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THE "TERMINATED" FIVE TRIBES OF OKLAHOMA: THE EFFECT OF FEDERAL LEGISLATION AND ADMINISTRATIVE TREATMENT ON THE GOVERNMENT OF THE SEMINOLE NATION*

Susan Work**

I. The Source of Confusion

The so-called "Five Civilized Tribes of Oklahoma," the Seminole, Choctaw, Chickasaw, Cherokee, and Creek Nations (hereinafter called the Five Tribes), are among the most misunderstood tribes in circles of federal Indian law expertise.¹ The designation of these tribes as "civilized" reflects the historic attitude of the dominant culture toward these tribes and is a clue to the unique treatment these tribes have received at the hands of the federal government. The Five Tribes are often described as having been the first to adopt the white man's "ways." It is commonly believed by the general public that the tribal entities have been terminated, that tribal members have rapidly assimilated, and that, having merged into the general population, they no longer have any of the problems faced by other Indians.²

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**B.A., 1973, Oklahoma; J.D., 1976, Oklahoma; member, Choctaw Tribe.

1. One of the most recent examples of this misunderstanding is contained in Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 144 (1977), [hereinafter cited as Wilkinson & Biggs], which states: "The closest historical precedent for outright termination involves the Five Civilized Tribes, the Cherokee, Choctaw, Chickasaw, Creek, and Seminole. After their removal to Oklahoma from ancestral lands in the Southeast, those tribes were subjected to a series of acts and agreements from 1893 to 1906. Taken together, those acts stripped the Five Civilized Tribes of most, but not all, governmental functions. . . . The status of those and other Oklahoma tribes has since been altered, and in some instances improved, by a complex set of statutes pertaining to Oklahoma. As a result, the Five Civilized Tribes are now federally recognized tribes, but most of their tribal land is gone and it is doubtful that the other effects of those termination acts will ever be wholly eliminated." [Footnotes omitted.] This statement contains three erroneous assumptions: (1) that the Five Tribes were completely terminated, (2) that for some period of time they were not federally recognized tribes, and (3) that the Oklahoma Indian Welfare Act, which is cited as authority in note 5, somehow restored federal recognition and some degree of government. These are all points that will be addressed in this article.

2. *Id.* See also M. WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION 349 (1938): "Upon the admission of Oklahoma to the Union, the Cherokee Nation furnished leaders whose ability made them formidable opponents or effective advocates in both state and national affairs. The passing of an Indian state was but another step in the direction of a larger Union of American commonwealth"; E. McREYNOLDS, THE SEMINOLES 354 (1959) [hereinafter cited as McREYNOLDS]: "The history of the Seminoles rapidly merged with that of other citizens of the United States who lived in the same area." See also G. WOODWARD, THE CHEROKEE 5 (1963); Gibson, *Constitutional Experiences of the Five Civilized Tribes*, 2 AM. IND. L. REV. 38 (No. 2 1974).

While it is true that for three-quarters of a century the people of the Five Tribes have had very little control over tribal affairs, neither the tribal entities nor the tribal governments were terminated by Congress. Tribal members did not all blend into the melting pot of American society, and today many are confronted with the same problems of poverty, discrimination, and organization of a political structure as are other Indians throughout the United States.³

The complexity of the legislation dealing with the allotment of the lands of the Five Tribes and the merger of Oklahoma and Indian territories into the state of Oklahoma has been the main source of confusion concerning the legal status of the Five Tribes. Immediately after statehood, federal administrative officials began to rely on these laws to avoid federal recognition of the tribal governments. Because federal officials refused to recognize the authority of the elected chief and tribal council, it was difficult for the people as a group to manage tribal affairs or to exert any significant political influence on Congress to improve their situation. But with more legal resources available today, members of the tribes are beginning to unravel the mysteries surrounding the allotment legislation. In 1976, *Harjo v. Kleppe*,⁴ a case brought by Creek citizens against the Department of Interior, cast a new light on the misconceptions concerning the governments of the Five Tribes. That decision contains a fairly exhaustive analysis of the Five Tribes' allotment legislation. Basically, it holds that the Creek Nation still possesses the powers necessary for self-government, and that the 1867 Creek constitution is still a viable legal document.⁵

That these tribes have managed to survive for so long under such adverse circumstances is not really surprising in light of the strength they exhibited in their earlier dealings with the United States. Although the Five Tribes did not resort to a long-term military resistance to federal expansion, they were stronger adversaries than many of the western tribes in the political and legal sense because of their grasp of the federal legislative process,

3. See S. REP. No. 1594, 90th Cong., 2d Sess. (1968): "Despite the long process of acculturation, the Seminole people are generally socially, economically, and educationally below state and county averages. The development of their abilities to manage community, tribal, and family affairs has been hampered by the low educational level, language barrier, assimilation retardation, and lack of employment opportunities. Because of this they tend to isolate themselves from the general community." *Id.* at 5. "The average median educational level achieved by the Seminole adults is fourth grade. Over 50 percent have a limited use of English." *Id.* at 8.

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

5. *Id.* at 1143.

resulting in treaty provisions expressly guaranteeing them extensive sovereign powers. By the late 1880's the United States government had managed to subdue the last of the Plains tribes and had begun to allot their lands in accordance with the Dawes Act of 1887.⁶ However, the United States still had to deal with the Five Tribes before they could eliminate the uncomfortable situation of having five nations, possessing almost absolute powers of self-government over their citizens and successfully functioning apart from the federal system, located in the middle of the federal republic.⁷

Rather than overtly breaking its treaty promises with the Five Tribes with one sweeping piece of legislation, Congress took a step-by-step approach which spanned more than a decade, under the pretext of securing tribal consent.⁸ By the time this procedure was completed, Congress had enacted a dozen statutes applicable to the Five Tribes and Indian Territory in general, plus other statutes and agreements dealing with each tribe specifically, and culminating in the allotment of the lands of the Five Tribes and statehood.⁹ Obviously, it is outside the scope of this article to give a detailed account of all the allotment legislation affecting the Five Tribes and the voluminous laws attempting to correct the many problems which followed.¹⁰ However, those provisions, affecting the question of termination of tribal government and the ability of the tribes to operate as a governmental entity will be discussed in some detail.

6. 24 Stat. 388 (1887), *codified at* 25 U.S.C. §§ 331 *et seq.* See D. OTIS, THE DAWES ACT AND ALLOTMENT OF INDIAN LAND (1973), for an analysis of the forces behind the passage of the Dawes Act. The exclusion of the Five Tribes from the Dawes Act was the result of the resistance of the Five Tribes to allotment. *Id.*

7. 24 CONG. REC. 102 (1892) (remarks of Mr. Platt): [T]he real question which should interest the American people is the question of whether we can longer endure five separate independent, sovereign, and almost wholly foreign governments within the boundaries of the United States."

8. Congress created the Five Tribes Commission in 27 Stat. 612 (1893), directing it to negotiate allotment agreements with the Five Tribes. The allotment of the lands of the Five Tribes was nearing completion when the Oklahoma Enabling Act, 34 Stat. 267 (1906), was enacted.

9. The more important statutes include the following: 25 Stat. 783 (1889); 26 Stat. 81 (1890); 27 Stat. 612, 645 (1893); 28 Stat. 693 (1895); 29 Stat. 321, 339 (1896); 30 Stat. 62, 83 (1897); 30 Stat. 495 (1898); 31 Stat. 657 (1900), *as amended by* 32 Stat. 774 (1903); 31 Stat. 794 (1901); 32 Stat. 774 (1903); 31 Stat. 794 (1901); 32 Stat. 841 (1903), *amended by* 80 Stat. 639 (1966); 33 Stat. 573 (1904); 34 Stat. 137 (1906); 34 Stat. 267 (1906).

10. The more important of the post-statehood legislation designed to correct the many problems confronting the people of the Five Tribes include the following: 35 Stat. 312 (1908); 37 Stat. 497 (1912); 38 Stat. 310 (1914), *as amended by* 41 Stat. 1204 (1921); 40 Stat. 606 (1918), *codified at* 25 U.S.C. § 555, (1970); 42 Stat. 994 (1922); 44 Stat. 239 (1926); 45 Stat. 495 (1928); 69 Stat. 666 (1955); 47 Stat. 777 (1933); 49 Stat. 1967 (1936), *codified at* 25 U.S.C. §§ 501 *et seq.* (1970); 61 Stat. 731 (1947); 66 Stat. 323 (1952); 67 Stat. 558 (1953); 25 U.S.C. § 375d (1970); 84 Stat. 1091 (1970).

Practically speaking, all of the legislation significant to this analysis applies to the Five Tribes as a whole, yet each tribe had its own treaties and allotment agreements, and its own unique history. Thus, although the present analysis is generally applicable to each of the tribes, the Seminole Nation will be used as a model.

A historical background will be outlined with an enumeration of treaty guarantees of the tribe's sovereign power of self-government, a description of the form of government, and a summary of federal legislative and administrative action affecting tribal government. Then a brief analysis of the concept of *tribal* termination, *i.e.*, the cessation of the special federal-Indian relationship, and its inapplicability to the Seminole Nation, will be presented. Finally, the inapplicability of the concept of *governmental* termination to the Seminole Nation will be examined at some length. This will be an analysis of those statutes dealing expressly with tribal existence, and an overview of the various statutory provisions which affected the ability of the tribe to exercise its right to self-government. No attempt will be made to define the extent of sovereignty left in the tribe, but the foundation for such an analysis will be provided.

II. *Seminole Government Prior To Allotment*

Sovereign Status of Government

Like other tribes, the Seminole Nation possessed the inherent sovereign power of self-government prior to the making of any treaties with the United States government.¹¹ However, the federal government tried to avoid recognition of the sovereign status of the Seminole Nation in its early relationship with the tribe. The removal treaties of the 1830's, which directed the removal of the Seminoles from Florida to Indian Territory, expressed the intention that the Seminoles should merge into the Creek Nation.¹² The Seminoles strongly objected to the proposed consolidation of the

11. It is well recognized that tribes are qualified to exercise powers of self-government, not by virtue of any delegation of power from the federal government, but rather by reason of their inherent tribal sovereignty. F. COHEN, *FEDERAL INDIAN LAW* 122 (1942) [hereinafter cited as *FEDERAL INDIAN LAW*]. See *In re Mayfield*, 141 U.S. 107, 115, 116 (1891); *United States v. Kagama*, 188 U.S. 375 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

12. The Treaty of May 9, 1832, 7 Stat. 368, art. I, provided that the Seminoles would be removed to the country assigned to the Creeks to be "received as a constituent part of the Creek Nation and to be readmitted to all the privileges as members of the same." A similar provision was contained in the Treaty of Feb. 14, 1833, 7 Stat. 417, art. IV.

two tribes, and large numbers refused to migrate westward.¹³ As a result, another removal treaty was ratified in 1845,¹⁴ and attempted to induce more Seminoles to emigrate to Indian Territory by allowing them to settle apart from the Creeks and to make their own town regulations subject to the general control of the Creek council. In spite of this treaty, a large group of Seminoles remained in Florida, and the Seminoles of Indian Territory continued to object to any consolidation with the Creeks.¹⁵

Finally, in 1856 a tripartite treaty was made in Washington in which the ties between the Creeks and Seminoles in Indian Territory were severed.¹⁶ The treaty provided for the cession of a tract of Creek land to the Seminoles¹⁷ and guaranteed both tribes the right to self-government as follows:

So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with their Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government within their respected limits; excepting, however, all white persons with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;)¹⁸

13. The objection of the Seminoles to consolidation is reflected in the Treaty of Jan. 4, 1845, 9 Stat. 821: "Many of the Seminoles have settled and are now living in the Creek Country, while others, constituting a large portion of the tribe, have refused to make their homes in any part thereof, assigning as a reason that they are unwilling to submit to the Creek laws and government, and that they are apprehensive of being deprived, by the Creek authorities of their property"

14. *Id.*, art. I.

15. Seminole leaders in Indian Territory complained in an 1855 resolution that the Seminoles were a separate people from the Creeks, and that the United States was acting in an unjust and arbitrary manner by attempting to join them with the Creeks. They stated that harmony and friendship between the two tribes could not be accomplished while they were joined in an artificial and undesired union. MCREYNOLDS, *supra* note 2, at 275.

16. Treaty of Aug. 7, 1856, 11 Stat. 699.

17. *Id.*, art. I.

18. *Id.*, art. XV. This article was cited along with other treaty provisions in a discussion of tribal powers in *Buster v. Wright*, 135 F. 947, 951 (1905), *app. dismissed*, 203 U.S. 599 (1906), in which the Court stated: "This power to govern the people within its territory was repeatedly guaranteed to the Creek Tribes by the United States . . . founded in its original national sovereignty, and secured by these treaties, the governmental authority of the Creek Nation, subject always to the superior power of the republic, remained practically unimpaired until the year 1889."

The treaty further protected tribal autonomy by providing:

The United States do hereby solemnly agree and bind themselves, that no state or territory shall ever pass laws for the government of the Creek or Seminole Tribes of Indians and that no portion either of the tracts or country defined in the first and second articles of this agreement shall ever be erected into a territory without the full and free consent of the legislative authority of the tribe owning the same.¹⁹

After the Civil War, the Five Tribes were forced to make new treaties because many of their citizens had fought with the Confederacy.²⁰ It is important to note, however, that the Seminole Treaty of 1866 specifically reaffirmed previous treaty obligations not inconsistent with the new treaty.²¹ In fact, the only provision in the 1866 treaty involving tribal government was one which expressly recognized Seminole governmental authority:

The Seminole Nation agrees to such legislation as Congress and the President may deem necessary for the better administration of the rights of person or property within Indian Territory: *Provided*, however, [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.²²

This treaty provision indicates that the United States recognized that it did not possess plenary power over the Seminole Nation because tribal consent to federal legislation generally affecting the tribe was apparently deemed necessary, and because the United States agreed not to interfere with tribal government in any way. The 1866 treaty also created a general council of the Five Tribes in Indian Territory which would legislate on the intercourse and rela-

19. *Id.*, art. IV. The United States Supreme Court in *Atlantic & Pac. R.R. v. Mingus*, 165 U.S. 413 (1897), cited similar guaranties of self-government contained in the Cherokee Treaty of Dec. 19, 1835, 7 Stat. 478, art. V; Cherokee Treaty of Aug. 16, 1846, 9 Stat. 871, art. I; Choctaw Treaty of Sept. 27, 1830, 7 Stat. 333, art. II; Creek Treaty of Mar. 24, 1832, 7 Stat. 344, and made the following statement concerning the governments of those tribes: "under the guarantees of these and other similar treaties the Indians have proceeded to establish and carry on independent governments of their own, enacting and executing their own laws, punishing their own criminals, appointing their own officers, raising and expending their own revenues. . . ."

20. Cherokee Treaty of July 19, 1866, 14 Stat. 799; Choctaw & Chickasaw Treaty of Apr. 28, 1866, 14 Stat. 769; Creek Treaty of June 14, 1866, 14 Stat. 785; Seminole Treaty of Mar. 21, 1866, 14 Stat. 755.

21. Treaty of Mar. 21, 1866, 14 Stat. 755, art. IX. In *Seminole Nation v. United States*, 171 Ct. Cl. 477 (1965), it was held that the 1866 treaty was valid, that there was no coercion in its signing, and that the United States was fair and honorable in the treaty process.

22. *Id.*, art. VII.

tionships between the tribes, but protected each tribe's right to govern itself with the provision: "nor shall said council legislate upon matters pertaining to the organization, laws or customs of the several tribes except as herein provided for."²³

The 1866 treaty was the last Seminole Treaty,²⁴ but the 1898 Seminole allotment agreement, which carried the same weight as a treaty,²⁵ provided: "This agreement shall in no wise affect the provision of existing treaties between the Seminole Nation and the United States except in so far as it is inconsistent therewith."²⁶ The only provision of the agreement expressly inconsistent with the 1856 and 1866 treaty provisions affecting tribal self-government conferred jurisdiction to the United States courts over certain crimes and legal actions committed within the borders of the Seminole Nation.²⁷ In spite of this treaty protection, federal legislation and unauthorized state action violated the tribe's right to self-government, resulting in the present confusion concerning the termination issue.

Form of Government

Immediately after their removal to Indian Territory, the United States recognized only a limited right of self-government in the Seminole people because the 1832 and 1845 treaties subjected them to the authority of the Creek Council. Despite this, the Seminoles established their own government in Indian Territory. There were twenty-five towns, or bands, constituting the Seminole Tribe. Each town elected a *tustenugee*, (subchief) and the Seminole Council was composed of these subchiefs under the presidency of

23. *Id.*, art. VII(3).

24. The Seminole government expressly recognized the validity of its treaties in its written laws as follows: "The lands set apart by the treaty with the United States in the year 1856, and reaffirmed in the treaty of 1866, as the Seminole reservation, and lying west of the Western boundary line of the Muskogee Nation, and between the north and south Canadian rivers we declare to be the country of the Seminoles, and by this fact we are guided in all public acts . . . Within our boundary lines alone will we exercise authority and operate our laws for the government of ourselves . . . In the government of ourselves by these laws, it is hereby declared and understood that attention and cognizance will be taken only of such interest and questions of a public character as have arisen since and subsequent to the ratification of the treaty with the United States in the year 1856 . . ." Revised Statutes of the Seminole Nation (1903), ch. 1, art. I, Oklahoma Historical Society, Indian Archives, Seminole Documents, Volume 5, which is a translation by G.W. Grayson, dated July 11, 1909, of the original manuscript loaned to the Indian Inspector, J. George Wright, by Chief John R. Brown [hereinafter cited as 1903 Revised Statutes of the Seminole Nation]. The original Seminole document is contained in the Seminole Documents, Volume 12.

25. Note, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?* 5 AM. INDIAN L. REV. 239 (1977).

26. 30 Stat. 567 (1898).

