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Inequalities Embedded in the United States Legal System Through the Lens of Tribal Governments

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INEQUALITIES EMBEDDED IN THE UNITED STATES LEGAL SYSTEM
THROUGH THE LENS OF TRIBAL GOVERNMENTS

A Capstone Experience Manuscript

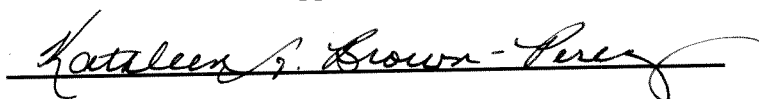
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A handwritten signature in cursive script, reading "Kathleen A. Brown-Perez", written over a horizontal line.

Professor Kathleen A. Brown-Perez, Commonwealth Honors College

ABSTRACT

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Author: Jessica Arthur, Sociology and Legal Studies

CE Type: Course Capstone Thesis

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Over the past 500 years, American Indians have been subjected to inequalities through the United States legal system as a result of the federal government's jurisdiction in Indian country, thus making tribal governments less powerful in Indian country and further expanding a jurisdictional void. Using scholarly literature accessed through the University of Massachusetts Amherst library database, law reviews, congressional legislation, and Supreme Court holdings this paper examines how the tribal government's power continues to be chipped away by Congress, through jurisdictional decisions and legislation, which develop in favor of the federal government. The three sovereign entities that have jurisdiction in Indian country are the federal government, tribal governments, and state governments. However, this judicial framework is complex and depends on the following: location, the crime, who committed the crime (the perpetrator), and whom the crime was committed against (the victim). Therefore, due to criminal jurisdiction in Indian country being based on the political status of American Indians it exemplifies inequalities in the United States legal system. In order to preserve and protect the economic, social, and cultural attributes of American Indians, tribal justice systems need to maintain their power. By taking away power from tribal government and allowing federal and state governments to prosecute crimes, it sends a message that tribal governments lack authority and are inferior to handle certain crimes. More importantly, the basic right of allowing tribal governments to maintain law within their reservations is fundamental to their survival as a community.

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CHAPTER ONE

INTRODUCTION

Through the past 500 hundred years, American Indians¹ have been subjected to inequalities through the United States legal system as a result of the federal government's jurisdiction in Indian country, thus making tribal governments less powerful in Indian country. In 1970, President Nixon's addressed the issue in a speech entitled "Special Message to the Congress on Indian Affairs" which stated:

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program, which is presently administered by a Federal agency (Richard Nixon).

¹ Although it is problematic to come up with one term to describe a large, diverse group of people, American Indian was chosen over Native American. One reason is that there is a preference for the word Indian among American Indians. In addition, most Indian organizations and groups such as the National Congress of American Indians, use Indian. Also, all federal Indian laws, such as the Indian Reorganization Act, and federal agencies, such as the Bureau of Indian Affairs, use Indian (Pevar 1). However, the best way to refer to an individual American Indian is with their relationship to their tribe.

President Nixon's speech demonstrates an example of executive branch acceptance of the tribal government. The federal government has recognized the importance of American Indian cultures, but sadly tribal governments are not recognized as a powerful governmental entity and do not exercise the power they once contained.

The three sovereign entities that have jurisdiction in Indian country are the federal government, tribal governments, and state governments (Cunningham 2189). However, this judicial framework becomes complex and depends on the following: location, the crime, who committed the crime (the perpetrator), and whom the crime was committed against (the victim) (Meisner 175). This framework exemplifies inequalities in the legal system because in the twenty first century a crime should not be evaluated based on race political status.

Consequently, this political struggle between federal, state, and tribal governments as to which has the sovereign right of jurisdiction in a situation has occurred for centuries. Indian tribes continue to have sovereign powers except those that have been established or restricted by treaties, agreements, or specific acts of Congress. However, it is important to remember that these powers were once held by the tribes, not the U.S. government which include the following inherent powers:

1. power to form a government.
2. power to define conditions for membership in the nation.
3. power to administer justice and enforce laws.
4. power to tax.
5. power to regulate domestic relations of its members.
6. power to regulate property use (King 198).

The United States has always been concerned with Indian affairs and took it upon them to claim this responsibility. However, federal and state governments provide little benefit to the tribes. One of the vital components for effective Indian tribal governments and justice systems is the availability of sufficient funding. In 1991, the U.S. Commission on Civil Rights noted the need for suitable funding for tribal governments. In addition, the American Indian Policy Review Commission noted the significance of tribal justice systems and advised Congress to provide adequate funding for their development and formation (Kickingbird).

In order to preserve and protect the economic, social, and cultural attributes of American Indians, tribal justice systems need to maintain their power. Since 1991, the Supreme Court has decided twenty-nine cases involving federal Indian law questions, and twenty-three of those were decided against the tribes (Krakoff 2). In 2008, the American Bar Association declared that tribal justice systems are the main institutions most suitable for maintaining order in tribal communities and also advocated for increased funding for the enhancement of tribal justice systems (Kickingbird). Overall, the tribal government's power continues to be chipped away by Congress, through jurisdictional decisions and legislation, which develop in favor of the federal government.

CHAPTER TWO

LITERATURE REVIEW

With regards to American Indian policy, United States Supreme Court holdings and legislation have, throughout the centuries, continued to repress tribal government's authority by limiting their jurisdiction. Extensive research includes a range of scholars who focus on the inequalities and hardships American Indians face from the federal and state governments. A wealth of literature has shown and supported that the role of the tribal government continues to be restricted by norms embedded in the federal government and legislation. This relationship between tribal, federal, and state governments is important to understand because if the government continues to promote inequalities towards American Indians, tribal government in the future will have virtually no power, thus further impacting their survival as a community.

