminal jurisdiction over them. Although this power has been exercised infrequently, its very existence has been a symbol to the reservation Indians that assertions of Federal power profoundly affecting their daily lives might be made through decisions over which they would have no control, and in the making of which they might not even be invited to participate.

"Not only would title IV of the pending legislation assure the tribes of a voice in the determination of whether they would be regulated by State law or Federal law, but also, as provided in the bill, any movement toward increased State jurisdiction would be done in an orderly and gradual fashion. Many States are well prepared to handle some aspects of this responsibility, but unwilling or unable to handle all responsibilities properly. Under the provisions of Public Law 280, our experience over the last 15 years has shown instances where States failed to give adequate protection or services to members of tribes because the States were unwilling to commit the resources necessary to properly enforce their laws. One of the attractive features of the bill is that those States which previously acquired jurisdiction under Public Law 280, but which are not now able to properly handle that responsibility, may now retrocede that jurisdiction back to the Federal Government. Moreover, in States where some tribes are more suited for State regulation than others, this bill would permit the State to assume jurisdiction over some Indian territory without having to assume jurisdiction over all Indian territory. Similarly, if a State is particularly well equipped in a particular field, such a mental health or facilities for juvenile delinquency, the State could assume jurisdiction in these areas without having to assume jurisdiction for all fields." 114 CONG. REC. 9596 (1968) (remarks of Mr. Meeds).

223. *DeCoteau v. District Ct.*, 420 U.S. 425 (1975).

224. *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978).

country is subject to the exclusive jurisdiction of the United States unless the offense is by one Indian against another. There being no tribal criminal justice system of the KCA [Kiowa, Comanche, Apache] tribes, it follows that jurisdiction over offenses by one Indian against another Indian, other than the thirteen specified major crimes, is vested in the courts of the State of Oklahoma.²²⁵

The notion that the federal agency should assist the tribal government in developing the tribal criminal justice system was not considered and the assumption was made that some other element of government had lawfully assumed the tribal prerogatives.

An illustration of the situation in a civil context is readily found in the creation of the Indian housing authorities within the state of Oklahoma. While Section 1151 of Title 18 of the United States Code specifically defines Indian country for criminal jurisdiction purposes, it has repeatedly been inferentially or directly applied by the courts in Indian civil jurisdiction cases.²²⁶ In addition, post-1948 legislation reveals that Congress subscribes to this statutory definition of Indian country for civil jurisdictional purposes.²²⁷ Therefore, the generally accepted operating area of an Indian tribe for civil purposes is the Section 1151 Indian country subject to its jurisdiction.²²⁸

With Indian tribes across the nation, Indian housing authorities are created pursuant to the tribes' inherent power by tribal resolution or ordinance.²²⁹ These authorities are, in effect, tribal bodies politic and corporate and owe their powers to a delegation of

225. Field Solicitors Opinion, Anadarko Area Office, BIA.

226. See, e.g., *DeCoteau v. District Ct.*, 420 U.S. 425, 427 n.2 (1975); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 177-78 n.17 (1973); *Kennerly v. District Ct.*, 400 U.S. 424, 425 n.1 (1971); *Williams v. Lee*, 358 U.S. 217, 220-22 nn.5, 6, 10 (1959); *Annis v. Dewey County Bank*, 335 F. Supp. 133, 134 (D.S.D. 1971); *Crow Indian Tribe v. Deernose*, 158 Mont. 25, 487 P.2d 1133, 1135 (1971); *Bayer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257, 441 P.2d 167, 170-71 (1968); *Kain v. Wilson*, 83 S.D. 482, 161 N.W.2d 704, 705 (1968); *Smith v. Temple*, 82 S.D. 650, 152 N.W.2d 547, 548 (1967); *State ex rel. Adams v. Superior Ct.*, 57 Wash. 2d 181, 356 P.2d 985, 990 (1960).

