SECTION 7. THE TAXING POWER OF AN INDIAN TRIBE

One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress [171] is a proposition which has never been successfully disputed.

A landmark in this field is the case of *Buster* v. *Wright*.[172] The Creek Nation, one of the Five Civilized Tribes, had imposed a tax or license fee upon all persons, not citizens of the Creek Nation, who traded within the borders of that nation. The Interior Department sought the advice of the Attorney General as to the legality of this tax, and was advised that the tax was legal and that the Interior Department was under an implied duty to assist in its enforcement.[173] Thereupon the Interior Department promulgated appropriate regulations to assist the tribe in making collections of license fees. The plaintiffs in the case of *Buster* v. *Wright* were traders doing business on town sites within the boundaries of the Creek Nation, who sought to enjoin officers of the Creek Nation and of the Interior Department from closing down their business and ousting them for nonpayment of taxes. On demurrer, the plaintiffs' bill was dismissed by the trial court. The decision of the trial court was affirmed by the Court of Appeals of the Indian Territory,[174] again by the Circuit Court of Appeals for the Eighth Circuit,[175] and finally by the United States Supreme Court.[176] The learned opinion of Judge Sanborn in the Circuit Court of Appeals illuminates the entire subject:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation, with or without the consent of that tribe, is in issue in this case, because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license, by treaty, or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted, and for the purposes of this. decision are here conceded. The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists. intact which has not been destroyed *or* limited by act of Congress or by the contracts of the Creek tribe itself.
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> Originally an independent tribe-the superior power of the republic early reduced this Indian people to a "domestic, dependent nation" (Cherokee *Nation* v. *State of Georgia*, 5 Pet. 1–20, 8 L. Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the United States, exercised legislatire, executive and judicial functions within its territorial jurisdiction for more than half a century. The governmental jurisdiction of this nation was neither conditioned nor limited by the original title by occupancy to the lands within its territory. * * * Founded in its original national sovereignty, and secured by these treaties, the governmental authority of the Creek Nation, subject always to the superior power of the republic, remained practically unimpaired until the year 1889. Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power, and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guarantied by the treaties of 1832, 1856, and. 1866, and sustained by repeated decisions of the courts and opinions of the Attorneys General of the United States, remained undisturbed.
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> * * * It is said that the sale of these lots and the incorporation of cities and towns upon the sites in which the lots are found authorized by act of Congress to collect taxes for municipal purposes segregated the town sites and the lots sold from the territory of the Creek Nation, and deprived it of governmental jurisdiction over this property and over its occupants. But the jurisdiction to govern the inhabitants of a country is not conditioned or. limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. (Pp. 950–952.)

The case of *Buster* v. *Wright* dealt with what may be called a license or privilege tax, but the principles therein affirmed are equally applicable to a tax on property. Such a tax was upheld in *Morris* v. *Hitchcock*.[177] This ease dealt with a tax levied by the Chickasaw Nation on cattle owned by noncitizens of that nation and grazed on private land within the national boundaries. The opinion of the United States Court of Appeals for the District of Columbia declares :

> A government of the kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinary power of taxation, and the property subject

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[171] No treaty provisions or special statutes dealing with tribal taxation have been found. But cf. Act of August 2, 1882, 22 Stat. 181, empowering Congress to tax certain railroad rights-of-way for the benefit of tribal grantors.

[173] 135 Fed. 947 (C. C. A. 8, 1905), app. dism. 203 U. S. 599.

[173] * * * the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation. nor does it authorize him to do any act in violation of the treaties with such nation. These laws requiring a permit to reside or carry on business in the Indian country existed long before and at the time this act was passed. And if any outsider saw proper to purchase a town lot under this act of Congress, he did so with full knowledge that he could occupy it for residence or business only by permission from the Indians. * * *

The treaties and laws of the United States make all persons. With a few specified exceptions, who are not citizens of an Indian nation or members of an Indian tribe. and are found within an Indian nation without permission, intruders there, and require their removal by the United States. This closes the whole matter, absolutely excludes all but the excepted classes. and fully authorizes these nations to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose. and it must be borne in mind that citizens of the United States have, as such, no more right or business to he there than they have in any foreign nation. and can lawfully be there at ail only by Indian permission; and that their right to be or remain or carry on business there depends solely upon whether they bare such permission.

As to the power or duty of your Department in the premises there can hardly be a doubt. Under the treaties of the United States with these Indian nations this Government is under the most solemn obligation. and for which it has received ample consideration. to remove and keep removed from the territory of these tribes. all this class of intruders who are there without Indian permission. The performance of this obligation. as in other matters concerning the Indians and their affairs. has long been devolved upon the Department of the Interior. * * *

Trespassers on Indian Lands. 23 Op. 4. C. 214, 217–218 (1900).

[174] *Buster* v. *Wright*, 82 s. w. 855 (1904).

[175] 135 Fed. 947 (C. C. A. 8, 1905).

[176] 203 U. S. 599 (1906). app. dism. without opinion.

[177] 21 App. D. C. 565 (1903). aff'd 194 U. S. 384 (1904).

thereto, ought to appear by express provision or necessary implication. *Board Trustees v. Indiana.* 14 How, 268, 272; *Talbott v. Silver Bow Co.*, 139 U. S. 438, *448.* Where the restriction upon this exercise of power by a recognized government, is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction in the clause of Article 7 of the Treaty of 1855, which excepts white persons from the recognition therein of the unrestricted right of self-government by the Chickasaw Nation, and its full jurisdiction over persons and property within its limits. The conditions of that exception may be fully met without going to the extreme of saying that it was also intended to prevent the exercise of the power to consent to the entry of noncitizens, or the taxation of property actually within the limits of that government and enjoying its benefits.[178] (P. 593.)

The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction.[179] Where, however, the tribe does have power to remove a. person from its jurisdiction, it may impose conditions upon his remaining within tribal territory, including the condition of paying license fees. An opinion of the Attorney General dated September 17, 1900, quoted with approval in *Morris* v. *Hitchcock,*[180] declares:

> "Under the treaties with the Five Civilized Tribes of Indians, no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the country occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted." (P. 391.)

It is therefore pertinent, in analyzing the scope of tribal taxing powers, to inquire how far an Indian tribe is empowered to remove nonmembers from its reservation. This question is the more important today because statutes authorizing the Commissioner of Indian Affairs to remove "undesirable" persons from Indian country were repealed, at the urging of the present administration, in the interests of civil liberty.[181] Because of its peculiar jurisdictional status an Indian reservation is sometimes infested with white criminals or simple trespassers, and the problem of what effective legal action can be taken by a tribe to remove such persons from its reservation is a serious one.