Andrew Boxer, who was an Assistant Professor of Psychiatry at the University of Chicago, presents an overview of the relationship and complications between the federal government and American Indians. Due to the Marshall trilogy of Indian law decisions, *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, Chief Justice of the Supreme Court, John Marshall, recognized American Indians in 1831 as "unique" and "unlike any other minority" (Boxer). It was established that American Indians are both a separate nation, but part of the United States (Boxer). This "unique" status of American Indians assists in partly explaining why relations between the federal government and American Indians have been so troubled, which is also supported by Larry Cunningham. Larry Cunningham, who was previously an Assistant Professor of Legal Writing at St. John's, but is currently the Assistant Dean of Students, also states

that the Marshall Trilogy has laid the foundation for Indian law today (Cunningham 2188). Marshall's judgments implies that US should assimilate American Indians into mainstream American culture, but also suggests the federal government has an obligation to "care" for American Indians (Boxer).

Boxer goes on to further discuss several major events from the mid 19th century to the end of the 20th century, such as the General Allotment Act (also known as the Dawes Act). The Dawes Act virtually became an opportunity for "land-hungry" Americans to acquire American Indian land (Boxer). This act is significant because it demonstrates the inequalities in the federal government aimed at American Indians. Furthermore, this Act upheld the Supreme Court decision of *Lone Wolf v. Hitchcock*, essentially stating Congress was allowed to give away American Indian land without gaining consent of American Indians. Therefore limiting the power of tribes and what land they had control over. Consequently as a result, American Indian land shrank from 154 million acres in 1887 to 48 million a half century later (Boxer). Even though American Indians were the original inhabitants of North America, the federal government has not successfully resolved exactly what the status and identity of American Indians should be which contributes to the complexities of the relationship between federal and tribal governments (Boxer).

While examining United States case law, it is evident that the federal government continues to diminish the role of tribal governments in Indian Country, which is an aspect most leading scholars can agree on. In Mary Beth West's article, "Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal

Jurisdiction," she also states how tribal, state, and federal jurisdictions continue to be refined in Supreme Court cases.

Kevin Meisner, who is a published author on American Indian law, discusses how Congress has continued to take away power from American Indian tribes who once had jurisdiction over all people who committed crimes in Indian Country by citing *Oliphant v. Suquamish Indian Tribe* (Meisner 175). The Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*, held that tribal courts do not have the inherent jurisdiction to punish non-Indians (Cunningham 2188). In addition, because tribes do not have the judicial authority to prosecute crimes non-Indians commit in Indian Country, crime unfortunately often goes unpunished. Cunningham argues that the federal government is lenient because their time is focused on what they perceive to be important federal crimes (Cunningham 2188). Overall, federal courts are the sole government for prosecuting major crimes, demonstrating one of the ways in which the federal government takes power away from tribal governments.

Numerous scholars, such as N. Bruce Duthu, have recognized that by the Supreme Court implicitly limiting tribal authority it results in the Court's approach being flawed ("Divestiture of Tribal Powers" 354). Duthu was the Samson Occom Professor of Native American Studies at Dartmouth College and is an internationally renowned scholar of American Indian law and policy. Philip P. Frickey, who was a professor at University of California Berkeley and one of the nation's experts on public law and federal Indian law and policy, argues that federal Indian law justifies colonialism in the pursuit of Constitutionalism. Moreover, federal Indian laws have been illogical because the doctrines deviate from general principles of American law.

In addition to the Court's approach being flawed, Duthu believes this is occurring because the Court is burdened with historical and "ethnocentric" biases which retain tribal powers ("Divestiture of Tribal Powers" 356). Sarah Krakoff who is a professor at the University of Colorado School of Law and has published works in the areas of American Indian law also points out in her article, "Undoing Indian Law One Case At a Time: Judicial Minimalism and Tribal Sovereignty." Krakoff states that since 1991, the Court has decided twenty-nine cases involving federal Indian law questions, and twenty-three of them were against tribes (Krakoff 1178). By the Supreme Court constantly reaching holdings against tribes, it sets additional precedent resulting in continued oppression.

Scholars have also acknowledged the importance of case law on tribal sovereignty, which furthermore demonstrate the power struggle between tribal, federal, and state governments. Throughout Duthu's book, *American Indians and the Law*, he focuses on the constant battle between tribal and state governments over taxes, regulation, and gambling.

The Supreme Court decision of *Montana v. United States* also restricts tribal sovereignty because the Court held that tribes may not regulate non-Indian activity on fee land within the reservation (King 196). Melanie Reed is an associate at Covington & Burling LLP who states that like the Court's decision in *Montana*, is similar to *Nevada v. Hicks* because both cases limit the scope of tribal sovereignty. The Supreme Court held in *Nevada v. Hicks*, tribal courts to not have the authority to regulate state officials in investigation off-reservation violations of state law. In addition, *Nevada v. Hicks* also limits recourse against nonmember civil offenders (Reed 137).

Jamelle King is the personnel director Oklahoma City Area Indian Health Service at Indian Health Service. In his article, "Tribal Court General Civil Jurisdiction over Actions between Non-Indian Plaintiffs and Defendants: *Strate v. A-1 Contractors*," he discusses case law that centers on the continuing struggle of the tribal courts trying to maintain their jurisdiction such as *Strate v. A-1 Contractors*. The court ruled when an accident occurs on a public highway maintained by the State, although over Indian reservation land, a civil action falls within state or federal governance. King argues that the intention of the Supreme Court was erred, and then details the future consequences of this harmful decision (King 196). This decision was yet another approach to limiting the tribal government.

While addressing the views of leading scholars in American Indian law, it is important to examine standpoints that differ from articles discussed earlier. Charles F. Wilkinson is a Moses Lasky Professor of Law and his area of specialization includes American Indian Law. His book, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, looks at Indian law over the past twenty five years and considers the effects of time on law. Wilkinson discusses historical sources of Indian law such as treaty negotiations, the political theory behind sovereignty, and studies of social change. Wilkinson states that the United States Supreme Court has acted in a more favorable way towards tribes, as opposed to what other scholars have suggested. Furthermore, he states that the Court has protected a policy of separatism in American Indian law and policy (Wilkinson 6). Although Wilkinson is one of the few scholars who believe the United States has acted in a favorable way towards American Indians, it is important to see other positions.

