

THE SCOPE OF TRIBAL SELF-GOVERNMENT<sup>1</sup>

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## SECTION 1. INTRODUCTION

The Indian's right of self-government is a right which has been consistently protected by the courts, frequently recognized and intermittently ignored by treaty-makers and legislators, and very widely disregarded by administrative officials. That such rights have been disregarded is perhaps due more to lack of acquaintance with the law of the subject than to any drive for increased power on the part of administrative officials.

The most basic of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's-land in which government can emanate only from officials of the Interior Department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a government department.

Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of

tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.

Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.

The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference.<sup>2</sup>

<sup>2</sup> See *In re Mayfield*, Petitioner, 141 U. S. 107, 115, 116 (1891).

<sup>1</sup> This chapter is so largely based upon the opinion of Solicitor Margold, *Powers of Indian Tribes* (Op. Sol. L. D., M.27781, October 25, 1934, 55 L. D. 14), and on the article of F. S. Cohen, *Indian Rights and the Federal Courts* (1940), 24 Minn. L. Rev. 145, that quotation marks have been dispensed with, as superfluous, in incorporating considerable portions of these works in the present chapter.

## SECTION 2. THE DERIVATION OF TRIBAL POWERS

From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities,"<sup>3</sup> and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers, rather than as the direct source of tribal powers. This is but an application of the general principle that "It is only by positive enactments,

even in the case of conquered and subdued nations, that their laws are changed by the conqueror."<sup>4</sup>

In point of form it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe.

<sup>4</sup> *Wall v. Williamson*, 8 Ala. 48, 51 (1845), upholding tribal law of divorce. And see Wharton, *Conflict of Laws* (3d ed. 1906), vol. 1, sec. 9; Wheaton, *Elements of International Law* (5th ed. by Phillipson, 1916) 66-68.

<sup>3</sup> *Worcester v. Georgia*, 6 Pet. 515, 559 (1832).

The earliest complete expression of these principles is found in the case of *Worcester v. Georgia*.<sup>6</sup> In that case the State of Georgia, in its attempts to destroy the tribal government of the Cherokees, had imprisoned a white man living among the Cherokees with the consent of the tribal authorities. The Supreme Court of the United States held that his imprisonment was in violation of the Constitution, that the state had no right to infringe upon the federal power to regulate intercourse with the Indians, and that the Indian tribes were, in effect, subjects of federal law, to the exclusion of state law, and entitled to exercise their own inherent rights of sovereignty so far as might be consistent with such federal law. The court declared, *per Marshall, C. J.*:

The Indian nations have always been considered as distinct, independent, political communities, \* \* \* (P. 559.)

\* \* \* and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the State." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is, consequently void, and the judgment a nullity. \* \* \* (P. 560.)

John Marshall's analysis of the basis of Indian self-government in the law of nations has been consistently followed by the courts for more than a hundred years. The doctrine set forth in this opinion has been applied to an unfolding series of new problems in scores of cases that have come before the Supreme Court and the interior federal courts. The doctrine has not always been so highly respected in state courts and by administrative authorities. It was of the decision in *Worcester v. Georgia* that President Jackson is reported to have said, "John Marshall has made his decision: now let him enforce it."<sup>7</sup> As a matter of history, the State of Georgia, unsuccessful defendant in the case, never did carry out the Supreme Court's decision, and the "successful" plaintiff, a guest of the Cherokee Nation, continued to languish in a Georgia prison, under a Georgia law which, according to the Supreme Court decision, was unconstitutional.

The case in which the doctrine of Indian self-government was first established has a certain prophetic character. Administrative officials for a century afterwards continued to ignore the broad implications of the judicial doctrine of Indian self-government. But again and again, as cases came before the federal courts, administrative officials, state and federal, were forced to reckon with the doctrine of Indian self-government and to surrender powers of Indian tribes which they sought to usurp

Finally, after 101 years, there appeared an administration that accepted the logical implications of Indian self-government.<sup>8</sup>

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external Powers of sovereignty of the tribe,<sup>9</sup> *e. g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i. e.*, its Powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress,<sup>10</sup> but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

A striking affirmation of these principles is found in the case of *Talton v. Mayes*.<sup>11</sup> The question was presented in that case whether the Fifth Amendment of the Federal Constitution operated as a limitation upon the legislation of the Cherokee Nation. A law of the Cherokee Nation authorized a grand jury of five persons to institute criminal proceedings. A person indicted upon this procedure and held for trial in the Cherokee courts sued out a writ of habeas corpus, alleging that the law in question violated the Fifth Amendment to the Constitution of the United States, since a grand jury of five was not a grand jury within the contemplation of the Fifth Amendment. The Supreme Court held that the Fifth Amendment applied only to the acts of the Federal Government; that the sovereign powers of the Cherokee Nation, although recognized by the Federal Government, were not created by the Federal Government; and that the judicial authority of the Cherokees was, therefore, not subject to the limitations imposed by the Bill of Rights:

The question, therefore, is, does the Fifth Amendment to the Constitution apply to the local legislation of the Cherokee nation so as to require all prosecutions for offences committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment. The solution of this question involves an inquiry as to the nature and origin of the power of local government exercised by the Cherokee nation and recognized to exist in it by the treaties and statutes above referred to. Since the case of *Barron v. Baltimore*, 7 Pet. 243, it has been settled that the Fifth Amendment to the Constitution of the United States is a limitation only upon the Powers of the General Government, that is, that the amendment operates solely on the Constitution itself by qualifying the powers of the National Government which the Constitution called into being. \* \* \*

The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee

<sup>1</sup> The most comprehensive piece of Indian legislation since the Act of June 30, 1834, 4 Stat. 735, is the Act of June 18, 1934, 48 Stat. 984, 25 U. S. C., 461-479, entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." and commonly known as the Wheeler-Howard Act or Indian Reorganization Act. Since its enactment, this statute has been amended in minor particulars (Act of June 15, 1935, 49 Stat. 378, 25 U. S. C. 478a, 478b; Act of August 12, 1935, sec. 2, 49 Stat. 571, 596, 26 U. S. C. 475a; Act of August 28, 1937, 50 Stat. 862, 25 U. S. C. 463-463c), and its more important provisions have been extended to Alaska (Act of May 1, 1936, 49 Stat. 1250, 48 U. S. C. 362) and Oklahoma (Act of June 26, 1936, 49 Stat. 1967, 25 U. S. C. 501-509).

<sup>8</sup> Certain external powers of sovereignty, such as the power to make war and the power to make treaties with the United States have been recognized by the Federal Government. See Chapter 14, sec. 3.

<sup>9</sup> See for example, *Beil v. Atlantic & P. R. Co.*, 63 Fed. 417 (C. C. A. 8, 1894). And see Chapter 5, sec. 6.

<sup>10</sup> 163 U. S. 376 (1896).

<sup>6</sup> 6 Pet. 515 (1832).

<sup>7</sup> Greeley, *American Conflict* (1864), vol. 1, p. 106.

nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this court have long since answered the former question in the negative. \* \* \*

True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self-government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. *Cherokee Nation v. Kansas Railway Co.*, 135 U.S. 641 where the cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government. \* \* \* (Pp. 382-384.)

The decision in *Talton v. Mayes* does not mean that Indian tribes are not subject to the Constitution of the United States. It remains true that an Indian tribe is subject to the Federal Constitution in the same sense that the city of New Orleans, for instance, is subject to the Federal Constitution. The Federal Constitution prohibits slavery absolutely. This absolute prohibition applies to an Indian tribe as well as to a municipal government and it has been held that slave-holding within an Indian tribe became illegal with the passage of the Thirteenth Amendment.<sup>11</sup> It is, therefore, always pertinent to ask whether an ordinance of a tribe conflicts with the Constitution of the United States.<sup>12</sup> Where, however, the United States Constitution levies particular restraints upon federal courts or upon Congress, these restraints do not apply to the courts or legislatures of the Indian tribes.<sup>13</sup> Likewise, particular restraints upon the states are inapplicable to Indian tribes.

It has been held that the guaranty of religious liberty in the First Amendment of the United States Constitution does not protect a resident of New Orleans from religious oppression by municipal authorities.<sup>14</sup> Neither does it protect the Indian against religious oppression on the part of tribal authorities. As the citizen of New Orleans must write guaranties of religious liberty into his city charter or his state constitution, if he desires constitutional protection in this respect, so the members of an Indian tribe must write the guaranties they desire into tribal constitutions. In fact, many tribes have written such guaranties into tribal constitutions that are now in force.<sup>15</sup>

<sup>11</sup> *In re Sah Quah*, 31 Fed. 327 (D. C. Alaska. 1886).

