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25 U.S.C. Sec. 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?

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INDIAN RIGHTS: 25 U.S.C. § 71: THE END OF INDIAN SOVEREIGNTY OR A SELF-LIMITATION OF CONTRACTUAL ABILITY?

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Due to the interpretation of the commerce clause of the United States Constitution,[1] the exclusive powers of the federal government to regulate its relations with Indian nations have never been successfully challenged.[2] However, the precise basis of congressional power to regulate Indian internal affairs has not been defined by the courts,[3] although they generally assume the power exists.[4]

Prior to the Act of March 3, 1871,[5] 666 treaties with Indian tribes appear in the statutes.[6] Although some commentators have expressed the opinion that treaties were used in lieu of the "normal legislative process,"[7] Indian legislation in Congress prior to 1871 was passed pursuant to either the commerce clause or ratified treaties.[8] The vast majority of this legislation was appropriations acts to fulfill treaty obligations.[9] The validity of Indian treaties being clearly established as a matter of law,[10] presumably legislation based on these treaties that allows Congress to regulate specified internal tribal affairs would be valid. However, in extending congressional authority to interfere with internal tribal government without Indian consent, the courts have generally resorted to a multi-inferentialistic approach,[11] ranging from theories such as economic[12] and military dependence,[13] and doctrines such as conquest,[14] wardship,[15] and plenary powers,[16] to statutes such as Section 71 of Title 25 of the United States Code (hereafter referred to as just Section 71).[17]

In view of the tremendous complexity required for any analysis of such a multi-inferential approach, it may be helpful to attempt an in-depth analysis of one specific portion of the Court's reasoning. With this in mind, Section 71,[18] which is often cited as part of the reasoning allowing such congressional intrusion into internal tribal affairs,[19] will be considered.

Legislative Origins

Section 71 of Title 25 resulted from opposition of the House of Representatives to its practical exclusion from any policy-making

role in Indian affairs.[20] For nearly a century the executive branch made treaty arrangements with Indians "by and with the Advice and Consent of the Senate."[21] Although the House appropriated monies to carry out the treaty provisions, it had no voice in the development of substantive Indian policy.[22] This resentment resulted in an 1867 act presaging the termination of the treaty-making period. The pertinent section of the act provided:

> And all laws allowing the President, the Secretary of the Interior, or the Commissioner of Indian affairs to enter into treaties with any Indian tribes are hereby repealed, and no expense shall hereinafter be incurred in negotiating a treaty with any Indian tribe until an appropriation authorizing such expense shall be first made by law.[23]

However, this provision, being one of several abortive attempts to end Indian treaty-making,[24] was repealed a few months later.[25]

In concert with attacks by the Indian Bureau administration[26] and frontier senators,[27] the strong fight by the House made it evident by 1871 that the treaty system had reached its end.[28] The Indian appropriation act for the fiscal year 1872, approved on March 3, 1871, contained the following clause, added to a sentence making an appropriation for the Yankton Indians:

> Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty: Provided further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[29]

Judicial Use and Interpretation

The Federal District Courts, in affirming congressional license to interfere with tribal affairs, have continuously relied on extralegal reasoning and partial quotation of Section 71.[30] For example, in *United States v. Blackfeet Tribe*,[31] the Court stated the blunt fact that an Indian tribe could exercise only those sovereign powers that the United States allowed.[32] While for many years treaties had been used to deal with Indian tribes, and some elements of sovereignty were recognized, Congress had prohibited the further recognition of Indian tribes as independent nations through Section 71.[33]

The difference between the implications of the Act as used and the Act as written are readily apparent. As used, Indian tribes or nations are no longer recognized as political entities to any degree other than that which the Congress specifically determines. However, as written, the Act simply changes the method of making arrangements between political entities.[34]

The Supreme Court appears to have gone full circle in its interpretation of Section 71. In 1872, shortly after passage of the statute, the Court was again called upon to determine the status of the Cherokee Nation in *Holden v. Joy.*[35] While recognizing the domestic dependent nation status expressed in *Cherokee Nation v. Georgia*,[36] the Court further stated that the Cherokees were recognized as a people capable of maintaining the relations of peace and war,[37] and of being politically responsible for aggressions by their people committed on citizens of the United States.[38] The Court felt that the actions of the legislative and executive branches throughout the history of the United States had plainly recognized the Indian tribal nations as states[39] and decided that they were bound by those actions.[40]

In 1876, in yet another appropriation act,[41] Congress specifically provided for agreements to be made between the President and the Sioux Indians.[42] The appropriation act was coupled with a proviso declaring that no further monies would be appropriated for subsistence of the Sioux until an agreement was entered into by the Sioux with the President of the United States outlining terms for cession of the Black Hills.[43] In *Ex parte Crow Dog*,[44] construing the status of an agreement which was made and ratified in part by an act of Congress,[45] the Court declared that its ratification by statute, instead of as a treaty, was in accordance with the policy declared in Section 71.[46]

