CHAPTER 5

THE SCOPE OF FEDERAL POWER OVER INDIAN AFFAIRS

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SECTION 1. SOURCES OF FEDERAL POWER

Since the National Government derives its sovereignty from powers delegated to it by the states, the Constitution of the United States forms the basis of federal control of Indian affairs.

The principal sources of congressional authority over Indian affairs are summarized by a leading authority in these terms:[1]

> * * * What is the constitutional basis of the national authority over the Indians? The national government is one of powers delegated by the states; yet Indians are mentioned in the U. S. Constitution only twice—once to exclude "Indians not taxed" (a phrase never more explicity defined, but probably meaning today Indians resident on reservations, that is, on land not taxed by the states) from the count for determining representation in the lower house of Congress; and again to empower Congress to regulate "commerce with foreign nations, among the several states, and with the Indian tribes." This commerce power is an express constitutional basis for Congressional action concerning the Indians, as is also, so far as appropriations for Indians are concerned, the power of Congress to raise and spend money "for the general welfare." But the regulation of Indians from Washington has gone much farther. Much power has been exercised because the whole Indian country, except the few eastern reservations, was formerly part of the national domain, with exclusive title and sovereignty (except to the extent it was recognized to be restricted by Indian occupancy) in the national government. In this respect, the reservations within the bounds of the original thirteen states, having a different history, are probably subject to a different legal regime. * * * The setting up of states in the territory once governed only from Washington has not affected the title of the nation to these lands. This ownership of the land supports a mass of Congressional and departmental regulations of land tenure on the reservations west of the Alleghenies; but even this, added to the express powers of Congress already mentioned, does not sustain the full extent of the national control of Indians wherever they are tribally organized. The chief foundation appears to have been the treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made. The colonies before 1776 (and the original states thereafter) often deal with the Indian tribes through political agreements. When in 1787 the Constitution made exclusive grant of treaty power to the national government, these precedents formed a strong basis for national dealings with Indian tribes, especially those beyond the bounds of any state. Habitually for nearly 100 years the nation treated with the Indians pursuant to the constitutional forms that were used in dealing with foreign states. And by a broad reading of these treaties the national government obtained from the Indians themselves authority to legislate for them to carry out the purpose of the treaties.
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> In view of the express grants of the commerce power and the expenditure-for-the-general-welfare power, of the fact that the greater Indian tribes lived on the national domain and not within any state (until the west was piece-meal admitted to statehood) and of the custom of dealing with Indian tribes by treaty, the United States Supreme Court has never found, so far as I can learn, that any Congressional regulation of Indians has been beyond the reach of national power. Indeed the net result is the creation of a new power, a power to regulate Indians. * * * (Pp. 80–81.)

In addition to the constitutional sources of authority over commerce[2] with Indian tribes,[3] expenditures for the general

[1] Rice, The Position of the American Indian in the Law of the United States (1934), 16 J. Comp. Leg. 78.

[2] Art. 1, sec. 8, cl. 3.

[3] This limitation upon federal power to situations involving the existence of a tribe is emphasized by the Supreme Court in the case of *United States v. Forty-Three Gallons of Whiskey*, 93 U. S. 188 (1876):

> As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department

welfare,[4] property of the United States,[5] and treaties,[6] noted by Professor Rice, other constitutional grants of power have played a role in Indian legislation. Most important, perhaps, are the power of Congress to admit new states and (inferentially) to prescribe the terms of such admission,[7] and to make war.[8] Congressional powers of lesser importance involved in Indian legislation include the power to establish post-roads,[9] to establish tribunals inferior to the Supreme Court,[10] and to establish a "uniform rule of naturalization."[11]

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of the government, Congress has the power to say with whom, and on what terms, they shall deal * * *. (P. 195.)

And see cases cited in Chapter 14, sec. 1, fn. 9. Note, however, that congressional objectives based upon federal power over the tribe may involve an exercise of jurisdiction over individual Indians or individual non-Indians, even outside of Indian lands. *Dick* v. *United States*, 208 U. S. 340 (1908).

In the case of *The Kansas Indians*, 5 Wall. 737 (1886), the Supreme Court said:

> While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into 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. (P. 757.)

[4] Art. 1, sec. 8, cl. 1. Art. 1, sec. 9, cl. 7 provides that "No money shall be drawn from the treasury, but in consequence of appropriations made by law * * *." Congress has appropriated money in the nature of a compromise of Indian claims against the Federal Government, and has made this appropriation conditioned on the consent of the tribe concerned. Act of March 3, 1903, 32 Stat. 982, 995 (Creek Nation). The validity of this provision was sustained in 24 Op. A. G. 623 (1903).

[5] Art. 4, sec. 3, cl. 2.

[6] Art. 2, sec. 2, cl. 2.

[7] Art. 4, sec. 3, cl. 1. See *Ex Parte Webb*, 225 U. S. 663 (1912).

The Supreme Court in *Cramer* v. *United States*, 261 U. S. 219 (1923) said:

> Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming State to disclaim all right and title to lands "owned or *held* by *any Indian* or Indian tribes". (P. 228.)

See Act of February 22, 1889, c. 180, sec. 4, par. 2, 25 Stat. 676, 48 U. S. C. 1460a; Act of July 16, 1894, c. 138, sec. 3, par. 2, 28 Stat. 107. Also see Act of June 16, 1906, 34 Stat. 267.

[8] Art. 1, sec. 8, cl. 11.

[9] Art. 1, sec. 8, cl. 7.

[10] Art. 1, sec. 8, cl. 9; Art. 3, sec. 1. The Supreme Court in the case of *Roff* v. *Burney*, 168 U. S. 218 (1897), said:

> * * * Congress may pass such laws as it sees fit prescribing the rules governing the intercourse of the Indians with one another and with citizens of the United States, and also the courts in which all controversies to which an Indian may be party shall be submitted. (Pp. 221–222.)

By virtue of the power to constitute tribunals inferior to the Supreme Court, Congress has created territorial district courts with jurisdiction over the crime of murder committed by any person other than an Indian upon an Indian reservation. *In re Wilson*, 140 U. S. 575 (1891). The Supreme Court, after alluding to the "power of Congress to provide for the punishment of all offenses committed" on reservations, "by whomsoever committed," said:

> * * * And this power being a general one, Congress may provide for the punishment of one class of offences in one court, and another class in a different court. (Pp. 577–578.)

See Chapter 14, sec. 6A. Also see Chapter 19, sec. 3.

Pursuant to this power, Congress has passed many jurisdictional statutes empowering Indian tribes to sue the Federal Government in the Court of Claims for claims arising out of Indian treaties, agreements, or statutes. Congress may confer jurisdiction upon this court to decide on the proper amount of recovery for property taken by an Indian tribe in amity with the United States. See *Leighton* v. *United States*, 161 U. S. 291 (1896); *United States* v. *Navarre*, 173 U. S. 77 (1899).

While granting statehood to a territory, Congress has also been upheld in transferring the jurisdiction of general crimes committed in districts over which the United States retains exclusive jurisdiction from territorial to federal courts. *Pickett* v. *United States*, 216 U. S. 456 (1910).

[11] Art. 1, sec. 8, cl. 4. See Chapter 8, sec. 2.

While the decisions of the courts may be explained on the basis of express constitutional powers, the language used in some cases seems to indicate that decisions were influenced by a consideration of the peculiar relationship between Indians and the Federal Government.[12]

Thus in *United States* v. *Kagama*[13] the Supreme Court found that the protection of the Indians constituted a national problem and referred to the practical necessity of protecting the Indians and the nonexistence of such a power in the states.

