SEPARATE BUT UNEQUAL: THE FEDERAL CRIMINAL JUSTICE SYSTEM IN INDIAN COUNTRY

TROY A. EID* & CARRIE COVINGTON DOYLE**

In this Article, Troy Eid, a former United States Attorney for the District of Colorado, and Carrie Covington Doyle conclude that the federal criminal justice system serving Indian country today is "separate but unequal" and violates the Equal Protection rights of Native Americans living and working there. That system discriminates invidiously because it categorically applies only to Native Americans and then only to crimes arising on Indian lands. It is unequal because it is largely unaccountable, needlessly complicated, comparatively under-funded, and results in disproportionately more severe punishments for the same crimes, especially for juveniles.

This Article traces the historical foundations of criminal justice in Indian country with emphasis on the Major Crimes Act of 1885 ("MCA") to demonstrate that Congress's decision to extend federal jurisdiction to Indian reservations was ill-

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* Shareholder and co-chair, American Indian Law Practice Group, Greenberg Traurig, L.L.P., Denver; and adjunct professor of American Indian Law, University of Colorado Law School. United States Attorney for the District of Colorado, 2006–09. A.B., Stanford University, 1986; J.D., University of Chicago Law School, 1991; Law Clerk to the Honorable Edith H. Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, 1991–92. This Article began as a presentation to the *University of Colorado Law Review* Symposium: "The Next Great Generation of American Indian Law Judges," on January 29, 2010. Thanks to Jim Allison, Les Anderson, Kee Allen Begay, Diandra Benally, Steve Bloxham, Kristen Carpenter, Cynthia Carter, Chris Chaney, Sam Deloria, Louis Denetsosie, Janelle Doughty, Michon Eben, John Echohawk, Allison Eid, Judy Evans, Matthew Fletcher, Paul Frye, David Getches, Albert Hale, Gary Hayes, Nicki Herberle, Ernest House, Jr., Ernest House, Sr., Sarah Krakoff, David Lester, Bernadine Martin, Paul Nitze, Todd Norvell, Peter Ortego, Frank Pommersheim, Rebecca Root, Viola St. Clair, Chaitna Sinha, Celene Sheppard, Gerald Skelton, Paul Spruhan, Richard Trudell, Kim Varilek, Kevin Washburn, Jennifer Weddle, Charles Wilkinson, Sam Winder, and Jim Zion for their insights and encouragement. The views expressed here are ours alone.

** Associate, Gutterman Griffiths PC, Littleton, Colorado. B.A. Rice University, 1998; M.A. in American History, University of Utah, 2004; J.D., University of Colorado Law School, 2009; Law Clerk to the Honorable John R. Webb, Colorado Court of Appeals, 2009–10. The author thanks Troy Eid for this opportunity; Charles Wilkinson for giving me roots and wings; the inspirational Indian law faculty at CU Law School; Alison Flint and Kim Perdue; and, ever, Ben Doyle.

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considered and meant only as a temporary expedient. Imposed by Congress with racist intentions in the late nineteenth century, that system still fails to satisfy even the minimum standards of fairness and equality that the Constitution is commonly understood to afford to all U.S. citizens under the Fourteenth Amendment.

A careful review of the MCA and its racist origins is long overdue and relevant to today's debate over the future of the federal criminal justice system in Indian country. Congress's extension of federal jurisdiction to Indian reservations was central to the federal government's forced-assimilation policy and the destruction of traditional tribal institutions, values, and culture in the late 1800s. Yet even as national policies toward Indians have changed dramatically in recent decades, the architecture of the federal criminal justice system in Indian country has remained stubbornly frozen in time and poses a serious obstacle to tribal sovereignty and self-determination.

Eid and Doyle explore how this "separate but unequal" federal criminal justice system systematically discriminates against Native American crime victims and offenders alike. There is a constitutional imperative, they argue, to end the federal government's role in Indian country as it currently exists. The remedy for this lingering injustice is for the President, Congress, and Supreme Court to return to constitutional first principles.

Eid and Doyle recommend that Indian tribes and nations be provided with far greater freedom to choose when and how to design and run their own criminal justice systems within the federal constitutional scheme. This includes the option of abandoning the MCA and exiting federal criminal jurisdiction entirely for offenses that would otherwise be purely local in nature, substituting tribal law and institutions in place of federal command-and-control policies.

INTRODUCTION

As the United States Supreme Court heard oral arguments in *Brown v. Board of Education*,[1] Justice Robert H. Jackson asked petitioners' counsel, Thurgood Marshall, if his clients' challenge to state-supported school segregation would also ap-

1. 347 U.S. 483 (1954).

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ply to Native Americans.[2] Marshall said he thought so, but "the biggest trouble with the Indians is that they just have not had the judgment or the wherewithal to bring lawsuits."[3]

"Maybe you should bring some up," Justice Jackson suggested.[4]

Marshall replied, "I have a full load now, Mr. Justice."[5]

Marshall never did bring up such a case.[6] His exchange with Justice Jackson in *Brown* is all but forgotten today, along with Jackson's description of the federal government's official policy toward Native Americans living and working on Indian reservations as "the segregation of the Indians."[7] *Brown* overturned *Plessy v. Ferguson*,[8] in which the Court had endorsed racial discrimination against African-Americans in public facilities under the so-called "separate but equal" doctrine.[9] Congress and the President went on to pass the Civil Rights Act[10] and the Voting Rights Act[11] to provide anti-discrimination enforcement tools to protect rights promised a century earlier by the Fourteenth[12] and Fifteenth Amendments,[13] but were suppressed against African-Americans in much of the country.

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2. Transcript of Oral Argument at 17, *Brown*, 347 U.S. 483, (No. 101), *available at* http://www.lib.umich.edu/brown-versus-board-education/oral/Marshall&Davis.pdf.

3. *Id.*

4. *Id.*

5. *Id.*

6. Marshall later authored several foundational opinions of modern Indian law as a Supreme Court Justice. CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 248 (2005). *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973). Although the modern tribal sovereignty movement benefited from the momentum of the Civil Rights movement, its goal of reversing forced assimilation was distinct from the Civil Rights goal of ending segregation. WILKINSON, *supra* note 6, at 129.