Only a year later in the Indian voting rights case of *Elk v. Wilkins*,[47] the Court made an even stronger statement as to the effect of Section 71. The Court pointed out that the utmost effect of this section was to require agreements with Indian tribes to be ratified through legislative power and not treaty-making power.[48] Thereafter the Court proceeded to deny an Indian's voting rights, even though he had fulfilled all of the conditions necessary under his people's treaty.[49] Here, thirteen years after passage of Section 71, is a definitive statement that the utmost effect of the statute was a change in the method of the United States' ratification of an agreement between two international bodies politic.[50]

However strongly the alien or foreign status of Indian tribes was expressed by a Court denying an Indian person voting rights

under the United States legal system,[51] when an Indian challenged the assumption of jurisdiction in a criminal case, the Court readily upheld jurisdiction.[52] Only two years after the decision in *Elk*,[53] the Court in *United States v. Kagama*[54] upheld the assumption of a criminal jurisdiction by the United States over Indian land, asserting that within the geographical limits of the United States there were only two political powers, the government of the United States and the states of the Union.[55] It should be noted that the Court did not cite or overrule *Elk*[56] on the jurisdictional question[57] when it decided that Section 71 was an expression of a new congressional intent to govern Indians by acts of Congress.[58]

In referring to *Crow Dog*,[59] the Court stated that the agreement was supposed to extend over the Sioux people the laws of the United States and the jurisdiction of its courts.[60] The Court further pointed out that the decision in *Crow Dog* admitted that if the intention of Congress had been for the courts to punish the murder of one Indian by another, the law would have been valid.[61] The Court could not see, however, in the agreement with the Indians sanctioned by Congress, a purpose to repeal Section 2146 of the Revised Statutes. This section expressly excludes from that jurisdiction the case of a crime committed by an Indian against another in the Indian country.[62] By approving the unilateral extension of jurisdiction in this instance, thee Court may have lost sight of two vital factors due to its interpretation of Section 71. First, whatever the suppositions of the Court as to the intended effect of the agreement, it did not explicitly extend to the United States' criminal jurisdiction.[63] Second, the Court's statement, "[I]f the intention of Congress had been to punish . . . the law would have been valid,"[64] avoids the substance of the agreement making process. In substance, an agreement was a treaty between the federal government and an Indian tribe[65] with only the manner of ratification by the federal government being changed.[66] Thus, agreement making depends on the will of both parties,[67] and either the United States or an Indian tribe may and frequently has refused to make treaties or pacts which the other has desired.[68]

Kagama[69] begins a period of uncertainty in the judicial interpretation of Section 71. Cases prior to *Kagama* held that the statute did no more than change the method of contracting and did not affect the political status of Indians.[70] In *Kagama*, the Court first used the statute as one of its many bases for denying Indian political control over Indian land.[71]

Quickly expanding the ruling produced by *Kagama*, the Court in *Choctaw Nation v. United States*[72] went on to decide that Sec-

tion 71 allowed Congress to unilaterally extend legislative authority to Indian land.[73] Also, that Congress was determined to extend its legislative power over Indian land and had made the Choctaws, in their "peculiar relationship to the United States,"[74] subject to the power and authority of the laws of the United States.[75] In 1890, this opinion was quoted with favor in *Cherokee Nation v. Kansas Railway Co.*[76] This decision allowed the United States to grant a railroad easement through the Cherokee country over the protests of the Cherokees and their fee simple title, which was acquired by the treaty of Fort Gibson, February 14, 1833.[77]

By 1898, the statute was interpreted in *New York Indians v. United States*[78] as a general law that denied the right of any Indian tribe or nation to be recognized as an independent nation for treaty-making purposes.[79] In 1902, the Court again authorized unilateral legislative control via Section 71,[80] stating that the intention Congress expressed there was to make Indian tribes directly amenable to the laws of the United States by the immediate exercise of congressional legislative power.[81] A change of position occurred again in 1903 when *Lone Wolf v. Hitchcock*[82] decided that legislative action to ratify federal government-Indian agreements was the consequence of the policy expressed in Section 71.[83]

Two years later, a return to the problems presented in *Kagama*[84] was evidenced when the Court, in the case of *In re Heff*[85] stated that Indians were not to be dealt with as separate nations after 1871. Thereafter Indians were subject to the direct legislation of Congress.[86] Between 1913 and 1962, three cases involving this statute produced conflicting interpretations.[87]

