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INDIAN TRIBES AND THE LEGAL SYSTEM

Ralph W. Johnson*

“The conduct of the Americans of the United States towards the [Indians] is characterised . . . by a singular attachment to the formalities of law. . . . It is impossible to destroy men with more respect for the laws of humanity.”¹

The legal profession has lost favor with the American public in recent years—high salaries, frivolous lawsuits, and negative television exposure have darkened the reputation of this once-nobler profession. Yet the legal profession is rendering a great and valuable service in at least one field: Indian law. The Indian’s status in society is improving, in no small part due to the increase in lawyers dedicated to the field. The law, accessed through tribal attorneys, legal services, and specialized law firms, increasingly has been a tool aiding tribes’ struggle for economic success and well-being. That the U.S. legal profession has had the flexibility to include representation of a people largely overlooked is a tribute to the profession.

This article surveys the past and present role of lawyers in the field of Indian law, from the absence of attorneys in early treaty negotiations through the formative role lawyers played in developing the federal trust relationship, to their modern role as “legal warriors”² for the increasingly independent, autonomous tribes of today. To understand all the changes now occurring in Indian law, a review of the background is helpful. What follows is a synopsis of the significant events in Indian history, focusing on how the U.S. government initially treated Indians and the role the legal profession played in this treatment.

I. HISTORICAL OVERVIEW

The period from 1789 through 1815 can be characterized as a time of “treaties among equals.” In the beginning, bona fide negotiations

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1. 1 Alexis de Tocqueville, *Democracy in America* 360–61 (Henry Reeve trans., London, Longmans, Green, & Co. 1889) (1848).

2. See generally Gloria Valencia-Weber, *Law School Training of American Indians as Legal Warriors*, 20 Am. Indian L. Rev. 5 (1995).

occurred between militarily powerful Indian tribes and the settlers who began to flood the new country. The colonies, and later the United States, needed the military assistance of the eastern tribes. Treaties were negotiated between equals, or near equals, and the success of the treaties meant victory or defeat for the colonists in battles with France, England, and Spain. These treaties involved grand strategy on a national level and were negotiated as between sovereign leaders. Around 1815, however, the U.S. government realized that it could defeat the tribes in battle, and U.S. policy toward the tribes changed. Thereafter, the motivating purpose of treaties and other documents creating reservations was getting the Indians' land.

In about 1815, the federal government adopted a national policy of "removal," which led to the exodus of many eastern tribes west, beyond the Mississippi River.³ Conflicts arose as an ever-increasing number of settlers moved into areas where Indians traditionally hunted, fished, and lived. From Presidents Thomas Jefferson through Andrew Jackson, national policy called for removal of Indians to separate the races and reduce conflicts.⁴ Dozens of tribes were removed,⁵ in many instances by means of undue persuasion.⁶ Among the most widely publicized was the removal of the Five Civilized Tribes;⁷ they were moved from their

3. See generally 1 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 183-213 (1986) (discussing removal policy and its implementation).

4. See Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834*, at 244-48 (1962).

5. See 1 Prucha, *supra* note 3, at 215.

6. Alexis de Tocqueville recounts:

When the European population begins to approach the limit of the desert inhabited by a savage tribe, the Government of the United States usually dispatches envoys to them, who assemble the Indians in a large plain, and having first eaten and drunk with them . . . spread before the eyes of the Indians fire-arms, woollen garments, kegs of brandy, glass necklaces, bracelets of tinsel, earrings, and looking glasses.

1 de Tocqueville, *supra* note 1, at 346.

"The Indians . . . reach the treaty-ground poor and almost naked. Large quantities of goods are taken there by the traders, and are seen and examined by the Indians. The women and children become importunate to have their wants supplied, and their influence is soon exerted to induce a sale. . . . The gratification of his immediate wants and desires is the ruling passion of an Indian. . . . The experience of the past is lost, and the prospects of the future disregarded. It would be utterly hopeless to demand a cession of land, unless the means were at hand of gratifying their immediate wants; and when their condition and circumstances are fairly considered, it ought not to surprise us that they are so anxious to relieve themselves."

Id. at 346 n.1 (quoting *Legislative Documents of Congress*, Doc. No. 117, Report of Messrs. Clarke & Cass (Feb. 1829)).

ancestral homelands in the Southeast to lands in Oklahoma.⁸ The removal policy was accomplished at the national level, and lawyers played no role.

The period of 1845–1887 is known as the “reservation era.” The area west of the Mississippi, once reserved as Indian country (where the removed Indians were settled), became overrun by settlers, and conflicts flared again. The national response was to separate Indians and settlers and to move the Indians onto confined reservations—sometimes forcibly. Again, this was primarily a military operation at the national level and did not involve private lawyers.

Throughout these years, Indian tribes were supposedly represented by the Solicitor’s Office in the Department of the Interior under the federal trust obligation.⁹ This representation, however, was a double-edged sword. The government had plenary power to act as it wished with regard to the Indians.¹⁰ The U.S. government consequently used the Indian trust relationship as a means of “protecting” the welfare of Indians, a stance that was effectively accomplished by removing them from their lands.

During the reservation era, tension developed between the Bureau of Indian Affairs (BIA) and tribal medicine men or shamans. Indians traditionally went to medicine men to resolve their conflicts, and such men held something akin to political power within the Indian communities. The BIA disapproved of this practice and initiated its own Courts of Indian Offenses on Indian reservations in 1883.¹¹ In these courts, the judge was a member of the tribe, but federal regulations provided the source of law,¹² and the BIA held the power to hire and fire the judge.¹³ By 1900, a Court of Indian Offenses had been established for almost every tribe. These Courts successfully diminished the political power of medicine men on reservations. However, by creating an effective alternative to the medicine-man practice, these BIA courts

7. The Five Civilized Tribes are the Cherokee, the Choctaw, the Chickasaw, the Creek, and the Seminole.

8. See 1 Prucha, *supra* note 3, at 215–42.

9. See *infra* Part II.

10. See *infra* note 29 and accompanying text.

11. See National Am. Indian Court Judges Ass’n, *Indian Courts and the Future: Report of the NAICJA Long-Range Planning Project* 8 (BIA Contract No. K51C14201023, 1978) [hereinafter *NAICJA Report*].

