CHAPTER 14

THE LEGAL STATUS OF INDIAN TRIBES

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SECTION 1. TRIBAL EXISTENCE

The term "tribe" is commonly used in two senses, an ethnological sense and a political sense. It is important to distinguish between these two meanings of the term.[1] Groups that consist of several ethnological tribes, sometimes speaking different languages, have been recognized as single tribes for administrative and political purposes. Examples are the Fort Belknap Indian Community[2] (Gros Ventre and Assiniboine), the Cheyenne and Arapahoe Indians of Oklahoma,[3] the Cherokee Nation (in which Delawares, Shawnees, and others were amalgamated), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation. Despite the use of the plural "Tribes" in this last case, and other similar cases, the group has been treated, politically, as a single tribe. Likewise what is a single tribe, from the ethnological standpoint, may sometimes be divided into a number of independent tribes in the political sense. Examples of this situation are offered by the Sioux, the Chippewa, and the Shoshone.

The question of tribal existence, in the legal or political sense, has generally arisen in determining whether some legislative, administrative, or judicial power with respect to Indian "tribes" extended to a particular group of Indians.

The most basic of these issues has been the constitutional issue arising from the grant of power to Congress to regulate "commerce with * * * the Indian Tribes."[4] The Supreme Court has, in a number of cases, taken the position that the applicability or constitutionality of congressional legislation affecting individual Indians, and the inapplicability or unconstitutionality of state legislation affecting such individuals, depended upon whether or not the individuals concerned were living in tribal relations.

While thus making the validity of congressional and administrative actions depend upon the existence of tribes, the courts have said that it is up to Congress and the executive to determine whether a tribe exists. Thus the "political arm of the Government" would seem to be in a position to determine the extent of its power. In this respect the question of tribal existence and congressional power has been classed as a "political question" along with the recognition of foreign governments and other issues of international relations.[5]

Thus in the case of *United States* v. *Holliday*,[6] the Supreme Court held that federal liquor laws were applicable to a sale of liquor to a Michigan Chippewa Indian, despite a treaty provision looking to the dissolution of the tribe, for the reason that the Interior Department regarded the tribe as still existing. The Court declared:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. (P. 419.)

Again, in the case of *The Kansas Indians*,[7] the Supreme Court dealt with the converse situation, involving an attempt to apply state tax laws to Shawnee, Wea, and Miami Indians of Kansas, and held such laws to be unconstitutional on the ground that the tribal relations of these Indians were still recognized by the Interior Department. In this case the Court declared:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. * * * Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws. (Pp. 755–757.)

[1] *Cf. Cherokee Nation* v. *United States*, 80 C. Cls. 1 (1932), holding that Cherokees by blood, calling themselves "the Cherokee Tribe of Indians," excluding the various tribes and groups incorporated into or adopted by the Cherokee Nation, had no standing to bring a suit in the Court of Claims under the special Cherokee jurisdictional Act of March 19, 1924, 43 Stat. 27. For examples of tribal consolidation effected by intertribal agreement authorized by a general treaty provision, see: *Cherokee Nation* v. *Blackfeather*, 155 U. S. 218 (1894) (Shawnee and Cherokee), and *Cherokee Nation* v. *Journeycake*, 155 U. S. 196 (1894) (Cherokees and Delawares). To the effect that the dissolution of a union between two tribes requires consent of the United States where such consent was a condition of the original act of union, see Choctaw and Chickasaw Union, 7 Op. A. G. 142 (1855). On the situation in Alaska, see Chapter 21.

For an anthropological definition of "tribe," see Handbook of American Indians (Bureau of American Ethnology, Bulletin No. 30, 1910), pt. 2, p. 814.

[2] See Memo. Sol. I. D., March 20, 1936.

[3] See Treaty of October 28, 1867, with these Indians, 15 Stat. 593, particularly Arts. XII and XIV.

[4] U. S. Const., Art. I, sec. 8.

[5] See *United States* v. *Rickert*, 188 U. S. 432 (1903); *United States* v. *Boyd*, 83 Fed. 547 (C. C. A. 4, 1897).

[6] 3 Wall. 407 (1865).

[7] 5 Wall. 737 (1866).

In the case of *Chippewa Indians* v. *United States*,[8] the power of Congress over Chippewa funds was challenged on the theory that the tribe had been dissolved and the funds individualized, and that Congress had therefore no right to expend the funds for various tribal purposes. In rejecting this argument, the Supreme Court put its criterion of tribal existence in these terms:

> It is true that, prior to the adoption of the Act of 1889, the tribe had been broken up into numerous bands, some of which held Indian title to tracts in the State of Minnesota. The Act refers to these collectively as "The Chippewas in the State of Minnesota." Whether or not the tribal relation had been dissolved prior to its adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.
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> This is evidenced by a series of acts, the first of which was adopted nineteen months after the Act of 1889, which are inconsistent with the view that the Congress considered the Indians as emancipated or intended to enter into a binding contract with them as individuals. [Citing findings.] Many of these statutes refer to the Chippewas of Minnesota as a tribe. [Citing statutes.] Moreover, an examination of the Act of 1889 discloses that it is not cast in the form of an agreement; and we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent. (Pp. 4–5.)

Issues similar to the above have been raised in many other cases, and determined in accordance with the foregoing principles.[9]

The limits of legislative power in this field were suggested in the opinion written by Mr. Justice Van Devanter, for a unanimous court, in *United States* v. *Sandoval*:[10]

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. (P. 46.)

Aside from those cases which have dealt with the term "Indian tribes" as used in the Constitution, there have been a few statutes which have used the term and about which legal questions of tribal existence have been raised.

One such statute is that regulating the purchase or leasing of land "from any Indian nation or tribe of Indians."[11] Under this statute a state court decree partitioning Oneida Indian lands in New York, based upon the theory that the Oneidas in New York had ceased to exist as a tribe, was set aside. The federal court held that the Oneidas of New York still existed as a tribe, in the eyes of the Federal Government, and that it was for Congress, and not the state courts, to say when this tribal existence was at an end.[12]

A similar holding with respect to the Pueblos of New Mexico is elsewhere discussed.[13]

Questions of tribal existence were extensively litigated under the Indian Depredation Act of 1891,[14] which gave to the Court of Claims jurisdiction over "all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for." Under the statute it became necessary, in each case, to determine whether the band or tribe to which the offender belonged was in amity with the United States.[15]

The question of tribal existence presented little difficulty under the 1891 Act where the group in question had entered into treaty relations with the United States, or where a separate

[8] 307 U. S. 1 (1939).

[9] *United States* v. *Kagama*, 118 U. S. 375 (1886) (upholding constitutionality of federal statute on murder of one Indian by another, as applied to Hoopa Valley Indians); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903) (upholding constitutionality of federal allotment statute for Kiowa, Comanche, and Apache tribes); *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 316 (1911) (upholding constitutionality of congressional restriction upon alienation of lands of "a member of the existing Creek Nation"); *United States* v. *Wright*, 53 F. 2d 300 (C. C. A. 4, 1931), revg. sub nom. *United States* v. *Swain County*, 46 F. 2d 99 (D. C. W. D. N. C. 1930), cert. den. 285 U. S. 539 (upholding constitutionality of congressional act exempting Eastern Cherokee lands from state taxation, declaring, at p. 304, "they live under a primitive tribal organization"); *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417 (C. C. A. 4, 1938) (Eastern Cherokee lands held "tribal" land exempt from condemnation by state); *Perrin* v. *United States*, 232 U. S. 478, 487 (1914) (upholding constitutionality of liquor legislation covering lands ceded by Yankton Sioux Tribe, where "the tribal relation has not been dissolved"). And see Chapter 5, sec. 8.

[10] 231 U. S. 28 (1913), revg. 198 Fed. 539 (D. C. N. M., 1912).

