V

Federal Power over Indian Affairs

Most Indian tribes maintained their neutrality in 1775 when the American colonists went to war against Great Britain to gain independence. To the Indians, the conflict between the colonists and England seemed like an internal family dispute. The colonists, however, had frequently stolen Indian land, whereas the British had not. Indeed, just twelve years earlier in 1763, the King of England issued a proclamation forbidding the colonists from forcefully taking any additional Indian land, a protection the king felt he owed the Indians for their having helped England defeat France in the French and Indian War, a seven-year conflict that had ended that year.[1] Therefore, many eastern tribes distrusted the colonists and had friendlier ties with the British.

Not long after the Revolutionary War began, the colonists began destroying Indian villages and their food supplies, fearful that the Indians would support and feed British soldiers.[2] These preemptive strikes had the effect of pushing neutral tribes into the British camp. By the end of the war, "most Indian peoples came around to siding with the British,"[3] although several tribes with whom the Americans had developed close ties supported the colonists, including the Oneida, Tuscarora, Mohegan, and Pequot. Many members of these tribes died alongside their American allies during the war.[4]

The Revolutionary War resulted in "a total war in Indian country" and was disastrous for many eastern tribes.[5] Hundreds of Indians were killed, Indian homes and crops lay in ruins, tribal economies collapsed, and tribal towns and villages were crowded with refugees.[6] Many tribes or portions of tribes fled west, causing a "domino effect" all the way to the Pacific, as each tribe in turn

competed for land already controlled or occupied by another tribe, which sometimes led to armed conflict.[7]

As discussed in Chapter I, in the decades following the Revolutionary War, thousands of white settlers and prospectors moved west, trespassing across and often settling on Indian land, with the U.S. Cavalry supporting them. Indians resisted these encroachments, but by the end of the nineteenth century, virtually every Indian tribe in the country had been placed on a reservation and most of their land was taken and given to white settlers. The United States entered into treaties with Indian tribes but broke those treaties whenever it was expedient to do so.[8]

The federal government's Indian policies, many people claim, have been driven from their inception "by greed, avarice, and the pursuit of manifest destiny"[9] and have been "ultimately genocidal in both practice and intent."[10] The very notion that this continent, on which hundreds of nations were already prospering, was "discovered" by Europeans—as school children in this country have been taught—reflects bigotry.[11] Critics assert that the United States has no legitimate right to regulate tribal governments.[12] Despite these assertions, however, all three branches of the federal government—legislative, executive, and judicial—have consistently upheld the government's power to regulate Indians and their property.[13]

The federal government will probably never permit Indian tribes to regain their complete independence, although it has moved further in that direction in recent years, as discussed in Chapter I. After nearly two centuries of domination and paternalism, Congress "now recognizes self-determination as the guiding principle of Indian relations."[14] Only time will tell how far the government will go in permitting Indian tribes to exercise true independence.

A. THE SOURCE AND SCOPE OF FEDERAL POWER OVER INDIANS

What is the Source of the Federal Government's Power Over Indians?

The United States controls Indian tribes because it has the military power to do so. The ultimate source of the federal government's power over Indians is its military strength. Other justifications are given besides this one, but the fact is that if the United States were not militarily more powerful, Indian tribes today would exercise the same sovereignty they did prior to the arrival of the Europeans.

Over the years, the U.S. Supreme Court has relied on four arguments to justify the exercise of federal authority over Indians. Two of them are based on

provisions in the U.S. Constitution. Article I, section 8, clause 3 (the Commerce Clause) provides that "Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article II, section 2, clause 2 (the Treaty Clause) gives the president and the Senate the power to make treaties, including treaties with Indian tribes. The Supreme Court held in 1832 that these constitutional provisions provide Congress with "all that is required" for complete control over Indians and tribes.[15] It has also held that the fact that Congress decided in 1871, as explained in the previous chapter, to stop entering into treaties with Indian tribes does not eliminate the Treaty Clause as a source of power over Indians,.[16]

The third argument that has been advanced to justify the exercise of federal power over Indians is the rule of international law that states that "discovery and conquest [gives] the conquerors sovereignty over and ownership of the lands thus obtained."[17] In 1823, the Supreme Court held that by virtue of the "discovery" of North America by the Europeans and the "conquest" of its inhabitants, the federal government (as the Europeans' successor) is entitled to enforce its laws over all persons and property within the United States.[18] As the nation in control of this territory, the United States may exercise all powers "necessarily inherent" in any sovereign nation, including the authority to regulate Indians and their property.[19]

The doctrine of trust responsibility (discussed in Chapter III) was cited in early Supreme Court cases as an additional source of federal power over Indians. Many treaties between the United States and Indian tribes contain a guarantee that the federal government will "protect" the treaty tribe. This promise, the Court has held, gives the federal government both the power and the duty to regulate Indians for their protection.[20]

Each of these justifications for federal control over Indians can be—and has been—strenuously challenged. First, nothing in the express language of the Commerce and Treaty Clauses confers any power on the federal government *over* Indians; instead, these clauses simply identify which federal officials may regulate commerce and enter into treaties *with* the Indians. (After all, when the Constitution was written in 1787, Indian tribes were strong and independent nations. Few government officials could have thought that merely by defeating the British, the United States had somehow acquired power over these independent and powerful Indian tribes, and the Commerce and Treaty Clauses contain no language of that nature.) Next, Europeans did not "discover" this continent; hundreds of independent nations were already thriving here. Lastly, it is a complete misuse of the trust doctrine to say that it supports federal power over Indians. To the contrary, the trust doctrine requires the federal government to support Indians by fulfilling the promises made to them in

exchange for Indian land. No tribe surrendered its right of self-government in any treaty with the United States.

Nevertheless, the Supreme Court announced in 1903 in *Lone Wolf v. Hitchcock*[21] that Congress possesses "plenary" power—full and complete authority—over Indians and tribes. Yet this raw assertion of power does not have a solid basis in the Constitution. Indeed, as Indian legal scholar Walter Echo-Hawk recently stated, "[t]the plenary-power doctrine [announced in *Lone Wolf*] was seemingly plucked out of thin air by the Supreme Court" and its rationale is "dubious."[22] In deciding *Lone Wolf* the way it did, Professor Frank Pommersheim has stated that the Supreme Court ignored what the Constitution actually said and the position that Indian tribes held at the time the Constitution was written, and instead the Court adopted a rationale that justified "federal land acquisition and power in Indian affairs."[23]

What is the Scope of Federal Power Over Indian Affairs?