Reference to the so-called "plenary" power of Congress over the Indians, or, more qualifiedly, over "Indian tribes" or "tribal Indians," becomes so frequent in recent cases that it may seem captious to point out that there is excellent authority for the view that Congress has no constitutional power over Indians except what is conferred by the commerce clause and other clauses of the Constitution. The most famous defender of federal power over Indians, Chief Justice Marshall, declared:[14]

> * * * That instrument [the Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the

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[12] See Chapter 8, sec. 9. Also see *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902); *Brader* v. *James*, 246 U. S. 88 (1918); N. D. Houghton, The Legal Status of Indian Suffrage in the United States, 19 Cal. L. Rev. (1931) pp. 507, 512; *cf.* Krieger, Principles of Indian Law, 3 Geo. Wash. L. Rev. (1935) pp. 279, 291; 13 Yale L. J. (1904) p. 250. "* * * Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States, * * *." (*United States* v. *Ramsey*, 271 U. S. 467, 471 (1926).

The Supreme Court said in *Perrin* v. *United States*, 232 U. S. 478, 486 (1914):

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary must be accepted and given full effect by the courts.

In *Gritts* v. *Fisher*, 224 U. S. 640 (1912), the Court said:

> * * * As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among them, and to terminate the tribal government. * * * (Pp. 642–643.)

The Court said in *United States* v. *Thomas*, 151 U. S. 577 (1894):

> * * * The Indians of the country are considered as the wards of the nation, and whenever the United States set apart any land of their own as an Indian reservation, whether within a State or Territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offences committed against them or by them within such reservations. (P. 585.)

The Court said in *United States* v. *McGowan*, 302 U. S. 535 (1938):

> * * * Congress alone has the right to determine the manner in which the country's guardianship * * * shall be carried out * * *. (P. 538.)

Also see *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (1930); *United States* v. *Nice*, 241 U. S. 591 (1916); *United States* v. *Quiver*, 241 U. S. 602 (1916); *United States* v. *Hamilton*, 233 Fed. 685 (D. C. W. D. N. Y. 1915); *In re Lincoln*, 129 Fed. 247 (D. C. N. D. Calif. 1904); *United States* v. *Rickert*, 188 U. S. 432 (1903); *In re Blackbird*, 109 Fed. 139 (D. C. W. D. Wis. 1901).

[13] 118 U. S. 375 (1886). For a criticism of this decision see Willoughby, The Constitutional Law of the United States (1929), p. 386.

[14] *Worcester* v. *Georgia*, 6 Pet. 515 (1832). And see Willoughby, The Constitutional Law of the United States (1929), pp. 379–402, 1327, 1368.

shackles imposed on this power, in the confederation, are discarded. (P. 559.)

Whatever view be taken of the possibility or danger of federal power arising from "necessity," it is clear that the powers mentioned by Chief Justice Marshall proved to be so extensive that in fact the Federal Government's powers over Indian affairs are as wide as state powers over non-Indians, and therefore one is practically justified in characterizing such federal power as "plenary." This does not mean, however, that congressional power over Indians is not subject to express limitations upon congressional power, such as the Bill of Rights.[15] In the pages that follow we shall attempt to survey the scope and limits of congressional power over Indian affairs. In later portions of this chapter we shall consider the secondary question of how far such power has been, or may be, validly delegated to administrative officials.

[15] Chief Justice Fuller of the Supreme Court in the case of *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478 (1899), said that Congress possesses "plenary power of legislation" in regard to Indian tribes, "subject only to the Constitution of the United States."

SECTION 2. CONGRESSIONAL POWER—TREATY-MAKING

The first and chief foundation for the broad powers of the Federal Government over the Indians is the treaty-making provision[16] which received its most extensive early use in the negotiation of treaties with the Indian tribes. Beginning with an Indian treaty submitted to the Senate by President Washington on May 25, 1789, the President and the Senate entered into some treaty relations with nearly every tribe and band within the territorial limits of the United States.[17]

To carry out the obligations and execute the powers derived from these treaties became a principal responsibility of Congress,[18] which enacted many statutes relating to or supplementing treaties.[19]

The scope of the obligations assumed and powers conferred upon Congress by treaties with Indian tribes has been discussed in Chapter 3 of this volume and need not be reexamined at this point.

[16] Earlier treaties under the Articles of Confederation are discussed in Chapter 3, sec. 4B.

[17] See *Marks* v. *United States*, 161 U. S. 297, 302 (1896).

[18] The United States assumed many obligations towards the Indians, including the following:

> * * * to secure them in the title and possession of their lands, in the exercise of self-government, and to defend them from domestic strife and foreign enemies: and powers adequate to the fulfilment of those obligations are necessarily reserved. (P. 17.) H. Rept. No. 474, Comm. Ind. Aff., 23d Cong., 1st sess., May 20, 1834.

The view that tribal power has been conferred upon the Federal Government by treaty is upheld by *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876).

[19] Act of January 9, 1837, 5 Stat. 135, 25 U. S. C. 152, 153, 157, 158, regulates the disposition of proceeds of lands ceded to the United States by treaty with the Indians. Also see Act of January 17, 1800, 2 Stat. 6; Act of March 30, 1802, 2 Stat. 139; Act of May 28, 1830, 4 Stat. 411; Act of June 30, 1834, 4 Stat. 729. And see Chapter 4, secs. 1, 3. Numerous appropriation acts have been enacted to fulfill treaty stipulations with the various Indian tribes. See Chapter 4, sec. 17.

SECTION 3. CONGRESSIONAL POWER—COMMERCE WITH INDIAN TRIBES

The power of Congress to regulate commerce with Indian tribes has for its field of action the entire nation, not just the Indian country. Commerce with tribal members anywhere, even wholly within a state, may be the subject of congressional regulation. While Congress has not usually exercised such sweeping regulation, its power has been completely demonstrated in the Indian liquor laws, which constituted one of the early examples of federal control over tribal Indians.[20]

The commerce clause[21] is the only grant of power in the Federal Constitution which mentions Indians. The congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between states.[22]

[20] These laws are discussed in Chapter 17. One of the reasons for the drastic liquor prohibition provisions in sections 20 and 21 of the Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, 732, 733 (R. S. § 2141, 25 U. S. C. 251; R. S. § 2150, 25 U. S. C. 223, amended by Act of May 21, 1934, 48 Stat. 787), was to enable administrative officials to prevent the manufacture of whiskey by Indians, who believed that they had the right to do as they pleased in their own country, and acknowledged no restraint beyond the laws of their own tribe. H. Rept. No. 474, Comm. Ind. Aff., 23d Cong., 1st sess., May 20, 1834. p. 103.

In *United States* v. *Holliday*, 3 Wall. 407 (1865), the Supreme Court held that Congress could forbid the sale of liquor to an Indian in charge of an agent in a state and outside of an Indian reservation. The Court declared:

> "Commerce," says Chief Justice Marshall, in the opinion in *Gibbons* v. *Ogden*, to which we so often turn with profit when this clause of the Constitution is under consideration, "commerce undoubtedly is traffic, but is something more; it is intercourse." The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.
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> If the act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision.
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> Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the act regulating it unconstitutional?
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> In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign states, says, "The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines." "If Congress has power to regulate it, that power must be exercised wherever the subject exists." It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes. (Pp. 417–418.)

[21] Article I, sec. 8, cl. 3 of the Constitution empowers Congress "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." See Chapters 16 and 17.