<sup>12</sup> *Cf. Roff v. Barney*, 168 U. S. 218 (1897), discussed *infra*, sec. 4.

<sup>13</sup> *In United States v. Seneca Nation of New York Indians*, 274 Fed. 946 (D. C. W. D. N. Y. 1921), it was held that federal courts have no power to set aside action of a tribal council allegedly confiscatory of the property rights of a member of the tribe.

That the First Amendment guaranteeing religious liberty does not limit the action of a tribal council is the holding of Memo. Sol. I. D., August 8, 1938 (Lower Brule Sioux).

<sup>14</sup> *Pemoli v. First Municipality*, 3 How. 589 (1845).

<sup>15</sup> A typical Indian bill of rights is the following, taken from the constitution of the Blackfeet Tribe, approved December 13, 1935, by the Secretary of the Interior, pursuant to sec. 16 of the Act of June 18, 1934 (48 Stat. 987, 25 U. S. C. 476):

#### ARTICLE VIII-BILL OF RIGHTS

SECTION I. Suffrage.—Any member of the Blackfeet Tribe, twenty-one (21) years of age or over, shall be eligible to vote at

An extreme application of the doctrine of tribal sovereignty is found in the case of *Ex parte Crow Dog*,<sup>16</sup> in which it was held that the murder of one Sioux Indian by another upon an Indian reservation was not within the criminal jurisdiction of any court of the United States, but that only the Indian tribe itself could punish the offense.

The contention that the United States courts had jurisdiction in a case of this sort was based upon the language of a treaty with the Sioux, rather than upon considerations applicable generally to the various Indian tribes. The most important of the treaty clauses upon which the claim of federal jurisdiction was based provided:

\* \* \* And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life. (P. 568.)

Commenting upon this clause, the Supreme Court declared:

It is equally clear, in our opinion, that the words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, and orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing

any election when he or she presents himself or herself at a polling place within his or her voting district.

SEC. 2. *Economic rights*.—All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the reservation.

SEC. 3. *Civil liberties*.—All members of the tribe may enjoy without hindrance freedom of worship, conscience, speech, press, assembly, and association.

SEC. 4. *Right to be accused*.—Any member of the Blackfeet Tribe, accused of an offense shall have the right to a bond open and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses on his own behalf. Trial by jury may be demanded by any prisoner accused of any offense punishable by more than thirty days imprisonment. Excessive bail shall not be required and cruel punishment shall not be imposed.

Twenty-one other tribal constitutions adopted prior to June 1, 1940, contain more or less similar guaranties, as follows: Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VII; Confederated Tribes of the Grand Ronde Community, Article VIII; Hopi Tribe, Article IX; Lower Brule Sioux Tribe, Article VII; Makah Tribe, Article VII; Muckleshoot Indian Tribe, Article VII; Northern Cheyenne Tribe, Article V; Papago Tribe, Article VI; Puyallup Tribe, Article VII; Quileute Tribe, Article VII; San Carlos Apache Tribe, Article VI; Shoshone-Bannock Tribes of the Fort Hall Reservation, Article VII; Shoshone-Paiute Tribes of the Duck Valley Reservation, Article VII; Swinomish Indians of the Swinomish Reservation, Article VII; Tulalip Tribes, Article VII; Ute Indian Tribe, Article VII; Sac and Fox Tribe of Indians of Oklahoma, Article IX; Pawnee Indians of Oklahoma, Article VII; Caddo Indian Tribe of Oklahoma, Article X; Confederated Tribes of the Warm Springs Reservation of Oregon, Article VII; Tonkawa Tribe of Indians of Oklahoma, Article IX; Skokomish Indian Tribe of the Skokomish Reservation, Article VII; Absentee-Shawnee Tribe of Indians of Oklahoma, Article IX; Alabama-Quassarte Tribal Town, Article IX; Citizen Band of Potawatomi Indians of Oklahoma, Article X; Thlopthlocco Tribal Town of Oklahoma, Article VII; Port Gamble Indian Community of Washington, Article V; Eastern Shawnee Tribe of Oklahoma, Article IX; Shiwits Band of Paiute Indians of Shiwits Reservation, Utah, Article VI.

<sup>16</sup> 109 U. S. 556 (1883). Also see Chapter 18.

of the laws, but, as a dependent community who were in a state of pupillage, advancing from the condition of a Savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society. \* \* \* (Pp. 568-569.)

In finally rejecting the argument for federal jurisdiction the Supreme Court declared:

\* \* \* It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and Unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. \* \* \* (P. 571.)

The force of the decision in *Ex parte Crow Dog* was not weakened, although the scope of the decision was limited, by subsequent legislation, which withdrew from the rule of tribal sovereignty a list of 7 major crimes, only recently extended to 10.<sup>17</sup> Over these specified crimes jurisdiction has been vested in the federal courts. Over all other crimes, including such serious crimes as kidnapping, attempted murder, receiving stolen goods, and forgery, jurisdiction resides not in the courts of nation or state but only in the Indian tribe itself.

We shall defer the question of the exact scope of tribal jurisdiction for more detailed consideration at a later point. We are concerned for the present only in analyzing the basic doctrine of tribal sovereignty. To this doctrine the case of *Ex parte Crow Dog* contributes not only an intimation of the vast and important content of criminal jurisdiction inherent in tribal sovereignty, but also an example of the consistent manner in which the United States Supreme Court has opposed the efforts of lower courts and administrative officials to infringe upon tribal sovereignty and to assume tribal prerogatives without statutory justification. The legal powers of an Indian tribe, measured by the decisions of the highest courts, are far more extensive than the powers, which most Indian tribes have been actually permitted by energetic officials to exercise in their own right.

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States<sup>18</sup> has not been a matter of lip service

<sup>17</sup> See sec. 9, *infra*.

<sup>18</sup> The doctrine of tribal sovereignty is well summarized in the following passage in the case of *In re Sah Quah*, 31 Fed. 327 (D. C. Alaska 1886):

From the organization of the government to the present time the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descents, and the punishment for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however to such restraints as were from time to time deemed necessary for their own protection, and for the protection of the whites adjacent to them. *Cherokee Nat. v. Georgia*, 5 Pet. 1, 16, 17; *Jackson v. Goodell*, 20 Johns, 193. (P. 329.)

And in the case of *Anderson v. Mathews*, 174 Cal. 537, 163 Pac. 902 (1917), it was said:

\* \* \* The Indian tribes recognized by the federal government are not subject to the laws of the state in which they are situated. They are under the control and protection of the United States, but they retain the right of local self-government, and they regulate and control their own local affairs and rights of persons and property, except as Congress has otherwise specially provided by law.

See, also, to the same effect, Story, *Commentaries on the Constitution of the United States* (1891), sec. 1099; Kent, *Commentaries on American Law* (14th ed., 1896), 383-386.

to a venerable but outmoded theory. The doctrine has been followed through the most recent cases, and from time to time carried to new implications. Moreover, it has been administered by the courts in a spirit of wholehearted sympathy and respect. The painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the *Cherokee Intermarriage Ca8W*<sup>19</sup> is typical, and exhibits a degree of respect proper to the laws of a sovereign state.<sup>20</sup>

The sympathy of the courts towards the independent efforts of Indian tribes to administer the institutions of self-government has led to the doctrine that Indian laws and statutes are to be interpreted not in accordance with the technical rules of the common law, but in the light of the traditions and circumstances of the Indian people. An attempt in the case of *Ex parte Tiger*<sup>21</sup> to construe the language of the Creek Constitution in a technical sense was met by the appropriate judicial retort:

\* \* \* If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law.<sup>22</sup> They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew. . . . With them, 'to indict' is to file a written accusation charging a person with crime. \* \* \*

So, too, in the case of *McCourtain v. Grady*,<sup>23</sup> the court had occasion to note that:

\* \* \* The Choctaw constitution was not drawn by geologists or for geologists, or in the interest of science, or with scientific accuracy. It was framed by plain people, who have agreed among themselves what meaning should be attached to it, and the courts should give effect to that interpretation which its framers intended it should have. \* \* \*

The realm of tribal autonomy which has been so carefully respected by the courts has been implicitly confirmed by Congress in a host of statutes providing that various administrative acts of the President or the Interior Department shall be carried out only with the consent of the Indian tribe or its chiefs or council.<sup>24</sup>

The whole course of congressional legislation, with respect to the Indians has been based upon a recognition of tribal autonomy, qualified only where the need for other types of governmental control has become clearly manifest. As was said in a report of the Senate Judiciary Committee in 1870:

Their right of self-government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned.<sup>25</sup>

It is a fact that state governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through state law or departmental regulation or arbitrary administrative fiat,<sup>26</sup> but these trespasses have not impaired the vested legal powers of local self-government which have been recognized again and again when these trespasses have been challenged by an Indian tribe. "Power and authority rightfully conferred do not nec-

<sup>19</sup> 203 U. S. 76 (1906). And see *Famous Smith v. United States*, 151 U. S. 50 (1894); 8 Op. A. G. 300 (1857).