227. Compare, e.g., 18 U.S.C. § 1162 (1970) (criminal) with 28 U.S.C. § 1360 (1970) (civil), both from the Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 588, 589; and 25 U.S.C. § 1321 (1970) (criminal) with 25 U.S.C. § 1322, 1326 (1970) (civil), both from the Act of Apr. 11, 1958, Pub. L. No. 90-284, § 201, 82 Stat. 77, for examples of the undifferentiated use of the term "Indian country." See also H.R. REP. No. 848, 83d Cong., 1st Sess., 6 (1953), and Act of Nov. 8, 1978, 25 U.S.C. § 1901, Pub. L. No. 95-608 (1978), 92 Stat. 3069 (Indian Child Welfare Act).

228. *DeCoteau v. District Ct.*, 420 U.S. 425 (1975); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *Kennerly v. District Ct.*, 400 U.S. 424 (1971); *Williams v. Lee*, 358 U.S. 217 (1959). See also Act of Nov. 8, 1978, Pub. L. No. 95-608 § 101(a) (1978), 92 Stat. 3069, 25 U.S.C. § 1901 (1970) (Indian Child Welfare Act).

229. 24 C.F.R. § 805.102 (1978); Navajo Tribal Code, tit. 6, § 352 (1969).

specific authority from the tribe.²³⁰ Where an Indian tribe has been terminated from federal supervision and the tribal powers reduced, or where no governmental relationship with the federal government has existed, or where the tribe's powers are undefined, the federal agencies generally take the position that the tribe does not have sufficient governmental authority to create and operate a housing authority.²³¹ When the Department of Housing and Urban Development (HUD) began to receive funds to provide housing for the economically disadvantaged, it was accepted, consistent with the confusion and resulting mythology concerning the legal status of the Indian tribes in Oklahoma, that the "Oklahoma Indians" did not possess the inherent power to create a housing authority. This agency interpretation of the power of the tribes in Oklahoma essentially meant that Indians in Oklahoma would not be able to participate to any reasonable extent in these low-income housing projects. To allow Indian tribes in Oklahoma to acquire HUD housing money set aside to provide housing for Indians, in 1965 the state attempted to fill this administratively created void by enacting authorizing legislation for the formation of Indian housing authorities. This legislation provided:

There is hereby created, with respect to each Indian tribe, band or nation in the state, a public body corporate and politic, to function in the operating area of such Indian tribe, band or nation to be known as the "housing authority" of said Indian tribe, band or nation which shall be an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county authorities created pursuant to this act²³²

Confusion was added to confusion. The administrative agencies, confused about the extent of the tribal powers which survived the creation of the state of Oklahoma, ignored the basic principle of Indian law that tribal powers continue until specifically extinguished,²³³ and ruled that somehow, according to the myth, the tribal police power had been extinguished by inference and that the tribes did not have sufficient power to create a housing authority for Indians within Indian country.²³⁴ The state, in attempting to fill the void created by the administrative interpreta-

230. Navajo Tribal Code, tit. 6, § 366 (1969).

231. 24 C.F.R. § 805.109(b) (1978).

232. 63 OKLA. STAT. § 1057 (1971).

233. COHEN, *supra* note 1.

234. 24 C.F.R. § 805.109(c) (1978). The authors have been unable to find a formal written determination for any tribe in Oklahoma during this time period (1965). Therefore, the

tion of the situation, ignored a principle of Indian law which has never been successfully challenged in the Supreme Court since it was first announced in 1832.²³⁵ This principle simply holds that state laws have no force within the territory of an Indian tribe in matters affecting Indians without a specific delegation of power from Congress authorizing the state to extend its laws over Indians within the Indian country in that state.²³⁶ The reported decisions, *Ware v. Richardson*,²³⁷ *Housing Authority of the Cherokee Nation v. Langley*,²³⁸ and *Housing Authority of the Choctaw Nation v. Craytor*,²³⁹ indicate the difficulty in trying to make logical sense of the resulting situation. *Ware*, a case involving the Indian Housing Authority of the Kiowa Tribe, was essentially a dispute between members of the tribe and the Authority about the quality of the homes being constructed by the Authority. The federal court held that no federal question was involved and that the Housing Authority was so intimately connected to the tribe, and so freed from state control, that it was in essence an agency of the tribe. The court went on to declare that because the case involved a dispute between an agency of the tribe and tribal members concerning the conduct of that agency, the matter was an intra-tribal dispute and not within the jurisdiction of the court.²⁴⁰ It would follow, then, that such disputes would also be outside the jurisdiction of the courts of the state of Oklahoma.²⁴¹

fact of this type of ruling is presumed from the actual situation, which situation would necessarily have arisen from such policy decision.

