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AMERICAN INDIAN POLICY REVIEW COMMISSION

FINAL REPORT

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INTRODUCTION

A history, once thought ancient and dead, has risen to challenge this generation of Americans. As never before, since the days of the last century when they were forced to fight militarily for their lands, their freedoms, and their existence, the Indian peoples of our country are today stirring both the consciousness and conscience of the Government and all elements of the Nation.

It is the fortune of this generation to be the first in our long history to listen attentively to the Indians, and thereby to begin to understand what they are saying, to recognize realistically their own points of view, as a unique part of our population, and to heed their voices for the righting of wrongs, the ending of frustrations and despair, and the attainment of their needs and aspirations as Indians and as free and proud Americans.

It is generally believed, mistakenly, that the Federal Government owes the American Indian the obligation of its trusteeship because of the Indians' poverty, or because of the Government's wrongdoing in the past. Certainly American Indians are stricken with poverty, and without question the Government has abused the trust given it by the Indian people. But what is not generally known, nor understood, is that within the federal system the Government's relationship with the Indian people and their sovereign rights are of the highest legal standing, established through solemn treaties, and by layers of judicial and legislative actions.

Perhaps someday in the future, the Indian people may return to the bargaining table to renegotiate and reshape those solemn agreements. But it must be done as equals, and not as one party coming, on its knees, pleading as inferiors.

For the Federal Government to continue to unilaterally break its agreement, especially to a people as unique to our history as are the Indians, would constitute moral and legal malfeasance of the highest order.

Today, the past must be used as a backdrop, rather than as an indictment. But it is a backdrop that explains most of what must be known about the present-day condition of Indians and their relations with the Government and the rest of the American people. It is a way of seeing into the mind of the Indian people of today. From the earliest days of European settlement in what is now the United States, and, more pertinently, since the founding of the Republic, the Indians have been subjected to ambivalent attitudes and policies by the advancing non-Indian society and, after 1789, by the United States Government itself. On the one hand, every method has been employed to force them to cease being Indians and to conform to the dominant society, while on the other hand they have been led to believe, in part and from time to time, that the Government would support their right to survive as Indians and to practice their own culture—a determina-

tion, which despite every adversity and pressure, they have maintained to this day.

They have survived. But it has been at a great cost to them. The history of social experimentation of the Indians by those who gained mastery over their lives and fortunes resulted in decades of confusion, hopelessness, and poverty, which the Indian people have asserted could never be corrected until they themselves could again be allowed to determine their own lives and, like all free Americans, manage and control their own affairs.

Today we must ask the central question: Is the American nation—now 200 years old, and 100 full years beyond the era of the Little Bighorn—yet mature enough and secure enough to tolerate, even to encourage, within the larger culture, societies of Indian people who wish to maintain their own unique tribal governments, cultures, and religions?

As Felix Cohen once said:

> If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who never were Indians and never expect to be Indians fight for the Indian cause of self-government, we are fighting for something that is not limited by accidents of race and creed and birth; we are fighting for what Las Casas, Vitoria and Pope Paul III called the integrity or salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes which should carry us through many defeats.

The question goes far beyond that of "restitution" for past wrongs. From the misdirected present, can the United States Government redirect its relations with the American Indians to enable them to determine their own lives now, and in the future?

The question is ringing loudly in our ears today. Nor will it be stilled—today or tomorrow—until it is answered.

A POLICY FOR THE FUTURE

This final report of the American Indian Policy Review Commission represents 2 years of intensive investigative work encompassing the entire field of Federal-Indian relations. The last such investigation occurred almost 50 years ago. The conclusions of that investigation and its condemnation of the policies which had governed Federal administration over the preceding 50 years brought an abrupt shift in the statutory policies governing the Federal-Indian relations, a complete repudiation of the policies which had controlled from the late 1800's to the mid-1930's. And yet the American Indian today finds himself in a position little better than that which he enjoyed in 1928 when the Meriam Report was issued.

It has been the fortune of this Commission to be the first in the long history of this Nation to listen attentively to the voice of the Indian ratlier than the Indian expert. The findings and recommendations which appear in this report are founded on that Indian voice. It can only be hoped that this Commission will be seen as a watershed in the long and often tarnished history of this country's treatment of its original people.

What are the explanations for the circumstances in which the Indian finds himself today? First and foremost are the consistently damaging Federal policies of the past—policies which sought through the first three-quarters of the 19th century to remove the Indian people from the midst of the European settlers by isolating them on reservations; and policies which after accomplishing isolation were then directed toward breaking down their social and governmental structures and throwing their land, water, timber and mineral resources open to exploitation by non-Indians. These policies were repudiated by Congress with passage of the Indian Reorganization Act of 1934, but by this time severe damage had been done.

It is the legacy of these policies with which the Indian people attempt to cope today; it is the legacy of these policies which this Commission examines in this report; and it is the legacy of these policies which the people of the United States must resolve over the next years.

One of the greatest obstacles faced by the Indian today in his drive for self-determination and a place in this Nation is the American public's ignorance of the historical relationship of the United States with Indian tribes and the lack of general awareness of the status of the American Indian in our society today. To adequately formulate a future Indian policy it is necessary to understand the policies of the past. For this reason the Commission has included extensive discussions of law and history in order to provide a foundation for understanding matters which affect Indian people.

Foundations of Federal Indian Law

The relationship of the American Indian tribes to the United States is founded on principles of international law. It is a political relation: a relation of a weak people to a strong people; a relation of weak governments to a strong government; a relationship founded on treaties in which the Indian tribes placed themselves under the protection of the United States and the United States assumed the obligation of supplying such protection. It is a relationship recognized in the law of this Nation as that of a domestic, dependent sovereign.

It is a relationship which has sometimes in the past been honored but more frequently violated and at times even terminated. It is a relationship which can and should be nurtured and cherished by this Nation. The fact that the United States has not chosen to disavow this relationship, has not chosen to simply abrogate its treaty commitments, has not chosen to withdraw its recognition of Indians as separate and distinct peoples with cultures, lands and governments of their own—these facts set the United States above other nations in its treatment of its native people, and provide a moral and legal setting from which a forward-looking policy of Federal-Indian relations must progress. No other course will do honor to this Nation; no other course can hold any future for the Indian people.

The fundamental concepts which must guide future policy determinations are:

1. That Indian tribes are sovereign political bodies, having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations, and
2. That the relationship which exists between the tribes and the United States is premised on a special trust that must govern the conduct of the stronger toward the weaker.

The concept of sovereignty and the concept of trust are imperative to the continuation of the Federal-Indian relationship. These form the foundation upon which our entire legal relationship with the Indian tribes stands. These are not new precepts—they are old, dating from the origins of this Nation. It can only be said that if they had been consistently honored in spirit as well as in name, it would not have been necessary to convene this Commission. Without recognition of these fundamental concepts acknowledging Indian rights, the work of this Commission will have been in vain, for without these concepts there is no future Indian policy—only Federal policy.

The Commission recognizes that there is substantial controversy surrounding the concept of tribal sovereignty and the exercise of governmental authority by the tribes within their reservations. The Commission has devoted a significant portion of this report to analysis of judicial decisions relating to the powers of Indian tribes. The trend of these decisions has favored the tribes in their efforts to achieve good government within the reservations. We approve of the judicial decisions which have thus far been rendered. But we caution that the powers exercised by tribes must bear a reasonable relationship to legitimate tribal interests such as protection of trust resources, maintenance of law and order, delivery of services, and protection of tribal government.

This Commission has not proposed any legislative action with regard to the jurisdiction or authority of tribal governments. We have rejected any such effort as being premature and not warranted by any factual evidence. We note that there are some 287 tribal governments within the United States (there are approximately 80,000 State, county and municipal governments) and it is not feasible to attempt to legislatively determine the precise powers of each of these governments in one legislative enactment. We also reject the notion that the jurisdictional reach of Indian tribes within Indian country should be limited to their own membership alone. If such a position were adopted it could truly be said that the tribes were mere social clubs, an assembly of property owners, with no more authority than any civic association. This surely was not the result contemplated by the tribes when they entered into treaties with the United States. Nor is it a result to be desired by anyone today—Indian or non-Indian—when the consequences are analyzed. For in many areas of Indian country the only workable law enforcement authority present is that of the tribe.

The Commission does not advocate that resolution of jurisdictional conflicts be left solely to the courts. To the contrary, we recommend that State and county governments sit down with the tribal governments and to the extent possible resolve their jurisdictional conflicts to their mutual satisfaction on the basis of mutual respect. To the extent resolution cannot be achieved, then and only then will legislative action by the Congress be appropriate. Clearly there are many areas in which both the States and the tribes have a commonality of interest and the discussion of State and tribal jurisdiction should not be cast in totally adversary terms.

The Trust Responsibility

The concept of the trust relationship of the United States to the Indian people is one which is not well understood and is the subject of frequent debate regarding both its source and its scope. We have already noted that the trust relationship is one of the two most important concepts underlying Federal-Indian law. This responsibility originates first from the treaties negotiated with Indian tribes in which the United States acquired vast areas of land in exchange for its solemn commitment to protect the people and property of the tribes from encroachment by U.S. citizens. Secondly, from statutory enactment dating from the Continental Congress to the present, regulating transactions between U.S. citizens and Indian people. A third major source of this responsibility arises from a course of dealing in which the United States in the latter half of the 19th century assumed dominion and control over the people and property of Indian tribes, imposing a vast array of regulatory authority over Indians and their property. When the United States assumed this authority over Indian people, it accepted an accompanying responsibility to Indian people.

While the exact parameters of the trust duty are not clearly defined, the Commission has concluded that it would not be desirable to attempt to spell out the duty in terms of statutory specificity. Like doctrines of constitutional law, the trust duty must be considered a constantly evolving doctrine responsive to the changing circumstance of

the times. Certain broad concepts have been agreed upon which we believe should guide future policy in relationship to the trust doctrine:

1. The trust responsibility to American Indians extends from the protection and enhancement of Indian trust resources and tribal self-government to the provision of economic and social programs necessary to raise the standard of living and social well being of the Indian people to a level comparable to the non-Indian society.

2. The trust responsibility extends through the tribe to the Indian member, whether on or off the reservation.

3. The trust responsibility applies to all United States agencies and instrumentalities, not just those charged specifically with administration of Indian affairs.

These and other details of the trust obligation are more fully discussed in chapter four of this report. It is recognized that in many areas affected by the trust, particularly social programs, Congress itself will determine the extent of the delivery of services. Chapter four contains numerous specific recommendations relating to the trust, including a requirement for preparation and filing of Indian impact statements by Federal agencies proposing actions which will adversely affect trust resources, and recommendations for a resolution of the conflict of interest which presently pervades legal representation of Indian interests. The principles enumerated above are just that—general principles from which policy considerations must flow.

Federal Administration

One of the most serious impediments to the development of Indian self-sufficiency today lies in Federal administration. Indian tribes, like non-Indian communities, are plagued by an excessive number of Federal agencies offering different programs all of which must be interrelated in order to achieve full community development. Unlike non-Indian governments, however, Indian tribes and people often face difficulties posed by statutory language or administrative rulings that bar their eligibility for participation in programs. There is a continuing tendency on the part of Congress and the Executive to overlook Indian interests in the formulation of new legislation or programs. In recent years there has been substantial improvement in this respect, but it still remains a significant problem.

Most serious is the lack of responsiveness, particularly on the part of the Bureau of Indian Affairs and Indian Health Service, to adhere to the principles of "self-determination" as expressed by Indians and the law. The problem of negative attitudes is compounded by an excessive administrative structure which interferes with the delivery of funds to Indian people. Federal administrators and their excessive field structure compete with Indians for scarce congressional appropriations.

Finally, Indian project initiatives must be encouraged through a program, planning, and budget process which is guided by Indian priorities rather than to satisfy the needs of a self-perpetuating bureaucracy.

It is the conclusion of this Commission that:

1. The executive branch should propose a plan for a consolidated Indian Department or independent agency. Indian pro-

grams should be transferred to this new consolidated agency where appropriate.

2. Bureaucratic processes must be revised to develop an Indian budget system operating from a "zero" base, consistent with long-range Indian priorities and needs. Those budget requests by tribes should be submitted without interference to Congress.

3. Federal laws providing for delivery of domestic assistance to State and local government must be revised to include Indian tribes as eligible recipients.

4. To the maximum extent possible, appropriations should be delivered directly to Indian tribes and organizations through grants and contracts; the first obligation being to trust requirements.

Economic Self-Sufficiency

Indian lands encompassed approximately 50 million acres located on over 200 reservations in some 26 States. A 1975 General Accounting Office report on Indian natural resources estimated that Indian lands include: 5.3 million acres of commercial forest land, including about 38 billion board feet of timber; 44 million acres of rangeland; and 2.5 million acres of cropland. Indians have superior claims to water to develop their lands, and they have valuable rights to share in the harvest of fish in the Pacific Northwest.

Deposits of oil and gas, coal, uranium and phosphate are found on some 40 reservations in 17 States. Production of coal on Indian lands in 1974 was 35.8 percent of the combined production on Federal and Indian lands (1.9 percent of the Nation's total); excluding offshore oil production, Indian lands produced 13.6 percent of the total production value of oil and gas on all Federal and Indian lands (4.4 percent of the Nation's total); phosphate production on Indian land was 35.4 percent of production on Federal and Indian land (4.9 percent of the Nation's total); and Indian lands produced fully 100 percent of the uranium value produced on all Federal and Indian lands.

And yet, for the most part, Indian reservations remain underdeveloped and Indian people lack credit, remain poor, uneducated and unhealthy. From the standpoint of personal well-being the Indian of America ranks at the bottom of virtually every social statistical indicator. On the average he has the highest infant mortality rate, the lowest longevity rate, the lowest level of educational attainment, the lowest per capita income and the poorest housing and transportation in the land.

How is this disparity between potential wealth and actual poverty to be explained? At least one explanation lies in the fact that a very significant part of this natural abundance is not controlled by Indians at all. Fractionated land ownership engendered by Federal laws impedes efficient development projects in timbering, farming, and ranching. Significant quantities of Indian natural resources are leased out to non-Indian enterprises at rates significantly less than that derived by non-Indians for comparable lands. Access to development credit is often difficult to obtain, and tribes often lack the technical skills necessary to undertake development of their own resources. Roads, communications systems and other elements of economic infrastructure are frequently insufficient to support development efforts.

Indian opinion is virtually unanimous in the desire for economic self-sufficiency. Certainly not all tribes will be able to fully attain this goal, but with proper support from the Federal Government, many can. Clearly it lies within the best interests of the Indian tribes and the United States to give full support to the development of economic enterprises by the tribes.

1. The first order of business of future Indian policy must be the development of a viable economic base for the Indian communities.
2. Adequate credit systems must be established for Indian economic development projects; funds must be established to provide for land acquisition and consolidation; and policies must be adopted which will favor Indian control over leases of their own natural resources.
3. Technical assistance must be available to tribes both in the planning and management stages of operations.
4. Every effort must be made to encourage and aid tribes in the development of economic projects relevant to their natural resource base.

