

12-14-1870

Report on the Effect of the 14th Amendment Upon Indian Tribes

Follow this and additional works at: <https://digitalcommons.law.ou.edu/indianserialset>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

S. Rep. No. 268, 41st Cong., 3rd Sess. (1870)

This Senate Report is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian and Alaskan Native Documents in the Congressional Serial Set: 1817-1899 by an authorized administrator of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 14, 1870.—Ordered to be printed.

Mr. CARPENTER, from the Committee on the Judiciary, submitted the following

REPORT.

The Committee on the Judiciary, who were instructed by resolution of the Senate, of April 7, 1870, "to inquire into and report to the Senate the effect of the fourteenth amendment to the Constitution upon the Indian tribes of the country; and whether by the provisions thereof the Indians are not citizens of the United States, and whether thereby the various treaties heretofore existing between the United States and the various Indian tribes are, or are not annulled," respectfully report:

That in the opinion of your committee the fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States, and does not annul the treaties previously made between them and the United States. The provisions of the amendment material to this question are as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States wherein they reside. * * *

Representation shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State, excluding Indians, not taxed.

The question is whether the Indians "are subject to the jurisdiction" of the United States, within the meaning of this amendment, and the answer can only be arrived at by determining the status of the Indian tribes at the time the amendment was adopted.

The European nations when first settling the American continent regarded discovery as the foundation of their relative rights; that is, they claimed the sovereignty of the country, including the right to extinguish the aboriginal title by purchase or conquest, without interference from any other European nation, as a consequence of discovery; but it was never pretended that discovery had any other effect as against the Indian nations inhabiting the country. Whatever may be thought of the Christianity of the Christians who established this principle, and in pursuance of it proceeded to exclude the Indians from the sovereign control of the country in which they were born, and which they and their ancestors had occupied and enjoyed, it is now too late to question its soundness, because in the condition of things which has grown up under its operation its renunciation would be productive of far more harm than good. The white man's treatment of the Indian is one of the great sins of civilization, for which no single generation or nation is wholly answerable, but which it is now too late to redress. Repentance is all that is left for us; restitution is impossible. But the harsh treatment of the race by former generations should not be considered a precedent to justify the infliction of further wrongs.

The principle must now be recognized and acted upon, that the Indians, after the European discovery and settlement of their domain, lost all sovereignty over it, retaining only the right of occupancy until their title to that should in some way be extinguished, and the right to regulate, without question, their domestic affairs, and make and administer their own laws, provided in the exercise of such right they should not endanger the safety of the governments established by civilized man. Beyond this limit the pretensions of European settlers never extended; but to this extent the principle referred to was recognized and enforced; and although the Indians were thus overshadowed by the assumed sovereignty of the whites, it was never claimed or pretended that they had lost their respective nationalities, their right to govern themselves, the immunity which belongs to nations in the conduct of war, or any other attribute of a separate political community.

By no nation was this doctrine more clearly declared than by England, and the English colonists immediately entered into treaties with the tribes, waged war and concluded peace with them, and in every respect recognized and treated with them in their collective and national capacity. During the Revolution Congress manifested great solicitude as to the course which might be pursued by the different Indian nations, and aimed to secure their coöperation against the British forces. And after the establishment of our independence, the same principle, as controlling the relations of the Government to the Indian tribes, was asserted and steadily maintained by the Congress of the Confederation, as it has been by the United States under our present Constitution. (Johnson *vs.* McIntosh, 8 Wheat., 543.)

One of the earliest official acts of the United States in relation to the Indians was the treaty concluded with the Delawares September 17, 1778, entitled "Articles of agreement and *confederation* made and entered into by Andrew and Thomas Lewis, esqs., commissioners for and on behalf of the United States of North America, of *the one part*, and Captain White Eyes, Captain John Kill Buck, jr., and Captain Pipe, deputies and chief men of the Delaware *nation*, of *the other part*." The provisions of this treaty are worthy of consideration, as showing the light in which the Indian tribes were then regarded :

ARTICLE 1. That all offenses, or acts of hostility, by one or either of the contracting parties against the other, be mutually forgiven and buried in the depth of oblivion, never more to be held in remembrance.

