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Special Issues

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I. INTRODUCTION

The 200th birthday of the United States Constitution will produce a profusion of patriotic phrases, and well it should. At the same time, however, another historic event is worth noting. One hundred years ago, on May 10, 1886 to be precise, American Indian sovereignty died. It was a clean and quiet death. Cavalry troops were not to blame, neither was Congress nor the President. Rather, the least dangerous branch of the federal arsenal pulled the trigger. The Supreme Court nine unanimously agreed in *United States v. Kagama*[1] that Indian tribes could no longer resist congressional laws simply by rejecting them. Congress alone could govern the tribes. With this single judicial pronouncement the political independence of the American Indian tribe was put to rest forever. A centennial remembrance of what happened is a small way to mark the occasion.

II. THE BACKGROUND

In the beginning, when the Europeans "discovered" America, they were met by natives already in residence. This unexpected presence meant that the land was not discoverable territory. What to do? One alternative under international law was to brand the Indians unworthy heathens. The discoverers could then ignore the Indian's claims to land and even disregard their claims to life, unless the Indians first adopted European religion.[2] A more civilized alternative,

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1. 118 U.S. 375, 385 (1886).

2. International law of the time was not really "international." It was both western world and Christian in perspective and coverage. A purported state that did not meet the double qualification was simply beyond the realm. *See* 1 H. LAUTERPACHT, INTERNATIONAL LAW 117-22 (1970). Of course, international "morality" was considered a proper standard to apply to the heathens, savages, or outsiders, where this could be done meaningfully. Not everyone held this generous attitude. "Of the natives, however, very little account was made. Being heathen, they were not, in the age succeeding the discovery of America, regarded as having rights, but might be subdued and stript of sovereignty over their country without

however, prevailed. Credit for this choice apparently goes to the Spanish theologian Francisci de Victoria.[3] His conclusion was that the Indians owned their land[4] and that war by whim[5] against them would violate international law. The European powers cooperatively accepted the limitations. To forestall disputes among themselves, however, they agreed that under the "right of discovery" the discovering nation would have the first opportunity to purchase Indian land whenever it was put up for sale. In effect this meant that the Indian tribes could sell to no one but European nations because these discovering nations would always buy whatever land was available. Of course, if the Indians chose never to sell, then there would be no land to buy. This civilized thinking about Indian land carried over to other matters as well. The tribes were sovereigns; the legal method of transaction was treaty.

III. UNDER THE CONSTITUTION

This sovereign status of the American tribes survived the Colonial days,[6] the Confederation,[7] the Northwest Ordinance,[8] the draft-

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compunction." T. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 66 (6th ed. 1906).

3. Victoria (or Vitoria) (1480(?)-1546) was a professor of theology at the University of Salamanca from 1526 until his death. He was advisor to the Spanish crown and has been called the father of modern international law. His views and influence are discussed in Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 9-21 (1942).

4. "The upshot [of earlier analysis] is, then, that the aborigines undoubtedly had true dominion in both public and private matters . . . and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners." F. VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES § 11, at 128 (E. Nys ed. 1917).

5. A just war, such as one waged in self-defense, was proper against the Indians as it was against Christian nations.

6. It was not to be expected that the refinements of modern international law as Professor Victoria and others formulated them would find their way into the everyday practice of the colonists. Nevertheless, to a suprising extent they did.

> [W]hatever loose opinions might have been entertained . . . in favor of the abstract right to possess and colonize America, it is certain that in point of fact the colonists were not satisfied, or did not deem it expedient to settle the country without the consent of the aborigines. . . . They always negotiated with the Indian nations as distinct and independent powers . . . .

3 J. KENT, COMMENTARIES ON AMERICAN LAW 89-90 (14th ed. 1896). Of course, the colonists were not solely motivated by law or even morality. The desire for marketable titles to land and cordial relations with their neighbors prompted the colonists to favor mutual agreement over unilateral power. Whatever the motivation, practice supported the law.