Restoration and Recognition

Despite recent policies which have encouraged self-determination and which have reaffirmed the permanent nature of tribal governments, there are many tribes which suffer because of past policies which failed to recognize their status, or sought to end it. Almost 100 tribes' relationship to the Federal Government was legislatively ended during the 1950's when Congress adopted a policy called "termination." One hundred thirty other tribes [1] have never been recognized by the Federal Government usually because of bureaucratic oversight, and they too suffer because their status is not defined. There is no reason why some 200 tribes should not benefit from the relationship the United States maintains with other tribes, and there is no reason why Federal policy should not be implemented equitably to all tribes.

1. Tribes which were terminated must be restored to their formal political status and Congress must establish a legal process for restoration.
2. Tribes which have been overlooked, forgotten, or ignored must be recognized as possessing their full rights as tribes.

Urban Indians

Through policies of "relocation" the United States sought to remove Indians from the reservation environment to cities where they would assimilate with non-Indian people. These policies were poorly administered and unsuccessful in attaining their goal. The United States bears some liability for the effect of these policies on Indian people, yet today Indian people who live in cities find it extremely difficult to avail themselves of the minimal federal services they would readily receive on reservations. Aside from this question of responsibility for past policies, the United States should also recognize that Indian people in urban areas have special needs which Government

[1] "Tribes" as it is used here, includes bands and other Indian groups, and is more clearly defined on pp. 461–462.

programs could help to alleviate. Unfortunately, Federal-Indian programs frequently ignore off-reservation Indians, and the structures which urban Indians have established themselves and which could aid in the administration of Federal programs.

1. Federal Indian programs should address the needs of off-reservation Indians.
2. Programs directed to the needs of urban Indians should encourage and utilize urban Indian service centers.

These elements make up the major thrust of this Commission's report. They are, in large measure, the direct result of 11 task forces which were assigned by Congress to investigate major areas of contemporary importance to Indian people. Task force studies were mandated in the following areas:

1. Trust Responsibilities and the Federal-Indian Relationship
2. Tribal Government
3. Federal Administration and the Structure of Indian Affairs
4. Federal, State, and Tribal Jurisdiction
5. Indian Education
6. Indian Health
7. Reservation and Resource Development and Protection
8. Urban and Rural Non-reservation Indians
9. Indian Law Consolidation, Revision and Codification
10. Terminated and Non-Federally Recognized Indians
11. Alcohol and Drug Abuse

These areas reflect Congress's initial understanding that Indian Affairs were plagued by the following problems, that: (1) the trust relationship and treaty rights were poorly defined and confusing concepts basic to Indian law; (2) tribal governments held a poorly defined and seldom-understood status in the Federal system; (3) Indian people were perplexed and impeded by a massive bureaucracy whose function and merit were perpetually questioned by Indians and non-Indians alike; (4) Indians and non-Indians on reservations were enmeshed in jurisdictional disputes with municipal, county, State, and Federal powers; (5) education of Indians was questionably administered and had disappointing results; (6) Indian health was substandard; (7) reservations were underdeveloped and economic planning was insufficient for development; (8) off-reservation Indians were alienated and disenfranchised; (9) Federal-Indian laws were complex and often absolute, and never received the scrutiny necessary for proper revision; (10) a number of tribes were unreasonably excluded from the Federal-Indian relationship; (11) alcoholism and drug abuse were afflictions which caused especially severe problems for the Indian population. Additionally, two special task force reports were prepared on the Management Study of the Bureau of Indian Affairs and on Alaskan Native Issues.

The Commission has utilized the work of these task forces in preparing this final report. Not all of the findings and recommendations of the task forces have gained expression here, but this broad statement of Indian policy falls generally into the context of the task force conclusions.

A summary of the specific recommendations of this Commission follows in the next chapter.

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SEPARATE DISSENTING VIEWS OF CONGRESSMAN LLOYD MEEDS, D-WASH., VICE CHAIRMAN OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

Introduction

With the creation of this Commission it was hoped that Congress would have before it an objective statement of past and current American Indian law and policy so that it could exercise its powers wisely in legislating a coherent and lasting policy toward American Indians.

Unfortunately, the majority report of this Commission is the product of one-sided advocacy in favor of American Indian tribes. The interests of the United States, the States, and non-Indian citizens, if considered at all, were largely ignored. This was perhaps inevitable because the enabling legislation which created the American Indian Policy Review Commission, Public Law 93–580, 88 Stat. 1910, required that 5 of the 11 Commissioners be American Indians, and that each of the investigating task forces be composed of 3 persons, a majority of whom were required to be of Indian descent. Public Law 93–580, § 4(a). As a result, of the 33 persons appointed to lead the task forces, 31 were Indian.

With due regard to those who worked on the task forces, the reports were often based on what the members wished the law to be. Their findings and conclusions were often poorly documented. Recommendations ignored contemporary reality. As an example, the report of Task Force No. 1 would require the return to Indian possession and jurisdiction large parts of California, Oregon, Nebraska, North Dakota, South Dakota, and Oklahoma. Despite contemporary litigation, most Americans are justified in believing that 400 years have been sufficient to quiet title to the continent.

In addition, the Commission's staff interpreted the enabling legislation as a charter to produce a document in favor of tribal positions. In support of its one-sided advocacy, the Commission's staff relied on language in the enabling legislation ordering a review of Federal Indian law and policy "in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefits of Indians." Declaration of Purpose. Public Law 93–580, 88 Stat. 1910. But, clearly, the formulation of policies and programs for the benefit of Indians did not require this Commission to prepare a document encompassing a tribal view of the future of American Indian law and policy. For Congress to realistically find this report of any utility, the report should have been an objective consideration of existing Indian law and policy, a consideration of the views of the United States, the States, non-Indian citizens, the tribes, and Indian citizens. This the Commission did not do. Instead, the Commission saw its role as an opportunity to represent to the Congress the position of some American Indian tribes and their non-Indian advocates.

This Commission failed to consider the fundamental and controversial issues in contemporary Indian law. Instead, it assumed as first principles, the resolution of all contemporary legal and policy issues in favor of Indian tribes. Hence, the report is advocacy and cannot be relied upon as a statement of existing law nor as a statement of what future policy should be. The report's utility, then, is limited to informing the Congress of the special interests of some American Indian tribes and their non-Indian advocates. Congress will either have to authorize another Commission to ascertain the views of non-Indians, the States, and the United States or perform that function on its own.

One further introductory comment is in order. Many of the chapters in the Commission report were hastily prepared and hastily presented to the Commission for review and approval. Even as I write this, various chapters of the report are unavailable to me and various of the other chapters are in the process of rewriting. Neither I, nor my colleagues on the Commission, have had an opportunity to carefully evaluate the staff input or, for that matter, to even read much of the report prior to its promulgation as a Commission report. We experienced the same problem when attempting to review and evaluate the changed report after it was circulated and rewritten. Because of the Commission's schedule, I have neither the time nor the resources to adequately evaluate, critique, and recreate this report. Yet certain fundamental and recurring ideas have been adopted by this report and labeled legal doctrine, but which are, in reality, either contrary to law or are tribally oriented resolutions of disputed legal issues. Hence, I must make some comments on them at this stage in the process so that the unwarranted findings and conclusions in this report do not go unchallenged. These include the notion of tribal self-government (referred to as "sovereignty" by tribal advocates), jurisdiction (including State power over Indian country and tribal power over non-Indians, or the lack thereof), the legal obligations of the United States (referred to vaguely as a "trust responsibility"), various social welfare programs which would in effect be an exercise of the Congress' spending power under the Constitution (but which in this report go under the guise of legal obligations), sovereign immunity, the absence of statutes of limitations or other legal impediments to the assertion of stale claims, the exercise by tribes of regulatory power over their members beyond the territorial limits of their reservations, and definitional problems associated with the words "Indian" and "tribe".

When in January 1977 it became clear that I would have serious and substantial disagreement with the Commission's findings and recommendations, I retained, through the Commission, Frederick J. Martone of the Arizona bar to work with me in critically evaluating the Commission's report. Mr. Martone and his colleague, Mr. Neil V. Wake, assisted me greatly in the preparation of these minority views.

Sovereignty—Tribal Self-Government or Territorial Government?

The fundamental error of this report is that it perceives the American Indian tribe as a body politic in the nature of a sovereign as that word is used to describe the United States and the States, rather than as a body politic which the United States, through its sovereign power, permits to govern itself and order its *internal* affairs, but not the affairs of others. The report seeks to convert a political notion into a legal doctrine. In order to demythologize the notion of American Indian tribal sovereignty, it is essential to briefly describe American federalism.

In our Federal system, as ordained and established by the United States Constitution, there are but two sovereign entities: the United States and the States. This is obvious not only from an examination of the Constitution, its structure, and its amendments, but also from the express language of the 10th amendment which provides:

> **The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.**

And, under the 14th amendment, all citizens of the United States who are residents of a particular State are also citizens of that State.

The Commission report (especially chapters 3 and 5), would have us believe that there is a third source of sovereign and governmental power in the United States. It argues that American Indian tribes have the characteristics of sovereignty over the lands they occupy analogous to the kind of sovereignty possessed by the United States and the States. The report describes Indian tribes as governmental units in the territorial sense. This fundamental error infects the balance of the report in a way which is contrary to American federalism and unacceptable to the United States, the States, and non-Indian citizens.

The blunt fact of the matter is that American Indian tribes are not a third set of governments in the American federal system. They are not sovereigns. The Congress of the United States has permitted them to be self-governing entities but not entities which would govern others. American Indian tribal self-government has meant that the Congress permits Indian tribes to make their own laws and be ruled by them. The erroneous view adopted by the Commission's report is that American Indian tribal self-government is territorial in nature. On the contrary, American Indian tribal self-government is purposive. The Congress has permitted Indian tribes to govern themselves for the purpose of maintaining tribal integrity and identity. But this does not mean that the Congress has permitted them to exercise general governmental powers over the lands they occupy. This is the crucial distinction which the Commission report fails to make. The Commission has failed to deal with the ultimate legal issue, which is the very subject of its charter.

In addition, the Commission has failed to make the distinction between the power of American Indian tribes to govern themselves on the lands they occupy, and their proprietary interest in those lands. Mere ownership of lands in these United States does not give rise to governmental powers. Governmental powers have as their source the

State and Federal constitutions. Hence, as landowners, American Indian tribes have the same power over their lands as do other private landowners. This would include the power to exclude or to sue for trespass damages. But landowners do not have governmental powers over the land they own. Land ownership, alone, is insufficient to give rise to governmental powers. Having failed to make this distinction, the Commission seeks to bootstrap its "tribe as a government" theory by relying on ownership principles.

Indian reservations exist within the boundaries of the States and within the United States. Reservation Indians are citizens of the States in which they live and of the United States. They are subject to the laws of the United States and, but for the exercise of congressional power, reservation Indians are subject to the governmental power of the States in which they live. American Indian tribal self-government comes into play because the Congress, in exercising its powers under article I, § 8(3), of the United States Constitution, has, in general, insulated reservation Indians from State governmental power. In order to promote the preservation of their distinctive cultures and values, the Congress has decided that some American Indians should be allowed to make their own laws and be ruled by them. This does not mean that the Congress allows American Indian tribes to govern their reservations in the same way in which a State governs within its boundaries. A tribe's power is limited to governing the internal affairs of its members. The United States Supreme Court has over and again upheld the power of the State to impose its law on non-Indians within the reservation. If American Indian tribes had the kind of sovereignty which this Commission urges, and if Indian tribal self-government were territorial rather than purposive, the States could not have jurisdiction over non-Indians within the reservation. These principles are easily demonstrated.

The doctrine of inherent tribal sovereignty, adopted by the majority report, ignores the historical reality that American Indian tribes lost their sovereignty through discovery, conquest, cession, treaties, statutes, and history. An international tribunal, Cayuga Indian Claims (*Great Britain* v. *United States*), 20 Am. J. Int'l L. 574, 577 (1926) (American and British Claims Arbitration Tribunal) and the United States Supreme Court, *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) and *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), have applied these well-settled international law doctrines to extinquish American Indian tribal sovereignty. Hence, to the extent American Indian tribes are permitted to exist as political units at all, it is by virtue of the laws of the United States and not any inherent right to government, either of themselves or of others.

Turning then to the laws of the United States, the supreme law is, of course, the United States Constitution. It is obvious from a reading of the Constitution that there are but two sovereigns, the United States and the States. And to the extent that American Indian tribes may claim a position in the interstices of the Constitution on which to ground a constitutional guarantee of separate tribal existence, the 10th amendment rather plainly destroys the argument. Since the draftsmen separately delineated foreign nations from Indian tribes in article I, § 8(3), Indian tribes were, even at that early date, not

considered foreign nations. See *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) 1, 18 (1831). It is clear that nothing in the United States Constitution guarantees to Indian tribes sovereignty or prerogatives of any sort, let alone their continued existence. The majority argue that since American Indian tribes did not participate in the creation of the United States Constitution, they are not bound by it. The folly of the majority's argument is apparent. The majority ignore the fact that American Indian tribes were conquered and subordinated to the will of the people of the United States. The consent, or lack thereof, of the ancestors of contemporary American Indians to the Government of the United States is quite irrelevant to the applicability of the sovereignty of the United States to American Indians and their tribes. Nor may anyone exempt himself from the sovereignty of all the people. Our predecessors fought a war among themselves over this and the question is settled. It is too late in the day to seek to recreate 400 years of history.

Congress, of course, has not been silent. During the conquest portion of our history with Indian tribes, we dealt with Indian tribes by treaty, under article II, § 2(2), of the Constitution. The treaties generally permitted Indian tribes to govern their own members but not others. See e.g., Treaty with the Cherokees, December 29, 1835, 7 Stat. 478, 481. When conquest was nearly complete, the Congress declared that no Indian nation or tribe would be acknowledged or recognized as an independent nation or tribe with whom the United States could contract by treaty. Act of March 3, 1871, ch. 120, 16 Stat. 544, 25 U.S.C. § 71.

Tribal government, no doubt, had one purpose when Indians were neither citizens of the United States nor of the State in which they lived. See, *Elk* v. *Wilkins*, 112 U.S. 94, 5 S. Ct. 41 (1884). But all noncitizen Indians were made citizens of the United States by the Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 1401(a)(2). And, under the 14th amendment to the United States Constitution, citizens of the United States are citizens of the State wherein they reside. American Indians, therefore, are citizens of the State in which they reside and the United States. They cannot now claim that their tribal entity gives to them a source of governmental power in an extra-constitutional sense.

Law follows reality and experience. Accordingly, the Supreme Court's treatment of the role of the tribe in the Federal system has reflected the realities of the tribe at the time the Court has dealt with the problem. But from the very beginning, the Court made it clear that Indian tribes were not sovereigns. In *Johnson* v. *M'Intosh*, *supra*, 21 U.S. (8 Wheat.) 543 (1823), the Court examined the legal impact of European settlement and concluded that discovery gave title to the continent to the European nation which made the discovery. 21 U.S. (8 Wheat.) at 573. The Court instructed us that the United States held title to the continent and had the exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest, and that title acquired and maintained by force was not a proper subject of judicial inquiry. 21 U.S. (8 Wheat.) at 587, 589.