[11] Act of June 30, 1834, sec. 12, 4 Stat. 729, 730, R. S. § 2116, 25 U. S. C. 177.

[12] *United States* v. *Boylan*, 265 Fed. 165 (C. C. A. 2, 1920), app. dism. 257 U. S. 614 (1921). Accord: *United States* v. *Charles*, 23 F. Supp. 346 (D. C. W. D. N. Y., 1938) (Tonawanda Band).

[13] See Chapter 20, sec. 4.

[14] Act of March 3, 1891, 26 Stat. 851, 852. *Cf.* the Act of March 3, 1885, 23 Stat. 362, 376, which dealt with depredation claims where treaties made provision for redress. An illuminating account of Indian depredation legislation will be found in the opinion of the Court of Claims in *Leighton* v. *United States and Ogalalla Band*, 29 C. Cls. 288 (1894), affd. 161 U. S. 291 (1895). See also *United States* v. *Martinez*, 195 U. S. 469 (1904); *Corralitos Co.* v. *United States*, 178 U. S. 280 (1900), affg. sub nom. *Corralitos Stock Co.* v. *United States*, 33 C. Cls. 342 (1898). The subjection of tribal funds to damage claims by private citizens was an outgrowth of the collective responsibility imposed by early statutes and treaties upon the tribes for the torts of their members. See sec. 14 of Indian Intercourse Act of May 19, 1796, 1 Stat. 469, 472; reenacted sec. 14 of Indian Intercourse Act of March 3, 1799, 1 Stat. 743, 747, made permanent in sec. 14 of Indian Intercourse Act of March 30, 1802, 2 Stat. 139, 143; reenacted as sec. 17 of Indian Intercourse Act of June 30, 1834, 4 Stat. 729, 25 U. S. C. 229. See also secs. 3 and 6, *infra*.

[15] The following cases involved decisions on tribal existence reached under this statute: *Marks* v. *United States*, 28 C. Cls. 147 (1893), affd. 161 U. S. 297 (1896) (Piute and Bannock Tribes); *Valk* v. *United States and Rogue River Indians*, 29 C. Cls. 62 (1894), affd. 168 U. S. 703 (1897); *Woolverton, Admr.* v. *United States and Nez Perce Indians*, 29 C. Cls. 107 (1894); *Jaeger* v. *United States and Yuma Indians*, 29 C. Cls. 172 (1894); *Leighton* v. *United States and Ogalalla Band*, 29 C. Cls. 288 (1894), affd. 161 U. S. 291 (1895); *Love, Admr.* v. *United States, Rogue River Indians, et al.*, 29 C. Cls. 332 (1894); *Barrow, Porter & Co.* v. *United States, Mojave, Cosnejo, and Navajo Indians*, 30 C. Cls. 54 (1895); *Graham* v. *United States and Sioux Tribe of Indians*, 30 C. Cls. 318 (1895); *Gamel* v. *United States, and Apache Indians*, 31 C. Cls. 321 (1896); *Carter* v. *United States*, 31 C. Cls. 441 (1896); *Tully* v. *United States*, 32 C. Cls. 1 (1896) (Apache); *Salois* v. *United States and Sioux Indians*, 32 C. Cls. 68 (1896); *Duran, Admr.* v. *United States and Navajo Indians*, 32 C. Cls. 273 (1897); *Brown* v. *United States and Brulé Sioux*, 32 C. Cls. 432 (1897); *Herring* v. *United States and Ute Indians*, 32 C. Cls. 536 (1897); *Litchfield* v. *United States and Sioux and Cheyenne Indians*, 32 C. Cls. 585 (1897); *Grow* v. *United States and Nisqually Indians*, 32 C. Cls. 599 (1897); *McKee* v. *United States and Comanche Indians*, 33 C. Cls. 99 (1897); *Painter* v. *United States, Humboldt, Eel River, Yaga Creek, Redwood, Mad River, and Klamath Indians*, 33 C. Cls. 114 (1897); *Dobbs* v. *United States and Apache Indians*, 33 C. Cls. 308 (1898); *Conners* v. *United States and Cheyenne Indians*, 33 C. Cls. 317 (1898), affd. 180 U. S. 271 (1901); *Labadie* v. *United States and Cheyenne Indians*, 33 C. Cls. 476 (1898); *Scott* v. *United States and Apache Indians*, 33 C. Cls. 486 (1898); *Luke* v. *United States and Hualapai Indians*, 35 C. Cls. 15 (1899); *Allred* v. *United States and Ute Indians*, 36 C. Cls. 280 (1901); *Lowe* v. *United States and Kickapoo Indians*, 37 C. Cls. 413 (1902); *Thompson* v. *United States and Klamath Indians*, 44 C. Cls. 359 (1909).

reservation had been set aside for the group.[16] A more difficult question, however, was presented in cases where a portion of a tribe went on the warpath. In this situation the rule was established that if the hostile party constituted *a distinct band* the original tribe was not responsible for its depredations.[17] In the case of *Montoya* v. *United States*,[18] the Supreme Court upheld the rule laid down by the Court of Claims, and sought to establish working definitions of the terms "tribe" and "band," in these words:

> We are more concerned in this case with the meaning of the words "tribe" and "band." By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership and concert of action. (P. 266.)

In the parallel case of *Conners* v. *United States*,[19] the Supreme Court declared:

> To constitute a "band" we do not think it necessary that the Indians composing it be a separate political entity, recognized as such, inhabiting a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word "band" implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of initiating hostile proceedings. (P. 275.)

In the case of *Dobbs* v. *United States*,[20] the Court of Claims declared:

> It has been urged in this and other cases that when a number of Indian tribes have been removed to a reservation the tribal entity of each ceases; that they become in legal effect one tribe, and that the question of amity is to be directed to all of the Indians thus brought together.
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> In dealing with the question of the amity of such a tribe as a band of the Apaches, the court has been more and more compelled to fall back upon the purpose of the earlier statutes which created a liability and gave to these claimants their right of action. That purpose, as has been said before, was to keep the peace—to prevent Indian warfare upon the frontier. The Government said both to the white man and to the Indian, "This depredation or this outrage is wrong, is indefensible, and you shall be indemnified for your losses so far as property is involved, provided always that you refrain from war." If the frontiersmen and the Indians did not comply with this simple condition, if the purpose of offering the indemnity was not effective, the claimants have no right to seek it under the act of 1891.
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> The practical question, then, is, Who were the Indians whose amity was to be maintained? Who were the Indians so affiliated with the depredators in fact that the depredators might reasonably be regarded as a part of them and they be regarded as a body whose amity it was desirable to maintain?
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> In dealing with this question the court has held, first, that a nation, tribe, or band will be regarded as an Indian entity where the relations of the Indians in their organized or tribal capacity has been fixed and recognized by treaty; second, that where there is no treaty by which the Government has recognized a body of Indians, the court will recognize a subdivision of tribes or bands which has been recognized by those officers of the Government whose duty it was to deal with and report the condition of the Indians to the executive branch of the Government; third, that where there has been no such recognition by the Government, the court will accept the subdivision into tribes or bands made by the Indians themselves. (*Tully* v. *The Apache Indians*, 32 C. Cls. R., 1.)
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> But in the application of this rule the court has had to go further and recognize bands which simply in fact existed, irrespective of recognition, either by the Department of the Interior or the Indian tribes from which the members of the band came. Victoria's band of Apaches was merely a combination of individuals from different bands associated together for the purpose of waging war against the United States. The band did not exist until its warfare began. It had no geographical home or habitat. A ferocious sense of injustice induced the Indians to prefer death to submission, and they fought the troops of the United States until the band and its members were extinct. (*Montoya* v. *The Mescalero Apaches*, 32 Id., 349.) * * *
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> The Chiricahuas were an isolated mountain band; they had their own habitat in remote valleys distinct from the valleys or mountains of the other bands; they fought their own battles; they pursued their own policy; they were hunted down and captured as Chiricahuas and were brought in and placed upon a reservation as a distinct and well-known military enemy. On the reservation they remained distinct, neither in fact nor in a legal sense merging with the other tribes. In their outbreak and escape from the San Carlos Reservation, in 1881, they still retained their tribal distinctiveness. For the court to hold that they had become an integral part of all the Indians upon the reservation and that all of the Indians upon the reservation, little better than prisoners of war, had become a new, distinctive Indian nation or tribal organization would be to introduce a new and artificial element into this branch of litigation founded not on the facts of the case but on a speculative theory. (Pp. 313–317.)