[22] See 1 Op. A. G. 645 (1824). Prentice and Egan in The Commerce Clause of the Federal Constitution (1898) describe the purpose of this commerce clause as follows:

> * * * The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or dis-

Chief Justice Marshall, in the case of *Cherokee Nation* v. *Georgia*,[23] said that it was the intention of the Constitutional Convention

> * * * to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it, as granted in the confederation. (P. 13.)

In *United States* v. *Forty-Three Gallons of Whiskey*[24] the Supreme Court declared:

> * * * Under the articles of confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. * * * (P. 194.)

The commerce clause in the field of Indian affairs was for many decades broadly interpreted to include not only transactions by which Indians sought to dispose of land or other property in exchange for money, liquor, munitions, or other goods,[25] but also aspects of intercourse which had little or no relation to commerce, such as travel,[26] crimes by whites against Indians or Indians against whites,[27] survey of land,[28] trespass and settlement by whites in the Indian country,[29] the fixing of boundaries,[30] and the furnishing of articles, services, and money by the Federal Government.[31]

The admission of a new state was held not to affect laws forbidding the sale of liquor to Indians living on the territory from which the state was formed.[32]

The Federal Government may constitutionally forbid the sale of liquor in an area adjoining an Indian reservation in order that Indians will not be tempted by the close proximity of this forbidden beverage.[33]

The Supreme Court, in the case of *Dick* v. *United States*[34] sustained federal liquor statutes protecting against the introduc-

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criminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks.

A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce. (P. 342.)

[23] 5 Pet. 1 (1831).

[24] 93 U. S. 188 (1876). Also see Article IX of the Articles of Confederation.

[25] See Chapter 17 and Chapter 18, sec. 2. See also *United States* v. *Nice*, 241 U. S. 591 (1916); *Perrin* v. *United States*, 232 U. S. 478 (1914). Mr. Knoepfler has said:

> * * * Commerce with the Indian tribes has been construed to mean practically every sort of intercourse with the Indians either in the tribes or as individuals. (Legal Status of American Indian & His Property (1922), 7 Ia. L. B. 232, 234.)

This regulation included the fixing of the prices of goods sold to the Indians. Act of April 18, 1796, sec. 4, 1 Stat. 452, 453. Licensed traders were prohibited from purchasing from Indians or receiving in barter or trade from them certain articles, such as "a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, * * *" or "any horse." Act of May 19, 1796, secs. 9, 10, 1 Stat. 469, 471. For similar provisions see Act of April 21, 1806, sec. 7, 2 Stat. 402, 403; Act of March 3, 1799, secs. 9, 10, 1 Stat. 743, 746. Sec. 4 of the Act of July 26, 1866, 14 Stat. 255, 280, which requires traders on Indian reservations to furnish surety bond, is also applicable to Indians. Memo. Sol. I. D., November 20, 1934.

The Act of June 30, 1834, 4 Stat. 729, which forms the basis for the present trade regulations, authorizes the President to prohibit trade with an Indian tribe "whenever in his opinion the public interest may require." Sec. 3, 25 U. S. C. 263, R. S. § 2132. The Circuit Court for the Ohio District, in *United States* v. *Cisna*, 25 Fed. Cas. No. 14,795 (C. C. Ohio. 1835), said:

> * * * The exercise of the power to prohibit any intercourse with the Indians, except under a license, must be considered within the power to regulate commerce with them, if such regulation could not be effectual short of an intercourse thus restricted. (P. 424.)

[26] For example, see Act of May 19, 1796, sec. 3, 1 Stat. 469, 470.

[27] See Act of July 22, 1790, sec. 5, 1 Stat. 137, 138; Act of March 1, 1793, secs. 4, 5, 10, 11, 1 Stat. 329 *et seq.*; Act of May 19, 1796, secs. 4, 6, 1 Stat. 469, 470; Act of March 3, 1799, secs. 2, 4, 5, 7, 8, 1 Stat. 743 *et seq.*; Act of March 30, 1802, sec. 4, 2 Stat. 139, 141; Act of June 30, 1834, sec. 25, 4 Stat. 729, 733. Superintendents, agents, and subagents were empowered to procure the arrest and trial of all Indians accused of committing any crimes and of other persons who may have committed crimes or offenses within a state or territory and fled into the Indian country. Act of June 30, 1834, sec. 19, 4 Stat. 729, 732. The President was authorized to sanction other means of securing the arrest and trial of these Indians, including the employment of the military force of the United States.

[28] The survey of lands belonging to or reserved or granted by the United States to any Indian tribe was made a crime. Act of May 19, 1796, sec. 5, 1 Stat. 469, 470. Also see Act of March 3, 1799, sec. 5, 1 Stat. 743, 745, and Act of March 30, 1802, sec. 5, 2 Stat. 139, 141.

[29] Act of July 22, 1790, sec. 5, 1 Stat. 137, 138; Act of March 3 1799, sec. 4, 1 Stat. 743, 744; Act of March 30, 1802, sec. 4, 2 Stat. 139, 141. The Act of June 30, 1834, sec. 10, 4 Stat. 729, 730, R. S. § 2147, 25 U. S. C. 220, empowered the superintendents of Indian affairs and Indian agents and subagents to remove from the Indian country all persons found therein contrary to law, and authorized the President to direct the military force to be employed in such removal. The President was also authorized (sec. 11) to employ the military force to drive off persons making "settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe." R. S. § 2118, 25 U. S. C. 180. On the issuance of passports to enter the Indian country see Chapter 1, sec. 3, fn. 47; Chapter 4, sec. 5, fn. 73.

[30] The Trade and Intercourse Act of May 19, 1796, secs. 1, 20, 1 Stat. 469, 474 provides for the marking of the boundary lines described in the acts and treaties between the United States and various Indian tribes. Also see Act of March 30, 1802, sec. 1, 2 Stat. 139.

[31] Money was often appropriated for allowances for agents and for the purpose of trading with the Indian nations. Act of April 18, 1796, secs. 5, 6, 1 Stat. 452, 453; also see Act of March 3, 1795, 1 Stat. 443; Act of March 3, 1809, sec. 1, 2 Stat. 544. The President was empowered to furnish animals, implements of husbandry, and goods and moneys to the Indians. Act of March 1, 1793, sec. 9, 1 Stat. 329, 331; Act of March 30, 1802, sec. 13, 2 Stat. 139, 143.

[32] *Ex parte Webb*, 225 U. S. 663 (1912). A cession by Indians may be qualified by a stipulation that the land shall continue to be under the liquor prohibition laws, though within state boundaries. See *Clairmont* v. *United States*, 225 U. S. 551 (1912).

[33] *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188 (1876). The Supreme Court, in the case of *Johnson* v. *Gearlds*, 234 U. S. 422 (1914), said:

> That it is within the constitutional power of Congress to prohibit the manufacture, introduction, or sale of intoxicants upon Indian lands, including not only lands reserved for their special occupancy, but also lands outside of the reservations to which they may naturally resort; and that this may be done even with respect to lands lying within the bounds of a State, are propositions so thoroughly established, and upon grounds so recently discussed, that we need merely cite the cases. *Perrin* v. *United States*, 232 U. S. 478, 483; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 195, 197; *Dick* v. *United States*, 208 U. S. 340. (Pp. 438–439.)

[34] 208 U. S. 340 (1908). Congress has power to prohibit the sale of liquor to Indians living on land owned in fee by their tribe. (*United States* v. *Sandoval*, 231 U. S. 28 (1913), and the introduction into an Indian reservation from a point within the state in which the reserva-

tion of intoxicants, for 25 years, lands ceded by, as well as lands allotted to, the Nez Perce Indians:

> If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well-being, would require us to impose further legislative restrictions, should country adjacent to their reservations be used to carry on the liquor traffic with them. (P. 357.)