<sup>20</sup> And see sec. 3, *infra*.

<sup>21</sup> 1 Ind. T. 41, 47 S. W. 304, 305 (1898).

<sup>22</sup> See *Waldron v. United States*, 143 Fed. 413 (C. C. S. D. 1905); *Henson v. Johnson*, 246 Pac. 868 (1926).

<sup>23</sup> 1 Ind. T. 107, 38 S. W. 65, 71 (1896).

<sup>24</sup> See sec. 10, *infra*; 25 U. S. C. 130, 132, 159, 162, 184, 218, 225, 229, 371, 397, 398, 402. These provisions are discussed later under relevant headings.

<sup>25</sup> Sen. Rept. No. 268, 41st Cong., 3d sess., p. 10.

<sup>26</sup> See Oskison, *In Governing the Indian Use the Indian!* (1917), 23 Case & Comment 722.

essarily cease to exist in consequence of long nonuser." <sup>21</sup> The Wheeler-Howard Act,<sup>22</sup> by affording statutory recognition of these powers of local self-government and administrative assistance in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various state agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves.<sup>23</sup>

<sup>21</sup> *United States ex rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14891 (C. C. Neb. 1879).

<sup>22</sup> Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 461 et. seq. See fn. 7, *supra*.

<sup>23</sup> On the subordination of departmental regulations to the provisions of tribal constitutions, see 25 C. F. R. 71.4, 161.1, 171.13. And see Memo. Sol. I. D., November 11, 1935 (re Grazing Regulations). The

Neither the allotting of land in severalty nor the granting of citizenship has destroyed the tribal relationship upon which local autonomy rests.<sup>24</sup> The extent, however, to which the foregoing principles may apply to scattered Indian groups which have never exercised powers of self-government presents questions to which no authoritative answers have yet been given.<sup>25</sup>

Secretarial order, approving a tribal constitution regularly contains this statement:

All rides and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and Bylaws are hereby declared inapplicable to these Indians.

<sup>24</sup> See Chapter 8, sec. 2C, and Chapter 14, secs. 1, 2.

<sup>25</sup> See Goodrich, *The Legal Status of the California Indians* (1926); 14 Calif. L. Rev. 83, 157.

### SECTION 3. THE FORM OF TRIBAL GOVERNMENT

Since any group of men, in order to act as a group, must act through forms which give the action the character and authority of group action, an Indian tribe must, if it has any power at all, have the power to prescribe the forms through which its will may be registered. The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine and define its own form of government. Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms add procedures which are to attest the authoritative character of acts done in the name of the tribe.<sup>26</sup>

Such power also includes the power to interpret its own laws and ordinances, which interpretations will be followed by the federal courts.<sup>27</sup>

The question of whether action taken in the name of an Indian tribe is in truth tribal action, has been before state and federal

<sup>26</sup> One of the current popular superstitions about Indians is the notion that every Indian male over the age of 30 is either a chief or a "Big Chief." This superstition is of great help to those Indians or pseudo-Indians who seek to earn a respectable living by selling snake oil to the sick, or by selling their fellow-tribesmen's land to land speculators or to the Federal Government, or by lecturing to women's clubs and congressional committees, or by endowing indigent lawyers with tribal business. It is generally very difficult to persuade those who have paid for or profited by such transactions with Indian "chiefs" that the Indian in question was not an officer of his tribe and had no tribal lands, tribal suits, or tribal wisdom to give away. It is, therefore, a matter of some concern to an Indian tribe that it should have the right to define a framework of official action and to insist that acts of individuals and groups that do not fall within that framework are not acts of the tribe. This definition of a framework or government may take the form of a written constitution, or it may take the form of the British Constitution, a disorderly mass of practices shading off into parliamentary procedure and court etiquette but including at its core the essential canons that we invoke, consciously or unconsciously, to decide whether the acts of certain individuals are governmental or nongovernmental or antigovernmental.

On the form of tribal organization, a leading authority has this to say:

The "tribe" is something we conceive of rather chaotically. Yet these native peoples were as neatly and elaborately organized politically as many civilized peoples. . . . (P. 181.)

. . . The police of the Plains tribes are, one may say, merely one facet of an elaborate and highly complex bureaucratic political organization. (P. 200.) *McLeland Police and Punishment among Native Americans of the Plains* (1937), 28 J. Crim. Law and Criminology 181.

<sup>27</sup> *Talton v. Mayes*, 163 U. S. 376 (1896). This rule has been generally followed by administrative authorities. See for example Memo. Sol. I. D., July 5, 1940, holding that the choice between two reasonable interpretations of a provision of the Constitution of the San Carlos Apache Tribe should be made by the tribe or its tribal council rather than by the Interior Department.

courts on many occasions, and in every case the courts have held that the definition of the form of tribal government is a matter for the decision of the Indians themselves.

Such a decision for example is found in the case of *Pueblo of Santa Rosa v. Fall*.<sup>28</sup> Certain attorneys claimed to represent an Indian pueblo and asserted ownership of a large area which the Federal Government considered public domain. The Indians themselves, apparently, denied the authority of the attorneys in question to put forward such a claim, but the attorneys justified their action on the basis of an alleged agreement with the "captain" of the Pueblo. When the case came before the Supreme Court, that body found that according to the custom of the Pueblo the "captain" would have no authority to act for the Pueblo in a matter of this sort, and that such action without the approval of the Pueblo council would be void. On the issue of fact the court found:

\* \* \* That Luis was without power to execute the papers in question, for lack of authority from the Indian council, in our opinion is well established. (Pp. 319-320.)

The Supreme Court reversed the decision of the lower court, which had dismissed the suit on the merits, and held:

\* \* \* the cause must be remanded to the court of first instance with directions to dismiss the bill, on the ground that the suit was brought by counsel without authority, but without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa. (P. 321.)

Special statutes relating to particular tribes frequently designate the tribal council, committee, or official who is to pass upon

<sup>28</sup> 273 U. S. 315 (1927). To the same effect, see 7 Op. A. G. 142 (1855); Memo. Sol. I. D., March 11, 1935.

In 6 Op. A. G. 79 (1849), the opinion is expressed that a release to be executed by the "Creek Indians" would be valid "provided, that the chiefs and headmen executing it are such chiefs and headmen, and constitute the whole or a majority of the council of the Creek nation."

In *Rollins and Presbrey v. United States*, 23 C. Cls. 106 (1888), the court finds that a chiefs authority to act in the name of the tribe has been established by the tacit assent of the tribe and by their acceptance of the benefits of his acts.

On the general question of how a tribe may contract, see Chapter 14, sec. 5.

In the case of *Mt. Pleasant v. Gansworth*, 271 N. Y. Supp. 78 (1934), it is held that the Tuscarora tribal council has never been endowed with probate jurisdiction, that no other body has been set up by the tribe to exercise probate powers, and hence that state courts may step in to remedy the lack. Whether or not the final conclusion is justified, in the light of such cases as *Patterson v. Council of Seneca Nation*, 245 N. Y. 433, 157 N. E. 734 (1927), the opinion of the court indicates at least that the limitations which a tribe may impose upon the jurisdiction of its own governmental bodies and officers will be respected.

matters entrusted to the tribe by Congress.<sup>35</sup> Some statutes confer upon the President or the Secretary of the Interior supervisory powers over certain named tribal councils.<sup>36</sup> Numerous appropriation acts specify the tribal governing bodies or officers recognized by the Federal Government, in making provisions for tribal approval of various expenditures or in appropriating tribal or federal funds for salaries of Indian councils, courts, or chiefs.<sup>37</sup> And treaties with Indian tribes frequently declare in express language, or show by the manner of Indian ratification, the character of tribal government.<sup>38</sup> Other treaties guarantee that such tribal governments will not be subjected to state or territorial law.<sup>39</sup> Other treaties guarantee to various Indian tribes

"the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States regulating trade and intercourse with the Indians." "Various other powers, including the power to pass upon various federal expenditures, the power to manage schools supported by the Federal Government, the power to allot land, and the power to designate missionaries to act in a supervisory capacity with respect to annuity distributions, are conferred or confirmed by special treaty provisions."<sup>40</sup>

In accordance with the rule applicable to foreign treaties, the courts have repeatedly indicated that they will not go behind the terms of a treaty to inquire whether the representatives of the tribe accepted as such by the President and the Senate were proper representatives.<sup>41</sup>

Treaties must be viewed not only as forms of exercising federal power, but equally as forms of exercising tribal power.<sup>42</sup> And from the standpoint of tribal law, a later ordinance may supersede a treaty, just as a later act of Congress may supersede a treaty, although in either case an international liability may result.<sup>43</sup>

Recognition of tribal governments and tribal powers may be found not only in acts of Congress and in treaties but also in state statutes, which, when adopted with the advice and consent of the Indians themselves, have been accorded special weight.<sup>44</sup>

Not only must officers presuming to act in the name of an Indian tribe show that their acts fall within their allotted function and authority, but likewise the procedural formalities which tradition or ordinance require must be followed in executing an act within the acknowledged jurisdiction of the officer or set of officers.<sup>45</sup>

Creek Tribe, 7 Stat. 366, 368; Art. V of the Treaty of December 29, 1835, with the Cherokee Tribe, 7 Stat. 478, 481.

