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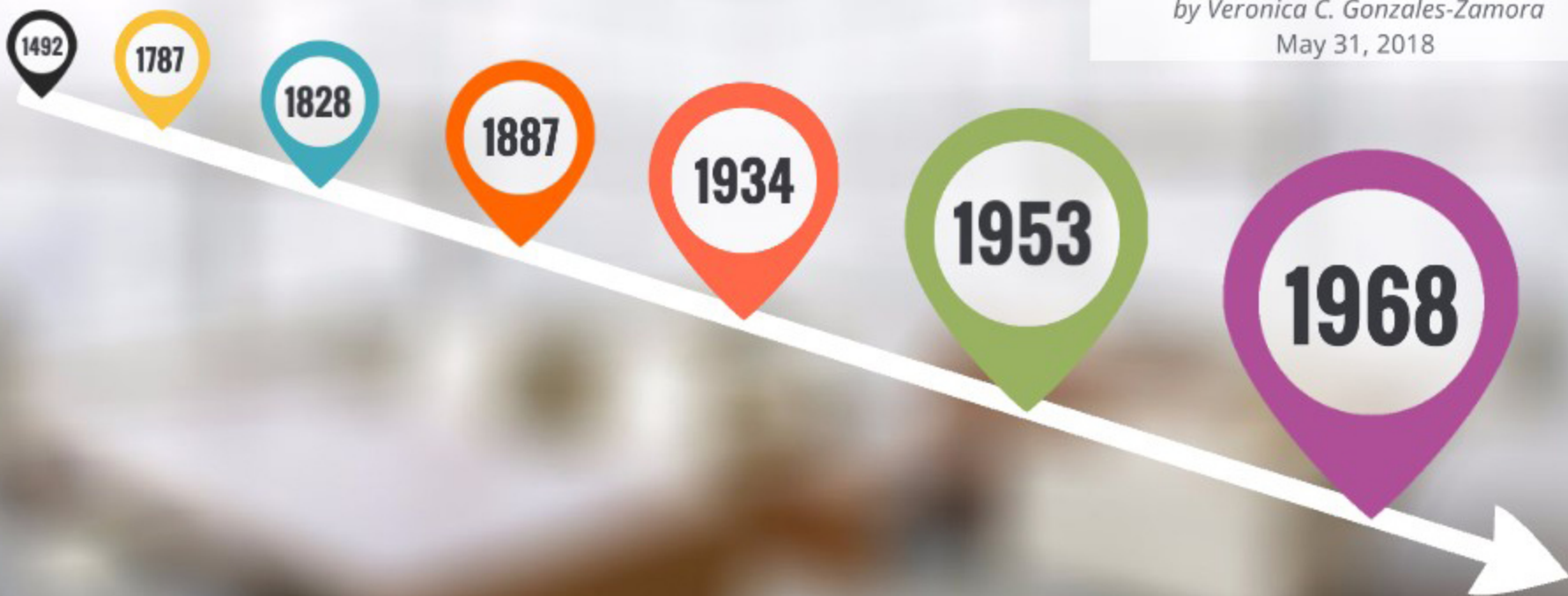
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Federal Indian Law

by Veronica C. Gonzales-Zamora

May 31, 2018



Tribal Independence Era (1492 - 1787)

Indian Perception (1756 Cherokee Chief):

- Treaties are a sign of brotherhood and mutual respect.
- Parties to a treaty are “one body”.

American Perception (1783, Letter from President Washington):

- Treaties are easier than war.
- Treaties viewed as expedient method of removal.
- **Reservation Policy** - create a boundary between settlers & Indians.
- **Inevitability of Removal** - if more land is needed, purchase is preferred to conquest.

The Treaty Era (1787 - 1828)

[The "Marshall Trilogy" Part I] *Johnson v. M'Intosh*, 21 U.S. 543 (1823)

- **Doctrine of Discovery:** the exclusive rights of the discovering European nation to acquire the soil from the Indians; the diminished sovereignty of tribes resulting as a consequence of discovery; and the Indian **right of occupancy**.
- Indians' "title of occupancy" is not a fee simple:
 - it can only be conveyed to the discovering sovereign unless "recognized" by treaty, statute, or executive order; and
 - it can be "taken" by the federal government without just compensation per the 5th Amendment of the U.S. Constitution.

Major Legislation

- **Trade and Intercourse Act of 1790**, 1 Stat. 137 § 137 - Asserts that a State can punish crimes committed by non-Indians against Indians under the laws of the State.
- **General Crimes Act of 1817**, 18 U.S.C. § 1817 - General Federal laws for the punishment of non-Indian crimes are upheld on Tribal lands; Indian offenses remain under Tribal jurisdiction.
- **Assimilative Crimes Act of 1825**, 18 U.S.C. § 13 - Extends coverage through Federal enforcement of certain state criminal laws in certain Federal enclaves.
- **Treaty of Hopewell** (1795) - Congress has EXCLUSIVE right to regulate American trade and manage all Indian affairs.
 - Gives Americans the power to punish Indians under American law; and
 - Gives Americans the power to punish American-on-Indian crime under American law.

