THE INDIAN CIVIL RIGHTS ACT

United States Commission on Civil Rights

Statement

by

Commissioner William B. Allen

The temptation to approve this report is great despite its manifest errors of legal and historical interpretation.[1] The reason for this is that the Commission's study has finally been freed from its unhealthy and collusive connection with the Department of Justice's efforts to build a case for legislation previously introduced as S. 517. During that earlier phase the Commission actually had less control over its own study than did certain staff from the Department of Justice.[2] The sheer scope and importance of the inquiry, however, had the effect of producing a record of far greater weight than the collusion intended. Despite the passage of time and changes in staff, the record remains to support a broader effort, and the Commission's study is now free from those prior suspicions. Nevertheless, some aspects of the prior analysis remain in the final product (to be expected, since the whole work could not be redone), and these convey erroneous conclusions even while no longer supporting their pre-determined end. I write, now, therefore, largely to clarify these errors of legal and historical analysis and also to take full advantage of the rich record this six-year study produced.

Moreover, I cannot concur in a report that claimed fewer than ninety seconds of substantive Commission deliberation after more than six years study and six-hundred thousand dollars of resources invested in it. The report is far briefer than such an extensive record would seem to justify.[3] Furthermore, the direction of its recommendations, contrary to the recommendations of the very worthwhile "Final Report and Legislative Recommendations" of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate, is to infuse the federal government even deeper into custodial care of Indians, while the gravamen of our findings is that that is the very source of most of the problems we uncovered.[4]

This abbreviated version seems to suggest far less importance for the ultimate product than I believe it in fact merits. Indeed, I am persuaded that the hearing and study record behind this report make it possible, for the first time in our history, for the Government of the United States to be completely honest rather than merely apologetic about its failures in treating with American Indians. The approved Commission "Report" fails to live up to this high expectation.[5]

Accordingly, I add now my own brief statement about the meaning of this extensive record.[6] In order to provide coverage as comprehensive as possible in the circumstances, I restrict the text to a further elaboration of findings and recommendations supported by the record. I omit interpretations save where absolutely necessary to justify findings or recommendations, and then I relegate them to footnotes in order to preserve an undisturbed flow in the text.

FINDINGS

I. There is no foundation for Congress' and the Court's assertion of a "plenary power" over Indian tribes taken as independent and sovereign governments. Such a "plenary power" neither has been nor can be acquired by conquest, treaty, or constitutional stipulation.[7]

A. Whatever may be the rule in international law, the assertion of complete and arbitrary power over non-citizens by the Government of the United States is incompatible with the Constitution of the United States, which is superior to every positive determination by the Government.[8]

B. Even if complete and arbitrary power over non-citizens were possible for the Government of the United States, such unlimited power could not be extended over citizens who, as such, are parties to the Constitution that limits the power of government.

1. Nor can citizens be placed outside of the protection of the Constitution by means of the fiction of "government to government relations," where the "government" with which the United States deals is not in fact independent and sovereign (including control of its own territory).[9]

a. Therefore, insofar as the ICRA applies to U. S. citizens, it exceeds the power of Congress to enact.

C. The Congress of the United States can legitimately exercise no power over tribes whose members are citizens of the United States which power is not in fact a power over the citizens themselves and therefore subject to the relevant constitutional limitations.

1. With respect to special protections afforded against lawfully subordinate governments, the United States has no power whatever to make exceptions, for any purpose whatever.[10]

a. With respect to special protections afforded against lawfully subordinate governments, the United States may not apply a lesser standard of protection against itself.

D. Not one federal dollar has been spent on the enforcement of fundamental civil rights of American citizens domiciled on reservations since the 1978 Supreme Court decision, *Santa Clara Pueblo v. Martinez*.

II. The Government of the United States has failed to provide for Indians living on reservations guarantees of those fundamental rights it is obliged to secure for all U. S. citizens living on territory controlled by the United States and under the laws of the United States.

A. In abandoning by act of Congress individual U. S. citizens to the indeterminate control of tribal governments without recourse to federal courts of judicature the United States thereby fails to provide the just constitutional claims for which all citizens may pray.

B. Federal legislation for tribes, as distinct from citizens, implicates the rights of citizens in other areas.

1. The Indian Child Welfare Act (ICWA) is a case study of rights imperiled by the process of legislating for tribes without regard to citizens.

a. ICWA produces institutional child neglect and abuse without recourse to fundamental due process protections.[11]

2. Congress established the Legal Services Corporation to provide legal representation for indigent clients in civil cases. An exception to a general prohibition against uses of Corporation funds in criminal cases is provided where persons are charged with a criminal misdemeanor or less in a tribal court, 42 U.S.C. §2996f(b)(2); 45 C.F.R. §1613.4. In 1988, Corporation staff advised the Commission that the Corporation had allocated $7 million for

all Native American legal services programs, of which 10 were reservation based and 22 were located near reservations. Discussions with Corporation staff indicated that many of these programs are overseen by boards of directors that include tribal council members, and that these programs frequently represent tribal governments in relation to state governments or the Bureau of Indian Affairs. The use of tribal council members as directors of the programs ostensibly set up to provide representation of indigent American Indians in litigation against tribal governments calls into question the integrity of these programs.

III. Enforcement of ICRA by tribal governments: The record of hearings and studies justifies the conclusion that tribal enforcement of ICRA has been at best uneven; sometimes reaching to customary levels of expectation among Anglo-American jurisdictions, often lacking altogether.

A. Among the explanations for, and examples of, the failures are a number of individual and systemic factors.

1. Claims of sovereign immunity.
2. Lack of autonomy in judicial offices.
3. Woeful lack of funding of tribal courts.
4. The Secretary of the Interior has failed to use statutory means (§450m of Public Law 93-638) to enforce the ICRA.
5. General allegations of illegal searches and seizures.
6. Widespread denial of the right to counsel.
7. Ex parte hearings.
8. Restriction of right to a jury trial.
9. Violations of freedom of the press.
10. Violations of due process and equal protection of the laws.
11. Cruel and unusual punishments.

RECOMMENDATIONS:

I.

A. That the “blueprint for a New Federalism” proposed in the “Final Report and Legislative Recommendations” of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate be enacted forthwith, including the four “indispensable conditions:”

1. The federal government must relinquish its current paternalistic controls over tribal affairs; in turn the tribes must assume the full responsibilities of self-government;

2. Federal assets and annual appropriations must be transferred in toto to the tribes;

2. Formal agreements must be negotiated by tribal governments with written constitutions that have been democratically approved by each tribe; and

4. Tribal government officials must be held fully accountable and subject to fundamental federal laws against corruption or abuse of power.

B. A comprehensive guarantee of the natural and civil rights of American citizens of Indian descent demands that we resolve the constitutional ambiguity in the relation between individual Indians, their tribal governments, and the government of the United States; such a resolution will embrace the either/or choice of full sovereignty or citizenship.