12. For the current regulations, see 25 C.F.R. pt. 11 (1997).

13. *NAICJA Report*, *supra* note 11, at 11.

ultimately paved the way for future independent tribal court systems and, in the long run, led to increased tribal sovereignty and autonomy.¹⁴

In 1887, Congress passed the Indian General Allotment Act,¹⁵ designed to break up the reservations and mold the Indians into an agrarian, family-oriented lifestyle.¹⁶ Having first moved the Indians west of the Mississippi, and then onto reservations, the United States now sought to disband the reservations and tribal governments altogether and allot parcels of land to families and individual tribal members. The allotted land was subject to restrictions for twenty-five years, after which the individual Indian could obtain fee title.¹⁷ This policy resulted in a great loss of Indian land, as reported to the House Committee on Indian Affairs:

Through sales by the Government of the fictitiously designated "surplus" lands; through sales by allottees after the trust period had ended or had been terminated by administrative act; and through sales by the Government of heirship land, virtually mandatory under the allotment act: Through these three methods, the total of

14. See *infra* text accompanying note 23 and Part III.B. (discussing evolution of tribal courts).

15. Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388.

16. Alexis de Tocqueville, decades prior to the Allotment Era, highlighted attempts to mold the Indians into an agrarian lifestyle:

Several attempts have been made to diffuse knowledge amongst the Indians The great error of these legislators of the Indians was their not understanding that, in order to succeed in civilising a people, it is first necessary to fix it; which cannot be done without inducing it to cultivate the soil; the Indians ought in the first place to have been accustomed to agriculture. . . . Men who have once abandoned themselves to the restless and adventurous life of the hunter, feel an insurmountable disgust for the constant and regular labour which tillage requires. We see this proved in the bosom of our own society; but it is far more visible among peoples whose partiality for the chase is a part of their national character.

1 de Tocqueville, *supra* note 1, at 348-49.

When the Indians undertake to imitate their European neighbours, and to till the earth like the settlers, they are immediately exposed to a very formidable competition. The white man is skilled in the craft of agriculture; the Indian is a rough beginner in an art with which he is unacquainted. The former reaps abundant crops without difficulty, the latter meets with a thousand obstacles in raising the fruits of the earth.

. . . . When the Indian wishes to sell the produce of his labour, he cannot always meet with a purchaser, whilst the European readily finds a market; and the former can only produce at a considerable cost that which the latter vends at a very low rate.

Id. at 353-54.

17. Indian General Allotment Act § 5, 24 Stat. at 389. See generally David H. Getches et al., *Federal Indian Law: Cases and Materials* 190-91 (3d ed. 1993).

Indian land holdings has been cut from 138,000,000 acres in 1887 to 48,000,000 acres in 1934.¹⁸

Consequently, with untold deception and outright fraud, the allotment system failed, with the devastating result that two-thirds of Indian land was lost between 1887 and 1934, when the allotment process ended. The primary task of attorneys during this era was to assist their non-Indian clients in purchasing allotment parcels when such parcels went up for tax sale. The Indians were seldom represented by attorneys, even though their interests were presumably protected by the Department of the Interior. Land held in allotment status could descend at death only to Indian heirs.¹⁹ Thus, over time this land became subject to multiple ownerships, with as many as three hundred to five hundred owners per parcel.

In 1934, Congress reversed the national policy towards Indians once more, adopting a policy of "reorganization." The Indian Reorganization Act (IRA)²⁰ presented an attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism.²¹ The overriding purpose of the IRA was to establish means to encourage and facilitate tribes to assume greater self-government, both politically and economically. Governmental infrastructures for the tribes were to be decided by Indians, with U.S. assistance. The Secretary of the Interior encouraged tribes to write their own constitutions and charters. Boilerplate versions of these constitutions and charters were based upon U.S. governmental models, and a tribe's version required Secretarial approval to become effective.²² Congress's new policy also encouraged tribes to develop tribal courts, courts that would operate on the basis of inherent sovereignty.²³ Tribal court judges were to be paid from nonfederal sources and apply law derived from the tribes' codes or constitutions. Nearly all of this work was done by the Solicitor's Office, and private attorneys played only a small part.

Once again, however, the government's good intentions did not stand up under the pressure of real politics. During the 1930s, the Great Depression grew into full swing, and, before the nation could regain its

18. Getches et al., *supra* note 17, at 196 (quoting John Collier, *Memorandum, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong. 16-18 (1934)).

19. Indian General Allotment Act § 5, 24 Stat. at 389.

20. Ch. 576, §§ 1-3, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1994)).

21. See Getches et al., *supra* note 17, at 216-21.

22. See 25 U.S.C. § 476.

23. See *NAICJA Report*, *supra* note 11, at 11.

economic footing, the Second World War preoccupied national attention. In 1945, after the war ended, the national mood changed once more, in favor of a policy called "termination." Adopted unanimously via voice vote by both houses of Congress, the termination policy envisaged ending the government's special trust relationship with Indian tribes.²⁴ In the postwar era, little incentive existed for obtaining legal counsel to aid tribes in becoming self-sufficient. The tribes were scheduled for termination, which meant ending the special relationship with the federal government, ending health and housing benefits, and ending the trust relationship.