27. *Id.*

the principal chief, or king. Supervision over the towns, by Seminole custom, belonged to the Council.²⁸ After the 1856 treaty severed the ties between the Seminole and Creek nations, reaffirming the Seminole Nation's right of self-government, the Seminoles moved to their new national domain. By 1860 a council house had been constructed and laws had been enacted which determined the governmental organization.²⁹ This organization remained basically unchanged even by a codification of the more important Seminole laws in the form of the 1903 Revised Statutes of the Seminole Nation.³⁰ There was no written tribal constitution, but the laws functioned as a constitution.³¹

According to the 1903 Revised Statutes, the tribal government was comprised of two branches consisting of the General Council and a principal and second chief. The General Council was basically responsible for all decisions concerning tribal affairs. It exercised legislative powers in accordance with the Revised Statutes, which provided: "We will be governed only by such laws as have been regularly enacted by the National Council of the Seminole Nation."³² The Council also was responsible for judicial decisions in criminal and civil cases, thus serving in a judicial capacity as well as a legislative capacity.³³

The principal and second chiefs had the broad executive power to "carry on the government in strict accordance of the law," and to recommend to the National Council those measures in the best interest of the nation.³⁴ The statutes expressly granted them the pardoning power;³⁵ a limited veto power, which could be overridden if no legal objections were given and the Council reaffirmed its action;³⁶ authority to issue arrest warrants;³⁷ to use tribal funds

28. McREYNOLDS, *supra* note 2, at 260.

29. *Id.* at 277-78.

30. 1903 Revised Statutes of the Seminole Nation, *supra* note 24.

31. *Id.* The main chapters outlining the structure of the tribal government include chapters 1-6, 21, 25, 32, 49, and 67.

32. *Id.*, ch. 2. The Seminole laws cover criminal areas such as wrongful lies (ch. 8), theft (ch. 9), arms violations (ch. 13), breaking and entering (ch. 14), and rape (ch. 12). It covers civil areas such as marriage (ch. 20), sales (ch. 27), hiring property (ch. 28), establishment of business by noncitizens (ch. 32), taxation (ch. 340), public roads (ch. 40), estates and wills (chs. 44, 45, 46, and 51), and divorce (ch. 47). *supra* note 24.

33. *Id.*, ch. 21, which provides: "Sec. III. Any person with a grievance shall report his case to the chiefs of the Nation, and if after preliminary examination they shall deem it worthy of a judicial trial by the Council, the same shall be laid before that body for consideration . . . Sec. VI. All cases of whatsoever character shall be laid before the National Council for consideration and settlement by the Chiefs in accordance with the provisions of this act."

34. *Id.*, ch. 39, §§ 1, 2, 3.

35. *Id.*, ch. 49.

36. *Id.*, ch. 39, §§ 4, 5.

37. *Id.*, ch. 6.

for law enforcement;³⁸ and to present cases to the Council for judicial decision.³⁹ The chiefs also had the power to disapprove Council judicial decisions, thus serving the judicial branch as an appellate court.⁴⁰

The Council and chiefs were the two most important governmental branches, yet the foundation of tribal government was the tribal town. There were fourteen tribal towns, each with an elected town chief.⁴¹ Each town had a delegate in nominating conventions for the principal and second chief⁴² and each town chief served on the National Council, along with two elected representatives from each town.⁴³ The importance of the town chiefs is reflected in the Revised Statutes as follows: "It is hereby acknowledged and declared that the town Chiefs are of inestimable value and benefit to the Nation being as they are in close touch with the people."⁴⁴ Besides their powers as Council members, town chiefs had the authority to enact rules and regulations and assess fines for the regulation of immediate local affairs.⁴⁵

The provisions of the 1903 Revised Statutes appear to be the most recently written laws of the Seminole Nation defining Seminole government until adoption of the 1969 constitution, which will be discussed later.

The preceding brief history of Seminole government at the time of statehood demonstrates clearly the tribe's ability to govern itself. However, the legal status of the Seminole government became a source of confusion when complex federal legislation and the subsequent federal administrative treatment of tribal government impaired the exercise of this legal right by tribal members.

III. Overview of Federal Legislative and Administrative Action Affecting Tribal Government

Federal Statutes Prior to Statehood

The sovereign status of the Seminole Nation remained relatively untouched by Congress until the last decade of the nineteenth cen-

38. *Id.*, ch. 25.

39. *Id.*, ch. 21.

40. *Id.*, ch. 67.

41. *Id.*, chs. 2, 4.

42. *Id.*, ch. 3.

43. *Id.*, chs. 2, 4.

44. *Id.*, ch. 25, § 4.

45. *Id.*

ture.⁴⁶ However, congressional interference began with the passage of the Act of March 3, 1871, which prohibited treaty-making with Indian tribes.⁴⁷ A few years later Congress began to pass special statutes authorizing railroad construction in Indian Territory.⁴⁸ Strong objections were heard from the Five Tribes, but the validity of the statutes was upheld by the Supreme Court under the federal power of eminent domain.⁴⁹ The establishment of railroads strengthened the pressure for allotment, and in 1887 the Dawes Act, providing for the allotment of Indian lands, was enacted.⁵⁰ The Dawes Act excluded the Five Tribes from its application, but legislation affecting those tribes soon followed.⁵¹ On March 1, 1889, an act was passed which established federal courts in Indian Territory.⁵² The act conferred on these federal courts only limited civil jurisdiction, and criminal jurisdiction over certain specified crimes.⁵³ However, it expressly excluded Indian versus Indian conflicts from federal jurisdiction.⁵⁴

Pursuant to the Dawes Act, the lands of the Plains tribes, who occupied the western half of Indian Territory, were allotted. As a

46. Congress did not begin to negotiate with the Five Tribes concerning the allotment of their lands and the incorporation of Indian Territory into a state until it created the Five Tribes Commission, 27 Stat. 612, 645 (1893).

47. 16 Stat. 466 (1871), *codified at* 25 U.S.C. § 71 (1970). Prior to the 1871 Act the executive branch had the authority to negotiate treaties and the Senate had the power of treaty ratification. The 1871 Act was the result of the opposition of the House to its practical exclusion from any policy-making role in Indian affairs. As a result of the Act, Congress began exercising greater authority over tribes, and soon judicial recognition of its complete plenary powers was established. For a discussion of the legal significance of this act, see Note, 5 25 U.S.C. 71: *The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239 (1977).

48. Statutes authorizing the construction of individual railroads through Indian Territory included the following: 23 Stat. 73 (1884); 25 Stat. 47 (1888); 27 Stat. 492 (1893); 29 Stat. 80 (1896); 32 Stat. 43 (1902). Congress also enacted two general statutes authorizing the construction of railroads. 30 Stat. 990 (1899); 32 Stat. 43 (1902).

49. *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641 (1889).

50. 24 Stat. 388 (1887), *codified at* 25 U.S.C. § § 331 *et seq.* (1970).

51. *Id.*, § 8.

52. 25 Stat. 783 (1889).

53. *Id.*, § § 5, 6, 20, 22-26. The Act extended jurisdiction over all civil actions involving \$100 or more; all controversies arising out of mining leases or contracts made with one of the Five Tribes where the amount involved exceeded \$100; and over all offenses against the laws of the United States committed within the Indian Territory "as in this act defined" not punishable by death or imprisonment at hard labor. The Act defined several types of crimes subject to federal jurisdiction when committed in Indian Territory, including obstruction of railroad tracks or telephone or telegraph lines, disturbance of a religious assembly, assault, and arson. However, the Act specifically made these crimes inapplicable to Indian versus Indian conflicts. Although the Act extended jurisdiction over Indian-non-Indian controversies within the areas enumerated, proceedings were to be conducted in English only, and jurors were required to be English-speaking United States citizens. At that time, members of the Five Tribes were not United States citizens, and English was not the primary language of the Five Tribes.

54. *Id.*, § 27.

result of increased pressure in that area for a non-Indian government, the Organic Act was enacted in 1890.⁵⁵ The act created Oklahoma Territory in the western half of Indian Territory and set up a territorial government there.⁵⁶ The eastern half, occupied by the Five Tribes, remained Indian Territory.⁵⁷ Although the Organic Act did not impose a territorial government on Indian Territory, it did provide for more extensive federal jurisdiction there, and extended a number of Arkansas civil and federal criminal laws over it.⁵⁸ However, the act recognized that each of the Five Tribes had exclusive jurisdiction over conflicts between tribal members.⁵⁹

In 1893 the Five Tribes Commission was created to negotiate with the tribes for the extinguishment of tribal title in order to effect the ultimate creation of a state embracing Oklahoma and Indian Territories.⁶⁰ In 1895 a lengthy act dealing with federal

55. 26 Stat. 81 (1890).

56. *Id.* Section 1 of the Act established the boundaries between the two territories. Sections 2-28 dealt with governmental and jurisdictional matters in the newly established Oklahoma Territory.

57. *Id.* Sections 29-44 dealt with affairs within the new boundaries of Indian Territory.

58. *Id.* Section 29 of the Act gave federal courts jurisdiction over all civil cases, "except cases over which the tribes have exclusive jurisdiction," with a provision that tribal laws would be applied in the enforcement of contracts between Indians and United States citizens. Section 34 of the Act contained an extensive grant of criminal jurisdiction to the federal courts. Section 33 put Arkansas criminal laws and laws of criminal procedure into effect, and two chapters of the federal statutes concerning traffic in intoxicating liquor. Section 35 put into effect a chapter of the United States Revised Statutes dealing with crimes committed in judicial proceedings in Indian Territory impeding the enforcement of laws in those courts, and Section 37 added the promotion of lotteries to the lengthy list of crimes subject to federal jurisdiction in Indian Territory. Section 31 of the Act (*amended* 29 Stat. 510 (1897)) extended the United States Constitution and all general criminal laws of the United States prohibiting crimes in places subject to exclusive federal jurisdiction over Indian Territory. That section also extended Arkansas laws of administration, probate, civil rights, descent and distribution, divorce, dower, participation and sale of lands, wills, and marriage. However, Congress was careful to protect the validity of marriages contracted under tribal laws and customs in Section 38 of the Act.

59. *Id.*, §§ 30, 31. Section 31 of the Act (*amended* 29 Stat. 510 (1897)) also protected tribal lands by prohibiting attachments against improvements on tribal lands, with a few exceptions, and by invalidating any judgments other than those of tribal courts ordering sales of improvements on tribal lands, with a few exceptions. The section further provided that any improvements of a non-Indian judgment debtor could be sold only to citizens of the tribe possible failure to ratify pending agreements, Mr. Curtis . . . addressed himself to the preparation of the bill the general design of which would be to transfer the property rights in these nations from tribal authority to that of the United States." *Id.*, Vol. 10, at 7 (1903): "Under these conditions Congress was in 1898 fairly confronted with the alternative of either abandoning its policy and abolishing the Commission, or else of converting the Commission from merely a negotiating body into also an executive and semi-judicial body, and of proceeding with the work under the constitutional power of Congress, and largely, at least, regardless of the will of the tribe."

60. 27 Stat. 612, 645 (1893). The Commission was directed by Congress in 29 Stat. 321, 339 (1896), to "respect all laws of the several Nations or tribes, not inconsistent with the

judicial authority in Indian Territory was enacted.⁶¹ Its more important provisions created an appellate court and prisons⁶² and extended Arkansas criminal laws over Indian Territory.⁶³ The 1895 act did not affect the exclusive tribal jurisdiction over tribal members,⁶⁴ but the Act of June 7, 1897, gave the United States courts exclusive jurisdiction to try all civil and criminal cases, and extended Arkansas and federal laws over everyone "irrespective of race."⁶⁵ The 1897 act also contained a provision requiring presidential approval of all acts, ordinances, or resolutions of each of the Five Tribes.⁶⁶ However, both of these provisions were superseded by the 1898 Seminole Agreement,⁶⁷ as a later analysis will show.

During the latter part of 1897 the Five Tribes Commission negotiated with the member tribes for allotment, but the Seminole Nation was the only tribe to ratify its agreement.⁶⁸ When it became apparent that the other tribes would not cooperate, Congress enacted the Act of June 28, 1898, known as the Curtis Act, in order to force them to consent to allotment.⁶⁹ This Act had the potential to weaken tribal government considerably. Besides providing for the compulsory allotment of tribal lands,⁷⁰ the Act

laws of the United States, and all treaties with either of said Nations or tribes," and to give due force and effect to the rolls, usages, and customs of each of said Nations or tribes.

61. 28 Stat. 693 (1895).

62. *Id.*, §§ 10, 11.

63. *Id.* § 4.

64. *Id.* Section 9 of the Act merely reaffirmed the jurisdiction already possessed by United States courts in Indian Territory, repealing those acts conferring criminal jurisdiction on federal courts located outside of Indian Territory.

65. 30 Stat. 62, 83 (1897), *repealed as to Seminoles*, 30 Stat. 567 (1898).

66. *Id.*

67. 30 Stat. 567 (1898).

68. 5 ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES 2 (1898) [hereinafter cited as ANNUAL REPORT].

69. *Id.* at 5: "In the meanwhile, in contemplation of the condition in which the Territory would be left by the possible failure to ratify pending agreements, Mr. Curtis . . . addressed himself to the preparation of the bill the general design of which would be to transfer the property rights in these nations from tribal authority to that of the United States." *Id.*, Vol. 10, at 7 (1903): "Under these conditions Congress was in 1898 fairly confronted with the alternative of either abandoning its policy and abolishing the Commission, or else of converting the Commission from merely a negotiating body into also an executive and semi-judicial body, and of proceeding with the work under the constitutional power of Congress, and largely, at least, regardless of the will of the tribe."

70. 30 Stat. 495, § 11 (1898). There were numerous provisions dealing with the disposition of property. Section 4 set up a scheme for payments for improvements made by persons failing to make the citizenship rolls. Section 14 allowed the taxation of personal property by city governments and provided for the establishment of free schools by city governments according to Arkansas laws. Section 15 created town commissions to lay out town sites and appraise town lots and their improvements; providing for the sale of improved lots, and the condemnation of improvements in federal courts, and allowed the sale of unimproved town lots of auction. Other sections provided for judicial involvement in

granted territorial towns the right to establish municipal governments under Arkansas laws;⁷¹ it made the civil laws of the tribes unenforceable in federal courts;⁷² it abolished tribal courts;⁷³ and it contained a provision prohibiting payments by the United States to tribal officers for disbursement to tribal members.⁷⁴ However, it provided an escape hatch for the Creek, Choctaw, and Chickasaw tribes: It incorporated the provisions of the tentative agreements made earlier with each of those tribes, providing that if the agreement was ratified by the tribe, the provisions of the agreement would replace any conflicting provisions in the Curtis Act.⁷⁵ No mention was made of the Seminole and Cherokee agreements because the Seminole Tribe had already ratified its agreement, and the Cherokee Tribe had refused to negotiate even a tentative agreement.⁷⁶

During the same period of time the Curtis Act was being debated, Congress was debating ratification of the Seminole Agreement.⁷⁷ Three days after passage of the Curtis Act, Congress

the disposition of land, Section 3 gave federal courts jurisdiction over cases against those claiming the right to hold lands by virtue of membership, and allowed tribal members to bring suits for removal of those in wrongful possession of lands when the chief refused to do so in behalf of the tribe. Section 11 provided for the ouster of illegal allottees. Sections 16 and 17 made excessive land holdings and demands by individuals for rents and royalties subject to criminal prosecution. Section 2 required federal courts to make the tribes party to any suits in any way affecting tribal lands.

71. *Id.*, § 14.

72. *Id.*, § 26.

73. *Id.*, § 28. This provision was to be effective as to the Cherokees July 1, 1898, and as to Creeks, Choctaws, and Chickasaws, Oct. 1, 1898.

74. *Id.*, § 19. Other provisions also weakened tribal control over land and funds. Section 13 gave the Secretary the authority to make all leases of mineral interests in Indian Territory, pursuant to rules and regulations created by him, and Section 23 invalidated all leases of agricultural or grazing land belonging to any tribe. Section 16 provided that all money from rented tribal lands and all mineral royalties were to be paid to the United States Treasury to the credit of the tribe under rules and regulations prescribed by the Secretary of Interior.

75. *Id.*, §§ 29, 31. The Creeks refused to ratify their agreement and the Curtis Act became effective as to that tribe. But the Creeks consented to a new agreement ratified by Congress in 31 Stat. 861 (1901). The agreement contained a provision protecting treaty rights but did not expressly repeal the Curtis Act. The agreement did contain a provision, however, to the effect that Creek courts were not revived by the agreement, indicating that the treaty protection provision may have impliedly repealed some provisions of the Curtis Act. The Choctaws and Chickasaws chose to ratify their tentative agreement on Aug. 24, 1898, 5 ANNUAL REPORT, *supra* note 68. Thus, it was incorporated into the Curtis Act and superseded inconsistent provisions of that Act, as provided by Section 29.

76. The Cherokees later made an agreement ratified in 31 Stat. 848 (1901). The agreement provided that Section 13 of the Curtis Act would not apply to Cherokee lands, and that "no Act of Congress or treaty provisions inconsistent with this agreement shall be in force in said nations" except Sections 14, 27, and 28 of the Curtis Act, which authorized the incorporation of towns, the location of an Indian inspector in Indian Territory, and abolished tribal courts.

77. 30 Stat. 567 (1898).

ratified the agreement without amendment.⁷⁸ Although it provided for the allotment of Seminole lands and per capita distribution of funds, it had a minor impact on tribal sovereignty compared to the Curtis Act. The only express diminution of governmental powers was a grant of exclusive federal jurisdiction over all controversies growing out of the title, ownership, occupation, or use of real estate owned by the Seminoles, and over the crimes of homicide, embezzlement, bribery, and embracery committed in the Seminole country, without reference to race or citizenship of the persons charged.⁷⁹ Other provisions expressly recognized tribal powers by requiring approval by the principal chief of all surface leases of allotments; giving tribal government the sole authority to lease mineral rights with the allottee's consent and the right to half of the mineral royalties; preserving the jurisdiction of tribal courts; and by repealing the provisions of the Act of June 7, 1897, which in any manner affected the proceedings of the General Council.⁸⁰

Besides these specific provisions concerning tribal government, the Agreement contained two broad protections of the Seminole right to self-government. It provided: "This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States except in so far as it is inconsistent therewith."⁸¹ The Agreement also repealed "all laws and parts of laws" inconsistent with its provisions.⁸² Considering these provisions in *pari materia* with those of the Curtis Act, it is obvious

78. The Curtis Act was introduced on Feb. 24, 1898 and passed on June 28, 1898. The Seminole Agreement was introduced on Feb. 7, 1898, and passed on July 1, 1898. See 31 CONG. REC. 2154, 2346, 3867, 3941, 5086, 5551, 5556, 5582, 5590, 5593, 5766, 6172, 6191, 6357, 6400, 6806 (1898) and the accompanying H.R. REP. No. 593 for the legislative history of the Curtis Act. See 31 CSO CONG. REC. 1494, 1535, 1589, 5506, 5575, 5581, 5766, 5646, 5766, 6235, 6271, CSC 6457, 6400, 6568 (1898) and the accompanying H.R. REP. No. 79 30 Stat. 567 (1898).

