

Troublesome Aspects of Western Influences on Tribal Justice Systems and Laws

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INTRODUCTION

The Federal Bar Association asked me to give an “overview of the colonial process by which tribal written law came to resemble the legal structures of the states and the federal government” at its annual FBA conference on Federal Indian law held in Albuquerque, New Mexico.² This paper is largely an outgrowth of this presentation.

I am aware that there are some in the academy that have taken tribal judges to task for being overly influenced by western concepts of justice.³ My goal here is not to criticize any tribal court system for being influenced by western law, but to highlight why and how this may have happened, as well as to discuss some of the problems associated with efforts to “integrate” tribal justice systems into the United States political system.

The influence of western culture on tribal judicial systems is due to at least three distinct efforts pursued by the federal government. The first is the attempt to impose western norms on the *structure and process* of tribal judicial decision-making. The second is the attempt to influence the *culture* of Indian tribes, and finally, the improper efforts to *incorporate or integrate* Indian tribes into the United States. After briefly discussing the efforts at imposing western norms on the culture and structure of tribal courts, this paper will focus on issues surrounding the integration of tribes within the United States.

I. Structure and Process

Explaining why the United States started to interfere with the structure of tribal courts and the process by which tribes develop their own laws, scholar and tribal judge B.J. Jones, summarized humorously in five words “Blame it on Crow Dog.”⁴ Jones’s point was that once the United States government was told by the Supreme Court in *Ex Parte Crow Dog*⁵ that it did not have criminal jurisdiction over Crow Dog, Congress set out to make sure that the next time around, the white man’s justice would be applied to such crimes.⁶ Thus that same year, 1883, the first Courts of Federal Regulations otherwise known as C.F.R. courts were created by the Bureau of Indian Affairs (BIA).⁷ The original purpose behind the creation

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² Alex Tallchief Skibine, Address at the Federal Bar Association Indian Law Conference (April 6 & 7, 2000).

³ See Russell Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL’Y 74 (1999).

⁴ B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 468 (1998).

⁵ 109 U.S. 556 (1883).

⁶ The Congress proceeded to enact the Major Crimes Act in 1885, the constitutionality of which was upheld in *United States v. Kagama*, 118 U.S. 375 (1886). It seems that what antagonized Congress was the realization the Crow Dog’s sentence under Sioux Law was not going to be as severe as what his punishment would have been had he been sentenced in federal court.

⁷ The legality of the CFR courts was upheld in *United States v. Clapox*, 35 F. 575 (1888).

of C.F.R. courts was to supplant the existing tribal mechanisms implementing “justice” in Indian country.⁸

Of course, *Crow Dog* was not the real culprit. Although a lot of the blame can be directed at Congress, perhaps the greater sinner was the Supreme Court and its decisions to allow Congress plenary power over Indian affairs by refusing to judicially review the legality of these acts.⁹ Eventually, with the 1934 enactment of the Indian Reorganization Act,¹⁰ tribes were allowed to develop their own courts but because the tribal laws and regulations setting the tribal courts had to be approved by the BIA, the tribes were under great pressure to incorporate western types of judicial procedure into their own judicial systems.

An historical overview of all federal legislation that has attempted to interfere with the autonomy of tribal justice systems is beyond the scope of this article,¹¹ however the experience of my own tribe, the Osage Tribe of Oklahoma, is indicative of how pervasive United States’ interference with tribal government was. It has been estimated that the Osage Tribe now of Oklahoma, but formerly of Kansas, Missouri, and Arkansas, lost close to 100 million acres as the result of the colonial process.¹² The tribe lost much more than just its lands. It also lost its constitutional form of government. The Osages had adopted a Constitution in 1881, which was modeled from a Constitution drafted by the Cherokees, which was loosely modeled after the United States Constitution, which itself was inspired by the political model devised by the Six Nations Iroquois Confederacy.¹³ By the early 1900s the BIA had problems with the members of the Osage Tribal Council, which had been elected under the 1881 Constitution.¹⁴ Therefore, the BIA suspended the Osage Constitution, fired all the councilmen, and hand picked a new council.¹⁵ In 1906, the Congress seemingly endorsed the BIA’s action by enacting a law which among other things redefined the membership of the tribe, described exactly what the Osage tribal government was suppose to look like,¹⁶ gave the BIA the task of conducting the tribal elections,¹⁷ and some would argue, also gave the BIA the authority to determine “who” could vote in these now federal elections. It is obvious that interfering with the structure of the tribal legislature will in turn have

⁸ See Jones, *supra* note 3, at 470.

⁹ See U.S. v. Kagama, 118 U.S. 375 (1886).

¹⁰ 25 U.S.C. § 476 (1994).

¹¹ See Douglas B. L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142 (1995) (providing general historical background on tribal courts); see also Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL’Y 17, 20-22 (1997).

¹² See generally LOUIS F. BURNS, A HISTORY OF THE OSAGE PEOPLE 242 (1989).

¹³ There is nothing wrong with adopting such a document. A tribal system can be genuinely tribal and have borrowed from or build upon the previous experiences of foreign institutions. What is important is that the borrowing be done by the tribe itself free of any unwarranted influence.

¹⁴ See TERRY WILSON, THE UNDERGROUND RESERVATION: OSAGE OIL. 42—44 (1985).