ARTICLE 2. That a *perpetual peace* and friendship shall from henceforth take place and subsist *between the contracting parties aforesaid*, through all succeeding generations; and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then *each shall assist the other*, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation; and that if *either of them shall discover any hostile designs forming against the other*, they shall give the earliest notice thereof, that timeous measures may be taken to prevent their ill effect

By the third article, the Delawares granted free passage *through their country* to the troops of the United States on their way to some of the forts held by British forces.

ARTICLE 4. For the better security of the peace and friendship now entered into by the *contracting parties* against all infractions of the same by *the citizens of either party* to the prejudice of the other, neither party shall proceed to the infliction of punishment on the citizens of the other otherwise than by securing the offender, &c., &c.

ARTICLE 5. Whereas the *confederation* entered into by the Delaware nation and the United States renders the first dependent on the latter for all the articles of clothing, utensils, and implements of war, and it is judged not only reasonable but indispensably necessary that the aforesaid nation be supplied with such articles, from time to time, as far as the United States may have it in their power, by a well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate salary, one more

influenced by the love of his country and a constant attention to the duties of his department, by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument; convinced of the necessity of such measures, the commissioners of the United States, at the earnest solicitation of the deputies aforesaid, have engaged, in behalf of the United States, that such a trade shall be afforded said nation, conducted on such principles of mutual interest as the wisdom of the United States, in Congress assembled, shall think most conducive to adopt for their mutual convenience.

ARTICLE 6. Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the States aforesaid to extirpate the Indians and take possession of their country; to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they, the said Delaware nation, shall abide by and hold fast the chain of friendship now entered into. And it is further agreed on between the *contracting parties*, should it for the future be found conducive for the mutual interest of both parties, to invite any other tribes who have been friends to the interest of the United States, to join the present *confederation*, and to form a State, whereof the Delaware nation shall be the head, and have a representation in Congress; provided, nothing contained in this article to be considered as conclusive until it meets the approbation of Congress. And it is also the intent and meaning of this article that no protection or countenance shall be afforded to any who are at present our enemies, by which they might escape the punishment they deserve.

This treaty is quoted from at considerable length, not only because it is the first entered into by this Government with any Indian tribe, but because it is believed to illustrate the relations which the Government has always claimed to maintain toward the Indian tribes.

The dependence of the tribe upon the United States is fully recognized by the fifth article of the treaty; but this was not regarded as depriving the tribe of their character as a nation or political community, because the treaty stipulates for many acts to be thereafter performed by the Delawares, which can only be performed by a separate community, independent of external municipal jurisdiction. Indeed such dependence is in no way incompatible with the idea of separate nationality. Sovereign states may be bound together by treaty alliances very unequal in their terms, and still remain sovereign states. (Vat., B. 1, ch. 16, sec. 194.)

The next treaty was concluded with the Six Nations, October 22, 1784, after the independence of the United States had been recognized by Great Britain. The supremacy assumed by the United States in this treaty, and the lofty tone of its provisions as compared with those of the treaty with the Delawares, indicate the different circumstances under which the two treaties were made. Yet the treaty with the Six Nations is made as with an independent state:

The United States of America give peace to the Senecas, Mohawks, Onondagas, and Cayugas, and receive them into their protection upon the following conditions, &c.

The treaty provides that the Oneida and Tuscarora *nations* should be secured in the possession of the lands on which they were settled; and fixed the boundaries of country to remain to the Indians; they releasing to the United States all outside of the limits agreed upon.

Then followed the treaty with the Wyandotts, Delawares, Chippewas, and Ottawas, concluded January 21, 1785; the treaty with the Cherokees, concluded November 28, 1785; the treaty with the Choctaws, concluded January 3, 1786; the treaty with the Chickasaws, concluded January 10, 1786; and the treaty with the Shawnees, concluded January 31, 1786; all prior to the adoption of the Constitution. In each and every of these treaties, the Indians are treated as states, or communities capable of entering into and performing the duties imposed by treaty obligations. They are treaties of peace; and made to cement

friendship between the United States and *the parties of the other part, respectively.*

Then came the Constitution ratified by New Hampshire, the ninth State, June 21, 1788, which contained the following provisions :

Article 1, section 2, clause 3: "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, &c., excluding Indians not taxed," &c.