The law as to the power of a tribe to exclude nonmembers from its territory is clearly stated in a series of authorities running back to tbe earliest days of the Republic. We find in the first volume of the Opinions of the Attorney General the following answer to a question raised by the Secretary of War as to the right of the Seneca Nation to exclude trespassers from its lands:

> So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent.[182]

The present state of the law on the power to remove nonmembers is thus summarized in the Solicitor's Opinion of. October 25, 1934, on "Powers of Indian Tribes":

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.[183]

The power of an Indian tribe to levy taxes upon its own members and upon nonmembers doing business within the reservations has been affirmed in many tribal constitutions approved under the Wheelcr-Howard Act, as has the power to remove nonmembers from land over which the tribe exercises jurisdiction. The following clauses are typical statements of these tribal powers:

> (h) To levy taxes upon members of the tribe and to require the performance of reservation labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the reservation
>
> (i) -To exclude from the restricted lands of the reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior.^184

Under such provisions, tribal tax ordinances imposing poll taxes, vehicle and other license taxes on members of the tribe, and permit and license taxes on nonmembers occupying tribal property have been held valid by the Interior Department [185] And as the payment of a tax or license fee may be made a condition of entry upon tribal land, it may also be made a condition to the grant of other privileges, such as the acquisition of a tribal lease.[186]

It has been held that the Fifth Amendment does not restrict tribal taxation of tribal members,[187] but tribal constitutional requirements were held violated when a tribal council tried to delegate its taxing powers to a reservation superintendent.[188]

[178] Other authorities supporting the power of an Indian tribe to levy taxes or license fees are: *Crabtree* v. *Madden, 54* Fed. 426 (C. C. A. 8, 1893); *Maxey* v. *Wright,* 3 Ind. T. 243, 54 S. W. 807, aff'd 105 Fed. 1003 (C. C. A. 8, 1900); 18 Op. A. G. 34, 36 (1884); 23 Op. A. G. 214, 219, 220, (1900); *ibid.*. p. 528 (1901).

[179] *Buster* v. *Wright, supra.*

[180] 194 U. s. 384 (1904).

[181] Act of May 21. 1934, 48 SM. 787. repealing 25 U. S. C. 220 *et seq.*

[182] 1 Op. A. G. 465, 466 (1821). Accord: United *States* v. *Rogers, 23* Fed. 658 (D. C. W. D. Ark. 1885). And see Chapter 15, sec. 10.

[183] 55 I. D. 14, 50. citing *Morris* V. *Hitchcock,* 194 U. S. 384 (1904), and other cases.. See also Memo. Sol. I. D., August 7, 1937.

[184] Constitution of the Rosebud Sioux Tribe, approved December 20, 1935, Art. IV, sec. 1.

[185] Memo. Sol. I. D., February 17. 1939 (Rosebud Sioux).

[186] Memo. Sol. I. D., March 28. 1939.

[187] Memo. Sol. I. D., February 17, 1939 (Rosebud Sioux).

[188] "Memo. Sol. I. D., May 14, 1938 (Oglala Sioux).

SECTION 8. TRIBAL POWERS OVER PROPERTY

The powers of an Indian tribe with respect to property derive from two sources. In the first place, the tribe has, with respect to tribal property, certain rights and powers commonly incident to Property ownership. In the second place, the Indian tribe has, among its Powers of sovereignty, the Power to regulate the use and disposition of individual Property among its members. While the distinction between these two sorts of Power must remain largely conventional [189] and, in most concrete situations, even academic, those rights and powers which Indian tribes

[189] M. R. Cohen, Property and Sovereignty, in Law and the Social Order (1934). 41.

share with other property owners are sufficiently distinguishable to deserve treatment in a separate chapter.[190] On this subject it will be sufficient for our present purposes to note that the powers of an Indian tribe with respect to tribal land are not limited by any rights of occupancy which the tribe itself may grant to its members, that occupancy of tribal land does not create any vested rights in the occupant as against the tribe,^191 and that the extent of any individual's interest in tribal property is subject to such limitations as the tribe may see fit to impose.^192

The power of a tribe over hunting and fishing on tribal territory may be analyzed either in governmental or in proprietary terms.[193]

In holding that a Pueblo is a stockowner, within the Taylor Grazing Act, the Acting Solicitor for the Interior Department. after citing the foregoing cases, declared : [194]

> It thus is clear that a determination whether a Pueblo is a "stock owner" within the meaning of the Taylor Act and the Federal Range Code must be made by reference to the internal structure of the community and to its laws and customs. In his request for an opinion, the Commissioner states :
>
> > "It is impossible, realistically or pragmatically, to apply either to Pueblo livestock or to Pueblo range or water, concepts of ownership familiar in white life; the only way that realism can be achieved is by a concept treating ail of these properties as properties of the community, whose keeping is vested by formal or informal community and/or religious decree in an individual or family."
>
> It appears that the custom is that certain individuals are designated by the governing body of the Pueblo to carry on the function of livestock raising. While in a limited sense and for certain purposes the livestock may be regarded as the personal property of these individuals, the livestock are subject to call by either the secular community, through the Governor and Council, the religious community, or the khiva or secret society organizations. indicating that the ultimate responsibility of the individuals is to the community and that the ultimate interest is that of the community. The individual's rights are basically usufructuary and always subject to the higher demand of the community itself. In these circumstances I am unable to see that any violence is done Anglo-Saxon legal concepts in holding that a Pueblo is an owner of livestock within the meaning of the Taylor Act and the Federal Range Code. (Pp. 13–14.)

The chief limitation upon tribal control of membership rights in tribal property is that found in acts of Congress guaranteeing to those who sever tribal relations to take up homesteads on the public domain,^195 and to children of white men and Indian women, under certain circumstances,[196] a continuing share in the tribal property. Except for these general limitations and other specific statutory limitations found in enrollment acts and other special acts of Congress, the proper authorities of an Indian tribe have full power to regulate the use and disposition of tribal property by the members of the tribe.

The authority of an Indian tribe in matters of property is not restricted to those lands or funds over which it *exercises the* rights of ownership. The sovereign powers of the tribe extend over the property as well as the person of its members.

Thus, in *Crabtree* v. *Madden*,[197] it is recognized that questions of the validity of contracts among members of the tribe are to be determined according to the laws of the tribe.[198]

In *Jones* v. *Laney*,[199] the question arose whether a deed of manumission freeing a Negro slave, executed by a Chickasaw Indian within the territory of the Chickasaw Nation was valid. The lower court had charged the jury "that their (Chickasaw) laws and customs and usages, within the limits defined to them, governed all property belonging to anyone domesticated and living with them." Approving this charge, upon the basis of

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[190] See Chapter 15. See also Chapters 9, 10, and 11.

[191] *Sizemore* v. *Brady*, 235 U. S. 441 (1914) ; *Franklin* v. *Lynch*, 233 U. S. 269 (1914) ; *Gritts* v. *Fisher*, *224* U. S. *640* (1912) ; Journey. *cake* v. *Cherokee Nation and United States, 28 C.* Cls. 281 (1893) ; *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, 220* U. S. *481* (1911) aff'g 45 C. Cls. 287 (1910) ; *Hayes* v. *Barringer*, 168 Fed. 221 (C. C. A. 8. 1909) ; *Whitmire*, *Trustee* v. *Cherokee* Nation et al., 30 C. Cls. 138 (1895) ; *Dukes* v. *Goodall* 5 Ind. T. 145. 82 S. W. 702 (1904) ; *In re Narragansett Indians. 20* R. I. 715. 40 Atl. 347 (1898) ; *Terrance* v. *Gray*, 156 N. Y. Supp. 916 (1916) ; *Reservation Gas Co. v. Snyder*, 88 Misc. 209; 150 N. Y. Supp. 216 (1914) ; *Application of Parker, 237 N. Y.* Supp. 134 (1929) ; *McCurtain* v. *Grady*, 1 Ind. T. 107, 38 S. W. 65 (1896) ; *Myers* v. *Mathis*, 2 Ind. T. 3. 46 S. W. 178 (1898).