Throughout American Indian history, not only has the federal government tried to decrease the power of tribal governments, but the state government has also tried to extend their laws into Indian Country. This idea is discussed by Clifford Lytle who is a published author on American law. In her article, "The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country," she states in the past the Supreme Court provided a barrier against the state government. However, recent decisions give American Indians less protection against the state (Lytle 65). This is important to note because it demonstrates American Indian policy is not moving forward and further enacts inequalities towards tribal governments.

Congress has continued to suppress and take away jurisdiction from tribal courts, not only through case law, but through statutes such as the Major Crimes Act and Public Law 280. The Major Crimes Act, transferred jurisdiction over certain offenses committed on Indian reservations to the federal government and Public Law 280 transferred complete civil and criminal jurisdiction to several states (Meisner 175). Kevin Washburn, who is an Associate Professor of Law at the University of Minnesota and writes in the areas of administrative law, American Indian law, criminal law and procedure, gaming law, and property, examines the injustices through the enactment of these legislations. In his article, "The Modern Structure and Process of Indian Country Criminal Justice," he focuses on the modern structure of criminal justice in Indian Country and the Major Crimes Act. He also states this law limits the tribal government's power. Furthermore, these statutes continue to oppress tribal governments by taking away their governing power.

It is important to note that many leading scholars agree that the Supreme Court is the institution least able to generate a satisfactory integration of federal Indian law, as suggested by Frickey in his article "(Native) American Exceptionalism in Federal Public Law (431)." In 2008 this opinion was also expressed by the American Bar Association by stating that tribal justice systems are the most appropriate institution for maintaining order in tribal communities (Kickingbird 16). Thus, tribal governments should be allowed to hold more power in the court system.

To help restore tribal governments, numerous scholars have suggested different approaches to give Courts better guidance in resolving questions about tribal authority. Such recommendations include, Duthu, who states that Congress should pursue to redirect the discourse on tribal-state-federal relations ("Divestiture of Tribal Powers" 356). In addition Kirke Kickingbird states tribes need authority to arrest non-Indians on Indian country because offenses hold little interest for the federal or state authorities. Kickingbird directed the American Indian Legal Resource Center at Oklahoma City University School of Law, where he was also a professor who focused on the history of the justice systems established by American Indians in the United States. Other suggestions include John Arai Mitchell who is an attorney that graduated from University of Chicago Law School and has published work examining tribal rights of self-government. Mitchell states tribal courts should speak as loudly as possible to express judicial assertion especially where state jurisdiction interferes with tribal common law (Mitchell 730). Lastly, Nell Jessup Newton who is a leading scholar of American Indian law and frequently writes on tribal property rights and rights to self-government, argues the Courts should apply a standard of inquiry in reviewing federal power (Newton 195).

Although there scholars suggest different approaches to increase tribal governments power, it should be noted that scholars believe tribes are putting forth effort to increase their power such as Dr. Tracey Skopek who is an Associate Professor at University of Wyoming where she teaches public policy and ethics in government. In Skopek, Engstrom, and Hansen's article, "All That Glitters...The Rise of American Indian Tribes in State Political Behavior," she believes tribal governments have adapted different strategies in pursuit of their goals by establishing a rigorous effort in their long term aim to prevent federal governments from seizing tribal lands, resources and wealth in the United States.

Society should be familiar with and understand the inequalities the government perpetuates towards American Indians. In order to recognize the tribal government's increasingly restrictive judicial power, the opinions of many scholars have been examined. Almost all American Indians scholars have stated that federal and state governments continue to restrain tribal government's power through Supreme Court holdings and legislation. Taking these scholars research and opinions will allow for a thesis that is supported by facts and examples.

CHAPTER THREE

EXPLANATION OF CURRENT METHODOLOGY

Research Methods

The primary concern addressed in this research is the diminishing power of tribal governments due to the United States legal system and the federal government's jurisdiction in Indian country, which creates a jurisdictional void. This research aims to explain the criminal jurisdiction in Indian country and how the political status of American Indians affects jurisdictional decisions and legislation. Thus the research illustrates how the inequalities in the United States legal system weaken the economic, social, and cultural attributes of American Indians.

The approach that is used in this research is a careful review of scholarly literature that was accessed through the University of Massachusetts Amherst library database. The literature includes academic peer reviewed articles, law reviews, congressional legislation, and Supreme Court holdings which were collected in a nine-month period in order to be as comprehensive as possible. In the future, this approach could be used to provide additional understanding of the topic addressed. The sources gathered were sufficient in proving that by Congress taking away power from tribal governments it affects their survival as a community.

CHAPTER FOUR

HISTORY

Overview

The first inhabitants of North America, the American Indians, began having their lives altered at the time of the European invasion, although American Indians are still experiencing colonization and its outcomes. In order to control and take away land from American Indians, who Europeans viewed as a burden to their resources, Europeans initiated an overall warfare that included violent attacks, seizing Indian property, and genocide on the entire American Indian population. Following European contact, it is estimated that within the first four centuries about 150 million Indians were murdered and the American Indian population had been reduced to 10% of its original size (Garret and Pitchette).

European settlers main goal centered around forced assimilation. Due to their discriminatory conceptions of Indians because of their color, appearance, and way of life, Europeans wanted to strip American Indians of their cultures and customs. By an Indian assimilating into mainstream American culture, it meant that Indians had to stop their own practices and go on to practice Christianity, speak English, wear western clothes, and abandon their hairstyles (Boxer 2). While American Indians who did not follow European traditions were murdered, by forcing Euro-American into mainstream culture also allowed for the population of Indians to decrease. Overall, Europeans wanted tribal structures, governments, practices, and traditional ways of life to be overthrown and replaced with their way of life through assimilation (Garret and Pitchette). This in return could cause Indians cultures and way of life to vanish.