Article 1, section 8, clause 3: The Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Article 2, section 2: The President "shall have power, by and with the advice and consent of the Senate, to make *treaties*, provided two-thirds of the Senators present concur."

Article 6, clause 2: "All *treaties made*, or which shall be made, under the authority of the United States, shall be the supreme law of the land," &c.

The treaty with the Six Nations of New York, which was concluded January 9, 1789, was submitted to the Senate, and President Washington issued his proclamation September 27, 1789, declaring that the treaty had been duly ratified.

On the 7th day of August, 1790, a treaty was concluded with the Creek Nation, entitled, "A treaty of peace and friendship, made and concluded between the President of the United States of America, on the part and behalf of the said States, and the undersigned, kings, chiefs, and warriors of the Creek Nation of Indians, on the part and behalf of the said nation."

The preamble of this treaty is as follows :

The parties being desirous of establishing permanent peace and friendship between the United States and the Creek Nation and the citizens and members thereof, and to remove the causes of war by ascertaining their limits, and making other necessary, just, and friendly arrangements ; the President of the United States, by Henry Knox, Secretary for the Department of War, whom he hath constituted with the full powers for this purpose, by and with the advice and consent of the Senate of the United States, and the Creek Nation by the undersigned kings, chiefs, and warriors, representing the said Nation, have agreed to the following articles, &c., &c.

ARTICLE 1. There shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals, towns, and tribes of the Upper, Middle, and Lower Creeks, and Seminoles, composing the Creek Nation of Indians.

Other articles acknowledged this nation to be under the protection of the United States, fixed the boundaries of their country, which the United States guaranteed to them ; and further provided as follows :

ARTICLE 6. If any citizen of the United States, or any person not being an Indian, shall attempt to settle on any of the Creeks' lands, such person shall forfeit the protection of the United States, and the Creeks may punish him or not, as they please.

ARTICLE 10. In cases of violence on the person or property of the individuals of either party, neither retaliation nor reprisal shall be committed by the other, until satisfaction shall have been demanded of the party of which the aggressor is, and shall have been refused.

The ratification of this treaty was proclaimed by President Washington August 13, 1790.

The treaty with the Cherokees, concluded November 28, 1785, contains the following :

ARTICLE 1. The headmen and warriors of all the Cherokees shall restore all the prisoners, citizens of the United States, &c.

ARTICLE 2. The commissioners of the United States, in Congress assembled, shall restore all the prisoners taken from the Indians during the late war to the headmen and warriors of the Cherokees, as early as is practicable.

ARTICLE 8. It is understood that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practiced on either side, except where there is a

manifest violation of this treaty; and then it shall be preceded first by a demand of justice, and if refused, then by a *declaration of hostilities*.

And from that time to the present similar treaties have been negotiated, entered into, and ratified by the Senate, with all the considerable tribes of Indians dwelling within the limits of the United States; and hardly a session of Congress is held that such treaties are not submitted to the Senate for their approval and ratification. During all this period, it has never been questioned that such treaties were properly made by the President, by and with the advice and consent of the Senate, exercising the treaty-making power conferred by the Constitution; and millions of dollars have been appropriated by law to discharge national obligations thus created.

This subject has frequently been considered by the State and federal courts, and in every instance the exemption of the tribes from municipal jurisdiction has been recognized and declared.