¹⁵ See *Harjo v. Kleppe*, 420 F. Supp. 1110 (1976) (holding that the Department of the Interior did not have the discretion to arbitrarily decide what constituted the legitimate government of a tribe but should have instead followed the specific congressional directives). In *Harjo*, the Department only recognized the Principal chief of the Creek Nation as the legitimate government of the Creeks and had refused to acknowledge the legitimacy of the Creek National Council even though such Council had never been abolished by any Act of Congress. *Id.* at 1114.

¹⁶ See Act of June 28, 1906, 45 Stat. 539.

¹⁷ See 25 C.F.R. parts 90.1-49 (2000).

an important impact on the tribal justice system as well as the laws, which are subsequently enacted by the tribe.

II. Interference with Tribal Culture:

One of the most basic interferences with tribal culture that has also had an impact on the evolution of tribal law was the systematic effort to eradicate Native languages.¹⁸ If I remember correctly, when I first visited the Osage reservation as a child in the 1950s, in order to publicly speak at official or social functions such as funerals and weddings, one had to speak in the Osage language. When I came back to the reservation as an adult, this custom had already vanished. Unfortunately for some tribes, the United States' effort to eradicate Indian languages has mostly been successful. This loss has an important impact on tribal court decisions because as some of the decisions of the Navajo Supreme Court remind us, some native concepts of justice can only be expressed in their native tongue.¹⁹ The Navajo Supreme Court has done a great job in not replacing Navajo words with English ones in the text of their opinions. Instead the Court has kept the native words and takes great care to fully explain what they mean.²⁰

Other concessions made to the western ways of thinking include the reliance on the written word at the expense of oral tradition. This does pose a problem for those tribes whose laws are related to their religion and the religion requires some aspects of it to remain secret. A second major cultural interference with tribal justice systems was the attempt to eradicate native religions. It should not be forgotten that the last effort of the United States cavalry against the tribes involved a campaign to eradicate Indian religion including the ghost dance and the sun dance. Some may ask what religion has to do with judicial opinions? I once heard Justice Austin of the Navajo Supreme Court give a talk on Navajo concepts of justice. He explained that one could not separate Navajo customary law or what we would call common law, from some of the Navajo's fundamental religious beliefs because these beliefs formed the foundation and were an integral part of the Navajo customary law.²¹

III. Integration and Incorporation:

A. The Nature of the Debate and Why it Matters:

¹⁸ See Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of their Languages*, 60 OHIO ST. L. J. 901 (1999).

¹⁹ See *Means v. District Court of the Chinle Judicial District*, 26 ILR 6083 (Nav. Sup. Ct. 1999).

²⁰ See also *Means*, 26 ILR at 6087 (where the Court made use of the word "*Hadane*" in order to show why Navajo tribal courts had criminal jurisdiction over a Sioux Indian who was not formally an "enrolled" member of the Navajo Nation but had become so associated with the Navajo Nation that he could under traditional Navajo law be considered a Navajo for the purpose of being subjected to the jurisdiction of Navajo courts); see generally *In re Certified Question II: Navajo Nation v. MacDonald*, 16 ILR6086, 6092 (1989)(where the Navajo Nation Supreme Court used the word *Naat'aanii* in order to explain why the Navajo political officials have a fiduciary trust and can be suspended when in violation of this trust).

²¹ See Robert Yazzie, "*Life Comes From It*": *Navajo Justice Concepts*, 24 N.M.L.REV. 175 (1994); see also Hon. T. Tso, *Judicial Branch of the Navajo Nation Annual Rep.* 1-2 (1988).

The third element that has a major impact on tribal justice systems is the efforts aimed at integrating tribal justice systems into the United States political system. Whether the tribes, as political entities, have been or should be integrated into the United States political system has been a divisive and difficult issue.²² On one hand, being a part of the United States system would allow tribal court decisions to be given full faith and credit by federal and state courts. On the other hand full faith and credit is a two way street and tribal courts would also have to recognize the decisions of state and federal courts. Without full faith and credit, however, non-Indian courts will only enforce tribal court judgments under principles of comity. Statements made by the Ninth Circuit decision in *Wilson v. Marchington*²³ highlight the potential problems. In that opinion, the Ninth Circuit expressed the view that before it will honor a tribal judgment, it reserves the right to not only decide de novo if the tribal court had jurisdiction but also whether the tribal court had given due process to the litigant.²⁴ Due process can have very different connotations in Native American tribal traditions than it does in western legal tradition.

If courts of another sovereign are allowed to review tribal courts' decisions, tribal courts might be influenced to conform to the norms of that sovereign. Some have argued that this has made tribal courts overly concerned with having their judgments respected by non-Indian courts and it has influenced them to over rely on western concepts of justice. Some other scholars have responded that this just demands that tribal judges walk a fine line between the Native American and Western paradigms of justice.²⁵ To a certain extent, it is true that decisions such as *National Farmers Union v. Crow Tribe*,²⁶ while on one hand respectful of tribal courts processes, nevertheless do create a dilemma because they allow for direct federal court review of tribal court jurisdictional determinations.

Coming to a correct understanding of the place of tribes vis-a-vis the federal government and the states is also important because these days, many federal judges have a federalist philosophy. By federalism, I have in mind the Jeffersonian definition of federalism, which means that central governmental power should be dispersed and flow to local governments. Tribes as local governments should benefit from such a devolution of federal power. The courts should adopt a tripartite form of federalism that should include the federal government, the states and the Indian nations. Unfortunately for many federal judges, including a majority of those on the Supreme Court, tribes do not seem to fit neatly in the system and therefore any devolution of federal power only flows to state institutions.