In 1975, a jurisdictional struggle developed between the United States and the state of Washington in *Antoine v. Washington.*[88] While Washington claimed the right to regulate hunting practices on land ceded by the Indians to the United States,[89] the federal government claimed jurisdiction to determine the hunting rights of the Indians on that land.[90] There was no question of tribal jurisdiction, and the Court held that as Section 71 did no more or no less than change the method of the ratification procedures incumbent on the federal government, the agreement, like all treaties made, became the law of the land.[91]

The situation in *DeCoteau v. District County Court,*[92] also decided in 1975, is somewhat different. Here the jurisdictional dispute arose between South Dakota and the Sisseton-Wahpeton Sioux.[93] Even though the tribal constitution and the tribal code, both approved by the Secretary of the Interior, expressly assumed complete jurisdiction[94] and a tribal resolution expressly provided

for tribal control of adoption cases,[95] the Court refused to allow that jurisdiction on nontrust land subject to non-Indian occupancy.[96] Notwithstanding the acknowledgement of *Kagama*[97] expressed in the dissent that the people of a state surrounding a reservation were among the Indians' deadliest enemies,[98] the Court proceeded to justify its interpretation of the agreement by "quotes of tribal spokesmen" in the local press.[99] Using Section 71 to deny international status to Indians and approve the authority of Congress to regulate Indian affairs through statute,[100] the authority of Congress and the President to implement the General Allotment Act of 1887[101] was unquestioned.[102] The dissent, however, felt that the duress under which the agreement was consummated and the insufficiency of the termination language was not well treated by the majority.[103]

So it developed that 103 years after the first Supreme Court interpretation of Section 71 of Title 25 of the United States Code and 86 years after the dual blows to Indian sovereignty of *Kagama*[104] and *Choctaw Nation*,[105] the Court cited Section 71 twice in the same year.[106] These two decisions are indicative of the manner in which this statute has been used since its passage. In *Antoine*,[107] the legislative history of the Act is considered in concluding that acts of Congress now ratify agreements with Indians.[108] This was the utmost meaning of Section 71,[109] and such agreements are the law of the land and binding upon the states, notwithstanding the state not being a party to the agreement.[110] However, less than two weeks later in *DeCoteau*,[111] the Court again cited Section 71 in part, stating: "after 1871, the tribes were no longer regarded as sovereign nations, and the Government began to regulate their affairs through statute or through contractual agreements ratified by statute."[112] As usual in the cases of partial quotation, this was a part of the "historical background"[113] used by the Court when rationalizing a decision limiting Indian jurisdiction.

In both cases, an agreement was made after 1871 between the Indians involved and the United States government ceding reservation land.[114] A jurisdictional question arose regarding the ceded land[115] and the validity of the agreement making process was unanimously approved.[116] While both cases involved the question of extension of state jurisdiction over the ceded portion of the reservation,[117] the distinction in the use of Section 71 may have arisen over the political question of jurisdiction claimed by the Sisseton-Wahpeton Sioux.[118]

Thus, in two similar cases, two distinct uses are made of the same statute. *Antoine*,[119] in upholding federal jurisdiction over In-

dians, treats Section 71 at length and incorporates it in the holding of the Court.[120] *DeCoteau*,[121] decided less than two weeks later, uses the section as obiter dicta in a method clearly contrary to its prior holding in *Antoine*[122] to deny Indian jurisdiction over Indians.[123] No change of the personnel of the Court or great philosophical changes in attitude can account for this change of usage. The Court generally determines, in its use of the statute as dicta, that it is an expression of Congress that Indian tribes are no longer considered as nations.[124] The Court's attempts to judge the legislative intent on questions of tribal status have not produced consistent results.[125] An example of the problems encountered in this area can be seen in the cases of *In re Heff*[126] and *United States v. Nice.*[127] In *Heff*,[128] after stating that since 1871 Indians had been subjected to the direct authority of Congress, the Court decided that the allotment acts had terminated the wardship status of Indians with the granting of United States citizenship.[129] However, the Court was later forced to overrule *Heff*[130] when it became clear that notwithstanding allotments and citizenship, both Congress and the administrative officers of the government had proceeded on the theory that the tribal relations and wardship status had not been disturbed.[131]

Nonjudicial Recognition of Sovereign Powers

Assuming, *arguendo*, that after 1871, Congress no longer considered Indians to be nations subject only to the superior power of the United States to force its will upon them, but considered them to possess none of the indicia of sovereignty, would the subsequent actions of Congress and the Executive be consistent with this policy? While statutes have been enacted that encroach on tribal sovereignty,[132] the stance of the executive and legislative branches held Indian nations to the highest concept of duty between nations under the rules of international law.[133] The executive branch has historically resorted to use of the armed forces to control "uprisings" occurring in Indian country.[134] The army held some tribes as prisoners of war into the 1900's[135] and justified the killing of members of those tribes as attempts to prevent escapes by prisoners of war as late as 1906.[136] Conversely, it appears that the killing of Americans by tribal members not in amity with the United States was an act of war and not punishable by domestic laws.[137] Congress, by specifically providing for United States actions if a state of war arises with an Indian tribe,[138] has recognized the power of Indians to make war until the present

time.[139] This recognition has had definite consequences for both the Indian and non-Indian in the adjudication of actions which would have been murder or manslaughter under domestic law.[140]