235. *Kennerly v. District Ct.*, 400 U.S. 424 (1971); *United States v. Kagama*, 118 U.S. 375 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832).

236. COHEN, *supra* note 1, at 116-17.

237. 347 F. Supp. 344 (1972).

238. 555 P.2d 1025 (Okla. 1976).

239. 50 OKLA. B.A.J. 1411, No. 53411 (June 26, 1979).

240. *Ware v. Richardson*, 347 F. Supp. 344 (1972).

241. The question of jurisdiction of the courts of the state of Oklahoma over tribal matters was presented in the recent case, *United States v. Pawnee Business Council*, 382 F. Supp. 54 (N.D. Okla. 1974). The Federal Court in the Northern District of Oklahoma held that a judicial determination of the District Court of Pawnee County, Okla., as to the members and president of the tribe's Business Council was void.

The court, relying on the intra-tribal dispute doctrine, determined that the acknowledgment by the Secretary of the Interior of one of two contending factions of the Pawnee Tribe as to the proper membership of the Council was correct and that a determination of the membership by a district court of the state of Oklahoma was improper and void for lack of jurisdiction.

The court explained its decision by saying: "The Court recognizes the legion cases from this Circuit and elsewhere that the Federal Courts are without jurisdiction to entertain and decide internal Indian affairs, matters or disputes; that Congress had exclusive plenary legislative authority over such affairs and has designated and empowered the Secretary of the Interior in this regard. The Court must further recognize that this prohibition of judicial action must also apply to State Courts as well as Federal Courts. This being so, the Court

The Supreme Court of Oklahoma, however, has twice held that the Indian housing authorities are agencies of the state, not agencies of the tribe. Thus, the court has upheld the exercise of eminent domain by the Housing Authority of the Cherokee Nation,²⁴² and in a dispute between tribal members and the tribal government, has ordered a district court of Oklahoma to accept jurisdiction to determine the proper membership of the Housing Authority of the Choctaw Nation.²⁴³

The precise legal nature of these authorities remains unresolved. If these authorities are agencies of the tribes, from what source did they derive their power to act? The Kiowa Tribe has no approved ordinance or resolution which establishes a housing authority and grants to that authority specific powers from which to operate within the Indian country subject to the jurisdiction of the Kiowa Tribe.²⁴⁴ If these authorities are agencies of the state, where did the state obtain power to extend its laws into the Indian country in such a manner as to affect any interest of the Indian tribe or its members residing therein, or to subject them to its civil or criminal process?²⁴⁵

Littlechief,²⁴⁶ a criminal case directly concerning the Kiowa Indian Housing Authority, focuses the unusual situation which results from the exclusion of tribal governments from their lawful prerogatives as a matter of policy. *Littlechief*, a Kiowa Indian allegedly killed his father, another Kiowa Indian, on a Kiowa In-

finds and declares that, as the membership of the Business Council and who is its President are internal tribal affairs, [the judicial determinations in these respects and any injunctive order in support thereof by the District Court of Pawnee County, Oklahoma, as aforesaid are void for lack of jurisdiction]". *Id.* at 58.

The intra-tribal dispute doctrine has been recently upheld by the United States Supreme Court. The Court held that the sovereign immunity of the tribe from suit precluded a civil action against the tribe even for rights granted as against the tribe by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-303 (1970). *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). If Indian tribes are immune from suit in the federal courts, they certainly must be immune from state court proceedings.