In the case *of Sizemore v. Brady, supra, the* Supreme Court declared :

> lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. (P. 446.)

Similarly, In Franklin v. *Lynch, supra,* the Supreme Court declared:

> As the tribe could not sell. neither could the Individual members. for they had neither an undivided interest In the tribal land nor vendible interest in any particular tract. (P. 271.)

In the case *of Hayes* v. *Barringer, supra,* the court declared. in considering the status of Choctaw and Chickasaw tribal lands:

> . . . At that time these were the lands of the Choctaw and Chickasaw Nations, held by them. as they held all their lands. In trust for the Individual members of their tribes, In the sense la which the public property of representative governments is held in trust for its people. But those were public lands and. while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow members of their tribes. they had no separate or individual right to or equity in any of those lands which they could maintain against the legislation of the United States or of the Indian Nations. *Stephens* v. *Cherokee Nation. 174* U. S. *445* 488. 19 Sup. Ct. 722. 43 L. Ed. 1041: *Cherokee Nation v. Hitchcock,* 187 U. S. 294. 23 Sup. Ct. 115. 47 L. Ed. 183: Lone *Wolf* v *Hitchrock, 187 U. S. 553. 23 Sup. Ct.* 216. 47 L. Ed. 299: WnZiace *v. Adams, 143* Fed. 716, *74 C. C. A. 540; Ligon* v. *Johnston* (C. C. A.) 164 Fed. 670. (Pp. 222-223.)

So, too. in *United* States v. *Lucero,* 1 N. M. 422, (1869) : title to lands within a pueblo Is recognized to lie in the pueblo itself, rather than in the individual members thereof.

[192] *In United Hates* v. *Chase, 245* U. S. *89 (1917).* the Supreme Court held that assignments made pursuant to treaty might be revoked by congressional action taken at the Instance of tribal authorities. And *cf. Gritts* v. *Fisher, 224* U. S. 640 (1912) and Chapter 5. sec. 5, Chapter 23. sec. 3.

In the case of *McCurtain* v. *Grady, supra,* a provision of the Choctaw Constitution conferring upon the discoverer of coal the right to mine all coal within a mile radius of the point of discovery was upheld as a valid exercise of tribal power.

In *Whitmire, Trustee v. Cherokee Nation, supra,* the Court of Claims held that the general property of the Cherokee Nation, under the provisions of the Cherokee Constitution. might he used for public purposes. but could not be diverted to per capita payments to a favored class.

On the power of the tribe with respect to assignments of tribal lnnd to members, see Memo. Sol. I. D., October 20. 1937 (3ldewekanton Sioux) : Memo. Sol. I. D.. April 14, 1939 (Santa Clara Pueblo). And see Chapter 9. secs. 1, 5; Chapter 15. sec. 20.

[193] See Chapter 14. sec. 7.

[194] Op. Acting Sol. I D., M. 29797. May 14. 1938.

[195] 43 U. S. C. 189 (Act of March 3. 1875, c. 131. sec. 15. 18 Stat. 420) provides that an Indian severing tribal relations to take up a homestead upon the public domain "shall be entitled to his distributive share of all annuities. tribal funds, lands and other property, the same as though he had maintained his tribal relations." For a discussion of this and related statutes. see *Oakes* v. *United States, 172* Fed. 305 (C. C. A. 8. 1909) : *Halbert* v. United *States,* 283 U. S. 753 (1931). And see sec. 4 *supra.* and Chapter 9, sec. 3.

[196] 25 U. S. C. 184.

[197] 54 Fed. 426 (C. C. A. 8, 1893).

[198] See, to the same effect, *In re Sah Quah,* 31 Fed. 327 (D. C. Alaska. 1886). Chattel mortgage forms approved by the Interior Department for use by tribes making loans to members regularly provide:

> This mortgage and all questions and controversies arising thereunder shall he subject to the laws of the United States and of the --- Tribe. Any question or controversy which cannot he decided under such laws shall be dealt with according to the laws of the State of ————.

See Memo Sol. I. D., December 22, 1938; and see Memo. Asst. Sec. 1. D., August 17, 1938.

[199] 2 Tex. 342 (1844).

which the jury had found the deed to be valid, the appellate court declared :

> Their laws and customs, regulating property, contracts, and the relations. between husband and wife, have been respected, when drawn into controversy, in the courts' of the State and of the United States. (P. 348.)

In the case of *Delaware* Indians v. *Cherokee Nation,*[200] it is said:

> The law of real property is to be found in the law of the situs. The law of real property in the Cherokee country therefore is to be found in the constitution and laws of the Cherokee Nation. (P. 251.)

In the *case* of *James H. Hamilton* v. *United States,*[201] it appeared that land, buildings, and personal property owned by the claimant, a licensed. trader, within the Chickasaw Reservation, had been, confiscated by an act of the Chickasaw legislature. The plaintiff brought suit to recover damages on the theory that such confiscation constituted an "Indian depredation." The Court of Claims dismissed the 'suit, declaring:

> The claimant by applying for and accepting a license to trade with the Chickasaw Indians, and subsequently acquiring property within the limits of their reservation, subjected the same to the jurisdiction of their laws. (P. 287.)

The authority of an Indian tribe to impose license fees upon persons engaged in trade with its members within the boundaries of the reservation is confirmed in *Zevely* v. *Weimer,*[202] as well as in the various cases cited under section 7 of this chapter dealing with "The Taxing Power of an Indian Tribe."

[200] *38 C. Cls. 234* (1903), decree mod. 193 U. S. 127.

[201] *42 C. Cls. 282* (1907). Cf. sec. 29 of Act of May 2, 1890. 26 Stat. 81, 93 (tribal law made applicable to contracts between Indian and non-Indian in Indian Territory).

[202] 5 Ind. T. 646, 82 S. W. 941 (1904).

The power of an Indian tribe to regulate the inheritance of individual property owned by members of the tribe likewise has been analyzed under a separate heading.[203]

Within the scope of local self-government, it has been held, fall such powers as the power to charter corporations.[204]

Repeatedly, in the situations above discussed, federal and state courts have declined to interfere with the decisions of tribal authorities on property disputes internal to the tribe.[205]

It clearly appears, from the foregoing cases, that the powers of an Indian tribe are not limited to such powers as it may exercise in its capacity as a landowner. In its capacity as a sovereign, and in the exercise of local self-government, it may exercise powers similar to those exercised by any state or nation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress.

The laws and customs of the tribe, in matters of contract and property generally (as well as on questions of membership, domestic relations, inheritance, taxation, and residence), may be lawfully administered in the tribunals of the tribe, and such laws and customs will be recognized by courts of state or nation in cases coming before these courts.^206

[203] Sec. 6.