II. THE TRUST RELATIONSHIP

In the early 1800s, following the treaty era, the U.S. government established a trust relationship with the Indians. This was a special relationship whereby the United States had a fiduciary duty towards Indians as "wards of state."²⁵ The courts invoked a policy of liberally interpreting statutes, treaties, agreements, and executive orders concerning reservations and other Indian rights in favor of the Indians.²⁶ As a rule, when a treaty or agreement was at issue, the courts construed these documents as the Indians had originally understood them.²⁷ The trust rules were meant to favor the Indians and in some cases actually did favor the tribes.²⁸ However, the U.S. Supreme Court soon decided that the government had "plenary" power over Indians arising out of its trust relationship.²⁹ This plenary power allowed the government to establish

24. See Getches et al., *supra* note 17, at 231.

25. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831) (describing relationship of United States to Indians as that of guardian to ward); *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444, 1450-51 (4th Cir. 1989) (describing origins of trust relationship, and discussing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)). Concerning the trust relationship with Alaska Natives, see *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, 101 F.3d 1286, 1297 (9th Cir. 1996) ("This circuit 'appears to recognize a federal trust responsibility comparable to that toward other Indians, even after passage of the Alaska Native Claims Settlement Act.'") (quoting *Alaska Chapter, Associated Gen. Contractors v. Pierce*, 694 F.2d 1162, 1168-69 n.10 (9th Cir. 1982)), *cert. granted sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 117 S. Ct. 2478 (1997).

26. See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 Cal. L. Rev. 601, 617 (1975).

27. See *United States v. Winans*, 198 U.S. 371, 380 (1905).

28. See *id.*; *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1963); *Winters v. United States*, 207 U.S. 564, 576-78 (1908).

29. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the

whatever policy it chose with regard to Indians, subject only to the limitations of the Constitution and Bill of Rights.³⁰ Congress could abrogate treaties and legislate practically anything as long as the legislation was “consistent with perfect good faith.”³¹ Good faith, however, was *presumed* and was not subject to review by the courts.³² If Congress chose to completely disestablish a reservation, it had the power to do so. Congress could also effectively terminate a tribal government by withdrawing all federal recognition of the tribe, reducing it to a status akin to an Elks Club. The Indians had no legal remedy except for remuneration for property taken or damaged. The legal profession was not involved, as the government and Congress made all relevant decisions in these circumstances.

Moreover, the U.S. Supreme Court continued to greatly weaken the earlier liberal canons of construction. In *DeCoteau v. District County Court*,³³ the majority ostensibly adhered to the canon, stating that any doubt as to the meaning of a federal statute was to be resolved in favor of the Indians.³⁴ The majority then held that Congress clearly intended to *disestablish* the reservation in question, finding no doubt as to this intent.³⁵ The dissent agreed that no doubt existed as to Congress’s intent, but that Congress clearly had *not* intended to disestablish the reservation.³⁶

The trust relationship is a powerful tool. In theory, the government will consistently act in favor of the Indians in managing property and other rights. If a state or some other outside entity tramples on Indian rights, the government should use federal lawyers to file the appropriate actions to protect these rights. Consequently, empowering a trustee to bring litigation is an important aspect of the trust relationship. Historically, however, it was not unusual for the government to decline to sue even when a tribe wanted suit brought. Formally, the United States, as trustee, is charged with retaining lawyers for tribes whenever appropriate.³⁷ However, conflicts of interest among governmental

treaties in which it has been promised, there arises the duty of protection, and with it the power.”); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903).

30. U.S. Const. amends. I–X.

31. *Hitchcock*, 187 U.S. at 566.

32. See, e.g., *id.* at 568.

33. 420 U.S. 425 (1975).

34. *Id.* at 444.

35. *Id.* at 444–45, 448.

36. *Id.* at 463–64 (Douglas, J., dissenting).

37. See 25 U.S.C. § 175 (1994).

departments have made it virtually impossible for the government to consistently execute its fiduciary duty toward Indians. Frequently, the federal government itself has been the culprit, undermining tribal rights and placing the tribes in a difficult position. Tribes have seldom been able to sue the federal government for abuse of its fiduciary duty, fearing that the government would misuse its plenary powers in retaliation.³⁸

In some instances, the United States represents both Indians and opposing interests. In irrigation development projects, for example, available water can be claimed by the Bureau of Reclamation *and* the BIA. When two agencies within the same department compete for the same water, the Department of the Interior is asked to represent both the Indians, as a "trustee," and the non-Indian population.³⁹ Justice Rehnquist highlighted this dilemma:

Today, particularly from our vantage point nearly half a century after the enactment of the Indian Reorganization Act of 1934, it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent.⁴⁰

In view of the many interests represented by the government in contemporary times, it is unrealistic to expect the Department of the Interior to serve as the exclusive trustee for Indians at all times. Fortunately, Indians today have greater access to private lawyers and

38. A present-day example of the difficulty of suing the federal government is illustrated by *PIT River Home & Agricultural Cooperative Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994). In that case, claims by a group of Indian families against the United States for breach of its fiduciary duty were recognized by the court under 28 U.S.C. §§ 1331 and 1361, which granted federal question jurisdiction, but were held barred by the sovereign immunity of government. The court stated: "Sections 1331 and 1361 do not waive the sovereign immunity of the United States." *PIT River Home Ass'n*, 30 F.3d at 1098 n.5.

39. See, e.g., *Nevada v. United States*, 463 U.S. 110 (1983).

40. *Id.* at 128 (citations omitted).

legal forums and do not need to rely exclusively on the government to protect their rights.