In *Jackson vs. Goodell*, 20 John., 193, the court, Kent delivering the opinion, say:

The Oneidas, the tribes composing the Six Nations of Indians, were originally free and independent nations, and it is for the counsel who contend that they have now ceased to be a distinct people, and become completely incorporated with us, to point out the time when that event took place. *In my view they have never been regarded as citizens, or members of our body-politic.* They have always been, and still are, considered by our laws as *dependent tribes*, governed by their own usages and chiefs; but placed under our protection, and subject to our coercion so far as the public safety required it, and no further. The whites have been gradually pressing upon them, as they kept receding from the approaches of civilization. We have purchased the greater part of their lands, destroyed their hunting grounds, subdued the wilderness around them, overwhelmed them with our population, and gradually abridged their native independence. *Still they are permitted to exist as distinct nations*, and we continue to treat with their sachems, in a national capacity, and as being the lawful representatives of their tribes. Through the whole course of our colonial history, these Indians were considered dependent allies. The colonial authorities uniformly negotiated with them, and made and observed treaties with them as sovereign communities exercising the right of free deliberation and action; but, in consideration of protection, owing a qualified subjection, in a national capacity, to the British crown. *No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and their lands under the protection of the British crown.* Such a fact is of frequent occurrence between independent nations. One community may be bound to another by a very unequal alliance, and still be a *sovereign state*. (Nat., Book 1, chap. 16, sec. 194.) *The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes. There is nothing in the proceedings of the United States, during the revolutionary war, which went to impair and much less to extinguish the national character of the Six Nations, and consolidate them with our own people. Every public document speaks a different language, and admits their distinct existence and competence as nations; but placed in the same state of dependence, and calling for the same protection which existed before the war. In the treaties made with them we have the forms and requisites peculiar to the intercourse between friendly and independent states, and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require of existing and acknowledged sovereignty?*

In 1831, in *The Cherokee nation vs. The State of Georgia*, 5 Peters, 1, Chief Justice Marshall says:

Is the Cherokee nation a *foreign state* in the sense in which that term is used in the Constitution? The counsel for the plaintiff have maintained the affirmative of this proposition with great earnestness and ability. *So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful.* They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. *The acts of the Government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.* And again, though the Indians are acknowledged to

have an unquestionable, and, hitherto, unquestioned right to the lands they occupy, until that right shall be extinguished by a *voluntary* cession to our Government. Yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated *foreign* nations. They may, more correctly, perhaps, be denominated *domestic dependent* nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of position when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relations to the United States resemble that of a ward to his guardian.

Mr. Justice Johnson, who delivered a separate opinion in this case, thus states the condition of the tribes :

I believe in one view, and in one only, if at all, they are or may be deemed a state, though not a sovereign state, at least while they occupy a country within our limits. Their condition is something like that of the Israelites when inhabiting the deserts. Though without land which they can call theirs in the sense of property, *their right to personal self-government has never been taken from them ; and such a form of government may exist, though the land occupied be in fact that of another.* The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them. *And such they certainly do possess ;* it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty, except as to their land and trade.

The court held the Cherokee nation not to be a *foreign state*, and consequently not capable of suing in the courts of the United States ; but Mr. Justice Thompson delivered a dissenting opinion, in which Mr. Justice Story concurred, maintaining that the Cherokees were a foreign state, within the meaning of the Constitution, and capable of suing in the federal courts.

In *Worcester vs. The State of Georgia*, 6 Pet., 515, Chief Justice Marshall again reviewed, in his clear and masterly style, the relations existing between our Government and the Indian tribes, examined history, treaties, laws, usages, and every other source of information, and deduced the conclusion which, it is believed, no man acknowledging the authority of reason can gainsay, that the States had no authority or dominion over the Indian tribes within their limits, and demonstrated that the United States had no such jurisdiction. Referring to history, he says :

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers who, as traders or otherwise, might seduce them into foreign alliances. The King purchased their lands when they were willing to sell, at a price they were willing to sell, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies ; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain, with regard to the Indians, were detailed by Mr. Stewart, superintendent of Indian affairs, in a speech delivered at Mobile in presence of several persons of distinction, soon after the peace of 1763. Toward the conclusion, he says :

" Lastly, I inform you that it is the King's order to all his governors and subjects to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them ; accordingly, all individuals are prohibited from purchasing any of your lands ; but, as you know that as your white brethren cannot feed you when you visit them, unless you give them ground to plant, it is expected that you will cede lands to the King for that purpose. But whenever you shall be pleased to surrender any of your territories to his Majesty, it must be done, for the future, *at a public meeting of your nation*, when the governors of the provinces, or the superintendent, shall be present and obtain the consent of all your people. The boundaries of your hunting grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