The question of what groups constitute tribes or bands has been extensively considered in recent years by the administrative authorities of the Federal Government in connection with tribal organization effected pursuant to section 16 of the Act of June 18, 1934.[21] A showing that the group seeking to organize is entitled to be considered as a tribe, within the meaning of the act,[22] is deemed a prerequisite to the holding of a referendum on

[16] *Thompson* v. *United States and Klamath Indians*, 44 C. Cls. 359 (1909).

[17] *Herring* v. *United States and Ute Indians*, 32 C. Cls. 536 (1897); *Allred* v. *United States and Ute Indians*, 36 C. Cls. 280 (1901); *Montoya* v. *United States and Mescalero Apaches*, 32 C. Cls. 349 (1897), aff'd 180 U. S. 261 (1901); *Dobbs* v. *United States and Apache Indians*, 33 C. Cls. 308 (1898); *Conners* v. *United States and Cheyenne Indians*, 33 C. Cls. 317 (1898), aff'd 180 U. S. 271 (1901). In the case of *Herring* v. *United States and Ute Indians*, the Court of Claims held that while the Ute Tribe was in amity with the United States, the members of Black Hawk's band had dissociated themselves from the tribe in order to engage in hostile acts, so that neither the tribe nor the band was liable for depredations which had been committed, the tribe being immune because not involved, the band immune because engaged in war. The Court declared:

> A band, being the lowest and smallest subdivision, confederates more readily than any other form of corporate existence, so to speak, and may be composed of Indians of different tribes or nations, and becomes a de facto band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief.
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> The different divisions of the Indians have not usually originated from the conventional mode which organizes white persons into political communities, but have originated as a condition in fact, and when so existing they are recognized by the laws and treaties as a separate entity, and held responsible as such. (P. 538.)

[18] 180 U. S. 261 (1901), aff'g 32 C. Cls. 349 (1897).

[19] *Conners* v. *United States*, 180 U. S. 271 (1901), aff'g 33 C. Cls. 317 (1898).

[20] 33 C. Cls. 308 (1898).

[21] 48 Stat. 984, 986, 25 U. S. C. 476.

[22] Sec. 16 of the act covers "any Indian tribe, or tribes, residing on the same reservation." Sec. 19 defines "tribe" as follows: "The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Critical cases arise particularly where the last phrase is inapplicable. Where this phrase is applicable, and the Indians of a given reservation

a proposed tribal constitution, and the basis for such a holding is regularly set forth in the letter from the Commissioner of Indian Affairs to the Secretary of the Interior recommending the submission of a tribal constitution to a referendum vote. In cases of special difficulty, a ruling has generally been obtained from the Solicitor for the Interior Department as to the tribal status of the group seeking to organize. The considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:

(1) That the group has had treaty relations with the United States.
(2) That the group has been denominated a tribe by act of Congress or Executive order.
(3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
(4) That the group has been treated as a tribe or band by other Indian tribes.[23]
(5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.[24]

Other factors considered, though not conclusive, are the existence of special appropriation items for the group[25] and the social solidarity of the group.

Ethnological and historical considerations, although not conclusive, are entitled to great weight in determining the question of tribal existence. A situation of peculiar difficulty and complexity arose in connection with the application of two tribal towns of the Creek Nation to organize under the Oklahoma Indian Welfare Act. In upholding the tribal status of the applicants, the Solicitor for the Interior Department declared:

> For the information of the Solicitor's Office an anthropological report, compiled by Mr. Morris Opler, was submitted which deals with the history and present character of these towns. This report provides data and opinions of authorities on the Creeks showing that the Creeks were originally a confederacy composed of a number of tribes, each referred to as a "Talwa." This word was generally translated into the English word "town" but rather covers the conception contained in the word "tribe." Each Talwa was self-governing. It was composed of people living in a single locality, but membership was dependent on birth rather than residence since a Creek Indian belonged to the Talwa of his mother. These towns were originally recognized by the Federal Government as the governing units in the Creek confederacy. The treaties of 1790 and 1796 with the Creeks were signed by the representatives of the various towns.[26] However, because of the pressure of the white people for land and the fact that the towns declared war and peace independently of each other, the Federal authorities found it advisable to insist upon centralization of the Creeks to avoid dealing with each Talwa. The Indians opposed this centralization and it was not until after the Civil War, in which the towns took opposing positions, that the Federal Government achieved the formation of a single government among the Creek Indians. And even then the union was opposed by the full-blood element. In spite of the centralization, however, the towns were still used for the official purposes of census and annuity payments and as a basis for representation in the central body. The census was kept on the basis of these towns until the making of the allotment rolls by the Dawes Commission. It was thought that the allotting of the Creek Indians would destroy their town organization but this did not in fact occur as the members of the town took allotments in the same locality and continued their social and political organization. The report states that at the present time the same offices described by members of De Soto's expedition are still maintained. Many of the old traditions and distinctions between the towns are likewise maintained, including the matrilineal membership.
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> There is other evidence besides the report of this anthropologist now available which indicates the tribal character of these towns. The federated government formed in the latter part of the nineteenth century was a modified replica of the United States government, with representatives elected from the self-governing towns to the two Houses of legislature, the House of Kings and the House of Warriors. These titles represented the Creek designation of the chiefs and headmen of the towns. The present Principal Chief of the Creek Nation has informed the office that these elections still continue, though the National Council has few functions, and that the towns still have their kings and warriors. The petition for an election connected with one of the constitutions and the provisions of the constitutions themselves show the existence of a fairly elaborate local organization with a chief, governing committee and various special offices. Some towns have a square dedicated by their members used for meetings, ceremonies and social functions and there is at least one case of communal ground, also given by the members, worked by them to the benefit of indigent persons in the town. The principal Chief reports various ways in which the towns are active in providing assistance and relief to the members of the town.
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> That the Indians themselves recognized the existence of the Creek tribal towns is clear from an examination of the constitution and laws of the Muskogee Nation.
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> Under the foregoing legal authorities it appears to me that the Creek towns can lay a substantial claim to the right to be considered as recognized bands within the meaning of section 3 of the Oklahoma Indian Welfare Act of June 26, 1936.[27]

It is not enough, however, to show that any of the foregoing elements existed at some time in remote past. As was said by the Solicitor in passing upon the status of the Miami and Peoria Indians under the Oklahoma Indian Warfare Act:[28]

> It is not enough that the ethnographic history of the two groups shows them in the past to have been distinct and well-recognized tribes or bands. A particular tribe or band may well pass out of existence as such in the course of time. The word "recognized" as used in the Oklahoma Indian Welfare Act involves more than past

organize and adopt a constitution under sec. 16, it has been administratively held that they thereby become a tribe, but do not thereby acquire nonstatutory powers of government which they have never exercised. See Chapter 7, fn. 67.

[23] The case of *Tully* v. *United States*, 32 C. Cls. 1 (1896), indicates that where the Indians themselves have treated a group as a band separate from or subordinate to a given tribe, the courts will accept the subdivisions so recognized.