The power over liquor traffic is not unlimited. The Supreme Court in *Perrin* v. *United States*,[35] said:

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus, a prohibition like that now before us, if covering an entire State when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts. (P. 486.)

tion is situated, though interstate commerce is not involved (*United States* v. *Wright*, 229 U. S. 226 (1913)). Also see *United States* v. *Soldana*, 246 U. S. 530 (1918); Robert C. Brown, The Taxation of Indian Property (1931), 15 Minn. L. Rev. 182.

[35] 232 U. S. 478 (1914).

SECTION 4. CONGRESSIONAL POWER—NATIONAL DEFENSE

Although comparatively little has been written about the war powers of Congress [36] and the Indian, these powers underlay much of the federal power exercised over Indian land and Indians during the early history of the Republic. In international law conquest brings legal power to govern.

At least 1,012 statutes, public and private, have been enacted by Congress to deal with matters arising out of Indian warfare.[37]

When the Constitution was adopted, the chief mode of dealing with Indians was warfare. Accordingly Indian affairs were entrusted to the War Department by the Act of August 7, 1789,[38] the first law of Congress relating to Indians.

The Congressional power "To * * * provide for the common defence * * * of the United States" [39] was again utilized by the Act of September 29, 1789,[40] which authorized the President to call into service from time to time such part of the militia of the states as he may judge necessary "for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians." Many other early statutes indicate the seriousness with which Congress considered the danger of Indian invasion. Such laws authorize an appropriation for "preserving peace with the Indian tribes," [41] the raising of three regiments which "shall be discharged as soon as the United States shall be at peace with the Indian tribes," [42] and mustering the militia to repel "imminent danger of invasion from any foreign nation or Indian tribe." [43] Some early representations of civil liberties sprang from attempts to attain peace with the Indians.[44]

The Act of July 20, 1867,[45] authorizes the appointment of a commission composed of three generals and four civilians to conclude peace with hostile Indian tribes in the path of the proposed railroads to the Pacific and secure their consent to remove to reservations. Provision was made in the event of failure of the commission for the services of mounted volunteers, not exceeding 4,000, for the suppression of Indian hostilities.[46] Military campaigns were frequently waged against Indians, ranging from expeditions of detachments of militia [47] to regiments carrying on wars against Indian tribes.[48]

The occupation of Florida by United States troops was justified on the basis of necessity to protect Georgia from hostile Indians from the peninsula.[49] Money [50] and ammunition [51] were supplied to territorial and state officials for defense against the Indians, and as late as August 5, 1876, a joint resolution was passed

[36] Art. 1, sec. 8, cls. 1, 11, 12, 15, 16, 17.

Cf. Duerr, Course of Lectures on the Constitutional Jurisprudence of the United States (1856), pp. 285–286, said:

> The powers to regulate commerce, declare war, make peace, and conclude treaties, comprise all that is required for regulating our intercourse with the Indian tribes.

[37] *Cf.* Chapter 8, sec. 4B(4)(c).

[38] 1 Stat. 49.

[39] U. S. Constitution, Art. 1, sec. 8, cl. 1.

[40] 1 Stat. 95, 96.

[41] Act of July 22, 1790, 1 Stat. 136.

[42] Act of March 5, 1792, 1 Stat. 241, repealed Act of March 3, 1795, 1 Stat. 430.

[43] Act of May 2, 1792, 1 Stat. 264. A similar provision is contained in the Act of February 28, 1795, 1 Stat. 424. Early protective statutes against the Indians include Act of January 2, 1812, 2 Stat. 670; Act of March 3, 1813, 2 Stat. 829. The Act of May 28, 1830, sec. 6, 4 Stat. 411, 412, authorized the President to protect migrating Indians "against all interruption or disturbance from any other tribe or nation of Indians * * *." The Act of July 14, 1832, 4 Stat. 595, authorized the appointment by the President of three commissioners to treat with the Indians in order to insure the protection promised the Indians in this provision. Also see Act of May 23, 1836, 5 Stat. 32.

[44] Act of January 17, 1800, 2 Stat. 6, discussed in Chapter 8, sec. 10A(2) *fn.* 311.

[45] 15 Stat. 17.

[46] For further post-Civil War statutory evidence of hostility with the Indians, see Act of March 3, 1873, 17 Stat. 566; Jt. Res. of July 3, 1876, 19 Stat. 214; Act of August 15, 1876, 19 Stat. 204; Jt. Res. August 5, 1876, 19 Stat. 216; Act of June 7, 1878, 20 Stat. 252. And see Chapter 14, sec. 3.

[47] See Act of May 13, 1800, 2 Stat. 82; Act of April 10, 1812, 2 Stat. 704; Act of July 2, 1836, 5 Stat. 71.

[48] See Act of April 20, 1818, 3 Stat. 459; Act of May 4, 1822, 3 Stat. 676; Act of May 26, 1824, 4 Stat. 70.

[49] Joint Resolution of January 15, 1811, 2 Stat. 666; Joint Resolution of January 15, 1811, 3 Stat. 471; Act of February 12, 1812, 3 Stat. 472; Act of March 30, 1822, 3 Stat. 654. The Joint Resolution of March 3, 1881, 21 Stat. 520, deals with expenditures of the State of Florida in suppressing hostile Indians.

[50] Act of July 27, 1866, 14 Stat. 307. The State of California floated four Indian war bonds. See Act of March 3, 1881, 21 Stat. 510; Act of June 27, 1882, 22 Stat. 111; Act of January 6, 1883, 22 Stat. 399.

[51] Act of April 7, 1866, 14 Stat. 26; Act of May 21, 1872, 17 Stat. 138; Act of January 16, 1889, 25 Stat. 646; Joint Resolution of December 9, 1890, 26 Stat. 1111.

authorizing the President to prohibit the sale of special metallic cartridges to hostile Indians.[52]

There are several statutes in force[53] which illustrate the exercise of the war power in relation to the Indians. The Act of July 5, 1862,[54] authorizes the abrogation of treaties with tribes engaged in hostilities; the Act of March 2, 1867,[55] authorizes the withholding of annuities from hostile Indians; the Act of February 14, 1873,[56] regulates the sale of arms to hostile Indians; and the Act of March 3, 1875,[57] forbids payments to Indian bands at war.

Apart from the specific statutes that mark the heritage of decades of military control, other less tangible relics of this control managed to persist long after the Indian Service was removed from the War Department.[58]

[52] 19 Stat. 216.
[53] See Chapter 14, sec. 3.
[54] 12 Stat. 512, 528, R. S. § 2080, 25 U. S. C. 72.
[55] 14 Stat. 492, 515, R. S. § 2100, 25 U. S. C. 127.
[56] 17 Stat. 437, 457, 459, R. S. § 467, 2136, 25 U. S. C. 266.
[57] 18 Stat. 420, 449, 25 U. S. C. 128.
[58] See Chapter 8, sec. 10A(3). See also Chapter 2, sec. 2.

SECTION 5. CONGRESSIONAL POWER—UNITED STATES TERRITORY AND PROPERTY

The principal Indian tribes lived on the national domain. By virtue of its control over the public domain and the United States' territories, the Federal Government was able to exercise broad dominion and control over the Indians, and to effectuate many Indian policies such as those predicated on westward removal, reservations and allotments.[59] Today the control over the Alaskan natives is partly based on this power.[60]

The control of land, water, and other property belonging to the United States is vested exclusively in Congress by the Constitution.[61] The Supreme Court has upheld a broad exercise of this power.

