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Pulling the Plenary Authority Card: The united States' Get Out of Jail Free Card in Membership Disagreements with Indian Tribes

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PULLING THE "PLENARY AUTHORITY" CARD: THE UNITED STATES' "GET OUT OF JAIL FREE CARD" IN MEMBERSHIP DISAGREEMENTS WITH INDIAN TRIBES

I. INTRODUCTION[1]

A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.[2]

From young children to adults, everyone has heard the stories of the friendly Thanksgiving dinner between the Pilgrims and the Indians and of the Trail of Tears. It is quite simple to think of Indians as a historical people—without much thought as to who these people are today. Who are these indigenous peoples? What characteristics or attributes make each of these people an "Indian"—historically and currently? Is it that a person has to have a certain amount of Indian blood—or is it that a person must live on a reservation? Whatever individual determinations a young child or even an educated adult would make as to what it means to be "Indian," probably very few people would proffer the suggestion that whether or not a person is an "Indian" depends on the government's definition of "Indian." Throughout U.S. history, the federal government has felt an obligation to define what it means to be "Indian."[3] These arbitrary attempts have resulted in an air of uncertainty regarding tribal identity that still exists today.

Understanding what it means to be an "Indian" is important to different groups and individuals for very different reasons. For the federal government, "[t]he definition of 'Indian' is the measure of eligibility that the government uses for benefits and preferences provided to Indians under a variety of federal programs."[4] It then follows that for federal *political* purposes, "to be considered an Indian one must be a member of a federally recognized Indian tribe."[5] However, for the average person, the term

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1. The author of this article addresses the extension of Indian tribal membership to illegal immigrants purely for analytical purposes.

2. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). Justice Thurgood Marshall wrote the opinion of this famous Indian law case, which discusses the jurisdictional question of tribal membership decisions. *Id.* at 50.

3. Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J. L. Reform 275, 278 (2000); *see* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. Pub. L. 1, 40–41 (2004).

4. Brownell, *supra* n. 3, at 276.

5. McCarthy, *supra* n. 3, at 41. While this is the case in order to receive federal benefits, tribes can still gain recognition from state governments and receive limited state benefits, despite an inability to get federal recognition. *See e.g.* Alexa Koenig & Jonathan Stein, *Lost in the Shuffle: State-Recognized Tribes and the*

"Indian" may simply imply "that a person has some Indian blood, and is recognized as an Indian by the relevant community."[6]

These particular definitions may be necessary from a federal or political approach—but what about from an Indian community perspective? This perspective embraces the notion that

> [s]ome people . . . can be an Indian for one purpose but not for another. A Caucasian or person of little Indian ancestry might become a tribal member by adoption for some purposes, such as voting and participation in tribal government, but not be an Indian for purposes of federal criminal jurisdiction. An Indian whose tribe has been terminated will not be considered an Indian for most federal purposes. Nevertheless, such a person remains an Indian ethnologically and continues to be a tribal member for internal tribal purposes.[7]

It follows then, from an individual and tribal cultural perspective, that being "Indian" cannot be defined by political or governmental criteria designed for governmental purposes. Unfortunately, though, for Indians, the federal government has defined their ethnology and culture this way. Thus, governmental attempts to define "Indian" are complicated by the fact that Indians address identity or tribal membership in a different manner.[8] Because the two perspectives are incompatible, conflict is inevitable.

Further complicating the issue of Indian membership determinations is a new group of people: illegal immigrants. In an attempt to circumvent the unwieldy U.S. immigration system, many illegal immigrants have sought shelter from deportation within the confines of non-federally recognized tribes in the United States.[9] Government officials have discouraged illegal immigrants, warning them that "[h]aving a card issued by a tribe, recognized or not, doesn't imply any legal immigrant status to the bearer."[10]

Currently, the United States recognizes the sovereign right of Indian tribes to make membership determinations.[11] Government officials argue, though, that tribal-issued membership cards do not extend U.S. citizenship or legal immigrant status under U.S. immigration laws, nor do they extend the right to stay in the United States legally.[12] However, by fully recognizing a tribe's sovereign authority in membership determinations, the government would have to acknowledge those individuals the tribes recognize as members. In the case of illegal immigrants, the government's acknowledgment of a tribe's sovereign rights to membership determinations would extend to the acknowledgement of illegal immigrants as tribal members. The question, then, important to the present discussion, is whether tribes, through these cards or other means, really can extend federally recognized membership in a tribe to illegal

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Tribal Gaming Industry, 40 U.S.F. L. Rev. 327, 328 (2006) (referring to a subset of America's tribal population that has been subjugated, yet never officially recognized by the federal government).

6. McCarthy, *supra* n. 3, at 40.

7. Brownell, *supra* n 3, at 277 (quoting Felix Cohen, *Handbook of Federal Indian Law* 26 (1982 ed., Michie 1982).

8. *Id.* at 276–77.

9. S. E. Ruckman, *Some Illegals Seek Tribal Cover*, Tulsa World A25 (Aug. 26, 2007).

10. *Id.* (quoting Christopher Bentley, a U.S. Citizenship and Immigration Services spokesperson).

11. *See generally Santa Clara Pueblo*, 436 U.S. 49.

12. *Id.*

immigrants.

This article argues that, as the law currently stands, they can. Currently, the courts have held that the power to determine Indian tribal membership lies exclusively with the tribes. If this were true, Indian tribes would not only have the power to extend membership to illegal immigrants, but the United States would recognize illegal immigrants' status as members of their respective tribes. Unfortunately, however, in establishing a policy of tribal sovereignty, the federal government did not anticipate illegal immigration as a factor. Thus, despite case law, which articulates complete tribal sovereignty in the area of tribal membership and concurring federal Indian policy, the federal government will most likely exert its plenary authority over the Indian tribes—thus refusing to recognize this extension of membership to illegal immigrants. In either not allowing Indian tribes to extend membership to illegal immigrants or disallowing these immigrants the ability to stay on the reservation, the United States is retreating from its policy of Indian tribal sovereignty in tribal membership determinations and revealing a watered-down version of tribal sovereignty.

Part II of this article will address the historical evolution of the definition of "Indian" and of membership criteria. Part III will address the constant jurisdictional battle between Indian tribes and the federal government over which rights still lie within the sovereign powers of the Indian nations and in what areas the United States has asserted jurisdiction. Part IV of this article will tackle an overview of the membership or citizenship requirements one must achieve in order to become a U.S. citizen. Part V will briefly discuss the federal government's approach to membership jurisdictional issues concerning the current plight of the Cherokee Freedmen. Parts VI and VII will return to the membership question and conduct an analysis of whether, in light of the aforementioned discussion, tribes can extend federally recognized membership to illegal immigrants.

II. HISTORICAL EVOLUTION OF WHAT IT MEANS TO BE "INDIAN"

From the government's point of view, the greatest concern is the extent to which statutes and regulations providing benefits to Indians are based on potentially unconstitutional racial criteria: blood quantum and Indian descent.[13]

The federal government, for purposes of making land and benefit allocations for Indians, had to devise a way to determine who the federal government would recognize as an Indian.[14] Through various legislation and court decisions, the federal government has attempted to make this determination.[15]

A. General Allotment Act

Governmental attempts at defining who was an "Indian" date as far back as the

13. Brownell, *supra* n. 3, at 277.

14. *Id.* at 279 (stating that in order to make a qualified assessment as to who was deserving of an allotment of land, the government had to rely on blood quantum in making determinations as to who was "Indian").

15. *See generally id.*

early 18th century.[16] However, it was not until the late 19th century that Congress made an official attempt to define what it means to be "Indian."[17] In 1877, Congress passed the Dawes Severalty Act, also known as the General Allotment Act.[18] The purpose of the General Allotment Act was to partition reservations into separate distinct parcels[19] of land and then deed the land "in trust"[20] for a period of twenty-five years.[21] At the completion of this twenty-five year term, individual Indians "would receive a patent in fee, free of encumbrance and fully alienable."[22] Because of these offers of land from the federal government, many non-Indians, in an effort to acquire *free* land under the Act, attempted to pass themselves off as Indians or claimed to be members of a tribe.[23] Inevitably then, with the threats of abuse in the assignment of allotments, came the necessary problem of how to determine who would qualify as an Indian and be eligible to receive an allotment.[24]

Recognizing the potential for such problems, various federal laws required the Department of Interior (DOI) to make membership determinations as to who qualified as "Indians" "for purposes of distributing Indian allotments and land claims judgments."[25] The government compiled these determinations into tribal membership rolls.[26] The government then distributed allotments based on who qualified as an "Indian" and had their name listed on the tribal membership rolls.[27]

At that time, the Bureau of Indian Affairs (BIA)[28] maintained the tribal membership rolls.[29] The government's objective in maintaining BIA oversight of the rolls was "accurate and equitable distribution of benefits" to Indians.[30] In an attempt to

16. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1 (2006). "Virginia . . . appears to have been the first to articulate a specific amount of blood, by defining mulatto in 1785." *Id.* at 5.

17. *Id.* at 9.

18. Pub. L. No. 49-119, 24 Stat. 388 (1887).

19. Sharon O'Brien, *American Indian Tribal Governments* 77 (U. Oklahoma Press 1989) ("Generally, heads of families received 160 acres and single persons over eighteen years of age received 80 acres. All other tribal members received 40 acres.").

20. Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 8 (1995) (citing *Morrison v. Work*, 226 U.S. 481, 485 (1925)).

21. *Id.* at 10.

22. *Id.*

23. Gail K. Sheffield, *The Arbitrary Indian: The Indian Arts and Crafts Act of 1990* 82 (U. Oklahoma Press 1997).

24. *Id.*

25. Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. Kan. L. Rev. 437, 457 (2002).