7. The two places in the Articles of Confederation where Indians are mentioned did not alter the original status of the tribes. Article VI provided that a state could engage in war if it "shall have received certain advice of a resolution being formed by some nation of Indians to invade such State" and the danger was imminent. Article IX provided that the Congress shall

ing of the Constitution,[9] and the Constitution itself. The Constitution barely mentioned the Indians and no amendments since have changed the situation. Aside from two identical references which exclude Indians from official population tabulation,[10] the only express reference to the Indians in the entire Constitution is in the commerce clause. It provides that "Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . . . "[11] This clause, however is a power allocation among competing power users governed by the Constitution; namely, the executive and judiciary at one level and the states at another. In terms of separation of power, it is Congress and not the executive or the judiciary who is granted this power. In terms of federalism, it is similarly Congress and not the states who is given this power. It is not an ascription of power as between Congress and the tribes because the Indians were apparently not intended to be included and were in fact not included within the coverage of the Constitution. Because of this intransigent limitation, the new federal government could enforce its will on the Indian tribes in only two ways: war[12] or treaty.[13] As is well known, both methods were in

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have the sole power of "regulating the trade and managing all affairs with the Indians . . . ." U.S. ARTICLES OF CONFEDERATION arts. VI, IX (1778).

8. Article III provided:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Northwest Territory Ordinance & Act, 1 Stat. 51, 52 (1797).

9. There is nothing in the reports of the Constitutional Convention of 1787, which James Madison, Rufus King, William Paterson, and Alexander Hamilton wrote, to indicate that the Indians were given much attention. The Indians are mentioned several times in *The Federalist*, but nothing relates to the status of the tribes. THE FEDERALIST (J. Cooke ed. 1961). It is difficult to verify an omission, and more difficult to cite authority. Perhaps it suffices to conclude that none of the authorities I perused made reference to anything more significant than what is expressly found in the Constitution itself.

10. In article I, "Indians not taxed" are excluded from the enumeration of persons within a state for determining the population of the state for purposes of apportioning both direct taxes and representatives to serve in the House. The fourteenth amendment contains an identical exclusion for apportioning representatives. U.S. CONST. amend. XIV, § 2.

11. U.S. CONST. art. I, § 8.

12. Neither the power of war nor the power of treaty mentions Indians, but both are designed to cover nations that are not within the scope of the Constitution. "When the Constitution was adopted, the chief mode of dealing with Indians was warfare. Accordingly Indian affairs were entrusted to the War Department by the Act of August 7, 1789, the first law of Congress relating to Indians." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 93 (1971).

13. Prior to the 1871 cutoff date, the United States made 389 treaties with the Indian tribes. *Id.* at v (Reference Tables and Index) (referring to the Department of Interior's first "comprehensive attempt" to collect basic Indian material).

common use. The Indian commerce clause, however, was not an empty vessel. Congress used the clause to support legislation, but only concerning matters of commerce and then only to the extent that American, in contrast to Indian, interests were implicated.[14] The sole deviation from this pattern, prior to the 1885 law that gave rise to the *Kagama* case, was an 1817 act[15] in which Congress tried to apply federal criminal law to crimes committed by Indians on Indian land. In 1834, however, Justice McLean, sitting on circuit, declared this law unconstitutional.[16]

The United States altered its method of dealing with the tribes in 1871. The House of Representatives, piqued at having to approve appropriations for countless obligations to the Indians contained in treaties entered into without its consent, attached a rider to one of its appropriation bills which provided, "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[17] The provision became law and is still on the books today.[18] Although the Supreme Court has never ruled on the constitutionality of the restriction, it has been faithfully followed.

The change, however, was unilateral and did not affect the status of the Indians.[19] No treaties were made with the Indian tribes after 1871. The new approach was to have representatives of either the President or the Congress make agreements with the Indians which were then subject to ratification by both houses of Congress. In this manner the House got its say and the autonomy of the tribes remained intact.

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14. A review of early legislation reveals how carefully Congress avoided legislating in a way that would interfere with the internal affairs of the tribes. *See id.* at 68-77.

15. Act of March 3, 1817, ch. 92, 3 Stat. 383, *repealed by* Act of June 30, 1834, ch. 161, § 29, 4 Stat. 734.

16. United States v. Bailey, 24 F. Cas. 937, 940 (C.C. Tenn. 1834) (No. 14,495).

17. Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1982)).

18. 25 U.S.C. § 71 (1982).