General Allotment Act

In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, which allowed for individual Indians to acquire eighty acres of agricultural land or 160 acres of grazing land. Congress rationalized that by giving Indians land, Indians would become farmers, thus being a good stepping ground for assimilation (West 75). Once each Indian was allotted his land, the rest of the land became opened for non-Indian settlement. This created a checkerboard pattern of Indian and non-Indian settlement on Indian reservations (West 76). The General Allotment Act was a failure and resulted in Indian lands being reduced from 136,397,985 acres in 1887 to 48,000,000 acres by 1934 (Meisner 178). Overall, the General Allotment Act was a way for Congress to deal with individual Indians and not the tribes, which employs a divide and conquer strategy.

Indian Country and Indian Reservation

Additional strategies were developed by the federal government to continue the process of assimilation that began with removing American Indians to undesirable areas of the country or onto reservations. Presently, only two percent of the United States is Indian reservation and the land is usually not the tribe's traditional land, which creates cultural constraints on tribal members (Washburn 729). This allowed for Congress to define the term Indian country and reservation which sets forth the geographical framework of Indian country jurisdiction. The United States government argues that due to the responsibility to preserve public safety on Indian country, it allows for the entire federal government to have jurisdictional rights in Indian country. Yet, this justification does not comprise to the general community or the state (Washburn 729). Therefore, by

the federal government having increased governmental jurisdiction in Indian country it creates inequalities targeted against the Indian population that lives in Indian country.

Although many people use the terms Indian country and Indian reservation interchangeably, the term Indian country provides a broader concept than Indian reservation. The federal government set aside Indian reservation land for the use and benefit of an Indian tribe. Most reservations were created by a treaty, statute passed by Congress, or an executive order by the President (Pevar 24). All land within an Indian reservation is Indian country, even if the land is owned by a non-Indian. Furthermore, trust land, restricted Indian allotments outside the reservation, and dependent Indian communities are considered Indian country (Washburn 729). Indian country is defined by the law. 18 U.S.C. § 1151 provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter, means

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Assimilation through Termination

In 1952, the United States federal government adopted a policy of assimilation through termination. The government wanted to end the trust relationship with Indian tribes by declaring if a tribe was economically stable and capable of managing its own affairs, a tribe could be terminated. This meant that if a tribe was terminated the government would not hold the tribes land in trust or provide services to the tribe (Meisner 178). Assimilation through termination left the tribes' societies, cultures, and justice systems at risk (Kickingbird).

CHAPTER FIVE FEDERAL POWER OVER AMERICAN INDIANS

Overview

The Supreme Court cites the Commerce Clause in the United States Constitution as the legal reason why the federal government exercises power over American Indians. Article I, section 8, clause 3 states that “Congress shall have the power... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In older Supreme Court decisions, the federal government maintained their power over American Indians because of *Johnson v. McIntosh*, 21 U.S. 542 (1823). The Supreme Court held that due to the “discovery” of North America by Europeans and the “conquest” of its people, the federal government was permitted to impose laws over all inhabitants and property in the United States (Pevar 59). Overall, the federal government and court continue to uphold its authority over Indian tribes.

Plenary Power

The term “plenary power” refers to Congress’s absolute authority and power over American Indian tribes, governments, members, and their property (Pevar 59). In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), the Supreme Court stated “Congress possess plenary power over Indian affairs, including the power to modify or eliminate tribal rights” and can also recognize or destroy an Indian tribe. Moreover, Congress can declare tribal laws invalid and can sell reservation land because the federal government owns it (Meisner 178). Thus, this broad power determines the power the federal government, tribal government, and state government can exercise, including the authority to determine the jurisdictional framework in Indian country.

Although few federal Indian laws have been overturned, Congress has limits on their power over American Indian affairs due to Due Process and the Just Compensation Clauses, which are contained in the Fifth Amendment² to the United States Constitution. The Due Process Clause states that no individual may be deprived of life, liberty, or property without due process of law. Accordingly this clause prohibits Congress from passing any laws that are unreasonable or discriminatory. Many American Indians have challenged laws under the Due Process Clause, but have lost many of the cases. The Just Compensation Clause provides that the federal government cannot take private property without paying adequate compensation (Pevar 60). The Court held that fair compensation must be required for loss of hunting and fishing rights³, taking land belonging to an Indian⁴, taking land belonging to a tribe⁵, and the loss of an Indian's tax immunity⁶.

² U.S. Const. amend. V. This amendment prohibits the taking of private property for public use without just compensation. It has been held to pertain to Indian property rights "recognized" by Congress, such as by treaty or statute.

³ *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968)

⁴ *Babbitt v. Youpee*, 519 U.S. 234 (1997)

⁵ *Shoshone Tribe of Indians v. U.S.*, 299 U.S. 476 (1937)

⁶ *Choate v. Trapp*, 244 U.S. 665 (1911)

CHAPTER SIX MARSHALL TRILOGY

Overview

The Marshall Trilogy is comprised of three landmark Supreme Court decisions that have paved the foundation for present Indian law (Cunningham 2187). Chief Justice of the Supreme Court John Marshall set forth a relationship among tribes, the federal government, and the states.

Johnson v. McIntosh, 21 U.S. 542 (1823).

After the United States gained its independence from England, it had to determine who owned the land occupied by American Indians. The issue in this case stemmed from whether a non-Indian who purchased land from an Indian tribe had obtained a valid title to land. The Supreme Court held that the non-Indian did not have a valid title because the tribe did not have the right to sell land. Due to the United States government “discovery” of North America and the “conquest” of its inhabitants, the U.S. was the owner of all the land and titles. Furthermore, the Court held that Indian tribes have a right to occupy and use the land, but the federal government could terminate this use whenever it pleased (Pevar 24).