26. Brownell, *supra* n. 3, at 279–80 (explaining that the Dawes rolls "listed the blood quantum of individual Indians" and the government relied on these blood quantums on the rolls to make determinations as to who was Indian). For further discussion on the use of blood quantum, see Nicole J. Laughlin, *Identity Crises: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 Hamline L. Rev. 97, 101 (2007).

27. Laughlin, *supra* n. 26, at 101.

28. The BIA is an arm of the Department of Interior. For a discussion on the role of the BIA in Indian Affairs, see generally McCarthy, *supra* note 3.

29. Melissa L. Meyer, *American Indian Blood Quantum Requirements: Blood is Thicker than Family*, in *Over the Edge: Remapping the American West* 231, 232 (Valeria J. Matsumoto & Blake Allmendinger, eds., U. California Press 1999).

30. *Id.* at 232.

assure compliance with the government allotment process, the BIA created the Dawes[31] Commission to organize the rolls.[32] The BIA anticipated the Commission's work would result in complete tribal membership rolls, which would then "[codify] each Indian person's status as a member of a specific tribe."[33]

Because governmental benefits were predicated on the determination of who was an "Indian," the Commission went to great lengths to determine the accuracy of their tribal membership rolls.[34] In doing so, it was necessary for the Commission to verify with each individual Indian from each tribe "his or her name, address, tribal membership and quantum of Indian blood."[35] The General Allotment Act itself contains no reference to blood quantum determinations for the allotment of Indian lands.[36] Without strict direction, "courts and executive branch officials applied varying rules to specific situations, utilizing the language of blood, but not necessarily applying blood quantum to divide Indian from non-Indian or tribal member from non-member."[37]

Although, from the perspective of the federal government, blood quantum would become an accepted and "important method of defining Indian and tribal membership . . . in the early twentieth century," this acceptance was not absolute.[38] Indians were not familiar with the concept of blood quantum as a marker of identity, but were instead historically dependent on the notion of kinship to identify what it meant to be "Indian":

> Kinship not only included those with whom one could trace familiar common descent, but could be extended to include more ramifying groups like clans, moieties, and even nations. Moreover, besides biological reproduction, individuals and groups could be recruited into kinship networks through naturalization, adoption, marriage, and alliance. Identity encompassed inner qualities that were made manifest through social action and cultural belief.[39]

The concept of partitioning off pieces of land to various people based on blood "directly conflicted with the widespread cultural belief that land should be shared communally."[40] This belief that kinship was the basis of identity and membership determinations in a particular tribe further complicated the Commission's attempt to classify Indians and members of Indian tribes.[41] The Commission members encountered many who would not participate in the process of verifying their blood quantum or tribal membership.[42]

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31. Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 9 (U. Texas Press 1983). The commission is named after Senator Henry Dawes of Massachusetts. He "assumed leadership of the forces that sought to make allotment and assimilation the national policy." *Id.*

32. Laughlin, *supra* n. 26, at 104 ("The ultimate determination of whether an individual had the requisite fraction of Indian 'blood' to be considered a member of a certain tribe was left up to the Commission.").

33. *Id.*

34. *Id.*

35. *Id.* (quoting Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 Wash. & Lee J. Civ. Rights & Soc. Just. 61, 100 (2005)).

36. *Id.*

37. Spruhan, *supra* n. 16, at 9.

38. *Id.* at 4.

39. Laughlin, *supra* n. 26, at 101.

40. *Id.* at 105.

41. Pratt, *supra* n. 35, at 100–01 ("[T]he Commission faced resistance, particularly from the full bloods who refused to be enrolled.").

42. *Id.*

Accordingly, these people were absent from the tribal membership rolls and not considered official members of their respective tribes, despite their Indian blood.[43]

B. *Indian Reorganization Act (IRA)*[44]

Despite the lack of "a uniform application of blood quantum in federal Indian law,"[45] and the absence of blood quantum requirements under the General Allotment Act, the federal government sought to utilize blood quantum standards in the Indian Reorganization Act (IRA).[46] Congress adopted this standard partly because "the bill was controversial when presented to Congress" due to the "significant philosophical shift in Indian policy" it represented.[47] The IRA included many reforms to federal Indian law,[48] but most notable to this discussion was the enablement of tribes to create their own constitutions.[49] By enabling tribes to write their own constitutions, the IRA half-heartedly attempted to end the use of race as criteria for tribal membership, thus giving the tribes greater determination in their identities.[50]

This *gift* of sovereignty in determining membership was not without governmental limitations.[51] While the IRA would seem to have allowed tribes the freedom and ability to make their own membership determinations, "BIA approval of [the] constitution" was still necessary.[52] For example, Section 16 of the Act allowed, "[a]ny Indian tribe, or tribes, residing on the same reservation . . . to organize for its common welfare," but their constitutions would be "*subject to BIA approval.*"[53] However, this approval only applies to the tribes that adopted IRA constitutions and other constitutions that retained the BIA approval clause.[54] Many tribes do not have this approval clause in their constitution.[55] Many tribes that originally did require approval have passed amendments to their constitutions removing this clause.[56]

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43. Goldberg, *supra* n. 25, at 457 ("Unfortunately, these federally-mandated lists are sometimes inadequate and incomplete, excluding some people with deep and continuous tribal connections, whose ancestors failed to show up for the sign-ups because their traditional beliefs counseled nonparticipation or for other culturally-based reasons.").

44. Indian Reorganization Act, 25 U.S.C. § 476 (2000) (enacted by Pub. L. No. 73-383, 48 Stat. 984, 984–88 (1934)).

45. Spruhan, *supra* n. 16, at 9.

46. *Id.* at 46–47.

47. *Id.* at 46.

48. Sheffield, *supra* n. 23, at 43–44.

49. Pub. L. No. 73-383, § 16, 48 Stat. 984, 987.

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

Id.

50. L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 720–21 (2001).

51. Goldberg, *supra* n. 25, at 446–47.

52. Gould, *supra* n. 50, at 721.

53. *Id.* (emphasis added).

54. O'Brien, *supra* n. 19, at 83.

55. *Id.*

56. *Id.*

While not explicitly stating who could and could not be tribal members, the IRA indirectly maintained control of tribal rolls by defining who could be an Indian under federal law.[57] According to Section 19 of the IRA, there are three categories of Indians:

> The first class, described as the "Membership Class," includes "all persons of *Indian descent* who are members of any *recognized* Indian tribe" and is defined without regard to blood quantum. The second class, described as the "Descendant Class," includes "all persons who are *descendants* of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation" and is defined without regard to either blood quantum or tribal membership. The third class, described as the "Unaffiliated One-Half Blood Class," includes "all other persons of *one-half or more Indian blood*" and thus offers eligibility for benefits to those who are not tribal members or residents on a reservation.[58]

If a person fit one of these three categories, they were a federally recognized Indian, and with this recognition came benefits from the federal government.[59] However, the benefits afforded were less important than the governmentally created definition of "Indian," which snuck its way into the "newly created tribal constitutions."[60]

C. *Indian Civil Rights Act (ICRA)*

In 1968, Congress enacted the Indian Civil Rights Act (ICRA).[61] With the ICRA, Congress sought to impose statutory rights similar to many constitutional protections on tribal members and others within the jurisdiction of the tribe.[62] Congress based its decision largely on the fact that because tribal governments were not created under the U.S. Constitution,[63] many of the protective provisions of the Constitution did not apply to Indian members.[64] The Act itself imposed ten statutory rights on the tribes, but did not go so far as to grant all the rights U.S. citizens enjoy under the Constitution.[65] The

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57. Brownell, *supra* n. 3, at 285.

58. *Id.* at 285–86 (emphasis added).

59. Laughlin, *supra* n. 27, at 108.

60. *Id.*

61. 25 U.S.C. §§ 1301–1303.

62. Laughlin, *supra* n. 27, at 108 n. 69 (offering as an example the language from 25 U.S.C. § 1302(8) which parallels the Due Process Clause: "No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law.").

63. O'Brien, *supra* n. 19, at 197 (stating that "tribal governments . . . sprang from a power, or sovereignty, in existence before the Constitution and the federal government existed").

64. Laughlin, *supra* n. 27, at 108–09 (citing *Talton v. Mayes*, 163 U.S. 376, 384 (1896)). In *Talton*, the plaintiff alleged that his conviction was void because his indictment was returned by a grand jury consisting of five jurors, and the laws of the United States and the laws of the Cherokee nation required a thirteen-person grand jury for the purpose of indictments. 163 U.S. at 378. Talton argued that, as a result, he was denied his due process guaranteed under the Fifth Amendment of the U.S. Constitution. *Id.* at 379. The court disagreed with Talton, stating that the U.S. Constitution did not apply to a Cherokee tribal member who acted criminally within Cherokee jurisdiction. *Id.* at 384–85. The court stated that seeing "as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment." *Id.* at 384.