[204] See, for example, the Cherokee resolution of March 8. 1813. chartering a corporation, embodied in the Treaty of February 27, 1819, with the Cherokee Nation, 7 Stat. 195. And see Memo. Sol. I. D., May 24, 1937 (Fort Hall); Memo. Sol. I. D., March 14. 1938 (Blackfeet).

[205] *Washburn v. Parker,* 7 F. Supp. 120 (D. C. W. D., N. Y., 1934); *Mulkins v. Snow,* 175 N. Y. Supp. 41 (1919). affd. 178 N. Y. Supp. 905. discussed in Note (1922) 31 Yale L. J. 331; accord: 7 Op. A. G. 174 (1855).

^206 See Pound, Nationals without a Nation (1922). 22 Col. L. Rev. 97; Rice, The Position of the American Indian in the Law of the United States (1934), 16 J. Comp. Leg. 78.

SECTION 9. TRIBAL POWERS IN THE ADMINISTRATION OF JUSTICE

The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has power to regulate the marriage relationships of its members, it necessarily has power to adjudicate, through tribunals established by itself, controversies involving such relationships.[207] So, too, with other fields of local government in which our analysis has shown that tribal authority endures. In all these fields the judicial powers of the tribe are coextensive with its legislative or executive powers.[208]

The decisions of Indian tribal courts, rendered within their jurisdiction and according to the forms of law or custom recognized by the tribe, are entitled to full faith and credit in the courts of the several states.

As was said in the case of *Standley v. Roberts:*[209]

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

And in the case of *Raymond* v. *Raymond*, the court declared:

> The Cherokee Nation * * * is a distinct political society, capable of managing its own affairs and governing itself. It may enact its own laws, though they may not be in conflict with the constitution of the United States. It may maintain its own judicial tribunals, and their judgments and decrees upon the rights of the persons and property of members of the Cherokee Nation as against each other are entitled to all the faith and credit accorded to the judgments and decrees of territorial courts. (P. 722.)[210]

The question of the judicial powers of an Indian tribe is particularly significant in the field of law and order. For in the fields of civil controversy the rules and decisions of the tribe and its officers have a force that state courts and federal courts will respect.^211 But in accordance with the well-settled principle that one sovereign will not enforce the criminal laws of another sovereign, state courts and federal courts alike must decline to enforce penal provisions of tribal law. Responsibility for the maintenance of law and order is therefore squarely upon the Indian tribe, unless this field of jurisdiction has been taken over by the states or the Federal Government.

It is illuminating to deal with the question of tribal criminal jurisdiction as we have dealt with other questions of tribal authority, by asking, first, what the original sovereign powers of

[207] The power of an Indian tribe over the administration of Justice has been held to include the power to prescribe conditions of practice in the tribal courts. Memo. Sol. I. D., August 7. 1937. And see 25 C. F. R. 161. 9.

[208] *Washburn* v. *Parker, 7* F. Supp. 120 (D. C. W. D. N. Y. 1934); *Raymond* v. *Raymond,* 83 Fed. 721 (C. C. A. 8. 1897); 19 Op. A. G. 109 (1888); 7 Op. A. G. 174 (1855).

[209] 59 Fed. 836 (C. C. A. 8, 1894). app. dism. 17 Sup. Ct. 999 (1896); and see Chapter 14. sec. 3.

[210] 83 Fed. 721 (C. C. A. 8, 1897). Accord : *Nofire* v. United States, 164 U. S. 657 (1897); *Mehlin* v. *Ice,* 56 Fed. 12 (C. C. A. 8. 1893).

[211] Note, however, that courts have sometimes taken the position that tribal law or custom must be shown by the party relying thereon. and that otherwise the common law will be applied. See *Hockett* v. *Alston,* 110 Fed. 910 (C. C. A. 8. 1901); *Wilson* v. *Owens, 86* Fed. 571 (C. C. A. *8. 1898*); *Pyeatt v. Powell,* 51 Fed. 551 (C. C. A. 8. 1892). And see Chapter 14, sec. 5.

the tribes were, and then, how far and in what respects these powers have been limited.

So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal Jurisdiction. no less than its civil Jurisdiction, was that of any sovereign power It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its Jurisdiction according to its own laws and customs. Such Jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.

It is clear that the original criminal Jurisdiction of the Indian tribes has never been transferred to the states. Sporadic attempts of 'the states to exercise Jurisdiction over offenses between Indians. or between Indians and whites. committed on an Indian reservation. bare been held invalid usurpation of authority.

The principle that a state has no criminal jurisdiction over offenses involving Indians committed on an Indian reservation is too well established to require argument. attested as it is by a line of cases that reaches back to the earliest years of the Republic.[213]

A state, of course, has Jurisdiction over the conduct of an Indian off the reservation.^214 A state also has Jurisdiction over some. but not all, acts of non-Indians within a reservation.[215] But the relations between whites and Indians in "Indian country" and the conduct of Indians themselves in Indian country are not subject to the laws or the courts of the several states.

The denial of state jurisdiction, then. is dictated by principles of constitutional law.[216]

In these respects the territories occupy a legal position similar to the states.[217]

On the other hand. the constitutional authority of the Federal Government to prescribe laws and to administer justice upon the Indian reservations is plenary. The question remains how far Congress has exercised Its constitutional powers.[218]

The basic provisions of federal law with regard to Indian offenses are found in sections 217 and 218 of U. S. Code, title 25:

> Sec. 217. *General laws as* to punishment *extended to Indian* country.-Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive Jurisdiction of the United States, except the District of Columbia. shall extend to the Indian country.
>
> Sec. 218. *Exceptions as to extension of general laws.*— The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian. nor to any Indian committing any offense in the Indian country who has been punished by the local law Of the tribe, *or* to any case where, by treaty stipulations. the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[219]

These provisions recognize that, with respect to crimes committed by one Indian against the person or property of another Indiao. the Jurisdiction of the Indian tribe is plenary. These provisions further recognize that, in addition. to this general Jurisdiction over offenses between Indians, an Indian tribe may possess, by virtue of treaty stipulations, other fields of exclusive Jurisdiction (necessarily including Jurisdiction over cases involving non-Indians). "The local law of the tribe" is further recognized to the extent that the punishment of an Indian under such law must he deemed a bar to further prosecution under any applicable federal laws, even though the offense be one against a non-Indian.

Such was the law when the case of *Ex parte* Crow *Dog*,[220] which has been discussed in an earlier connection, arose. The United States Supreme Court there held that federal courts had no Jurisdiction to prosecute an Indian for the murder of another Indian committed on an Indian reservation. such jurisdiction never having been withdrawn from the original sovereignty of the Indian tribe.

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[213] This power is expressly recognized, for instance, to tbe Treaty of July 2. 1791. with the Cherokees. 7 Stat. 39, providing :

> If any citizen of the United States. or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States. and the Cherokees may punish him or not. as they please. (Sec. 8.)