The power of Congress over a territory and its inhabitants is also exclusive and paramount, except as restricted by the Constitution,[62] and Congress can exercise all the sovereign and reserved powers of state governments subject to the provisions of the Constitution specifically restricting the power of the Federal Government.[63] The extent of this power of Congress over Indians is shown by many decisions of the Supreme Court. The Court in the case of *United States* v. *Kagama*[64] said:

> But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else. *Murphy* v. *Ramsey*, 114 U. S. 15, 44. (Pp. 379–380.)

The Supreme Court, in the case of *United States* v. *Rogers*,[65] said:

> * * * we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian. (P. 572.)

A. TRIBAL LANDS

The control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs,[66] and has provided most frequent occasion for judicial analysis of that power. From the wealth of judicial statement there may be

[59] For example, large areas of the public domain have been withdrawn for Indian reservations.
[60] See Chapter 21, sec. 4. Also see *Nelson* v. *United States*, 30 Fed. 112, 116 (C. C. Ore. 1887) and *Endelman* v. *United States*, 86 Fed. 456 (C. C. A. 9, 1898).
[61] See *Hallowell* v. *United States*, 221 U. S. 317, (1911). Since the time when the necessity for the exercise of the authority arose, there has been almost no question as to the absolute power of Congress to determine the form of political and administrative control to be erected over the territories, and to fix the extent to which their inhabitants shall be admitted to a participation in their own government. Both by legislative practice and by judicial sanction, the principle has from the first been asserted that upon this matter the judgment of Congress is absolute. Willoughby, The Constitution of the United States (1929), p. 439.

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State. (Art. 4, sec. 3, cl. 2.)
>
> Congress can grant to Indians fishing privileges in waters connected with a reservation. (Op. Sol. I. D., M. 28978, April 19, 1937.)

[62] See *Oklahoma* v. *A., T. & Santa Fe Ry. Co.*, 220 U. S. 277, 285 (1911).
[63] *Oklahoma K. & M. I. Ry. Co.* v. *Bowling*, 249 Fed. 592 (C. C. A. 8, 1918).
[64] 118 U. S. 375 (1886).
[65] 4 How. 567 (1846).
[66] The plenary power over tribal relations and tribal property of the Indians has been frequently exercised by Congress. See *Roff* v. *Burney*, 168 U. S. 218 (1897); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902); *Blackfeather* v. *United States*, 190 U. S. 368 (1903); *Choate* v. *Trapp*, 224 U. S. 665 (1912); *Ex parte Webb*, 225 U. S. 663 (1912); *United States* v. *Osage County*, 251 U. S. 128 (1919); *Nadeau* v. *Union Pacific R. R. Co.*, 253 U. S. 442 (1920).

The Attorney General said, in 34 Op. A. G. 171 (1924):

> * * * the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent. (P. 180.)

The United States has power to legislate concerning the distribution of tribal land. *United States* v. *Boylan*, 265 Fed. 165, 173 (C. C. A. 2, 1920), app. dism. 257 U. S. 614; *Heckman* v. *United States*, 224 U. S. 413 (1912). Also see *United States* v. *Candelaria*, 271 U. S. 432 (1926) and *United States* v. *Sandoval*, 231 U. S. 28, 48 (1913), and Chapter 11, sec. 1.

derived the basic principle that Congress has a very wide power to manage and dispose of tribal lands.

Examples of Supreme Court statements of the principle are the following:

Justice Brandeis, speaking for the United States Supreme Court in the case of *Morrison* v. *Work*,[67] declared:

> It is admitted that, as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare. The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession. (P. 485.)

The Supreme Court said in the case of *Nadeau* v. *Union Pacific Railroad Company*:[68]

> It seems plain that, at least, until actually allotted in severalty (1864) the lands were but part of the domain held by the Tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States. *Beecher* v. *Wetherby*, 95 U. S. 517, 525. The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 633; *United States* v. *Rowell*, 243 U. S. 464, 468; *United States* v. *Chase*, 245 U. S. 89. (Pp. 445–446.)

A necessary corrollary to this principle is that control of tribal land is a political function not to be exercised by the courts.[69]

The Supreme Court in the case of *Sioux Indians* v. *United States*[70] said:

> * * * Jurisdiction over them [the Indians] and their tribal lands was pecularly within the legislative power of Congress and may not be exercised by the courts in the absence of legislation conferring rights upon them such as are the subject of judicial cognizance. See *Lone Wolf* v. *Hitchcock*, *supra*, 565; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483. This the jurisdictional Act of April 11, 1916, plainly failed to do. (P. 437.)

In the case of *Cherokee Nation* v. *Hitchcock*,[71] the Supreme court said:

> * * * 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. (P. 308.)

The power of Congress extends from the control of the use of the lands,[72] through the grant of adverse interests in the lands,[73] to the outright sale and removal of the Indians' interests.[74] And this is true, whether or not the lands are disposed of for public or private purposes.[75]

To illustrate, the power of Congress to grant rights-of-way across tribal land is clearly established.[76] To quote the Supreme Court:[77]

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[67] 266 U. S. 481 (1925), aff'g 290 Fed. 306 (App. D. C. 1923).

[68] 253 U. S. 442 (1920). The Attorney General wrote in 26 Op. A. G. 340 (1907):

> It is unnecessary to go into any detailed discussion of the power of Congress to alter, modify, or repeal the provisions of the agreement with the Seminole Nation ratified by the act of July 1, 1898, and otherwise provide for the administration of their property and funds, as provided by the act of April 26, 1906, because the question has been conclusively settled by the decisions of the Supreme Court. (*Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; Lone *Wolf* v. *Hitchcock*, 187 U. S. 553; *Morris* v. *Hitchcock*, 194 U. S. 384, 388; *Wallace* v. *Adams*, 204 U. S. 415).
>
> These decisions maintain the plenary authority of Congress to control the affairs and administer the property of the Five Civilized Tribes in the Indian Territory and other Indian tribes. (P. 346.)

[69] The courts have usually denominated this power as political and not subject to the control of the judicial department of the government. See *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565 (1903) sustaining the disposal of a reservation of an Indian tribe on the ground that it was a legitimate exercise of congressional power over tribal Indians and their property. This case is discussed in *Oklahoma* v. *Texas*, 258 U. S. 574, 592 (1922). Also see *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308 (1902).

[70] 277 U. S. 424 (1928), aff'g 58 C. Cls. 302 (1923). Also see *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311–312 (1911).

[71] 187 U. S. 294 (1902).

The court cited with approval the following excerpt from *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899):

> It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

The court concluded:

> The holding that Congress had power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe. (P. 307.)

[72] *E.g.* grazing. See Act of June 18, 1934, sec. 6, 48 Stat. 984, 986, 25 U. S. C. 466.

[73] *E.g.* rights-of-way. See Chapter 4, sec. 13. And see fn. 76, *infra*.

[74] Congress in dissolving a tribe may also provide for the liquidation and distribution of tribal property. *United States* v. *Seminole Nation*, 299 U. S. 417 (1937). See also *United States* v. *Nice*, 241 U. S. 591, 598 (1916); 14 Col. L. Rev. 587–589 (1914). But the court will not assume that Congress abdicated its powers over the tribe or its property, without an unequivocal expression of that intent. *Chippewa Indians* v. *United States*, 307 U. S. 1 (1939); *United States* v. *Boylan*, 265 Fed. 165, 171 (C. C. A. 2, 1920), app. dism. 257 U. S. 614 (1921).