65. Laughlin, *supra* n. 27, at 108 n. 69 (quoting 25 U.S.C § 1302). The statute reads:

> No Indian Tribe in exercising powers of self-government shall (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the

ICRA did not address the effect this legislation and these statutory rights would have on tribal membership determinations.[66] As a result, the courts would have to determine whether the right to assert membership in an Indian tribe existed.[67]

III. TRIBAL JURISDICTION AND THE JURISDICTION OF THE FEDERAL GOVERNMENT

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one, and of a complex character.[68]

The issue of membership determinations in Indian tribes, just as with citizenship in the United States or any other nation, eventually boils down to jurisdiction.[69] Jurisdiction, generally speaking, is the legal authority of a government to make laws and govern its own people.[70] Issues of jurisdiction and related questions of authority are central in the discussion of tribal sovereignty and decision-making.[71] The jurisdiction of a particular government can encompass such things as "defining crimes and punishment for those crimes, and regulating such things as domestic relations, hunting and fishing, taxation, zoning and economic development."[72] One type of jurisdiction is territorial jurisdiction.[73] This type of jurisdiction addresses the "geographic area over which a government's authority extends."[74] The jurisdiction of Indian tribes is "limited geographically to 'Indian [C]ountry.'"[75] However, tribal jurisdiction within these boundaries is not complete. In certain instances, such as with criminal jurisdiction, the federal government has recognized the right to "assert jurisdiction over purely Indian

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right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy (4) compel any person in any criminal case to be a witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense; (7) required excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000 , or both (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302.

66. *See generally id.*

67. *See Santa Clara Pueblo*, 436 U.S. 49.

68. *U.S. v. Kagama*, 118 U.S. 375, 381 (1886).

69. O'Brien, *supra* n. 19, at 198.

70. Kirke Kickingbird, *Foundations of Sovereignty and Jurisdiction: A Miniconference of the Native American Legal Resources Center* 14 (Oklahoma City U. June 1988).

71. O'Brien, *supra* n. 19, at 198.

72. Kickingbird, *supra* n. 70, at 14.

73. O'Brien, *supra* n. 19, at 198.

74. *Id.*

75. *Id.* at 205.

matters in Indian territory."[76] However, "[i]n the area of civil jurisdiction over Indian Country the working rule remains that the Indian nations retain all their jurisdictional powers over the people and property within their territory except where restricted by a treaty provision or an Act of Congress."[77]

Congress, through Indian-related legislation, has articulated three types of lands that fall within Indian territorial jurisdiction.[78] These lands are considered "Indian Country" and consist of "(a) reservations, (b) dependent Indian communities and (c) Indian allotments."[79] All three land types included in "Indian Country" are important in determining tribal jurisdiction. They are important because "Indian Country" is the area in which tribes have jurisdiction, and only tribes that are federally or state recognized and have a political relationship with the U.S. government have such areas.[80] Reservations are included in the designation of "Indian Country" because they typically "represent the aboriginal territory of an Indian nation and/or lands negotiated for by an Indian government with the United States or a colonial government."[81] The second of the land types included as part of "Indian Country" are dependent Indian communities.[82] These lands include the communities that are not an actual part of an Indian reservation, but for various reasons are still parts of the Indian community.[83] These dependent Indian communities are included in "Indian Country" because they are part of the land set aside for the tribe and even though they are separate from the reservation, they still require the protection of the federal government.[84] Not all of the off-reservation tribal lands are considered Indian Country—only those to which the government holds in trust for the Indians.[85] The third of the land types included in "Indian Country" are the lands that were part of the allotments, which the federal government designated under the General Allotment Act.[86]

Even in "Indian Country," there are limitations to Indian jurisdiction.[87] For

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76. Kickingbird, *supra* n. 70, at 21.

> In 1816, Congress passed the General Crimes Act which made all federal criminal laws applicable to Indian Country except where: (1) offenses are between Indians; (2) an Indian has already been punished under tribal law; or (3) exclusive jurisdiction over a particular offense has already been reserved by a tribe in a treaty . . . . The Major Crimes Act of 1885 is the first major federal statute which allowed the federal government to assert jurisdiction over purely Indian matters in Indian territory. The act as amended gives federal courts jurisdiction over fourteen violent crimes even in cases where the crime was committed by one Indian against another.

Id. at 21–22.

77. *Id.* at 22.

78. *Id.* at 15.

79. *Id.* (citing 18 U.S.C. § 1151).

80. O'Brien, *supra* n. 19, at 90–91.

81. Kickingbird, *supra* n. 70, at 15.

82. *Id.* at 15 (citing 18 U.S.C. § 1151) (Indian Country includes "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the states.").

83. *Id.*

84. *Id.* at 15–16 (citing *U.S. v. Sandoval*, 231 U.S. 28 (1913)).

85. O'Brien, *supra* n. 19, at 205–06.

86. Kickingbird, *supra* n. 70, at 16.

87. O'Brien, *supra* n. 19, at 198–200. "Before white settlement, tribal governments enjoyed full jurisdictional powers within their territories. Today their jurisdiction is no longer total. Two hundred years of tribal-federal contact have greatly reduced tribal authority in certain areas." *Id.* at 198.

various reasons, the U.S. government has determined that because "Indian Country" falls within the territory and geographical boundaries of the United States, the United States "has ultimate 'title' to all lands which are held in 'trust' for the Indians."[88] As a result, "Indian Country" is federal land and the federal government has the right, if it chooses to assert it, to claim jurisdiction over the lands.[89]

A. Federal Recognition of Tribes

In shaping a governmental definition of what it meant to be an "Indian," the government not only attempted to control the definition of who could be an "Indian," but also what it meant to be truly recognized as an Indian tribe.[90] The federal government has four categories tribes can fall into based on their political relationship with the government.[91] The categories are "(1) federally recognized tribes; (2) state-recognized tribes; (3) terminated tribes; and (4) unrecognized tribes."[92] For tribal members to be eligible for services and benefits, such as health care, from the federal government, they must be members of a federally recognized tribe.[93] There are currently 561 federally recognized tribes in the United States.[94] In order to be federally recognized, tribes must meet recognition criteria that are "promulgated by the DOI through the Bureau of Indian Affairs Branch of Acknowledgement and Research."[95] These criteria require that to be a federally recognized tribe, the tribe:

> (1) . . . must have been identified as an American Indian entity since 1900; (2) it must comprise a distinct community and have existed as a community from historical times; (3) it must have political influence over its members; (4) it must have membership criteria; and (5) it must have a membership that consists of individuals who descend from a historical Indian tribe and who are not enrolled in any other tribe.[96]

A consequence of federal recognition is that the government typically sets aside land for tribal use.[97] Originally, tribal settlements spread across the United States. With the growth of these settlements, the federal government recognized a need to designate boundaries for these tribal settlements.[98] The government forced relocation of many of the tribes to "a large area between the Mississippi River and the Rocky Mountains."[99] The government then established settlements, or reservations, for these tribes.[100] The federal government still holds most reservation areas for the use and occupation of the

88. Kickingbird, *supra* n. 70, at 18.
89. *Id.*
90. Brownell, *supra* n. 3, at 301.
91. O'Brien, *supra* n. 19, at 90.
92. *Id.*
93. Brownell, *supra* n. 3, at 301.
94. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 70 Fed. Reg. 13,648 (Mar. 22, 2007).
95. Brownell, *supra* n. 3, at 301.
96. *Id.* at 302 (citing 25 C.F.R. § 83.7(a)–(f) (1999)).
97. O'Brien, *supra* n. 19, at 214.
98. *Id.*
99. *Id.*
100. *Id.*

Indian tribes.[101]

State recognized tribes do not have a political relationship with the federal government.[102] However, these tribes do typically live on state reservations and receive some form of state funding.[103] The two other Indian tribe classifications are terminated tribes and unrecognized tribes. Terminated tribes no longer have a relationship with the federal government, no longer have reservation lands, and "are no longer eligible for the special services and benefits granted to federally recognized tribes."[104] Unrecognized tribes have never had a political relationship with the federal government.[105] These tribes, similar to terminated tribes, "have no tribal land and receive none of the special services or benefits given to recognized tribes."[106]

B. The Plenary Authority of the United States over Indian Tribes

One manner in which the United States has claimed jurisdictional power in "Indian Country" is through the plenary authority the federal government considers itself to have over Indian affairs.[107] This plenary authority derives from the trust relationship that the courts have determined the United States has with the tribes.[108] This trust relationship is the foundation for Congress's plenary, or "almost absolute,"[109] power over the tribes.[110] Because of this plenary authority, Indians no longer have exclusive jurisdiction within "Indian Country."[111] There is no one document or case that articulates the exact duties of the U.S. trust relationship.[112] Instead, this trust relationship between the government and the Indian people has developed from various "treaties, court decisions, federal statutes and the Constitution itself."[113]

Kirke Kickingbird, an Indian scholar, has studied this trust relationship between the United States and Indian tribes and has determined there are three areas that define the trust duties of the United States: "1) Protection of Indian trust property. 2) Protection of the Indian right to self-government. 3) Provision of those social[,] medical[,] and educational services necessary for the survival of the tribe."[114] Fulfilling these duties is within the exclusive power of Congress[115]—thus, Congress alone "has the power to

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101. *See id.* at 213–15. In contrast, the Five Civilized Tribes and the Seneca Indians "possess full title to their lands." O'Brien, *supra* n. 19, at 215.

102. *See id.* at 90.

103. *Id.*

104. *Id.* at 90–91.

105. *Id.* at 91. "Unrecognized tribes, of which there are more than two hundred, have no political relationship with the federal government because they have never made a treaty with the United States, nor have they ever received federal recognition through executive or congressional action." O'Brien, *supra* n. 19, at 91.

106. *Id.*

107. *Id.* at 199.

108. Kickingbird, *supra* n. 70, at 17–18.

109. *Id.* at 18.

110. *Id.*

111. O'Brien, *supra* n. 19, at 198.

112. Kickingbird, *supra* n. 70, at 18.

113. *Id.* at 17. *See* O'Brien, *supra* n. 17, at 199.