> The policy of the United States in dealing with the Indians has been, as we understand, to accept the subdivisions of the Indians into such tribes or bands as the Indians themselves adopted, and to treat with them accordingly.
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> So that if such subdivisions, whether into tribes or bands, have not been recognized by treaty, but have been by the officers of the Government whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe or band upon which to predicate a judgment.
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> Or if there be no such recognition by the Government, then the court will accept the subdivisions into such tribes or bands as made by the Indians themselves, whether such tribes and bands be named by reason of their geographical location or otherwise. (Pp. 7 and 8.)

[24] See, for an example of the consideration given to the foregoing elements of tribal existence, Memo. Sol. I. D., February 8, 1937 (Mole Lake and St. Croix Chippewa).

[25] This appears to be given considerable weight by the Court of Claims in *McKee* v. *United States and Comanche Indians*, 33 C. Cls. 99, 104 (1897).

[26] Treaty of August 7, 1790, with the Creek Nation, 7 Stat. 35; Treaty of June 29, 1796, with the Creek Nation, 7 Stat. 56.

[27] Memo. Sol. I. D., July 15, 1937. The Constitution of the Thlopthlocco Tribal Town was ratified on December 27, 1938, that of the Alabama-Quassarte Tribal Town on January 10, 1939. Both constitutions recognize that membership in the town is not inconsistent with membership in the Creek Nation.

[28] Act of June 26, 1936, 49 Stat. 1967, 25 U. S. C. 501 *et seq.*

existence as a tribe and its historical recognition as such. There must be a currently existing group distinct and functioning as a group in certain respects and recognition of such activity must have been shown by specific actions of the Indian Office, the Department, or by Congress.[29]

The distinction between a band or tribe and a voluntary association or society is at times difficult to draw with precision. The Acting Solicitor for the Interior Department, ruling that a particular group could not be considered a tribe or band for purposes of organization under the Oklahoma Indian Welfare Act,[30] declared:

> The primary distinction between a band and a society is that a band is a political body. In other words, a band has functions and powers of government. It is generally the historic unit of government in those tribes where bands exist. Because of Federal intervention aimed to destroy tribal organization many recognized bands have lost most if not all of their governmental functions. But their identity as a political organization must remain if the group of Indians can be considered a band or tribe.
>
> This character of a band as an existing or historical unit of Indian government seems to be recognized in sections 16 and 19 of the Indian Reorganization Act which refer to "powers vested in any tribe or tribal council by existing law," and define tribe to include an "organized band." In the administration of the act, organizations of tribes or bands have included such limited powers of government as remain and are considered appropriate. It is this feature which distinguishes organization under section 3 of the Oklahoma Act from organization of voluntary associations under section 4.[31]

The question of tribal existence has generally been treated by the courts as a simple yes-or-no question. It remains true, however, that an Indian tribe may "exist" for certain purposes, and not for others. Where several Indian groups are considered a single tribe generally for political and administrative purposes, Congress may nevertheless assign tribal status to a component group for specified purposes. This has frequently occurred in connection with claims. Tribe A and Tribe B have amalgamated to form Tribe C and share a common reservation and common funds. But at some time prior to amalgamation, Tribe A had suffered some injury for which a later generation offers redress in the form of a jurisdictional act. In such cases, Congress occasionally recognizes as a tribe, entitled to bring suit in the Court of Claims, what is for most purposes only a part of a tribe.[32]

[29] Memo. Sol. I. D., December 13, 1938.

[30] Act of June 26, 1936, 49 Stat. 1967, 25 U. S. C. 501, *et seq.*

[31] Memo. Acting Sol. I. D., July 29, 1937.

[32] Examples of this situation are involved in the Act of February 25, 1889, 25 Stat. 694 (authorizing suit by "Old Settlers"), construed in *United States* v. *Old Settlers,* 148 U. S. 427 (1893); Act of October 1, 1890, 26 Stat. 636 (Shawnee and Delaware Indians, incorporated in the Cherokee Nation, allowed to bring tribal suits against the Cherokee Nation and the United States); Act of June 28, 1898, sec. 25, 30 Stat. 495 (authorizing suit by Delaware Indians), construed in *Delaware Indians* v. *Cherokee Nation,* 193 U. S. 127 (1904); Joint Resolution of June 9, 1930, 46 Stat. 531 (authorizing suit by Assiniboine Indians).

SECTION 2. TERMINATION OF TRIBAL EXISTENCE

Given adequate evidence of the existence of a tribe during some period in the remote or recent past, the question may always be raised: Has the existence of this tribe been terminated in some way?

Generally speaking, the termination of tribal existence is shown positively by act of Congress, treaty provision, or tribal action[33] or negatively by the cessation of collective action and collective recognition. The forms of such collective action and collective recognition which are considered criteria of tribal existence have already been discussed.

The view was once widely entertained that tribal membership was legally incompatible with United States citizenship. Thus a number of early treaties and statutes provided that a given tribe should be dissolved when its members became citizens.[34] Dissolution of the tribe required division of property, and this meant allotment of tribal lands and per capita division of tribal funds.[35]

The Supreme Court in *Matter of Heff*,[36] took the view that citizenship and allotment involved a termination of tribal relations, and that such termination of tribal relations removed citizen allottees from the scope of the Indian liquor laws.

The defendant in the case was a Kickapoo Indian, and the Treaty of June 28, 1862, with that tribe[37] had provided that upon allotment these Indians "shall cease to be members of said tribe, and shall become citizens of the United States." This provision provides a possible justification for the actual decision in *Matter of Heff*, but the opinion in the case put the decision upon the broader ground that under section 6 of the General Allotment Act,[38] which provides that allottees shall be citizens of the United States "entitled to all the rights, privileges, and immunities of such citizens," every allottee became emancipated from federal control.

This doctrine was rejected in the case of *United States* v. *Nice*,[39] which held that allotment did not terminate tribal existence so as to take allottees outside the scope of Indian liquor laws adopted pursuant to congressional power to regulate commerce with Indian tribes. The Supreme Court declared:

> We recognize that a different construction was placed upon section 6 of the act of 1887 in *Matter of Heff*, 197 U. S. 488, but after reexamining the question in the light of other provisions in the act and of many later enactments clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled. (P. 601.)

The view taken in the *Nice* case has prevailed ever since.[40]

While it is thus clear that neither allotment nor citizenship,[41] *per se*, nor both together, imply a termination of tribal existence, in the absence of express provision of treaty or statute asserting such a connection, presumably these are factors to be considered

[33] See *United States* v. *Anderson,* 225 Fed. 825 (D. C. E. D. Wis. 1915) (dissolution of Stockbridge Munsee Tribe by tribal agreement ratified by Congress).

[34] See Chapter 8, sec. 2A. And see Act of March 3, 1873, 17 Stat. 631 (Miami).

[35] See Chapter 15, sec. 23.

[36] 197 U. S. 488 (1905).

[37] 13 Stat. 623, 624.

[38] February 8, 1887, 24 Stat. 388, 390, 25 U. S. C. 349. See Chapter 8, sec. 2A(3).

[39] 241 U. S. 591 (1916).

[40] *United States* v. *Boylan,* 265 Fed. 165 (C. C. A. 2, 1920) aff'g. 256 Fed. 468 (D. C. N. D. Y. N. 1919), app. dism. 257 U. S. 614 (1921). Accord: *Farrell* v. *United States,* 110 Fed. 942 (C. C. A. 8, 1901).

[41] Of the argument that the Fourteenth Amendment conferred citizenship upon Indians and thereby dissolved tribal relations, the Senate Committee on Judiciary said, in 1870:

> To maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, * * * to annul treaties then existing * * * would be to charge upon the United States repudiation of national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce their just rights, and were enjoying the voluntarily assumed guardianship and protection of this Government. (Sen. Rept. No. 268. 41st Cong., 3d sess., December 14, 1870, p. 11.)