In *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) 1 (1831), the Court instructed us that lands occupied by Indians were part of

the United States and that tribes were not foreign nations under the Constitution. Id. at 18, 20. The Court described Indian tribes as "domestic dependent nations." Id. at 17. This was no doubt true in 1831. As the Court made clear, tribal Indians were "aliens, not owing allegiance to the United States". Id. at 16. And, compare the separate concurring opinions of Mr. Justice Johnson and Mr. Justice Baldwin with the dissenting opinion of Mr. Justice Thompson. The former denied tribal sovereignty while the latter affirmed it. I make these references to show that the issue of tribal sovereignty is one of long standing controversy. The majority would have us believe that the notion of tribal sovereignty is not an issue at all but a well settled legal doctrine.

By 1886, conditions had changed such that the Supreme Court would say:

> 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. United States*** v. ***Kagama***, 118 U.S. 375, 379 (1886). [Emphasis added.]

The Court upheld a Federal statute providing for Federal criminal jurisdiction for the murder of an Indian by an Indian on a reservation. Suffering under the narrow view of the commerce power of the time, the Court did not rely upon the Indian commerce clause, article I, § 8(3), but held the statute was constitutional "because it [jurisdiction over a reservation] never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." 118 U.S. at 384–85. The Court's premise was that sovereignty exists only in the United States and the States. Since the State had no jurisdiction, the United States had to have it.

Another case of the same era is even more specific. In *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 10 S. Ct. 965 (1890), the Supreme Court held that Congress had the power to take by eminent domain tribal land. The tribe had argued that the lands through which a railroad was authorized by Congress to construct its railway were held by the tribe as a sovereign nation and that the right of eminent domain within its territory could be exercised only by it and not by the United States without tribal consent. The Supreme Court rejected this argument summarily. 10 S. Ct. at 970. The Court said:

> The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, ***or in the sense that the several states are sovereign***, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of congress defining the relations of that people with the United States. 10 S. Ct. at 969. [Emphasis added.]

Therefore, not only were Indian tribes not nations as was the United States, but they were not sovereigns even in the domestic sense as were the several States of the Union. The Court went on to say:

> It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and ***directly*** subject to its political control. 10 S. Ct. at 971. [Emphasis added.]

The Court was making an important point. While the States of the Union are not political subdivisions of the United States but rather sovereign in their own sphere under the Federal Constitution, Indian tribes are political subdivisions of the United States and are under the direct political control of the United States. Since the United States could exercise the power of eminent domain in the several States, a fortiori it could exercise the same power over territory occupied by an Indian tribe.

If the Supreme Court instructed us in 1886 that "[t]here exist within the broad domain of sovereignty but these two [the United States and the States]", how can the majority of this Commission conclude that Indian tribal sovereignty exists in the territorial sense rather than in the more limited sense of congressionally licensed self-government over its own members and its internal affairs? Objectivity should have required this Commission to state that the issue of tribal sovereignty, though long settled against Indian claims, should be reopened by the Congress and report the various arguments on both sides, making whatever recommendations it deemed appropriate. The Congress could then either accept or reject recommendations as a matter of policy. The Commission, in essense, is making political recommendations under the guise of legal doctrine. This Commission uses the word "sovereignty" as it is politically used by Indian tribes "without regard to the fact that as applied to Indian tribes 'sovereign' means no more than 'within the will of Congress' ". *United States* v. *Blackfeet Tribe*, 364 F. Supp. 192, 195 (D. Mont. 1973). Indeed, by 1901, the Supreme Court would tell us that "[t]he North American Indians do not and never have constituted 'nations' * * *" *Montoya* v. *United States*, 180 U.S. 261, 21 S. Ct. 358 (1901).

Advocates of inherent tribal sovereignty frequently rely on the case of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), in which the Supreme Court struck down a Georgia statute in direct conflict with Federal treaties and statutes. But a reading of the case will show that the Georgia statute which purported to regulate the conduct of those in Indian country was held invalid not because of tribal sovereignty, but because under the Constitution, the matter of Indian affairs was exclusively within the Federal power. The Congress had exercised that power by both treaties and statutes which were in conflict with the Georgia statute. The Court did say that the laws of Georgia could have no force within the Cherokee Nation. 31 U.S. (6 Pet.) at 561. But the Court proceeded on "the actual state of things", Id. at 543, and the reality of 1832 has given way to a different reality in our contemporary era. For by 1973, the Supreme Court rejected the conceptual clarity of Marshall's view in *Worcester* v. *Georgia* and rejected the broad assertion that the Federal Government has exclusive jurisdiction over the tribe for all purposes and that the State is, therefore, prohibited from enforcing its laws against any tribal enterprise whether the enterprise is located on or off tribal land. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 147–48 (1973).

And in *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), the Court held that reservation Indians are insulated from State law, not because of tribal sovereignty, but, if at all, because of

applicable Federal treaties and statutes. 411 U.S. at 172. Indeed, the Court said:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption * * *. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. 411 U.S. at 172.

The Court said that Federal preemption of the field was such that the issue of residual Indian sovereignty was moot. 411 U.S. at 172 n. 8. Hence, it is clear that reservation Indians are immune from State law, absent a Federal statute to the contrary, not because of tribal sovereignty, but because of Federal preemption. *Bryan* v. *Itasca County*, — U.S. —, 96 S.Ct. 2102, 2105 n. 2. (1976).

If Indian tribes had inherent sovereignty, they would be free from State law even in their dealings with non-Indians. But such is not the case. State law applies to non-Indians on a reservation and the States may even require a tribe to implement State law as to non-Indians. *Moe* v. *The Confederated Salish and Kootenai Tribes of the Flathead Reservation*, — U.S. —, 96 S.Ct. 1634, 1645–46 (1976). The Supreme Court upheld this State power because it did not frustrate tribal self-government. 96 S. Ct. at 1646. It is clear that if the tribe was a government in the territorial sense rather than a limited purposive sense, the Court would be wrong since the application of State law to non-Indians would interfere with a tribe's territorial government. If, on the other hand, tribal self-government is merely purposive, in contrast to general and territorial, then the application of State law to non-Indians is proper because it does not frustrate the limited purpose of allowing Indians to govern themselves. It is plain to me that Congress and the Supreme Court see tribal government in the purposive sense, not the territorial sense.

Another major case relied on by the Commission to support its theory is *United States* v. *Mazurie*, 419 U.S. 544 (1975). But it is clear that this case does not support inherent tribal sovereignty. On the contrary, the case merely held that (1) Congress has the power to regulate the sale of alcoholic beverages in Indian country under article I, § 8 of the Constitution, and that (2) Indian tribes are entities with some independent authority over matters that affect the internal and social relations of tribal life such that Congress could constitutionally delegate its own authority to the tribe. The Court specifically said "[w]e need not decide whether this independent authority [the tribe's] is itself sufficient for the tribes to impose Ordinance No. 26 [requiring retail liquor outlets within Indian country, including those on non-Indian land, to obtain a tribal license]." Despite this language, the Commission report says of *Mazurie* "it appeared that the tribe could exercise such regulatory power without benefit of Federal law on the basis of its own inherent sovereignty." [Commission report, ch. 5, part B at 156.] So much for objectivity. Unless words are infinitely elastic, the Court's opinion in *Mazurie* simply cannot be pressed into the meaning the majority report attributes to it. Similar misstatements of law abound in the report.

The Commission report neglects to mention that there is not a single case of the United States Supreme Court which has ever held that

tribes possess inherent tribal sovereignty such that in the absence of congressional delegation they could assert governmental power (1) over nonmembers of the tribe, and (2) exclude State jurisdiction. The exclusion of State jurisdiction over reservation Indians has from *Worcester* to this day been based on Federal preemption. And, tribal jurisdiction over non-Indians, as in *Mazurie*, supra, and *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), has been based on specific congressional delegation, not on general notions of tribal power.

In sum, the Commission has converted the doctrine of tribal self-government into a doctrine of general tribal government by taking a quantum leap forward without any adequate legal foundation. And, I might add, prescinding now from the legal issues involved, the Commission has not even explained why, for policy reasons, it would be a good thing for Indian tribes to exercise general governmental powers over the lands they occupy. The Commission has just assumed that because Indian tribes would like to exercise governmental powers over their territory, it would be wise to let them. There is no adequate discussion in the Commission report of the detriments of such a course of action, much less any weighing of the advantages and disadvantages. The report fails to take into consideration that Indian tribes are no longer isolated communities. Indian reservations now abut major metropolitan areas in this country. The Commission report makes much of the fact that reservation Indians want to be left alone and be free of State interference (even though they are citizens of the State, vote in State elections, and help create State laws which are inapplicable to them), yet fails to understand that by arguing for the exercise by Indian tribes of general governmental powers, Indian tribes cannot be left alone. For example, the Commission's recommendations would leave us with the following results. Reservation Indians would be citizens of the State but be wholly free of State law and State taxation even though they participate in the creation of State law and State taxing schemes. In short, reservation Indians would have all the benefits of citizenship and none of its burdens. On the other hand, non-Indian citizens of the State would have no say in the creation of Indian law and policy on the reservation, even if they were residents of the reservation, and yet be subject to tribal jurisdiction. In short, non-Indians would have all the burdens of citizenship but none of the benefits. This is a strange scheme to behold.

The analytical framework adopted by the Commission is, in a sense, upside down. By adopting the doctrine of inherent Indian tribal sovereignty, the Commission looks at the original powers of the tribe and concludes that the tribes have retained all those powers except where expressly limited by the Congress. I submit the Commission's point of departure is faulty. The focus is not on the nature of the prior rights of tribal government. The question is by what mandate do tribal governments govern today? Under our Federal Constitution, there are but two sources of power: the States and the United States. Political subdivisions of the States derive their power from the States. Territorial governments derive their power from the United States. *United States* v. *Kagama*, 118 U.S. 375 (1886). Hence, all political entities exercising powers of government within the

political boundaries of the United States are exercising powers derived either from the United States or the States. To the extent that the Commission does not agree with this position, it is clear that the Commission would assert that Indian tribes exercise powers of self-government in some extra-constitutional sense.

In the 19th Century, when *Talton* v. *Mayes*, 163 U.S. 376 (1896) (holding that the Bill of Rights was not applicable to Indian tribes) was decided, tribal Indians were neither citizens of the United States nor of the States in which they lived. See *Elk* v. *Wilkins*, 112 U.S. 94 (1884). Ever since 1924, however, tribal Indians have been citizens of the United States, 8 U.S.C. § 1401(a)(2), and, under the 14th amendment, they are citizens of the States wherein they reside. The Commission report ignores the events of the last 100 years. In the 19th century Congress could not always control the activities of tribal Indians. Today Congress can. The theory adopted by the Commission would permit Congress to allow tribal governments to do what Congress itself cannot do because of Federal constitutional limitations.

The Constitution, as originally enacted, excluded Indians not taxed in determining the number of Representatives in the House of Representatives to which a State was entitled. U.S. Const. Art. I, § 2. The 14th amendment, ratified in 1868, continued this exclusion. When Indians were not citizens, a State could prohibit an Indian from voting in State elections, *Elk* v. *Wilkins*, 112 U.S. 94 (1884), despite the provisions of the 15th amendment. In short, tribal Indians were not considered part of the constitutional framework. Tribal Indians, however, were brought into the constitutional framework by 1924. 8 U.S.C. § 1401(a)(2). The Commission does not deal with the effect of this.

My point is this. To the extent tribal Indians exercise powers of self-government in these United States, they do so because Congress permits it. Tribes exercise powers of self-government as Federal licensees, because and as long as Congress thinks it wise. More than a tribe's *external* attributes of sovereignty have been extinguished. The Commission draws a distinction between the extinguishment of external attributes of sovereignty, which it concedes the United States has done, and internal attributes of sovereignty, which it alleges the United States has never done. It is my position that the one goes with the other. American Indian tribal governments have only those powers granted them by the Congress.

Those powers have over and again been labeled self-government and not sovereignty. It is one thing for the Congress to permit tribal Indians to govern themselves and not be subject to Federal constitutional limitations and general Federal supervision. It is quite another thing for Congress to permit Indian tribes to function as general governmental entities not subject to Federal constitutional limitations or general Federal supervision. The position adopted by the Commission would have Indian tribes exercising powers which the United States itself cannot exercise because of constitutional limitations.

Finally, there is no adequate theoretical basis for the assertion of inherent tribal sovereignty. The assertion of inherent tribal sovereignty proves too much. It would mean that whenever there is a group of American Indians living together on land which was allocated to them by the Federal Government, they would have the power to exer-

cise general governmental powers. The source of those powers would then be some magical combination of their Indianness and their ownership of land. Governmental powers do not have as their source such magic. Governmental powers in these United States have as their source the State and Federal constitutions. It is clear that Indian tribes do not govern themselves under State power. It is equally clear, however, that they govern themselves under the Federal power, and like all Federal power, their powers are specifically limited and the limitation with respect to tribes is one of self-government rather than the government of others. It is one thing for the Congress to permit tribal Indians to make their own laws and be ruled by them without State interference. It is quite another for the Congress to permit tribes to exercise general governmental powers without general Federal supervision. War, conquest, treaties, statutes, cases, and history have extinguished the tribe as a general governmental entity. All that remains is a policy. And, that policy is that American Indian tribes may govern their own internal relations by the grace of Congress. General governmental powers exist in this country only in the United States and the States.

Having missed this point, the Commission has missed the opportunity to address some of the major issues arising out of American Indian law and policy. What does it mean to be a citizen of a State and yet be immune to its laws? What is the basis for asserting that reservation Indians shall have representation in State government, but without taxation? On the other hand, what is the basis for asserting that non-Indian residents of Indian country shall not be represented in tribal government, yet be subject to tribal law, courts, and taxation? Is this obvious dual standard bothersome? And, if not, why not? What does it mean for a reservation to be within the boundaries of a State?

In his *The Role of the Supreme Court in American Government* (1976), Archibald Cox had occasion to describe the Federal system. He described the dual nature of State and Federal sovereignty and said:

> **The result is that within any territorial unit (any State) there are always two governments—State and Federal—operating side by side but each sovereign and independent within its functional sphere. Each of us (unless an alien) has dual citizenship; he is a citizen of the United States and of the State in which he resides. Each pays two sets of taxes. Each may claim rights under two governments. Each is subject to two sets of laws, one State and one Federal. Violations of a State law are subject to prosecution in the State court, violations of a Federal law in a Federal court. Civil cases may be brought in either the State or Federal judicial system according to the nature of the cause of action. Cox, supra, at 22.**

How does one fit the Indian tribe and the reservation Indian into this scheme? Is Cox guilty of oversimplification? Historical inaccuracy? These questions, which have gone unasked, and, therefore, unanswered by the Commission, must be raised and answered before the Congress can begin to deal with changes in American Indian law and policy.