²² See also Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899 (1998)(arguing against any form of integration into the United States political system); see generally Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990).

²³ 127 F.3d 805, 810 (9th Cir. 1997).

²⁴ *Id.* at 810.

²⁵ See generally B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87 (1997).

²⁶ 471 U.S. 845 (1985)(holding that even though deciding whether a tribal court had jurisdiction over a civil law suit involving a defendant who was not a member of the tribe presented a federal question giving federal court jurisdiction under 28 U.S.C. 1331, the non-member defendant still had to exhaust his remedies in tribal courts before the federal court could hear the case).

The Supreme Court has been schizophrenic as far as determining the legitimate place of tribes within the United States political system. At one end, the Supreme Court in its well known 1881 statement in *United States v. Kagama*²⁷ took the position that within the geographic confines of the United States there are only two sovereigns, the state and the federal government, and all governmental power has to flow from one or the other.²⁸ At the other end, around the time of the *Kagama* decision, the Supreme Court also decided *Talton v. Mayes*²⁹ where it held that when the Cherokee Nation exercised its power to prosecute one of its members, it was exercising an inherent sovereign power which predated the existence of the United States Constitution.³⁰

The position of tribes within the federal system also impacts their relationship with states. Being within a state should not mean that tribes are not at least equal sovereigns with the states. As recently stated by one scholar, “the relationship between the states and the tribes should reflect the relationship between two states as sovereigns within the same system, on the same plane, whose sovereign spheres do not overlap but influence each other through the federal political process.”³¹ Although I realize that some court decisions have said that tribes have a sovereignty status higher than that of the states,³² my argument does not take issue with this statement but only asserts that under no condition should tribes ever accept a degree of sovereignty that is less than the one enjoyed by the states under the United States Constitution. Recognizing that tribes should have at least as much sovereignty as the states is important because it structures the kind of relationship tribal courts will have with state courts.³³ Tribes should be allowed to make compacts with the states on a sovereign-to-sovereign basis.³⁴ The success of

²⁷ 118 U.S. 375 (1886).

²⁸ *Id.* at 379.

²⁹ 163 U.S. 376 (1896).

³⁰ *Id.* at 384 (holding that the Cherokee Nation’s government was not bound by the Fifth Amendment of the United States Constitution which only applies to the federal government and under the Fourteenth Amendment, the states).

³¹ See Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 619 (1994). The problem of course is that the states have the Tenth and Eleventh Amendments to protect their rights while the tribes only have their treaties. Unlike Tenth and Eleventh Amendments, history tells us that treaties can be easily abrogated, broken, or repealed.

³² See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1981)(Stevens, J., dissenting) (“In many respects, the Indian tribe’s sovereignty over their own members is significantly greater than the State’s power over their own citizens.”).

³³ I spoke about Indian sovereignty in 1978 at a conference in western Washington. I was followed on the program by the then attorney general for the state of Washington, Slade Gordon who had just won the *Oliphant* case in the Supreme Court. He started his presentation by saying that my talk about sovereignty was not helpful and encouraged the tribes to come into his office and negotiate “jurisdictional” agreements with him but he also said “when you come, you have to leave your sovereignty at the door. I am willing to talk to you about Indian jurisdiction which does exist but not about Indian sovereignty which does not.” He seemed not to have realized that without tribal sovereignty, there could not be any tribal jurisdiction.

³⁴ I was recently involved in a tribal state forum between tribal and state judges in Utah. This forum, originally created with seed money from a Justice Department grant, is aimed at promoting a working relationship between tribal and state courts and has enabled tribal and state judges to begin drafting various agreements and memorandums of understanding aimed at coordinating activities as well as resolving some of the outstanding issues between state and tribal courts. This can be and has been in some cases a very worthwhile and productive endeavor. The forum I was involved with benefited

these compact negotiations will depend largely on the willingness of the state judges to accept and treat the tribes as equal sovereigns within the United States political system.³⁵

Professor Robert Clinton once remarked that except for perhaps treaties, no act of Congress has formerly or legitimately politically integrated Indian tribes within the United States.³⁶ For sure, many attempts to integrate the tribes geographically and politically within the United States political system have not been legitimate. Supreme Court decisions such as *Johnson v. M'Intosh*³⁷ integrated all tribal lands within the geographical limits of the United States and then appropriated them all. Other court decisions have held that Indian tribes and their territories have been incorporated within the geographical and political boundaries of the states.³⁸ Other actions with integrative results have been the congressional acts interfering with issues of internal tribal governance, or the citizenship of tribal members such as the Act popularly known as the Indian Citizenship Act, which made all Indians citizens of the United States without first asking them if this was acceptable.³⁹

Even though all such efforts with the exception of treaties may have been illegitimate, it is undeniable that they have resulted in a certain amount of de facto

tremendously by the position of mutual respect held by the two co-chairs: Chief Justice Yazzie of the Navajo Supreme Court and former Chief Justice Zimmerman of the Utah Supreme Court.

³⁵ See, e.g., Hon. Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709 (1999).

³⁶ See Clinton, *supra* note 21, at 845-50.

³⁷ 21 U.S. (8 Wheat.) 543 (1823).