See Chapter 8, sec. 2(C), fn. 51.

in determining whether a given group has ceased to maintain tribal relations. Other factors considered by courts and administrative authorities in determining whether the tribal relations of a given group have come to an end are: the physical separation of a group from the main body of the tribe, and the cessation of participation in tribal resources and tribal government.

In the case of *The Cherokee Trust Funds*,[42] it was held that those Cherokees who remained in North Carolina when the main body of the Cherokees were removed to Indian Territory thereby lost their tribal status. The Supreme Court declared:

> * * * Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate Nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws. * * * (P. 309.)

As the Court of Claims pointed out, in this case, the nonmigrating Cherokees "had expatriated themselves from the Cherokee Nation. * * * The only privilege ever accorded to them by the nation was that they might become citizens and subjects upon removal within its territorial boundaries * * *".[43]

It has been administratively determined that those Choctaws remaining in Mississippi when the Choctaw Tribe removed to Indian Territory lost their tribal status and could not be recognized as a separate tribe,[44] and, similarly, that the Indians of the Georgetown or Shoalwater Reservation in Washington, all of whom, apparently, took allotments at other reservations or otherwise abandoned the reservation in question, could no longer be recognized as a separate tribe entitled to the use of receipts from timber sales on the Georgetown Reservation.[45]

Many of the attempts made by Congress to terminate the existence of particular tribes have proved abortive. Tribes which have been dissolved not once but several times have been recognized, in later congressional legislation, as still existing.

An example in point is the group of Winnebago Indians who, separating from their brothers in Nebraska, took up homestead allotments in Wisconsin, under the Act of March 3, 1875,[46] which provided for the issuance of homestead allotments to Indians upon proof of the abandonment of tribal relations. The intent of these Indians "to abandon their tribal relations and adopt the habits and customs of civilized people" was given special legislative confirmation in the Act of January 18, 1881.[47] Nevertheless, in many subsequent statutes Congress recognized the continued existence of the Winnebago Indians of Wisconsin as a separate band.[48] In 1937 the right of this group to organize as a separate band was affirmed by the Interior Department.[49]

The efforts of Congress to terminate the existence of the Five Civilized Tribes are elsewhere discussed.[50]

The efforts to terminate the existence of the Wyandotte Tribe apparently began in 1850, in a treaty by which that tribe, having "manifest an anxious desire to extinguish their *tribal* or *national* character and become citizens of the United States," agreed "that their existence, as a nation or tribe, shall terminate and become extinct upon the ratification of this treaty * * *."[51] The treaty was ratified on September 24, 1850. Apparently the extinguisher clause did not work, for another treaty containing similar provisions for the extinguishment of tribal existence was entered into by the supposedly nonexistent tribe some 5 years later.[52] In 1935, Congress again provided for the final distribution of the funds belonging to the Wyandotte Tribe.[53] Even this, apparently, did not interfere with the continued functioning of the tribe, and on July 24, 1937, the chief of the tribe certified that the members of the tribe, by a unanimous vote, had adopted a tribal constitution under the Oklahoma Indian Welfare Act[54] perpetuating the traditional tribal organization.

Various other attempts to terminate tribal relations by treaty or act of Congress have proved abortive.[55] These legislative experiences suggest that the dissolution of tribal existence is easier to decree than to effect, and indicate the value of a certain skepticism in considering current legislative proposals looking to the dissolution of all or some Indian tribes. They also point to the reasons for the judicial rule that an exercise of the federal power to dissolve a tribe must be demonstrated by statutory or treaty provisions which are positive and unambiguous.[57]

[42] *Eastern Band of Cherokee Indians* v. *United States and Cherokee Nation*, 117 U. S. 288 (1886), aff'g 20 C. Cls. 449 (1885).

[43] 20 C. Cls. 449, 473. Accord: *United States* v. *Elm*. 25 Fed. Cas. No. 15048 (D. C. N. D. N. Y., 1877) (Oneida).

[44] Memo. Sol. I. D., August 31, 1936. *Cf.* note on the status of Pojoaque Pueblo, Chapter 20, sec. 1.

[45] Op. Sol. I. D., M.24173, September 23, 1932, 54 I. D. 71.

[46] Sec. 15, 18 Stat. 402, 420.

[47] 21 Stat. 315.

[48] Act of March 3, 1909, 35 Stat. 781, 798; Act of January 20, 1910, 36 Stat. 873; Act of July 1, 1912, 37 Stat. 187; Act of December 17, 1928, 45 Stat. 1027.

[49] Memo. Sol. I. D., March 6, 1937.

[50] See Chapter 23, sec. 6.

[51] Treaty of April 1, 1850, with the Wyandot, 9 Stat. 987, 989.

[52] Treaty of January 31, 1855, 10 Stat. 1159, construed in *Schrimpscher* v. *Stockton*, 183 U. S. 290 (1902). *Cf.* Art. XIII of the Treaty of February 23, 1867, with the Senecas and others, including certain Wyandottes, 15 Stat. 513, 516, providing for Wyandottes, "many of whom have been in a disorganized and unfortunate condition since their treaty of one thousand eight hundred and fifty-five." And see *Gray* v. *Coffman*, 10 Fed. Cas. No. 5714 (C. C. Kans. 1874); *Conley* v. *Ballinger*, 216 U. S. 84 (1910).

[53] Act of August 27, 1935, 49 Stat. 894.

[54] Act of June 16, 1936, 49 Stat. 1967.

[55] *Wiggan* v. *Conolly*, 163 U. S. 56 (1896), construing the Treaty of June 24, 1862, with the Ottawa Indians of the United Bands of Blanchard's Fork, etc., 12 Stat. 1237, providing for the termination of tribal relations on July 16, 1867, and also the Treaty of February 23, 1867, with the Ottawa and other tribes, 15 Stat. 513, repealing this provision. And see Act of August 6, 1846, 9 Stat. 55.

[57] *Jones* v. *Meehan*, 175 U. S. 1 (1899); *Morrow* v. *Blevins*, 23 Tenn. 223 (1843).

SECTION 3. POLITICAL STATUS

The political status of Indian tribes may be considered with respect to the relations subsisting between the tribe and (*a*) its members, (*b*) other governments, and (*c*) private persons not members of the tribe.

(*a*) So far as concerns the political relation between a tribe and its members, this is a subject which has already been considered in treating of the nature and scope of tribal self-government.[58]

(*b*) The relation of an Indian tribe to other governments presents a series of difficult problems of international law. These problems involve: (1) The treaty-making capacity of an Indian tribe; (2) the capacity of a tribe to wage war; (3) its capacity to sue as a "foreign nation"; (4) its relationship to a foreign country; (5) the recognition which it may demand of the several states; (6) its relation to the federal power of eminent domain; (7) its relation to the state power of eminent domain; and (8) its status as a federal instrumentality.

[58] See Chapter 7.

(1) The Indian tribes were recognized as powers capable of making treaties before the United States was.[59] The validity of the many treaties made and ratified between the United States and nearly all the tribes within its boundaries, is clearly established, as a matter of law.[60] Treaty making, however, depends upon the will of two parties, and either the United States or an Indian tribe may refuse, and frequently has refused, to make treaties which the other party desired. Thus, since Congress expressed its opposition to the continued making of treaties with the Indian tribes, in a rider which the House of Representatives attached to the Indian Department Appropriation Act of March 3, 1871,[61] the President and the Senate have refused to make such treaties. Whether Congress, which is not the treaty-making department of the Government, has the power thus to lay down a binding limitation upon the treaty-making power, viz, the President and the Senate, and whether a treaty made next year with an Indian tribe and constitutionally ratified would be valid or invalid, are probably academic questions. They are also primarily verbal questions. When Congress condemned the use of treaties, it did not prevent the practice of dealing with Indian tribes by means of "conventions," "agreements," "charters," and "constitutions." From the standpoint of the Indian tribes, it made little difference what manner of ratification and procedure was incumbent upon the representative of the United States who treated with them.[62]

(2) A second fundamental attribute of sovereignty, in international law, is the power to make war. This power has been recognized in Indian tribes down to recent times,[63] and there are still on the statute books laws which contemplate the possibility of hostilities by an Indian tribe.[64] The capacity of an Indian tribe to make war involves certain definite consequences for domestic law. Acts which would constitute murder or manslaughter in the absence of a state of war, whether committed by Indians[65] or by the military forces[66] of the United States, may be justified as acts of war where a state of war exists. Hostile Indians surrendering to armed forces are subject to the disabilities and entitled to the rights of prisoners of war.[67] While the existence of a state of war at some time in the past continues to be a current question in Indian litigation, particularly claims litigation, it may be doubted whether the courts would recognize the legal capacity of an Indian tribe to engage in war today.