114. Kickingbird, *supra* n. 70, at 18.

115. *Id.*

change and redefine the scope of the relationship."[116] The Constitution does not explicitly give Congress these duties or designate Congress as the trustee in this relationship.[117] Instead, the courts have determined through case law that Congress has this authority over the tribes.[118] Furthermore, Congress, the ultimate trustee and the holder of power, can use this plenary power to assert jurisdiction over Indians in its attempt to *protect* Indians and Indian tribes.[119]

C. *The Role of the Courts in Jurisdictional Questions of Membership*

In interpreting the U.S. trust relationship with the tribes, courts have had to address questions of jurisdiction in "Indian Country."[120] More specifically, the court has had to respond to questions concerning whether the power to enact and administer laws in "Indian Country" lies with the federal government, or with the tribes. In determining with whom jurisdiction lies in the question of membership, there are various "complex and often conflicting variables such as treaties a tribe may have made with the federal government, statutes passed by Congress, federal court decisions, specific tribal laws, state laws and the economic and *political climate* at any one time."[121]

The underlying theme of each of these variables is "special trust duties with respect to Indian nations that... have allowed Congress broad power in Indian affairs."[122] This "unique legal and moral duty of the United States to assist Indians in the protection of their property and rights" is often what deprives Indians of jurisdiction in their own nations.[123] Because Indian tribes are nations[124] that "exist[ ] within the boundaries of the United States," history has afforded them a "special relationship with the United States government."[125] In *U.S. v. Wheeler*, the Court determined: "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised."[126] As a result, tribes retained limited tribal jurisdiction.[127] Furthermore, their jurisdictional rights exist only with the consent of Congress and

116. *Id.*
117. *Id.*
118. *Id.*
119. Kickingbird, *supra* n. 70, at 18.
120. *See e.g. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that a severance tax on an oil and gas lease that was located on the reservation and was enacted by the tribes on non-Indian lessee was within the tribe's jurisdiction); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that, unless otherwise authorized by Congress, Indian tribal courts do not have criminal jurisdiction over non-Indians); *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976) (determining that in an adoption proceeding where Indians are seeking to adopt the child of Indian parents and all involved were residents of the same Indian reservation, the tribal courts had exclusive jurisdiction over the adoption).
121. Kickingbird, *supra* n. 70, at 20 (emphasis added).
122. *Id.* at 18.
123. *Id.*
124. O'Brien, *supra* n. 19, at 58.
125. Kickingbird, *supra* n. 70, at 17.
126. 435 U.S. 313, 323 (1978) (quoting *Kagama*, 118 U.S. at 381).
127. *Id.*

Congress can take away those jurisdictional rights.[128] However, "until Congress acts, the tribes retain their existing sovereign powers."[129]

1. *U.S. v. Kagama*

In *U.S. v. Kagama*, the Court recognized the plenary authority of the federal government over Indian tribes and the government's ability to use this authority to limit jurisdiction.[130] The Court held that the federal government was in a position to act in the best interest of Indian tribes.[131] In *Kagama*, two Indians, Kagama and Mahawa, were charged with murdering Iyouse, another Indian.[132] One of the central concerns was whether the United States had jurisdiction over an Indian who committed a crime upon another Indian in "Indian Country."[133] In the Major Crimes Act of 1885,[134] Congress gave the power to "the federal government to assert [criminal] jurisdiction over purely Indian matters in Indian territory."[135] The Court determined that even though an Indian committed the crime, against an Indian, on an Indian reservation (which would typically fall under Indian jurisdiction), the federal government could assert jurisdiction.[136] In making this determination, the court stated:

> These Indian tribes are wards of the nation. They are communities dependent on the United States, dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.[137]

The *Kagama* decision was notable because the Court held "that the government had absolute authority to define how it would 'protect' Indian tribes."[138] As a result, under the guise of protecting the Indian people, Congress was able to "pass laws which enable the United States to assert jurisdiction over them."[139] This plenary authority is central to jurisdictional questions concerning tribal membership.

2. *Santa Clara Pueblo v. Martinez*

Because Congress did not explicitly retain control of tribal membership in the ICRA or even address the application of the ICRA to the issue of tribal membership

128. *Id.*
129. *Id.*
130. O'Brien, *supra* n. 19, at 199.
131. *Kagama*, 118 U.S. at 384.
132. *Id.* at 376.
133. *Id.*
134. Pub. L. No. 48-389, § 9, 23 Stat. 381, 385 (1885).
135. Kickingbird, *supra* n. 70, at 21.
136. *Kagama*, 118 U.S. at 384–85.
137. *Id.* at 383–84.
138. O'Brien, *supra* n. 19, at 73.
139. Kickingbird, *supra* n. 70, at 18.

determinations, this daunting jurisdictional task was left to the courts.[140] In 1978, in the landmark decision of *Santa Clara Pueblo v. Martinez*, the Court held that tribal membership is an exclusively tribal determination.[141]

In *Santa Clara Pueblo*, a female member of the Santa Clara Pueblo tribe,[142] along with her daughter, brought an action against her tribe alleging that a membership ordinance of the tribe violated Section 8 of the ICRA.[143] This ordinance denied tribal membership to children of female tribal members who married outside the tribe.[144] The Santa Clara Pueblo tribe also had an additional ordinance disallowing the naturalization of non-tribal members, thus foreclosing her husband and children from membership.[145] Because the children were not recognized as Santa Clara Pueblo tribal members, if the mother passed away, they would "ha[ve] no right to continue living on the reservation, or any right to inherit their mother's house or her possessory interests in communal lands."[146]

In addressing Martinez's claim under the ICRA, the Court determined that the case turned on whether "Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."[147] The Court concluded that it did not.[148] The *Santa Clara Pueblo* Court noted:

> A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.[149]

The Court determined that it was essential for membership determinations to remain with tribes because membership is at the heart of tribal identity.[150] Thus, placing tribal membership requirements with the tribe itself "secure[d] the critical right of tribes to preserve their tribal identities."[151]

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140. Laughlin, *supra* n. 27, at 109.

141. 436 U.S. at 72 n. 32.

142. O'Brien, *supra* n. 19, at 27. "The Spanish called these Indians 'Pueblos' because their houses were fashioned around closely clustered communities similar to *pueblos* (villages) of Spain." *Id.* (emphasis in original).

143. 436 U.S. at 51. The statute provided that "[n]o Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." *Id.* (quoting 25 U.S.C. § 1302(8) (1970)).

144. *Id.* at 52.

145. *Id.* at 52 n. 2.

146. Laughlin, *supra* n. 27, at 118 (citing *Santa Clara Pueblo*, 436 U.S. at 52).

147. *Santa Clara Pueblo*, 436 U.S. at 59.

148. *Id.*

149. *Id.* at 72 n. 32 (internal citations omitted). Justice Thurgood Marshall delivered this opinion, which Justices Brennan, Stewart, Powell, Stevens, and Chief Justice Burger joined. *Id.* at 50. Justice Rehnquist joined in all but Part III of the opinion. *Id.* Justice White was the only dissenter. *Santa Clara Pueblo*, 436 U.S. at 50.

150. *Id.* at 72 n. 32; *accord* Laughlin, *supra* n. 27, at 119 ("The ability of Indian tribes to determine membership is critical to the maintenance of tribal sovereignty because membership is at the core of a tribe's identity.").

151. Laughlin, *supra* n. 27, at 119.

IV. TRIBAL MEMBERSHIP DETERMINATIONS: THE CHEROKEE FREEDMEN

A recent controversy, which further affirms the U.S. policy of an Indian tribe's sovereign right to determine their own membership, is the situation of the Cherokee Freedmen. The Cherokee Freedmen were "African-descended people who had been owned by Cherokees until their emancipation by the Nation in 1863."[152] Three years later, in the Treaty of 1866, the Cherokee Nation agreed to make the Freedmen members of the Cherokee tribe and to reflect their membership in the Cherokee constitution.[153] In Article III of the 1975 constitution, the Cherokee Nation "extended membership to all the people who were 'citizens' of the Cherokee Nation as listed on the Dawes Commission Rolls,"[154] which included the Cherokee Freedmen.[155]

In addition to the constitutional provisions on membership, the Cherokee Nation later enacted further membership requirements to supplement the constitution via statutory regulations.[156] One such regulation, 11 C.N.C.A § 12, stated:

> A. Tribal membership is derived only through proof of Cherokee blood based on the Final Rolls. B. The Registrar will issue tribal membership to a person who can prove that he or she is an original enrollee listed on the Final Rolls by blood or who can prove to at least one direct ancestor listed by blood on the Final Rolls.[157]

This statute directly conflicted with the Cherokee Nation constitution, which did not require Cherokee blood for membership in the tribe.[158] The above statute, as enacted, required all members to have Cherokee blood.

A Cherokee Freedman, who was denied membership in the Cherokee Nation based on her lack of Cherokee blood, challenged this statutory provision.[159] The plaintiff, Lucy Allen, filed her claim in the Cherokee tribal courts.[160] The tribal court, in its opinion, discussed jurisdictional issues surrounding this case.[161] The court determined that the Cherokee tribal courts are the only venue for this type of claim.[162] In fact, federal courts dismissed lawsuits of other Cherokee Freedmen based on sovereign immunity and the fact that questions of membership were within the jurisdiction of the

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152. S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of the Freedmen's Descendants*, 12 Mich. J. Race & L. 387, 390 (2007).

153. *Id.*

154. *Allen v. Cherokee Nation Tribal Council*, No. JAT-04-09, slip op. at 2 (Jud. App. Trib. Cherokee Nation Mar. 7, 2006). Article III of the Cherokee Nation constitution states:

> All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants.

Id. at 3 (citing Cherokee Const. art. III, § 1 (1975) (emphasis omitted)).

155. *Id.* at 5–6.

156. *Id.* at 5.

157. *Id.* at 4.

158. *Allen*, slip op. at 1.

159. *Id.*

160. *Id.*

161. *Id.* at 2.