III. CURRENT DEVELOPMENTS: 1966–PRESENT

Before the 1960s, the field of federal Indian law struggled to exist. Although the “field” had been theoretically recognized in the 1940s by Felix Cohen in his seminal work, *Handbook of Federal Indian Law*,⁴¹ the area was slow to develop; in the 1960s, it lay largely dormant. Prior to the 1960s, the primary pool of lawyers accessible to tribes came from the Solicitor’s Office in the Department of the Interior. These lawyers were subject to inherent conflicts of interest in their representation of the tribes and labored under low salaries and limited advancement opportunities. Consequently, the tribes were too often ill-served by these government employees.⁴²

A number of significant events occurring after 1960 allowed tribes greater access both to lawyers working in their best interests and to the American legal system in general to enforce their rights. One primary reason for the increase in Indian lawyering was the huge success of the Pre-Law Summer Institute at the University of New Mexico.⁴³ Focusing on preparing Indian college graduates for law school, the Center turned out hundreds of young, aggressive, talented Indian law students since its founding in 1968. The program served to boost confidence among Indian college graduates interested in attending law school. Many of these Indian lawyers subsequently have devoted their talents to advocating for tribes.

Other events that have instigated an increase in Indian legal representation include: legislation passed by Congress allowing greater access to the courts;⁴⁴ the rise of public interest organizations and legal services, such as the Native American Rights Fund, aimed specifically at addressing the legal problems of Indians; an increase in the number of

41. Felix S. Cohen, *Handbook of Federal Indian Law* (1942).

42. “On balance, the record of the relationship of lawyers and Indians has not been an altogether ennobling one. In fact, on many occasions, many members of the bar have been at the head of the pack of those who have abused and defrauded the Indian.” Rennard Strickland, *An Essay: Take Us by the Hand: Challenges of Becoming an Indian Lawyer*, 2 Am. Indian L. Rev. 47, 51 (1974) (citing Angie Debo, *And Still the Waters Run* (1940) (chronicling process of abuse by lawyers)).

43. See Thomas W. Christopher & Frederick M. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 U. Tol. L. Rev. 691, 693; Heidi Estes & Robert Laurence, *Preparing American Indians for Law School: The American Indian Law Center’s Pre-Law Summer Institute*, 12 N. Ill. U. L. Rev. 278, 286 (1992).

44. See *infra* note 58 and accompanying text.

law schools offering federal Indian law courses, as well as an increase in the number of both Indian and non-Indian professors teaching such a curriculum;⁴⁵ an increase in the number of firms and on-reservation attorneys representing tribes; an increase in the training and expertise of tribal judges; publication of the 1982 revised edition of Cohen's *Handbook of Federal Indian Law*, as well as many other Indian law books and articles;⁴⁶ and a small group of Indians and non-Indians who, as individuals, have demonstrated farsighted leadership.⁴⁷ These events all had a profound and far-reaching impact on Indians and Indian tribes.

An important result of these many events has been a gradual weakening of the trust doctrine. First, the government's obligation to provide lawyers to protect tribal rights against outside infringement is now somewhat displaced by a tribal preference for independent attorneys. These private attorneys bring with them no conflict of interest issues and are more inclined to represent the best interests of the tribes with competence and diligence. Also, the services of the Solicitor's Office in overseeing the internal workings of the tribal government—tribal elections, tribal constitutional amendments, et cetera—have been diluted. The increase in the number of both lawyers and tribal courts better able and equipped to deal with intra-tribal affairs has led to a growing preference by many tribes for increased autonomy.

45. See G. William Rice, *There and Back Again—An Indian Hobbit's Holiday: Indians Teaching Indian Law*, 26 N.M. L. Rev. 169 (1996) (profiling number of Indian and non-Indian law professors teaching Indian law); see also Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 Syracuse L. Rev. 1243, 1244 (1996) (advocating incorporation of Indian law principles into basic law school curriculum).

The *AALS Directory of Law Teachers* lists the number of professors of Native American Law as well as the number of years they taught the subject: 62 professors have taught the subject between one and five years; 15 professors have taught the subject between six and 10 years; 23 professors have taught the subject over 10 years; 62 professors out of this list are currently teaching the subject. Association of Am. L. Schs., *The AALS Directory of Law Teachers 1996-97*, at 1200-01.

46. One example is the *American Indian Law Review*. Founded in 1974 to provide a forum for scholarly discussion of law issues affecting Indians, the *Review* is still hitting the printing press today. It has covered the spectrum of Indian law topics and has included both law and non-law perspectives from historians, geographers, educators, and environmentalists. See Robert A. Fairbanks, *American Indian Law Review: Purposes and Goals Revisited*, 20 Am. Indian L. Rev. 1 (1995-96). Another example is the 1994 edition of the *Hamline Law Review*. With Indian issues still a focal point in the 1990s, the *Hamline Law Review* devoted an entire issue to Indian concerns to "draw attention to the unique political and legal status possessed by American Indians." John Puoupart, *Introductory Remarks*, 17 Hamline L. Rev. 413, 413 (1994).

47. Among notable contributors are Philip S. Deloria, Frederick M. Hart, Robert Bennett, David H. Getches, John Echohawk, Monroe E. Price, Carole E. Goldberg, Reid Peyton Chambers, Charles F. Wilkinson, Rennard Strickland, Robert N. Clinton, and Vine Deloria.