Other treaties acknowledging tribal jurisdiction over white trespassers on tribal lands are: Treaty of January 21. 1785. with the Delawares. 7 Stat. 16: Treaty of January 10. 1786. with the Chickasaws, 7 Stat. 24 ; Treaty of January 9, 1789, with the Wiandots, Delawares, and others, 7 Stat 28: Treaty of August 7. 1790. with the Creeks. 7 Stat. 35 : Treaty of July 2. 1791, with the Cherokees. 7 Stat. 39 ; Treaty of August 3. 1795, with the Wyandots, Delawares. and others, 7 Stat. 49. Later provisions require the tribes to seize and surrender trespassers "without other injury, insult. or molestation" to designated federal officials. Treaty of November 10. 1808. with Osage Nations. 7 Stat. 107. *Cf. Leak Glove Manuf'g Co.* v. *Needles, 69* Fed. 68 (C. C. A. 8. 1895). and see Chanter 1.

[214] *Worcester* v. *Georgia*, 6 Pet. 515 (1832) ; *United States* v. *Kagama*, 118 U. S. *375* (1886) ; *United States v. Thomas.* 151 U. S. 577 (1894) ; *Toy* Toy v. *Hopkins*, 212 U. S. 542 (1909) : *United States* v. *Celestine*, 215 U. S. 278 (1909) ; *Donnelly* v. *United States*, 228 U. S. 243 (1913) : *United States* v. *Pelican, 232* U. S. 442 (1914) ; *United States* v. Ramsey. 271 U. S. 467 (1926) ; United *States* v. *King*, 81 Fed. 625 (D. C. E. D., Wis., 1897) ; *In re Blackbird. 109 Fed. 139* (D. C. W. D., Wls.. 1901) : In *re* Lincoln. 129 Fed. 247 (D. C. N. D., Cal.. 1904) : *United States ex rel. Lynn* v. *Hamilton, 233* Fed. 685 (D. C. W. D., N. Y.. 1915) ; *James H. Hamilton* v. *United States, 42* C. Cls. 282 (1907) ; *Yohyowan* v *Luce*, 291 Fed. 425 (D. C. E. D., Wash, 1923) : *State* v. *Campbell*, 53 Minn 354. 55 N. W. 553 (1893) ; *State* v. Big *Sheep*, 75 Mont. 219. 243 Pac 1067 (1926) ; *Ex parte* Cross. 20 Nebr. 417. 30 N. W. 428 (1886) ; *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183. 105 N. E. 1048 (1914) ; *State* v *Cloud. 228 N.* W. 611 (1930) : *State* v. *Rufus, 205* Wis. *317. 237 N* W 67 (Wis.) (1931). And see *United States* v. *Sa-coo-da-cot*, 27 Fed. Cas No 16212 (C. C. Nebr. 1870). See also Chapter 6.

[215] See *Pablo* v. *People.* 23 Colo. 134. 46 Pac. 636 (1896) (upholding state jurisdiction over murder of Indian by Indian outside of reservation) And see Chapters 6, 18.

^215 See *United States* v *McBratney*. 104 U. S. 621 (1881) (declining federal jurisdiction over murder of non-Indian by non-Indian on reservation). And see Chapters 6. 18.

[216] See Willoughby. The Constitutional Law of the United States (2d ed 1929). c 21.

[217] *United States* v. *Kie*, 26 Fed. Cas. No. 15528a (D. C. D. Alaska 1885). And see Chapter 21.

[218] See Chapter 5.

[219] These provisions are derived from the Act of March 3. 1817. 3 Stat. 383. which. in extending federal criminal laws to territory belonging to any Indian tribe. specifies:

> . . . . That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation. or to extend to any offence committed by one Indian against another. within any Indian boundary.

Similar provisions were contained in sec. 25 of the Act of June 30. 1834. c. 161. 4 Stat. 729, 733; sec. 3 of the Act of March 27. 1854. 10 Stat. 269. 270 ; sod R. S. §§ 2145-2146. amended by sec. 1 of the Act of February 18. 1875. 18 Stat. 316. 318.

[220] 109 U. S. 556 (1883). Shortly before the decision in this case. an opinion had been rendered by the Attorney General in another Indian murder case holding that where an Indian of one tribe had murdered an Indian of another tribe on the reservation of a third tribe. even though it was not shown that any of the tribes concerned had any machinery for the administration of justice, the federal courts had no right to try the accused. The opinion concluded :

> If no demand for Foster's surrender shall be made by one or other of the tribes concerned, founded fairly upon a violation of some law of one or other of them having Jurisdiction of the offense in question according to general principles, and by forms substantially conformable to natural justice, it seems that nothing remains except to discharge him (17 Op. A. G. 566. 570 (1883))

A similar decision had been reached in state courtsSee *State* v *McKenney*, 18 Nev. 182. 2 Pac 171 (1883). See also, *Anonymous*. 1 Fed Cas No. 447 (C. C. D. Mo 1843) (robber,).

Although the right of an Indian tribe to inflict the death penalty had been recognized by Congress,[221] so much consternation was created by the Supreme Court's decision in *Ex parte Crow Dog* that within 2 years Congress had enacted a law making it a federal crime for one Indian to murder another Indian on, an Indian reservation.[222] This law also prohibited manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In later years notorious cases of robbery, incest, and assault with a dangerous weapon resulted in the piece-meal addition of these three offenses to the federal code of Indian crimes.^223 There are thus, at the present time, 10 major offenses for which federal jurisdiction has displaced tribal jurisdiction. Federal courts also have jurisdiction. over the ordinary federal crimes applicable throughout the United States (such as counterfeiting, smuggling,^224 and offenses relative to the mails), over violations of special laws for the protection of Indians,^225 and over offenses committed by an Indian against a non-Indian or by a. non-Indian against an Indian which fail within the special code of offenses for territory "within the exclusive jurisdiction of the United States."[226] All offenses other than these remain subject to tribal law and custom and to tribal courts.

Although the statute covering the "10 major crimes" does not expressly terminate tribal jurisdiction over the enumerated crimes, and may be interpreted as conferring only a concurrent jurisdiction upon the federal courts, it is arguable that the statute removes ail jurisdiction over the enumerated crimes from the Indian tribal authorities.

Some support is given this argument by the decision in United *States v. Whaley.*[227] In this case, which arose soon after the passage of the statute in question, it had appeared fitting to the tribal council of the Tule River Reservation that a medicine man who was believed to have poisoned some 21 deceased patients should be executed, and he was so executed. The four tribal executioners were found guilty of manslaughter, in the federal court, on the theory, apparently, that the Act of March 3, 1885, had terminated tribal jurisdiction over murder cases. Whether tribal authorities may still inflict the death penalty for offenses other than the enumerated 10 major crimes is a matter of some doubt.

In opposition to the. argument that the 1885 act limits tribal jurisdiction over crimes, it may be said that concurrent jurisdiction of federal and tribal authorities is clearly recognized by section 218 of title 25 of the United States Code, above set forth, which exempts from federal punishment otherwise merited persons who have "been punished by the local law of the tribe," and that the current Indian Law and Order Regulations recognize concurrent federal-tribal jurisdiction over crime.[228]

The lacunae in this brief criminal code of 10 commandments are serious, and indicate the importance of tribal jurisdiction in the field of law and order.