7. Transcript of Oral Argument at 17, *Brown*, 347 U.S. 483, (No. 101), *available at* http://www.lib.umich.edu/brown-versus-board-education/oral/Marshall&Davis.pdf. Jackson, a former U.S. attorney general, served as the chief prosecutor in the Nuremberg trials against Nazi Germany and was no stranger to human rights issues. *See generally* GAIL JARROW, ROBERT H. JACKSON: NEW DEAL LAWYER, SUPREME COURT JUSTICE, NUREMBURG PROSECUTOR (2008).

8. 163 U.S. 537 (1896).

9. *Brown*, 347 U.S. at 495 (1954) ("We conclude that . . . 'separate but equal' has no place.").

10. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)).

11. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

12. U.S. CONST. amend. XIV.

13. U.S. CONST. amend. XV.

Brown catalyzed a Civil Rights Movement that finally exposed "separate but equal" for what it really was: separate but *unequal*. Yet, more than a half-century later, the federal criminal justice system in Indian country[14] still often fails to satisfy even the minimum standards of fairness and equality that the Constitution is commonly understood to afford to all U.S. citizens under the Fourteenth Amendment.[15] That system is *segregated* because it categorically applies only to Native Americans and then only to crimes allegedly committed on Indian lands.[16] It is *unequal* because it is largely unaccountable, needlessly complicated, comparatively under-funded, and results in disproportionately more severe punishments for the same crimes, especially for juveniles.

This Article traces the segregationist roots of the federal criminal justice system in Indian country to the *Plessy* era of racial and ethnic intolerance and examines how this separate but unequal system of justice endures in Indian country today.[17] Part I outlines the historical foundations of criminal justice in Indian country with emphasis on the Major Crimes Act ("MCA")[18] to demonstrate that Congress's decision to ex-

14. "Indian country" here refers to Indian lands held in trust by the U.S. government and subject to federal jurisdiction. 18 U.S.C. § 1151 (2006).

15. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

16. According to a July 2005 U.S. Census Bureau report, an estimated 4 million people, or 1.5 percent of the total U.S. population, list themselves as being Native American or Alaska Native; about one-third live in Indian country. Marianne O. Nielson, *Introduction to the Context of Native American Criminal Justice Involvement*, *in* CRIMINAL JUSTICE IN NATIVE AMERICA 1, 2 (Marianne O. Nielson and Robert A. Silverman, eds., 2009).

17. By "separate but unequal," we refer to the comparatively harsher sanctions that the federal criminal justice system systematically imposes on adult and juvenile offenders on tribal lands subject to its jurisdiction, as compared to what ordinarily occurs when state and local governments mete out punishments for the same or similar offenses arising on non-tribal lands, and to the comparatively limited, less accountable, and often inferior criminal justice services that the federal government generally provides there. This concept obviously differs in degree and kind from what Charles Wilkinson has called "measured separatism," the policy by which the federal government has sometimes encouraged the separate development of tribal governance and institutions to strengthen tribal self-determination. CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14 (1987).

18. Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)).

tend federal jurisdiction to Indian reservations was ill-considered and meant to be a temporary expedient. A careful review of the MCA and its racist origins is long overdue and relevant to today's discussion about the future of the federal criminal justice system in Indian country because the extension of federal jurisdiction to Indian reservations was a key component of assimilation.

A century later, the federal government's policies had eventually come to encourage tribal sovereignty and self-determination. Yet the MCA and the federal institutions that divested local control and accountability from the justice system in Indian country at the end of the Indian Wars remain strikingly unchanged today. In virtually all other communities in the United States, criminal justice is a matter of overwhelmingly local concern and redress. The federal government's role is carefully restricted to enforcing modern day "major crimes," such as anti-terrorism laws, international drug-trafficking operations, and large-scale criminal enterprises. Yet, by what may well be a historical accident, the federal government's role in criminal justice in Indian country is almost entirely unrestricted. The federal attorneys and law enforcement officers who serve these areas rarely live in their communities, are often located far from Indian reservations, lack direct knowledge or experience with victims and defendants living and working there, and are largely unaccountable to their Native American constituents. The federal criminal justice system in Indian country was simply never supposed to be a set of permanent laws and institutions. Even as national policies toward Indians changed, the architecture of that system has remained stubbornly frozen in time and poses a serious obstacle to tribal sovereignty and self-determination.

Part II explores some of the ways that the separate but unequal federal criminal justice system that emerged from the MCA—and which unexpectedly persists to this day—systematically discriminates against Native American crime victims and offenders alike. It perpetuates a degree of daily injustice that would be unthinkable to the vast majority of Americans who have little or no contact with it. Most disturbing of all is the treatment of Native American juvenile offenders; they are disproportionately sentenced as adults, they receive relatively longer sentences of incarceration, and they have comparatively restricted access to diversion and other programs designed to promote rehabilitation. Perversely, the only way for

Native Americans to avoid this unjust system is to leave the very homelands that the federal government has permanently set aside for Indian tribes and their members.

Part III suggests that there is a constitutional imperative to end the federal government's role in Indian country as it currently exists. The remedy for this lingering injustice is for the President, Congress, and Supreme Court to return to constitutional first principles. Indian tribes and nations should be provided with greater freedom to choose how to design and run their own criminal justice systems within the federal constitutional scheme. This includes letting Indian tribes and nations wishing to do so to exit the MCA entirely so long as they protect defendants' federal constitutional rights on par with state governments. It also means freeing tribes that so choose from concurrent federal jurisdiction for what would otherwise be purely local crimes, while retaining federal criminal laws of general application. For those tribes that choose to retain the MCA and concurrent federal jurisdiction on their lands, the federal government's goal must be to ensure that Native Americans consistently receive the minimum level of civil-rights protections to which all U.S. citizens are guaranteed.

I. THE MAJOR CRIMES ACT: FEDERAL BAND-AID TO THE "INDIAN PROBLEM"

Plessy attests to the late nineteenth century belief that the races were inherently different:

> A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.[19]

Not long before *Plessy*, in *Ex parte Kan-gi-Shun-ca*[20] (*Crow Dog*), the Supreme Court refused to extend federal jurisdiction

19. Plessy v. Ferguson, 163 U.S. 537, 543 (1896).

20. 109 U.S. 556 (1883). Known as the "*Crow Dog* case," the decision uses the defendant's Brûlé Sioux name rather than its English translation. The events that gave rise to *Crow Dog* began in 1881 with Crow Dog murdering Spotted Tail on the Great Sioux Reservation. White officials at the time dismissed the killing as a quarrel between two Indians over a woman, but Red Cloud and others saw it as an assassination of a leader who had defied Indian agents. "This was charged

to crimes involving solely Native Americans in Indian country, only to be overturned by Congress. But even in *Crow Dog*, the Justices were less circumspect about the differences they perceived between whites and Indians:

> It [federal criminal law] tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[21]

The late nineteenth century was a period of extreme violence in the history of ethnic relations in the United States. The rise of the Ku Klux Klan and the Chinese Exclusion Act[22] are but two examples of the way that industrialization and western expansion tended to marginalize and demonize many ethnic and racial minorities.[23] The period was no less insidious for the tribal members who survived disease and war only to be removed to Indian reservations.[24]

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upon the Indians because an Indian did it," Red Cloud said, "but who set on the Indian?" DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST 420 (Owl Books 1991) (1971). Ironically, and as discussed in Section I(B), *infra*, this was the case that triggered a Congressional backlash leading to the passage of the Major Crimes Act.