1. A resolution on the side either of sovereignty or of American citizenship must entail the dissolution of the Bureau of Indian Affairs per se, acting as a caretaker or guardian for a conquered race. Certain functions of the Bureau could survive in the Department of State relative to those Indian communities following the path of sovereignty.

a. Wherever there has been within any tribe no express acceptance of American citizenship, and where continued territorial and administrative integrity of the tribe obtains, the United States should accord full and formal recognition of the independence of the nation on grounds mutually acceptable, such grounds being spelled out in a final treaty of peace between such independent tribe(s) and the Union.

b. Because it is sometimes unclear where American citizenship has been embraced and where it has not, and because the government of the United States may not withdraw accomplished citizenship, before steps toward independence can be taken, the United States is obligated to conduct a plebiscite among the members of affected tribes. The plebiscite should be carried out under the direct control of the federal government, with all rules and procedures subject to congressional authority.

C. 1.

a. The Indian Civil Rights Act should be repealed.

i. Where Indians constitute a thriving political society but do not choose independence from the United States, where they possess territorial integrity and material resources for the conduct of government, and where there is sufficient divergence of interest between them and the state(s) of the Union where they are located geographically, they should be empowered to petition Congress for independent status within the Constitution of the United States as states or territories or commonwealths.

ii. Tribes ineligible for independent political status within the Constitution by reason of size or circumstance, but which yet retain fealty to American citizenship, should be encouraged toward separate municipal status wherever possible.

iii. Congress ought, all other provisions failing, at least to enact a self-denying ordinance to the effect that it will attempt over Indian tribes the exercise of no municipal powers other than those generally established over states within the United States. This will leave the tribes as “states” without representation, save through the states within whose boundaries they lie.

D. While the reservation system and/or the custodial responsibility of the United States still subsists, it is recommended that a Board of Indian Judges be established within the Civil Rights Division of the Justice Department, there to propose and oversee the establishment of adequate mechanisms and resources to guarantee the enforcement of fundamental civil rights on reservations.

1. The purpose of the Board of Indian Judges shall be to recommend a system of Indian Regional Appellate Courts and appropriate criminal justice procedures to articulate within such an appellate structure.

    a. Such courts may be based on existing regional judges associations and would be best organized according to the existing sympathies and common customs of the various tribes within a region.
    b. Such courts should also be articulated within the structure of existing circuit courts of the federal judiciary.

2. Alternatively, and failing by some fixed date such a result as called for from the Board of Indian Judges, the Department of Justice in consultation with the Board of Indian Judges should recommend to Congress a means by which existing tribal courts may be brought directly within the appellate jurisdiction of the federal court system. This course implies necessarily amendment of the ICRA to fill in the gaps cited by the Martinez decision.

II. Congress would do better to replace the ICRA with legislation providing for the enforcement of the civil and constitutional rights Indians enjoy by virtue of their citizenship in the United States. Such legislation should specify de novo review by appropriate judicial bodies in civil rights actions brought by plaintiffs in tribal courts.

A. Such legislation would subordinate tribal governments to the Constitution of the United States and provide for a waiver of tribal sovereign immunity. Additionally, Congress should explicitly amend civil rights currently in force to include American citizens domiciled on Indian reservations.

B. Congress should not only reverse the Duro decision, but should extend the rule to establish general jurisdiction over all persons committing infractions on Indian reservations.[12]

1. Congress should repeal the Indian Child Welfare Act, and any similar legislation the consequences of which are to enracinate social pathologies.

    a. Due process requirements mandated in particular civil rights areas ought expressly to be extended to all judicial procedures touching questions of life, liberty, or property.

2. b. Congress should amend 42 U. S. C. §2996(b) to clarify its intent with respect to use of funds by the Legal Services Corporation in providing funds for the representation of indigent clients, not governments, in tribal court proceedings.

III. A.

1. Within their own constitutions and without respect to their status, tribes should guarantee that sovereign immunity shall not constitute a defense against claims for injunctive, declaratory, or other equitable relief in fundamental civil rights pleadings.

3. Tribes should, further, provide judicial review by an independent judiciary. Moreover, Congress should amend the language in 25 U.S.C. §450n, which provides that "Nothing in this Act shall be construed as—(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.. ."

3. Congress should provide through the Department of Justice direct funding for tribal court systems commensurate with levels that obtain in comparable state or municipal systems.

    a. Congress should appropriate and earmark monies for a criminal defense fund to be used to reimburse attorneys who represent indigents in criminal proceedings in tribal court. A voucher system should be established to pay these attorneys a pre-determined rate for their services. Alternatively, Congress should appropriate and earmark monies to pay for attorneys to be added to either the federal defender's office or the United States Attorney's office in every jurisdiction that contains a tribal court.

4. Title 25 U.S. C. §450m requires, *inter alia*, that certain language be included in contracts or grant agreements which the Secretary of the Interior enters into with tribal organizations. That language is to expressly provide that the Secretary may rescind and reassume such contracts or agreements where he determines that the tribal organization's performance thereunder involves the violations of rights. Unwise though this relationship be, while it persists Congress should amend §450m to specify that violations of the Indian Civil Rights Act, while it is in force, provide a basis for rescission of such contracts or agreements and to require certification by the tribe that it is complying with the ICRA. This minimal level of enforcement should also provide a private right of action against the Secretary for persons whose rights are allegedly violated.

5-11. The Federal Judicial Center, an agency within the Judicial Branch of the United States, is mandated, *inter alia*, to conduct research on the operation of federal courts, to stimulate and coordinate such research by other agencies or persons, and to conduct programs of continuing education and training of judicial branch personnel including judges. Serious consideration should be given to using the Federal Judicial Center, alone or in conjunction with the Board of Indian Judges provided for above, to assist in the development of tribal courts through the provision of training and technical assistance. Such training and assistance should also be extended to tribal council members and police personnel.

    a. Ideally, the Board of Indian Judges would take the lead in recommending ways and means of regularizing and insuring a fair administration of justice under tribal governments wherever necessary. In addition to direct funding by the Department of Justice, it should provide for mandatory trial by jury in appropriate cases, the incorporation of American citizens living on reservations within all civil rights statutes, including the Voting Rights Act of 1965 (with amendments), and some workable standard to ensure that the orders of courts will be obeyed by tribal executives and police.

ENDNOTES

[1] All the present day inhabitants of North America can trace their origins to a history of primitive, unlettered barbarism. Nevertheless, Federal Indian law continues to be premised on the ignorance of the Indians. Indians, it is said, are in their pupillage; they are wards of the United States. It is essential first to understand this foundation of Indian law, before one can meaningfully address the Indian Civil Rights Act (ICRA) or entertain any serious discussion of what the United States Commission on Civil Rights should say about the ICRA.

Accordingly, it is important to note that the criticisms in this statement are not criticisms of the Commission staff who drafted the report and who in this as well as in other productions have exhibited a professional excellence beyond question. I here criticize an approach, in much the same spirit we have previously criticized the production of narrow reports by this commission. Before, we have insisted that an economic analysis, unleavened by historical sensitivity, was insufficient for the mission of the Commission on Civil Rights. Today I say that mere legal analysis is no more sufficient, alone, than mere economic analysis.