The resolution of the intra-tribal dispute problem is relatively simple. The Indian tribes must establish tribal forums to hear and decide internal matters of this sort which are within the exclusive jurisdiction of the tribal dispute resolution processes.

242. *Housing Auth. of Cherokee Nation v. Langley*, 555 P.2d 1025 (Okla. 1976).

243. *Housing Auth. of Choctaw Nation v. Craytor*, 50 OKLA. B.A.J. 1411, No. 53411 (June 26, 1979).

244. *Kennerly v. District Ct.*, 400 U.S. 424 (1971) disposes of the proposition that the authority can legally act under a state grant of power with the approval of the tribal governing body in the negative. Before state power can take effect, the requirements of 25 U.S.C. § 1326 (1970) must be met. *See Housing Auth. of Choctaw Nation v. Craytor*, 50 OKLA. B.A.J. 1411 (June 26, 1979).

245. COHEN, *supra* note 1, at 116-17. *See also Kennerly v. District Ct.*, 400 U.S. 424 (1971).

246. *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978).

dian allotment, in a HUD-financed house, built and serviced by the Housing Authority of the Kiowa Tribe.²⁴⁷ Both the Oklahoma Court of Criminal Appeals and the Federal District Court for the Western District of Oklahoma ruled that, as a matter of law, the state of Oklahoma had no jurisdiction to try Littlechief for murder because the allotment was Indian country and jurisdiction was vested in the federal courts.²⁴⁸ However, if Littlechief had been a tenant occupying that same house, the Oklahoma law establishing the Housing Authority purports to grant the Authority the power to subpoena Littlechief to testify before the Authority through service of state civil process and to evict him for breach of his agreement with the Authority.²⁴⁹ In the absence of a specific grant of power from Congress allowing the state of Oklahoma to exert its jurisdiction over Indians within the Indian country, the assertion of state civil jurisdiction is clearly contrary to the established body of federal Indian law.²⁵⁰

It must be emphasized that this result is *not* an outgrowth of the law applying to Indians within Oklahoma, but is an outgrowth of the policy of the administrative agencies and the state of Oklahoma which ignores the legitimate tribal prerogatives which are sustainable in law.

The administrative agencies and the state have often interpreted the extent of the current tribal powers in a manner which is counter to the generally accepted body of Indian law and the specific statutory law effective in Oklahoma. These interpretations have been repeated so often that they have, in effect, become slogans which have been enforced as a matter of policy. The

247. *Id.*

248. *Id.* (The state court opinion contains the full text of the federal decision; 18 U.S.C. §§ 1151, 1153 (1970)).

249. 63 OKLA. STAT. § 1061(a)(b)(h) (1971).

250. *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978); COHEN, *supra* note 1, at 116-17. See also *DeCoteau v. District Ct.*, 420 U.S. 425, 427 n.2 (1975); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 177-78 n.17 (1973); *Kennerly v. District Ct.*, 400 U.S. 424, 425 n.1 (1971); *Williams v. Lee*, 358 U.S. 217, 220-22 nn.5, 6, 10 (1959); *Annis v. Dewey County Bank*, 335 F. Supp. 133, 134 (D.S.D. 1971); *Crow Indian Tribe v. Deernose*, 158 Mont. 25, 487 P.2d 1133, 1135 (1971); *Sigane v. Bailey*, 282 Minn. 367, 164 N.W.2d 886, 888-89 (1969); *Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257, 441 P.2d 167, 170-71 (1978); *Kain v. Wilson*, 83 S.D. 482, 161 N.W.2d 704, 705 (1968); *Smith v. Temple*, 82 S.D. 650, 152 N.W.2d 547, 548 (1967); *State ex rel. Adams v. Superior Ct.*, 57 Wash. 2d 181, 356 P.2d 985, 990 (1960). Compare, for example, 18 U.S.C. § 1152 (1970) (criminal) with 28 U.S.C. § 1360 (1970) (civil), both from the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 589, and 25 U.S.C. § 1321 (1970) (criminal) with 25 U.S.C. § 1322, 1326 (1970) (civil), both from the Act of Apr. 11, 1968, Pub. L. No. 90-284, § 201, 82 Stat. 77, for examples of the undifferentiated use of the term "Indian country." See also H.R. REP. No. 848, 83d Cong., 1st Sess., 6, (1953), and Act of Nov. 8, 1978, Pub. L. No. 95-608 (1968), 92 Stat. 3069 (Indian Child Welfare Act).

