10-1-1976

American Indian property rights: Congress and the Supreme Court

Virginia C. Todd
University of Nebraska at Omaha

AMERICAN INDIAN PROPERTY RIGHTS--
CONGRESS AND THE SUPREME COURT

A Thesis

Presented to the

Department of Political Science

and the

Faculty of the Graduate College

University of Nebraska at Omaha

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts

By

Virginia C. Todd

October, 1976

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 - 1346

THESIS ACCEPTANCE

Accepted for the faculty of The Graduate College of the University of Nebraska at Omaha, in partial fulfillment of the requirements for the degree Master of Arts.

GRADUATE COMMITTEE:

Bernard Kolasa, Ph.D., Department of Political Science

Orville Menard, Ph.D., Department of Political Science

Woodrow Most, Ph.D., Department of Foreign Languages

Bernard Kolasa, Ph.D., Chairman

November 1, 1976
Date

TABLE OF CONTENTS

INTRODUCTION

Demands for citizens' "civil rights" has been a recurrent theme of contemporary society for nearly twenty years; however, it has not been until the last five that the rights of American Indians have been accorded great attention. Perhaps because of the romantic characteristics attributed to them by our fixation on the grand development of the nation, the rights of the Indian have become a challenge to the integrity of the United States.

The story of the development of the country is the story of acquisition of Indian lands, and this paper is a discussion of the elements and activities of the two outstanding contributors to the history of United States-Indian relations--the Congress of the United States, and the Supreme Court. The questions of primary responsibility and the content of policy will be discussed through chapters on the status of treaties, acquisition of title to lands, regulatory actions of Congress, and the Indian Claims Commission. In each chapter, significant opinions of the Supreme Court determining responsibility and policy will be considered.

CHAPTER I

THE STATUS OF TREATIES IN INTERNATIONAL AND AMERICAN LAW

Introduction

Treaties perform the same functions in international law that constitutions, legislation and contracts do within a sovereign nation. They have the authority of law, but are distinguished by a singular dependence on the good faith of the parties for enforcement.[1] In the absence of factors which contribute to enforcement within one nation, such as a unified political culture and standardized procedure for managing infractions of legal agreements, "good faith" is at best an ambiguous standard which varies with the ability of each party to maintain its authority to commit itself and its strength to enforce terms of the commitment.[2]

> Thus, though the state might have the capacity to enter into agreements with other states because of its inherent sovereignty, it might not have, by its Constitution, the ability to perform the obligations incurred. [Emphasis supplied.][3]

The crisis in American Indian policy was preordained by the nature of the parties--two highly dissimilar systems of law and culture. The sole outstanding similarity was the consciousness each party had of itself as a sovereign nation. However, the sovereignty of one was not

---

[1]James McLeod Hendry, Treaties and Federal Constitutions (Washington, D.C.: Public Affairs Press, 1955), pp. iii-4.

[2]Ibid., p. 39.

[3]Ibid., p. 96.

mutually recognized by the other, "sovereignty" itself was not identically defined, and the title of one "sovereign" tribe to property was not necessarily acknowledged by any other "sovereign" tribe. In this disagreement over sovereignty lies the nemesis of the treaty as a tool of conducting Indian relations. It forces us to acknowledge the applicability of Toynbee's statement that the only sanction to performance of the terms of a treaty is coercion by the stronger power.[4]

Each tribe regarded land as a tribal inheritance enjoyed in unqualified ownership. The United States regarded land, by reason of the right of discovery, as owned by the Federal government, and acknowledged only the tribes' use of such land at the grace of the government. It was extremely rare for Englishmen or Americans to support the tribal contention.

By the end of the Nineteenth Century, the recognition of tribes as nationalities having capacity to execute treaties with the United States was characterized as "a legal fiction" created solely out of necessity[5] by the demands of humanity and pure pragmatism without which "the lordly savage [would] forbid the wilderness to blossom like the rose . . . ."[6]

---

[4]Fred L. Israel, ed., Major Peace Treaties of Modern History 1648-1967, with an Introduction by Arnold Toynbee (New York: Chelsea House PUblishers, 1967), I, xxvii.

[5]Monroe E. Price, Law and the American Indian, Readings, Notes and Cases (New York: The Bobbs-Merrill Company, Inc., 1973), p. 372, citing Indian Land Cessions in the United States, 18 United States Bureau of Ethnology, Pt. 2, pp. 535-555, passim.

[6]Price, American Indian, p. 373, citing Indian Land Cessions (Oration of John Quincy Adams, December 22, 1802).

While it is understandable that Nineteenth Century attitudes would disqualify tribes as nations in the absence of the standard accoutrements of European civilization, not all tribes were inadequate in that respect. Written constitutions probably originated in the Fifteenth Century with the Iroquois Confederacy. The Constitution of the Five Nations provided for specific procedural and substantive requirements, including the rule of unanimity, a federal structure, provisions for initiative, referendum and recall, and male suffrage.[7] Though the majority of tribes operated under an unwritten code, those which acquired written forms provided services which we would consider municipal functions: land management, the identification of Indians as members of a distinct tribe with heads of state, and judicial determination of illegal actions.[8]

Regardless of these characteristics of an organized society and in the presence of overwhelming dissimilarities, treaty making with Indian tribes was a method of acquiring title on paper to land gained by conquest. Treaties were negotiated and executed because English law demanded compliance with established legal procedure. Their purpose was to achieve settlement of title disputes pursuant to a European system.

This chapter will examine four elements of treaty making with Indian tribes: (i) America's inheritance from England, (ii) constitutional status

---

[7]Felix S. Cohen, "How Long Will Indian Constitutions Last?" in The Legal Conscience, Selected Papers of Felix S. Cohen, ed. by Lucy Kramer Cohen (New Haven: Yale University Press, 1960), p. 222.

[8]Ibid., pp. 224-28.

of treaties, (iii) standard elements in some actual treaties, and (iv) the philosophical position of the Supreme Court in its early years.

America's Inheritance from England

International law accepts the doctrine that the law of a prior sovereign is maintained until actively changed by the new sovereign, and that the nationality of the source is of no special consequence. The United States, therefore, was fundamentally an heir of British and Spanish principles of law and obviously the British influence had greater impact.[9]

The first significant British interest in the position of the Indians in the colonies was expressed in a report of the Lords of Trade read before the Council at the Court of St. James on November 23, 1761.

> . . .the primary cause of that discontent . . . was the Cruelty and Injustice with which they had been treated with respect to their hunting grounds, in open violation of those solemn compacts by which they had yielded to use the Dominion, but not the property of those lands.[10]

The statement's significance lies in the enunciation of an assumed sovereignty ("Dominion") of the Crown though the land was maintained by the tribes.

The acknowledgment that injustices occurred in violation of agreements with the tribes was simply an expression of regret since Britain

---

[9]Felix S. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States," ibid., p. 248.

[10]Price, American Indian, p. 376, citing Indian Land Cessions.

generally ignored the legal status of Indians when making grants and charters. Such contracts were made with English subjects and retained sovereignty in the Crown. The Plymouth Charter, for example, included a provision that "the grant is not to include any lands 'actually possessed or inhabited by any other Christian prince or state,' but the Indians are wholly ignored."[11] Realistically, the religious status referred to would indicate that other European claims, even if not held to be absolute, would be granted serious appraisal, while Indian claims to title were inconceivable.

An exception to the common absence of mention of tribes is found in the Maryland Charter. While their occupancy of part of the land was acknowledged and nominal compensation (two arrows) required to take the land, the colonists were directed to consider tribes as enemies, and the grant authorized the Governor to wage war against them for the purpose of "vanquish[ing]" them.[12]

The general characteristics of Britain's Indian policy were, therefore, the sovereignty of the Crown over all territorial claims, an acknowledgment of the occupancy by Indians of parts of the claimed land and a legal requirement that compensation be paid for the taking of land from tribes. However, the state, being supreme, had the right to simply "vanquish" the tribes.

---

[11] Ibid., p. 375.

[12] Ibid., p. 376.

Spanish law, expressed primarily by the Roman Catholic Church, amplified the definition of the right of the discoverer by the stipulation that discovery did not give a right to confiscation of possessions, nor did religion or lack thereof have any bearing on rights to land.[13]

The United States expressed acceptance of the basic British and Spanish principles in its establishment of sovereignty over the continent. In the Northwest Ordinance of 1787, it expressed "good faith" toward Indians and guaranteed them possession of land and property unless they consented otherwise,[14] and in Article VI of the Treaty of April 30, 1803 for the cession of Louisiana from France it guaranteed property rights of the inhabitants of the Louisiana Territory:

> Art. VI. The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon.[15]

Constitutional Status of Treaties

An administrative system to execute America's philosophy of sovereignty over Indian lands was established by constitutional provisions for treaty making and management of United States-tribal relations. The power

---

[13]Felix S. Cohen, "Indian Claims," in Legal Conscience, p. 268-69.

[14]Cohen, "Spanish Origin," ibid., p. 242.

[15]Felix S. Cohen, "Original Indian Title," in Legal Conscience, p. 280, n. 16.

to make treaties with the advice and consent of the Senate, as well as general conduct of foreign relations, is granted to the Executive by Article II, Section 2. However, since Indian tribes were not regarded strictly as foreign nations, the Constitution grants to Congress in Article I, Section 8 the responsibility for dealing with tribes. Article I, Section 10 forbids treaty-making by states, guaranteeing Federal control over the matter.

In actual practice, the United States adheres to the monistic theory of treaties--if validly made they become law without further action.[16] However, there are several elements which complicate the process. Neither the President nor Congress is prohibited from qualifying, ignoring or revoking a treaty at any time.[17] Congress may, for example, invalidate a previously ratified treaty by legislation inconsistent with its terms.[18] And the activities of the Foreign Relations Committee and of individual Senators as representatives of the United States during informal negotiations may have significant impact on the treaty process.[19] Finally, enforcement of treaties may be impeded when

---

[16]The opposing dualistic theory is followed in Canada where treaties must be embodied in a statute. (Hendry, Treaties, p. 14.)

[17]Louis Henkin, Foreign Affairs and the Constitution (Mineola, New York: The Foundation Press, Inc., 1972), p. 133, citing U.S. v. Curtiss-Wright Corporation, 299 U.S. 304 (1936); U.S. v. Belmont, 301 U.S. 324 (1937); U.S. v. Pink, 315 U.S. 203 (1942); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[18]Hendry, Treaties, p. 91.

[19]Henkin, Foreign Affairs, p. 131.

the legislative branch and/or individual states are obligated to perform some function,[20] thereby expanding the scope of negotiation into other political arenas and decreasing the likelihood of completing good faith agreements in a timely fashion.

The judicial responsibility is based upon provisions in Article VI, Section 2 providing that treaties, the Constitution and laws are the supreme law of the land, and in Article II, Section 2 extending the judicial power thereto.

The judiciary may stipulate proper subjects of international negotiation,[21] but typically removes itself from consideration of the provisions of actual treaties. For example, whether the courts have the power to declare the terms of a treaty void and unenforceable has not been clarified,[22] nor has the judicial acceptability of a treaty requiring passage of some legislative program affecting the United States.[23]

The judicial responsibility arises in treaty performance, "to ascertain whether the treaty-making authority has acted constitutionally when it allegedly infringed some right of a subject . . . [J]udicial interference

---

[20]Hendry, Treaties, p. 7.

[21]Ibid., p. 72, citing Degeogroy v. Riggs, 133 U.S. 258 (1890).

[22]Ibid., p. 91, citing U. S. v. Reid, 73 Fed. (2nd)(U.S.) 153, p. 155.

[23]Ibid., citing Bacardi Corps of America v. Domenech, 311 U.S. 150 (1940); Fujii v. California 217 Pacific 2nd (U.S.) 481; (Calif. Appeals, 1950) overruled by (1952) 242 Pacific 2nd (U.S.) 617; 38 Calif. 2nd 718.

in the treaty process cannot arise until after a fait accompli." [Emphasis supplied.][24]

Since the power of the Court to declare the terms of a treaty void and unenforceable is doubtful, courts have adhered consistently to a policy of "judicial self-abnegation." Treaties are normally regarded as political questions inappropriate for adjudication and best left to the executive and legislative realms. However, if private rights are allegedly violated, the court's duty is to pass on the constitutionality of the treaty involved. The most effective challenges are based on infringements of preferred freedoms.[25] However, no treaty has been found unconstitutional by any American court and few have been seriously challenged.[26]

There are some exceptions to the court's abnegation; for example, where a procedural question arises,[27] where "doubtful expressions" are to be resolved,[28] where the amount of compensation is questioned, and where

---

[24] Hendry, Treaties, p. 67.

[25] Henkin, Foreign Affairs, p. 137.

[26] Hendry, Treaties, p. 72, citing In re Cooper, Ware v. Hylton, U. S. v. Reid, U. S. v. Thompson.