Prior to reservation Indian citizenship, Federal insulation of them from State law created no urgent problem. But once reservation Indians became citizens of the United States, they became citizens of

the States wherein they resided and were then eligible to vote in State and local elections, run for State and local public office, and enjoy State services, such as public education. Hence, they help create and administer law which is not applicable to them. They enjoy State services without sharing in the burden of financial support. This creates enormous hostility among non-Indians who feel (1) with the rights of citizenship go its burdens, and (2) if Congress is to insulate Indians from State taxation, it is the burden of Congress to provide the Indians' fair share of support to State services.

A particularly pernicious consequence of the existing scheme is that in those political subdivisions of a State in which reservation Indians are a majority, they can control that level of government and, for example, set property tax rates which are applicable only to non-Indians. This has in fact occurred and is no mere potentiality. The Commission appears to be content to accept representation without taxation and taxation without representation. Our forefathers were not.

Who Did the Reserving?

In support of its argument that Indian tribes by treaty have retained to themselves inherent powers of self-government, the Commission relies upon *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905). It is true that there is dictum in that case to the effect that the treaty in that case "was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." 25 S. Ct. at 664. This dictum raises the question of whether, in instances where the United States required Indians to relocate themselves and put them on reservations, the United States reserved the land for Indians or whether the Indians reserved the land for themselves. But this question must yield to a conceptual distinction. It is one thing to say, as the Court said in *Winans*, that Indian treaty rights belonging to Indians whose aboriginal possession was not disturbed by the treaty but rather confirmed, are rights reserved by the tribe. It is quite another thing to say that any tribe anywhere has reserved to itself the land on its reservation and various rights to self-government. The leap is unwarranted. The treaties vary. The reservations vary. Many Indians now exist on reservations which have no relationship to ancestral or aboriginal homes. Hence, it is clear that in these instances the United States reserved the land for Indians.

I believe the United States Supreme Court has recognized this conceptual distinction. In *Colorado River Water Conservation District* v. *United States*, —— U.S. —— 96 S. Ct. 1236 (1976), frequently referred to as the *Akin* case, the Court held that the McCarran amendment, 43 U.S.C. § 666, by which the United States consented to suit in State court for the adjudication of Federal water rights, extended to Indian reserved water rights. The Court described Indian reserved water rights under the *Winters* doctrine as included in those rights where the United States was "otherwise" the owner under the McCarran amendment. 96 S. Ct. at 1242. To do this, the Court viewed the Government's trusteeship of Indian rights as ownership and said that for the purposes of the McCarran amendment there was no distinction between Indian rights and non-Indian rights. Id. Accordingly, since

the McCarran amendment provided the consent necessary to sue the United States, and since Indian water rights were among Federal water rights subject to the McCarran amendment, it followed that Indian water rights could be litigated and determined in an action against the United States. In short, the Court was saying that there are no Indian reserved water rights but, rather, only Federal water rights reserved for Indians.

I make these remarks because, in my view, it is wholly erroneous to adopt, as this Commission has, the position that tribal Indians have reserved to themselves all rights not specifically extinguished by treaty. Generalizations, such as this one, are neither accurate nor helpful in seeking to define the powers of the United States, the States, and the Indians. It may be, as in *Winans*, that the relationship between the United States and a particular Indian tribe was one of arm's-length bargaining such that it could be said that a tribe actually reserved rights to itself. On the other hand, the relationship between the United States and other tribes was characterized by war and destruction. When these relationships culminated in peace treaties, it is simplistic, to say the least, to assert that the Indians reserved anything to themselves. It is clear that in most instances, the United States as the victorious party, dictated the terms of the treaty and reserved for the Indians various parcels of land.

So, as I have rejected the broad assertion of inherent tribal sovereignty, I also reject the broad assertion that tribal Indians have reserved to themselves inherent rights to self-government and property rights. Generalizations such as these have no place in law, and must yield to a judicious consideration of relevant treaties, statutes, State enabling legislation, history, and contemporary fact.

But the nature and scope of tribal self-government is too important to be left to case by case adjudication. I recommend that Congress enact comprehensive legislation which clearly defines the nature and scope of tribal self-government and makes it clear that the governmental powers granted tribes by the Congress are limited to the government of members and their internal affairs, and are not general governmental powers.

Tribal Jurisdiction

Since Indian tribes are granted some of the powers of government, many of the major problems and uncertainties of American Indian law and policy resolve down to questions of jurisdiction. Jurisdiction, of course, means the power to regulate (and tax) the conduct and property of people, and the authority to enforce those regulations against unwilling persons through coercive instruments of government.

A. Tribal Powers Over Non-Indians

One of the most important questions of Indian law and policy is the extent to which Indian tribes should or may exercise governmental authority over non-Indians and other nonmembers. The question has profound implications in that the unwise exertion of such powers over non-Indians could have a catastrophic effect on whether Indian peoples will be left alone to make their own laws and be governed by them. The exercise of such authority would also bear upon the most valued

political rights and civil liberties of those nonmembers who would be subject to the powers of tribal government. The Commission report assumes that tribal governments should grow and develop into "fully functioning governments," which "necessarily encompass the exercise of some tribal jurisdiction over non-Indian people and property." I disagree, as I think the vast majority of the American people would disagree.

1. Theoretical Considerations

Whether Indian tribes are to exercise governmental authority over nonmembers goes to the very roots of Indian law and policy. The question ultimately goes to what the purposes are for allowing Indian tribes some of the powers of government, or whether indeed those powers are not tied to any specific ends at all. The question is whether Indian governmental power is an instrument of Federal policy defined by its ends or whether it is an absolute prerogative without a limiting purpose.

Indian peoples do not have and have not been accorded any right of government good against the sovereignty of all the people. They are not given the power of government for its own sake. Rather, it is the policy of the United States to allow some Indian peoples to exercise some governmental powers over themselves for a purpose. The purpose is to allow peoples of distinct cultures, most of whose ancestors were present in this land before the non-Indians came to it, to decree their own norms of conduct and to control their affairs so as to preserve their own cultures and values.

The Federal purpose is to allow some Indian peoples to preserve the uniqueness of their own cultures and values by insulating them from the general municipal powers of the States. It is feared that their distinctive heritages and values could be unduly burdened if Indians were answerable for all the obligations and duties imposed upon the general populace by collective decisions reflective of the culture and values of the non-Indian majority.

Some Indian peoples enjoy, therefore, a unique exception to our deeply felt view that the powers of government are shared by all of our citizens on an equal footing to be exercised in furtherance of only publicly shared values, and that ethnic background is not a proper criterion for making distinctions in participation in public decisionmaking. In short, it is generally felt that the power to decree standards of conduct and to compel the unwilling to conform to them is properly exercised only by a majoritarian democracy open to all citizens.

The Commission report asserts that "the ultimate objective of Federal-Indian policy must be directed toward aiding the tribes in achievement of fully functioning governments exercising primary governmental authority within [the reservations]" with authority "to do any and all of those things which all local governments within the United States are presently doing."

The American people, however, have never intended to establish Indian tribes as absolute "sovereigns of the soil" over the lands on which they reside. The only "fully functioning governments" with "primary governmental authority" in any place are the governmental units open to participation of all citizens, regardless of race, birth, or

the uniqueness of their cultural heritages. As has been stated previously, we acknowledge one sovereign, all the American people, who have expressed their exclusive sovereignty in the United States Constitution, which allocates all power to the United States, to the States, to all the people, and to no one else.

In summary, the American people have not surrendered to Indians the power of general government; Indians are given only a power of self-government. They have the power to regulate only their members and the property of their members. They have some governmental powers because and to the extent that such powers are appropriate to the Federal policy of allowing Indian peoples to control their own affairs. But there is no Federal policy of allowing Indian peoples to control the liberty and property of non-members. Tribal powers of self-government are limited by their purpose.

2. Objections to Tribal Jurisdiction Over Non-Indians

With these fundamental reflections in mind, it becomes clear that Indian tribes do not have and should not have power over non-Indians or their property, except in the narrowest circumstances. Some of the specific reasons for this conclusion can be briefly outlined.

First, power over nonmembers could only be justified under a "territorial" notion of the governmental mandate of Indian tribes. But as we have seen, the mandate of Indian tribes is not supreme within their territory; rather their mandate is purposive, and there is no Federal policy of subjecting non-Indians to a supremacy of Indians.

The American people, through the Congress, have been willing to give Indian peoples governmental powers in order to assist them in the preservation of their own cultures and values. But I do not believe the non-Indian majority ever considered that their willingness to leave Indians alone to be governed by their own laws also constituted a surrender of their own liberty and property to the control of Indian tribes.

Even if a congressional choice to subject non-Indians to tribal jurisdiction were clear, there would be serious constitutional problems, which the Commission report ignores. The Supreme Court has held that Congress may not under its power "to make rules for the government and regulation of the land and naval forces" subject civilians to criminal trial in military courts because such civilians are entitled to be tried in article III courts. *Reid* v. *Covert*, 354 U.S. 1 (1957); *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960); cf. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). There would seem to be far less authority for Congress to allow the subjection of non-Indians to general criminal jurisdiction in non-article III courts operating within the boundaries of States.

State general purpose political subdivisions may not exclude persons from voting unless the exclusion is strictly necessary to serve a compelling State interest. *Avery* v. *Midland County*, 390 U.S. 374 (1968); *City of Phoenix* v. *Kolodziajski*, 399 U.S. 204 (1970). It would be exceedingly strange if Congress could authorize a group to exercise general municipal powers over all persons within a given territory yet disqualify some persons from political participation on grounds of accidents of birth.

There is a further objection to tribal jurisdiction over non-Indians which, although it may not cross the threshold of unconstitutionality, nevertheless raises important constitutional considerations. It may be questioned whether in promoting Federal policies concerned with the relations of Indians among themselves, it is proper to grant them governmental power over others as a mere adjunct to the exercise of their powers among themselves.

Furthermore, general powers of government are far more substantial than the power to regulate commerce. Congress surely cannot exercise general municipal authority over the lives and property of citizens within the boundaries of a State on a theory that such powers are ancillary to Congress' commerce power. It would be even less likely that such general municipal power over one group of citizens could be granted to another group of citizens merely because Congress has the power to regulate commerce between the two groups.

It is also sometimes urged that tribal governmental power, including power over non-Indians, derives from tribal ownership of the beneficial interest in trust lands. But whatever authority Indian tribes may have over trust property (which is far less extensive than the prerogatives of property ownership which is not subject to Federal fee interests), those rights are ultimately rights to control property itself, not rights to control activity or property of others. Indian tribes, like other landowners, may expel trespassers or sue them for damages. But there is no doctrine whereby when entering the land of another one consents to any general lawmaking and enforcing authority of the landowner merely by virtue of being on his land.

There are few values more central to our society than the belief that governments derive "their just powers from the consent of the governed." Government by Indian tribes over non-Indians, if allowed to take place, would be a clear exception to that principle. A heavy burden of justification should fall on those who would subject some of our citizens to the coercive powers of others without any opportunity or right to join in the deliberations and decisions which determine how that power is to be exercised. Those who assert that Indian tribes should be allowed to rule non-Indians offer little justification other than an appeal to the abstraction of "sovereignty". But our society sees no distinction between the rulers and the ruled; all citizens enjoy both statuses. There is little reason shown why academic deductions from the metaphor of "sovereignty" should take precedence over the Declaration of Independence and the first principles of democracy.

Consequently, it is all the more inappropriate that Indian tribes should exert governmental power over resident non-Indians who plainly would be entitled to vote and participate in tribal government were it not for the accident of their race. But of course, it would frustrate the whole purpose of allowing Indian self-government to require them to allow nonmembers also to participate in their "self" government. Once participation is opened up beyond the Indian peoples themselves, the governmental unit has abandoned its very purpose for existing—to allow Indians to make their own laws and be governed by them. Once political participation is extended beyond Indians themselves, there is utterly no reason for having Indian governments separate from political subdivisions of a State.

The recent case of *Oliphant* v. *Schlie*, 544 F. 2d 1007 (9th cir. 1976), *cert. granted* (June 13, 1977), recognizing that it is the first court to address the question in 100 years, holds that Indian tribes may prosecute on-Indians in tribal courts for criminal violations on the reservations. The majority opinion in *Oliphant* upholds the jurisdictional claim over non-Indians on the theory that Indian tribes have all powers which have not been forbidden to them and that Congress has never spoken to the question of jurisdiction over non-Indians. This view, of course, inverts the proper analysis and ignores history. The scholarly dissenting opinion of Judge Kennedy correctly points out that such jurisdiction has generally not been asserted and that the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction, not an implication that tribes should have such powers. The *Oliphant* case does not dispose of the question, and even if it is upheld by the United States Supreme Court, the Congress must still decide whether Indian power over non-Indians is wise.

3. Tribal Courts

Even assuming that Indian tribes should and may proscribe the standards of conduct and the civil and criminal liabilities of non-Indians within Indian reservations, it would be even more inappropriate for Indian courts to exercise criminal or civil jurisdiction over unwilling non-Indian defendants.

Again, the courts of tribal governments can have no broader reach than the purposes for which Indian tribes are granted governmental power in the first instance. That purpose is to regulate the Indians' affairs among themselves. The only purpose of subjecting non-Indians to the enforcing powers of tribal courts would be to allow Indians to govern non-Indians.

Nor can it be said that tribal criminal enforcement against non-Indians should be allowed in order to fill a gap in the preservation of law and order on the reservation. To the extent that State criminal laws apply of their own force to non-Indian activities on reservations, non-Indian violators can be prosecuted in State courts. Where Indian peoples feel that States are applying insufficient manpower to the enforcement of State laws against non-Indians, that problem can be met by cross-deputizing tribal police as State peace officers. The cross-deputized tribal/State peace officer would then have authority to initiate prosecutions against non-Indians in State courts when the tribal officer apprehends the non-Indian breaching the peace.

To the extent that State law may not apply of its own force to non-Indian lawbreakers on the reservation, State law would nevertheless apply indirectly through the Assimilative Crimes Act, 18 U.S.C. § 13, enforcement of which is in the Federal courts. See 18 U.S.C. § 1152.

In summary, there is no lack of enforcing authority which would show a practical necessity for subjecting non-Indians to criminal prosecution by the arm of a quasi-governmental entity from which they are excluded from political participation because of accidents of birth.

Reservation Indians in States which have neither been granted nor assumed jurisdiction under Public Law 280 are immune from suit in the State courts for causes of action which arise on the reservation.

Such Indians may be sued only in the tribal courts. Indians may, however, have access to the State and Federal courts on the same footing with all other persons. Some Indian tribes have claimed authority for their courts to hear claims against nonmembers. See *Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975).