162. *Id.*

tribes.[163]

In making its determination, the court looked to the Cherokee constitution to determine the validity of the statute.[164] The constitution is based on the Dawes Rolls, and the Dawes Rolls clearly include the Freedmen as Cherokee citizens.[165] The court further noted that if

> the Cherokee Nation is going to make a decision not to abide by a previous treaty provision, it must do so by clear actions which are consistent with the Cherokee Nation Constitution. A treaty provision cannot be set aside by mere implication. This treaty discussion leads to the same conclusion as the constitutional discussion. If the Cherokee people want to change the legal definition of Cherokee citizenship, they must do so expressly.[166]

Because the statute contradicted the constitution, the court determined the constitution preempted this statutory provision and the Cherokee Freedmen were citizens under the Cherokee constitution.[167]

In response to this decision by the highest court of the Cherokee Nation, the Cherokee tribal council took matters into its own hands.[168] The tribal council passed a proposed amendment to the constitution, which would "grant citizenship only to Cherokees (or their descendants) with a degree of Cherokee 'blood' or adopted Delawares or Shawnees (or their descendants) with a degree of Delaware or Shawnee 'blood' as determined by the Dawes Rolls."[169] In order to pass this resolution, Cherokee citizens had to approve it by a majority vote.[170] On March 3, 2007, the resolution passed[171] with almost 77 percent of Cherokees voting to "amend the nations' constitution to remove the [F]reedmen descendants and other non-Indians from tribal rolls."[172] Currently, the Cherokee Freedmen no longer have citizenship in the Cherokee tribe.[173]

It is not only sovereign immunity that prevents the federal court system from deciding the membership issue concerning the Cherokee Freedmen. It is also the tribe's sovereign right to membership determinations.[174] In *Nero v. Cherokee Nation of Oklahoma*, several Cherokee Freedmen members sued the Cherokee nation for denial of benefits and a right to vote in the Cherokee election.[175] In addition to the discussion of tribal sovereign immunity from the Freedmen's suit, the court also stated in its opinion

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163. *Allen*, slip op. at 2 (citing *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457 (10th Cir. 1989)).
164. *Id.* at 14.
165. *Id.* at 6–7.
166. *Id.* at 20.
167. Ray, *supra* n. 152, at 391–92.
168. *Id.* at 388–89.
169. *Id.* at 389.
170. *Id.*
171. *Id.*
172. Justin Juozapavicius, *Freedmen Issue on Detour to Capitol Hill*, http://www.indiancountry.com/content.cfm?id=1096415816 (Sept. 28, 2007) ("Only a fraction of the nation's tribal citizens—about 9,000—cast ballots" in the special election.).
173. Jeninne Lee-St. John, *The Cherokee Nation's New Battle*, http://www.time.com/time/nation/article/0,8599,1635873,00.html (June 21, 2007).
174. *Nero*, 892 F.2d at 1463.
175. *Id.* at 1458.

"that no right is more integral to a tribe's self-governance than its ability to establish its membership."[176] The court further stated that if they were to get involved with membership determinations, it "would in effect eviscerate the tribe's sovereign power to define itself, and thus would constitute an unacceptable interference 'with a tribe's ability to maintain itself as a culturally and politically distinct entity.'"[177] Thus, the court, based on the strong U.S. policy of tribal sovereign power in membership determinations, dismissed the suit of the Cherokee Freedmen.[178]

As a result of the federal courts' refusal to get involved with tribal membership issues, legislators on Capitol Hill have threatened to challenge tribal sovereignty in membership determinations. U.S. Representative Diane Watson has proposed legislation to withhold $300 million in federal money from the Cherokee tribe if they do not "reinstate 2,800 descendants of the tribe's former black slaves."[179] Watson's next step in the legislative process "is to gain sponsors for the bill and get it a joint hearing of the Judiciary and Natural Resources committees."[180] As it stands, Congress has taken no official action and the Freedmen's "fate, as well as the fate of the tribe, remains in doubt."[181]

V. IMMIGRATION IN THE UNITED STATES

Congress's plenary authorization applies not only to Indians, but also extends to immigration law as well.[182] Under the U.S. immigration system, only immigrants that have legally navigated their way through the system can stay legally in the United States.[183] A brief discussion of the basic structure of the immigration system provides insight into why immigrants would be desperate to circumvent such a system.

The U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security (DHS), currently oversees national immigration services and benefits in the United States.[184] USCIS and DHS have not always been in charge of immigration benefits and services.[185] In March of 2003, the "service and benefit functions of the U.S. Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security (DHS) as the U.S. Citizenship and Immigration Services (USCIS)."[186] As the new agency in charge of immigration

176. *Id.* at 1463.

177. *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 72).

178. *Id.* at 1466.

179. Juozapavicius, *supra* n. 172.

180. Jerry Reynolds, *Congressional Black Caucus Hosts Rally against Cherokee Nation*, http://www.indiancountry.com/content.cfm?id=1096415884 (Oct. 5, 2007).

181. Indianz.com, *Cherokee Nation Holds Election Amid National Scrutiny*, http://www.indianz.com/News/2007/003593.asp (June 25, 2007) ("Amid controversy, the Freedmen were [temporarily] reinstated in order to participate in [the June 23, 2007] election . . . .").

182. T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* 7 (Harvard U. Press 2002).

183. *See generally* Alison Siskin et al., *CRS Report for Congress RL 33351, Immigration Enforcement within the United States* (Cong. Research Serv. Apr. 6, 2006).

184. U.S. Citizenship Immigr. Servs. (USCIS), *About Us*, http://www.uscis.gov/portal/site/uscis (accessed Apr. 9, 2008).

185. *Id.*

186. *Id.*

services and benefits, USCIS oversees and conducts all "adjudication of immigrant visa petitions; adjudication of naturalization petitions; adjudication of asylum and refugee applications; adjudications performed at the service centers; and all other adjudications performed by the INS."[187]

Immigration law in the United States falls within the rule of the Immigration and Nationality Act (INA).[188] The INA is contained in the U.S. Code, but it stands alone as its own body of law.[189] Generally speaking, "[i]mmigration enforcement is the regulation of those who violate provisions of the . . . INA."[190] These violations of the INA can be civil or criminal.[191] The general provisions of the INA are "interpreted and implemented by regulations" in Title 8 of the Code of Federal Regulations.[192] These are the laws that USCIS uses daily when assessing services and benefits.[193]

The U.S. immigration system is an attempt to regulate the entry, exit, and stay of "aliens" in the United States.[194] An alien is "any person not a citizen or national of the United States."[195] For purposes of assessing benefits and services, immigration law further breaks down the term alien into immigrant and nonimmigrant aliens.[196] Immigrants, or resident aliens,[197] have been permitted by USCIS to stay permanently in the United States, and in fact, such aliens are "expected to proceed to citizenship" in the United States.[198] Nonimmigrant aliens are those people who are only admitted for "temporary periods and are expected to return to their countries of origin."[199] This includes such people as "students, tourists, diplomats, and temporary workers."[200]

Contrary to what many may believe, "[b]eing illegally present in the U.S. has always been a civil, not criminal, violation of the INA."[201] There are many instances in which a person could be illegally present in the United States, but not have entered the country illegally. For example, if a nonimmigrant's worker visa expires or if a visiting student's status changes while in the United States, those non-immigrants would be, at that point, unlawfully present in the United States.[202] There are also criminal penalties

187. *Id.*

188. USCIS, *Immigration and Nationality Act*, http://www.uscis.gov/portal/site/uscis (accessed Apr. 9, 2008).

189. *Id.* The INA also has code designations. However, it is more common to use the INA citation for immigration law. *Id.*

190. Siskin et al., *supra* n. 183, at Summary.

191. *Id.*

192. USCIS, *Title 8, Code of Federal Regulations*, http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=68ba267609da05e160433ee0f3c73289 (Apr. 2008).

193. *Id.*

194. Christian Joppke, *The Evolution of Alien Rights in the United States, Germany, and the European Union,* in *Citizenship Today: Global Perspectives and Practices* 38–39 (T. Alexander Aleinikoff & Douglas Klusmyer eds., Carnegie Endowment Intl. Peace 2001).

195. *Id.*

196. *Id.*

197. *Id.* at 39.

198. *Id.*

199. Joppke, *supra* n. 194, at 39.

200. *Id.*

201. Siskin et al., *supra* n. 183, at 8.

202. *Id.*

and violations in the INA.[203] Such violations include "the bringing in and harboring of certain undocumented aliens[,] . . . the illegal entry of aliens[,] . . . and the reentry of aliens previously excluded or deported."[204] Most of the immigration administrative processes and adjudications, though, are civil proceedings.[205]

A. Becoming a U.S. Citizen

Just as Indian tribes have designated membership criteria for citizenship in a tribe,[206] the federal government has established criteria or standards of naturalization for U.S. citizenship.[207] First, an applicant must be at least eighteen years of age in order to become a naturalized citizen.[208] The applicant must also have been *lawfully* admitted to the United States for permanent residency, have resided continuously as a permanent resident in the United States for at least five years prior to filing, and actually have been present in the United States for half of that five years.[209] The permanent resident alien must also display "good moral character."[210] Included in this requirement for good moral character is the requirement that an applicant must show an attachment to the U.S. Constitution.[211] There is also an educational aspect to naturalization.[212] There is a general requirement that applicants be able to read, write, and speak the English language.[213] Applicants must additionally complete a test as to their "knowledge and

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203. *Id.*

204. *Id.* at 8–9. Additional "criminal provisions include § 243(a) disobeying a removal order, § 1306 offenses relating to the registration of aliens, and § 274A(f) engaging in a pattern or practice of hiring illegal aliens." *Id.* at 9 n. 34.