21. *Crow Dog*, 109 U.S. at 571.

22. Chinese Exclusion Act of 1882, ch. 60, 27 Stat. 25 (repealed 1943). *See generally*, Virginia Martinez, Jazmin Garcia, & Jasmine Vasquez, *A Community Under Seige: The Impact of Anti-Immigrant Hysteria on Latinos*, 2 DEPAUL J. SOC. JUST. 101, 105–06 (2008).

23. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S. Ct. 2504, 2521 (2009) (briefly describing the rise of Klan violence in response to the Fifteenth Amendment's enfranchisement of blacks).

24. *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 632 (2009) ("Historians also increasingly identified triumph over the Indian tribes as the formative racial and national experience of white America."). For instance, writing in 1885—the same year Congress passed the Major Crimes Act—former president Ulysses S. Grant defended the United States' war with Mexico, in which he had fought as a young man. 2 ULYSSES S. GRANT, PERSONAL MEMOIRS OF U. S. GRANT 545–46 (New York, Charles L. Webster & Co. 1885). The Mexican War had been tied into the antebellum debate over slavery; many prominent leaders, including former president John Quincy Adams and then little-known Congressman Abraham Lincoln, had strongly opposed it as an unconstitutional vehicle for extending slavery. *See* JOHN STAUFFER, GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS & ABRAHAM LINCOLN 172–75 (2008). Tellingly, Grant defends the war on the basis that it accelerated the pace by which Indian tribes were destroyed and their members removed from the formerly

What would later be called "federal Indian law" was dramatically altered during this same period to enable forced Indian removal, divestiture of remaining tribal lands, and continued western expansion.[25] In the mid-nineteenth century, Indian tribes were widely acknowledged to be legally sovereign within their own ancestral homelands.[26] Yet that virtual legal consensus all but evaporated a few decades later as the law was radically changed to justify forced assimilation, with Indian tribes consigned mostly to distant and geographically isolated reservations and legally transformed from nations into "wards" of the federal government.[27] It was at the height of this extremist era that Congress extended federal criminal jurisdiction over otherwise purely local crimes involving only Indians by enacting the MCA, in support of what had become the final solution to the "Indian problem": forced assimilation.[28]

This Part begins with an overview of the General Allotment Act, which is generally recognized as the key vehicle for assimilation.[29] Next, it details the legislative history behind and passage of the MCA in order to demonstrate that this law, which has governed Indian country crime since 1885 and served as the foundation for other federal institution-building there, was intended to be temporary. If the MCA established federal jurisdiction over criminal law in Indian country, then *U.S. v. Kagama*, addressed in Section C, ensured the federal government's predominance there even as the Court struggled to explain the constitutionality of its presence. Finally, to round out the foundational history of criminal justice in Indian country, Section D gives an overview of the earliest efforts to bring federal notions of non-Indian law and order to the reservations, and Section E sketches relevant developments in the twentieth century.

Mexican lands that had been ceded to the United States in 1848. 2 GRANT, *supra* note 24, at 551. "It is probable," Grant concludes, "that the Indians would have had control of these lands for a century yet but for the war. We must conclude, therefore, that wars are not always evils unmixed with some good." *Id.*

25. *See, e.g.*, Berger, *supra* note 24, at 628–29.

26. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–61 (1832); *Crow Dog*, 109 U.S. at 571.

27. United States v. Kagama, 118 U.S. 375, 383–84 (1886).

28. *See, e.g.*, Berger, *supra* note 24, at 629.

29. *See* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 136 (2009); *see generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995).

A. The Backdrop of Allotment

Congress enacted the MCA,[30] which extended federal criminal jurisdiction to crimes committed by Native Americans on Indian reservations, at the same time it was embracing the so-called "allotment program" that would guide federal policy toward Indian tribes and their members until the New Deal.[31] The legal architecture of the federal criminal justice system in Indian country is rooted in both the MCA and the federal government's overarching policy of forced assimilation, which is epitomized by the General Allotment Act.

Congress passed the General Allotment Act in 1887, which, together with individual allotment acts that applied to individual tribes, impacted nearly every federally recognized Indian tribe in the United States.[32] The Act generally established a process whereby federal Indian trust land was to be divided into individual homestead parcels and converted into private (fee simple) property that could be sold after twenty-five years, at which time Indian families received a patent to the land and could become U.S. citizens.[33] During this time, Native Americans were to be assimilated as farmers and ranchers and converted to Christianity, primarily through federally supported missionaries and boarding schools.[34]

Rather than establish a system of individual land ownership within the reservation system, Congress intended land ownership by allotment to be the means to phase out and elim-

30. 18 U.S.C. § 1153 (2006).

31. "The basic idea of the Allotment Act was to make the Indian conform to the social and economic structure of rural America by vesting him with private property." VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 46 (1969). At the time the original act was passed, Indian tribes controlled nearly 138 million acres, almost 90 million acres of which was subsequently lost. POMMERSHEIM, *supra* note 29, at 130. Almost half the remaining 48 million acres consisted of desert lands. JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 33 (1994). Professor Wunder chronicles the often tortured implementation of the General Allotment Act and what he calls the "forced acculturation" of Native Americans, a policy finally halted by the so-called "Indian New Deal," specifically the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (2006). *Id.* at 31–78.

32. Indian General Allotment (Dawes) Act, 24 Stat. 388 (1887); *see also* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, CASES AND MATERIALS ON FEDERAL INDIAN LAW 165–66 (5th ed. 2005).