(3) A third issue in the relations between an Indian tribe and other governments relates to the possibility of suit by an Indian tribe against a state or its citizens in the federal courts.

It was settled in the historic case of *Cherokee Nation* v. *Georgia*[68] that the Cherokee Nation was not a foreign state entitled to bring suit in the federal courts against the State of Georgia to restrain the enforcement of unconstitutional laws.[69] The Supreme Court, *per* Marshall, *C. J.*, laid down the classic outlines of the doctrine which has since prevailed:

> * * * Is the Cherokee nation a foreign state, in the sense in which that term is used in the constitution? The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. * * *
>
> A question of much more difficulty remains. Do the Cherokees constitute a *foreign* statein the sense of the construction? The counsel have shown conclusively, that they are not a state of the Union, and have insisted that, individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state each individual being foreign, the whole must be foreign.
>
> This argument is imposing, but we must examine it more closely, before we yield to it. The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term *foreign* nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves, in their treaties, to be under the protection of the United States; they admit, that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes, by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence. Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well

[59] See *Preston* v. *Browder*, 1 Wheat. 115 (1816); *Patterson* v. *Jenks*, 2 Pet. 216 (1829); *Worcester* v. *Georgia*, 6 Pet. 515 (1832); *Lattimer* v. *Poteet*, 14 Pet. 4 (1840); *Porterfield* v. *Clark*, 2 How. 76 (1844); *Seneca Nation* v. *Christy*, 162 U. S. 283 (1896); *Mitchel* v. *United States*, 9 Pet. 711 (1835). Also see Chapter 3, sec. 4A.

[60] See Chapter 3.

[61] 16 Stat. 544, 566.

[62] See Chapter 3, sec. 6.

[63] *Montoya* v. *United States*, 180 U. S. 261 (1901); *Scott* v. *United States and Apache Indians*, 33 C. Cls. 486 (1898); *Dobbs* v. *United States and Apache Indians*, 33 C. Cls. 308 (1898). Warfare among the Indian tribes themselves was long a matter of concern to the Federal Government. See, for example, the Act of July 14, 1832, 4 Stat. 595.

[64] Act of July 5, 1862, 12 Stat. 512, 528, R. S. § 2080, 25 U. S. C. 72 (authorizing abrogation of treaties with tribe engaged in hostilities); Act of March 2, 1867, 14 Stat. 492, 515, R. S. § 2100, 25 U. S. C. 127 (authorizing withholding of annuities from hostile Indians); Act of February 14, 1873, 17 Stat. 437, 457, 459, R. S. §§ 467, 2136, 25 U. S. C. 266 (regulating sale of arms to hostile Indians); Act of March 3, 1875, 18 Stat. 420, 449, 25 U. S. C. 128 (forbidding payments to Indian bands at war).

[65] "The fact that they were treated as prisoners of war also refutes the idea that they were murderers, brigands or other common criminals." *Conners* v. *United States*, 180 U. S. 271, 275 (1901). And *cf. United States* v. *Cha-to-kah-na-pe-sha*, 25 Fed. Cas. No. 14789a (Superior Court, Ark. 1824) (holding Osage Indians guilty of murder, tribe being in amity). *Cf.* also *Ke-tuc-e-mun-guah* v. *McClure*, 122 Ind. 541, 23 N. E. 1080 (1890).

[66] See *Conners* v. *United States and Cheyenne Indians*, 33 C. Cls. 317, 325 (1898), aff'd. 180 U. S. 271 (1901) (killing of "escaping prisoners of war" legally justified).

[67] *Ibid.* And see *Montoya* v. *United States and Mescalero Apaches*, 180 U. S. 261 (1901), aff'g. 32 C. Cls. 349 (1897).

[68] 5 Pet. 1 (1831).

[69] *Cf. Worcester* v. *Georgia*, 6 Pet. 515 (1832), discussed in Chapter 7.

as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility. These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a state or the citizens thereof and foreign states.

* * * we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article, which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In this clause, they are as clearly contradistinguished, by a name appropriate to themselves, from foreign nations, as from the several states composing the Union. * * *

* * * * *

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion, that an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States. (Pp. 16–18, 20.)

(4) It has been held that the relation of dependence existing between an Indian tribe and the Federal Government is not terminated by the flight of the tribe to foreign soil or by its sojourn on such soil for 9 years. Thus the return of a refugee tribe has been demanded of the foreign country in which it was sojourning.[70]

(5) The Indian tribes have been treated, for certain purposes as similar to states, territories, or dependencies of the United States.[71] Thus, in the case of *Mackey* v. *Coxe*,[72] the Supreme Court held that an administrator appointed by a probate court of the Cherokee Nation occupied the same position as an administrator appointed by any state or territory of the United States. The court declared:

* * * In some respects they bear the same relation to the federal government as a territory did in its second grade of government, under the ordinance of 1787. Such territory passed its own laws, subject to the approval of congress, and its inhabitants were subject to the constitution and acts of congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory,—a territory which originated under our constitution and laws.

By the 11th section of the act of 24th of June, 1812, it is provided "that it shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted, by the proper authority in any of the United States or the territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or administration had been granted in the District." * * *

The Cherokee country, we think, may be considered a territory of the United States, within the act of 1812. In no respect can it be considered a foreign State or territory, as it is within our jurisdiction and subject to our laws. (Pp. 103–104.)

Again, in the case of *Standley* v. *Roberts*[73] the question arose whether a federal court might, by injunction, restrain the enforcement of a judgment rendered by the circuit court of the Choctaw Nation and affirmed by the supreme court of that nation, affecting title to land and rights to rentals within the Choctaw Nation. This issue was resolved in favor of the Choctaw Nation by the Circuit Court of Appeals, and the decision was sustained by the Supreme Court. In the opinion of the former court, rendered by Judge Sanborn, it was said:

* * * the judgments of the courts of these nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit. (P. 845.)

A similar decision was reached in the case of *Raymond* v *Raymond*, where the validity of a tribal divorce decree[74] was upheld.

The Interior Department has taken the view that tribal elections are within those provisions of the Hatch Act[75] applicable to "any election."[76]

(6) Again, it is held that an Indian tribe is not exempt from the power of federal eminent domain.[77]

(7) The rule has likewise been established that an Indian tribe is exempt from the eminent domain power of the several states, in the absence of federal legislation subjecting the tribe to such power.[78]

(8) In its relations with state and municipal governments, an Indian tribe is treated for certain purposes as an instrumentality of the Federal Government.[79] Following a ruling of the Attorney General of North Dakota to the effect that a state crop mortgage law did not apply to mortgages made to an Indian tribe, for the reason that such tribe was deemed an "agency" of the United States within the meaning of the statutory exemption, the Interior Department authorized the acceptance of such mortgages as security for revolving fund loans. The Assistant Secretary declared:

* * * This Department has previously held in various connections that an Indian tribe, particularly where incorporated, is a Federal agency. In the Solicitor's Opinion M. 27810, of December 13, 1934, the following statement is made:

"The Indian tribes have long been recognized as vested with governmental powers, subject to limitations imposed by Federal statutes. The powers of an Indian tribe cannot be restricted or controlled by the governments of the several States. The tribe is, therefore, so far as its original absolute sovereignty has been limited, an instrumentality and agency of the Federal Government. (See the recent opinion of this Department, 'Powers of Indian Tribes,' approved October 25, 1934—M.27781.)