19. *Ex parte* Morgan, 20 F. 298, 306 (W.D. Ark. 1883); F. COHEN, *supra* note 12, at 66-67 (1942). On the other hand, in a much later decision a court, without citing any authority, concluded that the 1871 law asserted "the right of the government thereafter to define the rights of Indians with or without their consent." United States v. Santa Fe Pac. R.R., 114 F.2d 420, 423 (9th Cir. 1940). It has been argued that "[a]lthough agreements were still concluded that were no different from previous treaties except in mode of ratification, the formal end of treaty making and the conscious intention thereby to denigrate the power of the chiefs resulted in a loss of old systems of internal order without the substitution of new ones in their place." 2 F. PRUCHA, THE GREAT FATHER 676 (1984).

IV. THE *Kagama* CONTEXT

Three years before *Kagama*, the Supreme Court decided the case of *Ex parte Crow Dog*.[20] This decision led directly to the passing of the law that was challenged in *Kagama*. Crow Dog, a Sioux Indian living on the Rosebud reservation in the Dakota territory, killed a Sioux chief who had made the compound mistake of extending his congenial ways to both the United States government and the wives of other Sioux leaders.[21] The families of the participants resolved the dispute in traditional Sioux fashion: Crow Dog's family compensated the family of the deceased. Influential Americans were not happy with the result. Not only was a friend and political ally of the United States murdered, but the killer went virtually unpunished. Thus, the federal government acted. Crow Dog was arrested, tried for murder in the First Judicial District Court of Dakota, convicted, and sentenced to death. The Supreme Court entertained Crow Dog's petition for a writ of habeas corpus.[22]

The Court granted Crow Dog's petition because the federal court had no jurisdiction.[23] Although an agreement between the United States and the Sioux tribe contained the provision, "[the Indians] shall be subject to the laws of the United States,"[24] the Court concluded that this language was not clear enough to, in effect, repeal the federal statute,[25] which provided that the criminal laws of the United States shall not extend to "crimes committed by one Indian against the person or property of another Indian."[26] The next year, 1884, a bill was introduced in Congress that would have applied federal criminal law to crimes committed by Indians against Indians on Indian land. The Senate killed it, apparently, because it applied to misdemeanors as well as felonies.[27] In 1885, however, a similar bill was passed without the misdemeanor provision. It provided in relevant part:

> [A]ll such Indians committing murder against the person . . . of another Indian . . . within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other

20. 109 U.S. 556 (1883).

21. This version of the facts is based on the narration in V. DELORIA, JR. & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 168-69 (1983).

22. *Ex Parte* Crow Dog, 109 U.S. 556, 557 (1883).

23. *Id.* at 572.

24. Act of Feb. 28, 1877, ch. 72, art. 8, 19 Stat. 254, 256.

25. *Crow Dog*, 109 U.S. at 568-72.

26. United States v. Rogers, 45 U.S. (4 How.) 567 (1846) (quoting Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733 (current version at 18 U.S.C. § 1152 (1982))).

27. 16 Cong. Rec. 935 (1885) (statement of Rep. Budd).

> persons committing [murder] within the exclusive jurisdiction of the United States.[28]

Crow Dog may have been the trigger for the new legislation, but it was only part of a larger drive to civilize the Indians. Not only were their criminal punishments too light in the eyes of some critics, but at times too savage.[29] The reformers argued that what the Indians needed, for their own good, was the installation of American law and procedure.[30] Other reformers went further and argued for the abolition of the tribes and their culture and for the assimilation of Indians into the mainstream American way of life.[31] This, again, was for their own good. With foe and friend united[32] in a national political goal of turning red into white, whatever countervailing movement existed to preserve Indian tribal sovereignty, with its accompanying independence, values, and history, was a movement out of step with the beat of the times.

Into this reform milieu came *Kagama*.

V. THE BARE-BONES CASE

Kagama, an Indian, was indicted under the new 1885 federal law, along with his accomplice Mahawaha, in August of 1885 for the murder of an Indian, Iyouse, on the Hoopa Valley Indian reservation in California.[33] The defendants demurred to the charge on the ground that Congress did not have constitutional power to enact the law.