As tribes have gained greater access to legal counsel, courts have increased their focus on Indian issues. By the mid-1980s, the U.S. Supreme Court had “become more active in Indian law than in fields such as securities, bankruptcy, pollution control, and international law.”⁴⁸ Between 1960 and 1969, for example, the Court handed down only eleven cases dealing with Indian issues. This number jumped to thirty-three in the 1970s, thirty-four during the 1980s, and eleven so far in the 1990s.⁴⁹

A. *The 1966 Tribal Federal Jurisdiction Act*

When all Native Americans became federally-recognized U.S. citizens in 1924,⁵⁰ individual Indians gained access to federal courts under diversity jurisdiction, but assertion of tribal rights was still precluded. The federal government had a trust obligation to bring suit for the protection of tribal interests, yet as discussed previously, was often disinclined to do so.⁵¹ The tribes could not even sue the government for failing to defend the very interests the government had a duty to protect.⁵² The tribes were not necessary parties to suits brought by the United States on their behalf,⁵³ and the tribes could not “determine the

48. Charles F. Wilkinson, *American Indians, Time, and the Law* 2 (1987).

49. Research by Sara Kelley, Student Reference Librarian, Marian Gould Gallagher Law Library, University of Washington School of Law, in April 1997. The numbers were found via a search on Westlaw for West Digest topic number 209 (Indians), and counted within the relevant decades to reach a conclusion.

50. Individual Indian citizens were extended federal citizenship in the Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1994)). About two-thirds of Indians were already citizens under prior acts of Congress. See Jordan Burch, *How Much Diversity is the United States Really Willing to Accept?*, 20 Ohio N.U. L. Rev. 957, 969 n.125 (1994).

51. See Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 Vill. L. Rev. 525, 536 (1994).

Note also that 25 U.S.C. § 175, originally passed by Congress in 1893, states: “In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.” Act of Mar. 3, 1893, ch. 209, § 1, 27 Stat. 631, 631 (codified at 25 U.S.C. § 175 (1994)). Yet, this section directing representation is discretionary, not mandatory. See *Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co.*, 353 F. Supp. 1098 (D. Ariz. 1972); *Lyngstad v. Roy*, 111 N.W.2d 699 (N.D. 1961). Courts have seldom ordered the government to undertake representation after it has declined to do so. Section 175, however, undoubtedly enhanced the expectation that the government, as trustee, would bring suit on behalf of the Indians.

52. See Nelson, *supra* note 51, at 537.

53. See Cohen, *supra* note 41, at 370 & n.56.

course of the suit or settle it contrary to the position of the Government.”⁵⁴

Prior to 1966, the tribes technically had access to federal courts under the grant of federal question jurisdiction contained in 28 U.S.C. § 1331.⁵⁵ Yet, while the United States could sue on behalf of the tribes and was not limited by any amount-in-controversy constraints, any tribe suing on its own behalf had to satisfy the \$10,000 amount-in-controversy requirement in section 1331.⁵⁶ This presented a problem for some tribes seeking federal redress: “By the 1960s, the federal courts were interpreting the district courts’ general grant of federal question jurisdiction more liberally. However, many courts still refused to hear tribal land claims on procedural grounds. They frequently found that these claims were nonjusticiable or untimely, or that the claimants lacked standing.”⁵⁷ Consequently, hiring a private attorney to bring suit on behalf of the tribe was not always an option, even where the tribe had the funds to do so. In the alternative, the tribe could make a special request to the Secretary of the Interior for the government to bring suit on its behalf. The Secretary of the Interior then could recommend the case to the U.S. Attorney’s office. Only subsequent to U.S. Attorney approval could the suit be brought.

In 1966, Congress enacted the Tribal Federal Jurisdiction Act⁵⁸ to specifically address the jurisdictional concerns of Indian tribes by removing the amount-in-controversy requirement. The 1966 Act states: “The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”⁵⁹ This law gives U.S. district courts jurisdiction in those cases where the U.S. Attorney has declined to bring an action and where a tribe cannot meet the \$10,000 amount-in-controversy requirement.⁶⁰ The tribes

54. *Id.* at 370.

55. *See* 28 U.S.C. § 1331 (1994).

56. The amount-in-controversy requirement in § 1331 was abolished in 1980. Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369; *see* Nelson, *supra* note 51, at 541 n.84.

57. Nelson, *supra* note 51, at 540; *see also id.* at 540 n.82 (referring to *Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation*, 339 F.2d 360 (9th Cir. 1964) (holding that suit by tribes did not satisfy \$10,000 amount-in-controversy requirement and court therefore lacked jurisdiction)).

58. Pub. L. No. 89-635, 80 Stat. 880 (1966) (codified at 28 U.S.C. § 1362 (1994)).

59. Tribal Federal Jurisdiction Act, 80 Stat. at 880.

60. *See* H.R. Rep. No. 89-2040 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3145, 3147.

subsequently were free of the limitations otherwise imposed on private litigants.⁶¹ Numerous courts have held that Congress intended to grant Indian tribes a unique co-plaintiff status with the federal government.⁶²

The Tribal Federal Jurisdiction Act has also been interpreted as “a frank acknowledgment by the Government that it often lacks the resources or the political will adequately to fulfill [the institutional] responsibility [for the vindication of Native American rights].”⁶³ The Act encourages tribes to initiate protective actions that, in years prior, would not have been commenced. The Act also gives the tribes leverage to pressure the United States to take action where it might not have done so before; tribes may inform the United States that they intend to prosecute a claim and convince the United States of the importance of standing by its Indian beneficiaries.⁶⁴ Perhaps most significant of all, tribes gain access to the federal courts through their own attorneys and are ensured of the same judicial determination regardless of whether the action is brought by the federal government on their behalf or by their own attorneys.⁶⁵ While not expected upon passage to significantly increase the number of cases tribes could bring,⁶⁶ the Act’s jurisdictional provision has been invoked “countless times” since 1966.⁶⁷

B. The Rise of Tribal Courts

The tribal court system is coming of age. Not only has the number of tribal courts increased, but increased training and financial support have bolstered confidence in, and support of, tribal court systems.⁶⁸ National and regional court personnel training programs have helped develop and strengthen the tribal court systems.⁶⁹ Congress as well has provided

61. See Daniel H. Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. Colo. L. Rev. 617, 625 (1976).

62. See, e.g., *id.*; Felix S. Cohen, *Handbook of Federal Indian Law* 204 n.262 (Rennard Strickland et al. eds., Michie Co., 1982) (1942).

63. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 794 (1991).

64. See Israel, *supra* note 61, at 625.

65. See H.R. Rep. No. 89-2040, *reprinted in* 1966 U.S.C.C.A.N. at 3147.

66. *Id.*

67. Israel, *supra* note 61, at 625.

68. See *id.*

69. The National Indian Justice Center has, since 1983, provided national training sessions for tribal court judges and personnel. The American Indian Lawyer Training Program (AILTP), founded in 1973, provides programs that seek to develop the skills of members of the Indian legal community. The American Indian Law Center (AIRC) provides training and technical assistance to tribal courts. The National Indian Justice Center has recently established both a national certificate

assistance and encouragement for the improvement of tribal court systems through both the Indian Civil Rights Act of 1968⁷⁰ (ICRA) and the Indian Tribal Justice Act of 1993.⁷¹ Through ICRA, Congress provided for "the establishing of educational classes for the training of judges of courts of Indian offenses."⁷² Congress sought to ensure proper implementation of the civil rights provisions contained in ICRA, as well as to continue the federal government's "longstanding policy of encouraging tribal self-government."⁷³ A major training program for tribal judges, most of whom had little formal education, was subsequently initiated and was administered by a private company⁷⁴ under the supervision of the Board of Directors of the National American Indian Court Judges Association. The Indian judge training program consisted of educational meetings held for an average of eighteen days per year in various cities across the country.⁷⁵ These training meetings initially focused on ICRA itself, but they gradually expanded in scope to include such subjects as criminal law and procedure, civil law, torts, evidence, contracts, civil procedure, and the U.S. legal system as a whole (including attorney-client privilege and other legal relationships). Two casebooks, dealing respectively with torts and contracts, were prepared to aid the training sessions. In addition, separate sessions were frequently held on the Indian Child Welfare Act (ICWA),⁷⁶ where participants were provided with continuing legal education outlines. Sessions after 1979

program for tribal court judges and, in conjunction with the New College of California, a two-year degree program for tribal court personnel (leading to an Associate of Arts degree in Indian Justice Systems).

Other smaller organizations, such as the Montana-Wyoming Tribal Court Judges Association, complement national training programs. See Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 Mont. L. Rev. 211, 305 nn.68-69 (1991).

70. Pub. L. No. 90-284, tits. II-VII, 82 Stat. 73, 77-81 (1968) (codified as amended at 25 U.S.C. §§ 1301-1341 (1994)).

71. Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended at 25 U.S.C. § 3601 (1994)).

72. 25 U.S.C. § 1311(4).

73. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); see also *id.* at 15 n.6.

74. A private company, Arrow, Inc., stationed at the time in Washington, D.C., administered the judicial training program from roughly 1971 to 1981. During most of this time, Tom Colosimo served as Executive Director for Arrow, Inc., and Robert Bennett (Oneida Indian and former Commissioner of Indian Affairs in the Department of the Interior) and Ralph Johnson organized and implemented the program.

75. Meetings were held, for example, in Seattle, Albuquerque, and Washington, D.C.

76. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963 (1994)).

also covered more specialized topics for judges who previously had attended the more basic sessions. Sessions were usually taught by lawyers, and occasionally by law professors and state and Indian court judges.

Enacted in 1993, the Indian Tribal Justice Act (ITJA)⁷⁷ focuses on the development and improvement of tribal court systems as a whole, and tribal courts in particular.⁷⁸ The Act provides funding to tribal judicial systems, as well as training programs for court personnel.⁷⁹ The Act establishes an Office of Tribal Justice to handle funding to tribes and to promote cooperation between tribal, state, and federal courts.⁸⁰

C. *The Native American Rights Fund*

With the enhancement of tribal courts, the training of Indian judges—of whom eighteen percent are law school graduates—and the increased access to the U.S. court system, satellite legal services organizations have developed. One of the most marked catalysts for change in the field of Indian law has been the rise of legal services devoting time and energy to Indian issues. A prime example is the Native American Rights Fund (NARF), which has built a convincing record of successful litigation and “has been at the vanguard of a legal movement that has substantially redefined the status and powers of tribal governments, bolstered Indian rights and helped tribes assert broader control over their land, water and other resources.”⁸¹

NARF began as a pilot program under California Independent Legal Services (CILS) in 1970, funded by the federal government as part of the War on Poverty.⁸² CILS programs were intended to provide poor and disadvantaged people with access to lawyers and the legal process, and many such programs were located on Indian reservations.⁸³ NARF

77. Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended at 25 U.S.C. § 3601 (1994)).

78. See Henry S. Noyes, *A “Civil” Method of Law Enforcement on the Reservation: In Rem Forfeiture and Indian Law*, 20 Am. Indian L. Rev. 307, 325 (1995–96).