Passport requirements to enter Indian country were not lifted until 1934,[141] and Congress has passed statutes which subject Indian nations to the standards of international law.[142] Furthermore, listed among the reasons for the United States' continuing involvement in the Inter-American Institute was: "4. Nonparticipation in the Institute might provoke the accusation by organized Indian groups in this country, such as the National Congress of American Indians, that the United States is neglecting its international obligations toward the Indian."[143]

Thus, while Congress passes statutes interfering with internal tribal sovereignty,[144] and the courts continue to declare that Indian nations no longer exist as nations,[145] the same Congress and courts continue to hold Indians to a standard of international conduct.[146] In fact, Congress and the courts have held Indian nations to the highest concept of reparations shared by independent nations under the law of treaties. This inconsistency has never been adequately explained.[147]

Constitutionality

The constitutionality of Section 71 has not been challenged and some questions may be raised as to its validity.[148] Whether Congress, a nontreaty-making division of the government, has the power to place a binding limitation upon the treaty-making power, *viz.*, the President and the Senate,[149] and whether a treaty made with an Indian tribe next year and constitutionally ratified would be valid or invalid, are questions which have not been addressed by the courts.[150]

However, the Supreme Court has stated that if Congress adopts a policy conflicting with the Constitution of the United States, it is then acting beyond its authority and the Court must declare the resulting statute null and void.[151] Thus it would follow that if Congress does not have the power to limit the treaty-making authorities, this statute must be null and void on its face.[152]

Conclusion

A return to the treaty method of interactions between the United States and Indian nations is a matter of great concern among traditional Indian people today.[153] The reasons for this con-

cern are perhaps best expressed by the Institute for the Development of Indian Law:

> Perhaps the basic contention of American Indians today with respect to their treaty rights is not that treaties cannot be repealed, abrogated, or superseded (by either party), but that they are not given the dignity which such legal agreements should receive. The United States is deadly serious when speaking of the land cessions made by the tribes under the treaties. When it comes to fulfilling the duties of the United States under the same treaties, however, we are told that the treaties are either old, have been superseded by subsequent legislation or that they do not mean what they plainly say.[154]

When Congress condemned the use of treaties, it did not prevent the practice of dealing with Indian nations by means of "constitutions," "agreements," "charters," and "conventions,"[155] nor impair the validity of any existing treaty,[156] nor impair the political status of Indian governments.[157] The only difference in these allowable types of agreements and treaties is that agreements are ratified by both Houses of Congress instead of by the Senate alone.[158] From the standpoint of the Indian nations, it made little difference what manner of ratification and procedure was incumbent upon the representative of the United States who dealt with them.[159] There was no change in the legal effect of such agreements,[160] and there is no reason Indian nations cannot make agreements with the United States of today.[161]

Section 71 of Title 25 of the United States Code did not destroy or decrease the political status of the Indian nations[162] and did not express a congressional intent that tribal governments were dissolved or weakened.[163] If constitutional, it served only to limit the United States in the manner in which it could deal with Indian nations.[164]

NOTES

1. U.S. CONST. art. 1, § 8, cl.3.

2. *See* Antoine v. Washington, 420 U.S. 194, 204 (1975).

3. Comment, 7 STAN. L. REV. 285, 287 (1955). *See, e.g.*, United States v. Kagama, 118 U.S. 375, 379 (1886).

4. Comment, 7 STAN. L. REV. 285, 287 (1955).

5. Indian Appropriations Act of Mar. 3, 1871, ch. 120, 16 Stat. 466 (1871) (*codified at* § 2079 of the Revised Statutes, now 25 U.S.C. § 71) (1971)). "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power *with whom the United States may contract by treaty*" (emphasis added) [hereinafter referred to in the text as § 71].

6. Marks v. United States, 161 U.S. 297, 302 (1896).

7. Note, *The American Indian, Tribal Sovereignty and Civil Rights*, 51 IOWA L. REV. 654, 660 (1966).

8. *Id.* at 660 n.47.

9. *Id.*

10. F. COHEN, FEDERAL INDIAN LAW 274 (1942).

11. *See* United States v. Ramsey, 271 U.S. 467 (1926); Brader v. James, 246 U.S. 96 (1918); United States v. Nice, 241 U.S. 591, 593 (1916); Tiger v. Western Inv. Co., 221 U.S. 286, 311 (1911); Super v. Work, 3 F.2d 90, 91 (D.C. Cir. 1925).

