Chapter 5
THE SCOPE OF FEDERAL POWER OVER INDIAN AFFAIRS

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SECTION 1. SOURCES OF FEDERAL POWER

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

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

* * * What is the constitutional basis of the national authority over the Indians? The national government is one of powers delegated by the states; yet Indians are mentioned in the U. S. Constitution only twice—one to exclude "Indians not taxed" (a phrase never more explicitly defined, but probably meaning today Indians resident on reservations, that is, on land not taxed by the states) from the count for determining representation in the lower house of Congress; and again to empower Congress to regulate "commerce with foreign nations, among the several states, and with the Indian tribes." This commerce power is an express constitutional basis for Congressional action concerning the Indians, as is also, so far as appropriations for Indians are concerned, the power of Congress to raise and spend money "for the general welfare." But the regulation of Indians from Washington has gone much farther. Much power has been exercised because the whole Indian country, except the few eastern reservations, was formerly part of the national domain, with exclusive title and sovereignty (except to the extent it was recognized to be restricted by Indian occupancy) in the national government. In this respect, the reservations within the bounds of the original thirteen states, having a different history, are probably subject to a different legal regime. * * *

The setting up of states in the territory once governed only from Washington has not affected the title of the nation to these lands. This ownership of the land supports a mass of Congressional and departmental regulations of land tenure on the reservations west of the Alleghenies; but even this, added to the express powers of Congress already mentioned, does not sustain the full extent of the national control of Indians wherever they are tribally organized. The chief foundation appears to have been the treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made. The colonies before 1776 (and the original states thereafter) often deal with the Indian tribes through political agreements. When in 1787 the Constitution made exclusive grant of treaty power to the national government, these precedents formed a strong basis for national dealings with Indian tribes, especially those beyond the bounds of any state. Habitually for nearly 100 years the nation treated with the Indians pursuant to the constitutional forms that were used in dealing with foreign states. And by a broad reading of these treaties the national government obtained from the Indians themselves authority to legislate for them to carry out the purpose of the treaties.

In view of the express grants of the commerce power and the expenditure-for-the-general-welfare power, of the fact that the greater Indian tribes lived on the national domain and not within any state (until the west was piece-meal admitted to statehood) and of the custom of dealing with Indian tribes by treaty, the United States Supreme Court has never found, so far as I can learn, that any Congressional regulation of Indians has been beyond the reach of national power. Indeed the net result is the creation of a new power, a power to regulate Indians. * * *(Pp. 80-81).

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

1 Art. 1, sec. 8, cl. 3.
2 This limitation upon federal power to situations involving the existence of a tribe is emphasized by the Supreme Court in the case of United States v. Forty-Three Gallons of Whiskey, 93 U. S. 188 (1876): As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department.
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welfare, property of the United States, and treaties, noted by Professor Rice, other constitutional grants of power have played a role in Indian legislation. Most important, perhaps, are the power of Congress to admit new states and (interstitially) to prescribe the terms of such admission, and to make war. Congressional powers of lesser importance involved in Indian legislation include the power to establish post-roads, to establish tribunals inferior to the Supreme Court, and to establish a "uniform rule of naturalization."

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

And see cases cited in Chapter 14, sec. 1, fn. 9. Note, however, that congressional objectives based upon federal power over the tribe may involve an exercise of jurisdiction over individual Indians or individual non-Indians, even outside of Indian lands. Dick v. United States, 208 U. S. 410 (1908).

... the case of The Kansas Indians, 5 Wall. 737 (1866), the Supreme Court said:

While the general government has a superintending care over the interests, freedom, and happiness of the Nations with them, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Compelling rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty agreement, or by property taken by and as part of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of the Union, and their property is withdrawn from the operation of State laws. (P. 757.)

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


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

Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming State to disclaim all right and title to lands "owned or held by any Indian or Indian tribes." (P. 229.) The State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Compelling rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty agreement, or by property taken by and as part of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of the Union, and their property is withdrawn from the operation of State laws. (P. 757.)

... Art. 1, sec. 8, cl. 1. Art. 1, sec. 9, cl. 7. Art. 1, sec. 8, cl. 2; Art. 1, sec. 8, cl. 2; Art. 1, sec. 8, cl. 9; Art. 3, sec. 1. The Supreme Court in the case of Roff v. Burnes, 168 U. S. 218 (1897), said:

... Congress may pass such laws as it sees fit prescriptive the rules governing the intercourse of the Indians with one another and with citizens of the United States. In all controversies to which an Indian may be party shall be submitted. (P. 239.)