critical analysis of the events surrounding the creation of the state of Oklahoma in the first portion of this article clearly indicates that, for the tribes embraced in what was the Oklahoma Territory, the inherent tribal powers survived the creation of the state almost totally intact, although the physical area within which those powers could be exerted was greatly reduced. For those tribes in what remained of the Indian Territory from 1890 until the time of statehood, the question is more complex, although there are indications that the inherent powers of those tribes may have survived the destruction of the vehicles for their expression.²⁵¹ In other words, the Indian tribes of the Oklahoma Territory emerged from the period during which the state of Oklahoma was created with essentially the same governing authority they possessed prior to 1890. Only the area of exercise of those powers had been reduced. The tribes maintained their governmental authority over the areas retained by them to the exclusion of the state, to the same extent that the classical "reservation tribes" retain governmental authority over their reservations.²⁵² The Kiowa Tribe, therefore, retains the power to create and supervise an Indian Housing Authority within its jurisdiction to the exclusion of the state. When such a housing authority is created pursuant to tribal law, the problems inherent in the status of the current state-created Indian housing authorities are nonexistent.

It is very clear that this solution is simply a matter of policy, not of law. The laws regarding Indian tribes in Oklahoma clearly support the exercise by Indian tribes of their inherent powers. However, recognition and exercise of tribal governmental powers does not come by academic research. Academic knowledge of the tribal legal status is only ancillary to the exercise of tribal powers. The process of progressing beyond worn-out slogans and the present caretaker status of tribal governments merely requires a change of policy and attitude, not law. The breadth of the law is sufficient to allow for the orderly development of tribal government. In this situation, sovereignty is merely a state of mind, and attitude is often worth more than facts.

Returning once again to the development of the inherent tribal law and order functions as an illustration, the cited weaknesses of the tribal governments in Oklahoma can become a source of strength for the cooperative development of a better law enforcement system for all Oklahomans. It has been said that the "checkerboard" pattern of Indian country, which is predominant

251. *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C. Cir. 1976).

252. COHEN, *supra* note 1, at 116-17.

in western Oklahoma, is a liability for the exercise of police powers by the tribal governments. However, this circumstance can be a strength, in that Indian tribes will generally develop their tribal justice systems in the context of these largely rural checker-board areas where local Oklahoma law enforcement agencies are often understaffed and underequipped. Particularly in the less populated rural Oklahoma counties, cross-deputizing of state and tribal law enforcement officers will result in lower response times, more materiel, and additional trained manpower actually patrolling in the field.²⁵³ With all law enforcement officers in a county—tribal, state, county, and city—empowered to respond to any complaint anywhere in the county through the use of cross-deputization, every citizen of Oklahoma will benefit from the recognition of the tribe as a working partner in the exercise of governmental authority within the state. When the New Federalism and Indian self-determination strategies for better government, recognition of inherent tribal powers, and simple intergovernmental cooperation can achieve results of this kind, that which is good for Indians is good for Oklahoma.

253. The state has recently recognized the effectiveness of the cross-deputizing arrangement whereby one law enforcement officer, hired and paid by any one jurisdiction but carrying state, tribal, and federal commissions, may enforce the laws of any level of government over any person wherever located. In this situation, immediate response to critical situations is greatly enhanced and the only "problem" to be resolved is which jurisdiction will try the accused. The authority to commission tribal law enforcement officers as "special OSBI law enforcement officers" is found in Executive Order 79-6, filed in the Oklahoma Secretary of State's office, Mar. 26, 1979, and authority for Oklahoma law enforcement officers to accept tribal and BIA (federal) commissions is found in Att'y Gen. Op. No. 78-176 (Okla. Jan. 4, 1978).