80. *Id.* It should be noted here that Congress provided in 35 Stat. 312, Sec. 11 (1908), that the interest of the nation in royalties from allotted lands, which was granted by the Seminole Agreement, would cease on June 30, 1908.

81. 30 Stat. 567 (1898). The following discussion took place in the House concerning the provision protecting existing treaty provisions:

"Mr. CANNON: I want to ask my friend a little further. On page 6, what is the effect of the following words on the top of the page: 'This agreement shall in no wise affect the provision of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith'?

"Mr. CURTIS of Kansas: Their general council has certain rights under the old treaties. It may enact certain laws which are to be enforced by the Indian court, and it has a right to provide for the running of their government, etc.

"Mr. CANNON. All of that is to disappear when you dissolve the tribal relations?

Mr. CURTIS of Kansas: Yes; but until that time they are to have the right of passing laws, and their courts are to have limited jurisdiction." 31 CONG. REC. 5575 (1898).

82. 30 Stat. 567 (1898).

that the Curtis Act was not intended to apply to the Seminole Nation, at least insofar as it conflicted with the Seminole Agreement.⁸³

Two years after ratification of the Seminole Agreement, on June 2, 1900, Congress ratified the Supplemental Seminole Agreement.⁸⁴ This agreement defined the final Seminole citizenship rolls, and provided that the property of Seminole citizens dying after the year 1899 would descend to heirs "who are Seminole citizens" according to the laws of Arkansas, with a minor exception.

After ratification of the Seminole Agreements, Congress continued to enact various statutes that were laying the foundation for statehood. The Act of March 3, 1903,⁸⁵ was one of the more significant acts passed during this time. It provided that the Seminole government would end March 4, 1906, but was later impliedly repealed by a joint resolution of Congress⁸⁶ and by the Five Tribes Act of 1906.⁸⁷ Another significant act was the Act of April 28, 1904, which gave federal courts "full and complete" jurisdiction over the settlement of estates and the guardianship of minors and incompetents, "whether Indians, freedmen, or otherwise."⁸⁸ That act also extended "all the laws of Arkansas heretofore put in force" in Indian Territory "so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise."⁸⁹

The last statute dealing with tribal government enacted prior to the enactment of the Oklahoma Enabling Act was the Five Tribes Act of 1906.⁹⁰ In general the Act provided for completion of the

83. According to a Five Tribes Commission report: "The one [agreement] with the Seminoles has since been ratified and is now the law which will hereafter control in that nation both its government and property holdings." The report was submitted to Congress after passage of the Curtis Act and ratification of the Seminole Agreement, and contained a copy of the Curtis Act and a discussion of the unratified agreements of the other tribes. 5 ANNUAL REPORT, *supra* note 68, at 4. According to *Seminole Nation v. United States*, 28 Ind. Cl. Com. 117, 126-27 (1972): "The Curtis Act, in its application concerned the allotment of tribal lands of those of the Five Civilized Tribes which had not come to agreement with the United States. The Seminoles had reached their agreement and the allotments were as provided by the specific terms of that agreement . . ."

84. 31 Stat. 250 (1890). Like the original agreement, the supplemental agreement required ratification by both Congress and the Seminole Council.

85. 32 Stat. 982 (1903), *repealed* 34 Stat. 822 (1906) and 34 Stat. 137 (1906).

86. 34 Stat. 822 (1906). The resolution continued the tribal governments of the Five Tribes "in full force and effect for all purposes under existing laws" until all property of the tribes was distributed "unless hereafter otherwise provided by law." This provision was later amended, 34 Stat. 137, § 28 (1906).

87. 34 Stat. 137 (1906). Section 28 continued tribal existence and government indefinitely, "until otherwise provided by law."

88. 33 Stat. 573, § 2 (1904).

89. *Id.*

90. 34 Stat. 137 (1906).

final rolls of citizenship;⁹¹ it contained a number of provisions relating to the final disposition of tribal lands;⁹² it authorized the Secretary of Interior to run the tribal schools;⁹³ and expanded federal control over lands held by allottees.⁹⁴ The Act also extended the powers of municipalities to include the authority to improve roads and to tax individual landowners within town borders.⁹⁵ It further authorized light and power companies to construct and maintain canals, reservoirs, auxiliary steam works, and dams across nonnavigable streams and to condemn the necessary lands, subjecting these rights to future state control.⁹⁶

This lengthy Act also contained two important provisions more directly related to tribal government. In order to ensure that the conveyance of allotments would not be interrupted by the refusal of any principal chief to sign deeds, Section 6 empowered the President to fill the office of principal chief in three limited circumstances: the removal, disability, or death of the incumbent. This section was misinterpreted for years by federal officials as prohibiting tribal elections of tribal officers, notwithstanding a second section directly related to tribal government, Section 28, which expressly continued the tribal existence and governments of the Five Tribes. The only express limitations placed on the government by Section 28 was the requirement that all council legislation and contracts affecting tribal property be approved by the President of the United States and a provision limiting the length of council sessions to 30 days out of every year.

Other provisions of the 1906 Five Tribes Act governed the tribe's power to control its financial affairs. Section 11 authorized the Secretary of Interior to collect all tribal revenues and pay all lawful claims against the tribe, abolished all taxes accruing under tribal law, and directed tribal officers to make a full accounting of all tribal records and documents in their possession and to deliver all other tribal properties to him. Other sections affecting tribal financial affairs included Section 17, which provided for the per

91. *Id.*, § 1.

92. *Id.*, §§ 1, 2 (*amended* 34 Stat. 342 (1906)), 4, 5, 14, 15 (*amended* 34 Stat. 342 (1906)), 16, 27.

93. *Id.*, § 10.

94. *Id.* Section 20 authorized the Secretary of Interior to approve leases of privately owned lands, other than homesteads, of fullblood allottees. Section 19 restricted the allotted lands of fullbloods from sale for a period of twenty-five years, but allowed the sale of inherited lands. Section 23 prohibited the disinheritance of the parent, spouse, or children of fullbloods without court approval. Section 21 provided that if a person died intestate without heirs, his allotments would revert to the tribe if death occurred prior to final distribution, and to the state if death occurred afterward.

95. *Id.*, § 26.

96. *Id.*, § 25.

capita distribution of proceeds from the sale of any unallotted lands, and Section 24, which authorized the expenditure of tribal funds for damage to private lands caused by the establishment of public highways, as well as for the actual cost of building the highways. An analysis below will indicate that these last three sections assumed a prior dissolution of tribal government and are thus inoperative.

The passage of the Five Tribes Act cleared the way to statehood and on June 16, 1906, Congress enacted a statute enabling the people of Oklahoma and Indian Territories to create the state of Oklahoma.⁹⁷ The Enabling Act put the laws of Oklahoma Territory in force, "as far as applicable . . . until changed by the legislature thereof,"⁹⁸ and provided that the state courts would be the successor of all courts of original jurisdiction of the two territories.⁹⁹ The Act protected the rights of Indians and the involvement of the federal government in Indian affairs as follows:

That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights 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.¹⁰⁰

The Act also contained a provision in which the state disclaimed any rights to unappropriated public lands owned or held by any Indian or tribe, and provided for federal jurisdiction over those lands until the title should be extinguished by the United States.¹⁰¹

As required by the Enabling Act, the state constitution provides:

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

97. 34 Stat. 267 (1906).

98. *Id.*, § 13.

99. *Id.*, § 19.

100. *Id.*, § 1.

101. *Id.*, § 3.

States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.¹⁰²

*Post-Statehood Federal Legislative and Administrative
Interference With Tribal Government*

The massive federal legislation necessary to accomplish allotment resulted in considerable confusion among both tribal and federal officials soon after statehood. In 1907 the Seminole Council passed an act continuing in office all the old officers, but its authority to do so was disputed by many Seminole citizens.¹⁰³ They took the view that because the Five Tribes Act continued the tribal government, they were still entitled to elect officers to carry out tribal law. These citizens requested an opinion from the Secretary of Interior, and a few weeks later the Commissioner of Indian Affairs recommended to the Secretary that an election be called for the purpose of electing tribal officers in accordance with Seminole laws.¹⁰⁴ The Commissioner relied on an office letter which expressed the opinion that the 1906 Five Tribes Act did not merely continue the incumbents in office, but continued the actual form of Seminole government.¹⁰⁵ The Acting Secretary refused to follow the Commissioner's recommendation, stating:

*Without entering into any discussion as to the possible construction of Section 28 of the Act of April 26, 1906; it is believed that Congress thereby intended that the existing status of the Five Civilized Tribes, so far as their officials were concerned was not to be disturbed during the short remaining period of tribal existence. [Emphasis added.]*¹⁰⁶

Consistent with the Department's view, John Brown, who was the elected principal chief when the Five Tribes Act was enacted, continued in that capacity until his death in 1919.¹⁰⁷ In the follow-

102. OKLA. CONST., art. I, § 3.

103. Letter from George Jones to F.E. Leupp, Commissioner of Indian Affairs (July 26, 1907) (National Archives, Natural Resources Division [hereinafter cited N.A., N.R.D.]).

104. Letter from F.E. Leupp, Commissioner of Indian Affairs, to the Secretary of Interior (Aug. 26, 1907) (N.A., N.R.D.).

105. *Id.* The office letter was dated July 24, 1907, and approved by the Department on July 25, 1907, but was later recalled by the Department.

106. Letter from G.W. Woodruss, Acting Secretary of Interior, to F.E. Leupp, Commissioner of Indian Affairs (Sept. 5, 1907) (N.A., N.R.D.).

107. John Brown was elected by the Council in 1905 after the death of Principal Chief Hulputta Micco. Letter from Frank L. Campbell, Assistant Attorney General to Secretary of Interior (July 22, 1905) (N.A., N.R.D.).

ing years the Department continued to refuse to recognize tribal elections, interpreting Section 6 of the Five Tribes Act as placing the exclusive authority to select a chief in the President of the United States.¹⁰⁸ Because the Five Tribes Act required the chief's signature on deeds to tribal lands,¹⁰⁹ the Department secured the presidential appointment of a chief for short periods of time on several occasions, in spite of protests by Seminole citizens.¹¹⁰ These appointments, however, did not always accomplish the results desired by the BIA. When Alice B. Davis was appointed chief in 1923 for the purpose of signing deeds, she refused to sign the deeds, viewing the land sales as an injustice to her tribe.¹¹¹ Likewise, when George Jones was appointed chief in 1925, he followed the recommendation of the General Council, which continued to function without Bureau recognition, that he sign all but the deed to the Emohocka Mission lands.¹¹² Because he couldn't acquire the signature of an appointed chief for the Emohocka deed, the Secretary of Interior finally signed it himself, pursuant to a provision in the 1906 Five Tribes Act.¹¹³

During this period of time Seminole citizens continued to seek a voice in the management of their affairs, but federal officials continued to block their efforts. In 1927 a Seminole Council, identical in form to the council described in the 1903 Revised Statutes, was organized. Harry Hully Tiger, the Council chairman, requested federal recognition of the Council as the official Seminole representative, and inquired whether tribal elections could be held.¹¹⁴ The Commissioner of Indian Affairs denied Tiger's

108. Letter from Jos. M. Dixon, Acting Secretary of Interior to Frank J. Boudinot (June 29, 1929) (N.A., N.R.D.). Letter from C.J. Rhoades, Commissioner of Indian Affairs to Chili Fish (Sept. 28, 1929) (N.A., N.R.D.), where the Commissioner summarized Section 6 and stated: "The above act does not provide for an election of the principal chief of said nation."

109. 304 Stat. 137 (1906), § 6. See also 30 Stat. 567 (1898).

110. Letter from Thomas McGeisey and Chili Fish to Charles H. Burke, Commissioner of Indian Affairs (June 21, 1923) (N.A., N.R.D.); Letter from Charles H. Burke, Commissioner of Indian Affairs, to John Wesley (Nov. 9, 1923) (N.A., N.R.D.); Letter from Chili Fish to the Superintendent of the Five Tribes Agency (May 4, 1931) (N.A., N.R.D.); Letter from C.J. Rhoades, Commissioner of Indian Affairs, to John Burgess (July 26, 1932) (N.A., N.R.D.) [hereinafter cited as McGeisey, Burke, Fish, and Rhoades letters].

111. Letter from Alice B. Davis to Acting Superintendent (June 26, 1923) (N.A., N.R.D.).

112. Letter from Acting Superintendent to Charles H. Burke, Commissioner of Indian Affairs (Jan. 18, 1926) (N.A., N.R.D.).

113. Letter from E.B. Meritt, Commissioner of Indian Affairs to Nina and Nellie Tanyan and Isaac Jones (Mar. 16, 1928) (N.A., N.R.D.).

114. Letter from Harry Hully Tiger to the Secretary of Interior (July 21, 1927) (N.A., N.R.D.).

request.¹¹⁵ Similarly, the Secretary of Interior refused to recognize the Council's authority in 1929, when he declined to approve an attorney's contract made with the Council.¹¹⁶ That same year, the Commissioner refused to acknowledge the need for a chief, because "there are now no tribal deeds or any other unfinished business requiring action by a Principal Chief at this time."¹¹⁷

The struggle between the federal administrators and tribal members continued into the 1930's. In 1931 the Commissioner of Indian Affairs refused to pay the train fare and other expenses for a delegation of Seminoles to go to Washington to examine certain records, stating: "It is not stated in your letter what object the Seminoles have in mind in desiring a delegation to examine the records and papers referred to in your letter, nor does it appear what good purpose would be served or what benefit the tribe would be derived there from."¹¹⁸ The Commissioner cited Section 19 of the Act of May 18, 1916, which prohibits the expenditure of tribal funds without specific appropriations by Congress, except for certain purposes,¹¹⁹ as authority for his decision not to release funds to the tribe. This interpretation of the 1916 Act was ironic, because the cited provision was actually intended by Congress to protect the Five Tribes from Bureau mismanagement of tribal funds.¹²⁰

Early in 1931, Chili Fish was appointed chief by the President of the United States, for the purpose of signing the deed to the Mekasukey lands, the last 320 acres owned by the tribe.¹²¹ He declined the appointment, stating: "Consistent with the attitude of the members of the Seminole group in connection with the arbitrary closing of the Mekasukey Academy, the property of the Seminole people, we look askance upon the policies of the Department with reference to matters pertaining to our properties and interests."¹²² Probably the Secretary would have sold the land

115. Letter from Charles H. Burke, Commissioner of Indian Affairs to Harry Tiger (July 26, 1927) (N.A., N.R.D.).

116. Letter from Jos. M. Dixon, Acting Secretary of Interior to Frank J. Boudinot (June 29, 1929) (N.A., N.R.D.).

117. Letter from C.J. Rhoades, Commissioner of Indian Affairs, to Chili Fish (Sept. 28, 1929) (N.A., N.R.D.).

118. Letter from C.J. Rhoades, Commissioner of Indian Affairs, to W.E. Tiger (Apr. 10, 1931) (N.A., N.R.D.).

119. 39 Stat. 123, 148 (1916). This provision was made permanent by 42 Stat. 552, 575 (1922), 25 U.S.C. § 124 (1970).

120. According to *Harjo v. Kleppe*, 420 F.Supp. 1110, 1134 (D.D.C. 1976), this legislation was the result of the obvious abuse by the Secretary of his control over tribal disbursements.

121. Letter from Chili Fish to A.M. Landman, Superintendent of the Five Tribes Agency (May 4, 1931) (N.A., N.R.D.).

122. *Id.*

without the signature of a chief, as he did in the case of the Emohocka lands, if Congress had not intervened by the Act of April 27, 1932.¹²³

That Act required the approval of the Seminole General Council "selected in pursuance of Seminole customs" for all sales, leases, encumbrances, or other dispositions of tribal lands. In spite of this obvious congressional recognition of the Council's general authority over tribal affairs, the Commissioner stated in a letter shortly after the passage of the Act that the need for a Seminole Council would arise only when the disposition of tribal property was involved, and cited the 1932 act as authority.¹²⁴ He also refused at that time to recognize elections for chief which had been held by two factions of the tribe, for the usual reason that "there is therefore no existing authority of law for the election of Principal Chief by the Seminole Indians."¹²⁵

Two years later the Act of June 18, 1934, known as the Indian Reorganization Act (I.R.A.), was enacted, reflecting a new congressional policy which was more favorable to tribal self-government.¹²⁶ Due to pressures from Oklahoma congressmen, the I.R.A. expressly made most of its important sections, including those providing a method of organizing tribal government, inapplicable to Oklahoma tribes.¹²⁷ However, this situation was remedied in 1936 when Congress passed the Oklahoma Indian Welfare Act (O.I.W.A.), which was designed to meet the special needs of Oklahoma Indians.¹²⁸ The O.I.W.A. authorized the Secretary to acquire lands for individuals and tribes to be held in trust, free of all taxes, except a state gross production tax on oil and gas;¹²⁹ gave the Secretary a preference in the purchase of the lands of the restricted Indians;¹³⁰ provided a method or organization of tribal government pursuant to rules and regulations created by the Secretary of Interior;¹³¹ allowed the creation of cooperative associations by Indian groups;¹³² provided that Oklahoma laws would govern matters concerning the cooperative associations not covered by the act, regulations, or charter;¹³³

123. 47 Stat. 140 (1932).

124. Letter from C.J. Rhoades, Commissioner of Indian Affairs, to John Burgess (July 26, 1932) (N.A., N.R.D.).

125. *Id.*

126. 25 U.S.C. §§ 461 *et seq.* (1970).

127. 25 U.S.C. § 473 (1970).

128. 25 U.S.C. § 501 (1970).

129. *Id.*

130. 25 U.S.C. § 502 (1970).

131. 25 U.S.C. § 503 (1970).

132. 25 U.S.C. § 504 (1970).

133. *Id.*

authorized the Secretary to remove suits involving the cooperative associations to federal court;¹³⁴ authorized loans to individuals or corporate groups;¹³⁵ made I.R.A. funds available to Oklahoma tribes;¹³⁶ and authorized the Secretary of Interior to make the necessary rules and regulations.¹³⁷

The Seminoles more or less ignored both the Secretary's refusal to acknowledge their governmental authority and the O.I.W.A. provisions for incorporation of tribal governments. Sometime around 1934 Seminole citizens drafted a brief organizational document for the tribe.¹³⁸ The Council continued to meet throughout the 1930's, discussing topics such as a waterwell easement, the reimbursement of the expenses of a geological survey, the appointment of a committee to help indigent members, insurance for the Mekasukey Mission buildings, a resolution against use of intoxicants, a protest against the location of an agency at Wewoka, the retainer of an attorney, construction of a tribal building, and the creation of a tribal newspaper.¹³⁹ The superintendent of the Five Tribes Agency viewed these meetings with a paternalistic attitude, stating:

The Seminole Indians are interested in organization as a tribe; however, there are a number of hurdles to jump before any effective action may be taken. The principal question is that of the share of the Seminole freedmen in any tribal assets or tribal organization. The matter of organization should not be pressed at this time, but should await a clarification of the legal aspect of a Seminole organization under the Thomas-Rogers Act.¹⁴⁰

Regardless of the hesitancy of the Bureau to "press" organization of the tribe, the Seminoles continued their Council meetings in the 1940's.¹⁴¹ On November 22, 1944, the Council met with the

134. 25 U.S.C. § 505 (1970).