"Assault" cases that do not involve a "dangerous weapon" Or where "intent to kill" cannot be proven, cannot be prosecuted in the federal court, no matter how brutal the attack may be, or how near death the victim is placed, if death does not actually ensue; men brutally beating their wives and children are, therefore, exempt from prosecution in the federal courts, and as above shown, the state courts do not have jurisdiction. Even assault with intent to commit rape or great bodily injury is not punishable under any federal statute.[229]

Aside from rape and incest, the various offenses involving the relation of the sexes (e. *g.*, adultery, seduction, bigamy, and solicitation), as well as those involving the responsibility of a man for the support of his wife and children, are not within the cases that can be prosecuted in federal courts.[230]

. Other offenses which may be mentioned, to which no state or federal laws now have application, and over which no state or federal court now has any jurisdiction, are: kidnaping, receiving stolen goods, poisoning (if the victim does not die), obtaining money under false pretenses, embezzlement, blackmail, libel, forgery, fraud, trespass, mayhem, bribery, killing of another's livestock, setting fire to prairie or timber, use of false weights and measures, carrying concealed weapons, gambling, disorderly conduct, malicious mischief, pollution of water supplies, and other offenses against public health.[231]

The difficulties of this situation have prompted agitation for the extension of federal or state laws over the Indian country, which has continued for at least five decades, without success.[232] The propriety of the objective sought is not here in question, but the agitation itself is evidence of the large area of human conduct which must be left in anarchy if it be held that tribal authority to deal with such conduct has disappeared.

Fortunately, such tribal authority has been repeatedly recognized by the courts, and although it has not been actually exercised always and in all tribes, it remains a proper legal basis

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[221] See report cited above, fn. 25.

[222] *Act* of March 3, 1885, 23 Stat. 362, 385, 18 U. S. C. 548.

Earlier attempts to extend federal criminal laws to crimes by Indians against Indians (*e. g.* Letter from Secretary of the Interior. March 31, 1874, Sen. Misc. Doc., No. 95, 43d Cong., 1st sess.) had failed. On May 20, 1874, the Senate Committee on Indian Affairs. rejecting the proposed bills. declared :

> • • • The Indians, while their tribal relations subsist, generally maintain laws. customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States. and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecutions for their violation. (Sen. Rept. No. 367, 43d Cong., 1st sess., vol. 2.)

This same report condemned other provisions of the proposed bill as vesting in Indian agents "a very dangerous and formidable discretion." *Cf.* Chapter 2, sec. 2C.

[223] Act of March 4. 1909. sec. 328. 35 Stat. 1088, 1151; Act of June 28, 1932. 47 Stat. 336, 337.

[224] See *Bailey* v. United *States,* 47 F. 2d 702 (C. C. A. 9, 1931), confirming conviction of tribal Indian for offense of smuggling.

[225] See 18 U. S. C. 104 (Timber depredations on Indian lands). 107 (Starting fires on Indian lands). 110 (Breaking fences or driving cattle on inclosed public lands). 115 (inducing conveyances by Indians of trust interests in lands) ; 25 U. S. C. 83 (Receipt of money under prohibited contracts). 177 (Purchases or grants of land from Indians), 179 (Driving stock to feed on Indian lands), 180 (Settling on or surveying lands belonging to Indians by treaty). 195 (Sale of cattle purchased by Government to nontribal members), 212 (Arson), 213 (Assault with intent to kill), 214 (Disposing or removing cattle). 216 (Hunting on Indian lands). 241 (Intoxicating liquors ; sale to Indians or introducing into Indian country), 241a (Sale. etc., of liquors in former Indian territory), 244 (Possession of intoxicating liquors in Indian country). 251 (Setting up distillery), 264 (Trading without license. 265 (Prohibited purchases and sales), 266 (Sale of arms).

[226] See 18 U. S. C., chaps. 11 and 13.

[227] 37 Fed. 145 (C. C. S. D. Cal. 1888). See also dictum in *United States* v. *Cardish,* 145 Fed. 242 (D. C. E. D. Wis. 1906).

[228] Memo. Sol. I. D.. November 17. 1936 (Ft. Hall).

[229] *United States* v. King, 81 Fed. 625 (D. C. E. D. Wis. 1897).

[230] See United *States* v. *Quiver,* 241 U. S. 602 (1916). discussed above under sec. 5.

[231] *Cf.* statements of Assistant Commissioner Merltt, *before* House Committee on Indian Affairs, 69th Cong., on H. B. 7826. Hearings (Reservation Courts of Indian Offenses), p. 91.

[232] See Harsha, Law for the Indians (1882), 134 N. A. Rev. 272; Thayer, *A* People Without Law (1891). 68 Atl. Month. 540, 676; Austin Abbott, Indians and the Law (1888). 2 Harv. Law Rev. 167: Hornblower, Legal Status of Indians (1891), 14 *A.* B. *A.* Rept. 261: Report of Comm. on Law and Courts for Indians (1892), 15 A. B. A. Rept. 423; Pound, Nationals Without a Nation (1922), 22 Col. L. Rev. 97; Meriam and Associates. Problem of Indian Administration (1928). chap. 13; Ray *A.* Brown, The Indian Problem and the Law (1930), 39 Yale L. J. 307 ; Report of Brown. Mark. Cloud, and Meriam on "Law and Order on Indian Reservations of the Northwest" Hearings Sen. Subcom. of Comm. on Ind. Aff., 72d Cong., 1st sess., pt. 26, p. 14137. et seq. (1932).

for the tribal administration of justice wherever an Indian tribe desires to make use of its legal powers.

The recognition of tribal, jurisdiction over the offenses of tribal Indians accorded by the Supreme Court in *Ex* parte *Crow* Dog, *supra*, and *United States* v. Quiver, *supra*, indicates that the criminal jurisdiction of the Indian tribes has not been curtailed by the failure of certain tribes to exercise such jurisdiction, or by the inefficiency of its attempted exercise, or by any historical changes that have come about in the habits and customs of the Indian tribes. Likewise it has been held that a gap in a tribal criminal code does not confer jurisdiction upon the federal courts.[233] Only specific legislation terminating or transferring such jurisdiction can limit the force of tribal law.

A recent writer,[234] after carefully analyzing the relation between federal and tribal law, concludes:

> This gives to many Indian tribes a large measure of continuing autonomy, for the federal statutes are only a fragment of law. principally providing some educational, hygienic, and economic assistance, regulating land ownership, and punishing certain crimes committed by or upon Indians on a reservation. Where these statutes do not reach, Indian custom is the only law. As a matter of convenience, the regular courts (white men's courts) tacitly assume that the general law of the community is the law in civil cases between Indians; but these courts will apply Indian custom whenever it is proved. (P. 90.)

A careful analysis of the relation between a local tribal government and the United States is found in an early opinion of the Attorney General,[235] in which it is held that a court of the Choctaw Nation has complete jurisdiction over a civil controversy between a Choctaw Indian and an adopted white man. involving rights to property within the Choctaw Nation :

> On the other hand, it is argued by the United States Agent, that the courts of the Choctaws can have no jurisdiction of any case in which a citizen of the United States is a. party * • *.
>
> In the first place, it is certain that the Agent errs in assuming the legal impossibility of a citizen of the United States becoming subject, in civil' matters, or criminal either. to the jurisdiction of the Choctaws. It is true that no citizen of the United States can, while he remains within the United States, escape their constitutional Jurisdiction, either by adoption into a tribe of Indians. or any other way. But the error in all this consists in the idea that any-man, citizen or not citizen, becomes divested of his allegiance to the United States, or throws off their jurisdiction or government, in the fact of becoming subject to any local jurisdiction whatever. This idea misconceives entirely the whole theory of the Federal Government, which theory is, that all the inhabitants of the country are, in regard to certain limited matters, subject to the federal jurisdiction, and in all others to the local jurisdiction, whether political or municipal. The citizen of Mississippi is also a citizen of the United States; and be owes allegiance to, and is subject to the laws of, both governments. So also an Indian. whether he be Choctaw or Chickasaw, and while subject to the local jurisdiction of the councils and courts of the nation, yet is not in any possible relation or sense divested of his allegiance and obligations to the Government and the laws of the United States. (Pp. 177–178.)