205. Siskin et al., *supra* n. 183, at 8.

206. O'Brien, *supra* n. 19, at 200.

207. USCIS, *General Naturalization Requirements*, http://www.uscis.gov/portal/site/uscis (accessed Apr. 9, 2008).

208. 8 U.S.C. § 1445(b).

209. *Id.* at § 1427(a).

210. *Id.* Regarding "good moral character," the USCIS notes:

> A person cannot be found to be a person of good moral character if during the last five years he or she: has committed and been convicted of one or more crimes involving moral turpitude; has committed and been convicted of 2 or more offenses for which the total sentence imposed was 5 years or more; has committed and been convicted of any controlled substance law, except for a single offense of simple possession of 30 grams or less of marijuana; has been confined to a penal institution during the statutory period, as a result of a conviction, for an aggregate period of 180 days or more; has committed and been convicted of two or more gambling offenses; is or has earned his or her principal income from illegal gambling; is or has been involved in prostitution or commercialized vice; is or has been involved in smuggling illegal aliens into the United States; is or has been a habitual drunkard; is practicing or has practiced polygamy; has willfully failed or refused to support dependents; has given false testimony, under oath, in order to receive a benefit under the Immigration and Nationality Act.

USCIS, *supra* n. 207.

211. 8 U.S.C. § 1427(a).

212. *Id.* at § 1423(a)(1)–(2).

213. *Id.* at § 1423(a)(1). Exemptions to this requirement do exist. Applicants are exempt if they

> have been residing in the United States subsequent to a lawful admission for permanent residence for periods totaling 15 years or more and are over 55 years of age; have been residing in the United States subsequent to a lawful admission for permanent residence for periods totaling 20 years or more and are over 50 years of age; or have a medically determinable physical or mental impairment, where the impairment affects the applicant's ability to learn English.

USCIS, *supra* n. 207.

understanding of the fundamentals of the history, and of the principles and form of government, of the United States."[214] Lastly, applicants must take an oath of allegiance swearing to

> support the Constitution of the United States; . . . to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; . . . to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; . . . to bear true faith and allegiance to the same; and . . . to bear arms on behalf of the United States."[215]

In 2006, DHS estimated that the "median time elapsed between the date of legal immigration and the date of naturalization was seven years."[216] However, the time one waits to naturalize can extend much longer.[217] Upon completion of the qualifications, as long as that may take, the applicant will become a citizen of the United States and have the opportunity to reside legally in the U.S. as a citizen.[218]

More controversial than U.S. immigration citizenship procedures is the issue of illegal immigration in the United States. DHS defines illegal aliens, or unauthorized residents,[219] as "all foreign-born non-citizens who are not legal residents. Unauthorized residents refer to foreign-born persons who entered the United States without inspection or were admitted temporarily and stayed past the date they were required to leave."[220] As of January 2006, DHS estimates there were 11.6 million illegal immigrants living in the United States.[221]

Because of the procedural red tape and the wait that accompanies legal attempts to enter the United States or to become a citizen, illegal immigration has become a growing problem.[222] As a result, immigrants are looking for ways to circumvent the U.S. immigration system and naturalization requirements, but still lawfully reside in the United States.[223]

VI. WHO HAS THE RIGHT?

The likelihood that the line between Indian law and immigration law will become hazy is highly probable. In fact, recently, the Kaweah Indian Nation, a non-federally recognized tribe, offered illegal immigrants the option of purchasing membership to the

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214. 8 U.S.C. § 1423(a)(2).

215. *Id.* at § 1448.

216. John Simanski, *Annual Flow Report: Naturalization in the United States: 2006* 4 (May 2007) (available at http://www.dhs.gov/xlibrary/assets/statistics/publications/Natz_01_Sec508Compliant.pdf).

217. *Id.*

218. *Id.* (tbl. 7).

219. Michael Hoefer et al., *Population Estimates: Estimates of Unauthorized Immigration Population Residing in the United States: January 2006* 1 (Aug. 2007) (available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf).

220. *Id.*

221. *Id.* This number is calculated by taking the total foreign-born population living in the United States on January 1, 2006, and subtracting the legal resident population on that same date. *Id.*

222. Sergio Bustos, *Backlog Keeps Immigrants Waiting Years for Green Cards*, http://www.usatoday.com/news/washington/2005-01-26-immigration-wait_x.htm (Jan. 26, 2005).

223. Ruckman, *supra* n. 9.

their tribe as a means of moving freely about the United States.[224] In early August, two Mexican nationals were charged with making false claims of U.S. citizenship based on their purchase of membership in the Kaweah Nation.[225] While government officials made it clear that tribal membership offers will not result in U.S. citizenship,[226] they failed to address the question of whether the tribe could extend tribal membership to the couple. The true issue at hand is not whether tribal membership is an attempt by the Mexican couple or other illegal immigrants to become U.S. citizens. Instead, the more interesting question is: Will the United States adhere to its established policy of recognizing tribal sovereignty in Indian membership determinations—the result of which could allow illegal immigrants to become full-fledged members of a federally recognized Indian tribe. Or, will the United States strip Indian tribes of this firmly rooted sovereign right by not recognizing illegal immigrants' new status and rights as tribal members—including the right to stay in Indian Country as members of their respective Indian tribes.

The recognition of the sovereign right of tribes to make membership determinations has developed slowly, culminating in the *Santa Clara Pueblo* decision wherein the Court expressly clarified this sovereign right.[227] In the past, however, the courts have viewed this sovereign right against a backdrop that did not contemplate illegal immigrants. The current issue then becomes whether this right will prevail—even when it may afford illegal immigrants an opportunity to circumvent immigration laws. Which is more important? Government officials, in response to the Kaweah situation, say tribes do not have the authority to give illegal immigrants the right to legally stay in the United States.[228] With whom does the authority to determine tribal membership lie? Can the federal government ignore the well-settled doctrine of tribal sovereignty in membership determinations, because of a risk that illegal immigrants will enroll as members in Indian tribes? The implications of these answers are critical.

This article argues that the power to make tribal membership determinations, as the law currently stands, is within the jurisdiction of the tribes. In order to fully address the current state of law as to tribal membership determinations, this article will first pose a hypothetical to which to apply the law. It will then discuss the tribe's sovereign right to determine membership under the current law, and then address the government's options if they choose to take proactive steps to prevent the execution of this sovereign right.

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224. Cindy Gonzalez, *Tribe's Offer of Citizenship Spurs Warning*, http://www.omaha.com/index.php?u_page=2798&u_sid=10104086 (Aug. 10, 2007).

225. Roxana Hegeman, *2 Arrested in Immigration Probe Linked to Unrecognized Tribe*, http://www.bluecorncomics.com/stype785.htm (Aug. 13, 2007).

226. Gonzalez, *supra* n. 224.

227. *Santa Clara Pueblo*, 436 U.S. at 72. Regarding membership the court determined that

> unless . . . Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

Id.

228. Gonzalez, *supra* n. 224.

A. *Tribe X and Family Z*[229]

Tribe X is a small Indian nation in Oklahoma. Tribe X is federally recognized and established its constitution under the Indian Reorganization Act of 1936. Until recently, Tribe X's constitutional membership provisions only provided application of membership to people who are descendants of members of Tribe X, who possess one-half or more Indian blood, or who were listed on the Dawes Rolls. Recently, however, Tribe X passed an amendment to their constitution, which included an opportunity for application of membership by those who are living on the reservation and have shown a commitment to the culture and traditions of Tribe X.

Family Z has lived on Tribe X's reservation for the past ten years. Family Z came into the United States legally ten years ago on visitor visas. Instead of leaving when their visas expired, Family Z remained in the United States. The mother of the family runs a daycare on the reservation, which all the children on the reservation attend. She teaches the children tribal traditions, history, and games based on the curriculum provided to her by parents and elders of the tribe. The father works as a carpenter, spending the better part of his ten years on the reservation making repairs to various pre-existing buildings and structures. The family participates in all tribal events and celebrations. The family is in the United States illegally.

B. *Evolution of Membership Determinations to the Current Law*

Currently, tribes possess the sovereign right to determine membership, and Tribe X can amend its constitution to allow for the extension of membership to Family Z.[230] Tribal membership has evolved into a determination within the jurisdiction of the people whom it affects—the tribes. Under the General Allotment Act, the federal government divided communal lands into allotments and distributed the parcels to Indians.[231] The government determined who was eligible for allotments, and, as a result, who could receive property as an "Indian."[232] The federal government took the determination of who was an Indian away from the tribes and granted land allotments based on governmental determination, not on notions of tribal identity and qualifications.[233]

With the passage of time, the federal government recognized greater sovereignty of the tribes and the right to tribal self-government.[234] The law began to evolve and the right of membership determinations began to shift gradually from the control of the federal government to the jurisdiction of the tribes. With the IRA, tribes were able to determine their own membership criteria and set other governing features.[235] The IRA

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229. Tribe X and Family Z are purely hypothetical.

230. O'Brien, *supra* n. 19, at 83, 200.

231. Spruhan, *supra* n. 16, at 23–24.

232. *See generally id.* at 24–26.

233. *Id.*

234. O'Brien, *supra* n. 19, at 86. In the early 1960s and 1970s, governmental studies concerning Indian affairs recommended that "Indians be given greater self-determination, that is, greater control in governing their reservations and greater participation in planning federal Indian policy." *Id.*

235. Pub. L. No. 73-383, § 16, 48 Stat. 984, 987.

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become

allowed for constitutional construction that did not require federal oversight or approval of the constitutions.[236] Tribes were free to construct constitutions with membership provisions based on their own criteria and qualifications.