\*Art. XV of the Treaty of January 15, 1838, with the New York Indians, 7 Stat. 550, 551. Accord: Art. 7 of the Treaty of June 22, 1855, with the Choctaws and Chickasaws, 11 Stat. 611, 612. Cf. 19 Op. A. G. 342 (1889) (holding establishment of national bank in Creek Nation unlawful). See Chapter 23, sec. 3.

<sup>41</sup> Treaty of January 31, 1786, with the Shawanoe Nation, 7 Stat. 26; Treaty of June 3, 1825, with the Kansas Nation, 7 Stat. 244; Treaty of January 24, 1826, with the Creek Nation, 7 Stat. 286; Art. VIII of Treaty of July 20, 1831, with the Shawnees and Senecas, 7 Stat. 351, 353; Art. VI of the Treaty of March 28, 1836, with the Ottowas and Chippewas, 7 Stat. 491, 493; Art. III of the Treaty of April 23, 1836, with the Wyandots, 7 Stat. 502; Art. I of the Treaty of January 4, 1845, with the Creeks and Seminoles, 9 Stat. 821; Art. II of the Treaty of August 6, 1846, with the Cherokees, 9 Stat. 871; Art. VI of the Treaty of June 22, 1852, with the Chickasaws, 10 Stat. 974, 976; Art. IV of the Treaty of March 17, 1842, with the Wyandott Nation, 11 Stat. 581, 582; Art. VI and Art. VII of the Treaty of June 22, 1855, with the Choctaw and Chickasaw tribes, 11 Stat. 611, 612, 613; Art. III of the Treaty of February 5, 1856, with the Stockbridge and Munsee tribes, 11 Stat. 663, 665; Art. VI of the Treaty of August 7, 1856, with Creek and Seminole Indians, 11 Stat. 699, 703-704; Art. V of the Treaty of September 24, 1857, with the Pawnee Indians, 11 Stat. 729, 731; Art. VII of the Treaty of March 12, 1858, with the Ponca Tribe, 12 Stat. 997, 1000; Art. VII of the Treaty of May 7, 1864, with the Chippewa Indians, 13 Stat. 693, 694; Art. I of the Treaty of March 21, 1866, with the Seminole Indians, 14 Stat. 755, 756; Treaty of April 7, 1866, with the Bois Forte band of Chippewa Indians, 14 Stat. 765; Art. XXIV of the Treaty of April 28, 1866, with the Choctaw and Chickasaw Nations, 14 Stat. 760, 776-777; Treaty of June 14, 1866, with the Creek Nation, 14 Stat. 785; Treaty of July 19, 1866, with the Cherokee Nation, 14 Stat. 799; Treaty of February 19, 1867, with the Sisseton and Warpeton bands of Dakota or Sioux Indians, 15 Stat. 505; Art. VIII of the Treaty of February 23, 1867, with the Shawnees Indians, 15 Stat. 513, 515.

<sup>42</sup> *United States v. New York Indians*, 173 U. S. 464 (1899); *Fellows v. Blacksmith*, 19 How. 366 (1856). See Chapter 3, sec. 1.

<sup>43</sup> See Chapter 14, sec. 3.

<sup>44</sup> *The Chickasaw Freedmen*, 193 U. S. 115 (1904). See Chapter 3, sec. 1.

<sup>45</sup> *United States v. Kennedy v. Tyler*, 269 U. S. 13 (1925). And see Chapter 3.

\*Thus in *Walker v. McLoud*, 204 U. S. 302 (1897), the Supreme Court held invalid a claim of title under a sale by a sheriff of the Choctaw Nation,

<sup>35</sup> Act of March 3, 1839, 5 Stat. 349 (Brothertown), R. S. § 1765-1779; Act of March 3, 1843, 5 Stat. 645 (Stockbridge); Act of August 6, 1846, 9 Stat. 55 (Stockbridge); Act of May 23, 1872, 17 Stat. 159 (Pottawatomie and Absentee Shawnee); Act of August 7, 1882, 22 Stat. 349 (Indian Territory); Act of March 3, 1885, 23 Stat. 340 (Umatilla); Act of October 19, 1888, 25 Stat. 608 (Cherokee); Act of February 23, 1889, 25 Stat. 687 (Shoshones and Bannocks, etc.); Act of July 1, 1898, 30 Stat. 567 (Seminole); Act of July 1, 1902, 32 Stat. 636 (Kansas); Act of June 28, 1906, 34 Stat. 539 (Osage); Joint Res. of March 2, 1906, 34 Stat. 822 (Five Civilized Tribes); Act of February 8, 1918, 40 Stat. 433 (Choctaw and Chickasaw); Act of May 14, 1926, 44 Stat. 555 (Chippewa); Act of July 2, 1926, 44 Stat. 801 (Pottawatomie); Act of July 3, 1926, 44 Stat. 807 (Crow); Act of May 25, 1928, 45 Stat. 737 (Choctaw and Chickasaw); Act of March 1, 1929, 45 Stat. 1439 (Klamath); Act of March 2, 1929, 45 Stat. 1478 (Osage); Joint Res. of May 12, 1930, 46 Stat. 268 (Yankton Sioux Tribe); Act of June 19, 1930, 46 Stat. 788 (Choctaw and Chickasaw); Act of February 14, 1931, 46 Stat. 1105 (Klamath); Act of April 21, 1932, 47 Stat. 88 (Choctaw and Chickasaw); Act of April 26, 1932, 47 Stat. 137 (Cherokee); Act of April 27, 1932, 47 Stat. 140 (Seminole); Act of June 6, 1932, 47 Stat. 160, (L'Anse Band of Lake Superior); Act of June 30, 1932, 47 Stat. 420 (Crow and Fort Peck); Act of June 6, 1934, 48 Stat. 910 (Quinault); Act of June 19, 1935, 49 Stat. 388 (Tlingit and Haida Indians of Alaska); Act of August 19, 1937, 50 Stat. 699 (Cherokee); Act of June 25, 1938, 52 Stat. 1207 (Klamath).

<sup>36</sup> See Act of June 7, 1897, 30 Stat. 62, 84 (Five Tribes); Act of March 3, 1901, 31 Stat. 1058, 1077 (Five Tribes); Act of June 28, 1906, 34 Stat. 539, 545 (conferring power to remove members of Osage Council), upheld in *United States ex rel. Brown v. Lane*, 232 U. S. 598 (1914).