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28. Appropriations Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385, *repealed by* Act of Jan. 15, 1897, ch. 29, § 5, 29 Stat. 487.

29. One congressman observed that the Indians frequently responded to a murder by having the "blood avenger," the next of kin of the deceased, retaliate by committing a new murder. 16 Cong. Rec. 934 (1885) (statement of Rep. Cutcheon).

30. Professor James Bradley Thayer of the Harvard Law School was "the most vigorous" advocate of this position. F. PRUCHA, INDIAN POLICY IN THE UNITED STATES 238 (1981). He drafted a bill and had it introduced in Congress. It proved to be too thorough and radical for even some of the reformers. *See* 2 F. PRUCHA, *supra* note 19, at 679-81.

31. For a discussion of this movement, see 2 F. PRUCHA, *supra* note 19, at 611-71.

32. Although benevolent reform groups may have been the prime forces behind the policy, other groups were interested in Indian land. Perhaps it is fair to say that "[i]gnorance of Indian culture, fatuous self-righteousness, and land hunger combined" to accomplish the national goal. W. WASHBURN, THE INDIAN IN AMERICA 249 (1975).

33. United States v. Kagama, 118 U.S. 375, 376 (1886). Commentators have argued that "[t]he Hoopas had no existing tribal government that could have enforced the tribal penalty had they wished to exert tribal jurisdiction over this particular crime." V. DELORIA, JR. & C. LYTLE, *supra* note 21, at 171. No authority is cited for this proposition and the significance of it is questionable. For example, it was reported in 1877 that the Hoopas "have well-established laws, or rather usages, as to . . . laws of murder, injury, and insulting words . . . . Murder is generally compounded for by the payment of shell-money." S. POWERS, TRIBES OF CALIFORNIA 74-75 (1976). It was easy to assume that the California Indians did not have enforcement mechanisms because they were organized in much smaller units than the traditional tribes found elsewhere in the country.

The two circuit court judges split on the issue and by certificate of division of opinion the case went directly to the Supreme Court of the United States.[34]

The defendants argued to the Court that the only source of congressional power over the Indians in the Constitution was the Indian commerce clause as supplemented by the necessary and proper clause. The defendants further pointed out that these powers, although extremely broad, did not authorize Congress to reach a crime of murder unrelated to commerce committed by one Indian against another Indian on an Indian reservation.[35] History supported this position, they argued. The "anomalous and peculiar" status of the Indian tribes "has not been changed nor has it been construed to be in any wise different than when defined by Chief Justice Marshall in the Cherokee case."[36] The defendant's conclusion was that "[i]n all the dealings of our Government with the Indians they have always been carried on either by open warfare or by commercial relation."[37]

The government responded that the commerce clause with the necessary and proper adjunct was broad enough to support the legislation.[38] After tracing congressional laws and Supreme Court cases, the state concluded "that there is no limitation upon the power of Congress to enact whatever laws may be necessary to regulate the affairs of the Indian tribes."[39] As for the specific application of the commerce power to murder, the government argued:

> If we are asked in what respect the commission of a crime by an Indian upon an Indian can relate to the question of intercourse with an Indian tribe, we deem it sufficient answer to say that if we have to maintain intercourse with the Indians, it is necessary and proper to provide that they shall not be permitted to destroy each other.[40]

On the commerce issue, the Supreme Court sided with the defendants. It saw that to impose a common law crime against the Indians without any showing of its relationship to commerce "would be a very strained construction"[41] of the commerce clause. The Court itself, however, made the arguments which enabled the government to

34. *Kagama*, 118 U.S. at 375.

35. Brief for Defendant at 11, United States v. Kagama, 118 U.S. 375 (No. 1246) (1886).

36. *Id.* at 9-10 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)).

37. *Id.* at 12.

38. Brief for United States at 14, United States v. Kagama, 118 U.S. 375 (No. 1246) (1886).

39. *Id.*

40. *Id.* at 24.