12. United States v. Kagama, 118 U.S. 375, 383 (1886).

13. *Id.*

14. United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 237 (1975).

15. United States v. Kagama, 118 U.S. 375, 383 (1886).

16. Board of County Commn'rs v. Seber, 318 U.S. 705, 716 (1943).

17. United States v. Kagama, 118 U.S. 375, 382 (1886).

18. 25 U.S.C. § 71 (1970) (originally enacted Mar. 3, 1871).

19. *E.g.*, Cherokee Nation v. Hitchcock, 187 U.S. 294, 305 (1902).

20. Antoine v. Washington, 420 U.S. 194, 202 (1975); FEDERAL INDIAN LAW, *supra* note 10, at 66; SCHMECKEBIER, OFFICE OF INDIAN AFFAIRS 56-58 (1927); WALKER, THE INDIAN QUESTION, 5 (1874).

21. Antoine v. Washington, 420 U.S. 194, 202 (1975).

22. *Id.*

23. Act of Mar. 29, 1867, ch. 13, § 6, 15 Stat. 7, 9 (1867). *See also* Act of Apr. 10, 1869, ch. 16, § 5, 16 Stat. 13, 40 (1869). The first annual report of the Board of Indian Commissioners submitted late in 1869, and the annual report of the Commissioner of Indian Affairs for the same year, recommended the abolition of the treaty system of dealing with the tribes. J. KINNEY, A CONTINENT LOST—A CIVILIZATION WON 148, 159, 160 (1937).

24. Schmeckebier recounts the incidents of that struggle in these terms: "While the Indian Peace Commission succeeded in ending the Indian wars, the treaties negotiated by it and ratified by the Senate were not acceptable to the House of Representatives. As the Senate alone ratified the treaties, the House had no opportunity of expressing its opinion regarding them until the appropriation bill for the fiscal year 1870, making appropriations for carrying out the treaties, came before it for approval during the third session of the Fortieth Congress. The items providing funds for fulfilling the treaties were inserted by the Senate, but the House refused to agree to them, and the session expired on March 4, 1869, without any appropriations being made for the Indian Office for the fiscal year beginning July 1. When the first session of the Forty-first Congress convened in March, 1869, a bill was passed by the House in the same form as at the previous session. The Senate promptly amended it to include the sums needed to carry out the treaties negotiated by the Peace Commission. The House again refused to agree but a compromise was finally reached by which there was voted in addition to the usual appropriations a lump sum of two million dollars 'to enable the President to maintain peace among and with the various tribes, bands, and parties of Indians, and to promote civilization among said Indians, bring them, where practicable, upon reservations, relieve their necessities, and encourage their efforts at self-support.'

"The House also insisted on the insertion of a section providing 'That nothing in this act contained, or in any of the provisions thereof, shall be so construed as to ratify or approve any treaty made with any tribes, bands, or parties of Indians since the twentieth day of July, 1867.' This was rather a remarkable piece of legislation in that while it did not abrogate the treaties, it withheld its approval although the treaties had already been formally ratified and proclaimed. It had no legal effect but merely wrote into the act the feeling of the House of Representatives. At the next session of Congress a similar section was added to the Indian appropriation act for the fiscal year 1871, with the additional provision that nothing in the act should ratify, approve, or disaffirm any treaty made since July 20, 1867, 'or affirm or disaffirm any of the powers of the Executive and Senate over the subject'. The entire section, however, was inadvertently omitted in the enrollment of the bill, and was not formally enacted until the passage of the appropriation act for the fiscal year 1872.

"Probably one of the reasons for the refusal of the House to agree to the treaty provisions was its distrust of the administration of the Office of Indian Affairs, for it was during the debate on this bill that General Garfield made his scathing indictment of that Office....

"When the appropriation bill for the fiscal year 1871 came up in the second session of the Forty-first Congress the fight of the previous year was renewed, the Senate insisting on appropriations for carrying out the new treaties and the House refusing to grant any funds for that purpose. As the end of the session approached it appeared as if the bill would fail entirely, but after the President had called the attention of Congress to the necessity of making the appropriations, the two houses finally reconciled their differences.

"The strong fight made by the House and expressions of many members of the Senate made it evident that the treaty system had reached its end, and the Indian appropriation act for the fiscal year 1872, approved on March 3, 1871, contained the following clause, tacked on to a sentence making an appropriation for the Yankton Indians: 'Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." OFFICE OF INDIAN AFFAIRS, *supra* note 20, at 56-58. *See also* the statement of former Commissioner of Indian Affairs, Francis A. Walker, who wrote in 1874: "In 1871, however, the insolence of conscious strength, and the growing jealousy of the House of Representatives towards the prerogative—arrogated by the Senate—of determining, in connection with the Executive, all questions of Indian right and title, and of committing the United States incidentally to pecuniary obligations limited only by its own discretion for which the House should be bound to make provision without inquiry, led to the adoption after several severe parliamentary struggles of the declaration..., that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." WALKER, THE INDIAN QUESTION 5, 11, 12 (1874), *reprinted in* FEDERAL INDIAN LAW *supra* note 10, at 67.