135. 25 U.S.C. § 506 (1970).

136. 25 U.S.C. § 507 (1970).

137. 25 U.S.C. § 509 (1970).

138. Constitution and By-Laws of the Executive Committee of the Seminole Nation, dated June 12, 1934 (private files of William Wantland, former Attorney General for the Seminole Nation, Seminole, Okla. [hereinafter cited as Wantland Files]).

139. Minutes of Seminole Council meetings dated Oct. 5, Nov. 2, Nov. 18, and Nov. 30, 1938 (forwarded to Department of Interior on Dec. 21, 1938) (N.A., N.R.D.); Minutes of Seminole Council meetings of Mar. 1 and June 19, 1939 (forwarded to Department of Interior, July 1, 1939) (N.A., N.R.D.); Letter from Eugene Wheeler, Assistant Superintendent to Commissioner of Indian Affairs, enclosing minutes of Seminole Council meeting dated July 5, 1939 (July 18, 1939), (N.A., N.R.D.).

140. Letter from A.M. Landlam, Superintendent, to Commissioner of Indian Affairs (Dec. 21, 1938) (N.A., N.R.D.).

141. Minutes of Seminole Council meetings dated Oct. 27 and Nov. 29, 1944 (forwarded

House Committee on Indian Affairs in Muskogee and requested that a clinic and council house be constructed on Mekasuke land, that appropriations be made to finance local government, that prohibition be continued for the tribe and enforced by tribal officers, that restrictions be continued, that the school system be approved, and that a special commission be created to hear claims by the tribe against the government.¹⁴² According to a Council resolution passed a few days after the meeting, these same suggestions had been made five years before, obviously without results.¹⁴³ The Council also passed a resolution in 1944 requesting the President to appoint Waddie Gibbs chief.¹⁴⁴ Apparently, by this time the Department had shifted to a policy of issuing certificates of appointment to the elected chiefs.

In 1952 the federal-tribal relationship showed some signs of improvement when Congress enacted the Act of July 3, 1952.¹⁴⁵ This act provided that the Five Tribes could make contracts involving tribal money or property with the approval of the Secretary of Interior pursuant to such rules and regulations as he might prescribe. That same year a small budget was authorized by the BIA for the operation of Seminole government in 1953.¹⁴⁶ However, these actions favoring Seminole self-government were the exception rather than the rule in the 1950's. Although the Seminole Nation escaped the termination legislation of that period, its struggle with federal administrators continued.

As usual, this struggle involved the refusal of the BIA to recognize the elected chief and Council as the valid representatives of the tribe. This time, rather than denying the authority of the tribe to organize, federal officials questioned the validity of the selection of the chief and Council in terms of tribal law. Marcy Cully, the elected chief, was given a certificate of appointment by the Secretary on November 20, 1952,¹⁴⁷ but in 1953 the Council ex-

to Department of Interior on May 2, 1945) (N.A., N.R.D.); Resolution of the Seminole General Council (June 22, 1948) (N.A., N.R.D.); Minutes of Seminole Council meetings (Aug. 21, 1945, Feb. 19, 1946, Apr. 23, 1946, May 7, 1946, June 18, 1946, July 16, 1946, Oct. 15, 1946, Dec. 10, 1946, Jan. 21, 1947, Apr. 15, 1947, June 22, 1948, July 5, 1948, Apr. 19, 1949, July 19, 1949, Aug. 26, 1949, Oct. 18, 1949) (private files of Charles Grounds, attorney, Seminole, Okla. [hereinafter cited as Grounds Files]).

142. Resolution of the Seminole General Council (Nov. 29, 1944) (Grounds Files).

143. *Id.*

144. Resolution of the Seminole General Council (1944) (Grounds Files).

145. 66 Stat. 323 (1952). This act amended 34 Stat. 137, § 28 (1906) which required *presidential* approval of contracts by the tribes involving the expenditure of money.

146. Bureau of Indian Affairs Operating Statement, Muskogee Area, Five Civilized Tribes Agency, Seminole Tribal Budget, 1953 Program (Grounds Files).

147. Letter from Paul Fickinger, Area Director, to Charles Grounds (Dec. 21, 1954) (Grounds Files).

pressed concern that the Bureau was not paying Cully his salary and complained that this was retarding the exercise of tribal government.¹⁴⁸ At some point during Cully's tenure a petition signed by 300 people protesting Cully's appointment was presented to the Secretary of Interior, and he revoked Cully's certificate of appointment.¹⁴⁹ In spite of the revocation and the apparent factionalism within the tribe, Cully served out his term, which ended in 1956.¹⁵⁰ One Seminole citizen, an attorney, evaluated the situation as follows: "Under tribal laws, Marcy Cully must remain our Chief until he resigns or is removed from office by impeachment proceedings Under these tribal laws, the Seminoles have an election every four years" ¹⁵¹

During this same period of time, the Council of the Five Civilized Tribes adopted a resolution advocating the continuance of the offices of the Five Tribes in response to rumors that the BIA was maneuvering to eliminate the chieftainships.¹⁵² To some extent this rumor proved to be true, because Cully was the last Seminole chief appointed by the Department of Interior.¹⁵³ After the revocation of Cully's appointment, the Bureau refused to recognize the validity of any of Cully's actions, even those actions which he took prior to the revocation of the certificate. Thus, in 1954 the area director refused to approve an attorney's contract approved by Cully, and took the position that delegates appointed by Cully could not participate in an upcoming meeting of the Inter-Tribal Council of the Five Civilized Tribes.¹⁵⁴

There is some evidence that the Bureau's failure to recognize the authority of a chief during this time arose from a genuine confusion as to who had the official recognition of the tribe. In late 1954 the acting area director of the Muskogee office met with groups for the purpose of determining who should be appointed, but without success.¹⁵⁵ There was also concern by the Bureau as to the

148. Minutes of the Seminole Executive Board meeting (May 9, 1953) (Grounds Files).

149. Letter from Charles Grounds to Arthur Jones (Mar. 25, 1955) (Grounds Files).

150. Resolution of the General Council (May 22, 1954) (Grounds Files), requesting the Secretary to extend the certificate to July, 1956, when Cully's term was to expire under tribal law; Letter from Charles Grounds to Arthur Jones (Mar. 25, 1955), saying that in spite of the revocation of the certificate, Cully should remain chief under tribal law (Grounds Files).

151. Letter from Charles Grounds to Arthur Jones (Mar. 25, 1955) (Grounds Files).

152. Muskogee Daily Phoenix, July 15, 1954, at p. 1. col. 1.

153. H. REP. No. 766, 72d Cong., 1st Sess. 6 (1932) [hereinafter cited as H. REP.].

154. Letter from Paul Fickinger, Area Director, to Charles Grounds (Dec. 21, 1954) (Grounds Files); Letter from Paul Fickinger, Area Director, to Charles Grounds (Dec. 22, 1954) (Grounds Files).

155. Letter from F.M. Haverland, Acting Area Director to Jeffie Brown, George Gibbs, Phillip Walker, and Henry Jones (Nov. 17, 1954) (Grounds Files).

identities of the Council members of the tribe. The area director sent out lists of those people whom he thought were the various band leaders to various tribal members, asking if the lists were accurate.¹⁵⁶ In 1955 the area director felt he had secured sufficient certification from the various bands, and apparently met with the Council on several occasions.¹⁵⁷

However, at least some Seminole citizens viewed the director's activities as a means of acquiring control over the tribal government, rather than what he considered a good faith attempt to respect the wishes of the people. In 1958 a group of tribal members formed a committee for reorganization and discussed the problems they had been having. They evaluated the situation as follows:

Copies of letters and memorandum from the Indian office show that what little authority that is left to the tribe is vested first in the Chief with the Council in a strong advisory capacity. This is the stated position taken by the Department over many years, yet for some strange reason, the Government will not permit the Seminoles to have a Chief. The Government violated its own directives by trying to deal through the appointed Chairman.¹⁵⁸

The minutes of the meeting further state:

That the so-called Council does not have true representation by election of the Tribal Bands as is required under the Tribal laws; that incumbent members have been appointed and approved by the Indian Office and that certain individual members of the Council have appointed themselves to the Council, which is strictly forbidden by our Tribal law; that funds have been disbursed by a Chairman who has no authority whatsoever to authorize disbursements; that the Indian Office under the present set up through its collusion with the ignorant incompetent group is fraudulently and wrongfully spending monies of the Seminole Tribe and that some action must be taken immediately to prevent an irreparable injury to the Tribe.¹⁵⁹

156. *Id.*

157. Letter from Paul Fickinger, Area Director, to Thomas Coker (Mar. 25, 1955) (Grounds Files).

158. Minutes of the meeting of a committee for reorganization (May 24, 1958) (Grounds Files).

159. *Id.*

Although it is unclear whether any new Council elections were held after the 1958 meeting, the Council continued to meet and discuss tribal matters, and at least one mass meeting occurred in 1961.¹⁶⁰ Finally on March 28, 1964, the Council created a constitutional committee comprised of one representative from each of the fourteen bands.¹⁶¹ The Committee worked on the constitution with the assistance of the BIA for several years, but the Council consistently found the draft objectionable and refused to submit it to the people for a referendum.¹⁶² In 1968 a petition containing approximately 600 signatures was submitted to the Council requesting a referendum.¹⁶³ At this point the Bureau brought some pressure to bear on the Council, and on March 8, 1969, the constitution was submitted to the voters¹⁶⁴ and was approved by a vote of 637 for and 249 against.¹⁶⁵

Although the drafters of the 1969 "Constitution of the Seminole Nation of Oklahoma" reviewed the 1903 Revised Statutes and other organizational documents drafted in later years,¹⁶⁶ the new constitution contains some basic changes which reflect to some extent the confusion concerning the allotment legislation and the years of administrative subjugation which the tribe has endured. First, the new constitution contains no delegation of judicial power over tribal members to the tribal government. Second, it eliminates the tribal town concept by providing that Council representatives are to be selected from the fourteen clans, rather than tribal towns.¹⁶⁷ It does not provide for town chiefs nor the special powers which they had under the old laws. Third, the constitution subjects the authority of the Council to the laws and constitution of the state.¹⁶⁸ Fourth, it expressly recognizes the superior authority of the United States where the selection of the principal chief is involved.¹⁶⁹ Finally, the 1969 constitution expressly recognizes the authority of the Bureau in some areas. Although

160. Meeting of Seminole Indian Committee (Sept. 23, 1961) (Grounds Files).

161. Resolution of the General Council of the Seminole Nation (Mar. 28, 1964).

162. Interview with William C. Wantland, former Attorney General of the Seminole Nation, phone conversation in Oklahoma City (Dec. 1977) [hereinafter cited as Wantland Interview].

163. Petition to the Hon. Secretary of the Interior, Commissioner of Indian Affairs, and General Council of the Seminole Nation (undated).

164. Constitution of the Seminole Nation of Oklahoma (adopted Mar. 8, 1969).

165. *Id.*

166. Wantland Interview, *supra* note 162.

167. Constitution of the Seminole Nation of Oklahoma, art. IV, § 1.

168. *Id.*, art. V.

169. *Id.*, art. III, § 3.

the constitution was not adopted pursuant to the O.I.W.A., the tribe secured ratification by the Commissioner of Indian Affairs.¹⁷⁰ The constitution also acknowledges the importance of the Commissioner by requiring the chief to call a special Council meeting upon his request, providing for a waiver of notice by the Commissioner in an emergency.¹⁷¹

In addition to the reorganization of the tribe, the late 1960's and early 1970's also brought the passage of three pieces of federal legislation favorable to Seminole government. The Act of October 17, 1968, made school and judgment funds totaling more than \$200,000 available to the tribe to be expended or invested for any purpose authorized by the General Council or other recognized governing body with the approval of the Secretary of Interior.¹⁷² The tribe used some of these funds for assistance to Seminole students, a housing program, tribal council expenses, and a new tribal building.¹⁷³ In the second statute enacted during this period, the Act of May 7, 1970, Congress provided that the restricted lands, and rents and profits therefrom, owned by a Five Tribes member dying intestate without heirs, would escheat to his tribe.¹⁷⁴ That same year Congress reaffirmed the power of the Seminole people to select their leaders by passing the Act of October 22, 1970, which provided for the popular selection of principal chiefs of the Five Tribes.¹⁷⁵

In summary, this brief overview of the relations between federal officials and the Seminole people shows that the former has generally had the upper hand in tribal affairs for approximately the last seventy years. However, the following legal analysis will show that the Bureau's control has often been unsupported by federal law, and as one court recently termed it, has amounted to "bureaucratic imperialism."¹⁷⁶ In spite of this misuse of power, the Seminole people have demonstrated throughout the years that they have never relinquished the principle that they are a governmental entity capable of dealing with their own affairs.

170. *Id.*, art. XIV.

171. *Id.*, art. VI, § 1.

172. 82 Stat. 1148 (1968).

173. S. REP. No. 1594, *supra* note 3.

174. 25 U.S.C. § 375d (1970).

175. 84 Stat. 1091 (1970).

176. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.C. Cir. 1976).

IV. *The Meaning of Tribal Termination: A Comparison of Five Tribes Legislation With The Termination Legislation of the 1950's*

The word "termination" is generally used to describe the cessation of the special federal-Indian relationship. During the 1950's Congress enacted legislation which affected this change in status for more than a dozen tribes, most notably, the Menominee and Klamath tribes.¹⁷⁷ This type of legislation has been described as follows:

The thrust was to eliminate the reservations and to turn Indian Affairs over to the states. Indians would become subject to state control without any federal support or restrictions. Indian land would no longer be held in trust and would be fully taxable and alienable, just like non-Indian land in the states. Special federal health, education, and general assistance programs for Indians would end.¹⁷⁸

A less well-known use of the word "termination" is its special application to the Five Tribes. Years before Congress began its termination policy, Felix Cohen, one of the most noted and authoritative scholars of Indian law, used the word to describe the effect of federal legislation on the *governments* of the Five Tribes. In his famous *Handbook of Federal Indian Law*, Cohen described various provisions of the Five Tribes allotment legislation which he viewed as effecting the destruction of tribal government, and labeled it "termination."¹⁷⁹ Cohen's description of the termination of the governments of the Five Tribes further implied that all tribal property interests and all tribal affairs were eventually disposed of, that the tribal governments ceased to function, and that tribal members became ordinary citizens. As the legislation of the 1950's produced similar results, and was also labeled "termination" legislation, it is generally believed and concluded by legal scholars who have read Cohen's book, but who are unfamiliar with Oklahoma tribes, that the Five Tribes have the same legal status as the Klamaths and the other tribes terminated pursuant to the termination acts of the 1950's. This assumption is erroneous. As will be discussed later, Cohen's conclusion concerning termination of tribal government was inaccurate. Furthermore, there are several

177. 25 U.S.C. § 564-564X (1970) (Klamath Tribe); 25 U.S.C. §§ 891-902 (1970), *repealed by* Menominee Restoration Act, 25 U.S.C. §§ 903-903f (Supp. 1975) (Menominee Tribe).

178. Wilkinson & Biggs, *supra* note 1, at 140.

179. FEDERAL INDIAN LAW, *supra* note 11, at 429, 430.

fundamental differences in the legislation affecting the Five Tribes and the termination legislation of the 1950's. Although the policies behind the two types of legislation were similar, and the *practical* result of impairing the exercise of tribal self-government was the same, the substantive legal effect of the legislation varies significantly. A recent study of the termination legislation of the 1950's distills into several basic elements,¹⁸⁰ an approach that will be utilized here.

Land Ownership Patterns

The 1950's termination legislation effected a fundamental change in land ownership patterns because most of the lands of the terminated tribes were sold.¹⁸¹ The Five Tribes allotment legislation had a similar impact on the land ownership patterns of the Seminole Nation. By treaty the tribe owned its land in fee,¹⁸² and individuals had certain occupancy rights according to tribal law.¹⁸³ The Seminole Agreement of 1898 provided for the allotment of lands to individual Seminoles, and the conveyance of all right and title in the land to the allottees when the tribal government ceased to exist.¹⁸⁴ The Five Tribes Act of 1906 provided that patents could be issued to Seminole citizens prior to the dissolution of tribal government.¹⁸⁵ By 1903 most of the Seminole land had been allotted in fee to individual Seminoles.¹⁸⁶ These lands quickly fell into non-Indian hands.¹⁸⁷ At present, of the 369,854 acres of land

180. Wilkinson & Biggs, *supra* note 1, at 152-54.

181. *Id.* at 152.

182. Pursuant to the Treaty of Mar. 21, 1866, 14 Stat. 755, art. III, the Seminoles sold their lands to the United States and purchased a new tract of land ceded by the Creeks "which shall constitute the national domain of the Seminole Indians."

183. While the enrolled members of the Five Tribes undoubtedly had a vested equitable right to their just share of communal lands against strangers and fellow members of their tribes, they had no separate or individual right to or equity in any of those lands which they could maintain against the legislation of the United States or of the Indian nations. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902); *Stephens v. Cherokee Nation*, 174 U.S. 56 (1899); a tribe with respect to tribal lands was not limited by rights of occupancy which might grant to its members, and the occupancy of tribal land did not create any vested rights in the occupant as against the tribe, *Sizemore v. Brady*, 235 U.S. 444, 447 (1914); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912); *Hayes v. Barringer*, 168 F. 221, 222 (8th Cir. 1907).

184. 30 Stat. 567 (1898). The agreement transmuted the tribe's communal estate to private ownership in severalty by its enrolled members prior to the actual issuance of patents, *Moore v. Carter Oil Co.*, 43 F.2d 322, *cert. denied*, 282 U.S. 903 (1930).

185. 34 Stat. 137, § 6 (1906).