The federal government takes the position, as just noted, that Congress has plenary power over all Indian tribes, their governments, their members, and their property. As the Supreme Court stated in 2011, citing its earlier decisions: "The United States retains plenary authority to divest tribes of any attributes of sovereignty. Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."[24] Congress, in other words, may assist or destroy a tribal government as it sees fit, and at various times it has assisted tribes while at others it has attempted to destroy them.

Are there any Limitations on the Power of Congress over Indian Affairs?

In *Lone Wolf*, the Supreme Court held that Congress had ultimate authority to legislate over Indians and, therefore, decisions made by Congress respecting Indians were not subject to review by a court.[25] In later cases, however, the Supreme Court slightly modified that principle and held that the "power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."[26] During the past fifty years, the Court has applied two constitutional limitations on congressional power over tribal affairs: the Due Process and the Just Compensation Clauses, both contained in the Fifth Amendment.[27] However, only rarely has the Court limited a congressional enactment involving Indians.

The Due Process Clause provides that no person may be deprived of life, liberty, or property without due process of law. This clause thus prohibits Congress from enforcing any law that is arbitrary, unreasonable, or invidiously discriminatory, including laws that impermissibly discriminate on the basis of race.[28]

The Just Compensation Clause prohibits the federal government from taking private property without paying fair and adequate compensation. As explained in the last chapter, rights and interests given Indians in a treaty or statute are a form of private property protected by the Just Compensation Clause. Thus, any taking of them by the federal government must be compensated. Courts have required that fair compensation be paid for the loss of Indian hunting and fishing rights,[29] the taking of land belonging to an Indian[30] or a tribe,[31] and the loss of a tribe's immunity from state taxation.[32] However, it is important to note that the Just Compensation Clause does not prevent Congress from taking the property or interest; it only requires that Congress pay fair compensation for any confiscation that occurs.

Another limitation on Congress, at least in theory, is the doctrine of trust responsibility, which obligates the federal government to remain loyal to Indians, to act in their best interests, and to fulfill the promises made to them in treaties.[33] But the trust doctrine is not *legally* enforceable against Congress, for reasons explained in Chapter III. A court may not, for example, order Congress to implement a treaty or prevent Congress from abrogating one.[34] Indian tribes can only hope that Congress has the integrity to honor the promises it made decades ago in exchange for Indian land, an integrity that in many instances has fallen short.

As previously noted, the Supreme Court no longer presumes that all acts of Congress respecting Indians are valid. However, the Court's current standard of judicial review has produced nearly the same result. Of the hundreds of laws passed by Congress respecting Indians, only a few (as discussed below) have been found to violate the Just Compensation Clause, and not one has been invalidated as arbitrary, capricious, or unreasonable under the Due Process Clause.

Given that the Constitution Prohibits Race Discrimination, why is Congress Allowed to Treat Indians and Non-Indians Differently?

Congress has passed so many laws applicable only to Indians that it has created a separate volume of the U.S. Code—Title 25—in which to place them. Virtually all of these laws treat Indians differently from non-Indians, sometimes to their benefit, sometimes to their detriment. Federal laws, for example, provide Indians with certain housing, financial, medical, and educational benefits that non-Indians are not eligible to receive, while other laws place unique restrictions on Indians and tribes regarding the sale and use of their land. Yet the Due Process Clause prohibits Congress from invidiously discriminating on the basis of race. Why, then, is Congress allowed to differentiate in this fashion?

The answer, according to the Supreme Court, lies in the fact that these laws are not viewed as race legislation. For one thing, the Constitution expressly authorizes Congress to regulate commerce with Indian tribes; thus, there is a *constitutional* basis for enacting laws unique to Indians. Moreover, there are important historical and political reasons for treating Indians differently. The United States entered into treaties with the Indians not because they were a different race, but because of their political status as the early inhabitants of this territory. Thus, the Supreme Court has explained, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the federal government's relations with Indians."[35] Moreover, the federal government has a trust responsibility to assist Indians and protect them, an obligation the government does not have to other groups.[36]

The Supreme Court's decision in *Morton v. Mancari* (1974)[37] applies these principles. At issue in *Mancari* was a federal law (the Indian Preference Act of 1934, 25 U.S.C. section 472) that requires that members of federally recognized Indian tribes receive a hiring preference for job vacancies within the Bureau of Indian Affairs (BIA). Non-Indians who were denied employment under this law contended that it constituted impermissible race discrimination in violation of the Due Process Clause. In a 9–0 decision, the Court upheld the Indian Preference Act. First, the Court said, the Preference Act was not race legislation. The Constitution gives Congress the power to treat Indians "as a separate people" based on their *political* status.[38] The Preference Act was intended by Congress to achieve political (and not racial) goals: Congress wanted to give Indians greater control within the agency that administers most of the federal government's Indian programs so as to promote Indian self-government.[39] Therefore, the legislation need only satisfy the less stringent "rational basis" test, rather than the more rigorous "compelling interest" test applicable to legislation that discriminates on the basis of race. The Court concluded that the Indian Preference Act was a rational, and therefore permissible, exercise of Congress's plenary power over Indians.[40] Consequently, Congress was permitted to provide this employment preference to Indians in their status as a political group. Relying on *Mancari*, a federal appellate court recently interpreted the Preference Act to require that Indians be afforded a hiring preference for all positions within the Department of the Interior that directly relate to the provision of services to Indians.[41]

Each federal Indian law, then, must be examined in its historical, political, and cultural context to determine if it constitutes race discrimination. Congress is permitted to give Indians special rights and benefits if doing so is a reasonable exercise of Congress's plenary powers over Indians.[42] Likewise, Congress may impose unique restrictions or disadvantages on Indians if they

are reasonably related to a legitimate federal interest. Indeed, it appears that not a single federal Indian law has ever been invalidated on the grounds that it constitutes race discrimination.

Thus, although the Supreme Court no longer defers entirely to Congress on matters of Indian policy as it did in *Lone Wolf v. Hitchcock*, congressional discretion continues to be extremely broad. Any legislation that can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" is a valid exercise of congressional authority.[43]

Does Congress have the Authority to Discriminate Among Groups of Indians?

Yes. Laws that discriminate among groups of Indians are reviewed by courts under the same rational basis test as laws that discriminate between Indians and non-Indians. Thus, Congress can create programs in which only some Indians are eligible to participate, such as programs that condition eligibility on possessing a certain degree of tribal blood.[44]

B. IMPLEMENTATION OF FEDERAL POWER

Congress has nearly unlimited authority to regulate Indians and tribes, as just explained. The rest of this chapter examines the many ways in which Congress has implemented that power through (1) administration of Indian affairs, (2) regulation of tribal governments, (3) termination, (4) regulation of tribal membership, (5) regulation of Indian land, (6) regulation of tribal assets, (7) regulation of individual property, (8) regulation of trade and liquor, and (9) exercise of criminal jurisdiction.