There is no justification for the exertion of civil jurisdiction against unwilling non-Indian defendants in tribal courts. The State or Federal courts are fully capable of hearing all such claims. It would be a drastic turnabout of Federal Indian policy to say that tribal courts may be used not as a shield but as a sword to assert claims against non-Indians. Again, the fundamental question involved is whether Indian government is self-government or general government. Only if the tribe enjoys general sovereignty of the soil can there be any justification for their courts exercising jurisdiction over nonmembers merely because the claim arose within the geographic boundaries of the Indian reservation. Such an affirmative assertion of jurisdiction is not tied to the policy of allowing Indians to make their own laws and be governed by them but rather is a claim to make laws to govern non-Indians. Indian tribes have no such mandate from the people of the United States.

4. Full Faith and Credit

The Commission report argues strenuously that civil judgments of tribal courts should be given full faith and credit by other courts of the States and of the United States. To the extent that tribal judgments are entirely between members, do not implicate any interests of nonmembers, and are arrived at according to substantive legal rules and modes of procedure satisfactory to the Indian peoples of the tribe whose court has entered the judgment, I see no substantial reason why such judgments should not be afforded full faith and credit. However, judgments against unwilling non-Indian defendants should not be afforded full faith and credit. Since such assertions of civil jurisdiction over non-Indian defendants exceed the jurisdiction of tribal courts, judgments against such defendants would not be entitled to full faith and credit under traditional legal concepts.

The question, then, of whether Congress should require full faith and credit for such judgments raises all the same considerations of whether non-Indians should be subjected to the civil jurisdiction of Indian courts in the first place.

5. Subjection of Non-Indians to Indian Law and Courts Will Destroy the Practical Ability of Indian Peoples To Make Their Own Laws and Be Governed by Them

Arguments are often made by Indian advocates that jurisdiction over non-Indians must be granted to tribes because the lack of such jurisdiction is inconsistent with the notion of "tribal sovereignty". Admittedly, if Indian tribes were sovereign within their boundaries, it would follow that all persons within their boundaries are subject to the rule of Indians. But the premise is false. Only the people of the United States are sovereign and neither Indians nor anyone else have any claim to sovereign power good against all the people.

Furthermore, it would be disastrous to Indian interests for tribes to have power over nonmembers. If we assume that the governmental

powers accorded to Indian tribes include the exercise of jurisdiction over non-Indians, then the non-Indian majority would have a vital stake in the precise content of all laws enacted by every Indian tribe and in all procedures utilized by them to enforce their laws. To the extent that non-Indians are subject to the rule and the process of Indian quasi-governments, all non-Indians have a direct stake in how those governmental powers are exercised by Indian tribes. Congress would have no choice but to closely supervise Indian governmental decisions in a way which would totally frustrate the very purpose of giving Indians governmental powers in the first place.

This point could be illustrated in many ways, but let us look specifically to the effect that tribal court jurisdiction over non-Indians would have on the Indians' ability to decide how their courts shall operate. If the liberty, property, and financial security of non-Indians are to be at the mercy of Indian judges hearing claims by their constituents against non-Indians, the non-Indian majority will justly demand the same degree of procedural exactitude and published rules of law which they are used to enjoying in the courts of the States and of the United States. We have complex procedural systems designed to assure correct and fair decisionmaking. We also have appellate review to assure uniformity in decisionmaking and to minimize the possibility of bias or error in individual cases. Where the rights of litigants involve questions of Federal law we have a right to seek review in the United States Supreme Court.

Indian tribal courts by contrast have very few of these complex assurances of fairness and accuracy in decisionmaking. Few tribal judges are trained in the law of the States and of the United States, and few tribes have systems of appellate review. Apparently none publishes appellate decisions. There is no appeal to the authoritative sources of law whether it be the highest court of the State or the United States Supreme Court.

The Indian Civil Rights Act of 1968 provides some limited review in the Federal courts for decisions of tribal courts insofar as those decisions impinge on minimal constitutional guarantees. But there is no review in Federal courts for decisions of Indian courts which are merely erroneous unless the error reaches constitutional magnitude or it deprives one of personal liberty.

While Indian peoples should be largely free to choose whatever quality of judicial process they wish to have for themselves, most of the non-Indian majority will insist upon having for themselves ample assurances of fairness, competence, and correctness of decisions. The absence of appellate review would be especially intolerable, and Congress would surely require tribes to provide for it. Indeed, Congress would be remiss in its duty to the non-Indian majority if it did not prescribe high standards of legal process according to the expectations of non-Indians, if non-Indians are to be subject to tribal courts,

Consequently, it would be profoundly unwise for Indians to force non-Indians to become involved in the details of tribal government by asserting jurisdiction over non-Indians. Indeed, as has been expressed above, once Indian tribes have assumed regulatory and court jurisdiction over non-Indians, the entire justification for allowing Indian peoples the limited governmental powers they enjoy will have vanished.

6. Recommendation for Legislation

I recommend that Congress enact legislation directly prohibiting Indian courts from exercising criminal jurisdiction over any person, whether Indian or non-Indian, who is not a member of the Indian tribe which operates the court in question.

I further recommend that Congress enact legislation prohibiting Indian courts from exercising civil jurisdiction over any person, whether Indian or non-Indian, who is not a member of the tribe which operates the court in question, unless the non-Indian defendant expressly and voluntarily submits to the jurisdiction of the tribal court after the claim arises upon which suit is brought.

B. CONFUSION OVER ALLOCATIONS OF JURISDICTION BETWEEN STATES AND TRIBES

One of the most important and perplexing questions in Federal Indian law and policy is the allocation of powers between States and Indian tribes. The problems are enormous and their ramifications extensive, and it is especially regrettable that the Commission, rather than thoroughly and fairly analyzing the many problems, chose instead to write a party tract uniformly advocating the maximum extension of tribal jurisdiction at the expense of State jurisdiction. In writing these minority views we cannot do in the short space of a few weeks what the Commission was supposed to have done in a year's time. However, these minority views will attempt briefly to outline some of the major considerations which should go into any fair-minded attempt to divide jurisdiction between States and tribes. The inadequacy of present laws to fairly allocate those powers will then be discussed, along with some special problem areas.

Several major principles concerning the allocation of powers between States and tribes can be stated summarily. States do not have governmental power over reservation Indians for their activities on the reservation unless expressly granted by the Federal Government. *McClanahan* v. *Arizona State Tax Commission*, supra. States do have power over the off-reservation activities of reservation Indians. *Mescalero Apache Tribe* v. *Jones*, supra. However, Indian reservations are part of the States within whose boundaries they are situated, and the States' powers over their territory are limited only to the extent that Federal law mandates restrictions on those powers. States enjoy comprehensive power over non-Indians and their activities on reservations, unless such State jurisdiction is expressly precluded or preempted by Federal law. State jurisdiction may also be barred under the nebulous doctrine against "infringement of tribal self-government". *Williams* v. *Lee*, supra.

The ultimate goal in allocating powers and responsibilities between tribes and States is to do so in a fashion appropriate to the legitimate interests of each political body. More specifically, States should not be allowed powers which in fact hamper the Federal purpose in giving Indian tribes governmental powers in the first instance—to allow Indian peoples to make their own laws and to control their own internal affairs. (But to the extent that national policy wishes to see reservation Indians enjoy the benefits they would otherwise

derive from participation in the affairs of the State government, but which they are not required to support, it is only fair for national policy to look to the tribe or to the national government to provide those benefits.)

Another goal of the allocation of powers is to avoid misallocation of economic cost and benefits. The division of powers should be such that the Indian reservations do not become jurisdictional islands from which activities which significantly affect the States' interests can be conducted outside the reach of the States' power to regulate them. Similarly, Indian reservations should not be allowed to become jurisdictional islands to which non-Indians can, for the sole purpose of escaping State authority, easily relocate their activities which would otherwise transpire off the reservation.

Absent Federal statutes, the courts have evolved a vague and indefinite "rule" for determining when State jurisdiction over non-Indians for their activities transpiring on Indian reservations is to be precluded. The rule is the "infringement of tribal self-government rule" articulated in *Williams* v. *Lee*, and explained in *McClanahan* v. *Arizona State Tax Commission.*

In *Williams* v. *Lee*, 258 U.S. 218 (1959), the court stated:

> Essentially, absent governing acts of Congress, the question has always been whether state action infringed on the right of reservation Indians to make their own laws and be ruled by them. 358 U.S. at 220.

In *McClanahan* v. *Arizona State Tax Commission*, supra, the Supreme Court made clear that the *Williams* v. *Lee* "infringement" rule is meant to test the permissible scope of State jurisdiction over the non-Indian aspects of transactions on the reservation involving both Indians and non-Indians:

> In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the state could protect its interests up to the point where tribal self-government would be affected. 411 U.S. at 179.

Where State jurisdiction over reservation activity of non-Indians will in fact impair legitimate tribal power, State jurisdiction must yield even though the State may otherwise have legitimate claims to regulate.

The "infringement" rule has proved to be a very poor discriminator between permissible and impermissible State jurisdiction because the rule does not identify what the "legitimate governmental interests" of tribes are over transactions involving both Indians and non-Indians. The lower court decisions applying this test are utterly irreconcilable.

The "infringement" test is further plagued by a tendency by some courts to confuse "self-government" with "sovereignty", a confusion zealously cultivated by some Indians and their lawyers.

It is clearly beyond the scope of these minority views to articulate a comprehensive statement of how State/tribal allocations of power should be made, but several obvious suggestions can be made for improving the "infringement" rule.

No infringement of tribal self-government should be found unless the non-Indian activities over which State jurisdiction is sought are part of a complex of activities which are substantially Indian in char-

acter. This threshold requirement of "substantial Indian involvement" is necessary to assure that non-Indians are immunized from State law only where it is incidental to and necessary for insulating Indians from State law.

As a closely related requirement, immunity-motivated conduct of non-Indians should *not* be immune from State law. Where transactions take place or take a particular form precisely because of hoped-for immunity to non-Indians, no tribal interest is truly implicated other than possible tribal desires to "franchise" their immunities to non-Indians. But such "interests" are not legitimate. Otherwise it would be possible for Indians to "market" immunity from State law by inducing essentially non-Indian activities to relocate on the reservation and by coloring them with a mere form of Indian involvement. For example, in a number of recent cases Indian tribes have entered into long-term leases of trust land to non-Indians for development and subdivision to other non-Indians. The courts have uniformly held that States may tax the leasehold interests of such non-Indian lessees and sublessees, even though there is a clear effect on Indian interets. E.g., *Chief Seattle Properties, Inc.* v. *Kitsap County*, 86 Wash. 2d 7, 541 P. 2d 699 (1976); *Fort Mohave Tribe* v. *County of San Bernadino*, 543 F. 2d 1254 (9th Cir. 1976).

There are also areas in which unitary regulation is necessary and therefore Indian reservations should be subjected to State jurisdiction. One example is the control of air pollution, which respects no political boundaries. Congress has charged States with the achievement of Federal air pollution standards within their boundaries, yet it is argued that the Clean Air Act does not authorize States to apply and enforce their air pollution laws on Indian reservations. Without getting into the details of Federal air pollution statutes, it is evident that States cannot meet the problems of air pollution unless they have authority coextensive with the problem.

Many other areas of law are similarly in need of unitary regulation and enforcement. The Commission could have done a great service by identifying those areas and recommending appropriate legislation.

C. ZONING

One area in which the conflict of jurisdictions is especially troublesome is land use regulation. The very justification for land use regulation is the concern with the external effects of land use, the effects of which are felt beyond the boundaries of the particular parcel of land itself. Indian reservation land situated close to urban development presents thorny problems of inconsistent and exploitative uses between Indian and non-Indian lands.

On the one hand, it is usually felt that only the Federal Government can ultimately control the uses of Federal lands, although the practice of the Federal Government is to cooperate closely with local authorities. On the other hand, the existence of jurisdictional islands within urban areas holds out the possibility of self-interested exploitation which would frustrate the very purpose of regional land use planning.

The individualized nature of land use planning decisions has made it difficult for courts to supervise the decisions of regulatory authori-

ties, and it is felt that the principal defense against abuse of the immense powers wielded by land use regulatory bodies is their accountability to all of the public. Sectionalism and favoritism are less likely to occur where the regulatory bodies are politically accountable to all the persons who will benefit or suffer from land use decisions.

Hence, the fractionalization of land use regulatory authority frustrates land use planning generally.

State power to regulate use of Indian trust land is uniformly prohibited. Even in States which have acquired general civil and criminal jurisdiction under Public Law 280, the most recent authority is that they may not regulate land use. *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655 (9th Cir. 1975).

Some specific Federal statutes have required the Secretary of the Interior to consider compatibility with surrounding land use planning when approving leases of Indian land. But in general no attempt has been made to reconcile Indian land uses with surrounding non-Indian land use planning, or vice versa.

Again, this is a problem which would have benefited much from careful factual and theoretical analysis. The Commission has chosen to ignore this problem, probably because any fair solution to it would entail some limitations on the prerogatives now enjoyed by Indian tribes.

The problems are especially difficult with land owned by nonmembers within the boundaries of the reservation. Obviously State regulation of such land use has the potential of bearing much more directly upon surrounding Indian interests than upon nonreservation interests. But to allow tribal regulation of land uses by non-Indians raises again all the problems discussed previously concerning tribal jurisdiction over non-Indians.

The solution will probably lie in some types of cooperative arrangements among local governmental units, Indian tribes, and Federal administrators. But it would seem that there must be authority in the Secretary of the Interior to override positions of tribal leaders themselves both because the land in question is ultimately Federal in ownership and because the Secretary, unlike tribal leaders, is responsible both to Indians and to non-Indians and is therefore better able to fairly resolve conflicts that may arise between such groups.

The implementation of such cooperative land use planning would require much legislative study. The fact that it has received virtually none from this Commission is highly disappointing.

In the absence of ultimate authority over Indian land use planning lying with Federal officials, the fairest system would be to place final authority in State planning authorities in which Indians would participate equally with other affected citizens.

D. TAXATION

There is a simple and fair formula for deciding who shall be taxed by whom in Indian country. The United States should tax all persons on Indian reservations the same as it does persons elsewhere. States should tax non-Indians and their property. Tribes should be able to tax members and their property.

1. Federal Taxation

Neither Indians nor non-Indians on reservations should enjoy exemption from Federal taxation. As citizens of the United States with equal participation in and enjoyment of the benefits of the Federal Government, there is no reason why Indians, any more than anyone else, should receive favored tax treatment from the Federal Government.

2. State Taxation of Non-Indians

The courts have uniformly held that taxation of leasehold interests of non-Indian lessees of Indian land does not bear closely enough upon Federal policies in order to infringe on legitimate tribal self-government. *Fort Mohave Tribe* v. *County of San Bernardino*, supra. The Commission report suggests such taxation should be precluded. The Commission also suggests a sweeping Federal tax immunity for non-Indian activities on Indian reservations so that the tribes would be free to assert or decline taxing authority over such non-Indian activities. The Commission would also shift to the State the burden of proving that taxes on non-Indian activities within Indian reservations do not interfere with tribal self-government.