186. 10 ANNUAL REPORT, *supra* note 68, at 37. By 1903 all but 18,630 acres had been allotted, most of which was later allotted to children born after the first rolls. *Id.*, 12, at 32-33.

187. Seminoles began to lose their lands immediately after allotment, often contrary to law, Letter from Commissioner of Indian Affairs to Secretary of Interior (Apr. 21, 1909)

originally owned by the tribe, only 29,744 acres of restricted lands remain in the hands of individual Seminoles, and only 380.10 acres remain in tribal ownership.¹⁸⁸

Trust Relationship

The termination legislation of the fifties ended the trust relationship between the United States and the affected tribes, thus ending federal protections against the sale of land and the availability of federal expertise in land and resource management.¹⁸⁹ While the end of the trust relationship between the Seminole Nation was obviously part of the future goal of assimilation, it was not intended to be an immediate result of the allotment legislation. The Five Tribes Act of 1906 restricted the lands of fullbloods from sale for a 25-year period,¹⁹⁰ and provided that tribal lands "upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes"¹⁹¹ In 1908, restrictions were removed from all lands of Five Tribes members except homestead lands belonging to those of half or more Indian blood, and all allotted lands (both homestead and surplus) belonging to those of three-quarters or more Indian blood.¹⁹² The restriction on homestead lands was extended by successive acts,¹⁹³ but under current law all restrictions cease at death.¹⁹⁴ However, any sales of such lands by heirs of one-half or more Indian blood must be approved in state district court.¹⁹⁵ All funds and securities of Five Tribes members of

(N.A., N.R.D.); Letter from John F. Brown, Chief of the Seminole Nation, to the Secretary of Interior (Feb. 23, 1911) (N.A., N.R.D.); Chief, to Commissioner of Indian Affairs (Aug. 6, 1915). The Act of May 27, 1908, 35 Stat. 312 placed restrictions only upon the homestead lands of Seminoles of one-half or more Indian blood, and all allotted lands (both surplus and homestead) of Seminoles of three-quarters or more Indian blood, leaving a great deal of Seminole land unprotected. The Act removed restrictions from a total of 8 million acres of land belonging to Five Tribes members. 15 ANNUAL REPORT, *supra* note 68, at 3. Land losses of Seminole allottees were so severe that the 1913 Appropriations Act, 38 Stat. 77, 95, authorized per capita payments from the tribal trust funds "to relieve the distressed condition at present existing among the allottees of that tribe"

188. Annual Land Report, BIA, Muskogee Area Office (Sept. 30, 1977).

189. Wilkinson & Biggs, *supra* note 1, at 152.

190. 34 Stat. 137, § 19 (1906).

191. *Id.*, § 27.

192. 35 Stat. 312, § 1 (1908).

193. The restriction period was extended to Apr. 26, 1956, by 45 Stat. 495 (1928), and was extended for the lives of the Indians owning restricted lands by 69 Stat. 666 (1955).

194. 61 Stat. 731, § 1.

195. *Id.*

one-half or more Indian blood are to remain restricted until otherwise provided by law.¹⁹⁶

The Secretary's involvement in management of tribal resources is further evidence of the trust relationship between the United States and the Seminole Nation. The Secretary has the power to dispose of tribal property with the approval of the tribal council,¹⁹⁷ to make rules and regulations concerning contracts between the Five Tribes and private entities,¹⁹⁸ to approve the expenditure of Seminole judgment funds,¹⁹⁹ and to make loans to the tribe.²⁰⁰ Although there are now only 29,744 acres of privately owned Seminole restricted lands and 380 acres of tribal trust lands, the Oklahoma Indian Welfare Act has authorized the Secretary of Interior to acquire trust lands for Oklahoma tribes,²⁰¹ and a 1970 act provides for the escheat of the lands of intestate members of the Five Tribes dying without heirs to the respective tribes, to be held in trust for them.²⁰² Thus, the trust relationship between the Seminole Tribe and the federal government continues to the present time.

State Judicial Authority

The 1950's termination legislation ended federal recognition of the reservations of the affected tribes and jurisdiction in all criminal and civil cases was vested in the state courts.²⁰³ The *practical* result of the Five Tribes allotment legislation was similar. A brief overview of the federal legislation involving jurisdiction over Seminoles, however, indicates the *legal effect* of that legislation was not a blanket grant of exclusive jurisdiction over Seminoles to the state. Admittedly, the subject of jurisdiction in Oklahoma is an exceedingly complex problem, but it is appropriate at this time to at least raise the issues concerning the validity of state jurisdiction over Seminoles.

Prior to 1889 the tribal courts in Indian Territory possessed exclusive jurisdiction over tribal members, and a state of lawlessness existed in controversies involving non-Indian intruders.²⁰⁴ In 1889

196. *Id.*, § 5.

197. 47 Stat. 140 (1932).

198. 25 U.S.C. § 82a (1970).

199. 82 Stat. 1148 (1968).

200. 25 U.S.C. § 506 (1970).

201. 25 U.S.C. § 501 (1970).

202. 25 U.S.C. § 375d (1970).

203. Wilkinson & Biggs, *supra* note 1, at 153.

204. *See* Leak Glove Mfg. Co. v. Needles, 69 F. 68 (8th Cir. 1895).

Congress established federal courts in Indian Territory,²⁰⁵ and in 1890 the Organic Act granted the federal courts jurisdiction over all civil and criminal cases, except those cases arising in one of the Indian nations involving tribal members only.²⁰⁶ The Act of June 7, 1897, gave the United States courts "exclusive jurisdiction" to try all civil and criminal cases in Indian Territory,²⁰⁷ and the 1898 Curtis Act abolished tribal courts.²⁰⁸ These provisions of the 1897 and 1898 acts did not affect Seminole tribal jurisdiction, however. The 1898 Seminole Agreement repealed all provisions of the 1897 law "in any manner affecting the proceedings of the general council of the Seminole Nation."²⁰⁹ In House debate of ratification of the agreement, this provision was explained as follows: "The law of 1897, which took away the Indian Courts and certain rights of the general council of the Seminole Nation is repealed, and this law is to take its place."²¹⁰

As previously discussed herein, the Curtis Act did not affect the Seminole Nation insofar as it was inconsistent to the Seminole Agreement.²¹¹ The abolition of tribal courts, which was to become effective on the same day on which the Seminole Agreement was ratified by Congress,²¹² was inconsistent with the Agreement and thus ineffective. The Agreement granted federal courts only limited jurisdiction by providing: "And the court of said Seminole Nation shall retain all jurisdiction which they now have, except as herein transferred to the Court of the United States."²¹³ The only jurisdiction transferred to the federal courts by the agreement was exclusive jurisdiction over all controversies growing out of the title, ownership, occupation, or use of real estate owned by the Seminoles, and exclusive jurisdiction to try all persons tried for

205. 25 Stat. 783 (1889).

206. 26 Stat. 81 (1890), §§ 30, 31, *amended* 29 Stat. 510 (1897).

207. 30 Stat. 62, 83 (1897), *repealed as to Seminoles*, 30 Stat. 567 (1898).

208. 30 Stat. 495, § 28 (1898).

209. 30 Stat. 567 (1898).

210. 31 CONG. REC. 5575 (1898). *See Seminole Nation v. United States*, 316 U.S. 286, 302 (1942); "[T]he Seminole Tribal government was not only to continue after the Curtis Act but was in fact relieved of the necessity of securing presidential approval of its legislation by an agreement ratified three days after the passage of that statute."

211. 30 Stat. 567 (1898).

212. The abolition of tribal courts was to be effective July 1, 1898, pursuant to Section 28 of the Curtis Act, 30 Stat. 495 (1898). The Seminole Agreement was ratified by Congress July 1, 1898, 30 Stat. 567.

213. 30 Stat. 567 (1898). The legislative history of the ratification of the Seminole agreement shows that Congress intended to recognize the judicial authority of the Seminole courts over most controversies as long as the tribe continued in existence. See discussion at note 81, *supra*.

homicide, embezzlement, bribery, and embracery thereafter committed in the Seminole country, without reference to race or citizenship of the person charged with such crime.²¹⁴ Thus, the tribal court retained its jurisdiction over all matters involving only tribal members, with the exception of the above enumerated cases.²¹⁵

The enabling act made state courts the successor of "all courts of original jurisdiction of said Territories."²¹⁶ It is outside the scope of the present discussion to give a full analysis of the meaning of this provision. However, it appears that since the federal courts in Indian Territory possessed only limited jurisdiction over Seminoles, the state courts succeeded only to that limited jurisdiction insofar as jurisdiction over Seminoles is concerned. There is a general presumption in law against repeal by implication of earlier legislation, in this case the Seminole Agreement, especially where the established legal rights of Indians under federal legislation or treaties are involved.²¹⁷

In addition to limiting state jurisdiction over the Seminole Nation to that jurisdiction granted to the federal courts by the Seminole Agreement, the enabling act expressly limits state jurisdiction over the disposition of all Indian lands located in the state, by protecting the jurisdiction of the United States over "all lands . . . owned or held by any Indian, tribe, or nation."²¹⁸ Consistent with this provision, in the years since statehood Congress has always been careful to define state court involvement in the disposition of Five Tribes lands,²¹⁹ and in such instances the state courts are viewed as federal, rather than state, instrumentalities.²²⁰

214. *Id.*

215. *Id.*

216. 34 Stat. 267, § 19 (1906).

217. *Mattz v. Arnett*, 412 U.S. 481 (1972); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940); *Choate v. Trapp*, 224 U.S. 665 (1912).

218. 34 Stat. 267, § 3 (1906).

219. Federal legislation has provided for approval by the Oklahoma courts of certain conveyances of restricted lands, 35 Stat. 495, § 9, (1908), *as amended by* 44 Stat. 239 (1926); the final determination of heirship of allottees by Oklahoma probate courts, 25 U.S.C. § 375, (1970); exclusive jurisdiction by Oklahoma courts of all guardianship matters affecting Indians of the Five Tribes, and all proceedings to administer estates or probate wills, 61 Stat. 731; 35 Stat. 312 § 3 (1947). But even in those situations where Congress has conferred jurisdiction on state courts over the disposition of the lands of Five Tribes members, their powers may be limited, *Parker v. Richard*, 250 U.S. 235 (1919); *Armstrong v. Maple Leaf Apartments*, 508 F.2d 518 (10th Cir. 1975).

220. The county courts of Oklahoma are recognized as federal agencies for the removal of qualified restrictions on lands of Five Tribes members, and for the approval of conveyances of inherited land, *United States v. Easley*, 33 F. Supp. 442 (W.D. Okla. 1940). The Oklahoma court, in approving a deed pursuant to 61 Stat. 731 (1947), acts as a federal

Thus, although a judicial determination of the extent of state jurisdiction over Seminole citizens and their lands remains for the future, it is clear that state jurisdiction is not absolute,²²¹ so that in

instrumentality and in an administrative capacity, *Springer v. Townsend*, 336 F.2d 397 (10th Cir. 1964) and *Armstrong v. Maple Leaf Apartments*, 508 F.2d 518 (10th Cir. 1975). In approving deeds to fullblood heirs of inherited lands, the state court acts as a federal instrumentality, *United States v. Goldfeder*, 112 F.2d 615 (10th Cir. 1940).

221. *Contra, Ex parte Nowabbi*, 61 P.2d 1139 (1939), where it was held that the criminal laws of the state applies to Indians in that part of the state that was formerly the Indian Territory, and that they are not subject to federal law, except in the cases where Congress has so expressly provided. That case turned upon a determination by the court that a Choctaw restricted allotment was not Indian country. The court based this conclusion on 34 Stat. 182 (1906) (18 U.S.C. § 349), which provides: "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . 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; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law . . . Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this act shall not extend to any Indians in the former Indian Territory." The court reasoned that since the provision, which retained exclusive federal jurisdiction over all allottees until the issuance of fee-simple patents, also expressly made its provisions inapplicable to Indian Territory, then "the obvious purpose . . . of said act was to take the Indians in the Indian Territory out of the category of Reservation Indians." *Id.* at 1154. The court erred in this interpretation. As the legal history of the Seminoles contained in this article has shown, the tribes in western Oklahoma are governed by the Dawes Act, and the Five Tribes are governed by a different set of allotment laws. The *Nowabbi* court failed to note that 34 Stat. 182 (1906) (now 25 U.S.C. § 349) was an amendment to the Dawes Act, so that it was natural for Congress to include the provision excluding the tribes of Indian Territory from its application, particularly since this amendment was enacted a month after passage of the 1906 Five Tribes Act.

Moreover, the court failed to note that *unlike the Dawes Act, none of the allotment legislation affecting the Five Tribes expressly made state law applicable to allottees at the expiration of the trust period.* Furthermore, even if the *Nowabbi* case was good law in 1936, it is not good law today. The definition of "Indian country" was amended in 1948 to include "all Indian allotments the Indian titles to which have not been extinguished," 18 U.S.C. § 1151, and the United States has exclusive jurisdiction over certain offenses committed within Indian country, 18 U.S.C. §§ 1153, 3242. For the effect of this amendment of the definition of Indian country on prior case law affecting tribes in western Oklahoma, see *State v. Littlechief*, 573 P.2d 263 (Okla. 1978), where it was held that the state did not have jurisdiction over the murder of a Kiowa man allegedly committed by another Kiowa on a Kiowa trust allotment, and *United States v. Littlechief*, No. CR. 76-207-D, Nov. 7, 1977, reprinted in *State v. Littlechief*, 573 P.2d 263 (Okla. 1978), where it was held that the United States had jurisdiction over the case.

Finally, it should be noted that the state never assumed jurisdiction over Indian country in Oklahoma pursuant to the provisions of Public Law 83-280, 67 Stat. 1588-90 (1953) (now codified as amended in 18 U.S.C. §§ 1151, 1162, 28 U.S.C. §§ 1331, 1360 (1970)). As originally enacted in 1953, this law extended state criminal and civil jurisdiction in five states, and allowed for similar assumptions of jurisdiction by other states in the future. The Indian Civil Rights Act, 82 Stat. 78 (1968) (25 U.S.C. §§ 1321, 1322), amended Public Law 83-280 by prohibiting the assumption of jurisdiction over a tribe by the state without tribal consent. Thus, the Oklahoma tribes retain control over whether the state may assume jurisdiction over those matters within the exclusive jurisdiction of the federal and tribal governments.

this area Seminoles enjoy a status superior to that enjoyed by members of the terminated tribes.

State Legislative Authority

The termination legislation of the 1950's granted the states broad legislative authority over members of the tribes affected. Similarly, the Five Tribes allotment legislation resulted in the imposition of considerable state legislative control over Five Tribes members. The Five Tribes legislation did not give it full and exclusive jurisdiction over them, however.

Prior to statehood, Congress extended the application of Arkansas laws over Indian Territory in areas such as estates, wills, civil rights, marriage, and criminal law.²²² Originally, these laws, which were to be applied by the federal courts in Indian Territory, were not applicable to matters involving only tribal members.²²³ The Act of June 7, 1897, extended Arkansas laws to all persons in Indian Territory "irrespective of race,"²²⁴ but as previously discussed, the Seminole Agreement repealed all provisions of the 1897 law "in any manner affecting the proceedings of the general council of the Seminole Nation."²²⁵ However, the Act of April 28, 1904, contained a provision similar to the 1897 act: "All the laws of Arkansas heretofore put in force in 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" ²²⁶ The question of whether, in passing this act, Congress intended Seminole courts to enforce Arkansas laws,²²⁷ is outside the scope of the present discussion. Furthermore, it is doubtful that the 1904 act survived the passage of the enabling act because that act extended the laws in force in Oklahoma Territory, rather than those in force in Indian Territory, over the new state.²²⁸

The only provision of the enabling act specifically dealing with state legislative authority states that "the laws in force in the Territory of Oklahoma, *as far as applicable*, shall extend over and

222. 26 Stat. 81 (1890), § 31, amended 29 Stat. 510 (1897); §§ 33, 34, 35, 38.

223. *Id.*, §§ 30, 31, amended 29 Stat. 510 (1897).

224. 30 Stat. 62, 83 (1897), repealed as to the Seminoles, 30 Stat. 567 (1898).

225. 30 Stat. 567 (1898).

226. 33 Stat. 573, § 2 (1904).

227. The legislative history of the ratification of the Seminole Agreement shows that Congress intended to recognize the legislative authority of the Seminole Council as long as the tribe continued in existence, 31 CONG. REC. 5575 (1898); see note 81 *supra* for discussion.

228. 34 Stat. 267, § 14 (1906).

apply to said state until changed by the legislature thereof."²²⁹ The phrase "as far as applicable" indicates Congress meant to restrict state legislative authority to those matters not within the exclusive jurisdiction of the federal and tribal governments. The enabling act further contains an express limitation on state legislative authority by preserving the authority 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."²³⁰ That this was a limitation on state jurisdiction is evidenced by the fact that since statehood, when Congress has seen fit to expressly make various Oklahoma property laws applicable to Five Tribes members and their lands, it has expressly done so by statute.²³¹ Thus, while the extent of state legislative control is a complex subject requiring further analysis, it is clear that Congress never expressly granted the state complete legislative authority over Seminoles and their lands.²³²

State Taxation

The termination legislation of the fifties ended the almost total immunity from state taxation which the affected tribes and its members enjoyed. While the Five Tribes allotment legislation did not end all exemptions from state taxation authority, there has been a movement by Congress in that direction since statehood, at least insofar as taxation of lands is involved. In 1908 all of the allotted Five Tribes' lands were subjected to taxation "and other civil burdens," except for homestead allotments owned by tribal

229. *Id.*, § 1.

229. *Id.* (emphasis added).

230. *Id.*, § 1.

231. State laws expressly applied to lands of Five Tribes members include the following: laws providing for the partition of real estate, 25 U.S.C. § 355 (1970); laws covering the sales of interests of minors and incompetents, 61 Stat. 731, § 1 (1947); oil and gas conservation laws, *id.* § 11; the state statute of limitations in some instances, 44 Stat. 239, § 2 (1926).