Again, speaking of the relation of the Cherokee nation to the United States under the treaties made with them, he says :

This relation was that of a nation claiming and receiving the protection of one more

powerful; *not that of individuals abandoning their national character and submitting, as subjects, to the laws of a master.*

Again :

From the commencement of our Government, Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

And again, at page 559 :

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentates than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently *admits their rank among those powers which are capable of making treaties.* The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

And again:

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States.

The doctrine of these decisions, like most of the legal and constitutional principles settled by that greatest of our Chief Justices, remains the unquestioned law of the court to-day, as may be seen by the recent case, *The Kansas Indians*, 5 Wallace, 737, where it was held :

If the tribal organization of Indian bands is recognized by the political department of the national Government as existing, that is to say, if the national Government makes treaties with, and has its Indian agent among them, paying subsidies, and dealing otherwise with "headmen" in its behalf, the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites, in the midst of whom, by the advance of civilization, they have come to find themselves, does not authorize a State government to regard the tribal organization as gone, and the Indians as citizens of the State where they are, and subject to its laws.

The legislation of Congress is based upon the same view of the relations which exist between the Government and the Indian tribes, and shows that Congress has uniformly respected the right of the Indians to govern themselves. A few instances only need be cited.

Chapter 13, Laws of 1802, section 14, (2 Stat. at Large, 143,) provides:

That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose, who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong for satisfaction; and if

such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, then it shall be the duty of such superintendent, or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury; and in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification: *Provided always*, That if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge by crossing over the line on any of the lands, he shall forfeit all claim upon the United States for such indemnification: *And provided also*, That nothing therein contained shall prevent the legal apprehension or arresting within the limits of any State or district of any Indian having so offended: *And provided further*, That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed by any such Indian, out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

Chapter 92, section 1, Laws of 1817, provides:

That if any Indian, or other person or persons, shall, within the United States, and within any town, district, or territory belonging to any nation or nations, tribe or tribes of Indians, commit any crime, offense, or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would by the laws of the United States be punished with death, or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offenses, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States.

Section 2 of same chapter provides:

That the superior courts in each of the territorial districts, and the circuit courts and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be first apprehended or brought for trial, shall have, and are hereby invested with full power and authority to hear, try, and punish all crimes, offenses, and misdemeanors against this act; such courts proceeding therein in the same manner as if such crimes, offenses, and misdemeanors had been committed within the bounds of their respective districts: *Provided*, That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another, within any Indian boundary.

Chapter 131, Laws of 1834, section 16, provides:

That where in the commission by a white person of any crime, offense, or misdemeanor within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment out of the treasury of the United States for any such property if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided also*, That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

Section 17 of same act provides:

That if any Indian or Indians belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the Commissioner of

Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification: *Provided*, That if such injured party, his representative, attorney, or agent shall in any way violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided also*, That unless such claim shall be presented within three years after the commission of the injury, such claim shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

Section 25 of same chapter provides:

That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country: *Provided*, That the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Chapter 83, Laws of 1839, was enacted to relieve the Brothertown Indians in the then Territory of Wisconsin, and provide for receiving them into citizenship. It provided for the division of a township of land among the members of the tribe, and that partition thereof should be made, and a map thereof be filed in the proper Department.

Section 7 provides:

That the said report and map shall be filed with the secretary of said Territory, and in the clerk's office of said county, and shall also be transmitted to the President on or before the 1st day of January next; and after the same shall have been filed and transmitted to the President, as aforesaid, the said Brothertown Indians, and each and every of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall in all respects be subject to the laws of the United States and of the Territory of Wisconsin, in the same manner as other citizens of said Territory; and the jurisdiction of the United States and of said Territory shall be extended over the said township or reservation now held by them in the same manner as over other parts of said Territory; and their rights as a tribe or nation, and their power of making or executing their own laws, usages, or customs as such tribe, shall cease and determine: *Provided, however*, That nothing in this act shall be so construed as to deprive them of the right to any annuity now due to them from the State of New York or the United States, but they shall be entitled to receive any such annuity in the same manner as though this act had not been passed.