This outlook was well expressed by Commissioner Mary Frances Berry, in the Commission meeting of November 17, 1989, when she declared: "I thought that the economics ought to be put into the context of the culture and social history of black women in this country so that we would have a fuller understanding of their status and that I also thought that there ought to be some discussion of the history of discrimination on the basis of gender in general with black women as a sub-context of that . . . I believe that that context, the history, needs to be put into the report so that people will more fully understand the economics that they read . . . I am considering [the report] from the perspective of a public who reads it. So, if we could separate criticism of what they have done from criticism of us as a body publishing a study, then I think we will be getting somewhere . . . to give people these narrow answers doesn't make any sense and so I pleaded . . . that we put more about the history of black women and women in this country to flesh out the areas where we talk about the economics . . . the people who did the report are not professional historians and perhaps . . . it's not their fault that they're not and they weren't asked to do this and we need somebody to do it." Similarly, Commissioner Blandina Cardenas Ramirez observed that ". . . we have spoken about a need for, if you would, an interdisciplinary approach to these issues consistently every single time one of these economic status reports have come up . . ." With Commissioners Berry and Ramirez I have consistently emphasized an interdisciplinary focus. I remain consistent in underscoring its importance. We do not have the capability at the Commission at this stage of our development to provide that kind of breadth in our reports. Therefore, I now write, not to provide the comprehensive focus we need, but at least to suggest the scope of such a capability. In doing so, I take occasion to correct the most misleading, if unintentional, errors of the report now approved by the Commission.

[2] This Commissioner well remembers sitting in the office of Senator Inouye and responding to an inquiry concerning DOJ influence that our study was independent, only then to be confronted for the first time with the copy of a memorandum which clearly showed such a relationship. Needless to insist, I had been assured that we retained an appropriate arms' length relationship and my embarrassment was acute.

[3] The Commission's study into enforcement of the Indian Civil Rights Act of 1968 was begun in 1985, when the Commissioners adopted a written project proposal authorizing further development of the study. The investigations and hearings by the Commission subcommittee responsible for the study comprise the most extensive factfinding conducted on the status of civil rights on Indian reservations ever undertaken. In significant part, this factfinding is set forth in the hearing records noted in Part I, n. 2 of the "Report."

In all, one hundred and seventy-eight persons testified before the Subcommittee. Witnesses included numerous tribal judges and council members, Assistant Secretary for Indian Affairs, Ross Swimmer, and other representatives of the Department of the Interior, United States Attorneys from South Dakota, New Mexico, and Minnesota, Indian law scholars, lay advocates, and attorneys who practice before tribal courts. Included also were numerous private citizens who sought recourse to the Commission to complain of tribal government abuses of their civil rights, testimony essential to a legitimate examination of the status of civil rights in Indian Country.

The eventual selection of hearing sites conformed to the Commission's purposes. Rapid City was chosen for its proximity to the Rosebud, Cheyenne River, and Oglala Sioux Tribes, all of which were generally perceived to be experiencing difficulty properly enforcing the ICRA. Flagstaff, on the other hand, was selected for its proximity to the Navajo and Zuni Pueblo Tribes, and because the Navajo judicial system was reputedly the best in Indian Country. Later the Subcommittee added hearings in Portland, to receive testimony from numerous tribal judges in the Northwest (at their request); in Washington, D. C., to examine the ICRA enforcement efforts of the Bureau of Indian Affairs; again in Flagstaff to examine alleged ICRA violations and more fundamental issues arising out of Indian Child Welfare Act (ICWA) cases, allegations of threats to the independence of the Navajo judiciary, and recent amendments to the Navajo Tribe's sovereign immunity act; and, finally, in Phoenix, to receive testimony of three members of the Navajo judiciary on the issue of judicial independence.

[4] "A New Federalism for American Indians," November 1989, S. Prt. 101-60. It was the institutionalization of the benefactor to ward relation which transformed Indian policy from a democratic to an imperial one, and which seemed to take as its goal the transformation of Indians into subjects habituated to dependency. It is not too much to say that the Bureau of Indian Affairs (BIA) was the first welfare agency in our nation's history, and we should not be surprised if our first and longest lasting welfare program has had similar, and perhaps even more harmful, effects than those of recent vintage.

In our study we found it a particularly striking and revealing fact that the BIA was created on March 11, 1823 by then Secretary of War John C. Calhoun, who later became the greatest of all antebellum defenders of slavery. [Francis Paul Prucha, *The Great White Father*, vol. 1, p. 164.] Calhoun's influence on the development of Indian policy corresponded with a significant shift of emphasis, from treating Indians as friends and brothers in the early years of the republic, to treating them as children of the "Great White Father." It was Thomas Jefferson, in the sixth compact with the Cherokees (1803, unratified), who introduced the language of "father" which Calhoun later perfected as "great white father." Jefferson addressed the Indians as "their father the President of the United States," and also scripted their response, "our Father, the President." Washington's language had always, "my brothers," from the early 1750s through the end of his Administration. Calhoun's writings demonstrate an intention to civilize the Indians (caring for them in the meantime), and to do so under the slavish tutelage of the federal government. In other words, only by treating Indians unequally, i.e. as lower than human, will they become human. In embarking upon an enterprise to civilize a race by direct intervention and superintendence of their way of life, Calhoun involved himself in tyranny as much as he did in denying the possibility of civilization to the black race.

The following excerpt from a Calhoun report aptly summarizes the attitude: "Our views of their [the Indians] interest, and not their own, ought to govern them. By a proper combination of force and persuasion, of punishments and rewards, they ought to be brought within the pales of law and civilization . . . When sufficiently advanced in civilization, they would be permitted to participate in such civil and political rights as [the government] might safely extend to them . . . It is only by causing our opinion of their interest to prevail, that they can be civilized and saved from extinction." Statement submitted to Congress, December 5, 1818. *American State Paper: Indian Affairs*, 2:182-184. The logical conclusion of such sentiments is the constitutional and administrative tyranny which still serves as the linchpin of our Indian policy (plenary power and guardianship), and under which tribes still suffer.

[5] Singular misunderstandings about America's treaty relations with Indians, the status of tribes during this process, and the evolution of Supreme Court decisions touching these matters characterize this report. A cursory view reveals that the end of treaty making in 1871 is hardly a starting point for our analysis.

Nothing can be more incredible than the belief—nay, assumption—that as the Americans were changing the foundations of all their laws while they broke their dependence on Great Britain, they nevertheless borrowed and perpetuated the terms of England's relationship to the Indians. "The three types of colony—provincial, proprietory, and charter governments—exercised varying degrees of self-government. [J. Story, *Commentaries on the Constitution of the United States*, §159, 1858.] By the time of the Revolution, however, all the colonies maintained that their authority to govern themselves derived from the British Crown. [Cf., Cambone, below, note 8.] Therefore, they argued, they were subjects of the King rather than of Parliament, which they claimed could not rightfully interfere with internal affairs of the colonies." [B. Bailyn, *The Ideological Origins of the American Revolution*, 224-25, 1967]. [Kenneth W. Johnson, "Sovereignty, Citizenship and the Indian," 15 *Arizona Law Review*, n. 36, 980 (1973)]. Not only would borrowing their relationship to the Indians from England tend literally to undermine the justifications of American independence, but it would more importantly surrender the just claim to establish principles of right, newly enunciated and only then practically brought to bear upon human life.