<sup>37</sup> Act of June 26, 1834, 4 Stat. 682, 685; Act of July 27, 1868, 15 Stat. 198, 210, 211; Act of July 15, 1870, 16 Stat. 335, 359; Act of March 3, 1871, 16 Stat. 544, 569; Act of May 29, 1872, 17 Stat. 165, 189; Act of February 14, 1873, 17 Stat. 437, 450; Act of June 22, 1874, 18 Stat. 146, 171; Act of March 3, 1875, 18 Stat. 420, 434, 444, 451; Act of March 3, 1877, 19 Stat. 271, 280; Act of May 15, 1886, 24 Stat. 29, 32; Act of June 7, 1897, 30 Stat. 62, 84, 92; Act of March 3, 1901, 31 Stat. 1058, 1077; Act of March 3, 1903, 32 Stat. 982, 1008; Act of June 21, 1906, 34 Stat. 325, 342; Act of March 3, 1909, 35 Stat. 781, 805; Act of March 3, 1911, 36 Stat. 1058, 1065; Act of June 30, 1913, 38 Stat. 77; Act of August 1, 1914, 38 Stat. 582; Act of May 18, 1916, 39 Stat. 123; Act of March 2, 1917, 39 Stat. 969; Act of May 25, 1918, 40 Stat. 561; Act of June 30, 1919, 41 Stat. 3; Act of February 14, 1920, 41 Stat. 408; Act of March 3, 1921, 41 Stat. 1225; Act of May 24, 1922, 42 Stat. 552; Act of January 24, 1923, 42 Stat. 1174; Act of June 6, 1924, 43 Stat. 390; Act of March 3, 1925, 43 Stat. 1141; Act of May 10, 1926, 44 Stat. 453, 458; Act of January 12, 1927, 44 Stat. 934, 939; Act of March 4, 1929, 45 Stat. 1562, 1566, 1534; Act of April 22, 1932, 47 Stat. 91, 94, 112; Act of February 17, 1933, 47 Stat. 820, 824, 839; Act of March 2, 1934, 48 Stat. 362, 366; Act of May 9, 1936, 49 Stat. 176, 182, 195; Act of June 22, 1936, 49 Stat. 1757, 1763; Act of May 9, 1938, 52 Stat. 291, 314, 315.

<sup>38</sup> Treaty of August 7, 1790, with the Creek Nation, 7 Stat. 35; Treaty of September 14, 1816, with the Cherokee Nation, 7 Stat. 148; Treaty of July 8, 1817, with the Cherokee Nation, 7 Stat. 156; Treaty of February 12, 1825, with the Creek Nation, 7 Stat. 237; Treaty of September 21, 1832, with the Sac and Fox Indians, 7 Stat. 374; Treaty of April 1, 1850, with the Wyandott Tribe, 9 Stat. 987; Treaty of May 10, 1854, with the Shawnee Indians, 10 Stat. 1053; Treaty of January 17, 1837, with the Choctaws and Chickasaws, 11 Stat. 573; Treaty of July 31, 1855, with the Ottawa and Chippewa Indians, 11 Stat. 621; Treaty of August 2, 1855, with the Chippewa Indians, 11 Stat. 633; Treaty of July 19, 1866, with the Cherokee Nation, 14 Stat. 799; Treaty of June 30, 1902, with the Creek Tribe, 32 Stat. 500. And see *United States v. Anderson*, 225 Fed. 825 (D. C. E. D. Wis. 1915).

<sup>39</sup> Art. IV of Treaty of September 27, 1830, with the Choctaw Nation, 7 Stat. 333, 334; Art. XIV of the Treaty of March 24, 1832, with the



The doctrine of *de facto* officers has been applied to an Indian tribe, in accordance with the rule applied to other governmental agencies, so as to safeguard from collateral attack acts and documents signed by officers acting under color of authority, though subject, in proper proceedings, to removal from office.<sup>47</sup>

Based upon the analogy of the constitutional law of the United States, the doctrine has been applied to Indian statutes and constitutional provisions that statutes deemed by the courts to be violative of constitutional limitations are to be regarded as void.<sup>48</sup>

The earlier statutes of Congress frequently recognized the authority of chiefs and headmen to act for a tribe.<sup>49</sup> In conformity with the policy of breaking down such authority, later statutes frequently contemplated action by general councils open to all male adult members of the tribe.<sup>50</sup>

Other congressional legislation has specifically recognized the propriety of paying salaries to tribal officers out of tribal funds.<sup>51</sup>

The power to define a form of government is one which has been exercised to the full, and it would be impossible within the compass of this chapter to analyze the forms of government that different Indian communities have established for themselves. Indeed, it may be said that the constitutional history of the Indian tribes covers a longer period and a wider

for the reason that the sheriff had failed to act in accordance with Choctaw laws governing such sales.

In 19 Op. A. G. 179 (1933), it is held that a decree of divorce which has not been signed by a judge or clerk of court, as required by the laws of the Choctaw Nation, is invalid.

In *re Daroh*, 265 N. Y. Supp. 86 (1933), involves action of a special tribal council meeting to which only a few members of the council were invited. The action was declared invalid on the ground that the council's rules of procedure, required due notice of a special meeting to be given to all the members of the council. Based on an analogy taken from corporation law, the rule was laid down that violation of this requirement rendered the acts of the council invalid.

In 25 Op. A. G. 308, 309, 312 (1904), it appeared that certain sums were to be paid to attorneys "only after the tribal authorities, thereunto duly and specifically authorized by the tribe, shall have signed a writing

By resolution of the tribe the business committee, had been authorized to sign the writing in question. The signatures of the business committee, in the opinion of the Attorney General, met the statutory requirement :

The proceedings of the council were regular, and the motions were carried by a sufficient number of voters, though less than a majority of those present. (See *State v. Vanocdal*, 131 Ind. 388; *Attorney-General v. Shepard*, 62 N. H. 383; and *Mount v. Parker*, 32 N. J. Law, 341.)

<sup>47</sup> See *Nofire v. United States*, 164 U.S. 657 (1897); *Seneca Nation of Indians v. John*, 16 N. Y. Supp. 40 (1891).

<sup>48</sup> See *Whitmire, Trustee v. Cherokee Nation, et al.*, 30 C. Cls. 138 (1895); *Delaware Indians v. Cherokee Nation*, 38 C. Cls. 234 (1903), aff'd 193 U.S. 127 (1904); 19 Op. A. G. 229 (1889).

<sup>49</sup> 25 U.S.C. 130 :

Withholding of moneys or goods on account of intoxicating liquors. No annuities, or moneys, or goods, shall be paid or distributed to Indians . . . until the chiefs and headmen of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country. (R. S. § 2087.)

25 U.S.C. 132 :

Mode of distribution of goods.—Whenever goods and merchandise are delivered to the chiefs of a tribe, for the tribe, such goods and merchandise shall be turned over by the agent or superintendent of such tribe to the chiefs in bulk, and in the original package, as nearly as practicable, and in the presence of the headmen of the tribe, if practicable, to be distributed to the tribe by the chiefs in such manner as the chiefs may deem best. In the presence of the agent or superintendent. (R. S. § 2090.)

And Cf. Act of June 14, 1862, sec. 3, 12 Stat. 427, 25 U.S.C. 187, R. S. § 2121.

<sup>50</sup> See *Klamath & Modoc Tribes v. United States*, 296 U.S. 244, 248 (1935).

<sup>51</sup> 25 U.S.C. 162, after providing generally for the segregation, deposit, and investment of tribal funds, contains the following qualification :

That any part of tribal funds required for support of schools or pay of tribal officers shall be excepted from segregation or deposit as herein authorized and the same shall be expended for the purposes aforesaid . . .

range of variation than the constitutional history of the colonies, the states, and the United States. It was some time before the immigrant Columbus reached these shores, according to eminent historians, that the first Federal Constitution on the American Continent was drafted, the Gayaneshagowa, or Great Binding Law of the Five (later six) Nations (Iroquois).<sup>52</sup> It was in this constitution that Americans first established the democratic principles of initiative, recall, referendum, and equal suffrage.<sup>53</sup>

In this constitution, also, were set forth the Ideal of the responsibility of governmental officials to the electorate, and the obligation of the present generation to future generations which we call the principle of conservation.<sup>54</sup>

Between the time of the adoption of the Constitution of the Five Nations and the adoption by more than a hundred Indian tribes of written constitutions pursuant to the Act of June 18, 1934, there is a fascinating history of political development that has never been pieced together.<sup>55</sup> Students of Indian law know of the achievements of the Five Civilized Tribes in constitution making by reason of occasional references in the decided cases

<sup>52</sup> A. C. Parker, "The Constitution of the Five Nations" (New York State Museum Bulletin, No. 184).

<sup>53</sup> 93. Whenever a specially important matter or a great emergency is presented before the Confederate Council and the nature of the matter affects the entire body of the Five Nations, threatening their utter ruin, then the Lords of the Confederacy must submit the matter to the decision of their people and the decision of the people shall affect the decision of the Confederate Council. This decision shall be a confirmation of the voice of the people.

94. The men of every clan of the Five Nations shall have a Council Fire ever burning in readiness for a council of the clan. When it seems necessary or a council to be held to discuss the welfare of the clans, then the men may gather about the fire. This council shall have the same rights as the council of the women.

95. The women of every clan of the Five Nations shall have a Council Fire ever burning in readiness for a council of the clan. When in their opinion it seems necessary for the interest of the people they shall hold a council and their decision and recommendation shall be introduced before the Council of Lords by the War Chief for its consideration.