[27] Price, American Indian, pp. 419-20, citing U. S. v. Santa Fe Pacific R. Co., in which the Court determined whether Congress had in fact authorized extinguishment of title.

[28] Ibid., citing Choate v. Trapp, 224 U.S. 665, 675 (1912)

Congress has specifically given the court jurisdiction in a particular claim.[29]

These exceptions are the fundamental standards of jurisprudence regarding Indian property rights, and have served as consistent standards for equitable relief of tribal grievances and management of Indian affairs. Generally, the position of the Supreme Court has been to support both the body of law inherited from England, principally the right of the discoverer with necessity of compensation, and the constitutional grant of authority to Congress. Its position is both the source and remedy of conflict. Since the action of the legislative branch is final as long as it conforms to procedural requirements and fairness, treaties can be overriden by act of Congress. While the Court can relieve a particular complaint, it does not have the power to direct the Congressional management of the treaty process.

---

[29] Ibid. In addition, the Department of State is a source of guidance to the judiciary in rendering its determination of whether the case involves a political question. Hendry, Treaties, p. 72.

> "An indication by the Dept. of State to the judiciary that it is an impolitic or embarassing agreement, and a subsequent determination that the treaty is not self-executing would be a possible way for the executive to repudiate such an obligation. Such a method would be a breach of international law, however, as the treaty is internationally valid on constitutional conclusion." Hendry, Treaties, p. 103, n. 29. "For a determination of the question of self-executing and non-self-executing treaties see Marshall's opinion in Foster v. Neilson, 2 Pet. 253, 314 (U. S. 1829)." Hendry, Treaties, p. 10.

Standard Elements in Treaties

The geographical expansion of the colonists demanded a government policy toward orderly acquisition of Indian land. The need was fulfilled by the passage of the Act of July 22, 1790 requiring a treaty to validate transfers of Indian land to the United States, and a special act of Congress for the sale of tribal land.[30] With the end of the War of 1812 American pioneers considered the move westward with less anxiety and promulgated the pretense of Indian tribes as independent nations in order to effectuate the treaty-making policy.[31] Between 1789 and 1850 alone 245 treaties were concluded for the purchase of 450 million acres of land at $.20 per acre.[32] At the height of the great crossing of the Plains, Indian Commissioners were established by executive order to negotiate treaties with reluctant tribes, and though negotiations were completed acquisition of property was only determined by successful military expeditions.[33]

Certainly an element which illustrated the inappropriateness of the treaty method was the incompatability of language. Although tribal repre-

---

[30]Cohen, "Spanish Origin," Legal Conscience, p. 236. However, if lands had been individualized under conditions of ownership for a certain period of time, usually 25 years, or with the approval of the Secretary of the Interior, a special act was not needed.

[31]Israel, Major Peace Treaties, with a Commentary by Emanuel Chill, II, 664.

[32]Notes, "Systematic Discrimination in the Indian Claims Commission: The Burden of Proof in Redressing Historical Wrongs," Iowa Law Review, Vol. 57, No. 5 (June, 1972), p. 1302.

[33]Israel, Major Peace Treaties, p. 665.

sentatives signed various documents, the meaning of the elaborate legal provisions eluded them.[34] Generally, the parties declared perpetual peace and friendship and promised each other assistance in just wars and service as a source of information on the activities of other hostiles. A system of trade was established and both parties agreed not to punish citizens of the other.

More detailed terms had great impact on the control and ownership of lands and demanded a clear and precise understanding of legal obligations, which may or may not have been present, and which most certainly were violated by both parties.

Under the Delaware Indian Treaty of September 17, 1778, the tribe agreed to give free passage to American troops and to provide food and supplies to them upon compensation. The United States stipulated that if other tribes should join the agreement, the Delawares would become the chieftains of all and have representation in Congress, and guaranteed "all their territoreal [sic] rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they . . . shall abide by, and hold fast the chain of friendship now entered into."[35]

The Treaty of Fort Greenville of August 3, 1795 clarified the guaranty of territorial rights by defining the term "relinquishment of claims". Article VI of the treaty stated:

---

[34] Ibid., p. 664.

[35] Ibid., pp. 669-71.

> . . . but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.[36]

By this definition, relinquishment of tribal lands clearly imposed Federal control over the property but it also created the basis for complete Federal acquisition against the interest of the tribes. Technically, the only right guaranteed the Indians was the right of occupancy. As long as the land was used as a home by the tribes it was available to their use in perpetuity; however, once the land was abandoned, title devolved to the government and the tribe had no claim to the land.

To compensate the tribe, the United States specifically relinquished its claim to "all other Indian lands" with certain exceptions and provided payment by a guaranty of goods valued at $20,000 in the first year and $9,500 in every following year. However, the boundary lines for the land ceded and paid for were established in only a general way. Exact surveys were to be taken after the fact in accordance with the provisions of the treaty and supervised by Indian representatives.[37]

In sum, all treaties contained provisions which acknowledged Federal ownership of land, Indian occupancy of land, granted some form of

---

[36] Ibid., p. 678.

[37] Ibid., p. 673.

compensation, usually in goods, and stipulated the events which would terminate the protected Indian occupancy of the land.[38] However, treaty-making was conducted in a highly unstable environment and the 1832 Treaty of Paynes' Landing exemplifies the problems involved. Under its terms, a delegation of six members of the Florida Seminoles was chosen to inspect land in Arkansas for prospective relocation. Their authority was limited to reporting their findings to tribal leaders and not to commit the tribe to any agreement. Despite their unfavorable opinion, the representatives were pressured into signing an agreement requiring the tribe to move to the Arkansas land. The agreement was upheld as part of the treaty and ratified by the Senate. When the government tried to enforce the terms of the Treaty, war ensued.[39]

The tremendous obstacles of language, understanding, capacity to carry out terms, and blatant violations of terms were all elements of the treaty process. The result of the system, however, was the acquisition by the United States of title to all lands within its boundaries and the defeat of Indian sovereignty.

---

[38]Other treaties included special provisions which recompensed the United States for expenses incurred as the result of a war in violation of a prior treaty, promised special gifts to the tribes upon information leading to discovery of valuable minerals and granted supervisory authority to tribal leaders. See Treaty of Fort Jackson, August 9, 1914, Israel, Major Peace Treaties, p. 691; Treaty of Fort Armstrong, September 21, 1832, ibid., p. 714.

[39]Notes, "Systematic Discrimination," p. 1302, n. 31, citing Blumenthal, pp. 104-106.

Philosophical Position of the Supreme Court

The validity of the treaty-making process was dependent on two processes--the negotiation and execution of agreements and the separate policy and action of Congress. While treaties were constitutionally recognized as part of the supreme law of the land, the administration of Indian relations was granted to the legislature. This dual approach to Indian affairs, treaty-making and legislation, is the major source of litigation and, consequently, the major theme of judicial debate.

As the final authority on constitutional and legal questions, the Supreme Court has rendered definitions of the status of treaties, tribes, and the boundaries of Congressional authority in its management of tribal lands. Notwithstanding the Court's opinions, the treaty process remained a complicated and chameleon-like approach to acquiring title. While the opinions themselves illustrate the legal questions involved, the facts behind each case illustrate the complexities and inherent failure of the treaty-making process as a just solution, and its success in attaining the goal of Federal ownership and control of property.

The Supreme Court defined the relationship of treaties and statutes in Cherokee Tobacco[40] finding that treaties have "no higher sanctity" and "are no more obligatory" when made with Indian tribes than in any other international relationship,[41] and are therefore subject to Congressional

---

[40]78 U.S. (11 Wall.) 616 (1870).

[41]Price, American Indian, p. 420, citing Cherokee Tobacco.

invalidation. While thus providing a simple legal standard of validity, i.e. the most contemporary is valid, the Court did not clarify the real problem of a consistent and just approach to acquisition of tribal lands. It was constitutionally prohibited from doing so as its function is not legislative in nature. But the effect of the decision was to negate a validly executed document which should have been honored in all respects.

The case arose from a conflict between Article 10 of the Treaty of 1866 and Section 107 of the Act of 1868. The Treaty granted the Cherokees the right to sell any product without paying a tax "levied on quantity sold outside of the Indian territory." The Act established a tax on liquor and tobacco produced anywhere within the United States.[42] To reconcile the conflicting policies, the Court first expressed the unchanging nature of the Constitution in the face of both treaty and statute. Neither changes the Constitution and both must fall if they violate the Constitution. Since both treaty and statute, in the case at hand, were valid and legal obligations, one or the other had to fall. The Constitution specifically granting authority to Congress, the Act of 1868 superseded the provisions of the Treaty and the Cherokees were subject to taxation.

> The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If

---

[42] Ibid., p. 421.

> a wrong has been done the power of redress is with Congress, not with the judiciary . . . .
>
> . . . The burden must rest somewhere.[43]

Cherokee Tobacco resulted in an acknowledgment that though treaties express obligations made in good faith they cannot be depended upon, the ability to abrogate any terms being a constitutionally recognized right of Congress. However, the standard of good faith was not to be lightly violated by state authority.

An 1831 opinion in Cherokee Nation v. Georgia is famous for its expression of federalist doctrine rejecting casual violation of the terms of federal treaties with tribes.[44] The opinion written by Chief Justice John Marshall found that a tribe could not maintain an action in federal courts as it was neither a state nor a foreign nation, but that Indians are "domestic dependent nations" under the sovereignty of the United States. As such, they have an unquestionable right to their land until they voluntarily yield their title to the United States.[45]

The case arose out of an attempt by Georgia to remove the Creek and Cherokee Indians outside its western boundary. While Federal policy had been to gradually purchase all of the tribal lands and include them within

---

[43] Ibid., p. 422, citing the Court's opinion per Justice Swayne.

[44] Alfred H. Kelly and Winfred A. Harbison, The American Constitution--Its Origins and Development (New York: W. W. Norton & Company, Inc., 1970), p. 301.

[45] Ibid., p. 303.

Georgia's jurisdiction, the Cherokee Nation adopted a written constitution in 1827 proclaiming themselves an independent state. Impatient for the completion of Federal acquisition and assignment of the land and in the face of the Cherokee action, Georgia extended state law over the Indian territory, declared all Indian law null and void, and directed the seizure of the lands. Pursuant to Georgia's laws, the state tried, convicted and executed an Indian (Corn Tassel) despite a writ of error granted by the Supreme Court after the trial. The Governor of Georgia declared absolute resistance to all interference with Georgia's courts and since President Jackson refused to act on behalf of the tribe an injunction was sought to restrain the state.[46]

Although in the Court's opinion the tribe had no standing to bring a suit before it, it legitimized tribal rights pursuant to federal treaties and reaffirmed Federal supremacy over state authority. Since the case had no legally binding outcome in the absence of valid standing of the tribe, the conflict between Georgia and the Cherokee Nation was not resolved. In a supplementary decision, the Court was able to render a legally binding opinion. In Worcester v. Georgia (1832), Marshall again held against the state, finding that the Cherokee nation was a separate and distinct political community which could be entered only upon the tribe's consent or "in conformity with treaties and acts of Congress."[47] Federal law, therefore, dominates both Indian and state law.

---

[46] Ibid., p. 302.

[47] Ibid., p. 303.

In this instance, Georgia had established a licensing system for non-Indians residing on Indian lands. A trader was tried and convicted for violation of the system and appealed his conviction. Here, a private, non-Indian individual was involved and these facts contributed to the clear statement of Federal authority and acknowledgment of Indian rights. However, when Marshall implied an executive duty to implement the decision, his caution was ignored by both Jackson and Georgia. The Cherokee's cause was resolved only when the tribe ceded its lands by another treaty and migrated west of the Mississippi River.[48]

Having affirmed Congressional authority to make and break treaties, and the supremacy of Federal authority in Indian relations, the question of the extent of administrative power held by Congress remained. Treaties could be revoked, but could Congressional authority be assigned to administrative agencies and how was the language of treaties to be interpreted?

In Cherokee Nation v. Hitchcock[49] the Court found that Congress had the power to grant specific authority to administrative agencies in its management of Indian relations and that the meaning of terms of treaties could be interpreted by the Congress. The case involved consideration of two treaties with the Cherokee made in 1835 and 1846, and a Congressional statute of 1898 which authorized the Secretary of the Interior to lease

---

[48] Ibid.

[49] 187 U.S. 294 (1902).

mineral and oil rights on land granted to the Cherokees pursuant to the treaties.[50]

The tribe challenged the statute by alleging that the Treaty of 1835 had granted them a "fee simple interest" in the land in question and the right, through their governing council, to make and execute all necessary laws to regulate the land.[51] Under the Treaty of 1846, however, the Cherokees were required to make laws for equal protection under the law and for the security of life, liberty and property.[52]

The Court's opinion by Justice White refused to enjoin the Secretary of the Interior from pursuing the leasing arrangements. Citing the Report of the Senate Committee on the Five Civilized Tribes of Indians,[53] the Court accepted the interpretation that the 1846 obligation of the tribe to provide for equal protection under the law meant "equitable participation in the common property of the tribe". It also accepted the doctrine of federal responsibility to provide for "equitable participation" in the absence of tribal action.[54]

---

[50]Price, American Indian, p. 422.