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

... * * * And this power being a general one, Congress may provide for the punishment of such class of offenses as are committed in a court, and another class in a different court. (Pp. 587-588.) See Chapter 14, sec. 6A. Also see Chapter 19, sec. 2.

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

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

... Art. 1, sec. 8, cl. 4. See Chapter 8, sec. 2.

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

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

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

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

... See Chapter 5, sec. 9. Also see Lone Wolf v. Hitchcock, 187 U. S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U. S. 294 (1902); Brader v. James, 246 U. S. 88 (1918); N. D. Houghton, The Legal Status of Indian Sufferage in the United States, 19 Cal. L. Rev. (1931) pp. 507, 512; cf. Kriger, Principles of Indian Law, 3 Geo. Wash. L. Rev. (1935) pp. 279, 281; 13 Yale L. J. (1904) p. 256. * * * Congress possesses the large power of legislating for the protection of the Indians wherever they may be within the territory of the United States, * * * (United States v. Ramsey, 271 U. S. 467, 471 (1926)).

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

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

In Grays Harbor, 224 U. S. 640 (1912), the Court said:

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

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

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

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

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


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

SECTION 2. CONGRESSIONAL POWER—TREASY-MAKING

The first and chief foundation for the broad powers of the Federal Government over the Indians is the treaty-making provision which received its most extensive early use in the negotiation of treaties with the Indian tribes. Beginning with an Indian treaty submitted to the Senate by President Washington on May 25, 1795, the President and the Senate entered into some treaty relations with nearly every tribe and band within the territorial limits of the United States. To carry out the obligations and execute the powers derived from these treaties became a principal responsibility of Congress, which enacted many statutes relating to or supplementing treaties.

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

SECTION 3. CONGRESSIONAL POWER—COMMERCE WITH INDIAN TRIBES

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

The United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision. Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the act regulating it unconstitutional?

In the same opinion to which we have just referred, Judge Marshall, in speaking of the power to regulate commerce with foreign states, says, "The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass these lines." If Congress has power to regulate it, that power must be exercised wherever the subject exists. It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes. (Pp. 417–418.)

Article 1, sec. 8, cl. 3 of the Constitution empowers Congress "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." See Chapters 16 and 17.

14 Chief Justice Fuller of the Supreme Court in the case of Stephens v. Ochopee Nation, 174 U. S. 445, 478 (1899), said that Congress possesses "plenary power of legislation" in regard to Indian tribes, "subject only to the Constitution of the United States."
Chief Justice Marshall, in the case of Cherokee Nation v. Georgia, said that it was the intention of the Constitutional Convention to give the whole power of managing those affairs to the government about to be instituted, the constituent States, and omit all those qualifications which embarrassed the exercise of it, as granted in the confederation. (P. 13.)

In United States v. Forty-Three Gallons of Whiskey, the Supreme Court declared:

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

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

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

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

The Supreme Court, in the case of Dick v. United States, sustained federal liquor statutes protecting against the introduction of:

- See Act of July 22, 1790, sec. 5, 1 Stat. 137, 138; Act of March 1, 1793, secs. 5, 10, 11, 1 Stat. 329 et seq.; Act of May 19, 1796, sec. 4, 1 Stat. 469, 470; Act of March 3, 1799, secs. 2, 4, 5, 7, 8, 1 Stat. 743 et seq.; Act of March 30, 1802, sec. 4, 2 Stat. 139, 141; Act of June 30, 1834, sec. 25, 4 Stat. 729, 738. Superintendents, agents, and subagents were empowered to prohibit the arrest and trial of all Indians accused of committing any crimes or of other persons who may have committed crimes or offenses within a state or territory and fled into the Indian country. Act of June 30, 1834, sec. 10, 4 Stat. 729, 738. The President was authorized to appoint the arresting and trial of these Indians, including the employment of the military force of the United States.

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

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

- The Trade and Intercourse Act of May 19, 1799, secs. 1, 20, 1 Stat. 469, 474 provides for the marking of the boundary lines described in the acts and treaties between the United States and various Indian tribes. Also see Act of March 30, 1802, sec. 1, 2 Stat. 139.