Relocation (1828 - 1887)

Removal Act of 1830 – President can give to Indians land west of Mississippi for purpose of removing them from land east of the Mississippi.

[Trilogy Part II] *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831)

- Tribes are not foreign states, as that term is used in the Constitution, in describing the court's original jurisdiction over "controversies" between a state (here, the state of Georgia) and "foreign states."
- Tribes are "domestic dependent nations," whose relations with the U.S. resemble that of a "ward to his guardian."
- Genesis of the **trust doctrine** in federal Indian law - U.S. has a trust responsibility to act on behalf of Indian Tribes.

Major Cases Cont.

[**Trilogy Part III**] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)

- The “laws of Georgia could have no force” in Cherokee territory.
- Indian nations defined as “distinct political communities, having territorial boundaries within which their authority is exclusive.”
- Suggests that doctrine of discovery, and corresponding colonial charter grants, did not extinguish the inherent sovereignty of the Indians.
- Suggests that the Cherokee’s acts of entering into treaties and associating with a stronger nation for its protection likewise do not strip itself of the right of governing itself.
- Tribes retain “their original natural rights as the undisputed possessors of the soil from time immemorial.”
- **Indian Canons of Statutory Construction** - Ambiguities are resolved in favor on Indians; Indians are not responsible for the nuances of terms in treaties; liberal construction of treaties in favor of Indians

Major Cases Cont.

United States v. McBratney, 104 U.S. 621 (1881) (providing exclusive State criminal jurisdiction over crimes between non-Indians for offenses committed in Indian country; rule later extended for “victimless” crimes)

Ex parte Crow Dog, 109 U.S. 556 (1883) (reaffirming Tribal self-governance and the absence of State jurisdictional authority in Indian country, as well as Federal jurisdiction in cases of intra-tribal crimes)

United States v. Kagama, 118 U.S. 375 (1886) (upholding the Major Crimes Act based on **congressional plenary power doctrine** over Indian affairs - Congress' authority over Indian tribes flows from the guardian/ward relationship and exists because such a relationship has “never existed anywhere else.”)

Major Legislation

Major Crimes Act of 1885, 18 U.S.C. § 1153 - Extended federal jurisdiction to include authority over Indians who commit 7 enumerated felonies (later, amended to 16)

General Allotment Act (Dawes Act) of 1887, 25 U.S.C. § 331 (1887) - Created individual Indian land parcels, held in trust by the Federal government for individual Indians and Indian households, out of reservation lands leading to “checker-boarded” jurisdiction as some parcels moved from trust to fee status.

Allotment and Assimilation (1887 - 1934)

Talton v. Mayes, 163 U.S. 376 (1896) (holding that by virtue of the Cherokee Nation's inherent sovereignty, the protections of the Bill of Rights of the U.S. Constitution do not apply to actions of the Cherokee government)

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)

- In controversies between Indians and the government, Congress has the unquestioned power under U.S. law to unilaterally abrogate an Indian treaty.
- The regulation of Indian affairs falls under **political question doctrine**, governed by Congress and not subject to judicial review.
- The Court must presume Congress will only exercise this plenary power in **perfect good faith**; Congress changed the form of the Indian investment from land to money, which is acceptable.

Major Legislation and Case

Dawes Act (Allotment Act) (1887-1934)

- Allowed President to divide the Reservation into 160 acre parcels.
- Surplus reservation lands were sold to homesteaders with the proceeds benefiting the Indians - Indians lost 90M acres under this policy.
- Caused a **checkerboard effect** on Reservations (some lands owned by Indians and some by non-Indians), which raised jurisdictional and regulation problems

United States v. Sandoval, 231 U.S. 28 (1913)

- Confirming that the Pueblo Indians' lands were "Indian country" over which Congress has legislative authority, even though the Pueblos' lands, unlike Indian reservations, were owned communally in fee simple by the Pueblos under grants from the Spanish government, later confirmed by Congress.
- The Pueblos were still Indians by virtue of race, customs, and domestic government: "**inferior people**... requiring special consideration and protection like other Indian communities."

Reorganization (1934 - 1953)

Indian Reorganization Act of 1934

- Goal: revive tribal government.
- Encouraged self-government with Indian Reorganization Act Constitutions.
- No change to the structure of government without Secretary of the Interior's and tribe members' approval.

Indian Country Act of 1948, 18 U.S.C. § 1151 - Defines the scope of Federal criminal jurisdiction over Indian lands.