In order, then, fully to appraise what in the way of right is yet owing to the American Indian, we must consider the American claim of right, in light of which alone it is possible to offer anything more than arbitrary power to regulate U. S. dealings with the Indians. The American Revolution on the basis of the theory that the land of the Indians belonged, not to the King of Great Britain (the colonies' sovereign) but to the Indians—a position that determined all American policy thereafter. The Indians, however, did not subscribe to this theory, with the exception of the Delawares. Accordingly, they became enemies to the United States, allied with the King of Great Britain. When the Americans vindicated their legal theory by force of arms, they then left Indian claims in limbo. Had those claims fallen along with the claims of the King? If not, were they left to the United States to define, as victor in war? Could it be that the U. S. had overthrown the King's claim of conquest over the Indians only to substitute one of their own?

Apologizing for dilating at length on matters well within memory, I insist only that, before we credit tales of customs and usages from time immemorial we must at a minimum establish an accurate recall of those events, laws, and usages that everyone knows. Who fails at relating what is well within memory must not be trusted in the pretense to recall time immemorial. The above-cited Senate Select Committee Report (1989) correctly reported George Washington's decision to treat with Indians as free and not as conquered nations. Using the pre-eminent

case of the Cherokees and related tribes, Robert Cotterill demonstrated the eventual development and ultimate abandonment of that policy.

"The territorial claims of the Cherokees ran from the northward-flowing Tennessee on the west to the Kanawha, Broad, Edisto on the east; from the Chattahoochee, Coosa, and Black Warrior on the south to the Ohio on the north. Although none of those boundaries was conceded by their [immediate] neighbors, the Cherokees succeeded in transmitting their claims thereto into an ownership sufficient for sale." Thus, the great acquisitions by the United States were effectuated by purchase through treaties. During this period tribes such as the Chickasaws remained small and sustained their integrity through a policy of naturalizing alien people. The southern Indians in general had mated economic communism with individual liberty by means of maintaining a state so near anarchy that only "unanimous consent" could attain any practical purpose, and dissident minorities consequently did not exist.

Against this background, neighboring states, like Georgia, were often tempted beyond resistance to intrude on Indian holdings, with the result that the U. S. dealt as often and as much with American citizens as with Indians in attempting to maintain a stable policy. The failure to execute the Treaty of New York, concerning the drawing of boundary lines, effectively undercut efforts to restrain Georgia. This set up conflicts, for which the Chief McGillivray was also in part responsible.

In 1785-86 three Treaties of Hopewell were signed, one with the Cherokees (November 28), one with the Choctaws (January 3), and one with the Chickasaws (January 10). That with the Choctaws contained an acknowledgment of American sovereignty (although the 31 signators had been inundated with liquor). At New York, July 21, 1790, McGillivray appeared on Washington's invitation to form a treaty in which he "refused . . . acknowledgment of United States sovereignty except over those Creeks living within the limits of the United States." Here is where the connection between land cessions and sovereignty began to be formed. Only the day after McGillivray arrived at New York President Washington signed an Act for Regulating Trade and Intercourse with the Indian Tribes. The Act was founded on continuing nationhood for Indians, save as explicitly surrendered in treaty. This had the effect of obligating the United States to defend established Indian land claims. By 1802, however, a new "Intercourse Act" carried with the political promise (a Compact with States) to extinguish Indian land claims!

The healthy policy unravelled in subsequent years. Return J. Meigs, Indian agent, reporting Cherokee resistance to surrender land and identity, wrote to the Secretary of War, April l6, 1811, "I have ever been of the opinion that the Indians have not the right to put their veto on any measure deliberately determined and decreed by the Government." On August 9, 1814 Andrew Jackson exacted the "Treaty of Fort Jackson" to close the Creek War of 1813-1814. This largely despoiled the Creeks of all land and set Cherokees and Choctaws in an impossible position from which they would never recover—despite an apparent respite won by the Cherokees on March 22, 1816, when two treaties acknowledged their land claims south of the Tennessee at the price of cession of all their South Carolina claims. The very concept of the "Indian Agent"—at once an ambassador but also a factor—worked against Indian claims of sovereignty. Nevertheless, tribes often demanded the appointment of such an official.

The treaties of March 22, 1816 were dead by fall, replaced by separate treaties liberally defended by the eloquence of bribery, with Cherokees, Chickasaws, and Choctaws. These were followed immediately by calls for "removal" and further demands for cession. By July 1817, and under coercion, Cherokees had agreed to swap land in Georgia and Tennessee for that territory in Arkansas on which a few voluntary emigrants already lived. This "Calhoun Treaty" announced the arrival and the policy of the newest Secretary of War. In March of the same year President Monroe had declared that Indians should no longer be dealt with by treaties but rather by legislation—a goal finally accomplished in 1871.

Yet another respite for the Cherokees occurred in the negotiations of 1819, which included clauses that foreshadowed Cherokee citizenship and permanent inhabitancy. In fact, however, this only set up the ultimate confrontation, although it bought a decade's quasi peace. By December 1, 1824 Americans who negotiated with Creeks announced (in a timid echo of a claim made to the Cherokees in 1823) that "they [Creeks] had been conquered in the Revolution and had since held their land as tenants at will . . . ," holding only by the forbearance of the United States. This explicit renunciation of the original policy fostered by George Washington is the immediate cause of the entire tragedy of Indian history in the United States since that day. At the very same time the fraudulent "Indian Springs Treaty" had the Creeks abandoning all claims and agreeing to removal! The treaty was subsequently abrogated by President Adams, but it had in fact been ratified by the Senate, clearly indicating the disposition of official opinion in the United States toward Indians.

This brief history is culled from many sources, but principally Robert Spencer Cotterill, *The Southern Indians: The Story of the Civilized Tribes Before Removal* (Norman, OK: Univ. of Oklahoma Press, 1966[1954]), pp 5, 7, 12, 85, 174, 188-89, 196, 202, 203, 207, 215, 217-18, 220, 234. Additional material is found in Kirke Kickingbird, et al., *Indian Treaties* (Washington, D.C.: Institute for the Development of Indian Law, 1980); Francis Paul Prucha, ed., *Cherokee Removal: Selected Writings of Jeremiah Evarts*, 1980; and Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," 21 *Stanford Law Review* 1969.

[6] A longer statement would be warranted by the record but would ill fit the limited dimensions of the approved statement. For the sake of propriety, therefore, I abbreviate my own statement.