25. Act of July 10, 1867, ch. 34, 15 Stat. 18 (1867).

26. FEDERAL INDIAN LAW, *supra* note 10, at 18. *See also* J. KINNEY, A CONTINENT LOST—A CIVILIZATION WON 148, 159, 160 (1937).

27. "[T]he relation of the Indian tribes to the United States... is continually changing, and nations of Indians that might have been so recognized years ago may now be well regarded as having deteriorated to such an extent as to justify the adoption of this declaration on the part of Congress." CONG. GLOBE, 41st Cong., 3d Sess. 1824 (1871), remarks of Senator Harlan. Senator Harlan was not the most disinterested observer of the status of Indian nations on America's frontier, *i.e.*, "Harlan, James, Raised on the Indiana Frontier; settled in Iowa, 1845; U.S. Senator Free Soil 1855-61, Republican 1861-65, 1867-73. Served an inept term as U.S. Secretary of the Interior 1865-66." CONCISE DICTIONARY OF AMERICAN BIOGRAPHY 299 (1964).

28. OFFICE OF INDIAN AFFAIRS, *supra* note 20, at 58.

29. 25 U.S.C. § 71 (1970).

30. *E.g.*, United States v. Banks, 383 F. Supp. 192 (W.D.S.D. 1974).

31. 364 F. Supp. 193 (D. Mont. 1973).

32. *Id.* at 194.

33. *Id.*

34. *Compare* "prohibited the further recognition of Indian tribes as independent nations," United States v. Blackfeet Tribe, 364 F. Supp. 192, 194 (D. Mont. 1973), *with* "prohibited the further recognition of Indian Tribes as independent nations *with whom the United States may contract by treaty.*" 25 U.S.C. § 71 (1970) (emphasis added).

35. 84 U.S. 211 (1872).

36. 30 U.S. (5 Pet.) 1, 16, 17 (1831).

37. Holden v. Joy, 84 U.S. 211, 242 (1872).

38. *Id.*

39. *Id.*

40. *Id.*

41. Indian Appropriation Act of Aug. 15, 1876, ch. 289, 19 Stat. 192 (1876).
42. *Id.*
43. *Id.*
44. 109 U.S. 556 (1883).
45. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 (1877).
46. *Ex parte* Crow Dog, 109 U.S. 556, 564, 565 (1883).
47. 112 U.S. 94 (1884).
48. *Id.* at 107.
49. *Id.* [The Court declared that] "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power) although in a geographic sense born in the United States are no more 'born in the United States and subject to the jurisdiction thereof' within the meaning of the first section of the fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government or the children born within the United States of ambassadors or other public ministers of foreign nations."

Thus, while federal courts were busy maintaining the plenary power of Congress over Indians, classifying Indian tribes as wards of the federal government, and denying an international dimension to Indian political existence, the individual Indians seeking to exercise their constitutional rights were being told that they were, in effect, "no more than the children of foreign subjects," although a member of a "domestic dependent nation." Elk was required to perform all of the naturalization functions of a native-born European, Asian, or African in order to exercise his voting franchise. V. DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES, 147, 178 (1974).

50. *See* Elk v. Wilkins, 112 U.S. 94 (1884); DELORIA, *supra*, at 148.
51. Elk v. Wilkins, 112 U.S. 94 (1884).
52. United States v. Kagama, 118 U.S. 374 (1886).
53. Elk v. Wilkins, 112 U.S. 94 (1884).
54. United States v. Kagama, 118 U.S. 375 (1886).
55. *Id.* at 379.
56. Elk v. Wilkins, 112 U.S. 94 (1884).
57. *Id.*
58. United States v. Kagama, 118 U.S. 375, 379, 382 (1886).
59. *Ex parte* Crow Dog, 109 U.S. 556 (1883).
60. United States v. Kagama, 118 U.S. 375, 382, 383 (1886).
61. *Id.* at 383.
62. *Id.*
63. *See* Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 (1887); *Ex parte* Crow Dog, 109 U.S. 556 (1883).
64. United States v. Kagama, 118 U.S. 375, 383 (1886).
65. *See* FEDERAL INDIAN LAW, *supra* note 10, at 67.
66. *Id.*
67. *Id.* at 274.
68. *Id.*
69. United States v. Kagama, 118 U.S. 375 (1886).
70. Elk v. Wilkins, 112 U.S. 95, 107 (1884); *Ex parte* Crow Dog, 109 U.S. 556, 564, 565 (1883); Holden v. Joy, 84 U.S. 211, 242 (1872).
71. United States v. Kagama, 118 U.S. 375 (1886).
72. 119 U.S. 1 (1886).
73. *Id.* at 27.
74. *Id.* One wonders if Justice Matthew's statement that "[The Choctaw Nation] stands in a peculiar relation to the United States," was attributable to an analogy placing Indians in a similar relation to the United States as were the blacks to individual whites within the "peculiar institution" of the South, a matter of great importance and conflict in his day.
75. *Id.*
76. 135 U.S. 641 (1890).
77. *Id.* at 655.