The first time the Court defined the federal government’s relationship to American Indians is seen in *Johnson v. McIntosh*, which developed a theory of Indian submissiveness to the federal government. Because the federal government claimed ownership of all the land, which is one of Indians most valuable resource, tribes were lowered to a dependent status. This established a “landlord-tenant relationship” between Indian tribes and the government. The federal government acted as the “landlord” and

controlled the power to abolish any Indian tribe who occupied the governments' land. Presently, much of the power the federal government has over Indian affairs derives from the concept of ownership over the land that was once only occupied by solely American Indians (Lytle 66).

Overall, the federal government strengthened its power by becoming the owner and regulator of the land, which ultimately affected the lives of American Indians. This impacted Indians because every single Indian lost a fundamental aspect necessary to their survival. Moreover, this gave federal government the authority to govern Indians and change their cultures and overall way of life.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831)

Cherokee Nation v. Georgia established that Georgia did not have authority to regulate the intercourse between citizens of its state and members of the Cherokee Nation Indian tribe. The precedent of Indian tribes being categorized as "domestic, dependent nations" was also established in this case. Marshall reasoned that Indians have a right to occupy the land, however because the land was in the territory of the United States, the United States asserted a title independent of the Indians' will (Lytle 68).

This Court decision laid the building blocks for the federal government to have responsibility over Indian affairs (Lytle 68). This decision continued to take away power from the tribes and result in the federal government to become more powerful.

Worcester v. Georgia, 31 U.S. 515 (1832).

The issue in *Worcester v. Georgia* was whether the state of Georgia could impose its laws on the Cherokee Indian land, which was located in the state. The Court held that Georgia could not extend its laws into Cherokee land, thereby protecting Indian tribes

from state intrusions. Marshall stressed that Indians were involved in their own self-government and had their own political institutions (Lytle 70).

However, this victory for Indian tribes has flaws. The state of Georgia proclaimed that it was not going to observe the Court's order and was firm on wanting to remove the Cherokees from Georgia. With President Jacksons having no opposition to Georgia, the Cherokees were forced out of Georgia on a long journey that became known as the Trial of Tears due to the thousands of Cherokee who died while walking to what later became Oklahoma (Lytle 71). Moreover, recent Supreme Court decisions have chipped away at the immunity that Indian tribes processed from state infringement. Thus, tribal governments are becoming increasingly less powerful as the approval for state jurisdiction into Indian country continues.

CHAPTER SEVEN JURISDICTION GUIDELINES FOR PROSECUTION

Determinants of Governmental Jurisdiction

The division of jurisdiction between tribal, federal, and state governments has been forming since the early nineteenth century (West 71). Each is allowed exclusive, concurrent, or no jurisdiction depending on certain variables, however this test has changed over the years because of Congress' decision making. Due to this multifaceted jurisdictional framework in Indian country, an inquiry of five questions needs to be asked in order to determine which government has jurisdiction over a crime. These questions are: Where was the location of the crime? Does a federal statute allow a state to exercise jurisdiction? Is federal law relevant? Is the victim Indian or non-Indian? Is the accused offender Indian or non-Indian? And what are the categories of victim and offender? (Cunningham 2189)

In-depth look at Determinants

The first issue relates to whether the crime occurred in or out Indian country. If the crime did not occur in Indian country, the state government has jurisdiction. If the crime occurred on federal land within a state, then the federal government has jurisdiction. If the crime occurred in Indian country, the analysis proceeds to whether states have jurisdiction under Public Law 280. If the crime was committed in a state that falls under Public Law 280, then that state has jurisdiction; if not the analysis proceeds. In the alleged crime is a crime under federal statute, such as treason, then the federal government has jurisdiction; if not the analysis continues. Next, the offender and victim's

tribal affiliation and political classification needs to be determined in order to decide whether federal, tribal, or state governments have jurisdiction (Cunningham 2189-91).

CHAPTER EIGHT

CRIMINAL JURISDICTION OVER INDIANS AND NON-INDIANS

Overview

With regard to criminal jurisdiction over Indians and non-Indians, the political status of the victim and defendant matters in order to establish the correct government entity that has jurisdiction and under what act the defendant will be prosecuted. The following indicates the political status of the offender and of the victim and the different jurisdiction each would be prosecuted under.

Member v. Non-Member Indians

The term Indian tribe can have more than one definition. A group of Indians can call themselves a tribe and others can recognize them as a tribe. However to get benefits from Congress, the tribe must meet the requirements by the Department of the Interior (Pevar 20). Thus, tribes are defined by their political identity and governmentally sponsored distinctions between Indians and non-Indians center around the tribal affiliation and not race. This is most obvious in how the law deals with Indians on non-federally acknowledged tribes. For instance, American Indians whose tribes are not federally acknowledged as sovereign nations are treated as non-Indians, despite their racial category. Only Indians whose tribes are federally acknowledged are treated differently.

Effects on Prosecution**If the crime committed is a Major Crime**

If the offender is Indian and the victim is Indian the federal government has jurisdiction under the Major Crimes Act, the state has no jurisdiction, and the tribe has inherent

sovereignty. Additionally, if the offender is Indian and the victim is non-Indian the federal government has jurisdiction under the Major Crimes Act, the states have no jurisdiction, and tribes have jurisdiction concurrent with the federal government (Cunningham 2192). In addition, if the offender is non-Indian and the victim is Indian then the federal government has jurisdiction under the Indian Country Crimes Act. Lastly, if the offender is non-Indian and the victim is non-Indian then only the state has jurisdiction (Pevar 145).

If the Crime Committed is Not a Major Crime

If the Indian is accused and the victim is an Indian, the tribal government has jurisdiction due to inherent sovereignty. If the Indian is accused and the victim is non-Indian then the federal government has jurisdiction under the Indian Country Crimes Act and the tribal government has inherent sovereignty. Next, if a non-Indian is accused and an Indian is a victim, the federal government has jurisdiction under the Indian Country Crimes Act. Lastly, if a non-Indian is accused and a non-Indian is the victim, the state government has jurisdiction (Pevar 145).