[75] But the land so managed and disposed of must be tribal land. Indians have frequently taken to court the complaint that the tribal property has become vested, by previous act or treaty, in individuals, and is no more subject to congressional control than the private property of other individuals. The courts, however, tend to construe such previous acts and treaties, wherever possible, against the vesting of private rights in tribal property. *Chippewa Indians of Minnesota* v. *United States*, 301 U. S. 358 (1937), aff'g 80 C. Cls. 410 (1935); *United States* v. *Chase*, 245 U. S. 89 (1917), rev'g 222 Fed. 593 (C. C. A. 8, 1915). Until property is allotted, Congress possesses plenary power to deal with tribal lands and funds as tribal property. *Sizemore* v. *Brady*, 235 U. S. 441 (1914). Also see *United States* v. *Mille Lac Chippewas*, 229 U. S. 498 (1913).

[76] *Nadeau* v. *Union Pacific R. R. Co.*, 253 U. S. 442 (1920).

Federal statutes provide for the taking of tribal lands by the United States. For example, the Act of May 23, 1908, 35 Stat. 268, created a national forest upon lands held by the Federal Government as a trustee for the Chippewa Indian Tribe. This law is discussed in *Chippewa Indians* v. *United States*, 305 U. S. 479 (1939). For other cases on eminent domain see *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937); *United States* v. *Creek Nation*, 295 U. S. 103 (1935), s. c. 302 U. S. 620 (1938). See, for example, Act of March 3, 1901, 31 Stat. 1058, 1084, discussed in 49 L. D. 396 (1923).

The right of eminent domain may be exercised by the Federal Government over land held by an Indian nation in fee simple under patent from the United States, without the consent of the tribe. *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641 (1890), which rejected the contention that land was held by the Cherokees as a sovereign nation. Some treaties provided that railroads should have rights-of-way upon payment of just compensation to the Indian tribes. Treaty of June 5, 1854, with the Miamis, Art. 10, 10 Stat. 1093. See Chapter 15, sec. 1B.

The Act of March 2, 1899, 30 Stat. 990, authorized any railroad company or telegraph and telephone company to take and condemn a right-of-way in or through any lands which have been or may hereafter be allotted in severalty, but have not been conveyed to the allottee with full power of alienation. The Act of February 28, 1902, sec. 23, 32 Stat. 43, discussed in *Oklahoma K. & M. I. Ry. Co.* v. *Bowling*, 249 Fed. 592 (C. C. A. 8, 1918), made this statute inapplicable to the Indian Territory and Oklahoma Territory.

[77] *Missouri, Kansas & Texas R'y Co.* v. *Roberts*, 152 U. S. 114 (1894).

Even though an Indian tribe has granted a purported exclusive license to a telephone company, Congress may issue a similar license to another

> The United States had the right to authorize the construction of the road of the Missouri, Kansas, and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the two hundred feet as a right of way to the ocmpany. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government; and when transferred, without reference to the possession of the lands and without designation of any use of them requiring the delivery of their possession, the transfer was subject to their right of occupancy; and the manner, time, and conditions on which that right should be extinguished were matters for the determination of the government, and not for legal contestation in the courts between private parties. This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions. It was asserted in *Buttz* v. *The Northern Pacific Railroad Company*, 119 U. S. 55, and has never, so far as we are aware, been seriously controverted. * * * Though the law as stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands has always been recognized, it is to be presumed, as stated by this court in the *Buttz case*, that in its exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race, the court observing, however, that the propriety or justice of their action towards the Indians, with respect to their lands, is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties neither of whom derives title from the Indians. The right of the United States to dispose of the fee of land occupied by them, it added, has always been recognized by this court from the foundation of the government. (Pp. 116–118.)

Plenary authority does not mean absolute power, and the exercise of the power must be founded upon some reasonable basis.[78] Thus, plenary power does

> * * * * not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation."[79]

The Supreme Court, *per* Mr. Justice Van Devanter, recently said:[80]

> * * * Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own.[81] * * * (P. 375–376.)

Thus, while Congress has broad powers over tribal lands, the United States does not have complete immunity from liability for the actions of Congress. If Congress takes tribal land from the Indians without either their consent or the payment of compensation, the United States is liable under the Fifth Amendment to the United States Constitution for the payment of just compensation,[81] which must include payment for the minerals and timber.[82] But the right of the Indians to just compensation is legally imperfect unless Congress itself passes legislation permitting suit by the Indians against the United States as the United States is not liable to suit without its consent.[83] While there is general legislation permitting suits for just compensation, this does not embrace suits by Indian tribes, and thus far they have been authorized to sue only by jurisdictional acts applying only to individual tribal complaints.[84]

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company. The Circuit Court of Appeals in the case of *Muskogee Nat. Tel. Co.* v. *Hall*, 118 Fed. 382 (C. C. A. 8, 1902), said:

> * * * It is well settled that, in the exercise of its power to regulate commerce among the several states and with the Indian tribes, Congress has full authority to grant rights of way through the land occupied by the five Indian tribes domiciled in the Indian Territory for the construction of railroads (*Cherokee Nation* v. *Southern Kan. R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 485, 19 Sup. Ct. 722, 43 L. Ed. 1041); and in the exercise of this power it has recently authorized the secretary of the interior to grant rights of way through the Indian Territory for the construction, operation, and maintenance of telephone and telegraph lines. 31 Stat. 1083, c. 832, § 3. It follows, of course, that none of these tribes had the power to declare that any one telephone company should have the sole right to construct and operate telephone lines within its borders, since the existence of such a monopoly would have a necessary tendency to prevent free communication between those who reside outside of, and those who reside within, the territory. To this extent the grant of such a franchise as the one in question operates to obstruct interstate commerce. (P. 385.)

The Solicitor of the Department of the Interior has said:

> About the plenary power of Congress over *tribal* Indian property there can be no doubt and in the absence of some controlling reason to the contrary Congress undoubtedly has the power to subject such property to taxation either by the State or Federal Government. (Op. Sol. I. D., M. 14237, December 23, 1924.)

[78] Wise, Indian Law and Needed Reforms (1926), 12 A. B. A. Jour. 37, 38–39.

[79] *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935).

Property rights can be conferred by treaty as well as by formal grant. *United States* v. *Creek Nation*, 295 U. S. 103 (1935); *Morrow* v. *United States*, 243 Fed. 854 (C. C. A. 8, 1917). Government liability on the conduct of Indian affairs arises only from statutes or treaties with the tribe. *McCalib, Adm'r* v. *United States*, 83 C. Cls. 79, 87 (1936). See *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497 (1937), in which the Court said:

> * * * Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty.

Also see Op. Sol. I. D., M. 29616, February 19, 1938.

[80] *Chippewa Indians* v. *United States*, 301 U. S. 358 (1937), aff'g 80 C. Cls. 410 (1935). Also see *Creek Nation* v. *United States*, 302 U. S. 620 (1938).

[81] The portion of this amendment which prohibits confiscation reads: "* * * nor shall private property be taken for public use without just compensation."

"* * * It is fundamental that tribal assets cannot be disposed of by the United States without the consent of the tribe or without compensation." Op. Sol. I. D., M. 29616, February 19, 1938, p. 7.

If vested rights are created in a tribe by a treaty or agreement, the Federal Government becomes liable for its violation by Congress. As the Supreme Court said in the case of *United States* v. *Mille Lac Chippewas*, 229 U. S. 498 (1913):

> * * * That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolutions, unlike the legislation sustained in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, and *Lone Wolf* v. *Hitchcock*, *Id.* 553, 564, 568, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the Government. Doubtless this was because there was a misapprehension of the true relation of the Government to the lands, but that does not alter the result. (Pp. 509–510.)