This is but another example of the majority's attempt to color Indian tribal authority within their reservations as a general territorial authority, rather than a purposive authority limited to regulating the conduct of Indians themselves. The suggestion also totally ignores the legitimate interests of states in deriving tax revenues from activities of their non-Indian citizens. Typically, non-Indians conducting activities on an Indian reservation take advantage of the whole panoply of State benefits and services. They enjoy the benefits of State law and travel off the reservation in connection with their activities on the reservation. There is simply no justification for preventing States from levying nondiscriminatory taxes against non-Indian activities merely because those activities are situated on Indian reservations and Indians would profit from selling immunity from State taxes.

The broad immunity for non-Indians suggested by the Commission would also result in large-scale tax-motivated relocation of non-Indian activity onto Indian reservations. It is not, and never has been, Federal Indian policy to allow Indian tribes to market immunity from State laws by selling the privilege to locate activities on Indian land. *Fort Mohave Tribe* v. *County of San Bernardino*, supra.

3. State Taxation of Indians

States may not tax reservation Indians or their property when situated on their own reservations. However, when Indians go off the reservations, they become generally subject to the law of the State, including tax laws. Mere status of the reservation Indian does not grant one a personal immunity from the obligations of State law when one leaves the reservation and takes advantage of the protections of State law off the reservation. The proper statement of State power to tax Indians is that contained in the report of the Western State Tax

Administrators discussed in the majority report. The State may not impose taxes, the legal incidence of which falls upon reservation activities or property of Indians. However, States may tax the reservation activities or property of non-Indians and Indians who are not members of the tribe on whose reservation they are found. Since non-member Indians have no right to participate in the government of a tribe to which they do not belong, it would be contrary to the purposes of Federal Indian policy and invidiously discriminatory against non-Indians to allow non-member Indians immunity from State law and taxation merely because they are Indian.

4. Tribal Taxation

It may be seriously doubted whether Indian tribes enjoy the power to tax. A few old, lower court cases, none less than 70 years old, recognize that power. In any event, I have no quarrel with tribal powers to tax, as long as the power is limited to taxation of members and their property. Taxation of their own members and property would be an appropriate way of financing the Indians' government of themselves.

The majority asserts the tribe should be free to tax non-Indians and their property situated on reservations. Again, they deduce this power from the assumption that Indian tribes are general governmental units with authority over all things and persons within their boundaries. Taxation of non-Indians and their property would be especially pernicious because of their exclusion from participation in the political processes which control the supposed power. The majority weakly suggests that non-Indian interests would be adequately protected by judicial review in the Federal courts once tribal taxation becomes confiscatory. Assuming that the doctrine against confiscatory taxation retains any vitality in contemporary constitutional law, this remedy would be blatantly inadequate to protect all the legitimate interests of non-Indian taxpayers. Those who pay taxes are entitled to be concerned about the level of taxes and uses to which they are put long before the taxation becomes confiscatory.

Apparently feeling the weakness of its position, the majority suggests that "any tax assessed and collected from a resident nonmember may have to bear a reasonable relationship to a service provided or available to such resident nonmember." But the majority fails to suggest how any teeth could be put into this restriction.

Tribes have no power to tax non-Indians or their property because tribes have no power at all over non-Indians or their property. Again, Indian tribes have a limited privilege to govern themselves; they have no general power of government within the boundaries of their reservations.

There are also serious constitutional values implicated in any attempt by Indians to tax non-Indians. Some Indian tribes enjoy governmental powers only because and as long as Congress, as a matter of national policy, thinks it is wise that they have such powers. Were it not for the Federal immunity, Indians would be entirely subject to the sovereignty of the States in which they are present.

It would be irrational for Congress to tolerate a system wherein the costs of Indian tribal separatism are not to be borne by all the taxpay-

ers of the United States, but rather are to be borne inordinately by those non-Indian taxpayers who, by accident, conduct activities or have property on Indian reservations. While Congress may insulate Indians from State law and may subsidize their efforts at government and social welfare, I seriously doubt that Congress could levy a tax on persons or property situated on Indian reservations and then remit those tax funds to the Indian tribes. The same result is achieved by allowing Indian tribes to tax nonmembers on their lands. It is a denial of due process of law for Congress to tolerate a scheme in which the financial burden of supporting Indians and Indian government falls disproportionately on non-Indians or on non-Indian property on Indian reservations.

5. Legislative Recommendations

I recommend that Congress enact legislation confirming that States have the same power to levy taxes, the legal incidence of which falls upon non-Indian activities or property, on Indian reservations as they have off Indian reservations. The only exceptions to this blanket recognition of State taxing power over non-Indians should be in the rare situations where comprehensive Federal regulation of specific subject matters would independently preempt State regulation, including taxation, of non-Indian activities on Indian reservations. *See Warren Trading Post Co.* v. *Arizona State Tax Commission*, *supra*.

I also recommend that Congress expressly proscribe taxation of nonmembers or property of nonmembers by Indian tribes.

E. PUBLIC LAW 280

A special concern to many States is Public Law 280, under which many States have been granted or have assumed general civil and criminal jurisdiction over Indian reservations. As the Commission report indicates, Public Law 280 has been interpreted to subject reservation Indians to the States' criminal law and civil law of general applicability between private persons, and to enforcement in the State courts. The law has been interpreted not to allow application of general regulatory laws or tax laws to reservation Indians. *Bryan* v. *Itasca County*. — U.S. —, 96 S. Ct. 2102 (1976).

The effects of Public Law 280 cannot be conveniently summarized. It allows State enforcement of criminal law and provides a State civil forum for litigation against reservation Indians with certainty that the civil law of the State generally applicable to private persons will be the rules of decision in such cases. The effects of the civil jurisdictional aspects of the statute probably include the facilitating of granting credit, doing business and making investments by non-Indians on reservations by assuring a forum and a predictable body of law for the enforcement of rights that flow from such transactions. The criminal jurisdiction probably promotes law and order by providing an additional instrument of criminal law enforcement.

It is not clear to what extent the granting of criminal enforcement powers to States obligates the States to spend their funds to provide police and law enforcement services on Indian reservations. Congress'

apparent refusal to allow States to require the Indian beneficiaries of State law enforcement to bear their share of the costs of that service may well indicate that the States were not thought to be obligated to provide law enforcement services.

A major problem raised by *Bryan* v. *Itasca County*, supra, is that it throws great doubt on what civil laws of the State are substantively enforceable against reservation Indians. Many States have assumed only designated subject matter jurisdictions, and there is now much doubt as to whether the laws they have purported to extend over Indian reservations are regulatory laws of the sort that *Bryan* held not to be allowed by Public Law 280.

Zoning laws, as has been stated, are held not to be applicable under Public Law 280, both because they bear upon Indian trust land and because they are usually local laws, not statewide laws. *Santa Rosa Band of Indians* v. *Kings County*, supra. The reasoning of *Bryan* v. *Itasca County* would also seem to exclude zoning regulation from the type of jurisdiction ceded to States under Public Law 280.

Bryan explicitly held that Public Law 280 did not extend State taxing laws to Indian reservations.

The present state of the law seems to be that Public Law 280, which was intended to reduce jurisdictional problems in Indian reservations, has now produced its own set of wide-ranging uncertainties about the permissible jurisdiction of States within Indian reservations.

Comprehensive congressional review of Public Law 280 is appropriate, if for no other reason than to reduce the confusion that now exists about the meaning of the statute.

The Commission report recommends that Indian tribes subject to State jurisdiction under Public Law 280 be granted the unilateral right to withdraw from such State jurisdiction. This recommendation is overbroad. Retrocession of jurisdiction should be predicated only on particular findings that State jurisdiction under Public Law 280 has resulted in actual harm to Indian culture and values. Immunity from the obligations and restrictions placed on all for public benefit will always be thought desirable by the few who would enjoy the immunity. If withdrawal from State jurisdiction is to be done on grounds of Federal policy, the policy choices should be made by Congress, which can weigh fairly the costs of Balkanizing State jurisdictions as well as the advantages to Indians.

F. NEW CIVIL JURISDICTION

In many instances, there are no judicial forums in which certain claims can be heard. Under the doctrine of *Williams* v. *Lee*, supra, Indians may not be sued in State courts for causes of action arising on the Indian reservation. But many tribes do not provide courts with civil jurisdiction, or limit the civil jurisdiction of their courts so as to exclude many types of civil claims. The result is that many civil claims against reservation Indians, whether by Indians or by non-Indians, cannot be heard. It is doubtful that these jurisdictional gaps are intentional.

The existence of these jurisdictional gaps also raises serious constitutional problems. Because of the interplay of Federal law and the

absence of tribal forums, it will often happen that parties to various transactions will have or not have remedies and enforcement forums depending on their race. So, for example, where the tribe has provided no civil court, or otherwise excludes civil jurisdiction, an Indian may have relief for injuries caused by the negligence of a non-Indian. But there is no relief if the racial statuses of the plaintiff and defendant are reversed. Surely this result is neither fair nor wise. It is not constitutional for Federal law to mandate a forum and relief, say in State courts, for Indians against non-Indians, but, at the same time, to allow Indians themselves to decide whether non-Indians shall have a forum and relief against them.

Assuming the unconstitutionality of this bizarre system of relief based on race, it is not clear what the consequence should be. Perhaps non-Indian defendants of Indian plaintiffs in State courts should be allowed to raise nonmutuality as a substantive defense to the claims of Indian plaintiffs. Perhaps a non-Indian plaintiff against a reservation Indian could have a claim under the Indian Civil Rights Act to compel the Indian tribe to provide a judicial forum for him such as an Indian plaintiff would have against him in State courts.

In any event, it is surely unwise and probably unconstitutional to permit the Federal purpose of allowing Indians to make their own laws and be governed by them to reduce down to a system whereby different laws apply to Indians and to non-Indians involved in identical or the same transactions.

Congress should enact legislation allowing civil jurisdiction in State courts against Indian defendants in all cases where there would be jurisdiction in the State courts were it not for the Indian status of the defendant and where the tribal government of the Indian defendant does not provide a judicial forum to hear the claims against the Indian defendant. Tribal interests in regulating their own members could be protected by providing that tribal rules of decision must be given appropriate weight in the State court proceedings. In the alternative, Congress should bar actions by Indians against non-Indians for claims arising on reservations where tribes have not provided forums for similar actions by non-Indians against Indians.

G. INDIAN CIVIL RIGHT ACT OF 1968

The Commission report takes exception with some of the provisions of the Indian Civil Rights Act of 1968, which, for the first time, expressly subjected Indian tribes to constitutional limitations in the exercise of power. In general, the Indian Civil Rights Act is a tremendously important bulwark against the abuse of power, which Indians are no less capable of than other persons. I must dissent from various of the Commission's recommendations to restrict the Indian Civil Rights Act.

The Commission seems to suggest that there should be only Federal habeas corpus jurisdiction for violations of the Civil Rights Act. They would not allow Federal jurisdiction over tribal officials who violate the constitutional rights of citizens, unless the violation restricts the personal liberty of the victims, such that a writ of habeas corpus could issue. There is no justification for such a restriction on Federal court vindication of federally protected rights against abuse

by tribal officials. By definition, the Federal courts do not grant relief against tribal officials unless they have violated the Federal rights of citizens. The demand for restriction on Federal jurisdiction is a demand for a license to infringe federally protected constitutional rights.

The Commission also suggests that requirements of exhausting tribal remedies before having access to Federal courts to redress tribal deprivations of constitutional rights should be strictly adhered to. I favor the more flexible approach to exhaustion which the Federal courts have taken. No mechanical rule can be prescribed in advance, and the courts should be free to protect constitutional rights whenever in the circumstances of particular cases it appears that it would not be beneficial to pursue tribal remedies.

The Commission also suggests that Federal court review of unconstitutional tribal action should be restricted to a review on records made in tribal court. There is no justification for this restriction on the ability of Federal courts to protect constitutional rights. The suggestion would, in effect, transform Federal jurisdiction under the Indian Civil Rights Act into appellate jurisdiction rather than original jurisdiction. The suggestion is ultimately grounded in a desire to insulate unconstitutional tribal action from close scrutiny of the Federal courts. I see no sense in Congress providing Indian and non-Indian peoples with constitutional rights good against Indian governments but then restricting the Federal courts' power to enforce those rights by requiring the Federal courts to limit themselves to the records of, or otherwise defer to the judgments of, the very agencies which perpetrate the constitutional violations.

The Commission objects that the jury trial requirements of the Indian Civil Rights Act are unduly burdensome on Indian governments. While it may well be true that many Indian courts are not well equipped to provide jury trials, this argument weighs against allowing such Indian communities to exercise governmental powers; it does not argue in favor of abridging the traditional procedural rights of our citizens. If the minimal constitutional protections which all our people cherish are too burdensome for Indian tribes to provide, then they should leave criminal law enforcement to those agencies which will provide them.

I likewise dissent from the Commission's recommendations that Indian tribes be allowed to fine criminal defendants up to $1,000 and imprison them for up to a year, rather than the $500 and 6-month limitations which now exist.

Finally, the Commission's recommendation that tribal sovereign immunity from Indian Civil Rights Act suits be expanded is at best shortsighted. If Indian governments are to exercise governmental powers as licensees of the United States, it is imperative that they be fully answerable for the improper exercise of those powers. Tribal sovereign immunity should be drastically reduced, if not eliminated. It should not be allowed to interfere with Federal court enforcement of federally protected civil rights.

H. FINANCING PUBLIC SERVICES

A major problem in the present allocation of State/tribal jurisdiction is the fairness of the allocation of costs of government and public

services. This has already been alluded to in the discussions of taxation and Public Law 280. Present law is somewhat schizophrenic about whether reservation Indians should be entitled to the benefits of State and local governments, but at the same time not pay their fair share of the costs. For example, Public Law 280 gave State governments authority to enforce their general criminal and civil laws against all persons on Indian reservations in six designated States and allowed other States to assume similar jurisdiction. Yet, last year, the Supreme Court held in *Bryan* v. *Itasca County*, supra, that such States did not have authority to tax the personal property of Indians who were to be benefited by the provision of general law enforcement in their communities by the State. Assuming that residents of Indian reservations are primarily benefited by law enforcement services, it would seem unfair that States should have to provide law enforcement for reservation Indians but that those persons not have to bear their fair share of financing those services. If it is national policy that Indians not have to pay taxes to States, but also national policy that Indians have the services that citizens and taxpayers of the States are entitled to, then it should also be a national, not a local responsibility to fund the services that national policy wishes Indian peoples to have but not to pay for.

To the extent that chosen national Indian policy entails financial burdens on persons other than Indians, it is neither fair nor rational for those burdens to be cast disproportionately on the taxpayers of the States in which Indian reservations are situated.

I. DEFINITION OF "INDIAN COUNTRY"

"Indian country" has generally been understood as meaning those areas within which Federal laws concerning Indians apply. The term has undergone a variety of legislative definitions. For the latter part of the 19th century and the first half of the 20th century, there was no statutory definition of Indian country at all. In 1948, Congress enacted a definition of Indian country for purposes of Federal criminal jurisdiction:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151.