Conclusion

Jurisdiction in Indian law is largely dependent on the political status of the parties involved, which should not be the case in the twenty-first century. American Indians are the only population in the United States that has laws directly influenced by their political status, which exemplify the inequalities Indians face through the legal system.

CHAPTER NINE

LEGISLATION

Overview

When Congress wants to permit a restraint on tribal self-government, it can act without limitation and has done so specifically by enacting a complex jurisdictional framework (King 216). This section outlines legislation enacted by Congress that imposes inequalities among tribal governments and American Indians. With the combination of federal government's definition of Indian country, the Major Crimes Act, the Indian Country Crimes Act, and Public Law 280, American Indians are subjected to structural violence and discrimination that is embedded in federal legislation. This reinforces that tribal governments lack jurisdiction for serious crimes in Indian country, and that these crimes should be handled by federal and state government.

The Major Crimes Act, 18 U.S.C. § 1153

In 1885, Congress passed the Major Crimes Act, which allowed federal officials to prosecute Indians who committed certain crimes on the reservation. It allows the federal government jurisdiction over major crimes that include: murder, manslaughter, kidnapping, and rape. The MCA has been amended and includes: maiming, felony sexual abuse, incest, assault with intent to murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and felony theft or embezzlement (Cunningham 2192).

This act was enacted in response to *Ex parte Crow Dog*, 109 U.S. 556 (1883), which involved the murder of a Brule Sioux chief by a fellow tribal member within the

reservation. Although each of the families resolved the matter in accordance with the tribal government, Crow Dog was tried in the United States Court, found guilty, and was sentenced to hang. The Supreme Court reversed the tribe's decision due to the "nature and circumstance of the case (*Crow Dog*, 109 U.S. at 571)."

Overall, the Major Crimes Act encroached into the area of tribal government and allowed federal law enforcement to be the primary government for prosecuting serious crimes in Indian Country (Washburn 717).

The Indian Country Crimes Act, 18 U.S.C. §1152

Jurisdiction over crimes not covered by the Major Crimes Act is covered by the Indian Country Crimes Act, also known as the General Crimes Act⁷. The Indian Country Crimes Act states that the federal laws that apply to locations within exclusive jurisdiction of the federal government apply in Indian country. These federal laws are known as the federal enclaves' laws. An example of a federal enclaves law is the Assimilative Crimes Act, 18 U.S.C. § 13, which provides that any state criminal law of a particular state can be adapted if there is no federal criminal law present.

The Indian Country Crimes Act allows the federal government to prosecute any possible offense, whether misdemeanor or felony. Federal courts have determined that

⁷ The Indian Country Crime Act Section 1152 declares:

Except as otherwise expressly provided by the law, the general laws of the United States as to the punishment of offenses committed in any place, within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian community an offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

this Act cannot be used to prosecute a crime if an Indian is not involved. Overall, this Act is only applicable if an Indian commits a crime against a non-Indian (Washburn 716). By having jurisdiction that only a certain segment of the population can be prosecuted under, the Indian Country Crimes Act exhibits an inequality against American Indians from federally acknowledged tribes.

Indian Civil Rights Act, 25 U.S.C. §1301

Additional legislation that takes away power from the tribes is the Indian Civil Rights Act. The protections of ICRA are found in 25 U.S.C. S 1302, which provides:

No Indian tribe in exercising powers of self-government shall-

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
3. subject any person for the same offense to be twice put in jeopardy;
4. compel any person in any criminal case to be a witness against himself;
5. take any private property for a public use without just compensation;
6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

7. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [1] a fine of \$5,000, or both;
8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
9. pass any bill of attainder or ex post facto law; or
10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

The Indian Civil Rights Act takes away jurisdictional power of tribes by not allowing them to punish crimes with sentences greater than one year of imprisonment or a fine of more than \$5,000. As a result, because of the sentence limitation, tribes prosecuting any offense that would normally be considered a federal offense would be a misdemeanor. Thus, only federal governments can address serious crimes that have sentencing (Washburn 772). The Indian Civil Rights Act thus has the effect of demonstrating the importance of the federal government jurisdiction in Indian country and the dominance the federal government has over tribal government.

Public Law 83- 280 (codified as 18 U.S.C. §1162, 28 U.S.C. § 1360)

This law chipped away at *Worcester v. Georgia* and gave states further criminal jurisdiction, limiting tribal government power. However, Public Law 280 is not a “great force” in Indian law because it was amended and states now cannot have jurisdiction over tribes without the tribe’s consent (Meisner 180). The six states that have full criminal jurisdiction in Indian country are Alaska, California, Minnesota, Nebraska, Oregon, and

Wisconsin. The other 42 states were allowed to accept jurisdiction at their option, which Florida, Nevada, Idaho, Iowa, Washington, South Dakota, Montana, North Dakota, Arizona, and Utah did prior to the amendments.

CHAPTER TEN

CRIMINAL JURISDICTION

Overview

American Indian scholar Charles F. Wilkinson argues that the Supreme Court “has cut directly against the normal inclinations of Anglo-American judicial decision making by enforcing laws of another age in the face of compelling, pragmatic arguments that tribalism is anachronistic, antiegalitarian, and unworkable in the context of contemporary American Society (5).” Federal courts have acted to limit tribal criminal jurisdiction in Indian country that can be seen in the following holdings which reaffirms that the Supreme Court is the institution least able to generate a satisfactory integration of federal Indian law (Frickey 437).

United States v. McBratney, 104 U.S. 621 (1881).