1. Administration of Indian affairs

What Powers have been Delegated by Congress to Federal Agencies Regarding the Implementation of Indian Policy?

The Constitution divides the federal government into three separate branches: legislative, judicial, and executive. The legislative branch (Congress) makes the law. The judicial branch (the courts) interprets the law. The executive branch (whose chief officer is the president) administers the law. Federal administrative agencies, such as those administering Indian programs, are part of the executive branch of government. These agencies are created by Congress but staffed with people appointed by the president or by persons acting under the president's command.

Congress is the only branch of government that has the authority to formulate the federal government's Indian policies. However, the administration of these policies must be performed by the executive branch. Congress creates federal Indian policy and then decides which agency will implement it. That agency must then faithfully perform its duties; it may not act beyond the powers conferred by Congress or ignore the duties delegated to it.[45] Thus, although Congress creates the policies, federal agencies have enormous control over many facets of tribal life because they implement those policies on a daily basis.

The first agency that Congress created to administer Indian policy, the Office of Indian Affairs, was established in 1824 and placed within the now-defunct War Department. In 1849, Congress transferred this agency to the newly created Department of the Interior, where it remains today, although in 1947 the Office of Indian Affairs was renamed the Bureau of Indian Affairs (BIA).

The highest official in the Department of the Interior is the Secretary of the Interior. The next highest official is the Assistant Secretary of the Interior, who oversees two agencies: the BIA and the Bureau of Indian Education. (Prior to 1977, the Assistant Secretary was called the Commissioner of Indian Affairs.) Both the Secretary and the Assistant Secretary are appointed by the president but must be confirmed by the Senate. The BIA employs some ten thousand people, more than 85 percent of whom are Indian (as a result of the Indian Preference Act discussed earlier).

The Department of the Interior administers the majority of the federal government's Indian programs, mostly through the BIA. For example, the Department regulates the sale and lease of Indian land, operates social welfare programs on reservations, controls the use of water on irrigated Indian lands, regulates and approves Indian wills, operates Indian schools, and purchases land for Indians and tribes.[46] The Department of Health and Human Services, the Department of Housing, and the Department of Agriculture also administer Indian programs, including various health care, housing, and food programs for Indians.

What Powers have been Delegated by Congress to the President?

A law passed by Congress in 1834 gives the president the general power to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs."[47] Currently, however, the president has been assigned no specific powers regarding Indians. Instead, Congress has delegated enormous authority to the Secretary of the Interior (as discussed later in this chapter), who is appointed by the president.

Between 1855 and 1919, it was a common practice for presidents to create Indian reservations by issuing an executive order. These "executive order"

reservations were created without congressional approval. In 1919, Congress passed a law prohibiting the president from creating any additional reservations.[48]

As part of the General Allotment Act of 1887, Congress authorized the president to assign parcels of tribal land to tribal members and to sell the remaining ("surplus") tribal land to non-Indians.[49] Congress eliminated that power in 1934 when it repealed the General Allotment Act.[50]

As chief executive, a president can exert tremendous influence in Indian affairs. As discussed in Chapter I, several presidents have used their power and prestige to greatly assist Indian tribes. These presidents include Franklin D. Roosevelt, who supported passage of the Indian Reorganization Act and appointed John Collier to oversee the Bureau of Indian Affairs; Richard Nixon, a strong supporter of tribal self-government who helped end the termination era; and Bill Clinton, who issued two significant Executive Orders that require federal agencies to relate to Indian tribes on a government-to-government basis and to engage in meaningful consultation with them.[51] President Barack Obama has received praise from the Indian community for promoting tribal self-government, including consultation with tribes;[52] for twice convening meetings with representitives of every federally recognized Indian and Alaska Native government, the only president to have convened such a meeting; for increasing the budget of the Indian Health Service; and for signing the United Nations Declaration on the Rights on Indigenous Peoples, an historic agreement discussed in Chapter XIII. No president, however, has done as much as he could have to foster tribal sovereignty and self-determination.

Can Congress Delegate Powers to Indian Tribes?

Yes, and Congress has exercised that power. The single most important law delegating authority to Indian tribes is the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA).[53] The ISDEAA authorizes Indian tribes to submit "self-determination" contracts to the Department of the Interior or to the Department of Health and Human Services to administer "programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law."[54] (These contracts are sometimes called "638" contracts because the statute that created ISDEAA was Public Law 93-638.) The federal agency to which a 638 application is submitted *must* approve the proposed contract unless the tribe's plan fails to meet ISDEAA standards, and the tribe may appeal any rejection to a federal court.[55] If the contract is approved, the agency must then transfer to the tribe all funds given by Congress to the agency for the operation of that program, including administrative expenses.[56] The tribe then administers the program subject only to the agency's general oversight.[57]

The purpose of ISDEAA is to foster tribal self-government and self-reliance—and reduce federal domination—by permitting tribes to administer federal programs on the reservation.[58] The ISDEAA has been a huge success. As a result of ISDEEA, Indian tribes now manage more than one-half of the budgets and functions of the BIA and the Indian Health Service, operating schools, hospitals and health clinics, social welfare programs, water treatment facilities, and law enforcement programs formerly operated entirely by those agencies.[59]

Have Federal Officials Done a Good Job in their Administration of Indian Affairs?

In 1999, the person in charge of the BIA, Assistant Secretary of Indian Affairs Kevin Gover, acknowledged that his agency had "a lousy reputation, much of it deserved" and admitted that the BIA has performed its job "poorly."[60] "The federal government, through the very agency I now head," Gover said, "sought to make tribal governments weak, and the Indian people weaker still."[61] As a federal court recently noted, it is "clear that the federal government has failed time and again to discharge its fiduciary duties" to Indians.[62] As discussed in Chapter III, there are many dedicated federal officials performing excellent work for Indians, but unfortunately, federal agencies have too often ignored their responsibilities and taken actions that have stifled rather than supported tribal self-government.

Congress is ultimately responsible for these failures, as it is the branch of government in charge of formulating Indian policy. Many things need to be fixed, including eliminating the patronizing attitude of the BIA and providing adequate funds so that federal agencies can support tribal projects and perform their own tasks adequately.[63] Federal agencies need to do more to change their focus from supervisors to that of advisors, and from controllers to that of helpers and associates.