[7] Felix S. Cohen, *Handbook of Federal Indian Law*, 1942 edition (Albuquerque, NM: Five Rings Corporation, 1986) Reprint with Foreword by Robert Bennett and Frederick Hart. The authority on the subject of "plenary power" has long been taken to be Cohen's compendium. Nevertheless, a critical reading of Cohen's work reveals that there is no fundamental basis for the claim; it results merely from the positive assertion whether of the Court or of Congress (most recently at the head of the Indian Child Welfare Act). The opacity of presumed "plenary power" law in the 20th century was silently reveled by Cohen, showing the entire idea to be a cruel hoax perpetuated by lawyers and jurists. At p. 42 Cohen defers discussion of Congress' power to legislate over Indian affairs to Chapter 5, sec. 2. But in chapter 5, sec. 2, he observes that "all the scope of the obligations assumed and powers conferred has been discussed in chap. 3," (where the original reference to chapter 5, sec. 2 is found!) "and need not be rexamined at this point." This empty explanation is amply explained by Johnson at 988 and 1001: "Exclusive federal jurisdiction over Indian affairs is predicated upon the Indian's nonparticipation in our constitutional system of government and the concomitant recognition of a tribal right of self-government." In other words, "plenary power" is just a mistranslation of "exclusive jurisdiction," which properly applies to the federal government only as against the states. And the price even of that "exclusive jurisdiction" is non-inclusion and liberty for Indians, exactly the reverse of "plenary power." That is why it is ultimately impossible to found federal concern for the civil rights of Indians on "plenary power." "In no other area of constitutional law does there exist a doctrine recognizing the preservation of cultural autonomy as a justification for limiting individual civil rights. Even disregarding notions of inherent tribal sovereignty, the actions of the tribe which affect individual civil rights still constitute the kind of governmental action found by the Supreme Court in arguably private actions performed in an environment of state inaction or merely nominal governmental support."

[8] Johnson misconstrues the relevance of this finding by interpreting it as militating against the Indian's claim of self-government while maintaining citizenship: "the 'grant' of citizenship to Indians, who still owe at least partial allegiance to the pre-constitutional sovereign tribes, is at odds with the framers' concept of membership in the American political community. Nor does it accord with the fourteenth amendment's prerequisites for citizenship. Congressional and judicial reluctance to attach the emotion-laden label of 'non-citizen' to the first Americans probably explains why challenges to this obvious contradiction have not met with success. It is nonetheless clear that, to the extent he asserts an inherent right of tribal self-government, the Indian has not truly manifested his consent to be governed wholly under the internal government set forth in the Constitution." Johnson, 1001-02. This error is not, as Johnson conceives, to be laid at the feet of the Indian. Rather, the contradiction falls to the responsibility of the United States government, which has operated with respect to the Indian *outside the limits of the Constitution*.

A more serious error than Johnson's is the underlying rationale of the Report of the Commission on Civil Rights, namely, that the Constitution does not apply to Indian tribes. Johnson has shown why that is inconsistent with a fulsome reading of the law. Nevertheless, there looms still more importantly an anachronistic reading of the law, the significance of which ought to broached here for the sake of future clarity about the constitutional status of the rights of American citizens who are Indians. Initially, let us observe that Alexander Bickel is simply incorrect to depreciate the relevance of citizenship: ". . . emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive and stable institutions . . " ["Citizenship in the American Constitution," 15 *Arizona Law Review* 387 (1973)]. Bickel's erroneous view subtends nevertheless the views of the Commission's Report, that "the Bill of Rights does not restrict tribal governments. The seminal case in this area is *Talton v. Mayes* [163 U.S. 376 (1895)]." At p. 4.

Without entering into the substance of *Talton* we may yet readily discern the error in this reading. *Talton* was decided *prior* to the decisive constitutional readings which affect the decision of this question and has *never* been reviewed in light of those developments. Two such developments, among others, are key: The general grant of citizenship in 1924 and the decision in *Bolling v. Sharpe* (347 U.S. 495 [1954]) that held the federal government to a standard not less than that to which the states were subject. Even if it were the case that the fourteenth amendment did not in its terms convey citizenship to Indians born in naturalized in all territory subject to the direct jurisdiction of the Constitution (and I believe that is not the case), it would nevertheless be true that these subsequent decisions had brought Indians within the ambits of the comprehensive protections of the Constitution. The result is that tribes would become akin to private associations for constitutional purposes. Accordingly, the Commission's anachronistic reading leads to a decisive misinterpretation which is decidedly unfriendly to the rights of Indians.

We must delve more deeply into the basis of this strange and anachronistic reading. Kenneth Johnson described this effect in the context of decision shortly following *Talton*: In *United States v.Wong Kim Ark*, the Supreme Court was presented with the question whether a child born in the United States of noncitizens was a citizen of the United States by virtue of the fourteenth amendment. Neither the majority nor the dissenting opinion appear to have accepted the fourteenth amendment alone as being dispositive of the issue. Rather (and unfortunately), both opinions chose as their reference point not concepts of sovereignty or consent to be governed but whether after the Revolution the common law or international law was to be utilized in construing the Constitution. *The majority relied upon the common law of Britain* [emphasis added, note omitted]. The very concept of sovereignty, embodied in the common law of citizenship, which was denied by the colonists in order to legitimize their demands for internal self-government was applied by the United States Supreme Court to identify natural born members of this nation's ultimate sovereign [note omitted]." Johnson, 992.

This points us properly toward the crucial historical error that has produced the anomaly of reading Americans citizens who are Indians out from under the protections of the Constitution. It is only partially, and not most importantly, the reliance upon the common law of citizenship though is closely related to the error. The error is a misconstruction of the international law of "discovery" as it applies to the status of Indians, an error the Commission's Report has followed uncritically. Cohen, at 45, remarked that "some time after the end of the treaty-making period [] the federal government [did] take the ultimate step of asserting jurisdiction over offenses committed by Indians against Indians within Indian Country." In light of our earlier discussion, this clearly was only an elaboration of a power that had long been at least tacitly assumed. But Cohen, at 47, introduced his thesis that Victoria had elaborated the moral basis for these relations with Indians. He attributed to these principles the main influence in deciding *Johnson v. McIntosh* (8 Wheat. 523 [1823]) and *Worcester v. Georgia* (6 Pet. 515 [1832]). But Victoria was never cited by Justice Marshall, and Emmerich de Vattel, given minor notice by Cohen, was cited by Marshall. Cohen does cross-reference, from this chap. 3, sec. 4, to his chap. 15, sec. 4, in which the same theme, "aboriginal possession" or title is treated in detail, and in which Vattel is properly cited. Still, Cohen's main argument relies on Victoria. ". . . the theory of Indian title put forward by Victoria came to be generally accepted by writers on international law of the sixteenth, seventeenth, and eighteenth centuries who were cited as authorities in early federal litigation on Indian property rights." Not only did Vattel not rely on Victoria; he disagreed with Victoria's analysis, as I will show.

Vattel, in *Le droit des gens, ou principes de la loi naturelles, appliqués à la conduite et aux affaires des nations et des souverains* [edition of James Brown Scott, The Classics of International Law, (Washington, D.C., Carnegie Institution, 1916), vol. I], discussed several titles to aboriginal holdings and their relations to the colonists in North American. At Bk. I, §81 he arrayed the cultivation of the earth against nomadic and other forms of existence, concluding that "the establishment of several colonies in the continent of North America, while restricting itself to just limits, can only be very legitimate" since it brings cultivation and more intense usage to the land. Additionally, "the peoples of these vast lands rather wander than dwell in them."