The Supreme Court held that the states have criminal jurisdiction over crimes committed by a non-Indian against another on Indian reservations. This holding changed the decision of *Worcester v. Georgia* (1832) and took away further power from tribal governments.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

This case arose when two non-Indians who both lived on the reservation, Mark David Oliphant and Daniel B. Belgarde, violated the Suquamish Law and Order Code. Oliphant was arrested for assaulting a police officer and then resisting arrest, while Belgarde was charged with reckless endangerment. Belgarde was involved in a high-speed chase with tribal police officers on reservation land where he crashed into a police

care. Both Oliphant and Belgarde were arraigned in tribal court and charged with their independent violations of the Law and Order Code (Cunningham 2193).

Oliphant stated that tribes do not have the inherent jurisdiction to punish non-Indians who commit crimes against Indians, thus further taking away tribal jurisdiction. The tribe argued that due to its tribal sovereignty, the tribe should be allowed to exercise jurisdiction over all persons on a reservation. However, the six-to-two majority of the Court held that the Suquamish Indian Provisional Court did not have jurisdiction over Oliphant and Belgarde.

Oliphant denies tribal governments the right to punish offenders (Cunningham 2201). It affirms the principle that Indians are virtually powerless to stop people of other races who commit crimes against them (Cunningham 2195).

Duro v. Reina, 495 U.S. 676 (1990)

Duro v. Reina further limited the power of the tribal court to punish people who are not members of their tribe. On the Salt River Indian Reservation, which is the home of the Salt River Pima-Maricopa Indian Tribe, Albert Duro, an enrolled member of another tribe, the Torres-Martinez Band of Cahuilla Mission Indians, allegedly killed a boy on the Salt River Indian Reservation. The tribe attempted to punish Duro in tribal court. The Supreme Court held that Indian tribes did not have jurisdiction over Indians who were members of other tribes. However, after *Duro* was decided, Congress exercised its plenary power and altered the result the Supreme Court decision. Congress said that tribal courts are allowed to exercise criminal jurisdiction over all Indians, not just members (Cunningham 2196).

By Congress changing the *Duro* decision, shows an aspect of inequality in different jurisdictions of law. For instance, non-Indians are immune from prosecution in tribal court, because of the inherent biases legislators think are present among Indian tribal courts. Yet, nonmember Indians are subjected to that tribal court's jurisdiction. This leaves one to argue if the alleged biases against nonmember Indian are any less serious than the alleged prejudice against non-Indians? (Cunningham 2196-97).

CHAPTER ELEVEN
CIVIL JURISDICTION

Montana v. United States, 450 U.S. 544 (1981)

The Supreme Court held that Indian tribes could not regulate hunting and fishing by non-Indians on land they owned within Indian country. The Court created two exceptions where a tribe has authority by stating “[a] tribe may regulate, through taxation licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members” and “[a] tribe may...retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

This decision took away tribal government’s right to regulate land and “severely restrict[ed] tribal sovereignty.” This decision also laid the foundation that as a general rule tribes cannot regulate non-Indian activity on fee land within the reservation (King 196).

South Dakota v. Bourland. 508 U.S. 679 (1993)

Congress held that a non-Indians right to use Indian country implies the loss of the tribes’ right, and thus tribes may not regulate activities of non-members on the land. Therefore, continuing to suppress tribal governments by not letting them regulate land.

Bourland involved the governmental taking of 104.420 acres of trust land belonging to the Cheyenne River Sioux Tribe for the Oahe Dam and Reservoir Project. In discussing *Montana* and *Bourland*, the Supreme Court stated these two cases established

that when an Indian tribe gives ownership of tribal land to non-Indians, it loses any right of absolute and exclusive use and occupation of the lands.

Strate v. A-1 Contractors. 117 S. Ct. 1404 (1997)

The Supreme Court held that tribal courts do not have jurisdiction when an accident happens on a public highway maintained by the state. In 1970, the Secretary of the Interior granted the State authority to maintain 6.59 miles of Highway 8 within the reservation, making the tribe and the state responsible for the rules of Highway 8. However, the tribe and the Bureau of Indian Affairs were primarily responsible for regulation (King 200).

On November 9, 1990, there was a two vehicle collision that occurred on Berthold Indian Reservation between Lyle Stockert and Gisela Frederick. Due to the accident, Gisela Frederick was hospitalized for twenty-four days, which amounted up to \$30,000 (King 200).

Gisela Frederick was a non-Indian, but because she was the widow of a deceased tribal member and all five of her children claimed tribal membership, she was also a member of the Indian community life and Reservation. Lyle Stockert was an employee for A-1 Contractors who operated a non-Indian subcontracting company off the reservation. However, A-1 Contractors were performing work on the reservation under a subcontract agreement for LCM, a corporation owned by the tribe. In the contract, A-1 agreed to be bound by the tribal building codes, employment rights codes, and the regulations appropriate to tribal governments (King 200).

The Supreme Court held that tribal courts may not exercise jurisdiction when an accident occurs on public highway maintained by the state. The Court relied on three

basic principles to justify their decision, which were: first, because there was no federal statute or treaty, tribal jurisdiction over nonmembers' conduct occurs only in limited circumstances. Second, Montana controlled the outlook of the case. Third, highway North Dakota acquired, was equivalent to, non-Indian owned land within the reservation (King 208).

The Court concluded with the following pronouncement in footnote 14:

When...it is plain that no federal grant provided for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay (at 1416)

By the Supreme Court prohibiting tribal court jurisdiction, it weakens the tribal police to efficiently patrol and enforce the laws of their land (King 212). Furthermore, by the Court stating "in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes," the bias of the Court is shown. *Strate* further proves the inequalities tribal governments are subjected to through when the Court takes away their governing power.

CHAPTER TWELVE

ARGUMENTS FOR /AGAINST SUPPORTING FEDERAL GOVERNMENT

Support for and Against Federal Government Authority in Indian Country

The Supreme Court believed that subjecting non-Indians to tribal laws would be unfair, however a closer look at these arguments demonstrates that they are not as powerful and should not overcome Indian law.