³⁸ Tribal territories did not have to be considered within the political or geographical boundary of the states any more than the territory of the Hopi Tribe is considered within the Navajo Nation's boundary just because it is surrounded by Navajo land. As a matter of fact, many federal acts incorporating new states into the Union had specific provisions in them stating that the tribal territories would not become part of any new State unless the tribes consented to it. The first case that interpreted such a clause held that the territories of the Shoshone Indians were not within the territory of Idaho because there was such an exclusion clause and the treaty signed with the Shoshones could not be interpreted as giving their consent to be included. See *Harkness v. Hyde*, 98 U.S. 476, 478 (1878). Two years later however in *Langston v. Monteith*, 102 U.S. 145, 146 (1880), the Court took a different approach and required that treaties signed with tribes contain a specific clause excluding the tribal territory from the states. Many tribes signed treaties before the creation of the federal territories or the incorporation of the new states, therefore most treaties had no such specific exclusion clauses. From then on tribes were considered included within the states unless specifically excluded while originally, they were excluded unless specifically included.

³⁹ I do not doubt that many Indians wanted United States citizenship and were proud of it. But many were not. The issue here is not United States citizenship, the issue is whether a choice should have been given to the tribes. Although Congress has much power to prevent people from becoming citizens, some scholars have argued that it is at least questionable whether Congress really has the power to declare people citizens without first asking them. At the time it was given, this unilateral grant of citizenship was not in accord with at least some tribal laws. For instance, my own tribe's 1881 constitution proclaimed that you could not be a citizen of the Osage Nation if you were a citizen of any other nation, including the United States. See THE CONSTITUTION AND LAWS OF THE OSAGE NATION 1881—1882, reprinted in THE CONSTITUTION AND LAWS OF THE AMERICAN INDIAN TRIBES XXXI, at 2 (Scholarly Resources, Inc.)(1975). The Osage Constitution did not talk in terms of membership but of citizenship. *Id.* It seems that around that time, the early 1900's, many Indians lost their tribal citizenship and acquired tribal membership. I guess you can say they exchanged their passports for a membership card. See, e.g., LAWS RELATING TO OSAGE TRIBE OF INDIANS, From May 18, 1824 to March 2, 1929, reprinted in THE CONSTITUTION AND LAWS OF THE AMERICAN INDIAN TRIBES III, at 73 (Scholarly Resources, Inc.)(1973).

integration.⁴⁰ This article will not debate or take a position on whether the tribes should be politically integrated.⁴¹ Instead, it will discuss some problems associated with such integration.⁴² A good example underlying the importance of correctly positioning tribes within the United States political system occurs when tribes administer programs pursuant to federal law. This can be seen in the Environmental Protection Agency's (EPA) interpretation of the sections in the Clean Water Act (CWA)⁴³ and the Clean Air Act (CAA),⁴⁴ allowing treatment of tribes as states.⁴⁵ The EPA took the position that under the CWA, the tribes will be treated as states only if they can show that they have jurisdiction over all reservation waters under principles of federal common law.⁴⁶ As to the CAA, the EPA took the position that it contained a delegation of federal authority to the tribe.⁴⁷

I have previously argued that both programs should be considered as a congressional reaffirmation of tribal sovereignty over reservations' air and water.⁴⁸ If tribes are treated as states, then they should have at least the same sovereignty as states. This means full sovereignty not only over their members but also over their territories. I took this position because, as the Supreme Court's decision in *Strate v. A-1 Contractors*⁴⁹ reminded some of us, having to prove tribal jurisdiction under federal common law can be a difficult proposition, and the rules of the game are subject to change without prior notice usually to the detriment of tribes.

On the other hand, delegation of federal authority can be a dangerous thing. Does it make the tribe an adjunct or an arm of the federal government? If that is the case, it will definitely have an impact on the administration of tribal law by the tribal courts. For one thing, it may mean that the United States Constitution is fully applicable to tribal governments while they administer these delegated programs. Some recent court decisions have raised puzzling questions. For instance, in a recent state court decision, *Seminole Tribe of Florida v. Florida State Department of Revenue*,⁵⁰ the Florida District Court of Appeals held that the tribe was exempted from state sales and use taxes. The court determined that the tribe

⁴⁰ *But see* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 3, 51 (1987).

⁴¹ *But see* Porter, *supra* note 21, at 899.

⁴² Discussing integration implicates discussing the correct position and status of Indian tribes within the constitutional framework. *See* Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313 (1997).

⁴³ 33 U.S.C. § 1377(a)(1988).

⁴⁴ 42 U.S.C. § 7601(d)(1994).

⁴⁵ 33 U.S.C. § 1377(e)(1988).

⁴⁶ *See* 40 C.F.R. §§ 123.31, 501.22 (1999); *see generally* James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N. D. L. REV. 433 (1995).

⁴⁷ *See* Clean Air Act 42 U.S.C. 7601(d)(1995); *Indian Tribes: Air Quality Planning and Management*, 63 Fed. Reg. 7254 (1998); *see generally* William H. Gelles, *Tribal Regulatory Authority Under the Clean Air Act*, 3 ENVTL. LAW. 363 (1997). The EPA's interpretation of the "Tribes as States" section of the Clean Water Act was upheld in *Montana v. E.P.A.*, 137 F.3d 1135 (9th Cir. 1998). The EPA's interpretation of a similar section in the Clean Air Act was upheld in *Arizona Public Service Company v. E.P.A.*, 27 ILR 2163 (2000).