96. All the Clan council fires of a nation or of the Five Nations may unite into one general council fire; or delegates from all the council fires may be appointed to unite in a general council for discussing the interests of the people. The people shall have the right to make appointments and to delegate their power to others of their number. When their council shall have come to a conclusion on any matter, their decision shall be reported to the Council of the Nation or to the Confederate Council (as the case may require) by the War Chief or the War Chiefs. (The Constitution of the Five Nations, translated and edited by A. C. Parker.)

<sup>54</sup> 28. When a candidate Lord is to be installed, he shall furnish four strings of shells (or wampum) one span in length bound together at one end. Such will constitute the evidence of his pledge to the Confederate Lords that he will live according to the constitution of the Great Peace and exercise justice in all affairs.

When the pledge is furnished the Speaker of the Council must hold the shell strings in his hand and address the opposite side of the Council Fire and he shall commence his address saying: "Now behold him. He has now become a Confederate Lord. See how splendid he looks." An address may then follow. At the end it shall send the bunch of shell strings to the opposite side and they shall be received as evidence of the pledge. Then shall the opposite side say :

"We now do crown you with the sacred emblem of the deer's antlers, the emblem of your Lordship. You shall now become a mentor of the people of the Five Nations. The thickness of your skin shall be seven spans which is to say that you shall be proof against anger, offensive actions and criticism. Your heart shall be filled with peace and good will and your mind filled with a yearning for the welfare of the people of the Confederacy. With endless patience you shall carry out your duty and your firmness shall be tempered with tenderness for your people. Neither anger nor fury shall And lodgment in your mind and all your words and actions shall be marked with calm deliberation. In all of your deliberations in the Confederate Council, in your efforts at law making, in all your official acts, self interest shall be cast into oblivion. Cast not over your shoulder behind you the warnings of the nephews and nieces should they chide you for any error or wrong you may do, but return to the way of the Great Law which is just and right. Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground-the unborn of the future Nation." (The Constitution of the Five Nations, translated and edited by A. C. Parker.)

<sup>55</sup> Descriptive accounts of various tribal governments will be found in : J. J. Thompson, *Law Among the Aborigines* (1924), 6 Ill. L. Q. 204; Hagan, *Tribal Law of the American Indian* (1917), 23 Case & Com. 735; E. L. Watson, *The Indian as a Lawyer* (1930), 7 Dicta, No. 9, p. 10.

to the Cherokee,<sup>66</sup> Creek,<sup>67</sup> and Choctaw<sup>68</sup> constitutions. What is not generally known is that many other Indian tribes have operated under written constitutions.<sup>69</sup> The writing of Indian constitutions, under the Wheeler-Howard Act of June 18, 1934, is therefore no new thing in the legal history of this continent, and it is possible to hope that some of the political wisdom that has already stood the test of centuries of revolutionary change in Indian life has been embodied in the constitutions of the hundred or more tribes which have been organized under that act.<sup>70</sup>

<sup>66</sup> The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people some of whom were still in the savage state, and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits; and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the territory—a condition which was to continue until the two branches of the nation should be united under the treaty of 1846 (27 C. Cls. R., 1); yet for more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. And it is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights. *Journey v. Cherokee Nation and United States*, 28 C. Cls. 281, 317-318 (1893).

<sup>67</sup> See *Ex parte Tiger*, 2 Ind. T. 41, 47 S. W. 304 (1898).

<sup>68</sup> See *McCurain v. Grady*, 1 Ind. T. 107, 38 S. W. 65 (1896).

<sup>69</sup> As of December 13, 1934, constitutions or documents in the nature of constitutions were recorded in the Interior Department for the following tribes: Absentee Delaware; Absentee Shawnee; Annette Islands Reserve; Blackfeet; Cherokee; Cheyenne and Arapahoe; Cheyenne River; Chickasaw; Chippewas of Michigan; Choctaw; Choctaw (Mississippi); Colorado River; Creek or Muskogee; Crow; Eastern Cherokee; Flathead; Fort Belknap; Fort Bidwell; Fort Hall; Fort McDowell; Fort Peck; Fort Yuma; Grand Portage; Grand Ronde; Hoopa Valley; Hopi Iroquois Confederacy; Kickapoo; Kiowa; Klamath; Laguna Pueblo; Lovelock; Makah; Menominee; Mescalero; Mohican; Navajo; Osage; Pima; Pine Ridge; Potawatomi (Kansas); Potawatomi (Okla.); Pyramid Lake; Quinalt; Red Lake; Rocky Boy; Rosebud; San Carlos; Seminole; Seneca (N. Y.); Seneca (Okla.); Shoshone-Arapahoe; Siletz; Sisseton; Standing Rock; Swinomish; Tongue River; Turtle Mountain; Uintah and Ouray; Warm Springs; Western Shoshone; White Birch; Winnebago; Yakima; Yankton.

<sup>70</sup> As of May 15, 1940, the following tribes had adopted constitutions or charters under the Act of June 18, 1934, as amended:

Arizona-San Carlos Apache Tribe, constitution, approved January 17, 1936; Gila River Pima-Maricopa Indian Community, May 14, 1936, charter ratified February 28, 1938; Fort McDowell Mohave-Apache Community, November 24, 1936, charter June 6, 1938; Hopi Tribe, December 19, 1936; Papago Tribe, January 6, 1937; Yavapai-Apache Indian Community, February 12, 1937; Colorado River Indian Tribes of the Colorado River Reservation, Arizona and California, August 13, 1937; White Mountain Apache Tribe, August 26, 1938; Hualapai Tribe of the Hualapai Reservation, December 17, 1938; Havasupai Tribe of the Havasupai Reservation, March 27, 1939.

California—Big Valley Band of Pomo Indians of the Big Valley Rancheria, January 15, 1936; Upper Lake Band of Pomo Indians of the Upper Lake Rancheria, January 15, 1936; Me-wuk Indian Community of the Wilton Rancheria, January 15, 1936; Tule River Indian Tribe, January 15, 1936; Tuolumne Band of Me-wuk Indians of the Tuolumne Rancheria, January 15, 1936, charter November 12, 1937; Fort Bidwell Indian Community, January 28, 1936; Kashia Band of Pomo Indians of the Stewart's Point Rancheria, March 11, 1936; Manchester Band of Pomo Indians of the Manchester Rancheria, March 11, 1936, charter February 27, 1937; Covelo Indian Community, December 16, 1936, charter November 6, 1937; Quechan Tribe, December 18, 1936; Quartz Valley Indian Community, June 15, 1939, charter March 12, 1940.

Colorado—Southern Ute Tribe of the Southern Ute Reservation, November 4, 1936, charter November 1, 1938.

Idaho—Shoshone-Bannock Tribes of the Fort Hall Reservation, April 30, 1936, charter April 17, 1937.

Iowa—Sac and Fox Tribe of the Mississippi in Iowa, December 20, 1937.

While the Act of June 18, 1934,<sup>71</sup> had little or do effect upon the substantive powers of tribal self-government vested in the

Kansas.—Iowa Tribe in Nebraska and Kansas, February 26, 1937, charter June 19, 1937; Kickapoo Tribe in Kansas, February 26, 1937, charter June 19, 1937; Sac and Fox Tribe of Missouri, March 2, 1937, charter June 19, 1937.

Michigan.—Hannabville Indian Community, July 23, 1936, charter August 21, 1937; Bay Mills Indian Community, November 4, 1936, charter November 27, 1937; Keweenaw Bay Indian Community, December 17, 1936, charter July 17, 1937; Saginaw Chippewa Indian Tribe of Michigan, May 6, 1937, charter August 28, 1937.

Minnesota.—Lower Sioux Indian Community in the State of Minnesota, June 11, 1936, charter July 17, 1937; Prairie Island Indian Community in the State of Minnesota, June 20, 1936, charter July 23, 1937; Minnesota Chippewa Tribe, July 24, 1936, charter November 13, 1937.

Montana.—Confederated Salish and Kootenai Tribes of the Flathead Reservation, October 28, 1935, charter April 25, 1936; Chippewa Cree Tribe of the Rocky Boy's Reservation, November 23, 1935, charter July 25, 1936; Northern Cheyenne Tribe, November 23, 1936, charter November 7, 1936; Blackfeet Tribe of the Blackfeet Indian Reservation, December 13, 1935, charter August 15, 1936; Fort Belknap Indian Community, December 13, 1935, charter August 25, 1937.