[51]Ibid. "An absolute or fee simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate." Henry Campbell Black, M.A., Black's Law Dictionary (St. Paul, Minn.: West Publishing Co., 1957).

[52]Price, American Indian, p. 423.

[53]Report of May 7, 1894, Sen. Rep. No. 377, 53rd Cong. 2d sess.

[54]Price, American Indian, p. 423, citing Cherokee Nation v. Hitchcock.

The Court then considered the question whether the 1898 Act was a valid exercise of Congress' power and found that since Indian tribes are directly subject to the legislative power of the United States and are by treaty under Federal authority, no treaty with the Cherokees had freed them from dependency on Congress. Congress, therefore, had a legitimate power to authorize the Secretary of the Interior to lease Indian lands.[55]

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.[56]

Congress may clearly administer tribal lands in any way it sees fit and it may interpret the terms of a treaty contrary to the Indian understanding of the agreement. While general language can be read with ease permitting diverse interpretations, specific language in treaties allows little flexibility and sharpens the issues when challenged. The Supreme Court has found that even specific terms of agreement with tribes can be validly and haphazardly rescinded by Congress.

In Lone Wolf v. Hitchcock,[57] the Court reaffirmed tribal dependence on the Federal government and Congressional authority to manage tribal lands even where by treaty tribal lands could not be ceded by further

---

[55]Price, American Indian, p. 424.

[56]Ibid., p. 425, citing Cherokee Nation v. Hitchcock.

[57]187 U.S. 553 (1903).

treaty unless voted upon and agreed to by a majority of tribal members. In this case, an 1867 treaty specifically limited the power of an 1892 treaty to convey title, and the Congressional statute in the intermediate years had specifically guaranteed the good faith of the government by virtue by any treaty executed prior to 1871.[58]

By the Treaty of Medicine Lodge of 1867, it was agreed that the lands held by the Kiowa and Comanche tribes could not be ceded by further treaty unless approved by three-fourths of the adult male Indians occupying the land. In 1892, 456 tribal members signed an agreement to sell 2.5 million acres of the same land to the Federal government. During the Senate consideration of the treaty in 1899, the Secretary of the Interior pointed out that the required three-fourths approval had not been met, but the treaty was accepted notwithstanding the 1867 treaty arrangements or the 1871 statute guaranteeing good faith toward pre-1871 treaties.[59]

In an appeal to the Court for an injunction against implementation of the cession of land, the Court considered whether the lands held under the 1867 Treaty of Medicine Lodge fell within the protection of the Fifth Amendment and consequently within the jurisdiction of the Court. The Court found that the lands did not have this protection and that, Indians being dependents of the Federal government and Indian lands being

---

[58]Price, American Indian, p. 425, citing Act of March 3, 1871 ending treaty making with Indian tribes.

[59]Price, American Indian, p. 425.

protected only from state and individual encroachment, Congress had a plenary right to determine the best means of managing the lands.

> When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.[60]

Although the Act of March 3, 1871 had declared Congressional intention to honor the terms of treaties, the Court reaffirmed Congress' power to choose the manner in which good faith agreement would be executed.[61] The sale of lands in open violation of the terms of the Treaty, lacking the required consent of tribal members, was defined as "a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."

> In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation [the Treaty of 1892]. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.[62]

---

[60] Ibid., pp. 426-27, citing Lone Wolf v. Hitchcock.

[61] Ibid., p. 427.

[62] Ibid., p. 428, citing Lone Wolf v. Hitchcock.

Although in prior decisions the Court had held that ambiguous expressions in treaties should be resolved in favor of the Indians,[63] Lone Wolf has the effect of declaring specific protections in the Indians behalf and limitations on the treaty-making power to be invalid. Where Congress chooses to rescind general or specific language, it may do so with impunity and good faith negotiation becomes meaningless.

The philosophical position of the Supreme Court affirmed the equal status of treaties and statutes, the absence of legal standing of tribes without special jurisdictional act of Congress, and tribal right of occupancy against state and individual encroachment. It also affirmed the supreme authority of Congress to execute its constitutional responsibility to conduct Indian relations in a manner of its choosing without limitation.

The Court's task was an unpleasant job of untangling the web of innumerable treaties and statutes, but its standards to dispose of cases were clearcut. There is little doubt as to the outcome of any grievance against Federal management of property--the United States owned the land and had the powers of a landlord over tribal occupancy. The greatest contribution of the Court in these cases was to clearly establish the powers of the Federal authority, a contribution essential to the unification of the country, but which reflects poorly on the process of "good faith" agreements with the Indian Nation.

---

[63]Cohen, "Spanish Origin," Legal Conscience, p. 244, no. 39, citing Worcester c. Georgia, 6 Pet. 515 (1832); The Kansas Indians, 5 Wall 737 (1866); Winters v. U.S., 207 U.S. 564 (1908).

CHAPTER II

THE ACQUISITION OF TITLE TO PROPERTY

Introduction

The Fifth Amendment requires that private property shall not be taken without just compensation. Two of the three substantive factors in the Amendment, i.e. the act of taking and just compensation, have been the subject of great controversy in the courts. The history of the Supreme Court contains numerous examples of the application of due process of law to property rights, and here will be examined in application to the Indian, who for most of our history has been considered a political and cultural alien and has been managed constitutionally under special Congressional powers of foreign relations.

Due process of law, requiring fair procedures, is a constitutional protection of property rights. Although the Bill of Rights did not apply to aliens, the due process requirement of fair procedures can be considered a limitation on foreign relations since it is applied universally in government structures.[1]

While emphasis is currently placed on exploitation of Indian tribes with the implication that land was simply confiscated, a defense can be made against the charge on the basis of documented purchase, pursuant to valid procedure, i.e. treaty or other agreement, of approximately

---

[1]Henkin, Foreign Affairs, p. 255.

95% of the land acquired by the United States.[2] This defense does not exonerate recognized abuses including fraud and coercion; its significance lies in the adherence to procedure and compulsory payment in order to legalize such transactions.

This chapter discusses the conceptual framework encompassing acquisition of title against Indian claims, consisting of several factors: Anglo-Saxon jurisprudence, the Eighteenth Century translation of natural law and Puritan ethic into American law, and the Supreme Court's interpretation of title acquisition.

Anglo-Saxon Jurisprudence

The recognition of Federal title to Indian lands originated in international law in the doctrine of discovery and was of primary significance in America's English heritage. The period of European exploration and colonization required the development of a justification for the taking of uncivilized lands and that justification is known as the rule of the discoverer. Briefly, discovery of land gives title to the sovereign whose subjects made the discovery. The title is good against all other sovereigns though the natives of the land are considered the rightful occupants thereof. Their use of the land is uninhibited subject to a curtailment of the right to dispose of the land without the approval of the sovereign.

---

[2]Cohen, "Indian Claims," Legal Conscience, p. 269.

Chief Justice Catron in State v. Foreman[3] identified the right of the discoverer as an accepted principle of international law. While perhaps morally questionable as serving ultimate justice, it is nevertheless the law of the land.

> Refined sensibility and elevated philanthropy may hold what it will, the truth is, neither our theory or practice has ever allowed to the Indians, any political right extending beyond our pleasure . . . . Theirs is not a case of conscience before this court, but a case of law.[4]

Pursuant to this right of discovery, the United States held exclusive title and could dispose of the land by purchase or conquest at its discretion, subject only to the Indian right of occupancy.[5] United States sovereignty originated with Great Britain which had claimed title through John Cabot's discovery of Newfoundland. The Supreme Court has expressed the conclusion that since the United States had acquired all rights formerly possessed by Great Britain, it had acquired exclusive title to all Indian lands.[6]

An express acknowledgment and explanation of the rule of the discoverer is contained in Johnson v. M'Intosh[7], in which the court limited

---

[3]16 Tenn. 256 (1835).

[4]Price, American Indian, pp. 377-78, citing State v. Foreman.

[5]Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, at 587.

[6]Notes, "Systematic Discrimination," p. 1305, citing Johnson v. M'Intosh.

[7]See n. 5 supra.

the power of the tribes to grant land owned under valid agreements made by authoritative representatives of the tribes. Chief Justice Marshall stated that title to any land depends entirely on the law of the nation of which the lands are a part. The principle which the United States operated upon was the right of the discoverer, impairing the rights of the tribes to dispose of land independently.[8]

> . . .[D]iscovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
> . . . . . .
> . . .It is not for the Courts of this country to question the validity of this title [obtained by conquest], or to sustain one which is incompatible with it.[9]

Marshall concludes that however morally objectionable it may appear to deny to the tribes, whose title by occupancy is valid, the right to dispose of the land as they see fit, it is an "indispensable" measure supported by reason and cannot be rejected by the courts. By denying to the tribes the right to dispose of their land, Johnson v. M'Intosh preserved in the Federal government a means of controlling white intervention in the affairs of Indians and established federalist philosophy in the ascendency by denying to states and individuals the right to deal with the Indians.[10]

---

[8]Price, American Indian, pp. 360-61.

[9]Ibid., p. 363, citing Johnson v. M'Intosh.

[10]Price, American Indian, p. 366.

The case arose under two conflicting grants of land made by the Illinois and Peankeshaw tribes. The Indians had sold the land to an individual (Johnson) after which the same land was sold to the United States by the Treaty of June 7, 1803. The government then granted the land to M'Intosh in 1818.[11] Following the rule of the discoverer, the defendant who held title by grant from the United States prevailed over the plaintiff who derived title from the Indians.[12]

In summary, the United States acquired title to all land by virtue of its inheritance of sovereignty from Great Britain. Similarly, lands inherited by treaty or conquest from any other sovereign would become property of the United States. Tribal inhabitants had the right of occupancy only and were prevented from selling tribal lands without the prior approval of the United States. Accordingly, under international law, the United States was free to dispose of the property in any way it saw fit, regardless of humanitarian motives or treaties.

Natural Law and Puritan Ethic

The influence of morality on the question of acquisition of title was contributed by the religious philosophy of the colonists. Although the philosophy was not free from challenge, its fundamental perception of law as a reflection of divine will influenced official government attitudes toward Indian property rights.

---

[11]Cohen, "Original Indian Title," in Legal Conscience, p. 292.

[12]Price, American Indian, p. 365.

The legally acceptable, though sterile attitude of the rule of the discoverer was expressed by John Winthrop, leader of the Massachusetts Bay colony, who justified taking of Indian property on the basis of two principles. First, American land was an "undomesticated void" and the Indians owned it only by a natural right. Second, the revealed word of God in the Bible ordaining that "man occupy the earth, increase and multiply" created a civil right to land, which superseded the natural right. In Winthrop's rationale, both natural and civil rights to property are God-given; however, occupancy and labor on land convert it from common to private property. Private property, a civil right to land, takes precedence over the natural right of a primitive society.[13] Therefore, colonists had a legal right verified by divine law to claim title to lands which they could occupy and work despite claims of tribes.

In December, 1632, Roger Williams challenged Winthrop's reasoning. He asserted that since tribes themselves recognized their personal ownership of land until an actual sale was negotiated and compensation paid, the land being occupied by tribes until that time, the usurpation of a government was not valid on the basis of Winthrop's definition of civil and natural property rights.[14]

---

[13] Ibid., p. 368, citing C. E. Eisenger, The Puritan's Justification for Taking the Land, 84 Essex Institute Historical Collections 131, 135-143 (1948).

[14] Ibid., pp. 368-69.

Winthrop's rebuttal to Williams consisted of an assertion of divine wisdom to which no further challenge could be made:

> . . .[I]f God were not pleased with our inheritinge these partes, whey did he drive out the natives before us? . . . [W]hy doth he still make room for us, by diminishinge them as we increase? . . . If we had no right to it, and if he be pleased to give it us . . . who shall control him or his terms?[15]

Despite the religious disagreement, it is significant that the Puritans developed a policy justifying taking of land in terms of a religious ethic. Their sense of moral integrity was gratified and a pragmatic justification created to attract new settlers to their colonies.[16] In addition, the factional arguments expressed a need to compensate tribes for taking their land and built a foundation for good faith negotiations and honorable management of Indian relations.[17]

The Supreme Court on Acquisition of Title

Although the precedent for compensation to tribes was not a legal standard, it was supported by government officials and the Supreme Court in dicta. Thomas Jefferson identified a limit on the Federal government in its Indian relations by specifying that its right to take Indian land was strictly limited by the tribe's willingness to sell. Washington's

---

[15] Ibid., p. 370.