232. The United States Supreme Court has upheld congressional authority over members of the Five Tribes and their lands since statehood. The United States is entitled to maintain an action to set aside all conveyances made by a member of one of the Five Tribes of restricted lands, *Deming Inv. Co. v. United States*, 224 U.S. 471 (1912); *Goat v. United States*, 224 U.S. 458 (1912); *Heckman v. United States*, 224 U.S. 413 (1912). A lease which Congress, in the exercise of its power over allotted Cherokee lands, pronounces absolutely void, cannot be validated or given any force in the state, and an Oklahoma statute attempting to do so is invalid in that respect, *Bunch v. Cole*, 263 U.S. 250 (1923). It is not competent for the state to enact or give effect to a local statute which disregards restrictions imposed by Congress on the alienation of Indian lands, *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911). Congressional authority over restricted lands did not terminate when the restrictions expired, and Congress had the power to impose restrictions on Choctaw lands, *Brader v. James*, 246 U.S. 88 (1918).

members of one-half or more Indian blood and all allotted lands (both homestead and surplus) belonging to tribal members of three-quarters or more Indian blood.²³³ A 1928 act further increased state and federal taxation authority by providing that all minerals produced after April 26, 1931, from restricted lands of Five Tribes members would be subject to state and federal taxes.²³⁴ The Act also limited the tax-exempt status of restricted lands to 160 acres per person.²³⁵

The tax-exempt status of lands improved somewhat in 1936 when Congress passed a law providing that lands held by any Indian subject to restrictions against alienation and purchased out of trust or restricted funds were to be nontaxable until otherwise directed by Congress.²³⁶ The tax-exempt status of lands belonging to members of the Five Tribes further improved when the Oklahoma Indian Welfare Act was enacted that same year, providing for the acquisition by the Secretary of Interior of trust lands on behalf of Oklahoma tribes or individuals, which were to be free from "any and all taxes" except the state gross production tax on minerals.²³⁷ The 1947 Stigler Act, however, did not improve the taxation situation, because it provided that all restrictions on Five Tribes land were to end at the death of the owner, and continued tax exemptions only "in the hands of such Indian during the restricted period."²³⁸ This tax status was reaffirmed by a 1955 act which provided: "Any existing exemption from taxation that constitutes a vested property right shall continue in force and effect until it terminates by virtue of its own limitations."²³⁹ Thus, the tax-exempt status of Seminole lands has been reduced almost to a state of dependency on statutory authority, rather than a reliance on the original sovereignty of the tribe. The only real advantage the Seminole Nation has over the terminated tribes in the area of taxation of lands is the O.I.W.A. provision for the acquisition of tax-exempt trust lands for Oklahoma tribes; but that provision is beneficial only if implemented, and to date the Secretary of Interior has failed to do so to any large extent.

Special Federal Programs to Tribes and to Individuals

The termination legislation resulted in the discontinuance of all special programs to the affected tribes and their members because

233. 35 Stat. 312, § 4 (1908).

234. 45 Stat. 495, § 3 (1928), amended by 46 Stat. 1108, (1931); 49 Stat. 1160 (1936).

235. 45 Stat. 495, § 4 (1928), amended by 46 Stat. 1108 (1931).

236. 25 U.S.C. § 412a (1970).

237. 25 U.S.C. § 501 (1970).

238. 61 Stat. 731, §§ 1, 6(b) (1947).

239. 69 Stat. 666, § 5 (1955).

eligibility for these programs generally depends on federal recognition.²⁴⁰ Because federal recognition of the Seminole Nation has never been discontinued, both the tribe and its members are eligible for federal programs. Today the Seminole Nation participates in federal Indian housing and employment projects, and tribal members are the recipients of federal health services and financial assistance for education.²⁴¹

Tribal Sovereignty

Although the termination legislation of the fifties did not expressly extinguish governmental authority of the tribes affected, the loss of a land base left the tribes with no geographic area over which to exert *in rem* jurisdiction, and the tribes stopped making laws and enforcing them in tribal courts. Thus, according to a recent analysis of the status of the terminated tribes, even though they still possess the legal right to self-government, it is almost useless in a practical sense.²⁴²

Like the terminated tribes, the Seminole Nation lost most of its land base, and through BIA pressure neglected to exert the jurisdiction which it still possesses over controversies involving tribal members. Also like the terminated tribes, the Seminole Nation ceased to function in its full governmental capacity. However, unlike the terminated tribes, the Seminole Nation's right to self-government is still significant legally. As the review of the elements of termination has shown, the Seminole Nation still possesses a special status under federal law which gives it access to opportunities not accessible to terminated tribes. First, the trust relationship still exists between the United States and the Seminole Nation. Second, the state does not enjoy complete legislative and judicial authority over Seminole lands and citizens. Third, the tribe and its members are still eligible for special federal programs.

240. Wilkinson & Biggs, *supra* note 1, at 153.

241. "The tribe has participated in the Office of Economic Opportunity programs of Headstart and the Neighborhood Youth Corporation. Services provided by other federal agencies are those of the Farmers Bureau Administration and Agricultural Stabilization Conservation Service," S. REP. No. 1594, 90th Cong., 2d Sess. (1968). Seminole students attending federal boarding schools, receive financial assistance from the BIA for college educations, and are the beneficiaries of Johnson O'Malley funding. *Id.* at 9. Seminole citizens are also eligible for federal health services, *Id.* at 8. This type of federal assistance is not a recent development. General appropriations acts allocating tribal funds for school purposes include 34 Stat. 325, 342 (1906); 41 Stat. 408, 428 (1920); 44 Stat. 453, 460 (1926); 46 Stat. 1115, 1130 (1931). Appropriations for funds to be used for the education of Seminoles include the following: 36 Stat. 269, 287 (1910); 39 Stat. 123, § 19 (1916); 43 Stat. 704, 708 (1924); 46 Stat. 279, 294 (1930); 50 Stat. 564, 583 (1937); 58 Stat. 463, 479 (1944).

242. Wilkinson & Biggs, *supra* note 1, at 153-54.

And finally, the Oklahoma Indian Welfare Act provides a mechanism by which land can be reacquired for the tribe. It is true that these opportunities are mainly related to the economic sphere of governmental authority, but economic stability is a crucial first step in the resumption of other governmental functions such as jurisdiction. The happenings over the past three-quarters of a century have shown that the loss of tribal control over economic and land interests was disastrous for the Seminole people. Thus, even if tribal sovereignty has been diminished in the sense of exclusive jurisdiction over a geographic area, an issue which we do not now address, the status of the tribal government is still extremely important in the development of the future of the Seminole people. The following discussions of the so-called termination of tribal *government* and the extent of basic powers necessary for the exercise of government, such as the right to select tribal representatives and tribal control over funds, is geared to meet this important need.

V. Governmental Termination: Harjo v. Kleppe

The termination of tribal government can be the result of two types of congressional action. One type is an express provision which terminates or discontinues tribal government. Another type is a group of provisions which strip tribal government of all powers essential to self-government, such as the ability to spend funds, the right to determine form of government, and the power to determine how their leaders will be selected. Although there have been no assertions that the former type of governmental termination occurred as to the Five Tribes, a discussion of those federal statutes which expressly deal with the continuance of Seminole tribal existence and government will clarify the analysis of the latter type of governmental termination.

The Continuance of Seminole Government

Congress first revealed its intention to terminate Seminole government in the Seminole Agreement, which provided for the execution of deeds by the chief "when the tribal government shall cease to exist."²⁴³ The first statutory provision actually setting a deadline for termination was the Act of March 3, 1903, which provided that Seminole government "shall not continue longer than" March 4, 1906.²⁴⁴ However, Congress was slow to wind up the af-

243. 30 Stat. 567 (1898).

244. 32 Stat. 982, § 8 (1903), *repealed* 34 Stat. 822 (1906) and 34 Stat. 137 (1906).

fairs of the Five Tribes and two days before the date set by the 1903 act for the end of Seminole government, Congress passed a joint resolution continuing "the tribal existence and present tribal governments" of the Five Tribes "in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."²⁴⁵ In debating the resolution, Congress expressed two major reasons for the continuance of tribal government. First, it was feared that if tribal government was discontinued before the disposal of tribal property, then tribal lands would become part of the public domain and would then be subject to claims by railroads.²⁴⁶ The second reason was concern that termination of tribal government would place the full burden of maintaining law and order over 80,000 people on the Secretary of Interior.²⁴⁷ In addition, it was feared that the tribal schools would cease to function, and that the absence of a principal chief would interrupt the allotment process.²⁴⁸

Shortly thereafter, the Five Tribes Act of April 26, 1906, was enacted.²⁴⁹ That Act contains the third and final treatment of the termination question by Congress. Section 28 provides:

That the tribal existence and present tribal government 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 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 any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.²⁵⁰

245. 34 Stat. 822 (1906), *amended* 34 Stat. 137, § 28 (1906).

246. 40 CONG. REC. 3120-22 (1906). This concern arose due to a condition of certain treaty land grants to the tribes that the land would inure to them and their descendants so long as they existed as a tribe and occupied the land.

247. *Id.* at 3121.

248. *Id.* at 3054.

249. 34 Stat. 137 (1906).

250. *Id.*

The legislative history of this section is consistent with that of the joint resolution passed the month before.²⁵¹

In spite of Section 28, federal officials often treated the people of the Five Tribes as if their governments were terminated. Judicial interpretations have consistently contradicted that view. In 1911 the Eighth Circuit in *United States Express Co. v. Friedman* described the Five Tribes as follows:

Under these laws the Five Tribes and tribal governments still exist. Eighteen government Indian agents are still maintained in the Indian Territory exclusive of a large force of clerks At the time of the decision of this case below and its submission to this court, these tribes of Indians in their tribal capacity owned about 3,000,000 acres or more of land. It would indeed be difficult to show how this land ceased to be Indian country.²⁵²

In 1943 the Supreme Court in *Creek Nation v. United States* stated that although at one time Congress planned to terminate tribal existence, during debate of the 1906 Five Tribes Act it determined to continue tribal existence and the Act was amended to that effect.²⁵³

More recently, in 1971 the Tenth Circuit in *Groundhog v. Keeler* noted that Cherokee tribal existence was continued by virtue of Section 28 of the Five Tribes Act.²⁵⁴

In spite of these cases, confusion concerning termination of tribal government continued until 1976, when a district court case, *Harjo v. Kleppe*,²⁵⁵ was decided. This case was an action for declaratory injunctive relief brought by Creek citizens against the Department of Interior. In its broadest sense, the central issue was whether the Creek Tribe still possessed sufficient powers to deal with tribal affairs as such. The jurisdictional, or, as the *Harjo* court termed it, "territorial" sovereignty of the tribe was not at issue. Plaintiffs claimed that the federal defendants, through their policies and practices, acted illegally in recognizing the principal

251. One of the main purposes for this provision was to safeguard against any contingency as to certain land grants, 40 CONG. REC. 5046 (1906).

252. 191 F. 673 (8th Cir. 1911).

253. 318 U.S. 629, 638 (1943). In that case it was held that the Seminole Nation could bring a trespass action against railroads using lands reserved from allotment for nonrailroad purposes, even though the United States was authorized to bring such a suit on behalf of the tribe.

254. 442 F.2d 674, 677 (10th Cir. 1971).

255. 420 F. Supp. 1110 (D.D.C. 1976).

chief as the sole embodiment of the government in the Creek Nation, and that according to existing federal and Creek law tribal funds could not be disbursed by the federal defendants for general tribal purposes without the approval of the Creek council. Defendants argued that the Creek national government had been rendered incompetent to handle the tribe's financial decision making, and that a 1970 law stripping the Interior Department of any power to appoint the principal chiefs of the Five Tribes impliedly abolished the entire federal and tribal legal scheme heretofore defining the form and scope of tribal government. The *Harjo* court carefully analyzed the relevant provisions of the Five Tribes allotment legislation, and concluded that plaintiff Creek citizens had demonstrated a clear legal entitlement to have their right to "democratic self-government" vindicated.²⁵⁶ The court prohibited the expenditure of tribal funds by the Bureau without the consent of the Creek council after September 1, 1978, set up a procedure to be used in the "re-creation" of the Creek constitutional government, and prohibited the Department of Interior from approving any proposed constitution other than one prepared according to the procedure set out by the court.

In the course of its analysis, the *Harjo* court addressed the question of whether Congress had ever expressly discontinued the governments of the Five Tribes. The court examined the legislative intent of Section 28 of the Five Tribes Act and concluded:

The legal effect of this provision was unmistakable: Congress had declined to terminate the tribal existence or dissolve the tribal governments, despite the fact that its failure to do so rendered some of the other provisions of the Five Tribes ineffective. While it was anticipated that the tribes would eventually be dissolved, the net effect of the act was to expressly preserve and ratify the then existing authority of the tribal governments, while reiterating the necessity for Presidential approval of tribal legislation imposed earlier. That section 28 had the effect of continuing indefinitely the existence of the Creek tribe has been confirmed by each court that has examined the question.²⁵⁷

The *Harjo* court further analyzed the 1906 resolution and Section 28 in light of the frequent Interior interpretations that the section merely continued in office the incumbent tribal officers while abolishing tribal constitutional procedures for filling those posi-

256. *Id.* at 1143.

257. *Id.* at 1129.

tions, thus by implication terminating the government itself when a sufficient number of officials died or left office. The court noted that it would not be logical to assume that the 1906 resolution, which set a specific date for the abolition of tribal government, also impliedly restructured the government.²⁵⁸ The court found that Section 28 of the Five Tribes Act also continued the tribal form of government because it replaced the termination date with provisions specifically allowing the continuance of tribal governments.²⁵⁹ In further support of this view, the court noted that Section 28 continued "present tribal governments," not "incumbents" or "officials."²⁶⁰ The *Harjo* court concluded: "For all these reasons, the Court can only conclude that the intent and effect of Section 28 was to permit the Creek government to continue to operate under the 1867 constitution as modified by the various statutory limitations."²⁶¹

Basic Powers

Even where Congress has not expressly terminated tribal government, legislation and/or administrative policy depriving the people of the most basic powers essential to self-government can effectively prevent tribal government from functioning. Felix Cohen, the well-known scholar of Indian law, apparently had this in mind when he stated in his *Handbook of Federal Indian Law* that the tribal governments of the Five Tribes were terminated.²⁶² Cohen noted that Section 28 continued tribal government, but apparently viewed the Curtis Act and several other provisions of the Five Tribes Act as being equivalent to termination. Cohen supported his conclusion with two opinions of Interior officials, brief descriptions of the Curtis Act and Five Tribes Act, and an assumption that tribal agreements "finally effectuated" the termination of tribal governments. Cohen made no attempt to consider each of the provisions he described in light of the whole body of legislation affecting the Five Tribes in the period of 1893 to 1906, nor did he cite any evidence of congressional intent concerning that legislation. A closer analysis of the relevant legislation would have revealed that the Five Tribes still possess sufficient powers for the continuance of tribal government, in spite of considerable diminishment of their territorial sovereignty.

258. *Id.* at 1130.

259. *Id.*

260. *Id.*

261. *Id.*

262. FEDERAL INDIAN LAW, *supra* note 11, at 429.

Unfortunately, such an analysis did not occur until 1976, when *Harjo v. Kleppe* was decided.²⁶³ The *Harjo* court found that the allotment legislation viewed in its entirety did not terminate the governments of the Five Tribes, but that the congressional intent that the governments should continue was circumvented by the Interior Department:

During the period immediately following the approval of the Five Tribes Act, the Interior Department behaved as though it had been successful in its efforts to prevent the enactment of section 28 and the Congressional changes made in its draft of section 6. The available evidence clearly reveals a pattern of action on the part of the Department and its Bureau of Indian Affairs designed to prevent any tribal resistance to the Departments' methods of administering those Indian affairs delegated to it by Congress. This attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by section 28 of the Act²⁶⁴

The *Harjo* court carefully reviewed the administrative treatment of the Creeks, which closely paralleled administrative interaction with the Seminoles.²⁶⁵ The court's review shows that federal administrators attempted to interfere with basic Creek governmental functions by refusing to permit elections to be held to fill vacancies of the council; by convincing the chief that he could not call regular sessions of the council without governmental approval, and refusing to give such approval; by expending Creek funds without the knowledge or consent of the Creek council; by exerting influence and control over the various reincarnations of the Creek national government between 1920 and 1970; by frequently treating the chief as the sole voice of the Creek Tribe, especially in the period from 1955 to 1970; and by pursuing a policy of appointing the chief, thus administering Creek affairs "without even a token of democracy."²⁶⁶

The *Harjo* court further noted that the Department often attempted to justify its actions by simply citing federal laws without further explanation. The court viewed this as evidence of the "prevalence within the Department of a belief that if the law did

263. 420 F. Supp. 1110 (D.C.C. 1976).

264. *Id.*

265. *Id.* at 1131-39.

266. *Id.* at 1139.

not support the outcome sought by the Departments, its objective was nevertheless best served by refusing to divulge its interpretation and thereby maximizing the uncertainty with which tribal officials had to cope.²⁶⁷ Although the Department succeeded to a considerable extent in suppressing tribal authority over tribal affairs for more than half a century, the *Harjo* court found that this did not extinguish the Creek Nation's legally enforceable right to exercise such authority.²⁶⁸

The *Harjo* court approached the problem of analyzing the legal effect of allotment legislation by examining each statute and each provision in chronological order. While the present discussion will rely heavily on the *Harjo* findings, a slightly different approach will be taken here, involving three questions. The first question will be whether federal legislation has altered the tribal power to select tribal leaders free from federal interference. The second question will concern the effect of federal legislation on the tribe's ability to determine form of government. The third and final question concerns tribal power over financial resources. Like *Harjo*, this analysis will be limited to legislation affecting tribal self-government in the limited sense, *i.e.*, tribal organization and management of tribal economic affairs. However, the analysis does have broader implications concerning tribal sovereignty: Without basic control over representation, form of government, and financial affairs, the possession of other sovereign powers, such as taxation and judicial authority, would be worthless.

Selection of Tribal Representatives

The ability of the people to select tribal representatives, whether the method be democratic or otherwise, is basic to self-government. Prior to the enactment of the Five Tribes Act, federal administrative officials acknowledged that the Seminole people possessed this power, and did not interfere with the tribal election and impeachment process.²⁶⁹ However, the history of post-

267. *Id.* at 1131, n. 56.

268. *Id.* at 1139: "As is evident from the foregoing, the influence and control of the Bureau over the various incarnations of the Creek National government between 1920 and 1970 was exercised wholly without the benefit of any specific congressional mandate. As such, it constitutes no support whatsoever for the defendant's position in this suit, and indeed the history of the period demonstrates the continued vitality and resilience of Creek political life and institutions, fatally undermining dependent's claim that the Creek political infrastructure is incapable of discharging the functions plaintiffs assert should be discharged by a Creek legislative institution."