Nebraska.—Omaha Tribe of Nebraska, March 30, 1936, charter August 22, 1936; Ponca Tribe of Native Americans, April 3, 1936, charter August 15, 1936; Santee Sioux Tribe of Nebraska, April 3, 1936, charter August 22, 1936; Winnebago Tribe of Nebraska, April 3, 1936, charter August 15, 1936.

Nevada.—Reno-Sparks Indian Colony, January 15, 1936, charter January 7, 1938; Pyramid Lake Paiute Tribe, January 15, 1936, charter November 21, 1936; Washoe Tribe, January 24, 1936, charter February 27, 1937; Shoshone-Paiute Tribes of the Duck Valley Reservation, April 20, 1936, charter August 22, 1936; Fort McDermitt Paiute and Shoshone Tribe, July 2, 1936, charter November 21, 1936; Yerington Paiute Tribe, January 4, 1937, charter April 10, 1937; Walker River Paiute Tribe, March 26, 1937, charter May 8, 1937; Te-Moak Bands of Western Shoshone Indians, August 24, 1938, charter December 12, 1938; Yomba Shoshone Tribe, December 20, 1939, charter December 22, 1939.

New Mexico.—Pueblo of Santa Clara, December 20, 1935; Apache Tribe of the Mescalero Reservation, March 25, 1936, charter August 1, 1936; Jicarilla Apache Tribe of New Mexico, August 4, 1937, charter September 4, 1937.

North Dakota.—Three Affiliated Tribes of the Fort Berthold Reservation, June 29, 1936, charter April 24, 1937.

Oregon.—Confederated Tribes of the Grande Ronde Community, May 13, 1936, charter August 22, 1936; Confederated Tribes of the Warm Springs Reservation, February 14, 1938, charter April 23, 1938.

South Dakota.—Lower Brule Sioux Tribe, November 27, 1935, charter July 11, 1936; Rosebud Sioux Tribe, December 20, 1935, charter March 16, 1937; Cheyenne River Sioux Tribe, December 27, 1935; Ogala Sioux Tribe of the Pine Ridge Reservation, January 15, 1936; Flandreau Santee Sioux Tribe, April 24, 1936, charter October 31, 1936.

Texas.—Alabama-Coushatta Tribes of Texas, August 19, 1938, charter October 17, 1939.

Utah.—Ute Indian Tribe of the Uintah and Ouray Reservation, January 19, 1937, charter August 10, 1938; Shivwits Band of Paiute Indians of the Shivwits Reservation, March 21, 1940.

Washington.—Tulalip Tribes, January 24, 1936, charter October 3, 1936; Swinomish Indian, Tribal Community, January 27, 1936, charter July 25, 1936; Puyallup Tribe, May 13, 1936; Muckleshoot Indian Tribe, May 13, 1936, charter October 31, 1936; Makah Indian Tribe, May 16, 1936, charter February 27, 1937; Quileute Tribe of the Quileute Reservation, November 11, 1936, charter August 21, 1937; Skokomish Indian Tribe of the Skokomish Reservation, May 3, 1938, charter July 22, 1939; Kalispel Indian Community of the Kalispel Reservation, March 24, 1938, charter May 28, 1938; Port Gamble Indian Community, September 7, 1939.

Wisconsin.—Red Cliff Band of Lake Superior Chippewa Indians, June 1, 1936, charter October 24, 1936; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the State of Wisconsin, June 20, 1936, charter May 21, 1938; Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, August 15, 1936, charter May 8, 1937; Ojibwa Tribe of Indians of Wisconsin, December 21, 1936, charter May 1, 1937; Forest County Potawatomi Community, February 6, 1937, charter October 30, 1937; Stockbridge-Munsee Community, November 18, 1937, charter May 21, 1938; Sokaogon Chippewa Community, November 9, 1938, charter October 7, 1939.

<sup>71</sup> 48 Stat. 984, 25 U. S. C. 461, et. seq.



various Indian tribes," it did bring about the regularization of the procedures of tribal government and a modification of the relations of the Interior Department to the activities of tribal government. Section 16 of the Act of June 18, 1934.<sup>63</sup> established a basis for the adoption of tribal constitutions approved by the Secretary of the Interior, which could not thereafter be changed except by mutual agreement or by act of Congress. This section was explained in a circular letter of the Commissioner of Indian Affairs sent out almost immediately after the approval of the Act of June 18, 1934, in the following terms :

*SEC. 16. Tribal Organization.—*

Under this section, any Indian tribe that so desires may organize and establish a constitution and by-laws for the management of its own local affairs.

Such constitution and by-laws become effective when ratified by a majority of all the adult members of the tribe," or the adult Indians residing on the reservation, at a special election. It will be the duty of the Secretary of the Interior to call such a special election when any responsible group of Indians has prepared and submitted to him a proposed constitution and by-laws which do not violate any Federal Law, and are fair to all the Indians concerned. When such a special election has been called, all Indians who are members of the tribe, or residents on the reservation if the constitution is proposed for the entire reservation, will be entitled to vote upon the acceptance of the constitution. \* . . If a tribe or reservation adopts the constitution and by-laws in this manner, such constitution and by-laws may thereafter be amended or entirely revoked only by the same process.

The powers which may be exercised by an Indian tribe or tribal council include all powers which may be exercised by such tribe or tribal council at the present time, and also include the right to employ legal counsel (subject to the approval of the Secretary of the Interior with respect to the choice of counsel and the fixing of fees). the right to exercise a veto power over any disposition of tribal funds or other assets, the right to negotiate with Federal, State and local governments, and the right to be advised of all appropriation estimates affecting the tribe, before such estimates are submitted to the Bureau of the Budget and Congress.

The following Indian groups are entitled to take advantage of this section : Any Indian tribe, band, or pueblo in the United States (outside of Oklahoma) or Alaska and also any group of Indians who reside on the same reservation, whether they are members of the same tribe or not.

The constitutions adopted pursuant to this section and those adopted pursuant to similar provisions of law applicable to Alaska<sup>64</sup> and Oklahoma<sup>65</sup> vary considerably with respect to the

<sup>63</sup> See Memo. Sol. I. D., March 25, 1939. Undoubtedly, the act had some effect upon the attitude of administrative agencies towards powers which had been theoretically vested in Indian tribes but frequently ignored in practice. See, for instance, decision of the Comptroller General A-86599, June 30, 1937, upholding tribal power to collect rentals from tribal land and declaring :

\* . . having in view the broad purposes of the act, as shown by its legislative history, to extend to Indians the fundamental rights of political liberty and local self-government, and there having been shown the fact that some of the power 60 granted by the new act would require the use of tribal funds for their accomplishment—being necessary incidents of such powers—and the further fact that the act of June 25, 1936, 49 Stat. 1928 provides that section 20 of the Permanent Appropriation Repeal Act, 48 Stat. 1233, shall not apply to funds held in trust for individual Indians, associations of individual Indians, or for Indian corporations chartered under the act of June 18, 1934 this office would not be required to object to the procedures suggested in your memorandum for the handling of tribal funds of Indian tribes organized pursuant to the said act of June 18, 1934.

<sup>64</sup> 48 Stat. 984, 987. 25 U. S. C. 476.

<sup>65</sup> This rule was modified by the Act of June 15, 1935, sec. 1, 49 Stat. 378. 25 U. S. C. 478a, which substituted the requirement of majority vote of those voting in an election where 30 percent of the eligible voters cast ballots.

<sup>66</sup> See Chapter 21, sec. 9.

<sup>67</sup> For a list of Oklahoma constitutions and charters, see Chapter 23 sec. 13.

form of tribal government, ranging from ancient and primitive forms in tribes where such forms have been perpetuated, to models based upon progressive white communities.

The Powers of self-government vested in these various tribes likewise vary in accordance with the circumstances, experience, and resources of the tribe.<sup>66</sup> The extent to which tribal powers are subject to departmental review is again a matter on which tribal constitutions differ from each other.