⁴⁸ *See* Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes As States" Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15, 38 (1998).

⁴⁹ 520 U.S. 438 (1997).

⁵⁰ 720 So.2d 1117 (Fla. Dist. Ct. App. 1998).

functioned as a federal instrumentality since it provided services which otherwise would be provided by the federal government.⁵¹ Similarly, in *United States v. Smith*,⁵² the Tenth Circuit held that because the police chief of the Osage Tribe was acting as a federal officer when he was attacked, his assailant could be convicted of the crime of assaulting a federal police officer. The Tenth Circuit was of the opinion that when arresting someone for disorderly conduct, the Osage Tribal police chief was enforcing federal law because he was acting pursuant to a self-determination contract entered between the tribe and the federal government pursuant to P.L. 93-638.⁵³ The Tenth Circuit cited as authority *United States v. Young*,⁵⁴ where the court held that while not every person employed to carry a 638 contract is acting pursuant to a grant of authority from the Department of the Interior, a police officer was because he was performing activities which otherwise would be performed by the BIA police. Although before they became self-governance contracts, 638 contracts used to be considered procurement contracts,⁵⁵ it was never proper to view 638 contracts as tribes assuming a federal function. For one thing, to the extent that these functions concern internal tribal self-governance, the federal government should not be considered as having the power to interfere with these tribal powers, at least not without tribal consent.⁵⁶

In *Thomas v. United States*,⁵⁷ some tribal members were challenging a Secretary of the Interior's decision not to recognize a tribal election. The Secretary argued that the case should be dismissed because the current tribal government, which supported the action of the Secretary, was an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedures but could not be joined against its will because of tribal sovereign immunity.⁵⁸ The Court held that the election to amend the tribal constitution was a federal election because the Secretary, pursuant to congressional legislation, conducted it.⁵⁹ The tribe, as represented by the current tribal leadership, was therefore not an indispensable party under Rule 19(b). If a tribal election conducted by the Secretary of the Interior is a federal election, does it follow that the people elected pursuant to such elections are federal officials in the same manner that the Osage tribal police chief was found to be a federal police officer because he was executing federal laws? Is the determination that such tribal officer could be deemed a federal officer based on a finding that he was executing delegated federal authority?

⁵¹ *Id.*

⁵² 194 F.3d 1321 (10th Cir. 1999).

⁵³ Because the police chief was acting under 25 USC 2804(a) he could be considered a federal officer under 18 USC 111.

⁵⁴ 85 F.3d 334, 335 (8th Cir. 1996).

⁵⁵ These are the same type of contracts that anyone procuring a service for the federal government, such as for instance building an airplane for the army, has to entered into.

⁵⁶ This reminds me of an opinion written by Browning Pipestem right after his appointment as a CFR court judge in Oklahoma. Just like some of the early opinions of Justice Marshall concerning the power of federal courts, Browning was attempting to lay the foundation for the CFR Court's power in Indian Country. He took the position that the only way the CFR courts could legitimately assume power over tribal members was with the consent of the tribes. Under his theory, the CFR courts were in fact acting pursuant to a delegation of tribal authority. I think he was right. The BIA should not be viewed as having the power to impose CFR courts on their members without tribal consent.

⁵⁷ 189 F.3d 662 (7th Cir. 1999).

⁵⁸ *Id.* at 666.

⁵⁹ *Id.* at 667-68.

The decisions just discussed above set dangerous precedents in that they contribute to the integration of Indian tribes not as much into the United States political system as into the federal government itself. If courts start to view tribes as federal instrumentalities or as only exercising delegated federal authorities, tribes will eventually lose the “inherent” attributes of their sovereignty, which is what set them apart from any other local government within the United States. In other words, they stand to lose the uniquely “tribal” or “native” component of their sovereignty. For this reason, the next section argues that it is better to view certain recent acts of Congress as accomplishing a “reaffirmation” of inherent tribal sovereignty rather than a congressional delegation of federal authority to the tribes.

B. Resolving the Delegation v. Reaffirmation of Tribal Authority Conundrum:

Starting in 1978 with the decision in *Oliphant v. Suquamish Indian Tribe*,⁶⁰ the Supreme Court has adopted the implicit divestiture doctrine according to which Indian tribes are said to have been implicitly divested of any inherent sovereign power if such power is inconsistent with their status as domestic dependent nations.⁶¹ Pursuant to the doctrine, tribes have been judicially divested first of criminal jurisdiction over non-Indians,⁶² and then over non-member Indians.⁶³ In the absence of consensual relations, tribes have also been divested of the power to regulate the activities of nonmembers on nonmember fee lands within Indian reservations unless such activities can be said to have a serious and direct impact on the tribe’s health and welfare, political integrity or economic security.⁶⁴ More recently, the Supreme Court held that tribal courts have been divested of civil jurisdiction over any law suits involving nonmember defendants for any activity which occurred on lands over which the tribe has lost its “right to exclude” unless the tribe could show that such jurisdiction was needed to allow tribal members to make their own laws and be ruled by them.⁶⁵

Although there have been some disagreements among scholars, the Supreme Court has expressed the view many times that following a judicial divestment of tribal jurisdiction, a tribe could only regain authority pursuant to a congressional *delegation* of federal authority.⁶⁶ For instance, in *Oliphant*, the Court stated that “[a]n examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.”⁶⁷ In *Duro v. Reina*,⁶⁸ the Court took the position that since a tribal criminal prosecution over a non-member Indian was “a manifestation of external

⁶⁰ 435 U.S. 191 (1978).