78. 170 U.S. 1 (1898).

79. *Id.* at 33. *Cf.* Stephens v. Cherokee Nation, 174 U.S. 445, 583 (1899) (only one year after *New York Indians*, the Court has returned to using 25 U.S.C. § 71 to approve the extension of unilateral legislative authority in *Stephens*).

80. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

81. *Id.* at 305.

82. 187 U.S. 553 (1903).

83. *Id.* at 556.

84. United States v. Kagama, 118 U.S. 375 (1886).

85. 197 U.S. 488 (1905) (overruled by United States v. Nice, 241 U.S. 591 (1916)).

86. *Id.* at 498.

87. "Prohibited the making of any contract with the Indians by treaty," Starr v. Long Jim, 227 U.S. 613, 623 (1913); "Congress began legislative control in 1871," United States v. Tillamooks, 329 U.S. 40, 48 (1946); "In 1871, the power to make treaties with Indian tribes was abolished," Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

88. 420 U.S. 194 (1975).

89. *Id.* at 200-204.

90. *Id.*

91. *Id.* at 194.

92. 420 U.S. 425 (1975).

93. *Id.*

94. *Id.* at 465 (dissenting opinion).

95. *Id.* at n.8.

96. DeCoteau v. District County Ct., 420 U.S. 525, 446 (1975).

97. United States v. Kagama, 118 U.S. 375 (1886).

98. DeCoteau v. District County Ct., 420 U.S. 425, 468 (1975) (dissenting opinion).

99. *Id.* at 433, 434.

100. *Id.* at 431, 432.

101. General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (Dawes Act).

102. DeCoteau v. District County Ct., 420 U.S. 425, 432 (1975).

103. *Id.* at 461-68 (dissenting opinion).

104. United States v. Kagama, 118 U.S. 375 (1886).

105. Choctaw Nation v. United States, 119 U.S. 1 (1886).

106. Antoine v. Washington, 420 U.S. 194 (1975); DeCoteau v. District County Ct., 420 U.S. 425 (1975).

107. Antoine v. Washington, 420 U.S. 194 (1975).

108. *Id.* at 203.

109. *Id.*.

110. *Id.*.

111. DeCoteau v. District County Ct., 420 U.S. 425 (1975).

112. *Id.* at 432.

113. *Id.*.

114. Antoine v. Washington, 420 U.S. 194 (1975); DeCoteau v. District County Ct., 420 U.S. 425 (1975).

115. *Id.*

116. *See* Antoine v. Washington, 420 U.S. 194, 208 (1975) (Douglas, J., concurring), and at 214 (two Justices dissenting, "Congress *could* undoubtedly have enacted the provisions of the 1891 agreement, but the critical question is whether it *did* so") (emphasis in the original); DeCoteau v. District County Ct., 420 U.S. 425, 461 (1975) (three Justices dissenting). In both instances all members of the Court agreed that the agreements, if ratified, were valid, but the dissent arose as to the interpretation of the agreements, and whether the agreements had in fact been ratified.

117. Antoine v. Washington, 420 U.S. 194 (1975); DeCoteau v. District County Ct., 420 U.S. 425 (1975).

118. *See* Antoine v. Washington, 420 U.S. 194 (1975); DeCoteau v. District County Ct., 420 U.S. 425 (1975). In *DeCoteau*, the dissent makes it clear that the tribe has a police force, provides rental housing, fire protection, and garbage collection, and, being the major

governmental entity in the area, services Indians and non-Indians.

119. Antoine v. Washington, 420 U.S. 194 (1975).

120. *Id.*

121. DeCoteau v. District County Ct., 420 U.S. 425 (1975).

122. *Id.* at 432.

123. *Id.*

124. *See, e.g.*, Village of Kake v. Egan, 369 U.S. 60 (1962); United States v. Kagama, 118 U.S. 375 (1886).

125. *See* United States v. Nice, 241 U.S. 591 (1916).

126. 197 U.S. 488 (1905).

127. 241 U.S. 591 (1916).

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

129. *Id.* at 498, 507, 509.