[16] Ibid.

[17] The southern colonies, however, generally justified taking of land by denying the humanity of the Indians. Price, American Indian, p. 370, citing G. Nash, "The Image of the Indian in the Southern Colonial Mind," 14 (unpublished 1971).

Secretary of War, Henry Knox, whose Department originally managed Indian affairs, also recognized the limitation of voluntarism and of obligatory compensation.[18]

On the part of the Supreme Court, while Johnson v. M'Intosh enunciated the principle of the right of the discoverer, Worcester v. Georgia in dicta contended that if the line of ownership was traced back to Britain's acquisition, it would be found that the land had been purchased from the Indians and that no coercion had been present. Therefore, under Worcester, only that property passed to the United States which had been purchased by Britain from the Indian tribes. Further, since Britain had not had the power of coercion, neither had its descendent in sovereignty. Since prior to discovery and purchase by Britain, title had rested in the Indian tribes, it could be acquired only by voluntary transactions.[19]

Had the Court held consistently to the extension of the rule of the discoverer to include compensation, management of title acquisition would have been greatly simplified. However, due to the Congressional responsibility in this regard, the Court maintained a two-faced approach by also holding to its original position that conquest alone was a valid

---

[18]Notes, "Systematic Discrimination," p. 1304.

[19]Price, American Indian, pp. 494-95, citing Worcester v. Georgia, 31 U.S. (6 Pet.) 483 (1832).

means of acquiring title. Finally, although in Beecher v. Wetherby [20] the Court stipulated a line of jurisdiction in acquiring title, i.e. the Federal government acquires land and states acquire title from the Federal government, it also stated that it could not consider whether Congress' authorization of any means to acquire title was actually valid. It could not do so because it had no jurisdiction to consider political questions, and in the opinion of the court, extinguishment of Indian title was a political question.[21]

An explanation of the Court's motivation in relying on the political question doctrine was expressed in 1835 by Chief Justice Catron:

> [W]e should look well to our powers, and the probability of submission to our judgments, lest the authority of the judiciary be weakened by successful resistance . . . .[22]

The Court had grounds to fear rejection of its decisions and consequent failure of the system of judicial review since it had already dealt with the stubborn resistance of Georgia and the Presidency in Cherokee Nation v. Georgia (1831) and Worcester v. Georgia (1832).

The Court therefore offered three standards to provide for valid acquisition of title: (1) the rule of the discoverer extended to require compensation, (2) acquisition of title without compensation by conquest, and (3) the nonjusticiability of the matter as a political question.

---

[20] 95 U.S. 517 (1877).

[21] Ibid., at 525.

[22] Price, American Indian, p. 378, citing State v. Foreman, 16 Tenn. 256 (1835).

The philosophy of the Court obviously expressed confusing standards. Although pursuant to the rule of the discoverer and the contribution of the Puritan ethic, a generalized attitude toward the conduct of Indian relations had been established, only when Congress had assumed its responsibility by delineating the methods of management of Indian affairs and was challenged in actual operation could the Court clarify its position. It is therefore necessary to look further into particular cases of a later date which place before the Court justiciable questions based on Congressional action.

CHAPTER III

CONGRESSIONAL MANAGEMENT OF INDIAN RELATIONS

Introduction

Since Congress was the principal body responsible for the conduct of Indian relations, the Federal protection of Indians was accomplished largely through legislation. This chapter will discuss the actions of Congress in carrying out its responsibility and the resulting questions brought before the Supreme Court. The discussion involves consideration of the Trade and Intercourse Acts, the end of treaty-making and special jurisdictional acts granting the Court the authority to decide cases of Indian claims.

The Trade and Intercourse Acts

The first measures taken by Congress attempted to provide an equitable system to manage criminal activity between Indians and whites, and were intended to enforce and honor treaty stipulations negotiated with the Indian tribes. Collectively referred to as the Trade and Intercourse Acts, the six statutes[1] were actually an attempt to control white aggression against the Indians by equating crimes against any Indian or his property with the same crime against a white.[2]

---

[1]Acts of 1790, 1793, 1796, 1799, 1802 and 1834.

[2]Francis Paul Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834 (Cambridge, Massachusetts: Harvard University Press, 1962), p. 190.

The first Trade and Intercourse Act of July 22, 1790 established treaty making as the means to conduct Congressional responsibility of Article I, Section 8 of the Constitution. The Act stipulated:

> Sec. 4. And be it enacted and declared, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[3]

This statement reflected the Proclamation of the Continental Congress of September 22, 1783 prohibiting whites "purchasing or receiving any gift or cession of . . . land or claims without the express authority and directions of the United States . . . .",[4] and restated the Court's assertion of federal supremacy in treaty making based on Article VI, Section 2 of the Constitution including treaties in the supreme law of the land. It is also significant for its underlying assumption that the purpose of treaties was to effectuate the purchase of lands rather than acquisition without compensation.

Having established the basic procedure to be followed, Congress pursued a detailed regulation of contracts between tribes and whites. The

---

[3]Francis Paul Prucha, ed., Documents of United States Indian Policy (Lincoln, Nebraska: University of Nebraska Press, 1975), p. 15, citing Trade and Intercourse Act, July 22, 1790, U. S. Statutes at Large, 1:137-38.

[4]Ibid., p. 3, citing Journals of the Continental Congress, 25:602.

general provisions of the Trade and Intercourse Acts established specific fines and licensing requirements for purchase of property and trade with the Indians. In addition, any purchases were to be reported to the Federal government under penalty of a fine, one-half of which was given to the government and the other half to the informer responsible for a conviction. Provisions guaranteeing satisfaction for theft had been written into some treaties and, if the person responsible could not satisfy the guaranty, the United States government was obligated to do so.[5]

The 1796 Act introduced a provision requiring the death penalty for anyone murdering an Indian in Indian territory[6] and if this were not possible, the United States paid the Indian's family $100 to $200 as compensation.[7] If property of an Indian was taken or destroyed, the responsible party upon conviction was required to reimburse the Indian twice the value of the property. Again, if he could not do so, the United States Government was obligated to pay it provided the Indian and his tribe did not seek personal revenge or satisfaction.[8]

The punishment of Indian crimes against whites followed a specific procedure. Whites were to report to agents, the agents applied to the tribe for satisfaction and, absent such satisfaction, the President was authorized to act. In matters concerning property, a sum could be deducted from any annuity due the Indians only if the whites sought no private satis-

---

[5]Prucha, Indian Policy, p. 207.

[6]Ibid., p. 192.

[7]Ibid., p. 202.

[8]Ibid., p. 192.

faction.[9] Treaties requiring certain payments to tribes could thereby by modified by Congress.[10]

The final Trade and Intercourse Act of June 30, 1834 restated the basic provisions of its predecessors. The traditional policy of acquiring Indian lands by treaty was not modified but penalties were increased for violation of the property and trade restrictions. In addition, penalties set originally in 1800 to deter British and Spanish incitement of the Indians against the United States and forbidding communication with tribes with the intent to incite violation of treaties were reinstated, as was the prohibition against inducment of a foreign nation to incite the Indians to revolt.[11]

The indemnification of each race against the other for theft or damage to property was also reinstated in the 1834 Act, having elapsed in 1802,

---

[9] Ibid., p. 193.

[10] The United States formally recognized the limited sovereignty of the Indian tribes in the Act of March 3, 1817 which established Federal jurisdiction over Indian offenses but specifically exempted that jurisdiction from intratribal and intertribal disputes and offenses. Prucha, Indian Policy, p. 211. However:

> "After the Mexican war several treaties abandoned the long-established distinction between internal and external affairs, and certain internal affairs were declared subject to federal control. In the act of March 3, 1885, certain specific crimes (notably murder, manslaughter, rape, assault with intent to kill, arson, burglury and larsony) were brought under federal jurisdiction. Cohen, Federal Indian Law, p. 46, 362-63." Prucha, Indian Policy, p. 212, n. 46.

[11] Prucha, Indian Policy, p. 264, citing U. S. Stat., II, 6-7.

in hopes of forestalling attempts at private satisfaction. Proponents of the passage of this provision were motivated by hopes of "patient submission" of both races to the laws of the Federal government.

> When persons are injured by the aggression of Indians, and can look confidently to the government for compensation, they feel disposed to submit patiently, and to await the operation of the laws.[12]

No absolute guaranty was made to preserve grants of land to tribes made by treaty, purchase or other agreement with the United States, but the 1834 Act restated the prohibition against settlement on or survey of those lands and increased the penalty for violation of that prohibition. In addition, whites were prohibited from destroying any game on the lands except for subsistence at the risk of forfeiture thereof and a fine. Whites were also fined for grazing livestock on Indian lands without the tribe's or individual's consent and government agents were authorized to remove "squatters". In the event the agents were unsuccessful, the President could authorize the use of military force to accomplish the removal.[13]

The Act of 1834 introduced one complete reversal of policy. Previously, the War Department had refrained from interference in intertribal disputes. Here the government committed itself to the opposite policy in order to protect American citizens and to preserve tribal integrity. Proponents argued that there was a paternal relationship between the Government

---

[12]Ibid., p. 265, citing proponents of passage of Act of 1834.

[13]Prucha, Indian Policy, pp. 263-64.

and the Indians; therefore, a paternal duty rested with the Government to end "ceaseless" and "causeless" Indian wars which were a violation of justice and humanitarianism. "It remains for the Government of the United States alone to determine when they shall end." In final form, the Act granted to the War Department general authority to use military force, under Presidential direction, to end or prevent Indian wars.[14]

The House Committee on Indian Affairs supported the passage of an additional bill in 1834 which would establish boundaries for an Indian territory west of Arkansas and Missouri to be reserved perpetually for the Indian tribes. Under the proposal, a system of government was to be established among the Indians, each tribe maintaining its independent government for the management of internal affairs and a voluntary tribal confederacy being managed by representatives from each tribe forming a council. A governor was to be appointed by the President with executive veto power, power of reprieve and authority to settle disputes, execute the laws and employ military force. The confederation was to be represented in Congress by one delegate and it was hoped that the territory

---

[14]Prucha, Indian Policy, pp. 266-67. At the time this provision was being debated on the floor of Congress, war had broken out between the Sacs and Foxes and the Sioux. In response to a plea by William B. Astor, President of the American Fur Company, Secretary of War Cass demanded the surrender of both sides and their confinement at military posts at the risk of the government's taking of hostages or use of military force. His actions were based upon treaties made with these tribes. Prucha, Indian Policy, p. 276.

would eventually be admitted to statehood.[15]

Objections to the proposal were chiefly that it was unconstitutional since it granted dictatorial powers to the President and that it would have a deleterious effect on treaty-making. In 1834, consideration of the bill was postponed. Although reconsidered late in the session, it was again postponed and never reconsidered.[16]

The laws passed in 1834 achieved a reorganization of the Indian Department, creating a legal basis of the Indian service, reinstated the guidelines for regulating contacts between Indians and whites and granted approval to the policy of Indian removal to the West. However, they did not guaranty the integrity of lands granted to tribes, maintaining only a shallow pledge of the United States to do so.[17]

In actual effect, the Acts of 1834 changed little. Protection of Indian rights remained an ideal largely due to the simultaneous growth of the westward movement and a reduction in military forces intended to protect the tribes by nearly half, from 10,000 to 6,000. Indian agents, though now organized and often effective, had no real power of enforcement.

---

[15] Ibid., p. 272.

[16] The idea had originally been considered in the 1820's when the policy of Indian removal was accepted and had been recommended in treaties made as early as 1778 (Treaties with Cherokees, May 6, 1828; Choctaws, September 27, 1830; Creeks, March 24, 1832). The annual report of the Secretary of War in 1836 stressed the need for some such system. Although legislation had been previously introduced to the same end in 1825, 1826 and 1827, it was consistently defeated. Prucha, Indian Policy, pp. 270-74.

[17] Ibid., pp. 273-74.

Courts and juries were frontier-oriented and strongly prejudiced against both the Indians and the military who acted as a buffer between the two groups. The Indian Department was forced to operate under strict budget limitations, and a consequent reduction in personnel and restriction of operations.[18] Simultaneously, the government was flooded with claims against the Indians "on the least provocation and without clear evidence", and the licensing provisions of the Acts yielded no convictions, effectively cancelling out the laws.[19]

The effect of these early Acts was to guaranty compensation for loss of property or life and to make the Federal government ultimately responsible for payment. The authority of the United States was therefore behind each treaty and statute pursuant to the custodial function of Congress. However, it had become necessary to reinstate the provisions frequently in an effort to organize and control the increasing incidents of crimes between Indians and whites. The success of the treaty-making system had been intended to be guaranteed by the Acts, but the needs of the growing frontier movement for land and free access to land created instead a call for the end of treaty making with the Indian tribes.