But there are other discrete categories for which there is need of geographic limitation to governmental powers. Those categories include the following:

1. The area within which Federal civil statutes concerning Indians apply.
2. The area within which tribal civil and criminal laws apply to members.
3. The area within which State laws do not apply to members of the tribe.

4. The area within which State laws do not apply to non-members.

Tribal laws and enforcement institutions should not apply to non-Indians; however, if they did, the area within which non-Indians are subject to tribal law and courts could constitute another category.

It is evident that the phrase "Indian country" is often used to refer to any and all of these discrete categories. But it is also evident that the phrase "Indian country" should not have the same reference for all these different purposes.

Congress may well wish its criminal laws concerning Indians to apply broadly. But that does not suggest Congress also intended tribal power over members to reach equally as far. Assuming Congress intended tribes to have power over non-Indians, the territorial scope of that power could well be intended to be even narrower. And it may be that the reach of Federal criminal statutes is broader than the area within which Indians are to be immune from State civil laws and courts.

The need for definition of the territorial reach of these different types of powers and immunities, together with the impossibility of fashioning judicial definitions, has led the Supreme Court to rely on 18 U.S.C. § 1151 for marking off the immunity of Indians from State civil jurisdiction, even though the statute defines "Indian country" only for purposes of application of Federal criminal laws. *DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975).

There is uncertainty about the meaning of "Indian country" which only Congress can cure. Worse yet, there is danger that misuse of the statutory definition of "Indian country" given in 18 U.S.C. § 1151 for purposes of Federal criminal jurisdiction will result in inappropriate extensions of tribal powers and restrictions on State power. Congress should undertake to define "Indian country" for the various purposes for which the term is used.

J. CONCLUSION

There is a welter of confusion in the present law over the jurisdiction of Indian tribes, the States and the Federal Government. Such jurisdictional uncertainties result in inability to act for ignorance of what laws and enforcement institutions will be brought to bear and result in vast waste of economic resources in the litigation of jurisdictional questions. There is a preoccupation with questions of who has power and what that power is, rather than with how power should be wisely exercised. Indeed, the majority identifies litigation of jurisdictional disputes as a special area requiring Federal financial subsidies to Indian tribes. All this confusion is of Congress' making by act and by omission. The courts have dealt with the problems on an ad hoc basis for more than 100 years, but they have not dealt with them well.

In light of this great uncertainty, and the great costs and burdens of that uncertainty, it is mindboggling that the Commission could suggest that no legislative solutions to the problems of jurisdiction should be undertaken at this time. The Commission probably takes this position because it fears that, if Congress were to carefully inform itself on the jurisdictional confusion and misallocations which now exist, it would

resolve the uncertainties and reallocate powers in ways distasteful to the champions of tribal absolutism. My view is that Congress should undertake a comprehensive reexamination of Indian jurisdiction in light of Federal Indian policy and legitimate State interests and then legislate clear and purposeful divisions of power which will allow tribes and the States to generate more good government and less litigation.

Federal Indian Trust Relations and Social Welfare Programs

Under the guise of legal obligation, the Commission report proposes various and vast social programs for Indians in education, health, and tribal self-government. It has done this under the umbrella of a doctrine which the Commission itself creates and labels the Federal trust responsibility. Though the doctrine appears throughout the report, it is the major subject of chapter four. The fallacy of the doctrine as it is created by the Commission is that it confuses the content of the duties of a fiduciary with the existence of legal duties in the first instance. The Federal trust responsibility as created, defined and promulgated by the Commission has no foundation in the law.

The legal duties of the United States are created by congressional treaty and statute, and are refined and defined by Supreme Court decision. Beyond those duties undertaken by treaty or statute (and contracts executed pursuant to them) the United States is subject to no "legal" duties to Indian tribes. What Congress does in the area of Indian affairs it does by voluntary choice, not under the constraints of any legal obligation.

Because the United States has assumed the role of trustee with respect to some tribal assets, the Commission would also have us believe that the United States is under a permanent legal obligation to do all things helpful to the protection and enhancement of Indian lands, resources, tribal self-government, culture, prosperity, and material well-being. In addition, the Commission charges that the entitlements under its new found obligation of the United States run to all Indians wherever they may be located, however assimilated, and whether or not they retain any ties with Indian culture or tribal self-government. In short, in seeking to find some nonexistent legal basis for the creation of a special status for Indians, the Commission has created a new doctrine, unknown to the law. This would convert tribal political aspirations into legal doctrine without the necessity of going through our democratic political processes.

This concept cannot prevail. The Commission report goes so far as to say that its version of a "trust responsibility" is merely a congressional recognition of existing law. It is one thing to ask for programs and changes in policy. It is quite another to create a legal theory out of whole cloth and then tell the Congress that what one is asking for is already a legal obligation of the United States.

As I mentioned, the fundamental fallacy with this Commission's new trust responsibility doctrine is that it confuses the existence of legal duties with the standards applicable to their exercise. Now, the existence of legal duties which run from the United States and go to

Indian tribes are created by the Congress formerly under its treaty ratification power, and currently under the exercise of its plenary power to regulate commerce with Indian tribes under article I, § 8(3) of the Constitution. Legal duties, therefore, arise only as they are undertaken in treaties and statutes of the United States. Once the Congress creates the legal obligation, then it is the responsibility of the executive branch to discharge those obligations. If the treaty or statute relates to tribal assets held in trust by the United States for the benefit of a tribe, then the United States must discharge its legal duties in accordance with fiduciary standards. For example, in *Seminole Nation* v. *United States*, 316 U.S. 286, 62 S. Ct. 1049, 1954–55 (1942), it was held that payment of funds by the United States through the Department of the Interior at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation. Note that the fiduciary duty grew out of treaty obligations. The legal obligation itself was the result of a treaty. In the exercise of that obligation, the Government had a fiduciary duty.

Note that the fiduciary duty arises when the United States discharges its duties, which duties are to be found in some independent document under which the United States holds property as trustee for a tribe. So, for example, in *United States* v. *Mason*, 412 U.S. 391, 93 S. Ct. 2202 (1973), the United States served in a fiduciary capacity where tribal assets had been "placed in trust", 93 S. Ct. at 2205, pursuant to statute. The trust was created by statute and in discharging its obligations the United States acted as a fiduciary. Note that the statute or treaty creates the legal obligation, and in both of these cases the fiduciary obligation arose from the United States' holding of tribal assets in trust. Some courts, though not the United States Supreme Court, have extended the trust principle to general statutes which relate to assets in general, even though the United States is not holding them as a trustee. But even in this instance, the duty arises out of statute and the duty relates to tribal assets. So, for example, in *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st Cir. 1975), the United States Court of Appeals for the First Circuit held that the Non-Intercourse Act imposed upon the Federal Government a fiduciary role with respect to the protection of the lands of the tribe covered by the Act. I think the court was in error in applying this principle to lands claimed by aboriginal possession which were not held in trust by the United States. But, even under this expansive notion, the court said:

> We emphasize what is obvious that the "trust relationship" we affirm had as its source the Non-Intercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. 528 F. 2d at 379.

Note that the Commission's version of a Federal trust responsibility extends beyond the fulfillment by the United States of fiduciary duties over tribal assets held in trust to include enhancing those assets and tribal self-government itself. There is no responsibility in terms of

legal obligation for the United States to enhance tribal assets. The United States has the role of a fiduciary when it holds tribal assets, but the United States has no general obligation to enhance the interests of all American Indian tribes and further their self-government. These matters are rightfully policy decisions to be made by the Congress. They are hardly legal obligations. In this regard, the United States Court of Claims stated the applicable principle of law in *Fort Sill Apache Tribe of State of Oklahoma* v. *United States*, 477 F. 2d 1360 (Ct. Cl. 1973) when it affirmed the denial by the Indian Claims Commission of a claim that the United States had a duty to protect the structure and existence of a tribal unit. The court looked to the applicable treaty, found that all parties violated it, and, therefore, noted that no special relationship on the part of the United States was created. The court added that, in any event, the treaty contained no language implying a duty upon the United States to protect the structure and existence of the tribal unit. 477 F. 2d at 1365–66. The court next looked at the Non-Intercourse Act and said:

> **In short, the Indian Trade and Intercourse Acts have consistently been interpreted as creating obligations on the part of the United States to protect the Indian tribes in dealings involving the disposition of their lands. The special relationship created by this statute, as amended, has never been extended to the intangible factors of tribal well-being, cultural advancement, and maintenance of tribal form and structure, 477 F. 2d at 1366.**

The point, though simple, has eluded the Commission. The Congress may choose to enhance tribal self-government, but it has no duty to do so. The Congress may choose to provide services for reservation Indians, but it has no duty to do so. If the Congress does act, then the legal duties of the United States are those arising out of specific congressional enactment. And, the officials of the executive branch must then discharge the duties of the United States in accordance with the relevant enactment. Where the enactment creates an express or implied trust giving the United States legal title to tribal assets for the benefit of the tribe, then the United States, as a trustee, must discharge its duties consistent wth fiduciary standards.

Making no distinction between legal arguments and policy arguments, the Commission then argues that included in the United States' trust responsibility would be those economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to that of the non-Indian society. The Congress has no such duty. It is axiomatic that the Congress has and hopefully will continue to enact economic and social programs for the benefit of tribal Indians, but this is a matter of legislative policy, not of legal obligation.

In this regard, the Commission would have the "trust responsibility" it creates run through the tribe to the Indian whether on or off the reservation. This would in effect create a special class of people entitled to Federal services and benefits solely on the grounds of race and without regard to whether such services and benefits relate to tribal self-government. This raises serious policy questions and, indeed, constitutional questions. In *Morton* v. *Mancari*, 417 U.S. 535, 94 S. Ct. 2474 (1974), the Supreme Court held that the employment preference for qualified Indians in the Bureau of Indian Affairs con-

tained in the Indian Reorganization Act, 25 U.S.C. § 461 et seq., did not constitute racial discrimination in violation of the 5th amendment. The Court said that the preference is not directed toward a racial group consisting of Indians but instead applied only to members of federally recognized tribes. This operated to exclude many individuals who were racially classified as Indians. Because of this the Court referred to the preference as political rather than racial in nature. 94 S. Ct. at 2482 n. 24. The Court noted that the preference applied only to employment in the Indian service. Had the preference covered other Government agencies, the Court would have been presented with the "obviously more difficult question . . . presented by a blanket exemption for Indians for all civil service examinations." 94 S. Ct. at 2482. The rule adopted by the Court was that legislation that singles out Indians for particular and special treatment will be upheld as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. 94 S.Ct. at 2485. To the same effect is *Delaware Tribal Business Committee* v. *Weeks*, — U.S. —, 45 U.S.L.W. 4202, 4205 [February 23, 1977].

It may be that as long as services are extended to members of a tribe, such legislation would not violate the 5th amendment. But serious policy objections remain.

What are the problems associated with giving Federal services to tribal Indians wherever located and however assimilated into the dominant society? The Commission would have us create a vast Federal social welfare system applicable only to Indians wherever located and regardless of their nexus to Indian country and tribal self-government. When Indian law and policy go from dealing with Indians in Indian country because they are members of tribes to dealing with Indians wherever located and regardless of assimilation, then the objectives have shifted from the preservation of tribal cultural identity and separation to the treatment of Indians, qua Indians, as a special and preferred class of people. The shift cannot be tied rationally to Congress' purpose of permitting reservation Indians to make their own laws and be ruled by them.

Another recommendation based in its trust principle (recommendation B of chapter four) asks the Congress to impose limitations upon itself in its exercise of its constitutional power to deal with Indian tribes even though such limitations are not found in the Constitution. The recommendation asks that (1) treaty or nontreaty rights protected by the trust responsibility, whatever these may be, not be abrogated without the consent of the tribe except under extraordinary circumstances where a compelling national interest requires otherwise, and (2) with or without tribal consent, such rights shall not be abrogated except pursuant to congressional act which identifies the specific affected right and which states that it is the intent of Congress to abrogate such right. As a matter of policy, this recommendation is an interference with Congress' exercise of its own power. As a practical matter, such self-imposed limitations would not be enforceable. Congress has and must have the power to repeal treaties and statutes relating to Indians. For example, under the expansive notion of trust responsibility advanced by the Com-

mission, if Congress were to pass a provision providing for health care with respect to Indians, Congress, if it adopted this recommendation, would be unable to repeal or modify such legislation except under extraordinary circumstances where a compelling national interest required otherwise.

Congress has the power to repeal a treaty by unilateral action. *Head Money Cases*, 112 U.S. 580, 599 (1884) (a treaty is subject to such acts as Congress may pass for its enforcement, modification, or repeal). To the same effect are *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) and *Stevens* v. *Cherokee Nation*, 174 U.S. 445, 483 (1889). Many examples of essential abrogations of treaty rights come to mind but let us take, for example, one that was actually adjudicated. By the Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 1401(a)(2), the Congress declared that all noncitizen Indians born within the territorial limits of the United States would be citizens of the United States. In *Ex Parte Green*, 123 F. 2d 862 (2d Cir. 1941), cert. denied, 316 U.S. 668 (1942), an Indian was inducted into the United States Army. He claimed that he was not a citizen of the United States within the meaning of the Selective Service Law and that the attempt by Congress to make him a citizen under the 1924 Act violated treaty rights. He argued that his tribe had never been conquered by the United States. The court denied his claim and held that even if his treaty argument were valid, where there is a conflict between a treaty and a subsequent statute, the statute prevails.

Suppose now that Congress were to adopt recommendation B now under discussion. In order to make all noncitizen Indians citizens of the United States, the Congress would first have to see whether or not the treaty rights or even the nontreaty rights "protected by the trust responsibility", whatever that means, were affected. If so, the consent of the tribe would have to be sought except in instances of compelling national circumstances. But with or without tribal consent, the Congress would have to identify each specific affected right and state that it was the intent of Congress to abrogate the right. So, to make Indians citizens of the United States, the Congress would have had to examine every Indian treaty. This sort of interference with the legislative process is unacceptable. The Congress has the power and the duty to declare law and policy, and cannot straitjacket itself.

Beyond the practical problems associated with recommendation B is the unenforceability of any such legislation. Suppose, for example, the Congress adopted recommendation B but then proceeded to ignore it. Since subsequent statutes repeal prior ones, and since the self-imposed limitation is not found in the Constitution of the United States, recommendation B would be unenforceable.. The short of it is that recommendation B seeks changes in our constitutional system without the trouble of constitutional amendment.

Tribal Land Claims, Statutes of Limitations, and Passamoquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975)

The status of tribal claims to land is best understood by referring to the authority under which the claim is made. In general, a claim would be made under (1) aboriginal possession, (2) executive order, or (3) treaty or statute.