⁶¹ The Court first described Indian nations as domestic dependent nations in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

⁶² *Oliphant*, 435 U.S. 191.

⁶³ *Duro v. Reina*, 495 U.S. 676 (1990).

⁶⁴ *Montana v. United States*, 450 U.S. 544, 566 (1981).

⁶⁵ *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

⁶⁶ See, e.g., L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53 (1994); Nell Jessup Newton, Permanent legislation to Correct *Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992).

⁶⁷ 435 U.S. at 208 (emphasis added).

⁶⁸ 95 U.S. 676 (1990).

relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by *delegation* from Congress, subject to the constraints of the Constitution.⁶⁹ Finally in the realm of civil jurisdiction, Justice Thomas in *South Dakota v. Bourland*⁷⁰ endorsed the statement first made in *Montana v. United States* [71] by asserting that the dissent "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without *express congressional delegation*' and is therefore not inherent."⁷²

Congress was not impressed by such judicial verbiage when it decided to overturn the Court's decision in *Duro* by recognizing and reaffirming the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians within their reservations.⁷³ Recently however, in *Means v. Northern Cheyenne Tribal Court*,⁷⁴ the Ninth Circuit expressed the view that Congressional legislation allowing Indian tribes to prosecute nonmember Indians, the so-called *Duro-fix* legislation,⁷⁵ was a delegation of federal authority to the tribes.⁷⁶ Although the Ninth Circuit held that the *Duro-fix* was not applicable in *Means* because Congress did not intend such legislation to be applied retroactively, it indicated in a footnote that had such been the case, serious equal protection questions would arise because non-member Indians would be subject to tribal jurisdiction but not non-Indians.⁷⁷ The Ninth Circuit further observed that there would also be serious due process questions concerning the power of Congress to delegate authority subjecting United States citizens to be prosecuted without all the protections of the Bill of Rights.⁷⁸ Similarly, a panel for the Eighth Circuit held that double jeopardy barred federal prosecution of an Indian who had already been prosecuted by a tribe pursuant to the *Duro* legislation because such legislation amounted to a delegation of federal authority to the tribe.⁷⁹

Whenever tribal jurisdiction over non-members is contingent on some kind of congressional legislation, does this automatically mean that the tribes are exercising delegated federal authority or can it still be said that they are exercising inherent authority which has been somewhat reaffirmed and supported by Congress? Although Congress clearly intended to reaffirm tribal powers lost as a result of *Duro*, the intent of Congress is not always that clear.

⁶⁹ *Id.* at 686 (emphasis added).

⁷⁰ 508 U.S. 679 (1993).

⁷¹ 450 U.S. 544 (1981).

⁷² 508 U.S. at 695 n.15 (emphasis added) (citing *Montana v. U.S.*, 450 U.S. 544, 564 (1981)).

⁷³ 25 U.S.C. § 1301(2) (1994) (amending the Indian Civil Rights Act by adding the following to the definition of "powers of self-government"; "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.").

⁷⁴ 154 F.3d 941 (9th Cir. 1998).

⁷⁵ See 25 U.S.C. 1301 (1983).

⁷⁶ *Means*, 154 F.3d at 946 (stating "once the Supreme Court has ruled that the law is 'X,' Congress can come back and say, 'no, the law is 'Y,'" but it cannot say that the law was *never* 'X' or *always* 'Y.'").

⁷⁷ *Id.* at n.7.

⁷⁸ *Id.*

⁷⁹ *United States v. Weaselhead*, 156 F.3d 818, 824 (8th Cir. 1998). However, the district court decision to the contrary was reinstated by an equally divided en banc court in a cursory per curiam order. See *U.S. v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999).

The Supreme Court's decision in *United States v. Mazurie*, [⁸⁰] indicates that the Court may be predisposed to treat any tribal assumption of jurisdiction based upon an underlying act of Congress as a delegation of authority to the tribes and not a confirmation of tribal authority.⁸¹ The Court in *Mazurie* held that Congress could validly delegate to the tribes the authority to regulate liquor transactions on the reservation even if such transactions occurred on non-Indian fee land within the reservation.⁸² What is surprising, however, was that the act in question was treated and presumed to be a delegation of federal authority to the tribes. None of the Justices even raised the possibility that it could be an affirmation or recognition of tribal sovereignty. The statute at issue provided that certain federal laws prohibiting liquor transactions on Indian reservations would not be applicable if such "transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country."⁸³

Treating such legislation as a delegation of federal authority to the tribes could pose several problems that, at least in the mind of some scholars, would not exist if the legislation were treated as a "reaffirmation" of tribal authority.⁸⁴ To begin with, there are questions concerning the extent of Congress' power to delegate authority over certain non-member activities to the tribes. For instance, in *Mazurie*,⁸⁵ the Court acknowledged that there are limits on the authority of Congress to delegate its legislative power but held that "[t]hose limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter."⁸⁶ The Court concluded that the power to regulate liquor transactions on the reservation could be delegated to the tribe because the tribe had "independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter."⁸⁷ However, if a court finds that a tribe does not have jurisdiction over certain activities by non-members because such activities do not affect the internal and social relations of tribal life, an argument can be made that the tribes may not have the necessary degree of independent authority to allow a congressional delegation of authority over such activity.⁸⁸

Furthermore, there are serious questions whether tribes can act pursuant to delegated federal authority without affording affected individuals the full protection of the United States Constitution. While it is true that pursuant to its

⁸⁰ 419 U.S. 544 (1975).