33. Royster, *supra* note 29, at 10.

34. *See id.* at 9; *see also* WILKINSON, *supra* note 17, at 20–21.

inate the reservation system altogether.[35] In 1896, the Supreme Court most clearly articulated the ultimate goal of allotment in *Draper v. United States*: "The [General Allotment Act of 1887] contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty."[36] Allotment, the Court said, was intended to bring individual Indians under state jurisdiction through ownership of a fee patent.[37] As section six of the General Allotment Act of 1887 stated, once individual Native Americans received their land patents, they would "have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."[38]

Allotment was a tribal land divestiture system in that the remaining excess or "surplus" lands from the Indian reservations that had previously been held in trust for tribes were opened to non-Indian settlement.[39] In this way, trust lands originally set aside permanently by the federal government for the benefit of Indian tribes and their members were expected to be "pulverized," in Theodore Roosevelt's appropriate phrase,[40] and sold as private property, primarily to non-Indian homesteaders and land speculators. Roughly 65 percent of Indian lands passed out of Native American hands between 1887 and 1934.[41]

B. Passage of the Major Crimes Act

The MCA, an ambitious title for the last section of the annual appropriations bill for 1885,[42] was the product of the same

35. "[A]dvocates of the [allotment] policy believed that individual ownership of property would turn the Indians from a savage, primitive, tribal way of life to a settled, agrarian, and civilized one. Assimilation was viewed as both humanitarian and inevitable." Royster, *supra* note 29, at 9.

36. 164 U.S. 240, 246 (1896).

37. *Id.*

38. *Id.* (quoting the Indian General Allotment (Dawes) Act, § 6, 24 Stat. 388 (1887)).

39. G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 576–77 (2009).

40. President Theodore Roosevelt described the federal government's allotment policy as "a mighty pulverizing engine to break up the tribal mass." POMMERSHEIM, *supra* note 29, at 131 (quoting President Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901)).

41. POMMERSHEIM, *supra* note 29, at 130.

42. The full language of what would come to be known as the MCA-Appropriations Act for Indian Department:

lawmaker whose name was given to the General Allotment Act, Senator Henry Dawes of Massachusetts.[43] The MCA was Dawes's response to the Supreme Court's decision in the *Crow Dog* case, in which the Supreme Court upheld tribal criminal jurisdiction where one tribal member murdered another.[44] To an extent breathtaking even for the time, Dawes, chair of the Senate Committee on Indian Affairs, almost single-handedly spearheaded the passage of the MCA, manipulating Senate and House rules to get it enacted into law quickly without a single Congressional hearing by an authorizing committee.[45] The MCA extended federal jurisdiction over seven major crimes in Indian country[46] and thereby effectively removed criminal jurisdiction from all tribal courts except those of the Five Civilized Tribes.[47]

To say that the MCA was hastily written, drafted, and reviewed would be a profound understatement. It is not clear

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> [A]ll Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person 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 persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Ch. 341, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)).

43. Honorable Ross O. Swimmer, *Modern Tribal Government: Social and Economic Opportunities and Realities*, 7 ST. THOMAS L. REV. 479, 484 n.29 (1995).

44. *Ex parte* Kan-gi-Shun-ca (*Crow Dog*), 109 U.S. 556, 571 (1883).

45. *See, e.g.*, *infra* notes 60, 62, 70.

46. The modern MCA covers 15 major crimes. 18 U.S.C. §1153(a) (2006) ("[N]amely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.").

47. 16 CONG. REC. 2385–86 (1885) (the proposed section that would have brought the Five Civilized Tribes under the jurisdiction of the United States District Court for the Western District of Arkansas was removed by the Senate).

from the limited legislative record that Congress intended for Indians to be brought under exclusive federal rather than concurrent federal and state jurisdiction. Dawes and his colleagues were focused on reducing the cost of the Indian reservation system to the federal government and opening new lands for white settlement.[48] Given their overarching focus on extending and accelerating the allotment process, they almost certainly did not intend to establish a long-term federal presence in Indian country, let alone a permanent system of federal criminal jurisdiction and institutions.[49] On the contrary, Dawes and his supporters were bullish on the potential of allotment to, in the jargon of the era, "kill the Indian to save the man,"[50] and to do so quickly. For some, the whole process of assimilation-by-allotment would be completed in only a matter of years, not decades. As one of Dawes's supporters put it:

> I believe that in the course of ten or twelve years the Congress of the United States would not be called upon to sit in Committee of the Whole for the purpose of considering a bill for the support of any Indian tribe. I believe that Indians would become self-supporting.[51]

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48. *See infra* notes 74–76.

49. The text of the MCA itself reflects the inherent racism of the era in which it was designed as a temporary expedient. By insisting on striking a provision that would have brought the Five Civilized Tribes under federal jurisdiction, Congress was effectively distinguishing between tribes that were ready to handle their own jurisdiction—the "civilized" tribes—and those that were not yet ready. *See* 16 CONG. REC. 2385–86 (1885). The key word here is "yet"; through assimilation, the logic went, Indians would become civilized. Once civilized, the logic continued, Indian people would either come under state jurisdiction (thanks to allotment) or tribes would organize into territories, and then into states. In this way, the federal role would be limited and short-term.

50. The phrase was popularized by Captain Richard H. Pratt, who, with federal support in 1879, founded the Carlisle Indian Boarding School at Carlisle Barracks, Pennsylvania. As Captain Pratt explained in an 1892 speech:

> A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.

Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900, at 260–61 (Francis Paul Prucha ed., 1973).

51. 16 CONG. REC. 863 (1885) (statement of Rep. Ellis). Ellis proposed a Northwest Indian Territory, which would go through the statehood process and then be admitted as a state on equal footing. *Id.* at 895 (statement of Rep. Rogers: "Sir, I believe the Indian people would consent, if a fair expression could be had, to an equal division of their lands among them and to the establishment of a Ter-

Importantly, what became the MCA was an appropriations rider—a piece of substantive or "authorizing" legislation that was simply appended to a Congressional funding bill, and which never received a public hearing by the appropriate authorizing committee. As early as 1882, a bill "to extend the jurisdiction of the district and circuit courts of the United States, for the punishment of crimes on Indian reservations within the limits of any State or organized Territory," had been introduced in the House of Representatives.[52] The House did not include the provision in its first draft of the appropriations bill for 1885,[53] but Representative Byron M. Cutcheon of Michigan added the provision as an amendment on January 22, 1885.[54] A few congressmen objected to the measure being introduced as an appropriations rider,[55] but they were assured that the House had passed similar legislation (also as an appropriations rider) the year before that the Senate had rejected only because it also included misdemeanors.[56] The House then passed the bill and sent it to the Senate.[57]

The Senate's discussion of the bill went quickly to the problem of appropriations riders generally, although its chief concern was with addressing settlers' claims for federal compensation for Indian "depradations" rather than concerns about protecting tribes or their members.[58] The Senate's procedural

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ritorial government. . . . Going hand in hand with this is citizenship, courts, and laws. It is coming to this. We know it. They know it. It is in their interest to accept the situation. It is our duty to protect them by humane laws.").

52. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EX. DOC. 47-1, pt. 5, at 15 (1882) (quoting H.R. 755, introduced by Rep. Willits).

53. *See* 16 CONG. REC. 863 (1885).

54. *Id.* at 934–36 (introduction and discussion of "Sec. 11", the major crimes provision amendment).

55. *Id.* at 935 (statement of Rep. Holman: "I regret that this legislation comes year after year upon appropriation bills, without taking the voice of a committee who are especially familiar with the subject."); *id.* at 934 (statement of Rep. Rogers: "This amendment is so long and the subject so important, that unless I can have an opportunity to investigate the proposition I must insist on the point of order."); *id.* at 936 (statement of Rep. Warner: "[I]n view of the large number of amendments that are proposed it seems to me we have proof enough that this whole question should go to the Committee on Indian Affairs and be reported from that committee. Some of these amendments are evidently crude, being suggested on the spur of the moment.").

56. *Id.* at 935 (statement of Rep. Budd).

57. *Id.* at 938 (passage of bill).

58. *Id.* at 1716 (with regard to a rider including a limited number of settlers seeking depredation claims against the federal government, Sen. Miller introduced the larger concern about appropriation riders: "[T]he action of the committee on this clause brings up the whole question of what the Senate is to do in respect of what is termed general legislation in this Indian appropriation bill."); *id.*

rules limited it to either approving or striking appropriations riders, but not amending them, so the major crimes rider was struck out of the Senate bill on February 16, 1885.[59] Senator Dawes charted a new path through Senate procedure by effectively proposing an amendment to the House's major crimes appropriations rider.[60] He did this by proposing an amendment to the House's amendment—to get it into the *Congressional Record*—and then declaring that he would vote *against* his own amendment because it was against procedure.[61] The senator himself advocated for the measure on the Senate floor, and he in fact was able to promote and amend the legislation—his own bill—despite Senate rules preventing him from doing either.[62]

As the Congressional session was coming to a close, the two houses agreed to compromise legislation (still in the form of appropriation riders) on March 3, 1885.[63] The final version of the MCA contained the language proposed by Dawes. Jurisdiction over Indian crimes was given to territories or the Unit-

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at 1717 (statement of Sen. Plumb: "There is a rule of the Senate that no legislation shall appear upon the appropriation bills, and that has been properly construed to mean that the Senate can not amend the House legislation sent to us on such bills. . . . That enforces what I have said about the improvidence of inserting measures of this kind or claims of this character on an appropriation bill; where they have not undergone such scrutiny no careful person can say whether more or less may not be necessary."). Here, Sen. Plumb was speaking about depredations claims, but the concern of a "careful person" would certainly also extend to legislation added to the appropriation bill that had nothing whatever to do with appropriations or money generally.

59. *Id.* at 1748–50; *see also id.* at 2385 (statement of Sen. Dawes, recapping the progress of the legislation on March 2, 1885: "[The bill] came over from the House with the ordinary appropriations for the Indian service loaded with a large amount of what are called depredation claims and burdened with a large amount also of general legislation upon important matters. The Senate at that time sustained the Committee on Appropriations in stripping the bill of everything except what pertained to the appropriations.").

60. *Id.* at 2385–86 (statement of Sen. Plumb regarding Sen. Dawes's experience).

61. *Id.* at 2385.

62. *Id.* (statement of Sen. Dawes) (the Senator advocated for the first part of the major crimes provision, but insisted that the second part of the provision, which would override the established jurisdiction of the Five Civilized Tribes with that of the U.S., was unjust and against treaty agreements.).

63. *Id.* at 2466, 2533; *see also id.* at 2387 (statement of Sen. Beck regarding the concern over the inevitably rushed nature of passing appropriations legislation: "Five of the most important appropriation bills that have come over to us have come laden down, some of them, with legislation, within the last week of the session. We come at once to look at them; we can not examine them without sitting up all night, as our Committee on Appropriations has had to do for a week past.").

ed States and taken away from states and tribes, and the Five Civilized Tribes were not mentioned and so managed to maintain their jurisdiction.[64] A third section holding that Indians in civil trials "shall not be rejected as witnesses on account of race or nation" was inexplicably removed as well.[65] The final Act imposed exclusive federal jurisdiction on Indians within reservations, although there were two different schemes: Indians on reservations within Territories would be subject to the territorial law, and Indians on reservations in states would be subject to federal law.[66]

A close read of the MCA's legislative history is warranted for two reasons. First, it is crucial to understand the policy reasons for a law that continues to govern federal criminal jurisdiction in Indian country today, and these reasons can really only be found in the legislative record because the measure was passed as an appropriations rider. Second, the wide-ranging discussion that members of both houses engaged in regarding the 1885 Indian appropriations bill demonstrates that the general consensus in Congress was that, thanks to assimilation-by-allotment, the federal government would shortly be getting out of the Indian business.

Representative Cutcheon introduced what became the MCA to the appropriations bill in the House on January 22, 1885.[67] Cutcheon described the situation of revenge on Indian reservations as an emergency situation: "I would not offer this amendment at the present time and in connection with this appropriation bill if I thought there existed the least chance or

64. *Id.* at 2385. Dawes seemed to regret the removal of state concurrent jurisdiction, but not enough to change the language: "[The MCA is an] important provision and one which the demands of the Indian service are very urgent for; and yet the provision, which is section 11 of this House bill, proposes in the first place—unfortunately in its phraseology, not in its intent—to take away from the State courts . . . jurisdiction over the commission of an offense . . . ." *Id.*

65. The third section was included when the major crimes rider was first introduced in the House, *id.* at 934, but it was gone without any discussion in Dawes's proposed amendment, *id.* at 2385. Dawes offers no explanation for the third section's removal, and no one questions its absence. Time seemed to be of the essence by March because the congressional session was nearing an end, and all parties seemed much more interested in Dawes's unique procedural wranglings than in protecting the right of Native Americans to serve as witnesses in civil trials.