- Money was often appropriated for allowances for agents and for the purpose of trading with the Indian nations. Act of April 18, 1796, 1 Stat. 230, 231; also see Act of March 3, 1799, 1 Stat. 443; Act of March 3, 1809, sec. 1, 2 Stat. 544. The President was empowered to furnish animals, implements of husbandry, and goods and money to the Indians. Act of March 1, 1793, sec. 9, 1 Stat. 329, 331; Act of March 30, 1802, sec. 13, 2 Stat. 139, 143.

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

- United States v. Forty-Three Gallons of Whiskey, 93 U. S. 168 (1876). The Supreme Court, in the case of Johnson v. Gerard, 234 U. S. 422 (1914), said:

That it is within the constitutional power of Congress to prohibit the manufacture, introduction, or sale of intoxicants upon Indian lands, including not only lands reserved for their special occupancy, but also lands outside of the reservations to which they may naturally resort; and that this may be done even with respect to lands lying within the bounds of a State, are propositions so thoroughly established, and upon grounds so recently discussed, that we need merely cite the cases. Perrin v. United States, 203 U. S. 476, 478, 27 Sup. Ct. 493, United States v. Forty-three Gallons of Whiskey, 93 U. S. 188, 195, 197; Dick v. United States, 208 U. S. 340. (P. 424.)

For example, see Act of May 19, 1796, sec. 3, 1 Stat. 469, 470.
tion of intoxicants, for 25 years, lands ceded by, as well as lands allotted to, the Nez Perce Indians:

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

The power over liquor traffic is not unlimited. The Supreme Court in Perrin v. United States,5 said:

SECTION 4. CONGRESSIONAL POWER—NATIONAL DEFENSE

Although comparatively little has been written about the war powers of Congress6 and the Indian, these powers underlay much of the federal power exercised over Indian land and Indians during the early history of the Republic. In international law conquest brings legal power to govern.

At least 1,012 statutes, public and private, have been enacted by Congress to deal with matters arising out of Indian warfare.7

When the Constitution was adopted, the chief mode of dealing with Indians was warfare. Accordingly Indian affairs were entrusted to the War Department by the Act of August 7, 1789,8 the first law of Congress relating to Indians.

The Congressional power "To * * * provide for the common defence * * * of the United States" was again utilized by the Act of September 29, 1789,9 which authorized the President to call into service from time to time such part of the militia of the states as he may judge necessary "for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians." Many other early statutes indicate the seriousness with which Congress considered the danger of Indian invasion. Such laws authorize an appropriation for "preserving peace with the Indian tribes,"10 and mustering and discharging regiments of militia to repel "imminent danger of invasion from any foreign nation or Indian tribe." Some early repres-

5 See Art. 1, sec. 8, cl. 1, 11, 12, 15, 16, 17.

6 Cf. Doerr, Course of Lectures on the Constitutional Jurisprudence of the United States (1856), pp. 985-986, and:

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

8 Cf. Chapter 8, sec. 4B(4)(c).

9 1 Stat. 49.

10 1 Stat. 95.

11 Act of March 5, 1792, 1 Stat. 136.

12 Act of March 5, 1792, 1 Stat. 241, repealed Act of March 3, 1793, 1 Stat. 430.

13 Act of May 2, 1792, 1 Stat. 254. A similar provision is contained in the Act of February 25, 1795, 1 Stat. 424. Early protective statutes against the Indians include Act of January 3, 1812, 2 Stat. 670; Act of March 5, 1813, 2 Stat. 829. The Act of May 28, 1830, sec. 6, 4 Stat. 411, 412, authorized the President to protect migrating Indians "against all sions of civil liberties sprang from attempts to attain peace with the Indians."

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

10A(2) fs. 311

15 Stat. 17.

14 For further post-Civil War statutory evidence of hostility with the Indians, see Act of March 3, 1873, 17 Stat. 560; Joint Res. of July 3, 1876, 19 Stat. 214; Act of August 15, 1876, 19 Stat. 204; Joint Res. of August 5, 1876, 19 Stat. 216; Act of June 7, 1878, 20 Stat. 252. And see Chapter 14, sec. 3.


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


authorizing the President to prohibit the sale of special metallic cartridges to hostile Indians."

There are several statutes in force which illustrate the exercise of this power in relation to the Indians. The Act of July 5, 1862, authorizes the abrogation of treaties with tribes engaged in hostilities; the Act of March 2, 1857, authorizes the withholding of annuities from hostile Indians; the Act of February 14, 1873," regulates the sale of arms to hostile Indians; and the Act of March 3, 1875," forbids payments to Indian bands at war. Apart from the specific statutes that mark the heritage of decades of military control, other less tangible relics of this control managed to persist long after the Indian Service was removed from the War Department."