130. United States v. Nice, 241 U.S. 591 (1916).

131. *Id.* at 498, 601.

132. *E.g.*, Major Crimes Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385, (1885) *codified at* 18 U.S.C. § 1153).

133. DELORIA, *supra* note 49, at 215.

134. *See generally* D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970). The most recent use of this type of executive action occurred during the Wounded Knee incident on the Pine Ridge Reservation in South Dakota, in 1973. While the district court held this military involvement was illegal, United States v. Banks, 383 F. Supp. 368, 374-77 (1974), use of the military to control a reservation is only a continuation of the stance taken both prior to and after 1871.

Another such case uncovered by the Senate field hearings was that of the Fort Sill Apaches. The majority of the Apaches had been scouts employed by the United States Army to catch Geronimo. Following Geronimo's capture, the army had taken the whole Chiricahua Apache Tribe, scouts and all, to Florida as prisoners of war, so classifying them from 1886 to 1906.. DELORIA, *supra* note 49, at 219.

135. Conners v. United States, 180 U.S. 271, 275 (1901) (Cheyenne Nation); DELORIA, *supra* note 49, at 219 (Apache Nation).

136. Conners v. United States & Cheyenne Indians, 33 Ct. Cl. 317, 325 (1898), *aff'd* 180 U.S. 271 (1901) (killing of "escaping prisoners of war" legally justified).

137. "The fact that they were treated as prisoners of war also refutes the idea that they were murderers, brigands or other common criminals," Conners v. United States, 180 U.S. 271, (1901). *Cf.* United States v. Cha-to-kah-na-pe-sha, 25 Fed. Cas. (Sup. Ct. Ark. 1824) (No. 14789a) (holding Osage Indians guilty of murder, tribe being in amity). *See also* Ketuc-e-mun-guah v. McClure, 122 Ind. 541, 23 N.E. 1080 (1890).

138. Act of July 5, 1862, 12 Stat. 512, 528 Rev. Stat. § 2080, 25 U.S.C. § 72 (1970) (authorizing abrogation of treaties with tribe engaged in hostilities); Act of Mar. 2, 1867, 14 Stat. 492, 515, Rev. Stat. § 2100, 25 U.S.C. § 127 (1970) (authorizing withholding of annuities from hostile Indians); Act of Feb. 15, 1873, 17 Stat. 437, 457, Rev. Stat. §§ 467, 2136, 25 U.S.C. § 266 (1970) (regulating sale of arms to hostile Indians); Act of Mar. 3, 1875, 18 Stat. 420, 449, 25 U.S.C. § 128 (1970) (forbidding payments to Indian bands at war).

139. Montoya v. United States, 180 U.S. 261 (1901); Scott v. United States & Apache Indians, 33 Ct. Cl. 486 (1898); Dobbs v. United States & Apache Indians, 33 Ct. Cl. 308 (1898). Warfare among the Indian tribes themselves was long a matter of concern to the federal government. *See, e.g.* Act of July 15, 1832, 4 Stat. 595.

140. *See, e.g.*, Conners v. United States, 180 U.S. 271, 275 (1901); Conners v. United States & Cheyenne Indians, 33 Ct. Cl. 317, 325 (1898), *aff'd*, 180 U.S. 271 (1901).

141. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 349 (1953).

142. *See, e.g.*, Indian Depredations Act, Mar. 3, 1891, ch. 537, 26 Stat. 851 (1891).

143. DELORIA, *supra* note 49, at 236.

144. *E.g.*, Major Crimes Act, Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (1885).

145. *E.g.*, Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

146. DELORIA, *supra* note 49, at 215.
147. *Id.*
148. FEDERAL INDIAN LAW, *supra* note 10, at 274.
149. *Id.*
150. *Id.*
151. Tag v. Rogers, 267 F.2d 664 (1959), *cert. denied*, 362 U.S. 904, *reh. denied*, 362 U.S. 957 (1960).
152. *Id.*
153. INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, AM. INDIAN J. 5 (1976) (Special Issue: Sovereignty and Jurisdiction).
154. *Id.* at 4.
155. FEDERAL INDIAN LAW, *supra* note 10, at 67.
156. 25 U.S.C. § 71 (1970).
157. See discussion in the text at notes 88-131 regarding Antoine v. Washington, 420 U.S. 194 (1975).
158. FEDERAL INDIAN LAW, *supra* note 10, at 67.
159. *Id.* at 274.
160. Sovereignty and Jurisdiction, *supra* note 153.
161. *Id.*
162. *See* FEDERAL INDIAN LAW, *supra* note 10, at 67.
163. *Id.*
164. *See* Antoine v. Washington, 420 U.S. 194, 203 (1975); Village of Kake v. Egan, 369 U.S. 60, 72 (1962).