79. See Diana B. Garonzik, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 Emory L.J. 723, 747 (1996).

80. See *id.* at 747–48.

81. William E. Schmidt, *The Law: An Indian Lawyer Leads in Fight for Tribal Rights*, N.Y. Times, June 24, 1988, at B5.

82. See Susan Sanders, *Native American Rights Fund: Our First 20 Years*, 26 Clearinghouse Rev. 49, 49 (1992).

83. *Id.*

presented an attempt to provide CILS services on a nationwide basis to Indians and tribes.⁸⁴

In 1971, NARF separated from CILS and opened a more centrally-located office in Boulder, Colorado.⁸⁵ Today, NARF is governed by a board of directors, all of Indian descent, which aims at keeping NARF as apolitical as possible.⁸⁶ NARF focuses on issues with lasting benefit to tribes, and has defined five areas of priority: (1) the preservation of tribal existence; (2) the protection of natural resources; (3) the promotion of human rights; (4) the accountability of governments of Native Americans; and (5) the development of Indian law.⁸⁷ As a marker of NARF's legal success in the past few decades, its co-founder John Echohawk was named as one of the one hundred most powerful attorneys in 1988.⁸⁸ Echohawk stated that such recognition was a "tribute to the fact that [NARF] has really been at the forefront of this change, of this movement."⁸⁹

D. *The Development of the Field of Indian Law*

Felix S. Cohen's 1942 *Handbook of Federal Indian Law*⁹⁰ represented an acknowledgment that, at least for some, the field of Indian law did exist. It compiled scattered authorities into one succinct source and provided a guide for anyone working with Indian law issues.⁹¹ The 1942 edition, however, focused on the powers of the tribes, an approach that by the 1950s had become disfavored under the federal termination policy.⁹² In 1958, at the height of the termination era, the Department of the Interior prepared a rewrite. This version aimed at discrediting the self-determination focus of the original text and stressed instead the plenary power of the federal government over Indians.⁹³ The revisers sought to remove all references to the sovereign powers of Indian nations and added footnotes to update the revised text.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See L. Wayne Hicks, *Native American Law Firm Makes House Calls*, *Denv. Bus. J.*, Mar. 15, 1991, at 10, 10.

89. *Id.*

90. See *supra* note 41.

91. See Getches et al., *supra* note 17, at 234.

92. *Id.*

93. *Id.*

The termination period did not last, and neither did the 1958 version of Cohen.⁹⁴ The University of New Mexico reprinted the 1942 version in 1971,⁹⁵ and in 1982, the Michie Company published a revised edition.⁹⁶ The 1982 Cohen was a complete overhaul of the treatise, performed by a group of academic scholars.⁹⁷ The revision began in 1975 and took seven years to complete. The 1982 Cohen is the version widely used and cited today. It stresses self-determination and examines self-sufficiency.

E. The American Indian Law Center's Indian Law Program at the University of New Mexico

A significant program that furthered the legal education of Indians was the Pre-Law Summer Institute for American Indians, administered by the American Indian Law Center (AILC) at the University of New Mexico School of Law.⁹⁸ The program was created because so few Indians were lawyers;⁹⁹ it sought to combat this problem by recruiting new students to attend its summer law classes.¹⁰⁰

In 1977, AILC became an independent, Indian-controlled program separate from the University of New Mexico and incorporated under New Mexico law. Robert Bennett, former Commissioner of Indian Affairs of the Department of the Interior and an Oneida Indian, was the first Director of AILC, serving from 1968 to 1972. Philip S. Deloria followed Bennett as Director and guided the Institute's funding to closely

94. *Id.*

95. *Id.*

96. See Cohen, *supra* note 62.

97. Revisers included: Rennard Strickland, as Editor-in-Chief; Charles F. Wilkinson, as Managing Editor; and Reid Peyton Chambers, Richard B. Collins, Carole E. Goldberg, Robert N. Clinton, David H. Getches, Ralph W. Johnson, and Monroe E. Price, as Board of Authors and Editors. Sam Deloria and Fred Hart played key roles in obtaining funds for the revision.

98. See Estes & Laurence, *supra* note 43, at 278. Criteria for admission to the Pre-Law Summer Institute included: (1) enrollment in a federally recognized tribe or one-quarter degree Indian blood; (2) completion of a bachelor's degree; (3) completion of the LSAT; (4) application to one or more ABA-accredited law schools; and (5) two letters of recommendation. *Id.* at 279.

99. "Although no segment of our society more needs representation within the legal profession than does the American Indian, no group has fewer lawyers." Christopher & Hart, *supra* note 43, at 692-93. "In 1967, when the Indian Pre-Law Summer Institute was begun for prospective Native American law students, it was estimated that there were at most only a few dozen Native American attorneys in the country. Today, the Pre-Law Summer Institute has aided in expanding that number to over 1200." Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77, 91 (1993).

100. Estes & Laurence, *supra* note 43, at 278-79.

correlate with those projects operated by the Office of Economic Opportunity.¹⁰¹

The Pre-Law Summer program provided college graduates with an eight-week introduction to law school the summer before they began their first year.¹⁰² The students took a full load of classes, focusing on substantive courses such as torts and contracts, which are traditionally taught during the first year of law school, as well as on Indian law.¹⁰³ The Institute encouraged its students to develop a sense of identity and affiliation, thus forming a network of Indian law students nationwide.¹⁰⁴ The Institute provided students with an educational edge they otherwise might not have enjoyed without such prior preparation and resulted in a remarkable success story for the legal education of Indians.¹⁰⁵ Hundreds of students graduated from the program and then scattered across the United States to attend some of the top law schools in the nation. Upon successfully completing law school, many of these graduates now devote their time and energy to advocating for tribes. Unfortunately, funding for this fine program was recently terminated and the program necessarily abandoned.

F. Law School Courses on Federal Indian Law

A phenomenal increase in law school courses on federal Indian law has occurred in recent years. The first courses were taught at UCLA and the University of Washington in the late 1960s.¹⁰⁶ Then, in the 1970s,

101. See Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. Rev. 285, 294 (1994).

102. Estes & Laurence, *supra* note 43, at 283.

103. *Id.*

104. *Id.* at 278, 281.

105. A study done of the 1984 and 1985 graduating law classes noted about a 70% success rate for Indian students who had attended the Institute the summer before their first year—roughly a 20% higher success rate than for students who had not attended the Institute's summer program. *Id.* at 285–86.