SECTION 5. CONGRESSIONAL POWER—UNITED STATES TERRITORY AND PROPERTY

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

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

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

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else. Murphy v. Ramsey, 114 U. S. 15, 44. (Pp. 393-396.)

The Supreme Court, in the case of United States v. Rogers, said:

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

A. TRIBAL LANDS

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

"4 How. 567 (1846).

The plenary power over tribal relations and tribal property of the Indians has been frequently exercised by Congress. See Roff v. Burns, 168 U. S. 218 (1897); Cherokee Nation v. Hitchcock, 197 U. S. 294 (1905); Blackfeather v. United States, 190 U. S. 368 (1903); Choate v. Trapp, 224 U. S. 665 (1912); Ex parte Webb, 225 U. S. 663 (1912); United States v. O'Bryne Cammey, 231 U. S. 128 (1919); Nadeau v. Union Pacific R. Co., 253 U. S. 442 (1920).


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

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

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

Justice Brandeis, speaking for the United States Supreme Court in the case of "Morrison v. Work," declared:

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

The Supreme Court said in the case of "Nadeau v. Union Pacific Railroad Company:

"It seems plain that, at least, until actually allotted in severality (1884) the lands were but part of the domain held by the tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States. Beecher v. Wethersby, 95 U. S. 617, 625. The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 633; United States v. Rowell, 243 U. S. 401; United States v. Chase, 245 U. S. 89. (Pp. 443-446.)

A necessary corollary to this principle is that control of tribal land is a political function not to be exercised by the courts. The Supreme Court in the case of "Sioux Indians v. United States" said:

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

In the case of "Cherokee Nation v. Hitchcock," the Supreme court said:

"* * * The power existing in Congress to administer and guard the tribal property, and the power being "266 U. S. 481 (1925), aff'd 290 Fed. 306 (App. D. C. 1923).


"It is unnecessary to go into any detailed discussion of the power, but it is to be noted that the power to alter, modify, or repeal the provisions of the agreement with the Seminole Nation ratified by the act of July 1, 1837, and otherwise provide for the administration of the property and funds, as provided by the act of April 20, 1906, because the question has been conclusively settled by the decisions of the Supreme Court. (See "Cherokee v. Thorpe," 174 U. S. 294; "Cherokee v. Hitchcock," 174 U. S. 445: "United States v. Hitchcock, 187 U. S. 555; "Hitchcock v. Hitchcock, 194 U. S. 354; 368; "Wallace v. Adams, 204 U. S. 115.)

These decisions maintain the plenary authority of Congress to control the affaires and administer the property of the Five Civilized Tribes in the Indian Territory and other Indian tribes. (P. 340.)

"The courts have usually denominated this power as political and not subject to the control of the judical department of the government. See "Lone Wolf v. Hitchcock, 187 U. S. 555, 565 (1903) sustaining the disposal of a reservation of an Indian tribe on the ground that it was a legitimate exercise of congressional power over tribal Indians and their property. This case is discussed in "Oklahoma v. Texas, 256 U. S. 674, 692 (1921). Also see "Cherokee Nation v. Hitchcock, 174 U. S. 294, 305 (1902).


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

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between administration of money and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the assets would not necessarily follow from the concession of the former. But in any event, we are of opinion that the constitutionality of these acts in political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts. (P. 308.)

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

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

"respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and money of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right to a portion of the same was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe. (P. 437.)"

"The holding that Congress had power to provide a method for determining membership in the five civilised tribes, and for authorising the citizens of the United States to purchase the property of the tribe among its members, necessarily involves, in the further holding, that Congress possessed authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe. (P. 437.)"


"But the land so managed and disposed of must be tribal land. Indians have frequently taken to court the claim that the tribal property has become vested, by previous act or treaty, in individuals, and is no more subject to congressional control than the private property of other individuals. The courts, however, tend to construe such previous acts and treaties, wherever possible, against the vesting of private rights in tribal property. "Chippewa Indians of Minnesota v. United States, 301 U. S. 388 (1937), aff'd 80 C. C. 412, 453; United States v. Carbon, 245 U. S. 293 (1917); United States v. Bowlin, 285 Fed. 169, 171 (C. C. A. 2, 1920). Until property is allotted, Congress possesses plenary power to deal with tribal lands and funds as tribal property. "Ewing v. Brady, 255 U. S. 441 (1914). Also see "United States v. Mille Lacs Chippewa Indians, 252 U. S. 498 (1919).