41. *Kagama*, 118 U.S. at 378.

prevail. It first denied to the tribes the status of a nation.[42] It then drew two conclusions from the fact that the tribes were geographically within the United States: one, because there were only two sovereigns within the United States, states and the federal government, the tribes were subject to the jurisdiction of one or the other[43] and two, because the federal government must have power over all the territory it owns, it may exercise that power to regulate not only the land, but persons located on it.[44] The fact that the federal government had a responsibility toward the Indians also supported this result.[45]

In conclusion, the congressional law was valid, the federal court in California had jurisdiction, and the Indian tribes lost their autonomy.

VI. THE CASE ELABORATED

Given the result in Kagama, a student of the law of both the American Indian and the Constitution might conclude that the Supreme Court of that day was either incompetent, biased, or nodding. None of the above is probably the best answer. "The Court as it was constituted from 1882 until the death of Judge Woods in 1887 stood at a remarkably high level of distinction. Five or six of its members would find places in any respectable list of the outstanding justices in the entire annals of the Court."[46] As for bias, if any was instrumental, it ironically, was pro-Indian. There is nothing to show the contrary. The language of the opinion and the mood of the times suggest that the Court was simply following the national reformist thinking then in vogue. The Court sat on the states and neutralized the tribes, but only so it could free Congress to proceed with civilizing the Indians. Maybe the Court nodded. The arguments of counsel did not focus the Judge's attention. Perhaps they missed the issue. This is doubtful though, as there was not one concurrence nor one dissent. That they all may have nodded in unison is easy enough to imagine, but hard to believe. Furthermore, the Court's opinion itself, refutes the notion that the Court was asleep at the bench. What went wrong in *Kagama*, in lieu of one of the above, is that the Court erred in both its analysis of reality and its formulation of constitutional policy.

The Court's first conclusion in its two part analysis, that the tribes were not nations, will not withstand scrutiny. As a matter of

42. *Id.* at 379.
43. *Id.*
44. *Id.* at 380.
45. *Id.* at 384-85.
46. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 388 (1939).

fact, the only discussion in the Court's opinion of the subject concluded that they were not "foreign" nations—a point not in dispute and one made fifty-five years earlier in *Cherokee Nation v. Georgia*.[47] In that same opinion, however, Chief Justice Marshall had called the tribes "domestic dependent nations."[48] In *Kagama*, the Court downgraded this language and with it the status of the tribes into "local dependent communities."[49] Nowhere in the opinion did the Court attempt to refute Chief Justice Marshall's analysis in the second of the two famous Georgia cases, *Worcester v. Georgia*,[50] in which the Chief Justice had not only referred numerous times[51] to the Indian tribes as "nations", but carefully explained and justified the reference.[52] In *Kagama*, by judicial fiat without argument or reliance on authority, Indian nationhood, an accepted legal status for over 300 years, simply disappeared.

In the second part of its analysis, the Court found that within the geographical limits of the United States there were but two sovereigns—the states and the federal government. The tribes were left out. Although "nation" and "sovereign" are often viewed as synonymous, the Court treated them separately, perhaps because the states are considered to be one, but not the other. In any event, the Court rejected the conclusion that there are three American sovereigns as easily as it denied the tribes their status as nations,[53] but the Court's fiat on this issue was just as faulty as its earlier one. Chief Justice Marshall in *Worcester* had traced the history of tribal authority and repeatedly noted throughout his opinion that "[t]he Indian nations had always been considered as distinct, independent political communities,"[54] and "[t]he very fact of repeated treaties with [the Indians] recognises [their right to self government]; and the settled doctrine of

47. 30 U.S. (5 Pet.) 1, 13 (1832).

48. *Id.* at 17.

49. *Kagama*, 118 U.S. at 382.

50. 31 U.S. (6 Pet.) 515 (1832).

51. I stopped counting at twenty.

52.

> The very term "nation", so generally applied to [the Indians] means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Worcester, 31 U.S. (6 Pet.) at 559-60.

53. *Kagama*, 118 U.S. at 379.

54. *Worcester*, 31 U.S. (6 Pet.) at 559.

the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."[55] In *Kagama*, no effort was made to challenge either the statements of historical fact in *Worcester* or the authorities on which they were based. The Court simply ignored them.