Significant progress, though, has occurred. Indeed, in November 2010, Jefferson Keel, President of the National Congress of American Indians, the oldest and largest organization representing Indian tribes, stated that as a result of efforts by Congress and several recent U.S. presidents, "self-determination has been phenomenally successful," and a new federal Indian policy is not necessary. "Instead," Keel wrote, "the real question" is how this policy will be implemented in the years ahead, and whether Congress will adequately fund the programs it has created for Indians and tribes.[64]

2. Regulation of tribal governments

Another way in which Congress implements its control over Indians is by regulating their governments. Congress has placed several limits on tribal powers,

although Indian tribes continue to have considerable power and discretion over their members and their territory, as discussed in the next chapter.

The single most comprehensive law regulating tribal governments is the Indian Civil Rights Act of 1968 (ICRA),[65] which is the subject of Chapter XIV. The ICRA confers certain individual rights and protections on all persons under tribal authority, such as freedom of speech, freedom of the press, protection against unreasonable search and seizure, and the right to a jury trial in criminal cases in tribal court. In addition, the ICRA limits the punishments that tribal courts may impose on persons convicted of a crime.

Congress also has passed laws, discussed in Chapter VII, that limit tribal powers to regulate the activity of non-Indians, particularly on land they own within the reservation. In addition, Congress has restricted a few tribes, such as the Osage Tribe in Oklahoma, regarding the form of government they may adopt.[66]

Those tribes that have organized under the Indian Reorganization Act of 1934 (IRA),[67] as most tribes have done, were initially required by the Secretary of the Interior to include a provision in their constitutions stating that the Secretary had to approve all tribal laws before the tribe could implement them, even though that limitation on tribal power was not contained in the IRA itself.[68] Some thirty years ago, however, the Secretary announced that IRA tribes could amend their constitutions and remove the requirement of secretarial approval of laws, and most tribes have done so.[69]

IRA tribes continue to be limited, however, concerning the manner in which they may adopt and amend their constitutions. The IRA, and regulations issued by the Secretary of the Interior under the IRA, set forth a detailed election procedure that tribes must follow whenever they want to amend their constitutions.[70] These rules, for instance, define voter eligibility and voter registration procedures, set forth the manner in which notice of the election must be issued by the tribe, and prescribe the types of ballots that may be used. Elections to adopt or amend a constitution are called "secretarial elections."[71] Secretarial elections are federal elections, not tribal, and a violation of the prescribed procedure is a violation of federal law.[72] The Secretary of the Interior has a duty to oversee all secretarial elections to ensure that they are conducted properly.[73] Persons who disagree with the Secretary's handling of an election may challenge the result in a federal court.[74]

Most congressional restrictions on tribal government were enacted more than forty years ago. In more recent times, Congress has made a concerted effort to bolster tribal sovereignty and remove or reduce federal oversight of tribal operations. Even some of the federal government's sharpest critics now have "some reason to be optimistic that the federal government is committed to reestablishing

a true government-to-government relationship with Indian nations."[75] The ISDEAA, discussed above, is a perfect example. Another is the Indian Tribal Economic Development and Contract Encouragement Act of 2000,[76] which amends a law first passed in 1872, Title 25 of the United States Code, section 81. Under the 1872 law, federal officials had to approve every decision made by tribal officials "relative to Indian lands." The law required tribes to submit *all* decisions affecting commercial transactions involving the use of tribal land to federal officials for approval. Viewing this law as paternalistic and stultifying, Congress sharply narrowed its application in 2000 to only those tribal actions that would "encumber" tribal land, that is, that would give an outside party a legal interest in the land itself. To illustrate, under the old law, an Indian tribe needed federal approval to sign a contract to construct any type of building on tribal land, whereas now federal approval is required only if the contract seeks to give someone a legal interest in the land itself, similar to a mortgage. By passing this amendment to section 81, one court recently noted, "Congress has determined that it is in the interest of Indian tribes to be free from bureaucratic oversight of their economic endeavors in all but a narrow category of circumstances."[77]

In addition to the many progressive laws that Congress has passed during the past few decades supportive of tribal governments, both President Clinton and President Obama issued executive proclamations, as noted above, requiring federal agencies to operate within a government-to-government relationship with federally recognized Indian tribes and to consult and cooperate with tribes on all agency activities that may affect them. Thus, both the legislative and executive branches of government have taken steps in recent years to support tribal self-government and autonomy.

What Role may the Federal Government Play in Choosing Tribal Leaders?

As noted earlier, Congress may, if it chooses to do so, regulate the form of tribal governments. For the most part, however, Congress has not interfered with the inherent right of Indian tribes to choose their own leaders, and Congress has authorized federal officials to interfere with that right in only one narrow circumstance.

On occasion, disputes arise within an Indian tribe as to which person (or group of persons) has won a tribal election to lead the tribe. When this occurs, the Secretary of the Interior has been permitted to select a leader on a temporary basis so that the United States and the tribe can continue to engage in government-to-government relations until the tribe can resolve the conflict. Federal courts have upheld these temporary interventions, holding that federal law, including the IRA and the federal government's trust responsibility,

charge the secretary "with supervising [tribal] elections and ensuring their fundamental integrity."[78] The typical remedy in these circumstances, unless the tribal court has been able to resolve the controversy, is for the tribe to hold a new election consistent with tribal and federal law.[79] One federal court also has held that tribal members who conspire to deprive other members of their right to vote in a tribal election or who attempt to rig its outcome may be prosecuted under federal anti-conspiracy laws, and that federal officials have a duty to file charges in those situations.[80]

For good reason, federal officials rarely intervene in tribal election disputes. Few things are of such fundamental importance to a tribe as choosing its form of government and its leaders, and federal officials appropriately leave these decisions to the tribe even when disputes arise.[81] In those circumstances where the Secretary of the Interior must intervene, an effort must be made to avoid unnecessary interference with a tribe's right of self-government.[82]

3. Termination

Another way in which Congress has exerted its authority over Indians is by terminating tribal governments. Congress can do nothing worse to an Indian tribe. Many people perceive termination as equivalent to genocide.[83]

What is Termination?

Termination is the process by which Congress terminates the federal government's trust relationship with an Indian tribe, thereby disqualifying the tribe from the many services that Congress makes available only to federally recognized tribes. At the same time, Congress eliminates the tribe's reservation and forbids the tribe from exercising powers of self-government.