The procedure by which tribal ordinances are reviewed, where such review is called for, is a matter which in nearly all tribal constitutions has been covered in substantially identical terms. A typical provision is that of the constitution of the Blackfeet tribe,<sup>67</sup> which reads as follows:

ARTICLE VI. POWERS OF THE COUNCIL

SEC. 2. *Manner of review.*—Any resolution or ordinance which, by the terms of this constitution is subject to review by the Secretary of the Interior, shall be presented to the superintendent of the reservation, who shall, within ten (10) days thereafter, approve or disapprove the same. If the superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety (90) days from the date of enactment, rescind the said ordinance or resolution for any cause, by notifying the tribal council of such decision. If the superintendent shall refuse to approve any resolution or ordinance submitted to him, within ten (10) days after its enactment, he shall advise the Blackfeet Tribal Business Council of his reason thereof. If these reasons appear to the council insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

Under the procedure thus established, positive action is required to validate an ordinance that is subject to departmental review. Failure of the superintendent to act within the Prescribed Period operates as a veto.<sup>68</sup> Failure of the superintendent or other departmental employees to act promptly in transmitting to the Secretary an ordinance validly submitted and approved does not extend the period allowed for secretarial veto.<sup>69</sup> On the other hand, where a superintendent vetoes an ordinance, failure of the tribe to act in accordance with the prescribed procedure of referring the ordinance, after a new vote, to the Secretary of the Interior, will preclude validation of the ordinance.<sup>71</sup>

Secretarial review of tribal ordinances, like Presidential review of legislation, involves judgments of policy as well as judgments of law and constitutionality. Only a small proportion of such ordinances have been vetoed. The reasons most commonly advanced for such action by the Secretary of the Interior are:

1. That the ordinance violates some provision of the tribal constitution ;<sup>72</sup>
2. That the ordinance violates some federal law;
3. That the ordinance is unjust to a minority group within the tribe.

<sup>68</sup> It has been administratively determined that constitutions of groups not previously recognized as tribes. In the political sense, cannot include powers derived from sovereignty, such as the power to tax, condemn land of members, and regulate inheritance. Memo. Sol. I. D., April 15, 1936. (Lower Sioux Indian Community; Prairie Island Indian Community.)

<sup>69</sup> Approved December 13, 1935.

<sup>70</sup> Memo. Sol. I. D., April 11, 1940 (Walker River Paiute).

<sup>71</sup> Memo. Sol. I. D., October 23, 1936 (San Carlos Apache).

<sup>72</sup> See Memo. Sol. I. D., April 11, 1940 (Walker River Paiute).

<sup>73</sup> See, for example, Memo. Sol. I. D., December 14, 1937 (Hopi).

During the 6 years following the enactment of the Act of June 18, 1934, Congress found no occasion to rescind any tribal constitution or ordinance, although it undoubtedly has power to do so,<sup>73</sup> nor was any tribal constitution adopted by an Indian tribe vetoed by the Secretary of the Interior. During this period, perhaps the chief threat to the integrity of tribal government has been the willingness of certain tribal officers to relinquish responsibilities vested in them by tribal constitutions. This tendency has been somewhat checked by rulings to the effect that the Interior Department will not approve or be party to such relinquishment of responsibility.<sup>74</sup>

An attempt to outline the probable future development of these Indian constitutions is made in a recent article on the subject *How Long Will Indian Constitutions Last?*<sup>75</sup>

Any answer to this question, that is more than mere guesswork must square with the recorded history of Indian constitutions. Tribal constitutions, after all, are not a radical innovation of the New Deal. The history of Indian constitutions goes back at least to the *Gayaneshagowa* (Great Binding Law) of the Iroquois Confederacy, which probably dates from the 15th century. \* \* \*

So too, we have the written constitutions of the Creek, Cherokee, Choctaw, Chickasaw, and Osage nations, printed usually on tribal printing presses, which were in force during the decades from 1830 to 1900.

These constitutions are merely historical records today. Other Indian constitutions, however, retain their vitality. A good many tribes have had rudimentary written constitutions, which simply recorded the procedure of their general council meetings, the method of electing or removing representatives or "business committees," and perhaps a brief statement of the duties of officers. Other tribes are governed by elaborate constitutions which have never been recorded. The difference between a written and an unwritten constitution should not be exaggerated. The rules concerning council procedure, selection of officers, and official responsibilities, which have been followed by the Creek towns, or by the Rio Grande Pueblos, without substantial alteration across four centuries, certainly deserve to be called constitutions. They do not lose their potency when they are reduced to writing, as the constitution of Laguna Pueblo was reduced, to writing thirty years ago.

In all the recorded history of Indian constitutions, two basic facts stand out.

It is a fact of deep significance that no Indian constitution has ever been destroyed except with the consent of the governed. Congress has never legislated a tribal government out of existence except by treaty, agreement or plebiscite. Even the wholesale destruction of the governments of the Five Civilized Tribes in the old Indian Territory was accomplished only when the members of these tribes, by majority vote, had accepted the wishes of Congress. These governments ceased to exist as governments primarily because they had admitted to citizenship, and to rights of occupancy in tribal lands, so many white men that the original Indian communities could no longer maintain a national existence apart from the white settlers. The acts of Congress and the plebiscite votes of the

tribes, which were dominated by the "squaw-men" and mixed-bloods, reflected an existing fact. The constitution of the Iroquois Confederacy likewise was broken only by the Indians themselves when the Six Nations could not agree on the question of whether to support the American revolutionaries or the British.

The second basic fact that stands out in a survey of the life span of Indian constitutions is that the Indians themselves cease to want a constitution when their constituted government no longer satisfies important wants. When this happens, a tribal government, like any other government, either dissolves in chaos or yields place to some, other governing agency that commands greater power or promises to satisfy in greater measure the significant wants of the governed.

If we are to be realistic in seeking to answer the question, "How long will the new Indian Constitutions last?" we must focus attention on the human wants that tribal governments under these constitutions are able to satisfy rather than on guesses as to what future Congresses and future administrations may think of Indian self-government. \* \* \* It is extremely likely that organized Indian tribes will continue to exist as long as American democracy exists and as long as the American people are unwilling to use the army to carry out Indian policies,—provided that the Indians themselves, feel that tribal governments satisfy important human wants.

What are the wants that a tribal government can help to satisfy?

### I

The most fundamental of the goods which a tribe may bring to its members is economic security. Few things bind men so closely as a common interest in the means of their livelihood. No tribe will dissolve so long as there are lands or resources that belong to the tribe or economic enterprises in which all members of the tribe may participate. The young man who in the plastic years of adolescence, goes to his tribal government to obtain employment in a tribal lumber mill, cooperative store, hotel, mine, farm, or factory, gives that government the most enduring kind of recognition. The returned student who applies to a committee of his tribal council for permission to build up his herds on tribal grazing land, or for the chance to establish a farm, or to build a home and garden upon tribal lands assigned to his occupancy, cannot ignore this tribal government. . . .

It follows that governmental credit policies in making loans to Indian tribes are of critical importance. If, in such loans, special attention is given to encouraging tribal enterprises, a real basis of social solidarity is provided; all members of the tribe are interested in the success of the enterprise, in the efficiency and honesty of its management; the development of a tribal enterprise becomes a course of adult education in economics and government. On the other hand, if credit operations are entirely confined to individual enterprises: no such common interest is created. The struggle for a lion's share of tribal loan funds may prove, on the contrary, a disintegrating and faction-producing drive. The tribal officials instead of being producers will be bankers. And there is no reason to believe that the bankers of an Indian tribe will be less cordially detested by their debtors than are bankers in any country of the world today.

Second in importance only to the reservation credit program is the reservation land-acquisition program. A landless tribe can evoke no more respect, among farmers, than a landless individual. But more than paper ownership of tribal land is here in question. The issue is whether the tribe that "owns" land will be allowed to exercise the powers of a landowner, to receive rentals and fees, to regulate land use, to withdraw land privileges from those who flout its regulations, or whether the Federal Government will administer "tribal" lands for the benefit of the Indians as it administers National Monuments, for instance, for the benefit of posterity, with the Indians having perhaps as much actual voice in the former case as posterity has in the latter.

The roots of any tribal constitution are likely to be as deep as the tribe's actual control over economic resources.

<sup>73</sup> On federal review of legislation of the Five Civilized Tribes. see Chapter 23, sec. 6.

<sup>74</sup> Memo. Sol. I. D., May 14, 1938 (veto of Oglala Sioux resolution delegating taxation powers to superintendent). See also Memo. Acting Sol. I. D., July 16, 1937 (disapproving proposal for indefinite review of actions of Business Committee of Chippewa-Cree Indians of the Rocky Boy's Reservation, affecting federally financed business but approving Contractual provision for review of such ordinances during period of indebtedness); Memo. Sol. I. D., October 16, 1936 (terms of loan to Lower Brule Sioux Tribe); Memo. Sol. I. D., July 12, 1937 (Ft. Belknap delegation of leasing power to superintendent disapproved); Memo. Sol. I. D., May 28, 1936 (Ft. Hall; same).

<sup>75</sup> F. S. Cohen, *How Long Will Indian Constitutions Last* (1939). 6 Indians at Work, No. 10. The excerpts here quoted follow the cited publication except with respect to editorial abridgments and corrections made therein.