Because discovery gave exclusive title to those who made it, fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign. *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823); *Oneida Indian Nation of N.Y. St.* v. *County of Oneida, N.Y.*, 414 U.S. 661, 94 S. Ct. 772, 777 (1974). It was recognized, however, that the Indians had a right to occupy the lands until their possessory right was extinguished by the United States. That right, based upon aboriginal possession, is frequently called Indian title and is good against all but the sovereign. *Id.* But Indian title is mere possession and not ownership and can be terminated by the United States without compensation under the 5th amendment. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279, 285 (1955). The power of Congress to extinguish Indian title based on aboriginal possession is supreme. The manner, method, and time of such extinguishment raise political not justiciable issues. *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 62 S. Ct. 248, 252 (1941).

Similarly, an Indian reservation created by Executive order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 69 S. Ct. 968, 979 (1949). To the same effect is *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 330 (1942). This is so because article IV, § 3 of the United States Constitution confers upon Congress alone the power to dispose of property belonging to the United States. Id.

Where, however, lands have been reserved for the use of Indians by the terms of a treaty or statute, and the Congress has declared that thereafter Indians were to hold the lands permanently, the tribe must be compensated under the 5th amendment if the lands are subsequently taken by the United States. *Sioux Tribe of Indians* v. *United States*, supra, 316 U.S. at 326. *Tee-Hit-Ton Indians* v. *United States*, supra, 348 U.S. at 277–78. *Hynes* v. *Grimes Packing Co.*, supra, 337 U.S. at 103–104.

The status of tribal land now begins to take form. The United States owned all the land in fee that Indian tribes claimed or now claim based upon aboriginal possession or Indian title, subject only to tribal possessory rights. These lands, therefore, were public lands under article IV, § 3 of the Constitution. It is only when Congress gives this land back to the tribe by treaty or statute that compensation is due under the 5th amendment upon a subsequent taking. *See also*, *Spalding* v. *Chandler*, 160 U.S. 394, 16 S. Ct. 360, 364 (1896); *Jones* v. *Meehan*, 175 U.S. 1, 20 S. Ct. 1, 4 (1899); *Northwestern Bands* v. *United States*, 324 U.S. 335, 65 S. Ct. 690, 692 (1945).

Recall that Indians were incapable of conveying land based on aboriginal possesion (Indian title), because they did not own them—ownership was in the United States. *Johnson* v. *M'Intosh*, supra. Even before *Johnson* v. *M'Intosh*, Congress prohibited the alienation of lands occupied by Indians except pursuant to the authority of the United States. Act of July 22, 1790, ch. 33, 1 Stat. 137. Subsequent Nonintercourse Acts. (1 Stat. 329, 1 Stat. 469, 1 Stat. 743, 2 Stat. 139, 2 Stat. 829, culminating in the Intercourse Act of 1834, 4 Stat. 729)

continued this prohibition against alienation but each of the Acts has variations and, therefore, resort to 25 U.S.C. § 177 is not enough. Resort must be had to the specific Nonintercourse Act in effect at the time aboriginal possession was extinguished.

I have capsulized the law applicable to the status of Indian lands or Indian possessory rights, for but one purpose. Contemporary Indian claims based on aboriginal possession have, no doubt, been a great surprise and shock to the American people. Such claims cannot be asserted against the United States for a variety of reasons. In the first place, Indian title is not good against the sovereign United States. In the second place, the Nonintercourse Acts culminating in 25 U.S.C. § 177 are not applicable to the United States or its licensees. *Federal Power Com'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543, 555 (1960). And finally, all pre-1946 claims not brought before the Indian Claims Commission under the Act of August 13, 1946, ch. 959, 60 Stat. 1949, amended and codified in 25 U.S.C. § 70 et seq., prior to 1951 have been forever barred by section 12 of the Indian Claims Commission Act. Indeed, section 12 provides that "no claim existing before such date [August 13, 1946] but not presented within such period [5 years] may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress."

But entities other than the United States have no such protection against ancient and stale Indian claims based on aboriginal possession. Thus it was that the Passamaquoddy Tribe in the State of Maine sought the aid of the United States in suing the State of Maine for Maine's alleged interference with the tribe's aboriginal possessory rights, Maine allegedly not having complied with the Nonintercourse Act as far back as 1794. *See generally*, *Passamaguoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st Cir. 1975). Ordinarily, in this country, the assertion of ancient claims is barred either by applicable statutes of limitations, or by the doctrine of laches. But these impediments are not ordinarily applicable to Indian tribes or the United States.

Now 28 U.S.C. § 2415, which contains various periods of limitation for actions brought by the United States on behalf of various Indian tribes, is uncertain in its effect. In the first instance, it is applicable against the United States. It may or may not be applicable to Indian tribes. In the second instance, it refers to recognized tribes. Third, it is expressly not applicable to actions which seek to establish title to or the right to possession of real or personal property. Accordingly, existing statutes of limitations are inadequate as a bar to the constant and perpetual assertion of stale claims by Indian tribes.

The assertion of stale claims which upset certainty in the area of real property law and centuries of expectations, and shock the conscience, cannot be countenanced by our legal system. Just as the Indian Claims Commission Act ended with finality the assertion of stale claims by tribes against the United States, similar legislation is needed to bar the assertion by tribes of all stale claims against all parties. I, therefore, propose a two-pronged approach to solve the problem of stale Indian claims. The first step is for the Congress to adopt legislation which extinguishes for all time all tribal or Indian claims to interests in real property, possessory or otherwise, grounded

on aboriginal possession alone. Indian lands held under treaty, statute, Executive order or deed would not be affected. As pointed out above at length, no compensation is due under the 5th amendment for such extinguishment. This would prevent the assertion of such claims on and after the date of the enactment of such legislation. I see this as essential to the orderly administration of justice in this country.

To ensure that such legislation would extinguish claims such as the Passamaquoddy's now asserted but not yet reduced to judgment, I would resolve all doubt by recommending to the Congress the enactment of a statute of limitations that all such claims not yet reduced to judgment shall be forever barred. This would bar the Passamaquoddy or similar claims and deny to the Passamaquoddy and other similar litigants any right to damages from any parties for trespass on possessory rights. Neither the Passamaquoddys whose possessory rights may have been interfered with, nor the people of the State of Maine or Massachusetts who may have dealt with them in the absence of Federal treaty, are now alive. There is nothing unfair about denying the descendents of the Passamaquoddys a windfall and preventing the imposition of a bizarre and unjust burden on the descendents of the people of the States of Maine and Massachusetts.

It seems to me that this is the correct solution because history clearly shows that the tribes for almost 200 years acquiesced in their land transactions with Maine and that the Congress had ratified Maine's and Massachusetts' actions. We must not be unmindful that "the architect of contemporary law is always contemporary fact." L. Friedman, A History of American Law 178 (1973).

Definitions: Tribe and Indian: Need for Finality

Because the Constitution grants to the Congress the power to regulate commerce with Indian tribes, article I, § 8, the recognition of Indians as a tribe, i.e., a separate policy, is a political question for the Congress to determine, and its determinations are not subject to judicial review unless the Congress were to heedlessly extend the label of Indian in an arbitrary way. *Baker* v. *Carr*, 369 U.S. 216, 82 S. Ct. 691, 709–10 (1962). But since the Congress cannot bring a community or a body of people within the range of its power over Indian affairs by arbitrarily calling them an Indian tribe, Id. at 710, neither can a tribe. The questions "who is an Indian" and "what is a tribe" have no meaning in the abstract. The questions have meaning in law only in the context of the congressional exercise of its powers under article I, § 8. Whatever its nonarbitrary exercise of that power is, is the answer to the questions. Hence, in any given context, resort must be had to the relevant treaties or statutes by which the Congress has made its declaration.

The Commission fails to appreciate this fundamental principle of constitutional law. By chapter 3, the Commission asserts that an Indian is a person recognized as an Indian by his or her tribe or community unless Congress has expressly provided to the contrary. Now it may well be that an Indian tribe may refer to this or that person as a member. But such definitions or declarations have no consequence unless the Congress specifically recognizes such declarations under its

constitutional power. It is for the Congress to say who is an Indian and what is a tribe for purposes of Federal Indian law and policy. Assuming the promulgation of adequate standards, the Congress may well have the power to delegate this power to the various Indian tribes. But in the context of the Commission report, this would not be a wise policy. American Indians would be entitled to a variety of Federal benefits because they are Indians. That being the case, Congress has a special interest in not delegating its definitional power to Indian tribes. If the people of the United States are to distribute their largess, then the United States must be responsible for its distribution. I would also recommend a limitations period, such that after a reasonable date certain, no person or entity would be permitted to assert that it is an Indian or a tribe for Federal purposes. Failing to do this, the Commission's recommendations could result in an open ended raid on the Federal treasury.

The definitional mechanism with a limitation period must be used with respect to any creation of new obligations on behalf of the United States, such as those recommended by the Commission to extend social welfare services to off-reservation Indians (ch. 9) to restore terminated tribes (ch. 10) and to recognize nonrecognized Indians (ch. 11).

Management of Property Rights to Which Indians are Entitled by Treaty but Which Exist off the Reservation

It is axiomatic that the extent of a tribe's power to govern its own members is limited to the territorial boundaries of its own reservation. And, absent express Federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory State law otherwise applicable to all citizens of the State. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 93 S. Ct. 1267, 1270 (1973). But note that the Congress has the power to immunize reservation Indians from the application of State law off the reservation. But the fact that the Congress has the power to immunize reservation Indians from the application of State law to them when they go beyond reservation boundaries, does not mean that the tribe has the power to apply its law to its members off the reservation. One would ordinarily associate Federal preemption with Federal jurisdiction. But the United States Court of Appeals for the Ninth Circuit in the case of *United States* v. *Washington*, 520 F. 2d 676 (9th Cir. 1975), cert. denied, 96 S. Ct. 877 (1976), has leaped from Federal preemption of State regulation of Indian fishing at treaty fishing grounds off the reservation, to tribal regulation of its members off the reservation in the area of Federal preemption. (Though footnote 4, 520 F. 2d at 686–87, is unclear, the opinion of the District Court in *United States* v. *Washington*, 384 F. Supp. 312, 410 (W.D. Wash. 1974), made it clear that a self-regulating tribe had no authority over nonmembers.)

Now, it is one thing to say that a Federal treaty grants to an Indian tribe property rights off the reservation. It is quite another thing to say, where the treaty says nothing of the kind, that a tribe may exercise governmental powers off the reservation to enforce its off reservation property rights. The result is wholly unsupported in the law. It

is as though a court were to hold that property belonging to the State of Washington, but located in the State of Oregon, could be regulated by the State of Washington. Obviously Washington's police and regulatory power does not extend beyond its boundaries. So too, a tribe's self-regulatory power does not extend beyond its boundaries. The protection of a tribe's off reservation property rights is to be accomplished under the law of the State in which the property is located. If the tribe has federally protected property rights off the reservation, then it is the duty of the State to enforce those rights. Indeed, if the State does not enforce those rights, then it is within the power of a Federal or State court to enforce those rights. But it is not within the power of a Federal or State court to grant to an Indian tribe regulatory powers beyond the boundaries of its reservation.

In any event, the scheme established by the United States Court of Appeals for the Ninth Circuit is unworkable. Accordingly, I recommend to the Congress appropriate legislation which makes it clear that Indian tribes exercising powers of self-government not only have no authority over non-Indians, but also have no governmental or regulatory authority outside of their reservation boundaries over their own members. Such legislation does not affect treaty rights or tribal property rights located off the reservation. But it would preserve intact the concept that a governmental unit's regulatory powers are no broader than its territorial boundaries.

Conclusion

Those of us who sponsored and supported the legislation to establish the American Indian Policy Review Commission conceived of it as a vehicle to study and recommend to the Congress a coherent, stable and lasting national policy toward American Indians. Unfortunately, I fear we have missed that opportunity.

We have missed it because the valid and achievable recommendations of the Commission will be lost in a cloud of controversy over others which are neither legally sustainable nor politically achievable.

The Commission recommendations for restructuring the Bureau of Indian Affairs are thoughtful and constructive. The many recommendations which call for greater participation by Indians in decisions affecting their lives deserve the support of the American people and the attention of the Congress. Such valuable recommendations abound in this report.

However, much of the report is neither legally nor historically accurate. Most of the inaccuracy springs from the initial erroneous conclusions regarding sovereignty, jurisdiction, and trust responsibility. These very basic and fundamental errors permeate and taint almost every part of the report.

Indian tribes, because of the misapplication of total sovereignty, become super-governments possessing all authority and powers not expressly forbidden them by Congress.

Tribal governments, because of the mistaken scope of the Commission's recommendations regarding jurisdiction, hold sway over the lives and fortunes of many who have no representation in the governing body which makes decisions affecting their lives.

An unduly broad and unwarranted extension of the trust responsibility leads to special obligations in health, welfare, education, and tribal government. The same broad interpretation would result in the extension of heretofore nonexistent legal obligations to off-reservation Indians, terminated tribes and nonfederally recognized Indians.

As a legislator I must say that many of the recommendations have absolutely no chance of being enacted into law. That is because they are oblivious to political reality. The combined effect of a number of recommendations and findings constitutes a degree of separatism which this country is totally unprepared to assume. Some of the recommendations and findings are inimical to concepts we hold sacred as American citizens.

So in the headlong flight to preserve the uniqueness of the American Indian, the Commission recommendations go too far and in my view threaten the existence of the very thing we seek to preserve. The quickest and most certain way to destroy that uniqueness is to immediately implement all the recommendations of this Commission. The backlash of the dominant culture would be swift and sure.

Even in the absence of backlash, subjecting the non-Indian majority to Indian jurisdiction will effectively destroy the uniqueness of Indians. The majority would then have a stake in the exercise of power which would be irresistible. Congress would have no choice but to closely supervise Indian governmental decisions in a way that would totally frustrate the very purpose of giving Indians governmental powers in the first instance.

That would be unfortunate. While it may have been necessary at one time to pursue the melting pot theory in this Nation, we are now big enough, strong enough, mature enough and hopefully wise enough, to countenance and even encourage diversity in our culture.

The American Indian has a very rich and unique culture. He should be given every opportunity to practice that culture. But the American Indian is also an American citizen. He lives among American citizens. Ways can be found to prevent the collision of his uniqueness as an Indian and the rights of other Americans, including Indians, under the Constitution.

Legislation, such as the Indian Self-Determination Act, which promotes separateness, should receive priority by the Congress if that is what Indians want. Substantial decisionmaking by Indians over events which control their lives should be allowed. Legislative action should come from a sincere and realistic desire to continue the special relationship between Indians and the Federal Government. But we must not legislate out of a sense of guilt or excessive zeal to cure all the sins and inequities of the past. Distorting the present and future to atone for the past cannot be the basis of a stable and enduring policy.

The United States is prepared to accommodate Indian interests, and to provide a substantial degree of self-determination. But there is a point beyond which it cannot go—our federal framework will not be compromised, nor will the rights of non-Indians be ignored. Where tribal aspirations collide with constitutional values, the tribe's interests must yield. Nor can the rights of the non-Indian majority be compromised to support tribal aspirations. Doing justice by Indians does not require doing injustices to non-Indians.