Accord: *Blackfeet et al. Nations* v. *United States*, 81 C. Cls. 101 (1935).

Typical jurisdictional acts provide for recovery by a tribe against the United States "if * * * the United States Government has wrongfully appropriated any lands belonging to the said Indians" (Act of May 26, 1920, sec. 3, 41 Stat. 623) (Klamath); or for "misappropriation of any of the * * * lands of said tribe" (Act of June 3, 1920, sec. 1, 41 Stat. 738) (Sioux); or "the loss to said Indians of their right, title, or interest, arising from occupancy and use, in lands or other tribal or community property, without just compensation therefor, shall be held sufficient ground for relief" (Act of June 19, 1935, 49 Stat. 388) (Tlingit and Haida).

[82] *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938). See Chapter 15, secs. 14, 15. Also see C. T. Westwood, Legal Aspects of Land Acquisition, Indians and the Land, Contributions by the delegation of the United States, First Inter-American Conference on Indian Life, Patzcuaro, Mexico, published by Office of Indian Affairs (April, 1940) p. 4.

[83] However, suits against officers of the United States based on alleged illegal acts require no such statutory authority. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919), wherein it was held that the Secretary of the Interior could be enjoined from disposing of certain Indian lands as public lands of the United States. See Chapter 20, sec. 7.

[84] See Chapter 14, sec. 6B.

B. TRIBAL FUNDS

The power of Congress over tribal funds is the same as its power over tribal lands, and is, historically speaking, a result of the latter power, since tribal funds arise principally from the use and disposition of tribal lands. The extent of congressional power has been expressed by the Attorney General as follows:[85]

> Now, as these royalties are tribal funds, it can not be seriously contended that Congress had not power to provide for their disbursement for such purposes as it might deem for the best interest of the tribe. That power resides in the Government as the guardian of the Indians, and the authority of the United States as such guardian is not to be narrowly defined, but on the contrary is plenary.
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> Examples of the exercise of such power over the tribal property of Indians, and decisions sustaining it, are found in many of the adjudicated cases, among them *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Gritts* v. *Fisher*, 224 U. S. 640; *Sizemore* v. *Brady*, 235 U. S. 441; *Chase* v. *United States*, decided April 11, 1921. (P. 63.)

The congressional control over tribal funds was defined by Justice Van Devanter in the case of *Sizemore* v. *Brady*.[86]

As in the case of lands, Congress cannot divert tribal funds from tribal purposes in the absence of Indian consent or corresponding benefit without being liable, when suit is brought, for the amount diverted. Thus, there has been occasion, not infrequently, for judicial analysis of the manner of disposition of tribal funds. On the whole the tendency of the Court of Claims has been to uphold expenditures authorized by Congress as made for tribal purposes.[87]

C. INDIVIDUAL LANDS

The power of Congress over individual lands, while less sweeping than its power over tribal lands, is clearly broad enough to cover supervision of the alienation of individual lands.[88] In fact the exercise of congressional power over individual lands has been largely directed toward the release, extension, or reimposition of restrictions surrounding their alienation, depending on whether the policy of conserving or of opening up Indian lands was dominant in Congress.

As "an incident to guardianship"[89] Congress not only has the power to extend,[90] modify, or remove existing restrictions on the alienation of such lands[91] but while the Indian is still the ward of the nation it may reimpose restrictions on property already freed from restrictions or delegate such power to an executive officer.[92]

This power includes permitting alienation upon such terms as Congress or the federal officer delegated with the power deems advisable from the standpoint of the protection of the Indians.[93] Such restrictions must be expressed and are not implied merely because the owner of land is an Indian,[94] nor can such restrictions be made retroactive so as to invalidate a conveyance made by an Indian before the restriction was imposed.[95]

Congress may lift the restriction on alienation of allotments to mixed-blood Indians and continue the restrictions on full-blood Indians, until the Secretary of the Interior is satisfied that such Indians are competent to handle their own affairs.[96] In deciding this question the Supreme Court said:

> * * * it is necessary to have in mind certain matters which are well settled by the previous decisions of this court. The tribal Indians are wards of the Government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection. *United States* v. *Nice*, 241 U. S. 591, 598, and cases cited. (Pp. 459–460.)

The restrictions on alienation of land express a public policy designed to protect improvident people.[97] Hence under the statutes, despite the good faith or motives of a grantee of land conveyed in violation of the restrictions,[98] the conveyance is void.[99]

As in the case of private property generally, Congress cannot deprive an Indian of his land or any interest therein without due process of law or take such property for public purposes without just compensation. An outstanding decision on this subject is

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[85] 33 Op. A. G. 60 (1921). Also see *Chickasaw Nation* v. *United States*, 87 C. Cls. 91 (1938), cert. den. 307 U. S. 646. Congress may appropriate tribal funds for the civilization and self-support of the Indian tribe. *Lane* v. *Morrison*, 246 U. S. 214 (1918). See Chapter 12, sec. 2.

[86] 235 U. S. 441 (1914). See sec. 6, *infra*.

The power of Congress over Osage tribal funds is upheld in *Ne-kah-wah-she-tun-kah* v. *Fall*, 290 Fed. 303 (App. D. C. 1923), app. dism. 266 U. S. 595 (1925).

[87] See *Gritts* v. *Fisher*, 224 U. S. 640 (1912).

[88] Congress has not exerted authority over individual lands not in a trust or restricted category except in so far as to reimpose restrictions and restore them to the class of lands under its supervision.

[89] *La Motte* v. *United States*, 254 U. S. 570, 575 (1921).

[90] *Tiger* v. *Western Inv. Co.*, 221 U. S. 286 (1911); *Heckman* v. *United States*, 224 U. S. 413 (1912). Also see *United States* v. *Jackson*, 280 U. S. 183, 191 (1930), involving extension of trust period of homestead patent under Act of July 4, 1884, 23 Stat. 76, 96, on the ground that the Indians possessed no vested right until a fee patent was issued; and *United States* v. *Pelican*, 232 U. S. 442, 451 (1914) involving congressional retention of trusteeship of land thrown open to settlement.

For a list of reservations in which the trust or restricted period was extended, see 25 C. F. R., appendix to Chapter 1, pp. 480–483.

[91] *Goat* v. *United States*, 224 U. S. 458 (1912); *Deming Inv. Co.* v. *United States*, 224 U. S. 471 (1912); *Jones* v. *Prairie Oil Co.*, 273 U. S. 195 (1927).

[92] *Brader* v. *James*, 246 U. S. 88 (1918), cited with approval in *McCurdy* v. *United States*, 246 U. S. 263, 273 (1918).

[93] *Mullen* v. *United States*, 224 U. S. 448 (1912). See *United States* v. *Noble*, 237 U. S. 74 (1915); *Sunderland* v. *United States*, 266 U. S. 226 (1924).

[94] *Doe* v. *Wilson*, 23 How. 457 (1859).

[95] *Wilson* v. *Wall*, 6 Wall. 83 (1867).

[96] *United States* v. *Waller*, 243 U. S. 452 (1917). From time to time Congress has by statute empowered the Secretary to remove restrictions or issue certificates of competency to Indians deemed capable of managing their own affairs. See Chapter 11, sec. 4.

[97] * * * In adopting the restrictions, Congress was not imposing restraints on a class of persons who were *sui juris*, but on Indians who were being conducted from a state of dependent wardship to one of full emancipation and needed to be safeguarded against their own improvidence during the period of transition. The purpose of the restrictions was to give the needed protection * * *. (Pp. 464–465.) *Smith* v. *McCullough*, 270 U. S. 456 (1926).