Between 1953 and 1968—during the Termination Era, discussed in Chapter I—Congress terminated 109 tribes, most of them in Oregon and California, but also some in Oklahoma, Michigan, Wisconsin, and other states. In each instance, Congress passed a law directing the Secretary of the Interior to distribute all the tribe's property either to tribal members or to a tribal corporation if the tribe chose to incorporate itself under state law. Once the tribe's property was distributed, the Secretary eliminated the reservation and placed a notice in the Federal Register that the tribe was terminated. As that point, the trust relationship ended, and tribal members became subject to state law, having lost the immunities from state law that living on an Indian reservation normally provides.[84]

Nothing causes Indian tribes to lose more rights and protections than termination. Termination is the ultimate weapon of Congress and the ultimate

fear of tribes because it eliminates the tribe's land base, replaces tribal law with state law, and eliminates the tribe's federal support and financial assistance. Despite its drastic effect, the Supreme Court has held that Congress has the power under the Commerce Clause to terminate an Indian tribe.[85]

Why did the Federal Government Terminate Indian Tribes?

A number of explanations were offered during the Termination Era for the government's termination policy. Some proponents claimed that termination was in the best interests of the Indians. Termination, they said, would help Indians integrate into the general society and, by doing so, reduce Indian poverty.[86] Many Indians believe, though, that termination was not intended to help them but rather to help non-Indians obtain Indian land and save money for the federal government by eliminating the government's treaty promises and trust responsibilities.[87]

Why did Congress Halt its Termination Policy?

Congress last terminated a tribe in 1966, and since then, it has restored to federal status nearly all of the tribes it previously terminated.[88] In 1970, President Nixon explained why the federal government must abandon its termination policy. In its treaties with Indian tribes, Nixon said, the government "has made specific commitments to the Indian people [in exchange for] vast tracts of land." These commitments create a "special relationship between Indians and the Federal Government" and "carry immense moral and legal force." Terminating that relationship and reneging on the nation's commitments, Nixon stated, "would be no more appropriate than to terminate the citizenship rights of any other American."[89] Nixon, who was vice president in 1953 when President Eisenhower commenced the termination process, reversed that process when he became president. Nixon "was the first president in the modern era to affirm treaties as the basis of the relation between American Indian communities and the federal government."[90]

Many non-Indians continue to advocate for the termination of Indian tribes. To prevent them from succeeding, Indians must continue to educate Congress and the public on why this nation should honor its treaty commitments and foster tribal sovereignty.

Have the Courts Established any Protective Rules Regarding Termination?

Due to the harm caused by termination, courts have created protective rules governing its application. One is that a court must refuse to recognize that a termination has occurred in the absence of "a clear and unequivocal" law passed

by Congress terminating the tribe.[91] Another rule is that vested rights survive termination unless Congress expressly extinguishes them. In *Menominee Tribe v. United States* (1968),[92] the Supreme Court held that even though the Menominee Tribe had been terminated and the tribe's reservation eliminated, tribal members could continue to exercise their treaty right to hunt and fish on the land that had been their reservation because the Menominee Termination Act had not expressly extinguished that right. (Congress has since restored the Menominee Tribe to federal status; the Menominee Reservation, which had been transferred to a state corporation, has also been restored.)

Moreover, courts have held that termination must comply with the Just Compensation and Due Process Clauses of the Constitution.[93] Therefore, Congress must provide monetary compensation for any land or other vested interests that are lost through termination.[94] In addition, if federal officials fail to comply with all of the requirements of the relevant termination law, a federal court may "unterminate" the tribe.[95]

4. Regulation of tribal membership

Who Controls Tribal Membership: The Tribe or the Federal Government?

Actually, both do. Indian tribes determine tribal membership for *tribal* purposes. Thus, each tribe decides who is eligible for membership ("enrollment") and which tribal benefits each member may receive, and neither federal officials nor federal courts may interfere with tribal enrollment determinations.[96]

The federal government, on the other hand, determines tribal membership for *federal* purposes, such as deciding which Indians are entitled to federal education scholarships and health benefits.[97] As with all other aspects of tribal affairs, Congress does have the power to limit tribes in their enrollment determinations, but Congress rarely has done so. This subject is discussed more fully in Chapter II, Section A.

5. Regulation of Indian land

Before the arrival of Europeans in North America, Indian tribes occupied or controlled all the land in what is now the United States. Today, tribes occupy or control only 2 percent of that land (approximately 56 million acres). The federal government's forceful taking of tribal land and its extensive regulation of what remains is a clear example of the federal government's authority over Indian tribes.

During the nineteenth century, many tribes at first were placed on fairly large reservations. As time went on and non-Indians clamored for additional

Indian land, Congress either diminished the size of these reservations or abolished them and, in most instances, moved the tribes to smaller reserves elsewhere. Some tribes were left with no home at all.

The General Allotment Act of 1887 (GAA), discussed in Chapter I, was intended to hasten the demise of the reservation system and promote the assimilation of Indians into the white system of property ownership. The GAA created a new method by which non-Indians could acquire Indian land: the federal government sold "surplus" land *within* Indian reservations to non-Indians. In addition, the GAA authorized federal officials to allot parcels of the tribe's land to tribal members. Hundreds of these Indian allottees were subsequently given deeds to their allotments, giving them full ownership rights and subjecting the land to state real estate taxes. Many allottees sold their land to non-Indians or lost their land through foreclosure when they failed to pay the state taxes. Of the 150 million acres of land that tribes owned collectively when the GAA was passed in 1887, less than a third remained when the GAA was repealed in 1934.

What is "Indian Land"?

There are two broad categories of Indian land: *trust* and *non-trust*. Trust land is owned by the federal government but set aside for the exclusive use of an Indian or a tribe, the "beneficial owner." Non-trust land (also called *fee, fee patent*, or *deeded* land) is owned outright by an Indian or tribe; Indians and tribes can own land, both on and off the reservation, just as anyone else can.

There are advantages and disadvantages to keeping land in trust status. The main advantage is that trust land, being federally owned, is immune from state tax and zoning laws and from most other forms of state regulatory jurisdiction, and crimes that occur on trust land involving Indians are not generally subject to state prosecution.[98] The main disadvantage is that trust land may not be sold, leased, or bequeathed by the beneficial owner without the federal government's consent. However, despite these disadvantages, most Indians and tribes possessing trust land opt to keep it in trust status largely because of its exemption from state taxation. Likewise, when Indians and tribes purchase land within the reservation, they usually ask the Secretary of the Interior to convert the land into trust status, as the Secretary has the authority to do (the "land into trust" process, discussed later).

Under the GAA, as just noted, hundreds of Indians were forced to accept deeds to their allotments, and eventually sold their land to non-Indians or lost it through tax foreclosures. In 1934, as part of the Indian Reorganization Act, Congress prohibited the federal government from issuing any more of these "forced" deeds. Today, Indians who possess trust allotments are not issued a deed unless they request one.[99]

How does the Federal Government Regulate the Sale of Trust Land?