From a perusal of these statutes it is manifest that Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States. On the contrary, they have uniformly been treated as nations, and in that character held responsible for the crimes and outrages committed by their members, even outside of their territorial limits. And inasmuch as the Constitution treats Indian tribes as belonging to the rank of nations capable of making treaties, it is evident that an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void.

In the opinion of your committee, the Constitution and the treaties, acts of Congress, and judicial decisions above referred to, all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment to the Constitution. The Government has asserted a political supremacy over the Indians, and the treaties and laws quoted from present these tribes as "domestic, dependent nations," separated from the States of the Union within whose limits they are located, and exempt from the operation of State laws;

and not otherwise subject to the control of the United States than is consistent with their character as separate political communities or states. Their right of self government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned; and while the United States have provided by law for the punishment of crimes committed by Indians straggling from their tribes, and crimes committed by Indians upon white men lawfully within the reservations, the Government has carefully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another in the Indian country. Volumes of treaties, acts of Congress almost without number, the solemn adjudications of the highest judicial tribunal of the republic, and the universal opinion of our statesmen and people, have united to exempt the Indian, being a member of a tribe recognized by, and having treaty relations with, the United States from the operation of our laws, and the jurisdiction of our courts. Whenever we have dealt with them, it has been in their collective capacity as a state, and not with their individual members, except when such members were separated from the tribe to which they belonged; and then we have asserted such jurisdiction as every nation exercises over the subjects of another independent sovereign nation entering its territory and violating its laws.

It is worthy of mention that those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, "and subject to the jurisdiction," and that such has been the universal understanding of all our public men since that amendment became a part of the Constitution. And in the opinion of your committee, the second section of the amendment furnishes conclusive evidence of this fact, and settles the question. It provides "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." The original Constitution determined the basis of representation, "by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." That is, three-fifths of the slave population were to be added to the number of free persons. The fourteenth amendment, section 1, further provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause "three-fifths of all other persons" is wholly omitted; but the clause "excluding the Indians not taxed" is retained.

The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. They were excluded by the original constitution, and in the same terms are excluded by the amendment from the constituent body, the people. Considering the political sentiments which inspired the amendment, it cannot be supposed that it was designed to exclude a particular class of citizens from the basis of representation. *The Indians were excluded because they were not citizens.*

For these reasons your committee do not hesitate to say that the Indian tribes within the limits of the United States, and the individ-

nals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the fourteenth amendment, "*subject to the jurisdiction*" of the United States; and, therefore, that such Indians have not become citizens of the United States by virtue of that amendment; and if your committee are correct in this conclusion, it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by that amendment.

To maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, and to which they were neither requested nor permitted to assent, to annul treaties then existing between the United States as one party, and the Indian tribes as the other parties respectively, would be to charge upon the United States repudiation of national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce their just rights, and were enjoying the voluntarily assumed guardianship and protection of this Government.

Although your committee have not regarded the questions proposed for their consideration by this resolution of the Senate as at all difficult to answer, yet respect for the Senate which ordered the investigation, and the existence of some loose popular notions of modern date in regard to the power of the President and Senate to exercise the treaty-making power in dealing with the Indian tribes, have induced your committee to examine the question thus at length, and present extracts from treaties, laws, and judicial decisions; and your committee indulge the hope that a reference to these sources of information may tend to fix more clearly in the minds of Congress and the people the true theory of our relations to these unfortunate tribes.

It is pertinent to say, in concluding this report, that treaty relations can properly exist with Indian tribes or nations only, and that, when the members of a tribe are scattered, they are merged in the mass of our people, and become equally subject to the jurisdiction of the United States. It is believed that some treaties have been concluded and ratified with fragmentary, straggling bands of Indians who had lost all just pretensions to the tribal character; and this ought to admonish the treaty-making power to use greater circumspection hereafter.