⁸¹ *Id.* at 556-57.

⁸² *Id.*

⁸³ 18 U.S.C. § 1161. The Court in a later case, *Rice v. Rehner*, 463 U.S. 713, 722 (1983) stated that there was no tradition of Indian sovereignty over liquor control on the reservation. The reason for this lack of tradition was that the federal government had previously expressly pre-empted tribal regulation by imposing a blanket prohibition on liquor within Indian reservations.

⁸⁴ See *Duro Decision: Criminal Misdemeanor Jurisdiction In Indian Country: Hearings on H.R. 972 Before the House Comm. on Interior and Insular Affairs*, 102d Cong., 135-43 (1991) (testimony of Prof. Nell J. Newton).

⁸⁵ 419 U.S. 544.

⁸⁶ *Id.* at 556-57 (citation omitted).

⁸⁷ *Id.* at 557.

⁸⁸ *But cf.* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990) (the author questions the validity of delegation to bodies not possessing enough attributes of sovereignty).

Indian commerce power, Congress can criminally prosecute non-member Indians on Indian reservations, Congress may not be able to delegate what it does not have and since it does not have the power to prosecute such non-members without affording them the protection of the Constitution, it is highly questionable whether it should be able to have the power to authorize the tribes to do that very thing.⁸⁹ Although I have previously argued that legislation such as the *Duro*-fix should be able to constitutionally survive an equal protection challenge even if treated as a “delegation” of authority,⁹⁰ I believe that any such delegation legislation subjecting United States citizens to tribal criminal prosecution without the full protection of the Bill of Rights would face a serious constitutional challenge.⁹¹ It seems, therefore, that it would be prudent for Congress to provide that in exercising such delegated powers, tribes would have to afford all the constitutional protections normally available to all persons affected by federal or state governmental actions.⁹²

Aware of the potential problems involved with any legislation delegating federal authority to the tribes, Professor Philip Frickey in a recent article took the position that Congress acted clearly within its power when it reaffirmed tribal authority in the *Duro*-fix legislation.⁹³ To illustrate his point, he gave the example of a state that was denied the right to regulate the length of semi-trailer trucks by a federal court on the ground that it unduly burdened interstate commerce.⁹⁴ According to Frickey, if Congress were then to enact legislation authorizing the state to regulate the length of such trucks, the state would be regulating pursuant to its police power and not pursuant to delegated federal authority.⁹⁵ The same result should obtain when tribes reassert criminal jurisdiction pursuant to the *Duro*-fix legislation.⁹⁶

⁸⁹ Gould, *supra* note 65, at 94-121.

⁹⁰ See Alex Tallchief Skibine, *Duro v. Reina* and the Legislation That Overturned It: A Power Play of Constitutional Dimensions, 66 S. CAL. L. REV. 767 (1993).

⁹¹ See *Reid v. Covert*, 354 U.S. 1 (1957).

⁹² My previous argument relied on the fact that courts have recognized that Congress has plenary power over Indian affairs not only because of the Indian Commerce Power but also pursuant to the trust relationship. Accordingly, Congress can at times act in a manner which otherwise might be constitutionally suspect as long as the legislation is tied to its role as trustee for the tribes. In recent cases, however, the Court has not mentioned either the “plenary” power of Congress or the trust relationship when considering the validity of congressional legislation allegedly infringing on constitutional rights. See, e.g., *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Irving v. Hodel*, 481 U.S. 704 (1987). In *Irving* for instance, the Court declared that a section of the Indian Land Consolidation Act of 1983, Pub. L. 97-459, 96 Stat. 2519, was unconstitutional because it took property rights without due process of law. The Court only mentioned the plenary power of Congress in a rather ambiguous and self-contradictory passage located in a concurrent opinion filed by Justice Stevens. In one sentence in his dissenting opinion, Justice Brennan wrote “... the conclusion that Congress has failed to provide appellees’ decedents with a reasonable opportunity for compliance implies no rejection of Congress’ plenary authority over the affairs and the property of Indians.” *Irving*, 481 U.S. at 734. Yet in the next line, he asserted that the Government’s power over the property of Indians is subject to constitutional limitations. *Id.* But if it is subject to such limitations, then by definition it is not plenary.

⁹³ See Philip P. Frickey, *A Common Law for our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L. J. 1, 67-68, n.322 (1999).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ At times, it seems that the Court is rather careless about distinguishing between a Congressional delegation of federal authority and a mere congressional authorization for another sovereign to regulate. For instance, the Court in *Rice v. Rehner*, 463 U.S. 713, 732 (1983), asserted that 18 U.S.C. § 1161, the

Some may question Professor Frickey's clever analogy because the Constitution does not treat tribes the same as it treats states. Thus, a state can regulate truck lengths pursuant to its own police power because the Constitution recognizes that states have such powers unless it is pre-empted due to a conflict with a power constitutionally assigned to Congress. As Professor Frickey himself observed, the state police power has always existed, it was only temporarily pre-empted by federal common law because pre-emption was deemed inconsistent with the power of Congress to regulate commerce.⁹⁷ Unlike the states whose limited sovereignty is recognized and guaranteed in the Constitution, the tribes' sovereignty is neither fully acknowledged nor preserved in the Constitution.⁹⁸