Trust land is owned by the United States. Therefore, it cannot be sold by an Indian without the consent of the federal government. Congress has created a process by which an Indian allottee may obtain a deed to his or her trust allotment of land. The allottee must fill out an application and prove that he or she "is competent and capable of managing his or her affairs."[100] Once the applicant proves competency, the Secretary of the Interior must issue the deed.[101] Determinations of competency are left by law to the Secretary's sound discretion, and courts generally do not overrule the Secretary's decision.[102] The Secretary has issued detailed regulations governing the sale, exchange, and conveyance of Indian trust land.[103]

When a qualified Indian allottee requests the issuance of a deed and indicates on the application an intent to sell the land once the deed is issued, the Secretary usually offers the tribe the right to purchase the land at fair market price.[104] If the tribe declines to purchase the land, the Secretary must issue the deed even if the tribe requests that the application be denied.[105] Federal law also permits Indians to sell their trust land through an installment contract, subject to secretarial approval, with the purchaser paying a portion of the price at periodic intervals.[106] In addition, federal law allows Indians to borrow money and to place a mortgage on their trust land as collateral for the loan.[107] If the Indian then fails to repay the loan, the federal government will issue the Indian a deed to the land and the creditor can then foreclose on the property pursuant to the mortgage.

Congress does not regulate the sale of fee land owned by an Indian, and this land may be sold by the owner to anyone at anytime. Fee land owned by a tribe, however, is treated differently. The Indian Nonintercourse Act (INA), passed in 1790, prohibits tribes from selling any interest in land unless the sale is approved by the federal government.[108] Any sale of tribal land without the government's consent is void, and the tribe may bring a lawsuit (even many years later) to recover the land.[109] However, as explained in the next chapter, the Supreme Court held in *City of Sherrill v. Oneida Indian Nation of New York* (2005)[110] that there is a limit to how many years a tribe may wait before asserting a violation of the INA and recovering governmental authority over land taken in violation of the INA.

How does the Federal Government Regulate the Leasing of Trust Land?

Congress has passed laws, and the Secretary of the Interior has issued regulations, governing the leasing of Indian trust land. Any noncomplying lease is invalid.[111] A separate federal statute governs each kind of trust lease, including farming and grazing leases; mining leases; oil and gas exploration leases;

and leases for public, religious, educational, recreational, residential, or business purposes.[112] The Secretary has issued extensive regulations governing the terms and conditions of these various leases, and each type of lease has its own requirements.[113] For instance, a lease for grazing purposes cannot exceed a term of ten years, whereas a lease for residential purposes may be made for twenty-five years.

The Secretary usually approves a tribe's request to lease its land unless there is evidence of mistake, fraud, or undue influence in the terms of the lease.[114] A lease of Indian trust land is subject to cancellation by the Secretary if it is later found to violate federal law or if the terms and conditions of the lease are not being met.[115] In such cases, the parties to the lease are entitled to a hearing before the cancellation takes effect, and the Secretary's decision can be reviewed by a federal court.[116] If an Indian or tribe believes that federal officials have violated federal law or federal trust duties in the leasing process, they may seek judicial review.[117] The Secretary is not allowed to enter into any lease of trust land without the consent of the beneficiary.[118]

On most Indian reservations, the Realty Office of the Bureau of Indian Affairs handles the leasing of Indian land, under the authority of the Secretary of the Interior. Those persons who lease Indian land (the "lessees") pay their rent to the Realty Office. The Realty Office then distributes this money to the Indian beneficiary. However, as explained in Chapter III, the federal government has often done a poor job collecting, accounting for, and distributing lease and royalty income derived from Indian trust land.

Does the Federal Government Regulate the Inheritance of Indian Land?

Congress has decided not to regulate the inheritance of *fee* land owned by an Indian. As a result, the inheritance of fee land owned by an Indian and located on the reservation is controlled by tribal law, whereas land located outside the reservation is controlled by state law.

As the owner of *trust* land, Congress regulates its inheritance, and the Supreme Court has upheld its authority to do so.[119] For instance, Congress has determined that (1) if an Indian dies without a will ("intestate"), the Indian's trust land will be inherited according to state law rather than tribal law; (2) if an Indian dies with a will, any assignment of trust land made in the will is invalid unless it previously had been approved by the Secretary of the Interior; and (3) if an Indian dies without a will and without legal heirs, the Indian's trust land will be inherited by ("escheat to") the tribe.[120] Congress has also determined that non-Indians cannot own trust land. Therefore, if an Indian's heir is non-Indian (which happens, for example, when an Indian marries a non-Indian and the

spouse inherits the property), then a deed will be issued as to any trust land the heir inherits.[121] Although, as just noted, the Secretary has broad authority to regulate Indian wills, the Supreme Court has held that the Secretary may not disapprove an Indian will unless there is evidence of fraud, duress, or lack of mental competency on the part of the Indian who made it.[122] Thus, there are limits to the Secretary's discretion.

The Secretary of the Interior has issued extensive regulations governing the inheritance of trust property.[123] A decision by the Secretary regarding the inheritance of trust property can be reviewed by a federal court to ensure that it is not arbitrary and capricious or otherwise contrary to federal law.[124]

As noted earlier, thousands of Indians were issued allotments of land under the GAA. Whenever these original allottees died intestate, their heirs inherited an undivided portion of the allotment. (For instance, if five children were the only heirs, they would each inherit a one-fifth interest in the entire parcel.) When those heirs died, the allotment would then be fractionated further. Today, many parcels of trust land are jointly owned by dozens and sometimes hundreds of people, all of whom must consent to a sale, lease, or other use of the land. Nationally, there are an estimated 3.2 million landowner interests in Indian trust land, with 86 percent of them owning less than 2 percent of the relevant parcel of land.[125] These fractionated land holdings stifle tribal economic development and often prevent maximization of land usage because obtaining the consent of all the owners is extremely difficult. Congress has attempted to assist tribes in resolving this problem. Initially, Congress passed a law declaring that whenever the value of the inherited land would generate less than $100 a year in lease income for the heir, the land would escheat to the tribe instead of passing to the heir. However, the Supreme Court held that this law resulted in a taking of property without just compensation in violation of the Just Compensation Clause.[126] In 2004, Congress tried again and enacted the American Indian Probate Reform Act,[127] which contains a series of measures designed to reduce tribal land fractionation, create a process by which family members can agree to consolidate their interests, and authorize the federal government to purchase small owner interests on behalf of the tribe. In 2010, Congress appropriated $1.9 billion to implement that law, enabling the federal government to pay heirs adequate compensation for their small shares, after which the entire parcel of land will be held in trust for the tribe.[128]

Are there Other Ways in Which Congress Regulates Trust Land, Besides its Sale, Lease, and Inheritance?