First, the Court said that since tribal laws are so different from state laws, federal and the laws of other tribes, they create cultural standards non-Indians and nonmember Indians are not accustomed to. However, non-Indians and nonmember Indians would recognize most of the criminal prohibitions because the laws used in the tribal court do not considerably differ from state laws, federal laws, and the laws of other tribes. (Meisner 197-200).

Others have argued because non-Indians do not participate in tribal government and have no say in the creation of the tribal laws; they should not be subject to those laws. Contrary, the notion that non-Indians and nonmember Indians do not participate in tribal governments and the creation of tribal laws should not affect tribal criminal jurisdiction. Reason being that a person from New York who commits a crime in Florida cannot argue that Florida has no jurisdictional void because they did not vote in Florida (Meisner 197-200).

Finally, because Indian tribal courts are not bound by the United States Constitution, it is feared that people charged with offenses in the tribal courts may be denied their constitutional rights to equal protections and due process. However, the

Indian Civil Rights Act guarantees procedural rights to anyone tried in Indian tribal court, thus this is an inadequate argument (Meisner 197-200).

CHAPTER THIRTEEN

NEGATIVE EFFECTS ON TRIBAL COMMUNITY

Overview

By the increasing power of federal and state jurisdiction in Indian country, American Indians are experiencing negative effects on their tribal community and way of life. This is shown through the prevalence of crime and violence to which Indians are subjected. In addition, practical problems occur when a member of the tribal community is prosecuted under federal jurisdiction. Furthermore, practical problems also occur when federal and state governments do not have time to exercise their jurisdiction when crimes occur in Indian country.

Crime

Non-Indian crime is prevalent on Indian reservations. Since the Indian tribes lack criminal jurisdiction over non-Indians, the Court has forced the Indian tribes to depend on state and federal courts to prosecute non-Indians who commit crimes in Indian country (Meisner 181).

Violence

Structural violence is embedded in the United States social structure and is a process that endorses injustices toward segments of the population that are at a disadvantage. American Indians are subjected to structural violence because of the sociopolicy in law. This sends a powerful message because while Indians account for only 0.9% of the United States population, approximately 2,357,000 persons, Indians are victims of violent crimes at a rate twice that of the national population (Cunningham 2197)

Violence among American Indians is common and is examined in the following studies. From 1992 through 2001, the average annual rate of violent victimizations among Indians was 101 per 1,000 residents twelve years of age and older. This compares to fifty violent victimizations per 1,000 blacks, forty-one per 1,000 whites and twenty-two per 1,000 Asians (Washburn 714).

Furthermore, in 1999, the Department of Justice published a study, *American Indians and Crime*, which collected statistics on crime against Indians from a variety of sources. The study concluded that American Indians suffer from certain violent crimes, such as rape and robbery, at a rate twice the national average. Approximately 30,000 crimes of violence are committed against Indians each year (Cunningham 2197). While a nationwide survey of crime victims found that blacks and whites suffered from interracial violence at rates of approximately 20% and 30% respectively, Indians were the victims of interracial violence at a rate of 70%. Approximately 90% of Indian victims of rape or sexual assault reported that their attackers were non-Indian. The astonishing reality of these statistics is that Indian tribal courts do not have jurisdiction over 70% of all violent crimes against their members and 90% of sexual assault against their members, because the offenders are of different races (Cunningham 2197-2198).

The prevalence of crime and violence among American Indians shows alarming statistics. Indians face an unreasonably higher rate of violent crime more than any other population in the United States. Moreover, the sad truth remains that crimes against Indians are committed by non-Indians, which highlights the importance for prosecution of non-Indian offenders against Indian victims (Cunningham 2198).

Practical Problems between Indian Community and Prosecution

If an American Indian were to commit a felony against another Indian on the reservation, the crime would set forth a federal court proceeding under the Major Crimes Act. The Indian could be summoned to federal district court that is far away from the reservation and community (Washburn 710). If the defendant is convicted at trial, he will be sentenced to federal guidelines, such as mandatory minimum sentences. Thus, the defendant may be forced to serve a longer sentence than the average sentence for a crime that is a similar offense but occurred in a different state (Washburn 724).

After sentencing, the defendant is most likely going to be assigned to a prison that is located a considerable distance away from the reservation. This makes it more difficult for the defendant to have visitors, which can deny the defendant emotional support (Washburn 724).

Unwillingness to Exercise their Authority

Although the FBI has investigative jurisdiction over all the crimes listed in the Major Crimes Act, Indian country cases differ from most other crimes investigated by the FBI and does not require the skills of the FBI. Given the FBI's responsibilities, Indian country crimes rarely rank high among the FBI's priorities (Washburn 718). This is also illustrated with United States Attorneys by abandoning their responsibility to prosecute crimes in Indian country committed by non-Indians (Cunningham 2188).

CHAPTER FOURTEEN

CONCLUSION

American Indians continue to be subjected to inequalities through congressional action, which allows for the further expansion of a jurisdictional void. In the twenty-first century the United States should not deprive tribes the authority to exercise jurisdiction. By taking away power from tribal governments and allowing federal and state governments to prosecute crimes, it sends a message that tribal governments lack authority and are inferior to handle certain crimes. Tribal jurisdiction is not a new phenomenon; therefore we should respect their judicial framework and decisions (Meisner 187). More importantly, the basic right of allowing tribal governments to maintain law within their reservations is fundamental to their survival as a community.

In the last fifteen to twenty years, tribal court systems have evolved and developed significantly. Many issues such as domestic relations, child custody, probate, tort and criminal prosecutions, may achieve a more satisfactory resolution in tribal judicial systems because of their closeness of the relations among the parties and the court (King 218).

As the twenty-first century approaches tribal judiciaries should not be limited in their jurisdiction and decision making. Moreover, a fair and impartial tribal judiciary should be recognized (Kickingbird).

Overall, federal Indian country regime creates a complex paradox that takes away control from tribal leadership and places control to federal officials who have little accountability to the tribal community (Washburn 740). In return, it discriminates against tribal governments and results in their cultures being threatened.

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