The resolution of the issues on nationhood and sovereignty against the tribes meant that they were mere groups of Indians living in the United States and subject to governmental control by either the states or the federal government, whichever had the constitutional authority. The Court spent most of its opinion on this power question. As already indicated, this may have been due to the fact that congressional power under the Constitution was the only issue that the parties briefed. Although the State based its argument solely on the commerce clause, the Court found congressional authority outside the powers enumerated in the commerce and property clauses. It relied partially on Chief Justice Marshall's opinion in *American Insurance Co. v. 356 Bales of Cotton*[56] in which he wrote, "[t]he right to govern, may be the inevitable consequence of the right to acquire territory."[57] In addition it relied on another ground:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . . . It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[58]

Taken together the congressional power source seems to be a composite of an inherent power over land and a necessary power over a weak, dependent people. Not only is this duo an odd couple but it undermines traditional learning that the Constitution limits the authority of Congress to enumerated powers.

Neither the fact that the Court considered congressional power the most important issue in the case, nor the Court's debatable basis for finding it, should be allowed to detract from the major omission in the case—the Court's failure to confront, analyze, and resolve the relationship between the Constitution and the Indian tribes. In other words, the question of consequence in the case was *not* the *power of*

55. *Id.* at 560-61.
56. 26 U.S. (1 Pet.) 511 (1828).
57. *Id.* at 542.
58. *Kagama*, 118 U.S. at 384-85.

Congress under the Constitution, but the *power of the Constitution* itself.

It is understandable why the Court glossed over the issue— there was little support for its conclusion. As history, the Constitution, the *Worcester* case, and the Senate judiciary committee[59] attest, the Indian tribes were not subject to the reach of the Constitution.

Two items of evidence that superficially support the Court deserve mention. One is the Supreme Court opinion that Chief Justice Taney wrote in *United States v. Rogers*.[60] This case, decided in 1846, concerned the constitutionality of a federal law making murder of a white man by a white man in Indian country a federal offense. The defendant, a white man, argued that he had married an Indian, lived among the Indians, and had been adopted by the tribe. He made the same argument on behalf of the victim. Thus, he argued he came within the statutory exemption that provided that the law "shall not extend to crimes committed by one Indian against the person or property of another Indian."[61] The Court, conceding he might be a member of the tribe, rejected his contention that he was an Indian as contemplated by the statute.[62] In short, he was still white. That the Constitution and a congressional law under it may be applied to a white man who later joins a tribe is not authority for the application of federal laws to Indians who are tribal members. Rather, this is simply an application of the nationality principle of criminal law jurisdiction, recognized in international law then and now.[63] What is interesting about *Rogers* is not the holding of the case, but the free-wheeling observations of Chief Justice Taney concerning the American Indian. For example:

> The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and

59. "An Act of Congress which should assume to treat the members of a tribe as subject to the municiple jurisdiction of the United States would be unconstitutional and void." Thayer, *A People Without Law*, 68 ATLANTIC MONTHLY 676, 677 (1891) (quoting F. WALKER, THE INDIAN QUESTION 125 (1874)).

60. 45 U.S. (4 How.) 567 (1846).

61. *Id.* at 572 (quoting Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733 (current version at 18 U.S.C. § 1152 (1982)).

62. *Id.* at 571-72.

63. *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 654-65 (1985); R. LEFLAR, CONFLICT OF LAWS 196-97 (1959); F. WHARTON, CRIMINAL LAW § 189 (1874).

> treated as, subject to their dominion and control.[64]

and

> It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavoured by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices.[65]

and finally,

> [W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and . . . Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.[66]

The Chief Justice cited no authority in support of his exegesis on the American Indian. The opinion reads more like a dream than reality. Perhaps it was. President Jackson, who appointed Taney as Chief Justice, held, it has been argued, similar views: that the Indians should be treated fairly, that relocating tribes to the west was the only sensible solution to white-red conflicts, and that to treat with the tribes instead of making them subject to municipal laws was absurd.[67] Perhaps Chief Justice Taney was articulating a political dream that many hoped would become reality. In any event, he was not describing the law as it was. *Rogers* thus, fails as meaningful support for *Kagama* for two obvious reasons—it is dicta and it is wrong.

A second kind of support comes from the bare fact that Congress passed the law. A "presumption" of constitutionality is said to attach to such matters.[68] Although this idea may be honored more in theory than in practice,[69] the fact that Congress has considered the constitu-

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64. *Rogers*, 45 U.S. at 572.