[98] *United States* v. *Brown*, 8 F. 2d 564 (C. C. A. 8, 1925), cert. den., 270 U. S. 644 (1926).

[99] *Heckman* v. *United States*, 224 U. S. 413 (1912); *Goat* v. *United States*, 224 U. S. 458 (1912); *Starr* v. *Long Jim*, 227 U. S. 613 (1913); *Monson* v. *Simonson*, 231 U. S. 341 (1913), holding that a deed by an Indian of an allotment subject to restrictions against alienation was absolutely void if made before final patent, even if made after passage of an act of Congress permitting the Secretary of the Interior to issue such patent; and that the unrestricted title subsequently acquired by the allottee under the patent does not inure to the grantee. Also see *Miller* v. *McClain*, 249 U. S. 308 (1919); *United States* v. *Reynolds*, 250 U. S. 104 (1919); and *Smith* v. *Stevens*, 77 U. S. 321, 326 (1870), discussing the policy behind restrictions on sale of land in Treaty between United States and Kansas Indians of June 3, 1825, 7 Stat. 244, 245, and the Act of May 26, 1860, 12 Stat. 21. Also see Chapter 11, sec. 4H.

Choate v. *Trapp*,[100] which held that exemption from taxation established by Congress created in the Indian landholder a vested right not subject to impairment by later legislative act.[101]

The Supreme Court distinguished between the exemption from taxation and the restriction on alienation:[102]

> But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. *Kansas Indians*, 5 Wall. 737, 756; *United States* v. *Rickert*, 188 U. S. 432. (P. 673.)

As part of its supervision of alienation of individual lands, Congress has provided for the disposition and inheritance, by descent or devise, of trust and restricted lands,[103] and the exercise of this power has been sustained.[104] Congress has also vested jurisdiction in the county courts over probate proceedings of such property.[105]

D. INDIVIDUAL FUNDS

The power of Congress over individual funds is an outgrowth of its control over restricted lands and the same general principles are applicable to both.[106]

SECTION 6. CONGRESSIONAL POWER—MEMBERSHIP

The Indian tribes have original power to determine their own membership.[107] Congress has the power, however, to supersede that determination when necessary for the administration of tribal property, particularly its distribution among the members of the tribe.[108]

The United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property.[109] The assumption of power on the part of the Federal Government to distribute tribal funds and land among the individual members of the tribe required the preparation of payment or census rolls. Several treaties[110] and statutes[111] authorized the establishment of such rolls and the pro rata distribution of tribal or public property among the enrollees. Rarely (considering the multitude of individual grievances presented annually by individual Indians or alleged Indians) has Congress specifically provided for additions to tribal rolls in individual cases.[112]

In addition to its ultimate authority to determine tribal membership, Congress may, as part of its power to administer tribal property, alter the basic rule that tribal property may

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[100] 224 U. S. 665 (1912). Also see *Morrow* v. *United States*, 243 Fed. 854 (C. C. A. 8, 1917); Chapter 13, secs. 1, 5, 10; 49 L. D. 348, 352 (1922); Op. Sol. I. D., M. 13864, December 24, 1924; Op. Sol. I. D., M. 25737, March 3, 1930.

[101] The Supreme Court said:

> There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *In re Heff*, 197 U. S. 488, 504; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Smith* v. *Goodell*, 20 Johns. (N. Y.) 188; *Lowry* v. *Weaver*, 4 McLean, 82; *Whirlwind* v. *Von der Ahe*, 67 Mo. App. 628; *Taylor* v. *Drew*, 21 Arkansas, 485, 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones* v. *Meehan*, 175 U. S. 1. * * *
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> Nothing that was said in *Tiger* v. *Western Investment Co.*, 221 U. S. 286, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress, to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that "Tiger was still a ward of the Nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation," it was said that "incompetent persons, though citizens, may not have the full right to control their property," and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.
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> But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment. (Pp. 677, 678.)

A recognition of this restriction on Federal power appears in Article XI of the Treaty of April 1, 1850, with the Wyandots, 9 Stat. 987, 992, which provided:

> All former treaties between the United States and the Wyandot nation of Indians are abrogated and declared null and void by this treaty—except such provisions as may have been made for the benefit of private individuals of said nation, by grants of reservations of lands, or otherwise, which are considered as *vested* rights, and not to be affected by anything contained in this treaty.

[102] *Choate* v. *Trapp*, 224 U. S. 665, 673 (1912). Apparently the removal of the restriction against alienation does not vest any rights in the Indian landholder. See *Brader* v. *James*, 246 U. S. 88 (1918).

Congress may assent to a state tax levied on the production of oil and gas under a lease of tribal lands. *British-American Co.* v. *Board*, 299 U. S. 159 (1936).

[103] Also see Chapter 11, sec. 6.

[104] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903); *Brader* v. *James*, 246 U. S. 88 (1918). See Chapter 10, sec. 10; Chapter 11, sec. 6.

[105] On jurisdiction of county courts over the Five Civilized Tribes, see Chapter 23, sec. 11C, and Act of May 27, 1908, 35 Stat. 312, amended by Act of April 10, 1926, 44 Stat. 239.

[106] For a discussion of congressional control of individual funds see Chapter 10, sec. 2.

[107] See Chapter 7, sec. 4.

[108] The Circuit Court of Appeals in the case of *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8, 1901), said:

> * * * It is the settled rule of the judicial department of the government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments, to which the determination of these questions has been especially intrusted. *U. S.* v. *Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182; *U. S.* v. *Earl* (C. C.) 17 Fed. 75, 78. (P. 951.)

[109] *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899). See *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306, 307 (1902).

[110] See, for example, Treaty of July 8, 1817, with the Cherokees, Art. 3, 7 Stat. 156; Treaty of November 24, 1848, with the Stockbridge Tribe, Art. 2, 9 Stat. 955; Treaty of November 15, 1861, with the Pottawatomie Nation, Art. 2, 12 Stat. 1191; Treaty of June 24, 1862, with the Ottawa Indians, Art. 8, 12 Stat. 1237; Treaty of June 28, 1862, with the Kickapoo Indians, Art. 2, 13 Stat. 623; Treaty of October 14, 1865, with the Cheyenne and Arrapahoe Tribes, Art. 7, 14 Stat. 703.

The general rule is that "in the absence of [statutory] provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, is terminated when the membership is ended, and is neither alienable nor descendible." *Wilbur* v. *United States*, 281 U. S. 206, 216 (1930); also see *Halbert* v. *United States*, 283 U. S. 753, 762, 763 (1931). For a fuller discussion, see Chapter 9, sec. 3; Chapter 7, sec. 4.

[111] See, for example, Act of March 3, 1873, sec. 4, 17 Stat. 631 (Miamie); Act of March 3, 1881, sec. 4, 21 Stat. 414, 433 (Miami); Act of July 1, 1902, sec. 1, 32 Stat. 636 (Kansas); Act of June 4, 1920, 41 Stat. 751 (Crow); Act of May 19, 1924, 43 Stat. 132 (Lac du Flambeau band of Chippewas). Also see *Campbell* v. *Wadsworth*, 248 U. S. 169 (1918).

[112] See, for example, Act of May 30, 1896, 29 Stat. 736 (a Sac and Fox woman); Joint Resolution of October 20, 1914, 38 Stat. 780 (Five Civilized Tribes); Act of May 31, 1924, c. 215, 43 Stat. 246 (Flathead), discussed in Op. Sol. I. D., M.14233, April 24, 1925; also see *Gritts* v. *Fisher*, 224 U. S. 640, 648 (1912).