There is, then, a preference in natural law for cultivation over forage when it comes to possession of land. Nevertheless, Vattel does not proceed from this finding to a law of conquest. He recognizes rather (Bk. I, §207-09) that "all men have an equal right" to those properties that don't already belong to someone. Accordingly, possession falls to the first occupant of any uninhabited territory. Nor is the mere sign of possession (such as a landmark) sufficient. Rather, evidence of a clear intention to inhabit and cultivate must follow. When the discoverers located deserted territories and claimed them in the name of their sovereigns, that produced a "title that has been respected, provided that a real possession followed shortly thereafter." By contrast, it is a serious question whether a nation can possess in this manner territory that it does not actually occupy, and Vattel concludes that "it is not difficult to

decide that such a pretense would be absolutely contrary to natural right. For nature has intended all the earth for the common needs of mankind and extends a right to particular men only to the extent that they may benefit, not in order to obstruct others. Accordingly, "when the sailors have come across deserted countries in which folk from other nations had erected some landmark in passing, they wasted no more time over that vain ceremony than over the papal dispositions which parceled out a large part of the world between the crowns of Castille and Portugal." Not discovery, then, but discovery and use conveys legitimate title, and that without respect to the conventions of Europe.

Beyond even this observation, however, is the intriguing question raised by the discovery of the new world; namely, whether a people can legitimately occupy a *portion* of a vast territory "in which one finds only some nomadic peoples, incapable by reason of their small numbers of inhabiting the entire land." Here Vattel returned to the reasoning of §81, namely that there was an obligation to cultivate the earth and that no one could claim exclusive power over land that neither needed nor were in a position to dwell in and cultivate. Further, the European peoples were "too crowded" at home and could "legitimately occupy" and establish colonies in such portions of that territory as the native peoples had no particular need for. "Nous l'avons déjà dit, la terre appartient au Genre-humain pour la subsistance: Si chaque nation eut voulu dés le commencement s'attribuer un vaste pays, pour n'y vivre que de chasse, de pêche & de fruits sauvage; notre globe ne suffiroit pas à la dixième partie des hommes qui l'habitent aujourn'hui."

While this view may rightly seem to depict a justification of European expropriation of Indian territory, its significance for our purposes is rather the contrary. For despite this natural license that Vattel accorded the Europeans, he immediately added the important reflection that "one must praise the moderation of the English Puritans, who first established themselves in New England. Although furnished with a charter from their sovereign, they purchased from the savages the land that they wished to dwell in. This praiseworthy example was followed by William Penn and the colony of Quakers that he led into Pennsylvania."

Vattel, therefore, recognized in the principal American settlers a disposition to deal with the Indians as "owners" despite any liberty nature may have accorded them to view the Indians as interlopers. Nor was this qualification of the claim of conquest vis-a-vis the Indians on the part of the Americans the only important observation Vattel made. Immediately thereafter he reflected that "a nation which establishes dominion over a distant country and sets up colonies in it, that country, although distant from the mother country, constitutes a natural part of the latter, entirely like its ancient territories. Whenever the political laws or treaties make no explicit difference between, all that one may say about the nation's own territory must also apply to its colonies."

Interestingly, these seventeenth century views were directly echoed in the American Revolution (and also in *McIntosh and Worcester*, though later commentators have misunderstood this relation), while the sixteenth century views of Franciscus de Victoria played no role at all, Felix Cohen to the contrary notwithstanding (Cf., "Original Indian Title," in *The Legal Conscience*, ed. by Lucy Kramer Cohen [New Haven: Yale U. Press, 1960], p. 289). Victoria's work simply dealt with a different question [See, *The First Relection of the Reverend Father, Brother Franciscus de Victoria, On the Indians Lately Discovered in The Classics of International Law*, ed. by Ernest Nys (Washington, D.C.: Carnegie Institution, 1917)], namely, what relations could legitimately subsist between the Spanish and the Indians in the new world. The title of the "Second Section" is "On the Illegitimate titles for the reduction of the aborigines of the New World into the power of the Spaniards." In discussing these illegitimate titles of *sovereignty* Victoria indicates "discovery" as one of the seven formal and an eighth informal title. To be sure, he discussed the Indians ownership of their land and of themselves in this review, but his primary focus was not on the possession of the land.

Discovery was the third of Victoria's titles: "Accordingly, there is another title which can be set up, namely, by right of discovery; and no other title was originally set up, and it was in virtue of this title alone that Columbus the Genoan first set sail. And this seems to be adequate title because those regions which are deserted become, by the law of nations [jus gentium] and the natural law, the property of the first occupant [Inst; 2,1,12]. Therefore, as the Spaniards were the first [among Europeans] to discover *and* occupy the provinces in question . . . Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant. . . And so, as the object in question was not without an owner, it does not fall under the title we are discussing. [138-39]." Thus dismissing discovery, which at most only distinguished European claims, without considering what it means "to occupy" a country, Victoria could well conclude that "the seizure and occupation of those lands of the barbarians whom we style Indians can best, it seems, be defended under the law of war. . . [163]—that is, conquest. Conquest,

in turn, can derive only from just war. Accordingly, the non-offending Indians could not be brought under Spanish sovereignty. Victoria's work aims to defend free intercourse under the *jus gentium*. Victoria dismissed a sixth title without much ado, namely, the consent of the majority of the natives. Then, after the "seventh and last title," he discussed "another title which can indeed not be asserted;" namely, the natural right to assume control over barbarians for their own good, and to set up rulers over them. Surely, this could by nature only be done, once, by the first discovers or occupiers, so to speak. Thus, following Victoria, neither discovery, conquest, nor the ward or pupillage theory could justify sovereignty over the Indians. This could not, then, have informed the American position toward the Indians.

Victoria's theory, however, makes little contact with the claims enunciated by Vattel, which concerned themselves far less with sovereignty over the Indians than with the colonists sovereignty over themselves. The question for the Americans turned rather around their relations to Indian nations than to Indian subjects and this for important political reasons as well as reasons of international law. Nor was control of the land of immediate consequence, as Vattel correctly foretold. The land sold to Europeans was to the Indians often as much a gewgaw as were to the Europeans the trinkets and jewelry used to acquire the land. *Jurisdiction* was the genuine interest transferred, as is reflected in the treaties by the use of "cede" rather than "sell." Indians could not integrate within tribal jurisdictions Europeans who retained or wished to retain possessory interests within tribal jurisdictions, although on their own terms they generally and freely integrated within tribes Europeans and Africans. Indians sold the jurisdiction both because it mattered little to them and because they received valuable consideration, besides gewgaws, in return, namely, the promise of protection. Still, they could have sold land without jurisdiction. That is, they could have welcomed Europeans within their own jurisdictions. They did not, for they could not. They knew only the territoriality of the tribe, not the individual. Possession is indeed nine-tenths of the law; unfortunately, it is not that tenth part that makes the law, jurisdiction, and without which possession is only use, only waste or consumption. There must be actions before there can be *choses en action*.