"Various statutes authorize the delegation of new powers of government to the Indian tribes. (See opinion cited above.) The most recent of such

[70] *Lowe* v. *United States and Kickapoo Indians*, 37 C. Cls. 413 (1902). Compare, however, *McCandless* v. *United States ex rel. Diabo*, 25 F. 2d 71 (C. C. A. 3, 1928) (Iroquois in Canada).

[71] See, for example, the Joint Resolution of June 15, 1860, 12 Stat. 116, providing that certain tribes should receive all congressional documents supplied to states and territories.

[72] 18 How. 100 (1855).

[73] 59 Fed. 836 (C. C. A. 8, 1894), app. dism. 17 Sup. Ct. 999 (1896).

[74] "The Cherokee Nation * * * may maintain its own judicial tribunals, and their judgments and decrees upon the rights of the persons and property of members of the Cherokee Nation as against each other are entitled to all the faith and credit accorded to the judgments and decrees of territorial courts." (*Per* Sanborn, J.) *Raymond* v. *Raymond*, 83 Fed. 721, 722 (C. C. A. 8, 1897). But *cf. Ex parte Morgan*, 20 Fed. 298 (D. C. W. D. Ark., 1883) (holding Cherokee Nation not a "state" for purposes of extradition).

[75] Act of August 2, 1939, 76th Cong., Pub. No. 252.

[76] Memo. Sol. I. D., April 6, 1940.

[77] *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641 (1890), rev'g 33 Fed. 900 (D. C. W. D. Ark. 1888). And see Chapter 15, sec. 181; and Federal Eminent Domain (Dept. Justice 1940).

[78] See Chapter 15, sec. 11.

[79] The "instrumentality" and "wardship" concepts are sometimes used interchangeably. See *United States* v. *4,450.72 Acres of Land*, 27 F. Supp. 167 (D. C. Minn. 1939) ("wardship" offered as basis of federal legislative power to condemn land for Indian use.) And see Chapter 8, sec. 9.

> statutes is the Wheeler-Howard Act, which sets up as one of its primary objectives, the purpose 'to grant certain rights of home rule to Indians.' This Act contemplates the devolution to the duly organized Indian tribes of many powers over property and personal conduct which are now exercised by officials of the Interior Department. The granting of a Federal corporate charter to an Indian tribe confirms the character of such a tribe as a Federal instrumentality and agency."

Again it has been ruled that Indian tribes handling rehabilitation funds are exempt from federal unemployment insurance and social security laws by reason of the exception in the application of those laws in favor of "an instrumentality of the United States." [80]

On the other hand, an Indian tribe has been held not a federal instrumentality within the meaning of various statutory and constitutional restrictions upon federal instrumentalities.[81]

The question of how far an Indian tribe is a federal instrumentality for tax purposes is elsewhere considered.[82]

(*c*) The relations between an Indian tribe and private persons not members of the tribe apart from questions of contract, which are elsewhere considered, raise the question of tribal liability for the acts of tribal members. This question involves the balancing of two opposing principles. On the one hand, an Indian tribe, as a municipality, falls within the ordinary rule that a municipality is not liable for damage inflicted by its citizens upon third parties. On the other hand, an Indian tribe is, in some measure, responsible, under principles of international law, for the conduct of its citizens towards the citizens of another friendly power.

An illuminating analysis of the problem which this conflict of principles creates is found in the opinion of the Court of Claims in the case of *Brown* v. *United States*.[83] The responsibility of an Indian tribe from the international law standpoint is, from the domestic law standpoint, no more than a proper consideration explaining certain treaty provisions and statutes. Where no treaties or statutes impose liability upon a tribe for acts of individual members, the courts will not do so.

In *Turner* v. *United States*,[84] the leading case on this point,

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[80] This office has frequently taken the position that an Indian tribe is an instrumentality of the United States, particularly insofar as its powers have been limited or expanded by the Federal Government * * *. However, even if the tribe could not otherwise be considered as an instrumentality of the United States, the trust agreement entered into between the Government and the tribe would give it that character, since the tribe becomes the means whereby the Government carries on the Rehabilitation activities provided for by Congress and administers to the needs of the tribes and their members. (Op. Sol. I. D., M. 29156. June 30, 1937.)

[81] To the effect that an Indian tribe is not an agency of the Federal Government in such a sense as to subject tribal officers to penalties for embezzlement by federal officers, see Memo. Sol. I. D., March 9, 1935 (Klamath).

To the effect that constitutional restrictions upon federal power do not limit tribal powers, see *Talton* v. *Mayes*, 163 U. S. 376 (1896), and see Chapter 7, sec. 1.

On the distinction between tribal employees and federal employees, see Op. Sol. I. D., December 9, 1932 (teachers in Choctaw-Chickasaw schools, after Curtis Act of June 28, 1898, 30 Stat. 495, held not federal employees although under federal supervision). And see Memo. Sol. I. D., Oct. 20, 1936 (Menominee); 27 Op. A. G. 139 (holding Menominee Mills employees not subject to federal employee 8-hour legislation); Op. Comp. Gen. A–51847, Nov. 16, 1933 (same employees held not subject to Economy Act reducing federal salaries).

[82] See Chapter 13, sec. 1A and 2.

[83] It is an established principle of international law that a nation is responsible for wrongs done by its citizens to the citizens of a friendly power. Ordinarily this responsibility is discharged by a government rendering to a resident alien the same protection which it affords to its own citizens and bringing the perpetrators to trial and punishment. This responsibility of a nation for the acts of its individual members is so well established and regulated by international law that it falls little short of being a natural right.

In like manner, though in a varying degree, the Government of the United States has always held an Indian tribe in amity to a like responsibility. The maintenance of peace on the one hand and the protection of its citizens on the other may be said to have been the two fundamental principles of the Government's Indian policy. The Indian tribes did not rise to the rank of independent nations, and the relations between them and the United States were peculiar. Consequently the assertion of the right to demand satisfaction for outrages committed upon property was generally made by statutes and not by treaties. These statutory declarations began in 1796 (1 Stat. L., 469) and continued until 1874 (Revised Stat., Sec. 2156). Between these there came the very important and elaborate statute of *30th June, 1834* (4 Stat. L. 731, Sec. 17), which codified our Indian policy, and which, with some modifications in 1859 (11 Stat. L. 401) and 1872 (17 Stat. L. 190), was reenacted in the Revised Statutes, and thus continued until the present day, or at least until the Indian Depredation Act of 1891. These statutes may not be binding upon the Indians in one sense, when the Indians are considered as treaty-making powers; but they are nevertheless declarations of the intention of the United States to hold the Indian tribes to a national or quasi international responsibility, and they indicate and define the extent or limits of this national or tribal liability as the United States understand it to exist. In the courts of the United States that effect must be given to the statutes. They must be regarded as an authoritative declaration of the quasi international law applicable to dependent Indian nations; that is to say, they must be regarded as correctly defining and laying down the limitations of tribal responsibility.

From 1796 until 1867 this declaration of the United States, that "satisfaction" must be made by a tribe for the unlawful depredations of its members, was thus proclaimed generally through their statutes. In 1867 the Government first introduced into an Indian treaty a provision looking toward the surrender of the wrongdoers as the tribal "satisfaction" which might be made for wrongs inflicted by its members in the stead of money indemnification. The act of 1834 had said and in 1867 continued to say:

> *"And be it further enacted,* That if any Indian or Indians belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or subagent to make return of his doings to the Commissioner of Indian Affairs that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification." (Sec. 17.)