269. Thus, in 1905 the Interior Department recognized the validity of the impeachment of the Seminole Chief; "Inasmuch, however, as the Seminole Nation is still recognized as an

statehood federal involvement with Seminole government has shown that after statehood the Secretary of Interior refused to recognize tribal elections and impeachment process. However, the history of post-statehood federal involvement with Seminole government has shown that after statehood the Secretary of Interior refused to recognize tribal elections, interpreting Section 28 of the Five Tribes Act as continuing the incumbents in office, rather than continuing the actual form of government.²⁷⁰ As already discussed in the analysis of Section 28 herein, this was a misinterpretation which the Department used to its advantage for many years.

The history of Bureau treatment of Seminole government has also shown that because the Five Tribes Act required that all deeds to tribal lands allotted or sold be signed by the principal chief of the tribe, federal officials began immediately after its passage to treat the Seminole chief as the sole representative of the tribe. Consistent with its policy concerning tribal elections, the Department interpreted Section 6 of the Five Tribes Act as authority for presidential appointment of a chief whenever a deed needed to be signed. Section 6 provided:

Section 6. That if the principal chief of the Choctaw, Cherokee, Creek, Seminole, or the governor of the Chickasaw Tribe, shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become[s] permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe²⁷¹

Thus, Seminole chiefs were appointed on several occasions for brief terms for the limited purpose of signing deeds, in spite of protests and requests by Seminole citizens for recognition of tribal elections.²⁷²

autonomous government, that was a matter within their powers, and I agree with the Indian Inspector and the Indian Office that the Department should not attempt to interfere therein," OP. ASST ATT'Y GEN., INTERIOR DEPT (July 22, 1905); Letter from Asst Sec. of Interior to Indian Inspector (Mar. 24, 1906) (Oklahoma Historical Soc'y Indian Archives, Seminole Misc. Doc. No. 39518-0), advising that the Department had no jurisdiction over the election, impeachment, or selection of the Seminole principal chief.

270. Letter from G.W. Woodruff, Acting Secretary of Interior, to F.E. Leupp, Commissioner of Indian Affairs (Sept. 5, 1907) (N.A., N.R.D.); Letter from C.J. Rhoades, Commissioner of Indian Affairs, to Chili Fish (Sept. 28, 1929) (N.A., N.R.D.).

271. 34 Stat. 137 (1906).

272. McGeisey, Burk, Fish, and Rhoades Letters, *supra* note 110.

A similar misuse of Section 6 with regard to the Creeks was examined in *Harjo v. Kleppe*, where it was held that the power of appointment applied only in three limited circumstances: the removal, the disability, or the death of the incumbent.²⁷³ The *Harjo* court examined the legislative record and found that Section 6 as originally drafted continued the chiefs in office in order to sign deeds and "to represent the tribe in such matters as may be referred to them by the Secretary of Interior," but that the latter clause was deleted after Congress, during the course of debate of the Five Tribes Act, decided to continue tribal government.²⁷⁴ Moreover, *Harjo* found that in enacting Section 6, Congress intended simply to insure that the office whose occupant was charged by statute with signing the allotment deeds would at all times be filled, and not to deprive the tribes of the right to continue electing their principal chiefs, under ordinary circumstances, as long as their tribal governments continued to exist.²⁷⁵

Although the intent of Section 6 was not judicially established until the 1976 *Harjo* decision, Congress made its intentions concerning Seminole tribal representation clear to the Bureau in 1932 by enacting a law which prevented the Secretary from selling, leasing, encumbering, or in any other manner disposing of tribal land interests without the approval of the tribe "acting through its general council *selected in pursuance of Seminole customs*."²⁷⁶ According to the committee report of the bill, the Seminole Nation maintained a strong tribal government, with elected town chiefs, councilmen, and principal chief.²⁷⁷ The Commission of Indian Affairs unsuccessfully fought passage of the act, maintaining that no *recognized* elections had been held since 1906, and that Section 6 gave the chief alone some authority over the disposition of land.²⁷⁸

The history of the administrative treatment of the Seminole government has shown that soon after passage of the 1932 act the Bureau took the position that there was no longer a need for a Seminole chief.²⁷⁹ Later this policy changed and the Secretary of Interior began to recognize the elected chiefs officially by "appointing" them. Finally, in 1952 Interior officials ceased appoint-

273. 420 F. Supp. 1110, 1127 (D.D.C. Cir. 1976).

274. *Id.* at 1127, citing 40 CONG. REC. 1242 (1906) and H. REP 183, 59th Cong., 1st Sess., 2 (1906).

275. *Id.*

276. 47 Stat. 140 (1932).

277. H. REP. No. 766, *supra* note 153, at 2.

278. *Id.* at 3.

279. Letter from C.J. Rhoades, Commissioner of Indian Affairs, to John Burgess (July 26, 1932) (N.A., N.R.D.).

ing the Seminole principal chiefs and refused to recognize any significant authority in them.²⁸⁰ Instead, they attempted to deal with the council chairman as the authoritative tribal spokesman. There is even some evidence that the Bureau interfered with the composition of the elected council by replacing some council members with hand-picked representatives.²⁸¹

This uncertain state of affairs continued until 1969, when the new Seminole constitution was adopted by tribal members and approved by the Commissioner of Indian Affairs. The constitution provides for the election of three council members from each band, and a general election of the chief.²⁸² Tribal members had apparently become so convinced of the authority of the Department to appoint the chief that a provision was included in the constitution which provides that pursuant to Section 6 of the Five Tribes Act the President can appoint a chief to replace the elected chief.²⁸³ This misinterpretation of Section 6 was corrected the following year when Congress enacted the Act of October 22, 1970.²⁸⁴ The Act provides that notwithstanding any other provisions of law, the principal chiefs and governors of the Five Tribes are to be "popularly selected" by the respective tribes in accordance with procedures established by the officially recognized tribal spokesman and/or governing entity and subject to approval by the Secretary of Interior.²⁸⁵ Although the Act requires secretarial approval of election procedures, it restored to the people the right to select their chief. Rather than expressly repealing Section 6 of the Five Tribes Act, which needed no repeal, Congress "repealed" an administrative policy which had acquired the force of law with the passage of time. Thus, today the right of the Seminole people to select both their chief and council is expressly protected by federal legislation.

Power to Determine Form of Government

The power to determine form of government is one of the most basic rights of Indian tribes repeatedly recognized in federal Indian

280. S. REP. No. 1594 *supra* note 3, at 6.

281. Minutes of the Meeting of a Committee for Reorganization (May 24, 1958) (Grounds Files).

282. Constitution of the Seminole Nation of Oklahoma (adopted Mar. 8, 1969), art. III, § 3 and art. IV.

283. *Id.*, art. III, § 3.

284. 84 Stat. 1091 (1970).

285. The Act was amended so as to substitute the phrase "popularly selected" for "elected" because the House Committee felt the choice of the method of selecting principal officers should be left to the tribe itself, *Harjo v. Kleppe*, 420 F. Supp. 1110, 1141 (D.D.C. 1976), *citing* H. REP. No. 91-1499, 91st Cong., 2d Sess., *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 4332, 4333 (1970).

law,²⁸⁶ and is one of the most complex of all the powers incidental to tribal sovereignty. A discussion of government in the context of tribal sovereignty necessitates a very sophisticated approach because legislation which diminishes a sovereign power can result in some changes in the structure of government, affecting at least indirectly the power to determine form of government. This type of approach is, however, outside the scope of this paper, and the present discussion will be limited to an inquiry into the effect of the Five Tribes Act, the 1932 Act, and the 1970 election Act on structure of government, and the effect of the Oklahoma Indian Welfare Act on concepts and organization of government.

The stance taken by federal administrators in regard to interpretation of Sections 6 and 28 of the Five Tribes Act²⁸⁷ and the Act of April 27, 1932,²⁸⁸ not only interfered with the power to select tribal leaders, but also with the power to determine form of government. By interpreting Section 28 as continuing incumbents in office and not the form of government, and by interpreting Section 6 as requiring federal appointment of a chief for the limited purpose of signing deeds, the Department was able to treat the chief as a monarch. After the 1932 act was passed, the Department more or less phased out of its concept of Seminole government the position of chief and continued to insist that the sole function of Seminole government, as embodied by the council, was to approve the disposition of lands.

This type of departmental interference with the Seminole form of government was completely unsupported by law. The discussion of Section 28 in the context of the continuance of government has already revealed that Congress did not intend to abolish either the structure or basic functions of Seminole government. According to the *Harjo* court, although Congress included provisions in Section 28 limiting the duration of council meetings and requiring presidential approval of tribal legislation, "it had equally explicitly recognized and preserved the authority of the national legislature and the basic form of government established by the 1867 constitution."²⁸⁹ Furthermore, although Section 6 of the Five

286. The nature of tribal systems is such that all internal matters are the responsibility of the tribal community, not the federal government, *Pueblo of Santa Rose v. Fall*, 272 U.S. 315 (1972); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973). This basic right "should constitute the prevailing policy influencing the Congressional view of the total federal-Indian relationship," TASK FORCE TWO OF AMERICAN INDIAN POLICY REVIEW COMM'n, 94th CONG., 2d SESS., REPORT ON TRIBAL GOVERNMENT 28 (Comm. Print 1976) [hereinafter cited as REPORT ON TRIBAL GOVERNMENT].

287. 34 Stat. 137 (1906).

288. 47 Stat. 140 (1932).

289. 420 F. Supp. 1110, 1143 (D.D.C. Cir. 1976).

Tribes Act requires the signature of the chief on deeds, there is nothing in the Act which indicates that Congress intended that the chief be the sole representative of the tribe, or that the sole function of the chief should be the signing of deeds. As for the 1932 act, Congress could not have made its intent more clear. The sole purpose of the act was to prevent the Bureau from appointing a chief and obtaining his signature on the deed to the last of the Seminole lands, thus forcing the land sale without tribal consent.²⁹⁰ The committee report for the 1932 act expressly recognized that the Seminole government was composed of both a council and a principal chief,²⁹¹ and there is nothing in either the act or its legislative history indicating that Congress intended to limit the function of the government to control over the disposition of land.

The Department's rather calculated manipulation of congressional intent continues even into the 1970's. For example, in *Harjo* the Secretary of Interior presented a rather strained interpretation of the meaning of the Act of October 22, 1970, which provides for the popular selection of principal chiefs of the Five Tribes.²⁹²

The Secretary of Interior argued that the legislative history of the 1970 act showed that Congress was made aware that the affairs of the Five Civilized Tribes were being administered by principal chiefs and a governor,²⁹³ and that Congress therefore intended to abolish the underlying legal authority for a constitutional government and ratify the "present form of government."²⁹⁴ The *Harjo* court failed to find such broad implications in the Act, whose purpose was simply to permit members of the Five Tribes to select their own principal chiefs or governor free from federal interference. The court noted that since the underlying theory of the Act was to facilitate tribal self-determination to the maximum extent possible, Congress could not have intended to impliedly

290. 53 CONG. REC. 6596 (1932); "Mr. Stafford: 'As I understand from reading the letter of the Commissioner of Indian Affairs the Commission does not intend to dispose of the rights anyway'."

"Mr. McKeown: 'For the present. He will not say that he will not do it in the future. The feeling of the members of the Committee was that as soon as Congress adjourned, he might proceed to sell the lands'." See H. REP. 766, *supra* note 153, at 2, wherein it is stated: "The purpose of the bill H.R. 10362 is to make certain that the Mekasuke land will not be sold or conveyed away as was the Emohaka land without the consent of the Seminole Tribe, acting through its general council."

291. H. REP. 766, *supra* note 153, at 2.

292. 84 Stat. 1091 (1970).

293. The 1932 act recognizing the authority of the Seminole council over the disposition of tribal lands did not extend to the other tribes, and so the Bureau continued to recognize the exclusive authority of the chiefs of the Choctaw, Chickasaw, Creek, and Cherokee tribes over tribal affairs.

294. 420 F. Supp. 1110, 1140 (D.D.C. 1976).

dismantle "an existing form of government which provided more self-government than the scheme allegedly to be substituted."²⁹⁵ The *Harjo* court found further support for this view in the wording of the Act to the effect that chiefs will be "popularly selected" rather than "elected," reflecting congressional concern that the federal government not force its ideas of proper form of government on the tribes.²⁹⁶

Although the *Harjo* court carefully reviewed the 1906 and 1970 acts in reaching its conclusion that throughout the years Congress has explicitly recognized the basic form of government established by the Creek 1867 constitution, it did not discuss the Oklahoma Indian Welfare Act²⁹⁷ at any length, simply stating that "no contention is made that the Act had any effect on the status of the Creek National Government under existing law, nor does the Court find any such effect."²⁹⁸ However, a brief discussion of the O.I.W.A. could help to clarify the legal status of Seminole government. The United States Supreme Court has stated in dictum that the Five Tribes have been "authorized" under the O.I.W.A. to resume some of their former powers, implying that the governments of the Five Tribes possess only those powers expressly granted them by the Act.²⁹⁹ This view is contrary to the clear intent of the Act, which expressly reaffirms already existing powers of internal sovereignty, including the power to determine form of government, in addition to expressly granting certain other powers.

Section 3 of the O.I.W.A. provides that Oklahoma tribes may organize and adopt a charter of incorporation under its provision. The section provides that the charter of incorporation

may convey to the incorporated group, in addition to any powers which may properly be vested in a body incorporated under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to *enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934.*³⁰⁰

The rights or privileges secured to an organized tribe under the Act of June 18, 1934, the Indian Reorganization Act, are set out in Section 16 of that Act as follows:

295. *Id.*

296. *Id.* at 1141.

297. 25 U.S.C. §§ 501 *et seq.* (1970).

298. 420 F. Supp. 1110, 1136 n.87 (D.D.C. Cir. 1976).

299. Board of County Comm'rs v. Sever, 318 U.S. 705, 718 (1943); Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 614 n.1 (1943) (dissent). See also Wilkinson & Biggs, *supra* note 1, at 144 n.51, which implies that the O.I.W.A. restored some of the "lost" powers of the "terminated" Five Tribes.

300. 25 U.S.C. § 503 (1970) (emphasis added).

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.³⁰¹

Shortly after the passage of the I.R.A., an Interior Department opinion held that tribal powers of internal sovereignty are vested in the various tribes "under existing law" within the meaning of the I.R.A. provision, and that the provision reaffirms such vested powers.³⁰² Case law has been consistent with this interpretation,³⁰³ and in 1977 an American Indian Policy Review Commission report reaffirmed this view of the I.R.A. as follows:

Thus Congress not only clearly conceded that existing law recognizes inherent powers vested in Indian tribes, but also affirmatively defined certain rights which tribes could exercise pursuant to constitutions adopted under the act, . . . in fact, nearly every conceivable governmental power necessary to maintain tribal existence as an independent

301. 25 U.S.C. § 476 (1970).

302. 55 Dep't of Interior 18, 19 (1934). "[T]he phrase 'powers vested in any Indian Tribe or tribal council by existing law' does not refer merely to those powers which have been specifically granted by the express language of treaties or statutes, but refers rather to the whole body of tribal powers which courts and Congress alike have recognized as properly wielded by Indian tribes, whether by virtue of specific statutory grants of power or by virtue of the original sovereignty of the tribe insofar as such sovereignty has not been curtailed by restrictive legislation or surrendered by treaties." *Id.* at 18.

303. In *Pyramid Lake Paiute Tribe v. Morton*, 499 F.2d 1095, 1097 (9th Cir.) *cert. denied*, 420 U.S. 962 (1974), the court expressly stated that the portion of Section 16 providing for the employment of legal counsel was to recognize certain attributes of Indian sovereignty, reflecting the Act's overall purpose of restoring a measure of self-control and initiative to the tribe itself. It has been recognized that the power of taxation is an inherent sovereign power which may be implemented in a tribal constitution pursuant to Section 16, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 J (8th Cir. 1956). In *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975), it was held that the inherent sovereign powers to exclude trespassers from the reservation and to create and administer a criminal justice system over tribal members and within the limits of the reservation can be implemented by a tribal ordinance coupled with an I.R.A. tribal constitutional provision. Another post-I.R.A. case, *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1974), recognized that the "quasi-sovereign status of Indian tribes entitled them to determine the extent to which the franchise to vote is to be exercised in tribal elections without 26th amendment of Indian Civil Rights Act restrictions, absent explicit congressional legislation to the contrary.

political entity had already been recognized by existing law prior to enactment of the I.R.A. The only limitation on the powers of Indian tribes under existing law was, and still is, an express limitation by the Congress.³⁰⁴

Since the O.I.W.A. incorporated by reference the section of the I.R.A. protecting all powers vested in any tribe, it must be similarly interpreted as preserving all sovereign powers not expressly taken by Congress. There is nothing in the legislative history of the O.I.W.A. requiring a contrary interpretation.³⁰⁵

In spite of this protection of sovereign powers, at first glance it appears that the I.R.A. and O.I.W.A. have interfered with the power to determine form of government by providing for the adoption of tribal constitutions and corporate charters under federal supervision. However, the more logical interpretation is that these two statutes are merely vehicles for tribal economic organization. According to a report to the American Indian Policy Review Commission "[I]ndeed, among the powers recognized by existing law on the part of Indian tribes was the power to create and define the nature of tribal government. That is, prior to the I.R.A. tribes were already recognized as having the power to adopt constitutions and by-laws if they should so choose."³⁰⁶ The report further indicates that because the I.R.A. reaffirmed those powers already possessed by tribes, including the power to define government, it did not limit tribes to organization under the I.R.A.³⁰⁷ As this rationale also holds true for the O.I.W.A., it follows that Oklahoma tribes are not required to organize under the O.I.W.A. Apparently the *Harjo* court took this view when it stated that "the [Creek] tribe as a whole is legally entitled to develop a new constitution to be adopted either as an exercise of the tribe's inherent sovereignty or pursuant to the provisions of

304. REPORT ON TRIBAL GOVERNMENT, *supra* note 286, at 18.

305. For the legislative history of the O.I.W.A., see 80 CONG. REC. 5557, 6652, 8572, 9448-450, 9884-845, 10107, 10278, 10359, 10552 (1936). For a general discussion and comparison of the I.R.A. and O.I.W.A., see AM. INDIAN LAWYER TRAINING PROGRAM, MANUAL OF INDIAN LAW, at n.1 (1976).

306. REPORT ON TRIBAL GOVERNMENT, *supra* note 286, at 18. See also AMERICAN INDIAN POLICY REVIEW COMM'n, 94th CONG., 2d SESS., FINAL REPORT 188 (Comm. Print 1977) [hereinafter cited as FINAL REPORT].