Federal statutes provide for the taking of tribal lands by the United States. For example, the Act of May 23, 1908, 35 Stat. 268, created a national forest upon lands held by the Federal Government as a trustee for the Chippewa Indian Tribe. This law is discussed in "Chippewa Indians v. United States, 305 U. S. 479 (1938). For other cases on eminent domain see "Shoshone Tribe v. United States, 290 U. S. 476 (1937); United States v. Creek Nation, 295 U. S. 103 (1935), s. c. 202 U. S. 620 (1938). See, for example, "Act of March 3, 1901, 31 Stat. 1058, 1064, discussed in 49 L. Ed. 206 (1923).

The right of eminent domain may be exercised by the Federal Government over land held by an Indian nation in fee simple under patent from the United States, without the consent of the tribe. "Cherokee Nation v. Kansas Ry. Co., 135 U. S. 641 (1900), which rejected the contention that land was held by the Cherokee as a sovereign nation. Some treaties provided that railroads should have rights-of-way upon payment of just compensation to the Indian tribes. "Treaty of June 5, 1854, with the Miamis, Art. 10, 10 Stat. 1093. See Chapter 16, sec. 1B.

The Act of March 2, 1899, 30 Stat. 990, authorised any railroad company or telegraph and telephone company to take and condemn a right-of-way through a reservation by allotment, or by license to be allotted in severalty, but have not been conveyed to the allottee with full power of alienation. The Act of February 23, 1902, sec. 23, 32 Stat. 43, discussed in "Oklahoma K. & M. I. R. Co. v. Rockwell, 249 Fed. 992 (C. C. A. 10, 1918), made this statute applicable to the Indian Territory and to the Chippewa Indians. "Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 144 (1894). Even though an Indian tribe has granted a purported exclusive license to a telephone company, Congress may issue a similar license to another..."
The Supreme Court, per Mr. Justice Van Devanter, recently said: 

- - - Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe to the other to deal with them as its own.


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

Plenary authority does not mean absolute power, and the exercise of the power must be founded upon some reasonable basis. Thus, plenary power does not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation."

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

- - - That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of constitutional rights. They are not in the Territory for the construction of railroads (Cherokee Nation v. Southern Ry. Co., 165 U. S. 641, 10 Sup. Ct. 955, 34 L. Ed. 295), came to the Territory without the authority of Congress, and were not entitled to any rights of way through the Indian Territory for the construction, operation, and maintenance of telephone and telegraph lines. (op. cit. 1062, c. 302, § 5.) It follows, of course, that none of these tribes had the power to declare that any one telephone company should have the sole right to construct and operate telephone lines within the boundaries, since the existence of such a monopoly would have a necessary tendency to prevent free communication between those who reside outside of, and those who reside within, the territory. To this extent the grant of such a franchise as the one in question operates a public injury. (P. 385.)

The Solicitor of the Department of the Interior has said:

About the plenary power of Congress over tribal Indian property there can be no doubt and in the absence of some controlling reason to the contrary Congress undoubtedly has the power to appropriate property without just compensation to the Indian Government. (Op. Sol. 1. D. M. 14237, December 23, 1924.)


Property rights can be conferred by treaty as well as by formal grant. United States v. Creek Nation, 295 U. S. 103 (1935); Morrow v. United States, 243 Fed. 554 (C. C. A. 8, 1917). Government liability on the conduct of Indian affairs arises only from statutes or treaties with the tribe. Morton v. Adams v. United States, 83 C. C. 79, 87 (1936). See Shoshone Tribe v. United States, 290 U. S. 476, 497 (1934), in which the Court said:

Power to control and manage the property and affairs of Indians is good faith for their betterment and welfare.
R TRIBAL FUNDS

The power of Congress over tribal funds is the same as its power over tribal lands, and is, historically speaking, a result of the latter power, since tribal funds arise principally from the use and disposition of tribal lands. The extent of congressional power has been expressed by the Attorney General as follows: 63

Now, as these royalties are tribal funds, it can not be seriously contended that Congress had not power to provide for their disbursement for such purposes as it might deem for the best interest of the tribe. That power resides in the Government as the guardian of the Indians, and the authority of the United States as such guardian is not to be narrowly defined, but on the contrary is plenary.