Yes. Besides controlling the sale, lease, and inheritance of trust land, the federal government also controls easements and rights of way on trust land,

such as railways, highways, power lines, and oil and gas pipelines, all of which must be approved by the Secretary of the Interior.[129] (In most circumstances, a right-of-way across tribal land requires the tribe's approval, too.)[130] The Secretary also manages the forestry on, and irrigation of, trust land.[131]

As explained earlier, a law passed by Congress in 1872, 25 U.S.C. section 81, provided that no contract or agreement may be made with Indian tribes "relative to their lands" unless approved by the Secretary of the Interior. This statute, however, was narrowed substantially in 2000, eliminating federal oversight of tribal commercial contracts to only those in which the contracting party would obtain an interest in the land itself.[132] This amendment illustrates the efforts being made by Congress to promote tribal self-determination and reduce federal control over tribal property.

Can Indians and Tribes Acquire Additional Trust Land?

Yes, by two methods, Indians and tribes can acquire additional trust land. Both methods require action by the Secretary of the Interior and both were created by a statute, Title 25 of the United States Code, section 465. Section 465 was passed by Congress as part of the IRA in 1934. First, section 465 authorizes *the Secretary* to purchase fee land with federal funds, convert that land into trust status, and assign it to an Indian or tribe.[133] This authority is discretionary, however, and the Secretary cannot be forced to purchase land even when funds are available.[134] Some years, Congress appropriates no money for this purpose.

Second, section 465 allows *an Indian or a tribe* to purchase fee land (on or off the reservation) and request that the Secretary convert that land into trust status ("land into trust"). Today, many tribes are purchasing parcels of land within their reservations that had been removed from trust status and sold to non-Indians as a result of the GAA.[135] Section 465 provides a method by which this land can be restored to trust status. Although section 465 appears to allow only IRA tribes to qualify for this benefit, Congress passed a law in 1938 that extends the application of section 465 to "all tribes."[136] Thus, the Secretary may take land into trust for any Indian tribe.[137]

Section 465, however, states that land may be converted into trust only for those tribes "now under federal jurisdiction," and in *Carcieri v. Salazar* (2009),[138] the Supreme Court interpreted the word *now* as limiting the statute's applicability to those tribes under federal jurisdiction in 1934, when the statute was passed. Many Indian tribes can show that they were "under federal jurisdiction" in 1934, but the *Carcieri* decision creates a problem for some tribes. Congress is being lobbied to amend section 465 so that it would apply to all Indian tribes that have received formal recognition by the Department of the Interior, which is currently 565 tribes.[139] In 2010, Assistant Secretary of Indian Affairs Larry Echo Hawk stated that he supported an amendment of that

nature.[140] In 2011, the Department of the Interior approved a land-into-trust exchange for the Cowlitz Tribe, which had obtained acknowledgement as a federally recognized tribe in 2000.[141] By approving a land-into-trust exchange for the Cowlitz, the department demonstrated that a tribe could be "under federal jurisdiction" for purposes of section 465 even though the tribe was not added to the list of federally recognized tribes until long after 1934.

Land-into-trust acquisitions often generate heated controversies.[142] One reason is that fee land is subject to state real estate taxation, whereas trust land is not. Local governments thus have a financial incentive to oppose a tribe's attempt to transfer fee land into trust status. Moreover, many of these applications relate to off-reservation land on which the tribe wants to construct a gambling casino,[143] and some local residents strongly oppose the opening of a casino in their neighborhoods. However, Congress passed the IRA to promote tribal self-government, improve tribal economies, and assist tribes expand their land base in an effort to ameliorate the damage caused by the allotment policy of the GAA.[144] Consistent with this congressional intent, the Secretary of the Interior has converted many parcels of fee land into trust status, and courts have consistently rejected efforts by state and local governments to overturn these secretarial determinations.[145]

Can Congress Diminish the Size of, or Abolish, an Indian Reservation?

Yes, Congress has the power to diminish or even abolish an Indian reservation. Indeed, using four methods, Congress has diminished many reservations and abolished others, although it has not exercised any of these powers in many years. First, Congress has sometimes abolished *entire* reservations and either created a new reservation for the tribe elsewhere or, as it did during the termination era to 109 tribes, simply eliminated the reservation; this is called "disestablishment." Second, Congress has eliminated a *portion* of the reservation, declaring it "restored to the public domain";[146] this is called "diminishment." Third, in another type of diminishment, Congress has restored to the public domain a portion of the reservation but allowed any trust allotments located within the restored area to remain in trust status. This extinguished the tribe's control over the area except for the remaining trust allotments, which are still considered "Indian country."[147] (*Indian country* is defined in Chapter II.) Fourth, Congress has opened reservations to settlement by non-Indians, allowing them to purchase unoccupied ("surplus") land *within* Indian reservations. The GAA, discussed earlier, is a prime example of this method. (The first three methods change the exterior boundaries of the reservation, but the last method does not; rather, it creates a "checkerboard" pattern in which Indian trust land and non-Indian private land exist side by side, and the entire area remains Indian country.)[148]

It some instances, it has proven difficult to tell from the language of the applicable statute whether Congress intended to disestablish an entire reservation, diminish the reservation, or merely open the reservation to non-Indian settlement. The Supreme Court has held that if a reasonable doubt exists as to what Congress intended, it will be presumed that Congress did not disestablish or diminish the reservation.[149] In certain cases, though, a majority of the Court has held that Congress had disestablished or diminished a reservation even though the dissenting justices found no clear intent on the part of Congress to do anything more than open the reservation to white settlement, rather than to reduce its boundaries.[150]

Are there any Limitations on the Federal Government's Control Over Indian Land?

There are three major limitations on federal power over tribal land, at least in theory, and all of them were discussed earlier. First, the Due Process Clause of the Fifth Amendment guarantees that any decision by Congress to take Indian land, and the manner in which the land is then removed by federal officials, must be reasonable and nondiscriminatory. The Due Process Clause, however, has not prevented Congress from removing Indian land, although it has compelled federal officials to carefully follow the instructions provided by Congress for the removal.[151]

The second limitation is the Just Compensation Clause of the Fifth Amendment, which guarantees that Congress must pay fair and adequate compensation for any property it confiscates.[152] When land is taken, compensation must be paid not only for the value of the land but for everything of value found on or within the land, such as timber, minerals, fish, and game, and the government must pay interest from the day the land was taken until the compensation is paid.[153]

Lastly, the doctrine of trust responsibility compels federal officials to manage tribal property wisely, in the best interests of Indian tribes, and in consultation with Indian tribes. The trust doctrine thus limits federal discretion and requires federal agencies to deal with tribes on a government-to-government basis concerning the management of tribal resources.