The End of Treaty Making

In the mid-Nineteenth Century, a subject of great controversy in Congress was the apparent failure of the Trade and Intercourse Acts to

[18] Ibid., pp. 275-76.

[19] Ibid., pp. 205-07.

provide peaceful settlement of the land. Since the Senate maintained its authority to approve such treaties with the President, Congress' opposition to treaty making was not, on the surface at least, based on jealousy of its Constitutional grants of responsibility for the management of Indian affairs. The fundamental argument made in the House was that (1) Indians can transfer title only to the United States, (2) treaty making cannot be used to relinquish land properly belonging to the United States, and (3) such use of treaty making is inherently capable of transferring United States control of lands into other hands.[20]

Dissatisfaction with the use of treaties for the conduct of Indian relations grew in other arenas as well. Indian Commissioner Parker, himself an Indian, expressed his support for abolition of treaty making in his annual report of 1869.

> A treaty involves the idea of a compact between two or more sovereign powers, each possessing sufficient authority and force to compel a compliance with the obligations incurred. The Indian tribes of the United States are not sovereign nations, capable of making treaties, as none of them have an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this character . . . . [G]reat injury has been done by the government in deluding this people into the belief of their being independent sovereignties, while they were at the same time recognized only as its dependents and wards.[21]

---

[20]Prucha, Documents, pp. 115-16, citing House Debate between Congressman Sidney Clarke of Kansas and Clenni W. Scofield of Pennsylvania on June 18, 1868.

[21]Ibid., pp. 134-35, citing Annual Report of the Commissioner of Indian Affairs, December 23, 1869 (House Executive Documents no. 1, 41st Cong., 2d sess., serial 1414, p. 448).

In 1871, Congress considered the matter of ending treaty making. In its report on the Organization of the Indian Territory,[22] the Congress restated its right to determine the status of Indians and the nature of any form of government established among them. Second, Congress referred to its authority to manage Indian affairs in any way it saw fit, including termination of treaty making. Third, "any system which does does not encourage [private proprietorship] is bad, and any which actually prohibits it will not long be tolerated."[23] Although private proprietorship had not been encouraged by laws and treaties (it had, in fact, been ignored, making numerous inalienable grants of land to tribes), Congress here specifically rejected the idea that it could not require allotment of the lands to private persons, stating "Is it to be wondered at that under these conditions these people make slow advancement in civilization?"[24]

While the Report acquiesced that previous grants of land were legitimate and necessary, it emphasized that land held in common should be sold for the benefit of the tribes and reminded the government that Indian title to land was not absolute.[25] The Report concluded in an emotional argument that the tribes will acquire a "magnificent fund" for their benefit, that in the absence of legislation ending treaty making

---

[22]Report No. 336, 41st Cong., 3d Sess. (1871), 3-4, 8-11.

[23]Price, American Indian, pp. 430-31, citing Report No. 336, supra.

[24]Ibid., p. 434.

[25]Ibid.

"a land monopoly so monstrous" would be maintained and that:

> The fundamental idea upon which our cosmopolitan republic rests is opposed to the encouragement or perpetuation of distinctive national characteristics and sentiments in our midst.[26]

On these grounds, treaty making as a means to conduct Indian affairs was ended on March 3, 1871 by a simple provision in an appropriations bill stating that henceforth no Indian tribe would be acknowledged as independent and capable of contracting with the United States to negotiate treaties. However, treaties made prior to that date would retain their validity and both the United States and the tribes were to be bound by obligations placed on them pursuant to those agreements.[27]

By the 1880's, Congressional attitudes were commonly accepted by the public; tribes were no longer seen as sovereign nations capable of treaty making, but as organizations holding a monopoly on vast tracts of land who would be benefitted by allotment of lands and instruction in the tradition of private proprietorship. Their incorporation into the main culture of the country would thereby be assured. The General Allotment Act of February 8, 1887 authorized the President to divide tribal lands into 160 acre plots and grant them to individual tribal

---

[26] Ibid. Alternatively, the idea of exclusive tribal ownership, i.e. land held in common, was well established since each group recognized its own territory, including specific limits essential for the preservation of its members' lives. Cohen, "Indian Claims," Legal Conscience, pp. 267-68.

[27] Prucha, Documents, p. 136, citing U. S. Statutes at Large, 16:566. See, however, the discussion of Lone Wolf v. Hitchcock, p. 22, supra.

members whenever he felt it best for agricultural or grazing purposes,[28] and was supplemented by the Curtis Act of June 28, 1898, accomplishing the final allotment of lands which had been exempted from the Dawes Act. Congress pursued its policy of division and assignment of tribal lands until 1934 with the passage of the Wheeler-Howard Act, reversing the policy of allotment and encouraging tribal organization.[29] Throughout the preceding 47 year period, Congress had justified its policy on grounds of a legal responsibility to ensure that all members of tribes shared as equal beneficiaries of the assets of the tribe,[30] and on the grounds that, since it was impossible to obtain agreements with the tribes to accomplish what was in its best interest, it was the obligation of Congress to do so.[31]

Thus, while Johnson v. M'Intosh provided the constitutional framework for federal control of Indian lands, the Trade and Intercourse Acts, Dawes Act and Curtis Act represent the statutory framework by which Indian property was controlled and title distributed from the Federal government to white settlers.

Special Jurisdictional Acts

Since the general constitutional grant of authority to Congress to

---

[28]Price, American Indian, p. 444, citing 25 U.S.C. §331.

[29]Prucha, Documents, p. 222.

[30]Price, American Indian, pp. 444-45, citing Senate Comm. Report No. 377, May 7, 1894, 53d Cong., 2d Sess., Vol. 5.

[31]Ibid., p. 446, citing Extracts from House Comm. Report, March 1, 1898, accompanying the Curtis Bill (House Rep. No. 593, 55th Cong. 2d Sess., Vol. 3).

deal with Indian tribes was consistently upheld by the Supreme Court, no effective means for the registry of Indian claims could be made without the acquiescence of Congress. Although the early Trade and Intercourse Acts had provided a system for settlement of claims between Indians and whites for personal property grievances by lower courts, suits by Indians against the United States for violation of the terms of a treaty were limited by the Act of March 3, 1863. The Act prohibited the consideration of claims arising out of any treaty with foreign nations or Indian tribes and made it necessary for such claimants to obtain special jurisdictional acts for hearing each alleged violation. Since these jurisdictional acts varied in content, the determination of a particular claim depended on judicial interpretation of each specific act.[32]

Northwestern Bands of Shoshone Indians v. United States,[33] is an example of the Court's dependence on such a special jurisdictional act. The suit against the United States asserted that title to Indian land had been unlawfully cancelled in violation of the Box Elder Treaty granting the land to the tribe. The jurisdictional act of 1929 authorizing hearing of the case specified that a claim which was based only on the terms of that treaty could be heard. Since the treaty had not specifically recognized the Indian title, the Court could not assume that Indian title

---

[32]Price, American Indian, p. 458.

[33]324 U.S. 335 (1945).

was valid and therefore rejected the tribe's claim. In a concurring opinion, the Court identified only a moral obligation, not a legal responsibility, of the United States in this instance.

> We can make only a pretense of adjudication of such claims, and that only by indulging the most unrealistic and fictional assumptions. Justice Jackson, concurring.

The "unrealistic assumptions" would result from a lack of written evidence presented by the tribe, the necessity of relying on indirect testimony, and the inapplicability of a court hearing where legal documents had been executed after conquest.[34]

Echoing the words of Indian Commissioner Parker in his annual report of 1869, Justice Jackson continued:

> The most elemental condition of a bargain was not present, for there was nothing like equality of bargaining power. . . Here we are asked to decide whether their [the Indians'] intent was to relinquish titles or make reservations of titles or recognition of titles. The Indian parties did not know what titles were, had no such concept as that of individual land title, and had no sense of property in land . . . Acquisitiveness, which develops a law of real property, is an accomplishment only of the 'civilized'.
> . . . . . .
> The treaty was a political document. It was intended to pacify the Indians and to let the whites travel in peace a route they somehow were going to travel anyway. [Emphasis added.][35]

While the Court's majority decision denied relief because the jurisdictional act granted no grounds for claims on unrecognized title as in the Treaty of

---

[34]Price, American Indian, pp. 459-61.

[35]Ibid., pp. 461-62, citing concurring opinion of Justice Jackson in N. W. Shoshone v. U. S.

July 30, 1863, its opinion also reflected a strong sense that no tribal claims to title were valid. The cession of land by defeat in war was sufficient to validate United States title without further agreement. Therefore, the responsibility of the Court was to render a simple decision based on the instructions given by the Congress. Legal claims were really not considered, only compliance with Congressional directives.

A strong dissenting opinion written by Justice Douglas was highly praised by the general public as reflecting the true spirit of United States-Indian agreements. His position was based on the premise that since the jurisdictional act had allowed claims pursuant to the treaty and since a treaty is a legal document between consenting parties, the United States was obligated to recognize legitimate title of the Shoshones. Though the Box Elder Treaty did not specifically state that title was vested in the tribe, the very act of negotiation presumed a recognition on the part of the United States that the tribe held title to the land.

> It was stated in Worcester v. Georgia . . . that 'The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.' That is good law. It is as applicable here as it was in that early case.[36]

---

[36] Ibid., p. 463, citing dissenting opinion of Justice Douglas in N. W. Band of Shoshones v. U. S. Felix Cohen referred to the grounds of the Court's majority opinion as a myth, stating that the absence of tribal identities was a fallacy, and that if nomadic existence cancels title those white persons then in possession of the land also had invalid title since the land was used only for seasonal grazing. Price, American Indian, p. 464. Also note Price's description of the events following

Due to the rigid interpretation of the special jurisdictional act, the Shoshone tribe was unable to gain acknowledgment of their ownership of the land. Such rigidity, however, fulfilled the instructions of Congress, which had primary authority in Indian relations. Therefore, given a favorably worded jurisdictional act from Congress, the Court would have grounds to accept the Indian position. Such was the case in United States v. Alcea Band of Tillamooks,[37] an example of the successful use of a special jurisdictional act to sue the Federal government. Chief Justice Vinson accepted the tribe's position because the jurisdictional act allowed "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in . . . the lands . . . occupied by the Indian tribes and bands . . . ."[38] The tribe therefore could obtain compensation because of a violation of their right of occupancy. The Court stipulated that while Congress may extinguish title based

---

the Court's decision on March 12, 1945:

> ". . . requests for a rehearing of the case were filed by the Senate and House Committee on Indian Affairs, the Attorney General of the State of Utah, the Attorney General of the State of Idaho, Judge Manley O. Hudson of the Permanent Court of International Justice, the Department of the Interior, the National Congress of American Indians, and the American Civil Liberties Union. Editorial comment on the opinion, uniformly unfavorable, appeared in many periodicals through the country. The request for rehearing was denied without opinion. The original opinion of the Court was a 5 to 4 decision from which Justices Roberts, Frankfurther, Douglas and Murphy dissented." Ibid., p. 463, n. 1.

[37]329 U.S. 40 (1946).

[38]Price, American Indian, p. 465.

on a right of occupancy, it is under an obligation to pay for the land so taken. Justice Black concurred in this decision but pointed out that Congress had, by the express terms of the jurisdictional act, created a ground for compensation which had not previously existed.[39] Unlike the Shoshone decision, in Alcea an Indian tribe successfully sued the Federal government because the jurisdictional act had specifically mentioned "original Indian title".[40]

From the end of treaty making in 1871 to the establishment of the Indian Claims Commission in 1946, the Supreme Court was severely limited by the disposition of Congress. Its reliance on special jurisdictional acts had resulted in narrow interpretations of Indian claims, more frequently against the interest of the tribes than in their favor. Between 1881 and 1946, 142 claims were litigated,[41] and of those heard by 1940, only 26% had awarded recoveries to Indians.[42]

The determining factor in successful suits against the United States was the issue of Indian title to the land, how it was acquired and how it was terminated. The period of use of special jurisdictional acts did provide an opportunity to resolve the issue. Congressional management of

---

[39] Ibid., pp. 465-66.

[40] In 1951, the Court considered a suit by the Alcea Band for interest due from the time of taking the land on the compensation awarded in the 1946 case. The Court denied their petition.

[41] Price, American Indian, p. 458.

[42] Cohen, "Indian Claims," in Legal Conscience, pp. 270-71.

Indian lands was restricted and the following section discusses the rationale of the Court in doing so.

The Court Against Congress

Several cases exemplify the activities of the Government during the years of the final frontier movement. Since Congress had pledged the good faith of the United States to honor treaties made before 1871, much of the litigation revolved around the negligence of the government in violating treaties. While the Court proclaimed that neither Congress nor administrative departments could ignore property rights vested by treaty,[43] it also proclaimed that property rights were protected even in the absence of recognized title by treaty, act of Congress or Executive Order where Congress had authorized a sale of land to a private company. The Court had consistently held that lands could be managed only by the Federal government.