66. *Id.* at 935 (statement of Rep. Cutcheon that this had been the Secretary of the Interior's suggestion). Additionally, Senator Dawes said that there was never the intent to take jurisdiction away from state courts, although the wording of the "amendment" fails to make jurisdiction clear. *Id.* at 2385.

67. *Id.* at 934.

opportunity of its becoming law in any other way."[68] He continued:

> Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the 'blood avenger'—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him. . . . [T]here is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.[69]

Senator Dawes described public support for the rapid exertion of either federal or state jurisdiction over crimes on Indian reservations: "The [MCA] attracted attention in the other body and throughout the country as one of vital importance . . . . [It is] a very important provision and one which the demands of the Indian service are very urgent for."[70]

Although Cutcheon's rider was rushed through as part of what amounted to a last-minute appropriations bill, Senator Dawes and his supporters were able to make two interesting changes. First, the amendment was modified so as to preserve concurrent jurisdiction with the federally funded Indian Police and Bureau of Indian Affairs ("BIA") Courts of Indian Offenses, used by many Indian agents to enforce law and order on reservations.[71] Second, reservation crimes were assigned to federal, rather than state or territorial, jurisdiction.[72] It is unclear when or why this decision was made, but what seems unmistakable is that only a relative handful of lawmakers—those involved in the appropriations process itself—could have even been aware of it. This is because the Secretary of the Interior had asked for state or territorial jurisdiction but not federal jurisdiction:

> [I]t will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the

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68. *Id.*

69. *Id.*

70. *Id.* at 2385 (statement of Sen. Dawes).

71. *Id.* at 934 (statement of Rep. Budd: "I desire to suggest another modification of the amendment—to strike out the words 'and not otherwise.' The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country."). *See also* Section D, *infra*.

72. Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C.A. § 1153 (2006)).

> Indians of the reservation. . . . The laws of the State or Territory wherein the reservation is situated ought to be extended over the reservation, and the Indians should be compelled to obey such laws and be allowed to proclaim the protection thereof.[73]

There is apparently no evidence in the legislative history to suggest that anyone in Congress disputed the Secretary of Interior's position, and yet the MCA emerged as an appropriations rider doing just the opposite. We may never know if this was intentional or accidental—the result of sloppy drafting and last-minute changes.[74]

What is known is that the federal government was more keenly interested in extricating itself from its responsibility to Indian tribes than in creating a permanent role in Indian country. To begin with, the Secretary of the Interior had recommended that the states and territories be given jurisdiction over Indians on reservations; nowhere did he advocate for federal jurisdiction.[75] Some representatives proposed relocating remaining Indian tribes to a second "Indian Territory" (pre-

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73. 16 CONG. REC. 935 (1885) (statement of Rep. Cutcheon, quoting the Secretary of the Interior).

74. Although the legislative history does not contain a clear explanation or articulation of Congress's rationale for passing the Major Crimes Act, an exchange in the House of Representatives gives some color to the realities of Congress's efforts to "civilize" the Indians:

> Mr. Hiscock. I would like to inquire of the gentleman from Michigan if he believes that all of these Indian tribes are in such a condition of civilization as that they should be put under the criminal law?
>
> Mr. Cutcheon. I think if they are not in that condition they will be civilized a great deal sooner by being put under such laws and taught to regard life and the personal property of others.
>
> Mr. Budd. This provision is as much for the benefit of the Indians as it is for the whites; because now, as there is no law to punish for Indian depredations, the bordermen take the law into their own hands, which would not be the case if such provision as this was enacted into law.
>
> Mr. Hiscock. That may all be true; but when we bring in a bill here year after year appropriating many millions of dollars to support and care for these Indians, and treat them as irresponsible persons, it seems to me that policy is not in the line of the policy indicated by this amendment, which proposes to extend to them the harsh provisions of the criminal law.
>
> Mr. Budd. We would like to change the policy of the Government in that respect. . . .
>
> Mr. Cutcheon. We want to change the law a little in the direction of law and order. . . . Yes, and the civilization of the Indians.

Id. at 936.

75. *Id.* at 935.

sumably in the Dakotas) and that those territories be allowed to enter the union on equal footing once they met the requirements for statehood.[76] In this way, tribes would pass from territorial to state jurisdiction for both criminal and civil matters.

The legislative history demonstrates that many congressmen believed that the reduction of the tribal land base and assimilation of tribal members rendered legislation of tribes a short-term concern. As one representative put it:

> We are upholding these rotten [tribal] governments there under the pretense of civilizing the Indians. We justify our conduct by clinging to treaties that have served their purpose, and were never intended as anything but temporary expedients. . . . We knew by past history that in the march of civilization these Indian governments must give way.[77]

While Congress's reasons for choosing federal as opposed to territorial or state jurisdiction were unclear, its conviction that Indian tribes would eventually cease to exist as sovereign nations is unmistakable and was widely held at the time. This, too, is consistent with the *Crow Dog* decision that originally upheld tribal jurisdiction from federal intrusion:

> [Indians] were nevertheless to be subject to the laws of the United States . . . as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society.[78]

The language of the MCA and its legislative history demonstrate that the 1885 Congress did not anticipate that it would be establishing the federal criminal justice scheme that Native Americans would endure well into the twenty-first century. The assimilation and allotment policies offered the hope that the federal government would be able to get out from under treaty obligations within, at most, a couple of decades. Se-

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76. *Id.* at 863.

77. *Id.* at 895 (statement of Rep. Rogers). In contrast to this view, Representative Keifer was the rare Congressional voice that highlighted the continuing injustice done to the Indians: "There is no time here, it seems, for anybody to say a word in behalf of these tribes of people who have no voice in the Congress of the United States and yet are being continually legislated about and to their great injury." *Id.* (statement of Rep. Keifer).

78. *Ex parte* Kan-gi-Shun-ca (Crow Dog), 109 U.S. 556, 568–69 (1883).

condly, Congress's protection of the Five Civilized Tribes' jurisdiction demonstrated that policymakers distinguished between tribes that were ready to accept jurisdictional responsibility and those that were not. Using the language of the time, it appears Congress seemed willing to hand jurisdiction over to tribes who had proven some measure of "civilization." At most, the underlying assumption of Senator Dawes and his legislative allies was that the federal government would simply transfer its criminal justice responsibilities quickly to newly created states, counties, and municipalities as the General Allotment Act converted Indian trust lands out of federal jurisdiction and into private property.