106. Monroe Price was an early teacher of Indian law at the UCLA Law School. My own experience in Indian law began in the spring of 1967. I had been teaching property law at the University of Washington Law School. One day, after finishing class, I returned to my office. To my surprise, about 15 Indians were sitting in my office, on my desk, on the floor, and spilling out into the hallway. I asked them what they wanted. They reminded me of the battles then raging over Indian off-reservation treaty fishing rights and said they were dismayed to learn that the law school had no faculty member who specialized in Indian treaty law or knew anything about the subject. They said they thought that someone on the faculty should be an expert in this field, and they thought it should be me.

many schools added federal Indian law to their curriculums. At present, about eighty law schools offer this course. Indian law courses attract many non-Indian as well as Indian law students.

G. The Rise of the In-House Tribal Attorney

Prior to 1966, very few tribes retained in-house counsel. As a result of the availability of Cohen's treatise, the training of Indian court judges, legal services such as NARF, and law school curriculum programs such as New Mexico's Pre-Law Summer Institute for Indians, a virtual explosion of lawyers working for Indian tribes has occurred. All this, combined with a greater availability of tribal funds and an increased awareness of the importance of lawyers to the tribes, has served to boost the number of in-house counsel retained by tribes. In 1970, for example, it was estimated that only two or three of the twenty-seven Washington State tribes had in-house counsel. Today, that number has swelled to thirty.¹⁰⁷

"In-house" lawyers usually live on or near the reservation and work full time for the tribe and its agencies. Some in-house lawyers are part of larger "city" firms dealing in Indian law. The cost to a tribe of retaining in-house counsel is less than the cost of separately retaining "city lawyers" from large firms, who earlier carried the full burden of tribal legal representation. City firms still serve an important role in Indian legal representation, usually concentrating on larger, long-term cases. In-house counsel tend to the day-to-day legal and administrative matters of the tribes.

I replied that there were no casebooks on the subject and few law review articles. But they persisted. Finally, I agreed to their proposal. I taught this Indian law course at the undergraduate level for two years. Then, in 1969, I taught the course as a law school seminar entitled *Indian Legal Problems* at the University of Washington School of Law. See Memorandum to Ralph Johnson from Cheryl Nyberg, Reference Librarian, Marian Gould Gallagher Law Library, University of Washington School of Law (Oct. 3, 1997) (on file with *Washington Law Review*).

Over the next six years this seminar produced about 50 research papers. I have to admit, they were of modest quality due to the dearth of existing scholarship on Indian law. But this made them "hot" items. We sold about 500 sets of these research papers to libraries, attorneys, tribes, and public agencies.

107. Michael Taylor, one of the first in-house tribal attorneys and current in-house counsel for the Tulalip Tribe in Washington State, has kept an informal record of the evolution of the in-house counsel trend because of his personal interest in the subject. The movement started in 1973 and moved rapidly throughout the nation. Some of the tribes that now have in-house counsel include Taos, White Mountain Apache, Hopi, Pima Maricopa, Navajo, the Colorado River Tribes, nearly all tribes in Oklahoma, and most tribes in Washington and Oregon.

V. CONCLUSION

How is it that such a brief time in history, from 1966 to the present, has brought such profound changes to the Indian legal environment? Special legislation has increased tribal access to U.S. courts and decreased tribal dependency on U.S. governmental protection. Tribal courts have developed and are improving significantly, bolstering confidence in tribal self-government. Legal services such as NARF devote immense amounts of time, energy, and talent to Indian concerns, and secure greater preservation of tribal existence by protecting tribal resources and culture and enriching the field of Indian law. Special educational programs such as the Pre-Law Summer Institute at the University of New Mexico have concentrated specifically on the legal education of Indians, and as a consequence, the number of Indian lawyers has gone from a small handful decades ago to well over a thousand today—and the number continues to increase. Most law schools include Indian law as an elective course; law reviews and legal texts are both more prevalent and more widely accepted. Perhaps most important of all, many tribes now have in-house counsel and many “city firms” devote the whole of their talents to furthering tribal interests. All of these events, significant in and of themselves, together have transformed the legal forum into a beneficial tool serving Indian concerns.

Fortunately, Alexis de Tocqueville’s pre-1860 prediction¹⁰⁸ about the unlucky future of the Indian race did not come to pass; although booming cities span the Atlantic and Pacific coasts, Indian tribes still exist in almost every state in America. The Indian race has survived despite historically adverse governmental policies and economic hardships. One of the greatest factors contributing to this survival has been the American legal profession. For so many years throughout history, the legal profession has been used as a tool against Indians and tribes. Now, it is a tool increasingly used in the tribes’ favor to protect tribal rights and concerns and to further tribal autonomy. The U.S. government and its courts may be in an assimilation trend at the moment, with bills introduced to restrict tribal income sources and land acquisitions,¹⁰⁹ but tribal governments and court systems cannot be turned back. Hundreds of attorneys, armed with knowledge from law

108. *See supra* note 1 and accompanying text.

109. *See, e.g.*, Nina Shapiro, *Slade’s Indian War*, *Seattle Weekly*, Oct. 8, 1997, at 20 (describing Sen. Slade Gorton’s attempts to cut tribal federal aid and abolish tribes’ sovereign immunity).

school courses, case studies, and publications, stand ready to defend members of the smallest U.S. minority, as provided in our Constitution.

[T]he field [of Indian law] has now become significantly more central as teachers, tribes, and Indian lawyers have moved from affirmation to adaptation to appropriation. For it is in the appropriation stage, whether in law or in art, that the people learn to use the institutions of the colonizers for their own benefit. And that, is for this generation, our challenge!¹¹⁰

110. Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. Rev. 153, 160 (1996).