65. *Id.*

66. *Id.*

67. The traditional view is that President Jackson hated the Indians and acted accordingly. The position stated in the text is a softer revisionist view presented in F. PRUCHA, *supra* note 30, at 138-52.

68. This "presumption" is not an operative doctrine that has a particular meaning and that produces a particular result. It is simply a way of acknowledging that Congress, when it passes laws, is functioning under the Constitution and that this should be considered by any court before it declares a congressional law unconstitutional.

69. The Supreme Court in Marbury v. Madison, was silent on the matter even though it was dealing with a Congress made up of numerous individuals who actually drafted the Constitution. 5 U.S. (1 Cranch) 137 (1803). On the other hand, the Court made much of this

tionality of a particular bill before transforming it into law, especially if it relates to a subject that ostensibly is within its power, is entitled to some weight. The 1885 law, however, does not qualify. First, the provision was a rider to an appropriation bill and was introduced on the floor of the House.[70] It was not even considered by the Appropriations Committee, let alone by any other more knowledgeable committees such as the Committee on Indian Affairs.[71] Second, the discussion in the House did not once allude to the question of either legislative or constitutional power. Third, the Senate reacted to the constitutional aspects of the proposal with a similar silent treatment.[72] On these facts, there is no basis for a presumption of constitutionality.

VII. So What?

So what if *Kagama* is wrong? A dirge on tribal death written a century after internment is not likely to start a movement to correct the error and liberate the tribes from federal authority. On the other hand, suppose the Indians were given the option to either remain as is or return to true sovereignty. A few tribes might opt for their independence. Maybe several small ones unable to grab the opportunity alone would join together to make a nation. Would such an attempt be feasible? I do not know. All the current federal laws applicable to any tribe choosing the new status would have to be reviewed. Those to which the tribe consented, then or now, would probably be maintained. Those based on proper constitutional and congressional authority would also not be affected. Only those beyond the Constitution and based in effect on *Kagama* would have to be voided. Thereafter, mutual consent would be required to bind the tribes.

But could all the federal laws be identified today? The task of isolating the numerous statutes and regulations may not be as formidable as first thought makes it seem. In the first place, Indian law has always been treated as sui generis and thus laws relating to the tribes are legislated and cataloged separately. Secondly, even under the current regime, all laws applicable to any given tribe must be identifiable to ascertain the current status of the tribe-United States relationship. Thirdly, The Bureau of Indian Affairs has been monitoring the tribes

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fact in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Both opinions are the handiwork of Chief Justice John Marshall.

70. 16 Cong. Rec. 934 (1885) (statement of Rep. Cutcheon).

71. 16 Cong. Rec. 2386 (1885) (statement of Sen. Plumb).

72. These conclusions are based on a perusal of the relevant sections of the Congressional Record. The Senate's great concern with the law was the procedural method used by the House, an appropriations rider, and not with the law's substance. *See* 16 Cong. Rec. 2385-87 (1885) (Senate discussion).

and administering federal laws for a long time. Even if the Bureau does not now have the information collated by tribe, it could perhaps make the necessary rearrangement with reasonable effort and within a reasonable time. Assuming the new legal relationship for the future could be accomplished, there would still be the problem of what to do with the past—those events that over the years have vested, rested, or nested, so to speak. I am not convinced the idea is workable, but neither am I convinced it is not. A feasibility study would be helpful.[73]

An acknowledgement that *Kagama* erroneously denied American Indian tribes their dual status as nations and sovereigns might have a salutary effect on those Supreme Court Justices who appear to be in search of reasons why the tribes today should be granted the unusual advantage of being "sovereigns-at-the-will-of-Congress."[74] This observation relates to the fact that the present Court often allows the tribes to function as sovereigns in the absence of congressional law to the contrary.[75] It is a judicial device for giving the tribes governmental authority over tribal members[76] and sometimes non-members;[77] and it serves as a limitation on the power of states to apply their laws to the tribes.[78] Some on the Court are uneasy with this

73. The idea is less fanciful today than before John Collier had his day. Actually, his influence was for a bit more than a day. For years he was a harsh critic of the way the United States dealt with the Indians; and then for twelve years, longer than any person before or after, he was Commissioner of Indian Affairs. Under Franklin D. Roosevelt he helped the Indians get a "new deal." "The emphasis . . . on tribal government made possible the perpetuation of the concept of tribal sovereignty . . . ." 2 F. PRUCHA, *supra* note 19, at 1011. And the concept of tribal sovereignty, even conditioned as it is on the will of Congress, makes it easier to think of tribal sovereignty without the condition.