307. REPORT ON TRIBAL GOVERNMENT, *supra* note 286, at 18-19. According to the Report: "In our analysis, it seems clear that the I.R.A., other than in its provisions which halted the allotment policy, is of limited significance The results of this research reinforced our feeling that there is little practical significance to sections 16 and 17 of the I.R.A.," *Id.* However, the Report noted that the choice presented to the tribes regarding acceptance or rejection of the I.R.A. placed an unfair burden on them "inasmuch as they were asked to choose between coming under the total provisions of the I.R.A. without an adequate opportunity to totally understand the implications, or to totally reject the act." *Id.* at 22.

the Oklahoma Indian Welfare Act.³⁰⁸ Carried one step farther, this reasoning also results in the conclusion that organizing tribes are not limited to a constitutional form of government patterned after the United States Constitution.³⁰⁹ Indeed, until fairly recently, the Seminole form of government was embodied in a group of written laws rather than in a constitution, and consisted of only two branches of government authorized to carry out the executive, legislative, and judicial functions of the tribe.

The foregoing consideration of the effect of the O.I.W.A. on the ability of the Seminole Tribe to organize free from federal control and concepts as one aspect of the power to determine form of government highlights one peculiar facet of the *Harjo* decision which should be mentioned. Although all the findings in *Harjo* emphasized the right of the Creeks to determine their form of government, the court fashioned a legal remedy inconsistent with this right.³¹⁰ According to the court, there was no national legislature as contemplated by the 1867 constitution in existence and thus the constitutional Creek government had to be recreated before the Bureau could legally expend tribal funds with the approval of the Creek council as required by the 1867 Creek constitution. The court stated that the re-creation of the constitutional Creek government should be accomplished by the Creeks themselves, but then proceeded to specify the exact procedure to be used, instead of leaving it up to the tribal towns to elect town

308. 420 F. Supp. 1110, 1144 (D.D.C. 1976).

309. This is at least true for those tribes who organize by virtue of their inherent sovereignty, rather than under the I.R.A. or O.I.W.A. The I.R.A. has been criticized by the American Indian Policy Review Commission because it requires that constitutions and by-laws adopted by tribes pursuant to the Act be ratified and approved by the Secretary. FINAL REPORT *supra* note 306, at 188. The Commission also recommended that the I.R.A. be amended "to reflect specifically the fact that tribes have an inherent right to form their own political organizations in the form which they desire." *Id.* at 192. However, both statutory and case law involving the effect of the Federal Constitution on tribal government does not have to embrace federal values and concepts. Prior to the enactment of the Indian Civil Rights Act in 1968, 25 U.S.C. §§ 1301 *et seq.* (1970), federal courts refused to extend constitutional restrictions over Indian tribal activities, because to do so would violate the inherent sovereignty of tribal government. See *Constitutional Rights of the American Tribal Indian*, 51 VA. L. REV. 121, 141 (1965). The Indian Civil Rights Act enumerates specific rights which are not to be abridged by tribal government, *id.*, § 1302. While the enumerated rights in the I.C.R.A. are similar to those found in amendments one, four, five, six, seven, and eight of the United States Bill of Rights, some courts have found standards different from traditional Anglo standards more appropriate to the tribal setting. See *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976); *McCurdy v. Steele*, 506 F.2d 653, 655 (10th Cir. 1974); *Lohnes v. Cloud*, 336 F. Supp. 620, 633 (D.N.D. 1973); *Yellow Bird v. Oglala Sioux Tribes*, 380 F. Supp. 438 (D.S. 1974). For a general discussion of the effect of the I.C.R.A. on tribal sovereignty, see Note, *Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

310. 420 F. Supp. 1110, 1143-47 (D.D.C. 1976).

chiefs and councilmen pursuant to the 1867 constitution. In spite of the fact that the 1867 constitution authorized only the council to make constitutional amendments or submit a new constitution for amendment, the court ordered a referendum on a proposed new constitution which had already been drafted by a committee appointed by the chief. It further determined the voting requirements, created a five-member commission to handle the referendum and make any necessary changes in the draft, and required that it be forwarded to the Bureau for approval. The Creek plaintiffs have appealed this remedy because it subjects the Creek Nation to considerable judicial and executive involvement in the most basic aspect of the right to determine form of government—the very organization of the government. The remedy is a further example of the misguided legal conclusions and interpretations the Five Tribes have experienced in exercising their right to self-government.

Power to Allocate and Spend Tribal Funds

The power to expend funds is essential to self-government for the obvious reason that governmental decisions are powerless without control of financial resources. In addition, the power to expend funds has taken on special significance because of the Secretary's attempts to hamper the functioning of the governments of the Five Tribes by withholding tribal funds desired by them for council meetings, salaries, and other basic expenses.

Several provisions, most of which are contained in the allotment legislation, deal with the expenditure of the funds of the Five Tribes. The first such provision is Section 19 of the Curtis Act, which provides:

That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officers thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed to him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.³¹¹

As already discussed, the Curtis Act probably was never intended to apply to the Seminole Nation. This was recognized to some ex-

311. 30 Stat. 495 (1898).

tent by the Supreme Court in *Seminole Nation v. United States*, where the Court assumed, "without deciding," that Section 19 applied to the Seminole Nation, and proceeded to give it a narrow interpretation.³¹² The Court held that it prohibited payments by the federal government to the tribal treasurer only when such payments were to be distributed to tribal members. The Act had no application to money earmarked for educational or tribal purposes, or for any other purpose the tribe might designate.³¹³ In reaching this conclusion, the Supreme Court reasoned that if the first clause of Section 19 was construed as prohibiting *all* payments to the Seminole Nation, then the later clauses, which provided only for payments to members and per capita payments, would be inadequate to cover the disbursement of money for the expenses of maintaining and conducting tribal government, "despite the fact that the Seminole tribal government was not only to continue after the Curtis Act but was in fact relieved of the necessity of securing Presidential approval of its legislation by an agreement ratified three days after the passage of that statute."³¹⁴ The Court also noted that as originally introduced, Section 19 provided that payments of "all expenses incurred in transacting their business" were to be made under the direction of the Secretary of Interior. The Court reasoned that the deletion of that proviso from the final clause shows that Congress intended that tribal officers should retain the right to disburse their funds for government expenses.³¹⁵ Section 19 was similarly interpreted in *Choctaw Nation v. United States*,³¹⁶ a Court of Claims case, and in *Harjo v. Kleppe*.³¹⁷

The Seminole Agreement, ratified three days after the Curtis Act, authorized the Department's control over some tribal funds.³¹⁸ The Agreement set aside \$50,000 of Seminole funds held by the United States as a permanent school fund, and directed that the interest from the fund be used by the Secretary of Interior for the support of Seminole schools "after extinguishment of tribal government."³¹⁹ Section 10 of the Five Tribes Act³²⁰ also authorized the Secretary of Interior to run the tribal schools of the Five Tribes

312. 316 U.S. 286, 301 (1942).

313. *Id.* at 302-303.

314. *Id.* at 303.

315. *Id.*

316. 91 Ct. Cl. 320 (1940), *cert. denied*, 312 U.S. 695 (1941).

317. 420 F. Supp. 1110, 1123 (D.D.C. 1976).

318. 30 Stat. 567 (1898).

319. *Id.*

320. 34 Stat. 137 (1906).

with tribal funds. This section interfered substantially with tribal control over educational needs of tribal members. In 1930 the last of the Seminole schools was discontinued by the Department of Interior in spite of protests of Seminole citizens and in spite of the fact that there was more than \$100,000 in the Seminole school fund.³²¹ Ironically, the Seminole Nation was the only one of the Five Tribes having funds available for school purposes, and was the only one of those tribes for which the government ceased maintaining schools at that time.³²² If the tribe had had control of its educational fund, this situation would not have occurred.

The Five Tribes Act also contained four other sections which dealt with tribal financial affairs. A provision in Section 28 required that the President of the United States approve all contracts made by the tribes involving the expenditure of money. Section 11 provided for the collection of "all revenues of whatever character" accruing to the tribes before or after dissolution, by an officer appointed by the Secretary of Interior. It further authorized the office to pay all lawful claims against the tribe resulting from contracts or regularly issued warrants. It also abolished tribal taxes after December 31, 1905, and required tribal officers or members in possession of tribal property to turn it over to the Secretary upon dissolution of the tribal government. According to the *Harjo* court, the legislative history of the Five Tribes Act indicates that the first provision of Section 11 was intended only to provide a mechanism for the collection of revenues accruing after the contemplated dissolution, and thus did not affect a tribe's authority to manage financial affairs as long as the tribes were in existence.³²³ However, the second provision abolishing tribal taxes affected the ability of the tribes to acquire revenue.

The other two provisions of the Five Tribes Act affecting tribal financial affairs in the event of the dissolution of tribal government were Sections 24 and 17. Section 24 provided that any expenses incident to the establishment of public highways in the territory of any tribe be paid from tribal funds by the Secretary. Section 17 directed the Secretary to pay any remaining tribal funds per capita to tribal members when any tribe's financial affairs had been concluded by the sale of any unallotted land or other property and the payment of any outstanding obligations. According to the *Harjo* opinion, Section 17 presumed a prior dissolution of the tribe because tribal financial affairs could not be concluded until

321. H. REP. No. 766, *supra* note 153, at 2.

322. *Id.*

323. 420 F. Supp. 1110, 1128 (D.D.C. 1976).

the tribe ceased to exist and function as such.³²⁴ The court further noted that because the provision applied only to tribal assets involved in the allotment process, any assets accruing to the tribe at a later time were not covered by the section.³²⁵

Thus, the Seminole Nation's general control over tribal funds survived the allotment legislation, with limitations only on the tribe's power to tax, to distribute funds to its members, and to control the school fund. However, the Department of Interior cited the allotment legislation as authority to prevent the Five Tribes from controlling and using tribal funds for any purposes, and abused this control by mishandling the funds of some of the tribes.³²⁶ Congress became concerned with the situation, and each appropriation bill from 1912 until 1922 restricted the Secretary's authority to make disbursements from the funds except for the following purposes: equalization of allotments, payments to individual members, education, employment of attorneys, and the salaries and contingent expenses of chiefs, secretaries, interpreters, and mining trustees. Congress made this restriction on the Secretary permanent in the Act of May 24, 1922.³²⁷ According to the Court of Claims in *Creek Nation v. United States*, this legislation did not limit the use of tribal funds for expenses of the tribal governments, including those of council meetings.³²⁸

The authority of the Seminole Nation over its funds has been expressly recognized in the two more recent statutes. The Act of July 3, 1952, authorized the Five Tribes to make contracts "involving the payment or expenditure of any money or affecting any property belonging to the Five Tribes" with the approval of the Secretary of Interior, under such rules and regulations as he might prescribe.³²⁹ The Act of October 17, 1968, provided that the judgment funds from two Seminole Indian Claims Commission cases and the Seminole school fund, plus the interest on those funds, "may be advanced, expended, invested, or reinvested for any purpose that is authorized by the General Council of the Seminole Tribe of Oklahoma or other recognized governing body of that tribe and approved by the Secretary of Interior."³³⁰ The congress-

324. *Id.*

325. *Id.*

326. *Id.* at 1134, citing *Creek Nation v. United States*, 78 Ct. Cl. 474 (1933).

327. 25 U.S.C. § 124 (1970).

328. 78 Ct. Cl. 474, 493-94 (1933).

329. 66 Stat. 323 (1952). This statute in effect amended section 28 of the Five Tribes Act, 34 Stat. 137 (1906), which prohibited the tribes from making contracts involving the expenditure of funds without presidential approval.

330. 82 Stat. 1148 (1968).

sional authorization of the tribal use of the judgment funds was necessary because "the annual appropriation acts for the Department of Interior prohibit the use of any Indian Claims judgment until after legislation has been enacted that sets forth the purposes for which the money may be used."³³¹ The authorization of tribal use of the school fund was necessary due to the provision in the Seminole Agreement placing that fund within the control of the Secretary of Interior.

*Conclusion: The Legal Status of the Five Tribes—
Question for the Future*

Although the present analysis has been confined to a discussion of the legal status of the Seminole government, it provides answers to some questions concerning the status of the Five Tribes in general, insofar as it has involved the interpretation of legislation affecting the tribes as a group. First, it is clear that these tribes still enjoy a special trust relationship with the federal government and have not been terminated as the Klamath and other tribes were terminated during the 1950's. Second, Congress expressly continued the existence of the governments of the Five Tribes and intended that tribal members continue to operate them. Finally, the Five Tribes still possess basic powers necessary to the exercise of their right to self-government, *i.e.*, the powers to select tribal representatives, determine form of government, and disburse funds. The few limitations Congress has placed on basic governmental operations of the Five Tribes as a group consist of the requirement that the Secretary of Interior approve election procedures;³³² the requirement that the President approve all tribal resolutions and ordinances;³³³ the limitation on length of council meetings;³³⁴ the authorization of the Secretary of Interior to have access to the books and records of the Five Tribes;³³⁵ the requirement that the Secretary, rather than the tribe, expend any per capita payments;³³⁶ and the authorization of the Secretary to make rules and regulations and approve contracts made by the tribes involving the expenditure of funds.³³⁷ Thus, federal administrators

331. S. REP. No. 1594, 90th Cong., 2d Sess. (1968).

332. 84 Stat. 1091 (1970).

333. 34 Stat. 137, § 28 (1906).

334. *Id.*

335. 25 U.S.C. § 199 (1970).

336. 30 Stat. 495, § 19 (1898). See 36 Stat. 1070, § 17 (1911), *codified at* 25 U.S.C. § 156 (1970), which gives the Secretary of Interior the authority to designate the depositories for the receipts from the sale of surplus and unallotted lands of the Five Tribes and to make per capita payments from the interest on those funds.

337. 82 Stat. 1148 (1968).

have far less control over tribal affairs than they have been willing to admit for the last three -quarters of a century.

However, several important and difficult questions remain to be answered for each tribe individually. First, the special legislation affecting each tribe, apart from the others, needs to be examined in order to determine whether Congress has placed any limitations, other than the ones enumerated herein, on their basic governmental powers. Second, the impact of the old tribal constitutions and laws on the present tribal governments need further study. While the *Harjo* case held that the old Creek constitution was still valid, the court obviously had problems in understanding the actual utilization of that document. Even where the old constitutions have been replaced by new ones, as in the case of the Seminole and Cherokee nations, questions remain concerning the validity of the old laws and their relationship with the new constitutions.³³⁸ Finally, the tribes still face the difficult task of determining the extent of inherent sovereignty still vested in them, such as powers of taxation, judicial authority, and legislative authority over land use. This will entail a study of the legislative intent behind the allotment legislation and the separate allotment agreements, and should determine whether a federal legislative remedy is necessary to the resumption of the exercise of any given sovereign power.

Admittedly, these remaining legal questions are somewhat intimidating, but the Creek people have set a precedent in solving difficult questions in their successful litigation of the *Harjo* case. The importance of the *Harjo* case has already been recognized by Choctaw and Chickasaw citizens. At a congressional hearing in May, 1977, they raised objections to the proposed sale of the

338. The new Seminole constitution contains no reference to the 1903 Revised Statutes of the Seminole Nation. Thus, it is possible that those provisions of the 1903 Revised Statutes not inconsistent with the new constitution are still valid today. As for the Cherokees, their new constitution, The Constitution of the Cherokee Nation of Oklahoma (effective July 5, 1976), specifically supersedes the provisions of the 1839 tribal constitution in Article XVI. Interestingly, a case brought by some Cherokee citizens against the newly elected chief, the former chief, the election committee, and the BIA, was decided a few months prior to the adoption of the new Cherokee constitution, and contains dictum to the effect that the 1839 Cherokee constitution was a "dead letter." That case, *Drywater v. Keeler*, No. 75-247-C, Slip op. (D.Okla. Mar. 31, 1976), was brought pursuant to the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.* (1970), and alleged that elections for chief were not conducted pursuant to the 1839 constitution. The action was dismissed, however, because the court found that the named defendants were only tribal members, and not actually the tribe per se, so that no jurisdiction could be had under the provisions of the Indian Civil Rights Act. While the dictum in the *Drywater* case is not persuasive as to the validity of the old constitution the tribe probably has settled that question by inserting the provision of supersession in the new. However, no mention is made in the new constitution of the old Cherokee laws, raising questions concerning the validity of those laws.

Arkansas riverbed, because the Choctaw chief and the Chickasaw governor were attempting to sell it without council approval as required by their nineteenth-century tribal constitutions.³³⁹ In August, Choctaw citizens filed a lawsuit alleging the current validity of their 1869 constitution.³⁴⁰ This type of action is necessary to the eventual understanding of the Five Tribes allotment legislation. Once this understanding occurs, federal officials will no longer be able to hide under a cloak of ignorance of the law, or make their own laws to fit agency goals, and the Five Tribes can move forward confident of their right to self-government.

339. *Arkansas Riverbed Rights of Cherokee, Choctaw, and Chickasaw Indian Nations, Hearings on S. 660, Before the U.S. Senate Select Comm. on Indian Affairs*, 90th Cong., 1st Sess. 50-53 (1977) (Statement of Jimmy Sam): "Our major concern is that neither the Bureau nor the principal chief has recognized the integral role that the legislative branch must have in authorizing the pursuit of such legislation and in considering the appropriateness of the proposed settlements.... I am speaking of the internal institutional structures of the tribe itself.... Within the Choctaw Nation, our [1860] constitution establishes a role for a general council. But through years of suppression by the Bureau of Indian Affairs and in cooperation with that policy by the principal chiefs since statehood in 1906, they have tended to identify tribal interests with the principal chief and have recognized him as the sole embodiment of the tribal interests."

340. *Morris v. Andrus*, No. 77-1667 (D.D.C. filed Sept. 27, 1977). This suit was brought by Choctaw citizens, members of the Choctaw General Council, against Department of the Interior officials and the principal chief of the tribe. The complaint alleges that the 1860 tribal constitution is the valid organizational document of the tribe, and that the attempts of the BIA to treat the Choctaw chief as the sole tribal representative, particularly where financial matters are concerned, violate the tribal constitution, treaties guaranteeing the tribe the right to self-government, and the trust relationship between the federal government and the tribe. The plaintiffs request the following: a declaratory judgment confirming the validity and continued force of law of the Choctaw constitution; the issuance of a preliminary injunction prohibiting defendants from disposing of tribal assets and from expending Choctaw funds, except those for operating expenses; the issuance of injunctive relief concerning the reorganization of the Choctaw government in accordance with the Choctaw constitution; and a permanent injunction prohibiting defendants from expending Choctaw funds and disposing of tribal assets, including the tribe's interest in the Arkansas riverbed, without the approval of the Choctaw General Council.