In a further attempt to protect tribal rights, Congress granted various statutory protections, similar to various U.S. constitutional protections, to tribal members through the ICRA.[237] While the ICRA did not explicitly state it was within the tribe's sovereign rights to make membership determinations,[238] it also did not claim governmental jurisdiction over membership determinations. Congress did not explicitly address membership determinations in the ICRA and did not attempt to retain control of tribal membership.[239] Therefore, with whom the power lay was still ambiguous. However, the Supreme Court in *Santa Clara Pueblo* clarified any possible confusion as to whether a tribe would have the sovereign right to make tribal membership determinations.

With *Santa Clara Pueblo*, the policies from the past hundred years regarding membership determinations culminated in a decision recognizing the rights of tribes to make their own membership determinations.[240] In *Santa Clara Pueblo*, the Court held that tribal membership determination is exclusively within the sovereign right of the tribes.[241] In its decision, the Court stated that this right of the tribe "has long been recognized as central to its existence as an independent political community."[242] Like the hypothetical Tribe X, the Santa Clara Pueblo tribe made distinct changes to its membership determinations based on their own desires and not on governmental requirements or pressures.[243] Since *Santa Clara Pueblo*, tribes and the federal government have all acted in conformity with the notion that this right to membership determinations lies within tribal sovereignty.[244]

Recently, the Cherokee Freedmen tested this sovereign right of the Cherokee Nation to make membership determinations.[245] The federal courts affirmed the rule in *Santa Clara Pueblo* by maintaining a hands-off approach with the Cherokee Freedmen situation and leaving membership determinations to the Cherokee tribe.[246] Legislators and commentators have expressed much disappointment and discontent regarding the treatment of the Cherokee Freedmen, and there have been discussions regarding the

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effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized by the Secretary of the Interior under such rules and regulations as he may prescribe.

Id.

236. O'Brien, *supra* n. 19, at 83.

237. Laughlin, *supra* n. 27, at 108 (citing as an example 25 U.S.C. § 1302(8), which prohibits Indian tribes using their "powers of self-government" to "deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law").

238. *See generally* 25 U.S.C. § 1302.

239. *Id.*

240. 436 U.S. 49.

241. *Id.* at 72 n. 32 (citing *Roff v. Burney*, 168 U.S. 219 (1897)).

242. *Id.*

243. *See e.g. id.* at 52 n. 2.

244. *Allen*, slip op. at 2 ("When other Cherokee Freedmen have asked the federal courts to enforce their rights . . . the federal courts have properly dismissed those lawsuits.").

245. *See generally id.*

246. *Id.* at 2 (citing *Nero*, 892 F.2d 1457).

withdrawal of federal appropriations to the Cherokee tribe.[247] However, Congress has taken no formal legislative action.[248] Currently, the Freedmen are no longer citizens of the Cherokee tribe.[249]

C. *Current Law Applied to Tribe X*

The right to make membership determinations clearly lies within the sovereign rights of Tribe X. They can extend membership to Family Z. Currently, U.S. policy is clear and unambiguous: Membership rights are within a tribe's jurisdiction. If this were true, the right to determine membership would be not only a sovereign right of Tribe X, but also a means for Family Z to stay in the United States legally. This sovereign right to determine membership coupled with the tribe's jurisdictional powers over Indian Country, or their reservation, as currently recognized by the federal government, would afford Family Z the ability to stay on the reservation, within the boundaries of Indian Country, legally, not as U.S. citizens, but as tribal members.

Tribe X created their constitution under the authority of the IRA. Originally, their constitution included the previously mentioned IRA categories of Indians and a government approval clause. However, they later amended the constitution to remove the governmental oversight requirement and the IRA categories of Indians. At the point in which they removed these provisions, BIA approval of any provisions in their constitution was no longer necessary.[250] They are free to add or remove provisions as the tribe deems necessary—this includes membership provisions.[251]

Similar to Tribe X, the Santa Clara Pueblo tribe made distinct changes to its membership determinations based on tribal desires, not on governmental requirements or pressure.[252] In *Santa Clara Pueblo*, the children of a female member of the Santa Clara Pueblo tribe were prohibited from becoming members of the tribe.[253] Because they did not have Santa Clara Pueblo blood, the tribe refused to allow them to become members, and the Court held this was within the right of the tribe to determine.[254] Tribe X draws support for its new amendment and membership decision from *Santa Clara Pueblo*. The Court's adamant expression of the necessity of a tribe to be able to make their own membership determinations is the basis for Tribe X's decision to extend membership to Family Z. This necessity is present whether the tribe is seeking to include members with general Indian blood or members who are attached in dedication and spirit to the tribe. Since *Santa Clara Pueblo*, tribes and the federal government have all acted in conformity with the notion that this right to membership determinations lies within the jurisdiction of the tribes.[255]

Tribe X, and other federally recognized tribes, as part of its relationship with the

247. Juozapavicius, *supra* n. 172.
248. *Id.*
249. *Id.*
250. O'Brien, *supra* n. 19, at 83.
251. *See* Pub. L. No. 73-383, § 16, 48 Stat. at 987.
252. *Santa Clara Pueblo*, 436 U.S. at 52 n. 2.
253. *Id.* at 52.
254. *See id.* at 52, 72 n. 32.
255. *Allen*, slip op. at 2.

government, possesses land for the use and occupation of the tribe.[256] Tribes retain jurisdiction over these recognized tribal boundaries, unless Congress expressly takes it away.[257] As discussed previously, there are three types of land that comprise Indian jurisdiction: reservations, dependent tribal communities, and allotments.[258] It is within this Indian Country that tribes retain jurisdiction.[259]

Tribe X, because of their relationship with the government and granted reservation lands, has jurisdiction within their reservation. It is within these lands that Tribe X can, to some extent, assert jurisdiction and enforce tribal laws.[260] Without federal recognition, a tribe has "no tribal land and receive[s] none of the special services or benefits given to recognized tribes."[261] The Kaweah tribe, for example, is not a federally recognized tribe and, in turn, has no recognized tribal lands.[262] Without these recognized tribal lands, the Kaweah tribe has no federally recognized boundaries in which to assert jurisdiction. Therefore, U.S. jurisdiction never gives way to the tribal jurisdiction of a federally recognized tribe. Without federal recognition and recognized tribal boundaries, the Kaweah tribe is unable to assert jurisdiction over illegal immigrants.

Tribe X is federally recognized and has recognized tribal boundaries over which to assert its jurisdiction. Tribe X's jurisdiction over the affairs of its members only extends to the boundaries of Indian Country.[263] Illegal immigrants may fall within the law of the tribes when they are within tribal boundaries and are tribal members, but this does not make the immigrants U.S. citizens. In 1924, the Indian Citizenship Act (ICA) issued citizenship to qualified Indians.[264] Under the ICA, the federal government issued certificates of citizenship to those Indians who were "born within the territorial limits of the United States."[265] Family Z, despite the extension of membership in Tribe X, was not born in the territorial limits of the United States. Therefore, they have membership rights in Tribe X, but no rights as U.S. citizens. Without this U.S. citizenship, Family Z is only lawfully present in the United States when within the territorial boundaries of Tribe X, or its Indian Country.[266] As long as Family Z remains within these territorial boundaries, Tribe X maintains jurisdiction over them.[267] However, at the point Family

256. O'Brien, *supra* n. 19, at 62.

257. *Wheeler*, 435 U.S. at 323 ("In sum, Indian tribes still possess aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

258. Kickingbird, *supra* n. 70, at 15.

259. O'Brien, *supra* n. 19, at 198 ("Tribal geographic jurisdiction generally encompasses what is known as 'Indian [C]ountry.'").

260. Kickingbird, *supra* n. 70, at 20.

261. O'Brien, *supra* n. 19, at 91.

262. *Id.* at 205–06.

263. Kickingbird, *supra* n. 70, at 22 (Jurisdiction has been withdrawn however, if it has been "restricted by a treaty provision or an Act of Congress.").

264. Wilcomb E. Washburn, *The American Indian and the United States: A Documentary History—Volume III* 2209 (Random H. 1973).

265. *Id.*

266. *See* Kickingbird, *supra* n. 70, at 23–24 ("Indian governments have inherent jurisdiction to regulate their own affairs as well as all activities occurring within their territory . . . . Tribes have the fundamental right to determine citizenship.").

267. *Id.* at 23 ("United States courts have upheld a tribe's power to enforce its laws regarding crimes and taxation, thus it can reasonably be concluded that tribal jurisdiction extends to all aspects of civil law.").

Z leaves the territorial boundaries of the reservation, they would be unlawfully present in the United States, just as if they had entered into another country, and would be subject to the laws of that country.

Tribe X's jurisdiction within Indian Country would be upset if the federal government asserted jurisdiction.[268] The federal government has asserted jurisdiction over criminal affairs in Indian Country through the General Crimes Act and the Major Crimes Act of 1885.[269] However, generally speaking, civil jurisdiction within Indian Country remains within the jurisdiction of the tribes.[270] Tribal law generally prevails on civil matters in Tribe X.[271] Family Z overstayed their nonimmigrant visas ten years ago. Their unlawful presence in the United States is a civil violation of immigration law, not a criminal violation.[272] Because their presence is a civil violation and because they are tribal members, it would fall within the jurisdiction of the tribal courts to prosecute.[273] Under current law, as long as Tribe X recognizes Family Z as lawful members who are lawfully present in the boundaries of Tribe X's territory, Family Z may legally remain in the United States within the boundaries of Tribe X. Tribe X's power to assert jurisdiction over matters in Indian Country, coupled with the United States's recognition of their right to determine membership of their tribes, is the basis for this authority.