The treaty 21st October, 1867, with the Kiowas and Comanches (15 Stat. L. 581) then introduced into our Indian policy a new element, thus declared:

> "If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indians, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws, and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as, in his judgment, may be proper; but no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs and the Secretary of the Interior; and no one sustaining loss, while violating or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor." (Art. 1.)
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> * * * * *

The making of the treaties was apparently the institution of a new Indian policy—a policy which would induce the tribes to give up their offenders instead of paying for their offenses by a communal tax upon their annuities—a policy which would tend to weed out the worst criminals among the Indians and stamp in their estimation depredations as crimes. But the policy instituted by the treaties never was instituted in fact. The provision of the first article remained a dead letter. The President never "prescribed rules and regulations for ascertaining damages;" the United States never notified an Indian tribe to deliver up a wrongdoer; no tribe ever willfully refused so to do, or was offered an opportunity to refuse; no person, by virtue of any one of these nine treaties ever became entitled to "be reimbursed for his loss from the annuities or other moneys due or to become due" to any one of these treaty-making tribes.

(*Brown* v. *United States*, 32 C. Cls. 432, 433–436 (1897).)

[84] 248 U. S. 354 (1919), aff'g. 51 C. Cls. 125 (1916).

the plaintiffs were white men, who, by procedures of questionable legality, had secured a lease to approximately 400 square miles of Creek tribal land. When they proceeded to fence the land, the tribal treasurer and many other Indians of the vicinity rose in protest and destroyed 60 miles of fence, which was as much as the plaintiffs had built. Congress thereafter enacted a statute authorizing the Court of Claims to hear the plaintiffs' claim against the Creek Nation. The Court of Claims finally dismissed the plaintiffs' suit, declaring:

> Plaintiff's petition avers that the damage was inflicted by "a mob of Indians of the Creek or Muskogee Nation or Tribe"; and if that be true the Creek Nation is not to be held responsible for the mob's action. It can be said of the Creek Nation, as was said of the Cherokee Nation, that it has "many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community, and treaties have been made with them in that capacity." *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127, 144. They are not sovereign to the extent that the federal or state governments are sovereign, but this suit is predicated upon the assumption that their laws are valid enactments, and it recognizes the separate existence of the Creek Nation. When, therefore, the effort is made to hold them responsible as a nation for the illegal action of a mob we must apply the rule of law applicable to established governments under similar conditions. It is a familiar rule that in the absence of a statute declaring a liability therefor neither the sovereign nor the governmental subdivisions, such as counties or municipalities, are responsible to the party injured in his person or estate by mob violence.[85] (Pp. 152–153.)

The decision of the Court of Claims, affirmed by the Supreme Court, clearly establishes that an Indian tribe is not a mere collection of individuals, and that the action of a mob, even though it should include all the members of a municipality, is not the action of the municipality.

[85] Citing: *Louisiana* v. *Mayor*, 109 U. S. 285, 291 (1883); *Hart* v. *Bridgeport*, 11 Fed. Cas. No. 1649 (C. C. Conn. 1876); *Gianfortone* v. *New Orleans*, 61 Fed. 64 (C. C. E. D. La. 1894); *City* v. *Abbagnato*, 62 Fed. 240 (C. C. A. 5, 1894); *Murdock Grate Co.* v. *Commonwealth*, 152 Mass. 28, 31, 24 N. E. 854 (1890).

Under the Act of March 3, 1885,[86] the Secretary of the Interior was authorized to pass on claims for depredations where the tribe concerned had, by treaty, assumed collective responsibility for the acts of its members. This statute was narrowly construed. The Court of Claims held that in order to bring a case within the terms of the statute it had to be shown that the tribe had expressly undertaken to make compensation for injuries committed by individual members.

> While Congress has the undoubted right to provide that an obligation to pay may arise from an act of Congress, the policy of the Government has confined the responsibility of the Indian and the consequent power of the Secretary to the obligation arising from treaties in which there is an express undertaking on the part of the Indians to pay for depredations.[87] (P. 22.)

As was said by the Court of Claims, with respect to a depredation suit brought against an Indian tribe under the statute:

> * * * the Indian defendants were not liable, for they were a tribe, a quasi body politic, and the trespassers were individuals. There was no natural right * * * except that of pursuing and proceeding against the depredators individually. They were the only wrongdoers known to the common law—to any law. As against both of the defendants in this suit, the Government and the Cheyenne tribe, the only semblance of liability that existed, or exists, is that which has been expressly declared and created by treaties and statutes.[88] (P. 479.)

We have already noted that a later act imposed upon Indian tribes a liability for depredations which was statutory and not based upon treaty provisions. While the power of Congress thus to impose a corporate liability for individual wrongs is unquestioned, it remains true that clear and unambiguous language must be used to show such an intention.[89]

[86] 23 Stat. 362, 376.

[87] *Crow* v. *United States and Arapahoe and Kiowa Indians*, 32 C. Cls. 16 (1896). Accord: *Mares, Adm'r.* v. *United States and Jicarilla Apache Indians*, 29 C. Cls. 197 (1894).

[88] *Labadie, Adm'r.* v. *United States and Cheyenne Indians*, 33 C. Cls. 476 (1898).

[89] See fn. 85, *supra*.

SECTION 4. CORPORATE CAPACITY

Whether an Indian tribe, in the absence of some act of incorporation, is to be regarded as a corporate body is an interesting question. The answer to it must depend, in part, upon one's definition of the term "corporation." In the narrow sense in which the term is frequently used, a corporation is something chartered by a government, and in this sense only those Indian tribes which have been chartered by some government, *e. g.*, the Pueblos of New Mexico incorporated by territorial legislation,[90] and the tribes incorporated under section 17 of the Act of June 18, 1934,[91] are to be considered corporations.

The term "corporation," however, is frequently used in a broader sense,[92] as when it is stated, for instance, that the City of London, or the United States, is a body corporate, even though a charter of incorporation cannot be discovered. The term "corporation," in this sense, might be defined as designating a group of individuals to which the law ascribes legal personality, *i. e.*, the complex of rights, privileges, powers, and immunities enjoyed by natural persons generally. This definition is not precise, because the rights, privileges, powers, and immunities of different classes of natural persons vary, and various organized groups may enjoy the status of individuals in some respects and not in others. The definition does, however, establish a direction and a method of analysis, and enables us to say that for certain purposes a group has corporate status.

In this sense, we may say that Indian tribes have been assigned corporate status for many different purposes.[93] Among these purposes are the right to sue, the capacity of being sued, the capacity to hold and exercise property rights not vested in any of the members of the tribe, the power to execute contracts that bind the tribe even when in the course of time its entire membership has changed, and the separation of tribal liability from the liability of tribal members.

Various general statutes on Indian depredations, for instance, have authorized suits by injured citizens of the United States against Indian tribes whose members had committed such depre-

[90] Laws of New Mexico, 1851–52, pp. 176, 418; see Chapter 20, sec. 2.

[91] 48 Stat. 984, 988, 25 U. S. C. 477.

[92] See Stevens on Corporations (1936), c. 1.

[93] In *Farmers' Loan and Trust Co.* v. *Pierson*, 130 Misc. 110, 119, 222 N. Y. S. 532 (1927), Justice Bijur of the New York Supreme Court wrote that "a corporation is more nearly a method than a thing, and that the law in dealing with a corporation has no need of defining it as a person or an entity, or even as an embodiment of functions, rights and duties, but may treat it as a name for a useful and usual collection of jural relations, each one of which must in every instance be ascertained, analyzed and assigned to its appropriate place according to the circumstances of the particular case, having due regard to the purposes to be achieved."