C. Constitutional Contortions and the Dubious Roots of Plenary Power

The MCA's test case, *United States v. Kagama*,[79] is most famous for announcing Congress's plenary power over tribal sovereignty.[80] The main constitutional question in *Kagama* was whether the MCA could extend federal jurisdiction to Indians on reservations in states and, in so doing, restrict states' rights to self-government.[81] The Court easily answered this question, not by reference to the Constitution, but the status quo: "Congress *has* done this, and *can* do it, with regard to all offences relating to matters to which the Federal authority extends."[82]

In *Crow Dog*, the Supreme Court had balked at the idea of such an unprecedented federal intrusion on tribal sovereignty. But, as passage of the MCA illustrates, Congress practiced no such restraint.[83] The *Kagama* Court was then forced to find a valid constitutional reason—or indeed, *any* basis—to uphold the MCA, ultimately rejecting the Indian Commerce Clause of Article I of the Constitution.[84] Rather than grounding this ex-

79. 118 U.S. 375 (1886).

80. *See generally* VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 76–79 (1999).

81. *Kagama*, 118 U.S. at 383.

82. *Id.*

83. *See, e.g.*, *supra* notes 64, 66.

84. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations . . . and with the Indian Tribes"); *see generally* WILKINSON, *supra* note 17, at 12 n.27. In rejecting the Indian Commerce Clause, the Court frankly observed:

> [W]e think it would be a very strained construction of [the Indian commerce] clause, that a system of criminal laws for Indians living peacea-

pansion of federal authority over Indian affairs on the Constitution, the Court substituted the status quo for legal analysis:

> 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, as well as to the safety of those among whom they dwell. 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.[85]

This was an entirely new concept in American law: Congress's so-called "plenary power" over Indian affairs, which was essentially an unrestricted license to assimilate Native Americans and legally take away their lands despite the solemn assurances otherwise in treaties and earlier court decisions.[86] This remains a dubious legal proposition for a country whose government was based on constitutionally limited powers. Congress's plenary power over Indian affairs was tethered not to the Constitution, but to an amorphous federal trust responsibility that was supposed to act as a shield to protect tribes and their members.[87] Not surprisingly, that shield was soon transformed, in Frank Pommersheim's words, into "a destructive sword with which to carve up and dispose of the tribal land estate."[88]

> bly in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes. . . . [Or] to see, in either of these clauses of the constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians . . . .

Kagama, 118 U.S. at 378–79.

85. *Kagama*, 118 U.S. at 384–85.

86. *See generally* WILKINSON, *supra* note 17, at 78 (explaining that *Kagama* and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), "expostulated on the untrammeled, 'plenary' nature of federal constitutional power over Indian affairs.").

87. POMMERSHEIM, *supra* note 29, at 138–39.

88. *Id.* (analyzing *Lone Wolf*, 187 U.S. at 567). For an enlightening discussion of *Lone Wolf* and the unconstitutional roots of the plenary power doctrine, see WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 161–86 (2010). The doctrine, Echo-Hawk observes,

> was seemingly plucked out of thin air by the Supreme Court against the backdrop of federal guardianship of a dependent, supposedly inferior race of people—a dubious basis upon which to sanction the rule of Native people by unlimited power, a despotic power aimed at no other Ameri-

Kagama also marks a crucial shift in the federal government's role in Indian country. In reasoning that the murder of one Indian by another on a reservation was entirely outside the purview of their state of residence, the Court explained that such a crime had no effect on the "operation of State laws upon white people found there."[89] The tension that had grown between states and tribes by this time was working in the background of the decision: "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."[90]

Hence, the *Kagama* Court declared that the Indians "owe no allegiance to the States, and receive from them no protection."[91] Perhaps this was true: settlers interested in farmable land and extractable minerals were certainly no friends of the Indians, and territories seeking statehood needed the Indians out and the settlers in.[92] However, by declaring Indians entirely under the protection of the federal government, *Kagama* had also released states from legal responsibility to Indians, and established the precedent of exclusive (albeit begrudging) federal jurisdiction over Indians that continues today.[93]

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cans in U.S. history.

Id. at 163. Echo-Hawk's analysis reveals that *Lone Wolf*, like *Kagama*, has no basis in the Constitution:

> Writing for the unanimous Court, Justice Edward Douglas-White explained that Congress possesses paramount power over Indian tribes and their property because it is their guardian. Strangely, this plenary power is not found in the Constitution, but was implied by the Court from the trusteeship doctrine. The Court declared that Congress's plenary political power over Indians is absolute—that is, beyond the rule of law—because it is not subject to judicial review, and it includes the raw power to abrogate treaties. The sole check on that unlimited power was a bare presumption that Congress will exercise it in "perfect good faith."

Id. (quoting *Lone Wolf*, 187 U.S. at 568).

89. *Kagama*, 118 U.S. at 383.

90. *Id.* at 384.

91. *Id.*

92. *See, e.g.*, HELEN JACKSON, A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALINGS WITH SOME OF THE INDIAN TRIBES 343–58 (Little, Brown, & Co. 1903) (describing the Sand Creek Massacre and reprinting a letter to the editor of the New York Tribune by William Byers stating that "Sand Creek saved Colorado").

93. It has even been expansively suggested that *Kagama* marks the moment at which, in regard to Indian tribes, federal power triumphed over states' rights:

> Thus, the most important jurisdictional result of *Crow Dog* . . . was implicitly incorporated into *Kagama* to give the tribes protection against the states. This interpretation, coupled with the plenary power doctrine, greatly strengthened federal jurisdiction over the Indian tribes. This was the first time since *Worcester* that the Court had acknowledged that

D. Federalization of Criminal Justice in Indian Country Takes Shape

In the wake of the MCA and *Kagama*, the federal government's presence in Indian country subverted and eventually supplanted tribal laws and institutions dealing with what had traditionally been considered community or family matters. The end of the Indian treaty-making[94] during this era coincided with the federal takeover of law and order on Indian reservations in the years immediately prior to and following *Kagama*. Treaties with the federal government had often recognized tribes' inherent ability to resolve local disputes and address infractions of traditional law and custom, but in a constitutionally suspect move, Congress in 1871—legislating on yet another appropriations rider—abolished the President's power to make treaties with Indian nations.[95] Commissioner of Indian Affairs Ely Parker had suggested a primary rationale behind ending the treaty-making power in 1869: "[B]ecause treaties have been made with them, . . . they have been falsely impressed with the notion of national independence. It is time that this idea should be dispelled and the government cease the cruel farce of thus dealing with its helpless and ignorant wards."[96] The end of Indian treaty-making, which presidents beginning with George Washington had always understood to

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there was a serious conflict between the tribes and the states that required federal intervention.

SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 149 (1994).

94. U.S. CONST. art. II, § 2, cl. 2 ("[The President] . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

95. *See Kagama*, 118 U.S. at 382 (quoting Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)), where Congress ended the President's treaty-making power: "No 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 . . . ."). Before Congress ended Indian treaty-making, more than 380 treaties were negotiated with tribes. CHARLES WILKINSON, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 91 (2d ed. 2004). In his concurrence in *United States v. Lara*, Justice Clarence Thomas argues that the treaty-making power is an executive rather than legislative function located in Article II, Section 2, Clause 2, which enumerates the president's powers and could not be unconstitutionally delegated to Congress by statute in 1871. 541 U.S. 193, 225–26 (2004) (Thomas, J., concurring).

96. DIV. OF LAW ENFORCEMENT SERVS., BUREAU OF INDIAN AFFAIRS, INDIAN LAW ENFORCEMENT HISTORY 2 (1975) (quoting Ely S. Parker, Comm'r of Indian Affairs *in* ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 6 (1869)).

be required by the Constitution,[97] helped set the stage for the Court's announcement in *Kagama* that Congress could exercise constitutionally unfettered power over Indian affairs because it was already doing so.[98]

The federal government's foray into Indian country criminal justice expanded rapidly as the military occupation of many tribal lands began to recede. Eileen Luna-Firebaugh has found that "[b]y 1880, two-thirds of the reservations in the United States had Indian police forces under the auspices of the federal government."[99] A decade later, federally supported Indian police were established on nearly every reservation, reporting directly to the Indian agents who controlled them.[100]

Meanwhile, the federal Office of Indian Affairs, which would later become the BIA,[101] gained expansive new power over Native Americans living on reservations when the Courts of Indian Offenses were created in 1883.[102] These courts were established administratively in response to Secretary of the Interior Henry Teller's belief that "[c]ivilization and savagery cannot dwell together."[103] In calling for the establishment of the Courts of Indian Offenses, Secretary Teller explained that

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97. Washington, who had presided over the Constitutional Convention in 1787, set the precedent by insisting that the 1784 Fort Harmer Treaty with the Six Nations be formally ratified in the same manner as treaties with European nations. WILKINSON, *supra* note 95, at 93.

98. 118 U.S. at 384–85.

99. Eileen Luna-Firebaugh, *More than Just a Red Light in Your Rearview Mirror*, *in* CRIMINAL JUSTICE IN NATIVE AMERICA, *supra* note 16, at 134, 136. There were 900 federally authorized Indian police on reservations that year. *Id.* at 138. Individual Indian agents had begun to establish Indian police forces as early as 1869. *See, e.g.*, DIV. OF LAW ENFORCEMENT SERVS., BUREAU OF INDIAN AFFAIRS, *supra* note 96, at 2 (quoting ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 356 (1869) (describing the first Indian police force, established by Agent Thomas Lightfoot of the Iowa and Sac and Fox of Nebraska agency in 1869)). However, Congressional appropriations directed to Indian police were not approved for another decade. *Id.* at 6–7 (describing the San Carlos Apache police forces that helped to peaceably arrest Geronimo).

100. Luna-Firebaugh, *supra* note 99, at 137.

101. The department was not officially renamed the Bureau of Indian Affairs until 1947. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1227–29 (1984).

102. *See* HARRING, *supra* note 93, at 175 (discussing the "near-absolute administrative powers" of the BIA's Indian Police and Courts of Indian Offenses: "These were 'police' and 'courts' in name only. They could claim no legal status under either U.S. or tribal law. Rather, they were designed to perform important social control functions to force assimilation of the tribes under the authority of the BIA, through its Indian agents.").

103. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EX. DOC. NO. 48-1, pt. 5, at III (1883).

"[i]f it is the purpose of the Government to civilize the Indians, they must be compelled to desist from the savage and barbarous practices that are calculated to continue them in savagery . . . ."[104] The Commissioner of Indian Affairs, Hiram Pierce, promulgated the rules of the Courts of Indian Offenses in 1883,[105] though Congress did not appropriate any funds for the program until 1888.[106] The rules of the Court of Indian Offenses directly attacked Native American cultural practices that undermined federal efforts at "civilizing," such as prohibiting sun dances and consulting with medicine people.[107]

In the next few decades, other federal agencies would extend their reach into Indian country as the federal government replaced tribal law and institutions. The primary federal institution dominating day-to-day life on Indian reservations, including criminal justice responsibilities for all but the most serious crimes, remained the BIA, which was originally part of the War Department but was transferred to the U.S. Department of the Interior in 1849.[108] Yet other federal agencies—including the U.S. Marshal's Service,[109] and what is now the Federal Bureau of Investigation ("FBI"), established in 1908[110]—supplemented that authority and, in some circumstances, replaced it. United States Attorneys and their offices have been prosecuting Indian country cases in the federal courts involving Native Americans since the MCA was enacted.[111] These institutions, which, along with the federal courts, constitute the federal criminal justice system in Indian

104. *Id.* at X.

105. OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, RULES GOVERNING THE COURT OF INDIAN OFFENSES (1883), *available at* http://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf. A federal district court in 1888 held it was not unconstitutional for these courts to decide what amounted to criminal charges despite their being "mere educational and disciplinary instrumentalities" because they were created administratively by the executive branch rather than Congress. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

106. DIV. OF LAW ENFORCEMENT SERVS., BUREAU OF INDIAN AFFAIRS, *supra* note 96, at 26.

107. OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, *supra* note 105.

108. Donald Craig Mitchell, Alaska v. Native Village of Venetie*: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 357–58 (1997).

109. *See* U.S. Marshals Serv., History—A Pirate, a Marshal, and the Battle of New Orleans, http://www.usmarshals.gov/history/duplessis/03.html (last visited Aug. 10, 2010).

110. *See* Fed. Bureau of Investigation, History of the FBI, Origins: 1908–1910, http://www.fbi.gov/libref/historic/history/origins.htm (last visited Aug. 10, 2010).

111. 28 U.S.C. § 547 (2006) ("[E]ach United States attorney, within his district, shall—(1) prosecute for all offenses against the United States").