In effect, then, an Indian tribe bears a relation to the Government of the United States similar to that which a territory bears to such government. and similar again to that relationship which a municipality bears to a state. An Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation,[236] subordinate only to the expressed limitations of federal law.

Some tribes have exercised a similar jurisdiction, under express departmental authorization, over Indians of other tribes found on the reservation.[237] This has been justified on the ground that the original tribal sovereignty extends over visiting Indians and also on the ground that the Department of the Interior may transfer the jurisdiction vested in the Courts .of Indian Offenses to tribal courts, so far as concerns jurisdiction over members of recognized tribes.[238]

On the other hand, attempts of tribes to exercise jurisdiction over non-Indians, although permitted in certain early treaties,[239] have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody.^240

Recognition of tribal authority in the administration of justice is found in the statutes of Congress, as well as in the decisions of the federal courts.

U. S. Code, title 25. section 229, provides that redress for a civil injury committed by an Indian shall be sought. in the first instance from the "Nation or tribe to which such Indian shall belong." [241] This provision for collective responsibility evidently assumes that the Indian tribe or nation has its own resources for exercising disciplinary power over individual wrongdoers within the community.

. We have already referred to title 25. section 218, of the United States Code, with its express assurance that persons "punished by the law of the tribe" shall not be tried again before the federal courts.

What is even more important than these statutory recognitions of tribal criminal authority is the persistent silence of Congress on the general problem of Indian criminal jurisdiction. There is nothing to justify an alternative to the conclusion that the Indian tribes retain sovereignty and jurisdictions over a vast area of ordinary offenses over which the Federal Government has never presumed to legislate and over which the state governments have not the authority to legislate.

Attempts to administer a rough-and-ready sort of justice through Indian courts commonly known as Courts of Indian Offenses, or directly through superintendents, cannot be held to have impaired tribal authority in the field of law and order. These agencies have been characterized, in the only reported case squarely upholding their legality, as "mere 'educational and disciplinary instrumentalities by which the Government

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[233] *In re Mayfield*, 141 U. S. 107 (1891).

[234] Rice, The Position of the American Indian in the Law of the United States (1934), 16 J. Comp. Leg. (3d series), pt. 1, 78.

[235] 7 Op. A. C. 174 (1855).

[236] The jurisdiction of the Indian tribe. ceases at the border of the reservation (see 18 Op. A. G. 440 (1886). holding that the authority of the Indian police is limited to the territory of the reservation), and Congress has never authorized appropriate extradition procedure whereby an Indian tribe may secure jurisdiction over fugitives from its justice. See *Ex parte* Morgan, 20 Fed. 298 (D. C. W. D. Ark.. 1883).

[237] See Memo. Sol. I. D.. February 17, 1939 (Rocky Boy's Blackfeet). But *cf.* Memo. Sol. I. D.. October 15. 1938 (Ft. Berthold). For a fuller discussion of the question of jurisdiction of the person, raised In such cases as *Es parte Kenyon*, 14 Fed. Cas. No. 7720 (C. C. W. D. Ark., 1878). see Chapter 18.

[238] *Ibid.*

[239] See Chapter 1, sec. 3.

[240] *Ex parte Kenyon*, 14 Fed. Cas. No. 7720 (C. C. W. D. Ark., 1878). and see Chapter 18.

"This provision was apparently first enacted as see. 14 of the Trade and Intercourse Act of May 19. 1796. 1 Stat. 469. 472; reenacted as sec. 14 of the Trade and Intercourse Act of March 3, 1799, 1 Stat. 743, 747; reenacted as sec. 14 of the Trade and Intercourse Act of March 30, 1802. 2 Stat. 139, 143; and finally embodied in sec. 17 of the Trade and Intercourse Act of June 30. 1834. 4 Stat. 729. 731.

Of a similar character are treaty provisions in which tribes undertake to punish certain types of Indian offenders. See. e. *g.*, Art. 7 of Treaty

of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian" [243] Perhaps a more satisfactory defense of their legality is the doctrine put forward by a recent writer that the Courts of Indian Offenses "derive their authority from the tribe, rather than from Washington." [243]

Whichever of these explanations be offered for the existence of the Courts of Indian. Offenses, their establishment cannot be held to have destroyed or limited the powers vested by existing law in the Indian tribes over the province of law and order and the administration of civil and criminal justice.

Today the administration of law and order is being taken over as a local responsibility by most of the tribes that since the enactment of the Wheeler-Howard Act of June 18, 1934, have adopted constitutions for self-government.^244

Faced with a tremendous problem, the Indian tribes have done an admirable job of maintaining law and order, wherever they have been permitted to function.^245 There are some reservations in which the moral sanctions of an integrated community are so strong that apart from occasional drunkenness and accompanying violence, crime is unknown. Crime is more of a, problem on reservations where the social sanctions based on tribal control of property have been broken down through the allotment system, and. the efforts of these tribes to meet their law and order problem through tribal codes, tribal courts, and tribal police, are worthy of Serious attention.

The earliest codes adopted by tribes which have organized under the Act of June 18, 1934, generally differ from comparable state penal codes in' the following respects :

1. The number of offenses specified in a tribal code generally runs between 40 and 50, whereas a state code (exclusive of local municipal ordinances) generally specifies between 800 and 2,000 offenses.[246]

2 The maximum punishment specified in the Indian penal codes is generally more humane, seldom exceeding imprisonment for 6 months, even for offenses like kidnapping, for which state penal codes impose imprisonment for 20 years or more, or death.

3. Except for fixing a maximum penalty, the Indian penal codes leave a large discretion to the court in adjusting the penalty to the circumstances of the offense and the offender.

4. The form of punishment is typically forced labor for the benefit of the tribe or of the victim of the offense, rather than imprisonment.

5. The tribal penal codes, for the most part, do not contain the usual catch-all provisions to be found in state penal codes (vagrancy, conspiracy, criminal syndicalism, etc.), under which almost any unpopular individual may be convicted of crime.

6. The tribal penal code is generally put into the hands of every member of the tribe, and widely read and discussed, which is not the case with state penal codes.

On the basis of this comparison it seems fair to say that the confidence which the United States Supreme Court indicated, in the *Crow* Dog case,[247] in the ability of Indian tribes to master "the highest and best of all * * * the arts of civilized life * * * that of self-government * * * the maintenance of order and peace among their own members by the administration of their own laws and customs" has been amply justified in the half century that has passed since that case was heard.

of November 15, 1865, with Confederated Tribes. of Middle Oregon, 14 Stat. 751, 752: Art. 12 of Treaty of February 5, 1856, with Stockbridges and Munsees; 11 Stat. 663, 666.