The Indian perspective is not alone sufficient for our purposes, however. We must also consider what the Americans aimed to accomplish in elaborating their complex relations with the Indians. In this respect, nothing is more important than the constitutional claims of the Americans in their struggles with Great Britain. They had debated the law of discovery and the law of conquest with the Crown long before they employed the terms in their dealings with Indians. To sustain their own just claims, they had to refute the claims of the Crown, reflected in Blackstone's *Commentaries*, that the lands of the colonies were conquered lands, carrying with them the absolute dominion, or "plenary power," of Great Britain—a meaning Blackstone elaborated in the observation that "sovereignty and legislature are indeed convertible terms; once cannot subsist without the other." [Blackstone 46]. This sovereignty, to be distinguished from the jurisdiction described by Vattel as travelling with colonization, Burlamaqui observed to be conveyed by conquest. [*The Principles of Natural and Political Law* (5th ed., 2 vols. in 1, Dublin, 1791), II, Pt. I, chap. viii, secs. 1-3, 230]. By contrast, the discovery of deserted land and the insertion of a colony thereinto carried corporate standing under the constitution of the mother country. [The full discussion of the significance of this constitutional argument is presented in Stephen A. Cambone, *Noble Sentiments and Manly Eloquence: The Suffolk Resolves and the Movement for Independence* (Ann Arbor: University Microfilms, 1980), pp. 7-75.] This reasoning was familiar to the Americans from the case of the Irish (See, James Wilson, *Lectures on Law*, Appendix, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," 1774, at 532. The Americans, then, articulated a principle of discovery, a constitutional principle, which was essential to the attainment of their independence and in accord with which it was necessary for them to maintain that America was not conquered but rather freely settled. This meant, in turn, that their relations with the Indians could not have been the relations of conquerors to conquered, if they were to maintain consistency with their revolutionary claims.

The principle of discovery that surfaced in *McIntosh* and was present by implication in *Worcester* (and *Cherokee*) bore strong marks of the constitutional debate through which the Americans had so recently come. That is why it is incautious at best simply to relate it to the theory of Victoria. It bears far more the marks of Vattel, including his praise of American sensitivity to the Indians. Perhaps the authoritative reading of this period of jurisprudence is that preserved to us by Justice Story, first in his *Commentaries*, written just after the landmark decisions of the early 1830s, and finally in his 1859 abridgment of that work for student readers. In the first work he reported the law as the Supreme Court had decided it, although indicating along the way that the history did not justify it. By 1859, however, he was sufficiently removed from the controversies of the 1830s that he could rewrite the sections dealing with Indian law. What he did then was to reassert the version of American history that is recorded here.

Story wrote in the *Commentaries* [2:41, §1099 & 43, §101] that America had inherited from the British Crown a prerogative power in dealing with the Indians. This would have depended upon a right of conquest as opposed to that form of discovery the Americans had asserted in the Revolution. Nevertheless, this was precisely the argument the Court had developed in the series of cases from *McIntosh*. He went on to observe that this required viewing tribes as "distinct political societie[s], capable of self-government." This tracked with the Court's opinion, which went on to distinguish this political societies as nonetheless not foreign states, and instead "domestic dependent nations" (there is no comma in the text, as the Report emends!). On this reading, the relation of the tribe to the United States is that of a "ward to a guardian." Justice Story, still sitting on the Court, stopped just there, simply quoting the majority opinion in *Cherokee* from which he had dissented!

The reason the Court seemed to have backed into this position derived from Justice Marshall's wrestling with the problem of Indian title. He wrote, "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." [Quoted at 1 Story 15] The problem, however, is that if the Indians had no such absolute and complete title, the Americans had no basis for their Revolution! After Story quoted Marshall's McIntosh opinion at length, presenting the history of "conquest or treaty" that led to European domination of Indians, and in the very few mentions of Indians at all—New Haven, Rhode Island, Pennsylvania, all counter to the thesis—one gets a picture of ready and easy accommodation, punctuated by the generosity of William Penn. In short, Story comes very near to certifying the "desert land" point of view, reducing the notion of European discovery to nothing more than a polite fiction of realpolitik.

Then, in his chapter sixteen, following the history, Story gives the analysis whereby, like Wilson, he refutes Blackstone's claim that colonies were conquered lands! [1 Story 101] "There is great reason to doubt the accuracy of this statement in a legal view." He continued that, at the time of the leading grants from the Crown, there had been no "conquest or cessions from the natives." The Indians were not overcome by force and were not considered as "having any regular laws, or any organized government." They were subjected to obedience "as dependent communities, and no scheme of general legislation over them was ever attempted." Indeed, they were generally regarded as at liberty to govern themselves, so long as "they did not interfere with the paramount rights of the European discoverers." The implication that the "discoverers" acquired no rights over the Indians was then affirmed by Story in the declaration, "as there were no other laws there to govern them, the territory was necessarily treated, as a deserted and unoccupied country, annexed by discovery to the old empire and composing a part of it." This shows clearly that the theory of discovery does not undergird the notion of a "domestic dependent nation" and cannot, therefore, constitute the foundation of a wardship or pupillage. [Joseph Story, *Commentaries on the Constitution of the United States*, 2 vols., (Boston: Charles C. Little and James Brown, 1851), 2d edition].

If this reading of Story's famous work seems too subtle, it will perhaps add further credence if we consider at least the critical portion of his subsequent work: *A Familiar Exposition of the Constitution of the United States*, Reprint of the 1859 edition (Lake Bluff, Illinois: Regnery-Gateway, Inc., 1986). At chapter one, p. 28, Story uses a different voice to describe the Indian situation.

> At the time of the discovery of America...the various Indian tribes, which then inhabited it, maintained a claim to the respective limits, as sovereign proprietors of the soil. They acknowledged no obedience, nor allegiance, nor subordination to any foreign nation whatsoever; and *as far as they have possessed the means*, they have ever since consistently asserted this full right of dominion, and have yielded it up only, when it has been purchased from by treaty, or obtained by force of arms and consent. In short, *like all civilized nations of the earth*, the Indian tribes deemed themselves rightfully possessed, as sovereigns, all the territories, within which they were accustomed to hunt, or to exercise other acts of ownership, upon the common principle, that the exclusive use gave them an exclusive right to the soil, whether it was cultivated or not.
>
> It is difficult to perceive, why their title was not, in this respect, as well founded as the title of any other nation, to the soil within its own boundaries. How, then, it may be asked, did the European nations acquire the general title. . .? The only answer which can be given, is their own assertion . . . that their title was founded upon the right of discovery. . .
>
> The truth is, that the European nations paid not the slightest regard to the rights of the native tribes. They treated them as mere barbarians and heathens, whom, if they were not at liberty to extirpate, they were entitled to deem mere temporary occupants of the soil. They might convert them to Christianity; and, if they

> refused conversion, they might drive them from the soil, as unworthy to inhabit it. They affected to be governed by the desire to promote the cause of Christianity, and were aided in this ostensible object by the whole influence of the papal power. But their real object was to extend their own power and increase their own wealth, by acquiring the treasures, as well as the territory, of the New World. Avarice and ambition were at the bottom of all their original enterprise.