The case at issue, Cramer v. U. S.,[44] was one of many involving the development of a national railway system, an essential element in the settlement of the West. Cramer involved the issue of patents which had been made to the Central Pacific Railroad Company under a land grant of July 25, 1866 authorizing the sale of lands to private individuals. The grant was challenged on the basis that the lands sold by the railroad had been reserved to the Indians. The Court reiterated its fundamental principles in questions

---

[43] Jones v. Meehan, 175 U.S. 1 (1899).

[44] 261 U.S. 219 (1923).

of Indian title to and occupancy of land. First, their right of occupancy can only be interferred with by the Federal government; second, individual as well as tribal occupancy is protected. Since the territories involved were required by statute to "disclaim all right and title to lands 'owned or held by any Indian or Indian tribes.' [emphasis supplied.]"[45] in order to acquire statehood, the Indian lands were still clearly part of the Federal trust. Finally, Cramer held that denying individual possessory rights would be contrary to the federal policy of encouraging settlement and acculturation of the Indian and the patent was found invalid. Since the suit was based on statutory authority and not on a constitutional question, the Court could deny Congress the power to terminate Indian title by virtue of the Indian right of occupancy.[46]

In a highly sensitive case in 1925, U. S., as Guardian of Hualapai Indians v. Santa Fe Pacific Railway, the question arose as to the right of Congress to authorize an exchange between a railway and the Indian tribe of lands which had never been ceded to the United States by treaty, purchase or conquest.[47] In 1866, Congress passed an act granting the odd-numbered sections of land in question to the railway, and authorized the

---

[45]Cohen, "Original Indian Title," in Legal Conscience, pp. 275-76.

[46]Ibid., pp. 274-76.

[47]The Attorney General of the United States had refused to argue the case on behalf of the Indians for fear that the results might impose a tremendous liability on the government. In his absence, the case was pleaded by the Solicitor for the Department of the Interior. Ibid., p. 278.

Secretary of the Interior to negotiate an exchange of land between the railway and the tribe to facilitate property boundaries. The Secretary of the Interior took action to patent one-half of the Hualapai Reservation in Arizona established in 1883 to the Santa Fe Pacific Railway.

The tribe argued that it had a possessory right to all of the land based on aboriginal title and that the railway could not "exchange" land it did not own. The Court's decision was unanimous in favor of the tribe, stipulating that occupancy established valid property rights even in the absence of treaty or statutory support of title and that this right was enforceable against non-Indian grantees. Had there been a previous land cession through some agreement to the United States, the exchange of land authorized by Congress would have been valid.[48]

Cramer and Hualapai express the legal position that Indian lands are protected by Federal guaranties and that in the absence of a valid, overriding statute, such guaranties are absolute. A statute could be invalidated if it violated the Federal obligation to protect Indian lands from state or individual encroachment.

It is of extreme importance that one remember, however, that although tribal lands were protected from invalid Congressional statute and transfer to private citizens without prior acquisition through the Federal government, the Court still recognized the plenary authority of Congress to

---

[48]The conflict was resolved by the entry of a decree on March 13, 1947 establishing Indian title to 500,000 acres which the Government had previously promised to the railroad. Cohen, "Original Indian Title," in Legal Conscience, pp. 277-79.

manage Indian lands and to extinguish title on the basis of Article I, Section 8 of the Constitution.[49] Tribal rights of occupancy were vulnerable only to the Federal government and the Court could not inquire into its acquisition of title because it remained a political question.

Justice Douglas expressed a harsh, but explicit summary of the Court's position on political questions in Santa Fe Pacific Railway in relation to extinguishment of title:

> And whether it be done by treaty, by the sword, by purchase, by the exercise of complete domination adverse to the right of occupancy or otherwise, its justness is not open to inquiry in the courts.[50]

Nevertheless, where Congress had guaranteed the right of occupancy, the Court was free to entertain suits.

The whole history of Indian claims, then, revolves around the succession of treaties and ensuing statutes. In many cases, complex renegotiations with tribes were attempted to achieve the goal of acquisition of land and eventual settlement. Two cases will illustrate the results of good faith negotiations with the United States by Indian tribes.

In Shoshone Tribe of Indians v. United States,[51] the Court validated the action of the United States in acquiring title to land pursuant to three treaties with the Shoshone Tribe. In its petition, the tribe alleged that

---

[49]U. S. v. Santa Fe Pac. R. R., at 347.

[50]Price, American Indian, p. 419, citing U. S. v. Santa Fe Pac. R. R., at 347.

[51]299 U.S. 476 (1937).

the Treaty of July 3, 1868 had been violated. The tribe had agreed by that treaty to relinquish a reservation of 44.7 million acres for one of 3.1 million acres contingent upon a pledge by the United States that no person would ever be allowed to cross over or settle upon the land. The Commissioner of Indian Affairs, acting with the Secretary of the Interior, relocated the Arapahoe tribe on a portion of the 3.1 million acres pledged to the Shoshone. While the Shoshones agreed to the temporary presence of the Arapahoe, no action was taken by the government to locate an alternative permanent settlement for the squatters. When the tribe objected to the situation, an agreement was concluded purchasing another portion of the land and stipulating that the new agreement did not deprive the Shoshone of annuities or benefits made under prior treaties. The Agreement was ratified by Congress in 1897; the same procedure was followed in a third agreement of purchase in 1904.[52]

The Supreme Court found that the transactions were valid, but that the amount of compensation had been inadequate since the land had been at least value at the time of the taking.[53] The Court therefore affirmed a judgment against the United States in the amount of $4,408,444.23 plus interest as compensation for the lands taken without tribal consent by relocating another tribe thereon.[54]

---

[52]Price, American Indian, pp. 451-53.

[53]Ibid.

[54]Cohen, "Spanish Origin," in Legal Conscience, p. 247, n. 51.

The Court performed honorably in Shoshone by requiring reasonable compensation for lands validly taken. However, the allocation of land and just payment for them was a difficult question and more often than not Congress' action was validated even where its purpose and methods were morally questionable. Sioux Tribe of Indians v. United States[55] is an interesting example of how the government managed tribal lands when confronted with the unavoidable intrusion of white settlers. The area involved, the Black Hills, had been part of a Sioux reservation by an agreement of 1868. However, with the discovery of gold in 1874, the "government was faced with a fait accompli which it accepted in violation of the treaty [Blumental 128-29]." [56]

Military troops were sent to the area to prevent the incursion of fortune hunters with the eventual result of war, but following the failure of Custer's Expedition it became obvious that new agreements had to be negotiated for the purchase of the Indian lands and their subsequent removal.

In his annual report to Congress in 1875, the Secretary of the Interior urged that Congress take action to resolve the crisis in the Black Hills resulting from the inability of the government to settle the disputes peacefully. While the Secretary acknowledged that the land was held by valid title in the tribes and that treaties should be generally

---

[55]97 Ct. Cl. 613 (1942).

[56]Notes, "Systematic Discrimination," p. 1303.

inviolate, he urged that Congress take action on the basis of the gratuitous services provided the tribes by the government. The obligation was valued at approximately $1.25 million over a two year period. He concluded:

> It is submitted, therefore, under these circumstances, for the consideration of Congress, whether it would not be justifiable and proper to make future appropriations for supplies to this people, contingent on the relinquishment of the gold field in the Black Hills and the right-of-way thereto.[57]

In December, 1875, the President recommended similar action and cited the opinion of the Secretary in his report.[58]

The resulting legislation of August 15, 1876 accepted the Executive recommendation and appropriated an additional sum of $1.0 million per year for the subsistence and civilization of the Sioux contingent upon their relinquishment of the lands. The President appointed a commission to handle the negotiations for the purchase and, although more than 90% of the tribal members rejected the government's offer (under the Treaty of 1868, three-fourths assent was required), the agreement was submitted to Congress and approved on February 28, 1877.[59]

In finding against the Sioux Tribe, the Court concluded:

> Plaintiff's position in substance is that one party to a proposed transaction cannot legally fix the terms or consideration and force the other party to accept them. This is true

---

[57]Price, American Indian, pp. 437-438.

[58]Ibid.

[59]Ibid., pp. 438-39.

> in transactions between private parties dealing at arm's length and on terms of equal authority, but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, unless Congress has clearly granted to the Indians the right to do so.[60]

An agreement accepted by only 10% of the tribe was thereby accepted by the Court as a valid exercise of Congressional authority. The position of the Sioux tribe as a whole was not acknowledged; only the action of Congress was of significance before the Court.

Conclusion

The activities of Congress in managing Indian relations are the ultimate determining element in how and when title to Indian land is transferred to the United States. Congress has followed a pattern of establishing methods of title acquisition which would streamline the settlement of the continent and fulfill its obligation to make laws for the welfare of the country. The Trade and Intercourse Acts enunciated federal supremacy in these matters and guaranteed Federal protection of treaty rights against state and individual encroachment. Although attempts made to recognize the political equality of Indians by incorporating their tribal system into the republican structure had failed, at least the precedent for compensation for taking land had been accomplished by the Acts.

---

[60]Price, American Indian, p. 440, citing Sioux Tribe of Indians v. United States.

Settlement of land was of the utmost concern to Congress and the subsequent end of treaty making in 1871 was merely an acknowledgment of the fact. Treaties were defined as political documents whose result had been to create the ogre of land monopoly and therefore were clearly unacceptable means of controlling the Federal domain. With the end of treaty making, a new policy of division and allotment of tribal lands was instituted to tranquilize the nation's fear of vast portions of land impeding the development of the nation.

Although Congress rejected the sovereignty of tribes, it expressed its intention to honor its treaty obligations. To do so, it permitted requests for special consideration of claims against the United States. The exact terminology of the special jurisdictional acts was of great importance to the Supreme Court in determining liability, and since Congress was responsible for the terminology the Court's function was to dispose of cases according to the intent of Congress. Where, however, the language of the acts was general, the Court was able to maintain the integrity of treaties and find liability in the government. Nevertheless, whatever means Congress used, whether by agreement or by conquest, were valid, pursuant to the constitutional grant of authority to the legislative body for the conduct of Indian relations.

The Court was, however, able to nullify Congressional action which violated the general legal principles of Indian relations. Treaty rights were vulnerable only to the Federal government and could not be infringed by state or individual actions. Attempts to simplify the development of

a transcontinental railway system exemplified the Court's adherence to this rule even where the national interest was thereby complicated. Congress was, therefore, obliged to honor its prior agreements with Indians, but, as the Court expressed in Sioux Tribe, even the most transparent infractions of terms of a treaty were valid if approved by Congress.

In sum, Congressional action was supreme and the Court's role was one of balancing treaties against statutes, maintaining only the most elemental obligations of the government to the Indian tribes.

CHAPTER IV

THE INDIAN CLAIMS COMMISSION

Introduction

Adjudication of Indian property rights had always depended upon Congress to provide a means of suing the Federal government. Once the period of Indian wars came to an end, and the Trade and Intercourse Acts were no longer relevant, special jursidictional acts had provided the means to assert claims against the United States. As tribes became educated to the standards of American jurisprudence, the number of claims increased formidably and Congress sought a means to eliminate the growing demands on its time for passage of the special jurisdictional acts. The result of the discussion was the passage of the Indian Claims Commission Act of August 13, 1946.[1]

The establishment of the Commission was the logical result of American reliance on the rule of law, a concept inherited from Britain, and an increase in the number of claims brought by Indian plaintiffs.[2] The passage of the Act acknowledged that tribes have a legitimate right to reparation and that there must be a method of acquiring such reparation. These concepts were new to the theory of compensability of Indian claims, and were regarded not as legal, but as moral obligations of the government.[3]

---

[1]Act of August 13, 1946, ch. 959, 1, 60 Stat. 1049 (Codified at 25 U.S.C. ch. 2A (1970)).

[2]Cohen, "Indian Claims,", in Legal Conscience, p. 268.

[3]Notes, "Systematic Discrimination,", p. 1307, citing 90 Cong. Rec. 5314 (1946).

This chapter contains a discussion of the new standards for adjudication provided by the Indian Claims Commission Act of 1946, and the application of the standards in actual practice of the Commission and the Court of Claims, the body of appeal from decisions of the Commission.

Standards

The Commission operates in an adversary manner between the government and the Indian tribes and renders decisions based on events arising before 1947. Decisions may be appealed to the Court of Claims, which also has direct jurisdiction for actions based on events arising after 1946.[4] The system is based on the principal that compensation should be provided for lands unfairly or illegally taken even if full restitution can never be made.[5]

Included in the definition of its jurisdiction are claims based on fraudulent revisions to agreements with the United States, mutual or unilateral mistakes, "unconscionable consideration", and "fair and honorable dealings" not recognized by any law or rule. While most of these definitions require interpretation of treaties and other legal documents, the "fair and honorable dealings" standard is one requiring consideration of moral or ethical questions. Its subjective nature has been severely limited in practice, but, again, it is a statutory acknowledgment that

---

[4]Sandra C. Danforth, "Repaying Historical Debts: The Indian Claims Commission," North Dakota Law Review, Vol. 49, No. 2 (Winter, 1973), p. 390.