Tribal responsibility for surrender or extradition of Indian horse thieves, murderers, or "bad men" generally was imposed by various treaties: Treaty of January 21, 1785. with Wiandots, Delawares, and others. 7 Stat. 16; Treaty of January 10. 1786, with the Chickasaws 7 Stat 24: Treaty of January 9. 1789. with Wiandots, Delawares, and others, 7 Stat. 28; Treaty of August 7, 1790. with the Creek Nation 7 Stat. 35: Treaty of July 2, 1791, with Cherokee Nation, 7, Stat. 39; Treaty of November 3, 1804. with Sacs and Foxes, 7 Stat. 84: Treaty of November 10, 1808. with Great and Little Osage Nations, 7 Stat. 107 Treaty of September 30. 1809. -with Delawares and others. 7 Stat. 113 Treaty of May 15, 1846, with Comanches and others, 9 Stat. 844.

[242] *United States* v. *Clapox*, 35 Fed. 575 (D. C. Ore., 1888) ; and *cf Ex parte Bi-a-lil-le*, 12 Ariz. 150. 100 Pac. 450 (1909).

[243] Rice, The Position of the American Indian in the Law of the United States (1934). 16 J. Comp. Leg. (3d Ser.), pt. 1, pp. 78, 93.

[244] See,' for example, Code of Ordinances of the Gila River Pima-Maricopa Indian Community, adopted June 3, 1936, and approved by the Secretary of the Interior on August 24. 1936: Rosebud Code of Offenses, adopted April 8, 1937, and approved by the Secretary of the Interior July 7, 1937.

[245] See Meriam, *op. cit.*, p. 17 ("* . . on the whole they work well."). On aboriginal police organizations, see MacLeod, Police and Punishment among Native Americans of the Plains (1937), 28 J. Grim. Law and Criminology 181.

[246] The Penal Code of New York State (39 McKinney's Cons. Laws of N. Y., 1936 supp.) lists 54 offenses under the letter "A." The Penal Code of Montana (Rev. Codes of Montana, 1921) contains 871 sections defining crimes.

[247] *Ex parte Crow Dog*, 109 U. S. 556 (1883).

SECTION 10. STATUTORY POWERS OF TRIBES IN INDIAN ADMINISTRATION

Within the field of Indian Service administration various powers have been conferred on Indian tribes by statute. These powers differ, of course, in derivation from those tribal powers which spring from tribal sovereignty. They are rather of federal origin, and no doubt subject to constitutional doctrines applicable to the exercise or delegation of federal governmental powers.

Potentially the most important of these statutory tribal powers is the power to supervise regular Government employees, subject to the findings of the Secretary of the Interior as to the competency of the tribe to exercise such control. Section 9 of the Act of June 30, 1834,[248] now embodied in U. S. Code, title 25. sec. 48, provides :

> *Right of tribes to direct employment of persons engaged for* them.-Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

Under the terms of this statute it is clearly within the discretionary authority of the Secretary of the Interior to grant to the proper authorities of an Indian tribe all powers of supervision and control over local employees which may now be exercised by the Secretary. e. *g.*, the power to specify the duties, within a general range set by the nature of the employment, which the employee is to perform, the power to prescribe standards for appointment, promotion and continuance in office. and the power to compel reports, from time to time, of work accomplished or begun.

It will be noted that the statute in question is not restricted to the cases in which a federal employee is paid out of tribal funds. Senators are responsible to their constituents regardless of the source of their salaries, and heretofore most Indian Service employees have been responsible only to the Federal

* 4 Stat. 735. 737. R. S. § 2072.

Government, though their salaries might be paid from the funds of the tribe.

In directing the employment of Indian Service employees an Indian tribe may impose upon such employees the duty *of enforcing the laws and ordinances of the tribe, and the authority of federal employees so acting has been repeatedly confirmed by the courts.[249]

The section in question has not, apparently, been extensively used by the Interior Department, and that Department at one time recommended its repeal. This recommendation was later withdrawn.^250

Various other statutes make Indian Service administration dependent, in several respects, upon tribal consent.

Thus, U. S. Code, title 25, section 63,[251] provides that the President may "consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary," but that such action may be undertaken only "with the consent of the tribes to be affected thereby, expressed in the usual manner."

Section 111 of the same title^252 provides that payments of moneys and distribution of goods for the benefit of any Indians or Indian tribes shall be made either to the heads of families and individuals directly entitled to such moneys or goods or else to the chiefs of the tribe, for the benefit of the tribe or to persons appointed by the tribe for the purpose of receiving such moneys or goods. This section finally provides that such moneys or goods "by consent of the tribe" may be applied directly by the secretary to purposes conducive to the happiness and prosperity of the tribe.

Section 115 of the same title [253] provides :

> The President may, at the request of any Indian tribe, to which an annuity is payable in money, cause the same to be paid in goods, purchased as provided in section 91.

Section 140 [254] of the same title provides that specific appropriations for the benefit of Indian tribes may be diverted to other uses "with the consent of said tribes, expressed in the usual manner."

Perhaps the most important provision for tribal participation in federal Indian administration is found in the last sentence of section 16 of the Act of June 18, 1934. which, applying to all tribes adopting constitutions under that act, declares:

> The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.[255]

Under this section each organized tribe has the right to present its comments and criticisms on the budgetary plans of the Interior Department covering its own reservation prior to the time when such plans are considered by the Bureau of the Budget or by Congress. This is a power quite distinct from the tribal power to prevent the disposition of tribal funds without tribal consent, a power elsewhere discussed.[256]

While this provision imposes a legal duty upon administrative authorities, it is, of course, purely advisory so far as Congress is concerned.

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[249] *Morris v Hitchock,* 194 U. S. 384 (1904) ; *Buster v. Wright,* 135 Fed. 947 (C. C. A. 8, 1905), app. dism. 203 U. S. 599; *Maxey v. Wright,* 3 Ind. T. 243, 54 S. W. 807 (1900). aff'd 105 Fed. 1003 (1900) ; *Zevely v. Weimer,* 5 Ind. T. 646, 82 S. W. 941 (1904) ; 23 Op. A. G. 528.

[250] See annotations to 25 U. S. C. 48 in various annual supplements to U. S. C. A.

[251] Act of May 17, 1882, sec. 66, 22 Stat. 68, 88, reenacted Act of July 4, 1884. sec. 6. 23 Stat. 76, 97.

[252] Act of June 30, 1834, sec. 11, 4 Stat. 735, 737 ; amended Act of March 3, 1847, sec. 3, 9 Stat. 203; amended Act of August 30, 1862, sec. 3, 10 Stat. 41, 56 ; amended Act of July 15, 1870. secs. 2–3, 16 Stat. 335, 360. See Chapter 15. secs. 22, 23.

[253] Act of June 30. 1834, see. 12, 4 Stat. '735. 737.

[254] Act of March 1, 1907, 34 Stat. 1015, 1016.

[255] 48 Stat. 984, 987, 25 U. S. C. 476.

[256] See Chapter 5, sec. 5B, and Chapter 15, sec. 24.