This Justice Story no longer sits on the Court and no longer defers to the "settled rule of law.

When Story accepted Marshall's reliance on Spanish and Portuguese experience, instead of distinguishing the U. S. from the other America, his voice changed, and he blasted the foundation as a hypocrisy: "The right of discovery, thus asserted, has become the settled foundation . . . and it is a right which, under our governments, must now be deemed incontestable, however doubtful in its origins, or unsatisfactory in its principle." [at p. 30] What this means, then, is that the principle of discovery yields the occupation of the territory of North America, and perhaps even jurisdiction over it, but can by no means yield "plenary power" over either individual Indians or tribes. Yet, one fears that the Commission Report accepts precisely this result as incontestable, without seeing how doubtful and unsatisfactory the principle is.

In light of this review, it is no longer possible for responsible policy makers to accept the last two of Felix Cohen's "four basic principles" of federal Indian law: (1) The principle of the legal (sic) equality of races; (2) the principle of tribal self-government; (3) the principle of federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians. ["Spanish Origin of Indian Rights," *Legal Conscience*, p. 232].

[9] Cohen's discussion of the development of the ward status in the recent era illustrate the problem. In 1 Cohen 16 we find an explanation of the mounting pressure to end treaties with Indians as a response to defections and attempts to treat with the Confederacy during the War of American Union. Cohen quoted interior Secretary Caleb Smith in 1862 to the effect that a conscious choice was to be made: "A radical change in the mode of treatment of the Indians should be adopted. Instead of being treated as independent nations they should be regarded as wards of the government . . ." Smith said it had been mistaken theretofore to treat tribes as "quasi-independent nations," since they lacked all of "the elements of nationality." Even though the formality of consent was acknowledged through treaties, in fact the Indians always yielded to irresistible force. In 1869 Interior Secretary Parker repeated the recommendation [1 Cohen 18] and observed along the way that the government had injured Indians "in deluding this people into the belief of their being independent sovereignties, while they were at the same time recognized only as its dependents and wards." In fact Parker called them "subjects," assimilating their status to that of a people governed by relationships not derived from consent. Actually, however, the argument for independence was made most forcefully as early as 1828, when Attorney General William Wirt maintained three criteria for tribal independence: government by their own laws; absolute power of war and peace; and inviolable territory and sovereignty. None of Wirt's three criteria apply to tribes in the United States of 1990, of course. To apply the term, sovereign, to them in their present state is a cruel and inhuman pun—for they are capable of none of the essential attributes of sovereignty. It is an extreme aggravation of the joke, therefore, to deny Indians at the same time the essential protections of citizenship. Nor does Cohen lighten the Indian's burden by his happy ejaculation, "the special status of the Indian is, by and large, something that he has bought and paid for and that he can relinquish whenever he chooses to do so." ["Indians Are Citizens!", *Legal Conscience*, at 257]. One might have expected better of Cohen, since the burden of his argument is actually to insist upon full rights of citizenship for Indians, a point he reiterated in "Indian Wardship: The Twilight of A Myth," [*Legal Conscience*, 328]: ". . . the courts have held that Indians are not wards under guardianship, but on the contrary are full citizens of the United States and of the states wherein they reside, and are entitled to all the rights and privileges of citizenship." The catch, of course, is that this claim is not understood to apply to the tribes, where Indians may be no less completely members than they are citizens in the United States, but where their United States citizenship is of little value to them. Cohen concluded the article with the hopeful anticipation that we will eventually dispel the "lingering legend of wardship," whether of individual Indians or of tribes. That surely will not be accomplished for so long as the so-called special "government to government" relationship persists.

[10] The Constitution of the United States prescribes no criteria for legitimacy in government, other than the republican. Tribal heritage may be a legitimate basis of government, but it is not one known to the Constitution. It may operate, therefore, only independently of the Constitution. Tribal governments—pre-constitutional and pre-republican—have always been at a disadvantage trying to find a secure space under and within the Constitution of

the United States. They are in fact tolerable under the Constitution only to the extent that they may be treated as private associations. Cf., Johnson, at 985.

[11] Cf., *Indian Child Welfare: A Status Report*, "Final Report of the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act and Section 428 of the Adoption Assistance and Child Welfare Act of 1980," prepared by CSR Incorporated (Washington, D. C.) and Three Feathers Associates (Norman, OK) for the Administration for Children, Youth and Families, U. S. Department of Health and Human Services and the Bureau of Indian Affairs, U.S. Department of the Interior, April 18, 1988. This must come as no surprise to any who have regarded closely the results of the ICWA. The abuses which I have personally documented, received innumerable complaints about, and seen reflected in official testimony and reports, are all too apparently the natural concomitants of the systemics liabilities of this approach to cultural preservation. Considering the five leading consequences of the ICWA to date:

1. Fewer adoptions, coupled with increasing resistance to termination of parental rights.
2. Concerns about a lack of tribal accountability which undermines even potentially positive enforcement of the act.
3. A not insignificant absence of tribal courts in many places and, hence, adequate due process.
4. Federal-level efforts to communicate performance standards and to monitor or enforce compliance have been limited.
5. No reduction in the flow of Indian children into substitute care has resulted, coupled with a dramatic shortage of Indian foster homes, and a decline in adoption rates spells disaster for Indian youths.

The fact is, the ICWA is a blunderbuss where a rifle was called for; pinpoint accuracy in addressing human suffering is a moral necessity, not a mere budgetary luxury. Of the many concrete cases of abuse that have resulted, perhaps none is more compelling than the story of the child with 20:500 vision, who loves to read and who was restored to her tribe, only to be deprived of the prosthetic her foster parents had provided and subjected to physical abuse as well! This tragedy resulted in significant measure as a consequence of the ICWA.

[12] The problem aimed at by the "Duro-fix" did not originate with 1950s self-determination nor even the 1934 "Reorganization Act," as the Report implies. Like so many *other* evils it originated in the paternalism of the early 19th century. 1 Cohen 2-3 offers a compelling account of its early origins. A primitive version of "self-government" policy was contained in the 1834 Trade and Intercourse Act: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: *Provided*, the same shall not extent to crimes committed by one Indian against the person or property of another Indian" [note omitted]. In short primitive "self-government" was nothing but a federal license for Indians to abuse one another, even if it did convey by implication a kind of racially construed "sole and exclusive jurisdiction" to tribes themselves. Since U. S. jurisdiction must follow the power to punish crimes by whites aginst Indians and crimes by Indians against whites, clearly the tribes cannot have "sole and exclusive jurisdiction" within their territory however construed. This comports with Cohen's definition of "Indian Country" at p. 5 as "country within which Indian laws and custom and federal laws relating to Indians are generally applicable." Thus, they receive the concession to handle crimes of Indians against Indians, meaning that their jurisdiction is as to race alone. That will remain true unless the proposed "Duro-fix" extends a truly general jurisdiction.