Examples of the exercise of such power over the tribal property of Indians, and decisions sustaining it, are found in many of the adjudicated cases, among them Cherokee Nation v. Hitchcock, 187 U.S. 294; Lone Wolf v. Hitchcock, 187 U.S. 533; Gritts v. Fisher, 224 U.S. 640; Slocum v. Brady, 225 U.S. 441; Chase v. United States, decided April 11, 1921. (P. 63)

The congressional control over tribal funds was defined by Justice Van Deranter in the case of Slocum v. Brady. 63

As in the case of lands, Congress cannot divert tribal funds from tribal purposes in the absence of Indian consent or corresponding benefit without being liable, when suit is brought, for the amount diverted. Thus, there has been occasion, not infrequently, for judicial analysis of the manner of disposition of tribal funds. On the whole the tendency of the Court of Claims has been to uphold expenditures authorized by Congress as made for tribal purposes. 63

C. INDIVIDUAL LANDS

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

As “an incident to guardianship” Congress not only has the power to extend, modify, or remove existing restrictions on the alienation of such lands but while the Indian is still the ward of the nation it may reimpose restrictions on property already freed from restrictions or delegate such power to an executive officer. 64

This power includes permitting alienation upon such terms as Congress or the federal officer delegated with the power deems advisable from the standpoint of the protection of the Indians. Such restrictions must be expressed and are not implied merely because the owner of land is an Indian or can such restrictions be made retroactive so as to invalidate a conveyance made by an Indian before the restriction was imposed. 65

Congress may lift the restriction on alienation of allotments to mixed-blood Indians and continue the restrictions on full-blood Indians, until the Secretary of the Interior is satisfied that such Indians are competent to handle their own affairs. 66 In deciding this question the Supreme Court said:

- It is necessary to have in mind certain matters which are well settled by the previous decisions of this court. The tribal Indians are wards of the Government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection. United States v. Nix, 241 U.S. 591, 596, and cases cited. (P. 493-495)

The restrictions on alienation of land express a public policy designed to protect improvident people. Hence under the statutes, despite the good faith or motives of a grantee of land conveyed in violation of the restrictions, the conveyance is void. 67

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


64 295 U. S. 441 (1914). See sec. 6, infra.


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

La Motte v. United States, 224 U.S. 370, 375 (1912).

68 Tiger v. Western Ind. Co., 222 U.S. 296 (1912); Heckman v. United States, 224 U.S. 413 (1912). Also see United States v. Jackson, 280 U.S. 183, 191 (1930), involving extension of trust period of homestead patent under Act of July 4, 1894, 25 Stat. 76, 90, on the ground that the Indians possessed no vested right until a fee patent was issued; and United States v. Pelican, 224 U.S. 442, 451 (1914) involving congressional retention of trusteeship of land thrown open to settlement.

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

The Supreme Court distinguished the exemption from taxation and the restriction on alienation:

"But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. Kansas Indians, 5 Wall. 731, 756; United States v. Ricker, 188 U. S. 432. (P. 673.)"

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

D. INDIVIDUAL FUNDS

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

SECTION 6. CONGRESSIONAL POWER—MEMBERSHIP

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

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

In addition to its ultimate authority to determine tribal membership, Congress may, as part of its power to administer tribal property, alter the basic rule that tribal property may pass as a part of the decedent's estate. The general rule is that "in the absence of [statutory] provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, is terminated when the membership is ended, and is neither alienable nor descendable." Witwer v. United States, 291 U. S. 206, 216 (1933); also see Halbert v. United States, 283 U. S. 753, 762, 763 (1931). For a fuller discussion, see Chapter 9, sec. 3; Chapter 7, sec. 4.

See, for example, Act of March 3, 1777, ch. 1, 17 Stat. 631 (Miamis); Act of March 8, 1811, sec. 4, 21 Stat. 414, 453 (Miami); Act of July 1, 1902, sec. 1, 32 Stat. 636 (Kaskaskias); Act of June 4, 1920, 41 Stat. 751 (Crow); Act of May 19, 1924, 43 Stat. 352 (Lac du Flambeau band of Chippewa). Also see Campbell v. Wadsworth, 248 U. S. 169 (1918).

See, for example, Act of May 30, 1896, 29 Stat. 736 (a Sac and Fox woman); Joint Resolution of October 20, 1914, 38 Stat. 750 (Five Civilized Tribes); Act of May 31, 1924, c. 215, 43 Stat. 426 (Tarahumara), discussed in Op. Sol. 1, D. M. 14233, April 22, 1925; also see Gitts v. Fisher, 224 U. S. 904, 948 (1912)."