VII. PULLING OUT THE "CARDS"

As the law currently stands, tribal membership determinations lie within the jurisdiction of Tribe X and other Indian tribes similarly situated. This right to determine membership is a firmly-rooted attribute of Indian self-governance.[274] But, what if Congress decides Tribe X cannot extend membership to illegal immigrants and, in turn, uproots this facet of Indian self-governance? As displayed throughout history,[275] Congress maintains the ultimate right, if it chooses to assert it, to claim jurisdiction over Indian lands and tribes.[276]

Since September 11, 2001, immigration has been at the forefront of discussions in Congress, the 2008 Presidential debates and campaign, and every breakfast room table and water cooler across the country.[277] The growing numbers of illegal immigrants in

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268. *Id.* at 22.

269. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. Pitt. L. Rev. 1, 18–21 (1993).

270. Kickingbird, *supra* n. 70, at 22.

271. *Id.*

272. Siskin et al., *supra* n. 183, at 8.

273. Kickingbird, *supra* n. 70, at 23.

274. *Nero*, 892 F.2d at 1463.

275. McCarthy, *supra* n. 3, at 46.

> Although tribes retain considerable authority over the conduct of both tribal members and nonmembers on Indian land, or land held in trust for a tribe by the United States, Congress and the Court have imposed a number or restrictions on tribal jurisdiction, sometimes by expanding state and federal jurisdiction into Indian country.

Id.

276. Kickingbird, *supra* n. 70, at 18.

277. *See e.g.* Jennifer Ludden, *Q&A: Inside the Immigration Debate*, http://www.npr.org/templates/story/story.php?storyId=5303676 (Mar. 28, 2006).

the United States exacerbates the current concern over terrorism.[278] In the wake of the terrorist attacks and additional national threats, the federal government has focused its priorities on "strengthening borders in the name of national security."[279] National security, not indigenous rights, is propelling the current political debate. Family Z may pose no terrorist threat to the United States. However, the situation viewed in a broader sense exposes a loophole in the immigration system that can be viewed as a threat to national security.

With efforts to maintain tribal identity and culture, this identity-related right to membership determinations serves as the cornerstone of Indian culture. The federal government is faced with quite the conundrum. On the one hand, the federal government has an established and vocal history of recognizing the sovereign authority of tribes in membership determinations. On the other hand, in recognizing this sovereign right in its entirety and permitting tribes to extend federally recognized membership to illegal immigrants, the federal government faces national security concerns for which the consequences could be disastrous.

The federal government historically holds a "get out of jail free card" for situations such as the one posed in the hypothetical, which would allow illegal immigrants to stay in the United States. It is up to the federal government, however, whether it will choose to pull this card. In fact, the United States has two of these cards: The "federal recognition"[280] card and the "plenary authority"[281] card. It is inevitable that the federal government will choose national security over Indian sovereignty. But the point still remains that as the law currently stands, the federal government must make a decision between the two: Recognize the sovereign right to extend membership to illegal immigrants or prohibit it. In a threat of removal of federal recognition designation and a claim of plenary authority, the United States could, at its convenience, assert jurisdiction over the tribes and refuse to recognize the extension of membership to illegal immigrants. The question is whether the government will disregard firmly rooted tribal autonomy in the area of membership determinations.

The government can assert jurisdiction over membership determinations directly or indirectly. It can do so directly by asserting its plenary authority over the tribes, or it can do so indirectly by removing the tribe's federal recognition and along with it, services, benefits, and tribal lands.

A. Pulling the Federal Recognition Card

Because of Tribe X's extension of membership to illegal immigrants, Congress could and probably would end the government's special relationship with Tribe X by revoking their federal recognition. Tribe X is currently a federally recognized tribe, and the power to revoke that federal recognition lies with Congress.[282] The result of such legislation would be the end of the special relationship between Tribe X, or a similarly

278. *Id.*
279. *Id.*
280. McCarthy, *supra* n. 3, at 34–35.
281. *Id.* at 18.
282. O'Brien, *supra* n. 19, at 90.

situated tribe, and the federal government.[283]

What would be the repercussions of ending this relationship? The current law that leaves the right to membership determinations to the individual tribes would remain intact. However, absent federal recognition, it would mean little. The tribe would no longer be eligible for federal benefits and services.[284] The tribe would no longer receive federal funds or federal assistance. More importantly, though, federal recognition is a "prerequisite for the development of tribal self government" and without this recognition, the government would no longer recognize the sovereignty of the tribe.[285] It would fall under the designation of a terminated tribe and be without a reservation and federal benefits.[286]

Currently, Tribe X is a federally recognized tribe and has sovereignty and jurisdiction over their lands—unless and until the federal government takes that jurisdiction away.[287] Congress could strip Tribe X of its jurisdiction by voting to pass legislation to remove its federally recognized status.[288] As a result, the federal government would no longer recognize Tribe X as a sovereign nation. A necessary element for Tribe X to allow illegal immigrants to remain legally within its tribal boundaries is its recognized tribal boundaries flowing from federal recognition.[289] As a part of its federal recognition, the federal government recognizes the tribe's right to assert some jurisdiction within these boundaries.[290] Thus, with the loss of its sovereignty, Tribe X would lose the right to assert jurisdiction within their reservation or Indian Country—the foundation upon which Tribe X was able to assert jurisdiction over Family Z. As a result, Tribe X would no longer have jurisdiction over its boundaries in which to protect Family Z from immigration laws. In fact, Tribe X would have no boundaries at all. Furthermore, with the loss of federal recognition, Tribe X would lose the federal benefits, appropriations, and services on which the tribe had come to depend.

B. Pulling the Plenary Authority Card

Congress's most powerful and historically based "get out of jail free card" is plenary authority, which is derived from the trust relationship the United States has with federally recognized tribes.[291] This trust relationship is based partly on the tribe's "incorporation within the territory of the United States, and their acceptance of its protection" which has "necessarily divested them of some aspects of the sovereignty which they had previously exercised."[292] Because of this incorporation, Indian tribes

283. *See id.*

284. Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Policy Rev. 271, 277 (2001).

285. *Id.*

286. O'Brien, *supra* n. 19, at 90.

287. Kickingbird, *supra* n. 70, at 18.

288. Brownell, *supra* n. 3, at 303 ("In the 1950s and 1960s, the federal government terminated its relationships with numerous tribes which it deemed sufficiently capable of self-government and thus no longer in need of federal supervision or benefits.").

289. O'Brien, *supra* n. 19, at 205–06.

290. *Id.*

291. Kickingbird, *supra* n. 70, at 18.

292. *Wheeler*, 435 U.S. at 323.

implicitly surrendered exclusive jurisdiction and their full sovereignty.[293] Currently, federally recognized tribes retain a distinctive type of sovereignty.[294]

> It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[295]

As a result, Congress has the final authority to determine how it will go about protecting Indian tribes—even if it means asserting jurisdiction over purely Indian matters.[296]

Tribe X's extension of membership to Family Z exposes an immigration loophole and a possible threat to national security. Congress will most likely choose to correct this loophole by asserting its plenary authority over the tribes and preventing this extension of membership to illegal immigrants. In other words, Congress will refuse to recognize these extensions. In viewing the tribes as "wards of the nation,"[297] the United States will probably recognize this refusal as its duty to protect the Indian tribes from infiltration by illegal immigrants.[298] Because Congress has the absolute authority to protect Indian tribes in whatever manner it deems necessary, it could assert jurisdiction over the tribes and prevent Family Z from gaining membership in the tribe.

VIII. CONCLUSION

This article argues that, as the law currently stands, membership determinations are within the sole jurisdiction of the tribes—years of federal legislation and court decisions concur. Throughout history, legislation, and court decisions, the responsibility of membership determinations has moved from Indian tribes, to the federal government, and ultimately back to the group of people with whom it belongs, the tribes. This sovereign right of the tribes, as with all current facets of tribal sovereignty, should be absolute—not conditional, or watered down. Identity is a vital component to the culture and existence of Indian tribes in the United States. Making determinations as to who is deserving of this sacred right should be within the jurisdiction of the tribes.

Since 9/11, national security and immigration issues have taken center stage and become critical concerns facing the United States. Therefore, the jurisdictional and sovereign ability of tribes to extend membership to illegal immigrants exposes a potentially dangerous loophole in federal immigration laws and a possible threat to national security. Thus, in light of national security and immigration concerns, it is clear that the United States would refuse to recognize the extension of membership to illegal immigrants or allow illegal immigrants to stay in the United States as tribal members. However, in getting to this point, more than a loophole would be addressed. Tribal membership determinations would no longer be a sovereign right of the tribes.

The federal government could address this loophole in the current law in a number

293. *Id.*
294. *See id.*
295. *Id.*
296. *Kagama*, 118 U.S. at 384–85.
297. *Id.* at 383.
298. *Id.* at 384–85.

of ways: Revoking federal recognition from tribes that are attempting to extend membership to illegal immigrants, or asserting its firmly established plenary authority over the tribes to prevent this extension of membership. However, in doing so, the federal government will ignore and cast aside a firmly rooted U.S. policy—the tribal right to membership determinations. It will revoke an integral function of tribal self-governance and leave tribes with an even more watered-down version of tribal sovereignty. Is Family Z a threat to national security? Is it that the federal government cannot risk illegal immigrants circumventing the U.S. immigration system? Or is it the over-arching concept that the federal government has no qualms with dwindling down tribal sovereignty? Regardless, in one fell swoop, Congress will close this loophole and, at the same time, undermine the integrity of what is left of tribal sovereignty. Tribal sovereignty as a whole, not just membership determinations, will be left crippled in its wake.

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