[5]Notes, "Systematic Discrimination," p. 1300, citing W. Blumenthal, American Indians Dispossessed 22-23 (1955).

such questions are significant in resolving claim disputes.[6]

The standards of the Indian Claims Commission which expanded the bases for entry of claims against the United States are, in summary, the acknowledgment of a moral obligation of the government to provide reparation for invalid taking of land, any claim arising out of fraud, "mistakes", unreasonable compensation and the absence of good faith negotiations which are not recognized by any law or rule.

The 1946 Act also provided additional standards to the court of appeal. The Court of Claims was granted judicial review to determine

> . . . whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law . . . stated by the Commission as a basis for its final determination, are valid and supported by the Commissioner's findings of fact.[7]

The Court of Claims will therefore affirm any action of the Commission it feels was based upon "substantial evidence" supported by reason, and reverse any decision lacking substantial evidence. The Court is also free to determine questions of law and may reject the Commission's decision if it is based on a misinterpretation of law.[8]

The "substantial evidence" based on reason rule seems arbitrary but considering the age of much of the evidence, which may be based only

---

[6]Danforth, "Historical Debts," p. 388. Indeed, the sponsor of the Act, Henry Jackson, commented that many claims concern strictly moral obligations. Notes, "Systematic Discrimination," p. 1307, citing 92 Cong. Rec. 5314 (1946).

[7]Notes, "Systematic Discrimination,", p. 1312, citing 25 U.S.C. §70(s) 1970.

[8]Notes, "Systematic Discrimination," pp. 1312-13.

on tribal custom and oral tradition, great flexibility is allowed in its interpretation. For example, the inaccuracy and inadequacy of accounts of the geography in question frequently must be considered. What materials have been written were generally compiled by non-Indians and may reflect a prejudice to the government's case. The odds against a claimant successfully overcoming the variables of ancient, oral evidence, geographical discrepancies and prejudicial data are considerable.[9] The arbitrary standard of "substantial evidence" is, therefore, a realistic standard and, since appeal may be made from decisions of the Court of Claims, is subject to review by the Supreme Court.

The Indian Claims Commission Act, by acknowledging the obligatory but difficult nature of Indian claims settlements, did provide expanded grounds for successful entry of claims against the United States. All of the principles previously assumed, e.g. the lack of accurate evidence, are clearly translated into the statute. This statement alone greatly contributed to the redress of unjust acquisition of land at the expense of the Indian.

The greatest contribution of the Commission and the Court of Claims has been to provide equitable compensation for the lands illegally taken. While the Act requires that the Commission deliver a statement as to whether there are just grounds for relief and the amount of relief [§19], and authorizes appropriation of the amounts [§22] and manner of distribu-

---

[9] Ibid., p. 1311.

tion of amounts,[10] it does not rule out settlement by restoration of property.[11]

> Given the strong attachment to land which has remained one of the persistent characteristics of Indian societies, just compensation would involve return of at least some of the land which was taken, not a monetary substitute.[12]

In a few cases before the Commission, claimants have rejected monetary awards and insisted upon the return of the land in question. For example, the Taos Pueblo were awarded Blue Lake, a portion of the ancestral lands which had great religious significance to them. The land had been part of a national forest preserve and was returned to them largely through the efforts of the executive branch of government which pushed through the necessary legislation. The action was justified as a matter of respect for religious principles[13] and does not serve as a reliable standard for all recoveries.

Whatever compensation is requested, the Indian Claims Commission Act formally established grounds for recovery based on legal and extra-legal questions written in generalized terms. The effect was to acknowledge the justiciability of such indefinite causes as fraud, misrepresentation, unfair or dishonorable dealings and unreasonable compensation. Such standards are of an arbitrary nature, but under the Act they are acknowledged as valid components of the Indian claims problems, in addition to the written evidence of treaties and statutes.

---

[10] See Federal Register, Vol. 41, No. 97--Tuesday, May 18, 1976, p. 20429 for an example.

[11] Danforth, "Historical Debts," pp. 390-91.

[12] Ibid., p. 392.

[13] Ibid., pp. 393-94.

Practice

Although expanded grounds for redress were provided by the Indian Claims Commission Act, in actual practice they were somewhat restricted. Given the possibility of the tremendous monetary obligations which could be enforced against the United States, the Court of Claims and the Supreme Court were cautious in interpreting the statutory terms. In Yakima Tribe v. United States,[14] the claimants were unable to overcome the variables of oral evidence and discrepancies in ancient descriptions of property ceded to the United States by treaty. On first hearing, the Commission acknowledged that it could not accurately determine the boundaries under the treaty, and settled upon a boundary line which excluded the land claimed by the Indians, thereby denying them compensation. The Court of Claims on appeal approved the action of the Commission, finding that its determination was a reasonable solution.[15] Although the Court of Claims acknowledged the thoroughness and reasonableness of the Indians' argument, it found that "substantial evidence existed for the Commission's finding. [It] had been confronted by an unclear treaty and 'conflicting opinion evidence' and, according to the court, had arrived at a reasonable conclusion."[16]

---

[14]158 Ct. Cl. 672 (1962).

[15]177 Ct. Cl. 184, 205 (1966), Confederated Tribes v. United States.

[16]Notes, "Systematic Discrimination," p. 1315.

Here, then, the substantial evidence rule worked in favor of the government rather than the claimants, even though the claimants' case was found to be reasonable and supported by detailed and extensive evidence.

The Indian Claims Commission Act was further restricted by a decision of the Supreme Court in Tee-Hit-Ton Indians v. United States.[17] Since the Indian Claims Commission Act had allowed claims which were not based on any law or rule, redress was available for the taking of lands title to which had never been acknowledged by any treaty or statute. While tribes had previously been protected in the absence of treaty or statute (see previous discussion of Santa Fe Pac. R.R.), the Court in Tee-Hit-Ton expressed a different principle by finding that only where title had been specifically acknowledged could the tribes obtain compensation for violation of that title. The Fifth Amendment requires compensation only for those lands, and to establish a valid claim it must be shown that there was some definite intention by Congress to acknowledge Indian title, whether by treaty, statute or other action.

The case arose when the Tee-Hit-Ton tribe sought compensation for timber which had been sold by the Secretary of Agriculture in 1951 from land claimed by the tribe. The Supreme Court resolved the issue by restating its principle that Congress is the authoritative body to determine the extinguishment of title and compensation due.[18]

---

[17] 348 U.S. 272 (1955).

[18] Price, American Indian, p. 470.

> . . . Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.[19]

Under Tee-Hit-Ton, therefore, the fact of occupancy of a tribe on a specific piece of land in the absence of title recognized by Congress would not serve as a valid basis for the assertion of a claim against the United States. However, in subsequent cases before the Court of Claims tribes could obtain compensation where title was not recognized by Congress if they were able to prove their "aboriginal" title to the lands in question. Aboriginal title was defined as "actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of their land." [20]

Again, the difficulties of proving such ownership by aboriginal title cannot be ignored, and the substantial evidence rule of the Indian Claims Commission has been used against the assertion of such a claim. Aboriginal title to the Iowa Tribe was rejected and compensation denied in Iowa Tribe v. United States,[21] where the Court justified the findings of the Commission denying relief by stating:

> Where the evidence . . . is neither sharp nor decisive, nor overwhelmingly one way, the fact-finding tribunal must make its own judgments and its choices. We have no option but

---

[19]Ibid., pp. 467-69, citing Tee-Hit-Ton Indians v. United States.

[20]Notes, "Systematic Discrimination," p. 1315, citing Sac and Fox Tribe v. United States, 315 F. 2d 396 (Ct. Cl. 1963).

[21]no. 3-70 (Ct. Cl. July 14, 1971).

> to conclude that the evidence on which the Commission relied for its resolution of the factual questions is substantial . . . .[22]

In contrast to John Marshall's insistence upon deciding doubtful cases in favor of the Indians,[23] the Indian Claims Commission Act's substantial evidence rule tends to be a more precise standard, but simultaneously decreases the chances of successful Indian recoveries. How can one present substantial evidence to prove "actual, exclusive and continuous use and occupancy" by a particular tribe in the absence of written documentation?

Tribes situated to the west of the Great Plains had enjoyed such aboriginal title since the incursion of settlers came at the end of the territorial expansion. In United States v. Northern Paiute Nation,[24] aboriginal title was successfully used to acquire compensation for lands taken by the United States. The case arose pursuant to a taking in 1860 of land which contained Virginia City, Nevada and the valuable Comstock Lode. When members of the Paiute tribe revenged the kidnapping of two of their members by the settlers, the Virginia City miners organized an unsuccessful expedition against the tribe and requested the assistance of the Army in eventually wiping out the Paiute tribe.

---

[22]Notes, "Systematic Discrimination," p. 1316, citing Iowa Tribe v. United States.

[23]Cherokee Nation, Worcester v. Georgia, supra.

[24]393 F.2d 786 (Ct. Cl. 1968).

In the Court's opinion, the tribe had incontestably owned the land by virtue of aboriginal title, and the United States had clearly taken the land not by virtue of a treaty or statute, but by virtue of the action of the U. S. Army, the refusal of Congress to intervene, the establishment of a Nevada territorial government and judicial structure, and by the determination of the Supreme Court that the miners were more than trespassers on the land.[25]

In Northern Paiute, therefore, a series of actions without the specific intent of Congress to extinguish title amounted to a definite intent of Congress to take the land against a valid aboriginal title of the tribe. Under the terms of this conflict, the tribe was due compensation.

Conclusion

The Indian Claims Commission Act was an attempt to simplify a claims procedure for the benefit of Indians which had become incapable of hearing all the claims asserted against the United States without special jurisdictional acts. By acknowledging the presence and validity of such standards as ethical consideration, and fair and honorable dealings, the Congress added to the legal dimension new and imprecise standards which were difficult to fulfill but an essential part of United States-Indian relations.

---

[25]Price, American Indian, pp. 449-50.

The Court of Claims has narrowed the applicability of such standards by supporting reasonable decisions of the Commission based on substantial evidence. A further challenge to the effectiveness of the Commission is the potential conflict of interest which the government may find in attempting to preserve its responsibility to the tribes under the act while increasing its responsibility to manage public resources.[26]

In the absence of extensive written evidence, the general standards under the Act of "unconscionable consideration" and "fair and honorable" dealings demand evidence of gross misconduct in the management of Indian affairs.[27] Since the standards are so broad they may result in inconsistent determination. Further, the Act's provision for hearing of claims based on moral grounds has become the area of last resort; if a claim cannot be supported under the slightly less general standards of "unconscionable consideration" and "fair and honorable dealings", it is not surprising that the standard of "moral or ethical questions" is rarely used and rarely proven.[28]

The Indian Claims Commission Act did, however, contribute to the acknowledgment of wrongdoing on the part of the United States. It further, and most importantly, extended to the Indian all of the fundamental

---

[26] Ibid., pp. 457-58.

[27] Denforth, "Historical Debts," pp. 396-96.

[28] Ibid., pp. 396-400.

principles of American law, providing a court for hearing claims and expanding the law to cover the claims. The property rights of Indian tribes were thereby accorded the fullest legal standing, no longer requiring the permission of Congress to present specific grievances against the United States.

CHAPTER V

CONCLUSION

In the thirty years since the passage of the Indian Claims Commission Act, Congress has passed legislation which has created an opportunity for some potentially far-reaching decisions of the Supreme Court. Although the opinion John Marshall in Worcester v. Georgia that Indian tribes were sovereign entities has long since been abandoned with respect to their status as political states capable of entering into agreements with the United States, their intratribal sovereignty had never been impugned. Tribal authority to control its internal affairs was reaffirmed by the Indian Civil Rights Act of 1968.[1] The Act accepted the 1961 report of the United States Commission on Civil Rights which acknowledged the tribal right to self government, stating that "it preceded and was not created by the Federal Government."[2]

The grand exception to tribal government's jurisdiction has been its control of property. Although the tribes right to manage property which was held in fee simple interest is absolute, lands to which the United States held title as trustee could be disposed of in any way Congress saw fit, as has been previously discussed. Federal protection

---

[1]82 Stat. 77, 25 U.S.C. §1302, et seq.