6. Regulation of tribal assets

What Control does Congress have Over Tribal Assets?

The power of Congress to regulate tribal assets—such as tribal funds and tribal land—is "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs."[154] As with the

other exercises of congressional power discussed above, federal power over tribal assets is plenary.[155] This power is so extensive that Congress can order a tribe to distribute all of its assets and to disband as a government, a power that Congress exercised with disastrous results during the termination era.

Federal statutes give the Secretary of the Interior the express authority to administer most tribal assets, including tribal land, as already explained. The Secretary also has the authority to take tribal funds and use them to pay for Indian education, road construction, hospitals, medical supplies, and tribal insurance.[156] However, the Secretary has no independent authority to manage tribal assets and may only do what Congress has authorized. Federal officials must properly manage the property they take under their control, consistent with federal laws and their trust responsibilities.[157]

In 1994, Congress passed the American Indian Trust Fund Management Reform Act,[158] a historic piece of legislation that permits Indian tribes (but not tribal members) to withdraw funds held in their trust accounts for the purpose of managing those funds themselves. Tribes now have the option of investing their money privately. However, with this greater discretion comes greater risk. Once the funds are withdrawn, the United States no longer has any liability or responsibility with respect to that money.[159]

7. Regulation of individual property

Does Congress Regulate the Individual Property of Indians?

As other citizens, Indians can own private property, including land, cattle, automobiles, and the like. Congress does not regulate *private* property owned by Indians any differently than private property owned by non-Indians.

However, Congress does regulate individual Indian *trust* property, all of which is owned by the United States and set aside for Indian use. Many Indians, for instance, were issued allotments of trust land under the GAA, and hundreds of these trust allotments still exist today. As discussed earlier in this chapter, everything that an Indian may wish to do with trust land—sell, lease, or develop it—must be approved by the federal government.

When Indians lease their trust lands to mining or oil companies, or to farmers or ranchers, as many Indians do, those who lease the land (the "lessees") pay rent or royalties. These funds are paid to the Secretary of the Interior, who must deposit them into a government account for the benefit of the Indian or tribal beneficiary. Considerable controversy surrounds these accounts. As discussed in Chapter III, it was proven in the *Cobell* case that the federal government had lost or misplaced hundreds of millions of dollars that should have been paid to beneficiaries. The *Cobell* lawsuit was resolved in 2010 when

Congress appropriated $1.4 billion as compensation, although many beneficiaries believe that this amount is inadequate.[160]

8. Regulation of trade and liquor

Does Congress have the Power to Regulate Trade with Indians?

Yes. The Commerce Clause gives Congress plenary power to regulate commerce with the Indian tribes,[161] and most aspects of Indian trade are regulated by the federal government. As early as 1790, Congress passed a comprehensive law to regulate commerce with Indian tribes, and most of its provisions are still in effect.[162] This law requires all persons, except Indians "of the full blood," who trade on an Indian reservation to obtain a federal license and to obey certain restrictions on the type of goods and services being offered and the manner of their sale. Violators are subject to the forfeiture of their goods and a fine.[163]

Congress has delegated to the Assistant Secretary of Indian Affairs (the person in charge of the BIA) the authority to regulate Indian trade.[164] Only the Assistant Secretary (or a designee) may issue a trader's license, and no license may be issued unless the applicant proves that he or she is "a proper person to engage in such trade."[165] The Assistant Secretary has enacted regulations describing in detail how trade with Indians must be conducted and the goods and services that may be sold.[166]

Any person (Indian or non-Indian) who discovers that someone is violating these federal laws may file a lawsuit against that person in the name of the United States.[167] If the court finds a violation, the trader's goods must be confiscated by the federal government and sold, and the person filing the suit is entitled to half the proceeds.[168] If federal officials ignore their duty to regulate reservation trade, a court can order them to enforce the law.[169]

Congress has decided that federal employees who work directly with Indians and tribes may not trade with them except on behalf of the United States so as to guard against corruption or undue influence.[170] In addition, Congress has made it a crime to negotiate with an Indian tribe for the sale or lease of tribal land without the federal government's consent.[171]

Does the Government's Power to Regulate Trade Include the Power to Regulate Liquor?

Yes, and Congress has made extensive use of this power.[172] In 1892, Congress passed a law prohibiting all sales of liquor to Indians, both on and off the reservation. The law was amended to only prohibit sales to Indians on or near Indian reservations, and later amended again to prohibit only on-reservation sales. The law was again amended. The current version authorizes each tribe to

decide for itself what types of liquor regulations to establish, and tribes have the authority to issue their own liquor licenses,[173] to refuse to issue a liquor license to non-Indians,[174] and to ban entirely the sale of liquor on the reservation (as several tribes have done).

9. Criminal jurisdiction

Indian tribes had their own systems of criminal justice long before Europeans arrived on this continent, and each tribe decided what behavior to prohibit and how to punish misconduct. Until 1885, the federal government did not interfere with these traditional systems for punishing crimes committed by one reservation Indian against another.

In 1885, Congress passed the Major Crimes Act,[175] which authorizes federal officials to prosecute Indians who commit certain crimes on the reservation. The Act was passed in response to a highly publicized trial that occurred in the Dakota Territory in 1883. An Indian named Crow Dog was arrested and prosecuted by federal officials for murdering a chief of the Brule Sioux, Spotted Tail. Crow Dog appealed his conviction to the U.S. Supreme Court, arguing that federal officials had no right to prosecute him for something that occurred on an Indian reservation between two Indians. The Court agreed with Crow Dog and ordered his release.[176]

Congress quickly responded. Believing that Indians would become "civilized a great deal sooner"[177] if they were subject to certain federal criminal laws, Congress passed the Major Crimes Act, which authorized the federal government to prosecute the following seven crimes when committed by an Indian in Indian country against any other person: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. Since then, more crimes have been added to the list.

Chapter VIII further explains the federal government's criminal jurisdiction in Indian country. As discussed in that chapter, various laws confer on federal officials considerable authority to prosecute crimes committed on Indian reservations. Congress, however, has failed to appropriate sufficient funds to hire enough federal and tribal law enforcement officers and support personnel, purchase needed equipment, and construct adequate jails and halfway houses on Indian reservations, resulting in far more crime and misery than our society should permit.