Nonetheless, this article agrees with Professor Frickey's position that judicially divested tribal powers should be treated as having been pre-empted by federal common law until Congress consents to the tribal exercise of such powers. These judicially divested tribal powers could even be conceptualized as being held in trust by the United States for the benefit of the tribes. For instance, in the first Supreme Court decision to ever mention and recognize tribal sovereign immunity from suit, the Supreme Court stated that "[t]hese Indian nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."⁹⁹ Just as a tribal decision to lease or sell tribal trust lands to nonmembers has to be approved by the federal government, cases such as *Duro*¹⁰⁰ can be viewed as requiring that a tribal decision to assume criminal jurisdiction over nonmembers has to be somehow condoned or approved by the federal government.¹⁰¹ In some fashion, tribal inherent powers that have been judicially divested can be conceived as being in a state of suspended animation until Congress gives some kind of indication that such tribal powers can be reactivated.

For all these reasons, it seems that the courts could legitimately hold that Congress can enact legislation confirming or reaffirming the existence of tribal

same statute at issue in *Mazurie*, also delegated federal authority to the state to regulate liquor transactions on Indian reservations. Yet earlier in the opinion, the Court had described section 1161 as a federal authorization for the states to assume jurisdiction. *Id.* at 726. Under professor Frickey's theory, however, section 1161 should not have been described as a delegation to the states.

⁹⁷ Frickey, *supra* note 92.

⁹⁸ "Indians" and "Indian Tribes" are each mentioned once in the Constitution. "Indians" are mentioned in Article I, Section 2, Clause 3 for the purposes of "excluding Indians not taxed" from being counted for the purpose of apportioning representatives to the United States House of Representatives. "Indian Tribes" are mentioned in Article I, Section 8, Clause 3 for the purpose of allowing Congress to regulate commerce with the Indian tribes.

⁹⁹ See *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). This concept of governmental powers being transferred in trust to a government was also mentioned in the infamous Chinese exclusions case, *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889), where the Court stated that "... the powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties." This theory can also explain why the federal government may have certain powers over Indian affairs beyond commerce. Some powers can be considered to have been transferred in trust to the United States for the benefit of the tribe.

¹⁰⁰ 495 U.S. 676 (1990).

¹⁰¹ This would not mean that tribes have lost all their sovereign powers and now are under the United States Constitution. See Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty Under the Constitution*, 60 MONT. L. REV. 3 (1999).

authority over nonmembers. For instance, in *United States v. Enas*, [¹⁰²] the Ninth Circuit held that the *Duro-fix* legislation was recognition of inherent tribal sovereignty and not a delegation of federal authority to the tribes because:

It is well established that Congress may deal with the special problems facing Indians using its authority under the Indian Commerce Clause. Congress may alter the scope of tribal power as set forth by the Supreme Court if the Court determines that scope as a matter of federal common law; it can do so because Congress has legislative authority over federal common law. See *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313-14 (1981). Additionally, we note that Congress may *recognize* a power without being the *source* of that power. See *Wheeler*, 435 U.S. at 328 (1978).¹⁰³

IV. Conclusion

It is crucial for tribal courts not to become just an extension or appendage of federal courts.¹⁰⁴ The Supreme Court's recent application of the implicit divestiture doctrine may place the tribes and those in Congress who support an inherent vision of tribal sovereignty between a rock and a hard place if the Court's jurisprudence is interpreted as preventing Congress from affirming the previous existence of a sovereignty subsequently found to have been divested by the Court.

Let me conclude by invoking the closing ceremony at a conference I recently attended at St. Thomas University in Miami. A Mayan holy man conducted the ceremony. He started speaking in Mayan but at one point switched to Latin and his words reminded me of words used in Catholic mass. Afterwards, I asked his assistant what this was all about and whether the ceremony was truly Mayan. She said that at the level of spirituality that this holy man was operating, it did not matter what language he was speaking. His Mayan religion was strong enough to incorporate some Catholic concepts. The important thing here is that the process of incorporation was done by a Mayan according to the Mayan way.

It is not for me to tell tribes how "tribal" the tribal laws and courts should be and whether they should or should not pursue "integration" within the United States political system and if so, under what conditions. What I do believe is that the tribes should be the ones deciding and they will not be free to truly decide until both the states and federal government respect their sovereignty and let them decide pursuant to a tribal process.

¹⁰² 27 ILR 2083 (9th Cir. 2000).

¹⁰³ *Id.* at 2084-85 (some citations omitted).

¹⁰⁴ As recently stated by Professor Christine Zuni, "... to the extent that tribal justice systems pattern themselves, not only in structure but in the law applied in their systems, after federal and state court systems, they surrender their own unique concepts of native law and participate, at a certain level, in their own ethnocide. Zuni, *supra* note 10, at 24. Another Native American professor stated that: [W]hy is the preservation of the native paradigm of justice so important for modern tribal courts? The reason is internal credibility. Arguably. The ultimate barometer for determining the success of a tribal court is whether the grandmothers and grandfathers of a particular tribe, that routinely appear before the tribal court, leave with the sense that traditional justice has been done. Jones, *supra* note 24, at 91.