74. In Merrion v. Jicarilla Apache Tribe, Justices Brennan, White, Blackmun, Powell, and O'Connor joined Justice Marshall's strong "sovereignty" opinion. 455 U.S. 130 (1982). The next year, however, Justice Marshall, writing for a unanimous Court in New Mexico v. Mescalero Apache Tribe, softened his sovereignty analysis considerably by turning it into one of preemption. 462 U.S. 324, 334-36 (1983). By so doing, he picked up the support of Chief Justice Burger and Justices Stevens and Rehnquist. He was also able to retain the support of Justices White, Powell, and O'Connor. In another 1983 case, Rice v. Rehner, Justice O'Connor, joined by Justices White and Powell and the three dissenters in *Merrion*, created a modified preemption analysis. 463 U.S. 713 (1983). The bottom line as of 1983 is that the Justices who advocate Indian sovereignty are feeling pressure from those on the Court who favor a preemption alternative. In short, sovereignty supporters need help.

75. *E.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribal sovereignty allows tribes taxing power over non-Indians on reservation); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (tribal sovereign immunity recognized); United States v. Wheeler, 435 U.S. 313 (1978) (double jeopardy inapplicable to double criminal prosecutions by United States and a tribe).

76. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 (1978).

77. *E.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982).

78. *E.g.*, Williams v. Lee, 358 U.S. 217, 223 (1959).

idea and would do away with it as an anachronism and a fiction.[79] Reflections on *Kagama* could inspire those Justices whose faith in the current approach is weakening or dead to refresh their thoughts and renew their efforts to maintain what is left of the sovereignty perspective—as bizarre and illogical as it is. Some sovereignty is better than none.

A third reason for rethinking *Kagama* is that it may lead to compensatory action by Congress. Money is always a possibility. Beyond that, however, Congress could confess error and admit the United States was wrong. Although the status quo ante *Kagama* may not be feasible, a recognition by Congress of the true tribal status could renew a sense of pride and self-esteem among the Indians. This is the remedy of restitution at its best.

Finally, *Kagama* should be remembered as one more item on the long litany of injustices to the American Indian.[80] That the case may have emasculated the tribes inadvertently and for their own good makes it worse in the sense that we did not think enough of them to realize what we were doing. Sometimes the unkindest cut is indifference. Whether or not it is too late to rectify the mistakes of *Kagama* for the benefit of the Indians, it is not too late to set the record straight for the benefit of the rest of us.

79. In Rice v. Rehner, Justice O'Connor for the majority made it clear that sovereignty is dispensable: "[I]f . . . we determine that the balance of state, federal, and tribal interests so requires, our preemption analysis may accord less weight to the 'backdrop' of tribal sovereignty." 463 U.S. 713, 721 (1983). In Oliphant v. Suquamish Indian Tribe, Justice Rehnquist, in summarizing his position, quoted the language from *Kagama* that denied sovereignty status to Indian tribes. 435 U.S. 191, 211 (1978). Again Justice Rehnquist, in a dissenting opinion joined by Justices White and Stevens, stated his perspective that "apart from those rare instances in which the State attempts to interfere with the residual sovereignty of a tribe to govern its own members, the 'tradition of tribal sovereignty' *merely* provides a 'backdrop' against which the pre-emptive effect of federal statutes or treaties must be assessed." Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 848 (1982) (emphasis added). Rarely does a Justice admit disenchantment as directly and simply as Justice Blackmun did when he wrote, "I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity." Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 178 (1977).

80. Although there may be disagreement concerning the extent of the injustices, that they existed and in great numbers is beyond question. For an interesting narrative on injustices concerning the Sioux and their loss of the Black Hills of South Dakota, see United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).