[2]Michael Smith, "Tribal Sovereignty and the 1968 Indian Bill of Rights," Civil Rights Digest (Summer, 1970), p. 9.

of lands held by tribes in fee simple interest was expressly rejected by the 1953 Termination Act[3] which terminated the legal standing of some tribes as "tribes" and which defined the policy of Congress as one intended to:

> . . . subject [the Indians] to the same laws and [entitle them] to the same privileges and responsibilities as are applicable to other citizens of the United States . . . .[4]

The threat to tribal identity has been modified since the passage of the Termination Act, both by Executive statements of intent to honor the "balanced relationship" between the government and the tribes[5] and by action of the Supreme Court. Justice Douglas, writing the opinion in Menominee Tribe v. United States,[6] closely scrutinized the Termination Act which had dissolved the Menominee's tribal identity and found that the Act had repealed only the effect of statutes on the tribe. Rights of the Menominee tribe pursuant to treaties remained untouched by the Act; therefore, the Court recognized treaty rights in the absence of express Congressional repeal.

Treaty rights and tribal identities are protected from infringement. However, the protection does not apply where the United States is not the

---

[3]House Concurrent Resolution 108, 67 Stat. 132 (1953).

[4]Daniel H. Israel, "The Reemergence of Tribal Nationalism" (paper presented at Institute on Indian Land Development--Oil, Gas, Coal and Other Minerals, sponsored by the Rocky Mountain Mineral Law Foundation, Tucson, Arizona, April 1-2, 1976), p. 5, citing H. Res. 108, 83rd Cong., 1st Sess. (1953); H. Rept. No. 841; S. Rept. No. 794.

[5]Israel, "Reemergence," p. 17. [6]391 U.S. 404 (1968).

trustee of tribal lands. An explicit statement of this exception is found in Federal Power Commission v. Tuscarora Indian Nation,[7] by which the Court approved the New York Power Authority's condemnation through the power of eminent domain of 1,000 acres of Tuscarora tribal lands. While the Court had guaranteed tribal protection from state and individual interference, it found that since the lands were held by the Tuscaroras in fee simple interest, they were subject to the actions of state authority.[8] Any licensee of the United States, therefore, is free to extinguish Indian title without prior Congressional approval if the land is held in fee simple interest.[9] Tuscarora made a distinction in the requirement for prior Congressional approval by limiting that requirement to the disposition of Indian lands by Indians to others, eliminating its application to the activities of Federal licensees.[10]

The Tuscarora decision elicited a strong dissent from Justices Warren, Douglas and Black. Justice Black's opinion found the distinction to be "artificial,"[11] and one which violated statutory rights of the tribe merely for the sake of convenience.

---

[7]362 U.S. 99 (1960).

[8]Price, American Indian, p. 442.

[9]Israel, "Reemergence," p. 3.

[10]United States Supreme Court Digest, Vol. 8, §38, p. 668.

[11]362 U.S. 99, 142.

> I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word.[12]

This paper has been a discussion of the elements which make up the body of law and legislation relative to Indian property rights. The ability of the government to keep its word pursuant to innumerable treaties has been found inadequate. Under the doctrines of international law relating to treaties, as discussed in Chapter I, the United States inherited all of its sovereign powers from Britain, including the title to property of tribes. Although early documents expressed our good faith and guaranteed them possession of their lands until voluntary cession to the United States, the Supreme Court found the status of treaties to be no higher than that of statutes. Congress could, therefore, simply override good faith agreements, and was relatively free from judicial interference since such matters were considered by the Court to be political questions constitutionally granted to the jurisdiction of the legislative branch.

The establishment of treaty-making as the means of Congressional conduct of Indian relations in 1790 produced a series of agreements which had as their main contributions the control of trade with tribes and, most importantly, the assertion of the Federal government as the ultimate controller of the nation's property.

---

[12]Price, American Indian, pp. 442-43, citing dissent in Federal Power Commission v. Tuscarora Indian Nation.

The Supreme Court supported the role of Congress by assisting in maintaining the federalist doctrine vis-a-vis its decisions in Cherokee Nation v. Georgia and Worcester v. Georgia, and validated the ability of Congress to interpret treaties without the consideration of the tribes in Lone Wolf v. Hitchcock. Congress' authority, by virtue of the philosophical position of the Supreme Court, was plenary.

The contributions made by Great Britain were chiefly the requirements of legal systems to manage questions of property rights, and the infusion into our culture of Puritan ethics, requiring consideration of the morality of governmental actions and the necessity of compensation for lands taken. Even so, the Supreme Court maintained its respect for the authority of Congress, expressing its acceptance of the rule of the discoverer and the efficacy of title acquisition to all land by whatever means chosen by Congress.

During the years of the greatest exploration and settlement of the continent, Congress executed its obligation by the use of the Trade and Intercourse Acts, establishing basic compensatory guidelines for taking property. With the end of treaty making in 1871, an acknowledgment was made that treaty making had been or had become a sham based on the unbelievable proposition that Indian tribes were sovereign and capable of bargaining with the United States. In the hopes of ending a procedure which had resulted in the "monopoly" of lands, Congress assumed a policy of division and allotment of tribal lands to incorporate their society

into the mainstream of American life. Yet to maintain its position of "good faith", it also provided that no claims could be considered unless approved by special jurisdictional acts granting authority to the Federal courts to consider claims against the United States. Pursuant to these acts, the Supreme Court was limited in its consideration of questions of law. Specific terminology could result in the denial of a claim even if based on a valid treaty; general terminology alone gave the Court an opportunity to provide relief to tribes denied adequate compensation for lands illegally taken by the Federal government.

Not until the passage of the Indian Claims Commission Act were the courts granted jurisdiction to consider claims based on matters of ethical conduct. With the expanded scope available for redress of grievances, litigation against the United States and demands for return of property rather than monetary compensation have become of great significance in contemporary law.

Nevertheless, it is apparent that Congress has been the leader in incorporation of any legislation and policy toward the American Indian. The Court has merely followed the guidelines of the legislative branch. Its decisions have resulted in a seemingly confusing melange of positions related to the acquisition of title, when and how Congress may legitimately acquire property on behalf of the United States, and what rights to compensation are possessed by the tribes. The Court has determined that where Congress has taken some action which indicates an intent to end

the title of an Indian tribe, or has specifically ended title by treaty or overriding statute, then the United States has valid title to the land. However, where tribes can prove aboriginal title or where Congress has ended its statutory control of lands but not its control pursuant to treaties, Indians have title to the land.

In short, the Court may uphold previously granted rights under a treaty but the merest indication of some intent by Congress to invalidate property holdings of a tribe must be upheld as incontestable.

A final example of the relationship between the Congress and the Supreme Court will suffice to illustrate the long standing partnership of the two bodies in the conduct of Indian relations with the United States. In 1974 a case was brought before the Supreme Court by the Oneida Tribe of New York charging that the United States owed the tribe the rental value of their lands from 1795 to the present.[13] Having discussed numerous other cases in which the Court found the merest indication of Congressional action to extinguish Indian title it is nearly inconceivable that the plea of the Oneidas would be accepted.

Pursuant to several treaties concluded between 1780 and 1790, the United States had guaranteed tribal ownership of certain lands until they were purchased by the United States. Further, the 1790 Intercourse Act had stipulated that the lands could not be conveyed to other parties without the consent of the United States. However, in 1795, the tribe ceded the lands in question to the State of New York without the express

---

[13]The Oneida Indian Nation of New York State v. The County of Oneida, New York, 414 U.S. 661.

approval of the Federal government. Here was an opportunity to reaffirm the federalist doctrine rejecting state interference in the conduct of Indian relations, but the opportunity was overlooked. The tribe contended that the 1795 cession to New York was ineffective because it had been made without the consent of the United States and, therefore, that the tribe's right to ownership of the land had never been terminated.

The Supreme Court determined that the case involved a question which must be determined; it could not be simply assumed that treaty rights had been terminated; and returned the matter to the lower courts for determination. The impact of the Court's ruling was, however, a restatement of its fundamental principles in Indian affairs, chiefly that the power of Congress is supreme with respect to Indian title to lands and that such title can be extinguished only with federal consent.

It appears, therefore, that the Court has contributed little to the body of law protecting Indian tribal rights. Although it has on occasion chided Congress by insisting that it follow the rules it had created, the Court clearly has never seriously challenged the authority of Congress to manage Indian property rights in any manner of its choosing.

Although many injustices were done, it is hoped that the historical legal tradition of allowing Indian claims against the United States will continue to produce the return of just compensation to tribes and an arena for hearing grievances caused by the absence of good faith of a sovereign nation.

SELECTED BIBLIOGRAPHY

Books

Cohen, Felix S. Handbook of Indian Law. Albuquerque: University of New Mexico Press, 1942.

Cohen, Felix S. The Legal Conscience, Selected Papers of Felix S. Cohen. Edited by Lucy Kramer Cohen. New Haven: Yale University Press, 1960.

Deloria, Vine, Jr. Behind the Trail of Broken Treaties. New York: Delacorte Press, 1974.

Hendry, James McLeod. Treaties and Federal Constitutions. Washington, D.C.: Public Affairs Press, 1955.

Henkin, Louis. Foreign Affairs and the Constitution. Mineola, New York: The Foundation Press, Inc., 1972.

Kelly, Alfred H. and Harbison, Winfred A. The American Constitution - Its Origins and Development. New York: W. W. Norton & Company, Inc., 1970.

Israel, Fred L., ed. Major Peace Treaties of Modern History 1648-1967. New York: Chelsea House Publishers, 1967.

Price, Monroe E. Law and the American Indian, Readings, Notes and Cases. New York: The Bobbs-Merrill Company, Inc., 1973.

Prucha, Francis Paul. American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834. Cambridge, Massachusetts: Harvard University Press, 1962.

Prucha, Francis Paul, ed. Documents of United States Indian Policy. Lincoln, Nebraska: University of Nebraska Press, 1975.

United States Supreme Court Reports Digest. Rochester, New York: The Lawyers Cooperative Publishing Company, 1970.

Journals, Law Reviews and Proceedings

Bean, Jerry L. "The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers." North Dakota Law Review. Vol. 49, No. 2 (Winter, 1973), 303-31.

Danforth, Sandra C. "Repaying Historical Debts: The Indian Claims Commission." North Dakota Law Review. Vol. 49, No. 2 (Winter, 1973).

Federal Register. Vol. 41, No. 97 (May 18, 1976). Washington, D.C.: Government Printing Office.

Israel, Daniel H. "The Reemergence of Tribal Nationalism." Paper presented at Institute on Indian Land Development--Oil, Gas, Coal and Other Minerals, Sponsored by the Rocky Mountain Mineral Law Foundation, Tucson, Arizona, April 1-2, 1976.

Notes, "Systematic Discrimination in the Indian Claims Commission: The Burden of Proof in Redressing Historical Wrongs." Iowa Law Review. Vol. 57, No. 5 (June, 1972), 1300-1319.

Smith, Michael. "Tribal Sovereignty and the 1968 Indian Bill of Rights." Civil Rights Digest. (Summer, 1970), 9-15.

Case Citations

Bacardi Corps of America v. Domenech, 311 U.S. 150 (1940)
Beecher v. Wetherby, 95 U.S. 517 (1877)
Cherokee Nation v. Georgia, 30 U.S. 1 (1831)
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)
Cherokee Tobacco, 78 U.S. 616 (1870)
Choate v. Trapp, 224 U.S. 665 (1912)
Confederated Tribes v. United States, 177 Ct. Cl. 184 (1966)
Cramer v. United States, 261 U.S. 219 (1923)
DeGeogroy v. Riggs, 133 U.S. 258 (1890)
Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960)
Foster v. Neilson, 2 Pet. 253 (1829)
Fujii v. California, 242 Pac. 2d 617 (1950)
In re Cooper, 143 U.S. 472 (1892)
Iowa Tribe v. United States, no. 3-70 (Ct. Cl. 1971)
Johnson v. M'Intosh, 21 U.S. 543 (1823)
Jones v. Meehan, 175 U.S. 1 (1899)
The Kansas Indians, 5 Wall. 737 (1866)
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)
Menominee Tribe v. United States, 391 U.S. 404 (1968)

Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 (1945)
The Oneida Indian Nation of New York State v. The County of Oneida, New York, 414 U.S. 661 (1974)
Sac and Fox Tribe v. United States, 315 F.2d 396 (1963)
Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937)
Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613 (1942)
State v. Foreman, 16 Tenn. 256 (1835)
Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)
United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946)
United States v. Belmont, 301 U.S. 324 (1937)
United States v. Curtiss-Wright Corporation, 299 U.S. 304 (1936)
United States v. Northern Paiute Nation, 393 F.2d 786 (Ct. Cl. 1968)
United States v. Pink, 315 U.S. 203 (1942)
United States v. Ried, 73 F.2d 153 (1934)
United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941)
United States v. Thompson, 258 F.2d 257 (1919)
Ware v. Hylton, 3 Dal. 199 (1796)
Winters v. United States, 207 U.S. 564 (1908)
Worcester v. Georgia, 6 Pet. 515 (1832)
Yakima Tribe v. United States, 158 Ct. Cl. 672 (1962)
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)