Felix Cohen wrote his **Handbook of Indian Law**:

- Sovereignty: Indian tribes possess powers of any other state.
- Plenary power: But Congress has rendered tribes subject to federal laws, which isn't an automatic destroyer of sovereignty.
- Tribal powers qualified or diminished ONLY if done so explicitly by act of plenary power.

Major Cases

Seminole Nation v. United States, 316 U.S. 286 (1942)

- U.S. government breached its fiduciary duty to the Seminoles when it continued to pay money to the tribal counsel even after the government discovered that the money has been misappropriated.
- To continue to pay the tribe's money when the government knew it was being fraudulently misspent was a violation of the government's duty to the tribe.
- The Court "recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."
- **Equitable trust principles** - scope of government's trust obligations.

Termination (1953 - 1968)

Public Law 83-280, 18 U.S.C. § 1162, 25 U.S.C. § 1360 (1953)

- Transfers federal jurisdiction over Indian lands to 5 mandatory States excepting 3 Tribes, without Tribes' consent (other states optional).
- **1968 Amendment** allows States to request retrocession of Indian country jurisdiction (a return of jurisdiction to the Federal government).

Williams v. Lee, 358 U.S. 217 (1959)

- Denied state jurisdiction over a civil matter between an Indian and a non-Indian where the transaction took place on the reservation.
- The Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants.
- *No federal act gave state courts jurisdiction over internal Indian affairs.
- The state court infringed "on the right of the reservation Indians to make their own laws and be ruled by them."

Major Events

Indian Reallocation Act of 1956 (aka Public Law 259) - Law providing housing, tuition, tools, etc. subsidies to encourage Native Americans to leave Indian reservations, acquire vocational skills, and assimilate into the general population.

Indian Civil Rights Act of 1968 - Requires tribal consent for a state to become PL 280 state; Limits tribal punishment for civil crimes to 6 months in prison and \$500 (later one year and \$5,000).

- States have no jurisdiction; federal government is the main enforcer in "Indian Country," which is defined by statute.
- Imposes some of the Bill of Rights on Indians.
- Presumption that Indian governments will continue (self-determination)
AND Usurpation of Indian control over law-making decisions (termination)

Self-Determination (1968 - now)

President Nixon officially ends Termination Period with passage of dozens of Acts, all with the goal of giving Indians the power to make law and business decisions in Indian Country, or at least to improve living conditions.

Indian Self- Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 - Allows for the reassertion of control over Tribal services through self-governance contracts and other mechanisms.

Major Cases

- *Morton v. Mancari* (1974) (BIA passing over a non-Indian in favor of hiring an Indian, per **Indian Preference Statute**, did not violate the 14th Amendment; rational basis applied because the preference to Indians is not racial, but political (quasi-sovereign political entities), and reasonably related to goal of self-determination)
- *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978) (sovereign immunity of the Indian tribes bars the tribes from suit, and that nothing within the Indian Civil Rights Act created a federal cause of action)
- *Oliphant v. Susquamish Indian Tribe*, 435 U.S. 191 (1978) (Tribal courts lack criminal jurisdiction over non-Indians if offense committed on Indian land)
- *United States v. Wheeler*, 435 U.S. 313 (1978) (Double jeopardy does not apply in cases subject to concurrent Federal and Tribal criminal jurisdiction)

Major Cases cont.

Montana v United States, 450 U.S. 544 (1981) (Indians' sovereign rights as a nation within the U.S. have necessarily been limited to no longer include the right "to determine their external relations", such that tribes may not exercise their power beyond what is necessary to protect tribal self-government or to control internal relations" *unless* Congress expressly grants it)

Duro v. Reina, 495 U.S. 676 (1990) (prevents Tribal courts from exercising criminal jurisdiction over Indians who are not members of that tribe)

- **"Duro fix" of 1991** - overriding this case via congressional legislation recognizing and affirming the power of tribes to exercise criminal jurisdiction within their reservations over all "Indians."

Major Legislation

Tribal governments' consent for federal capital punishment, 18 U.S.C. § 3598 (1994) - Requires that no Indian may be subject to a capital sentence unless the Tribe has first consented to the imposition of the death penalty for crimes committed on the tribe's lands

Tribal Law and Order Act of 2010, 25 U.S.C. § 2801 - Enhances Federal collaboration with Tribal law enforcement agencies, expands Tribal courts' sentencing authority to felony jurisdiction by amending ICRA to permit incarceration for up to three years per offense, while allowing multiple offenses to be "stacked", if additional due process protections are in place.

Violence Against Women Reauthorization Act of 2013, 127 Stat. 54 - Tribal criminal jurisdiction over non-Indians in Indian country for certain crimes involving domestic and dating violence and related protection orders.

Resources

- *Judicial Toolkit on Indian Law: An Overview of Key Federal Indian Law Cases* by Judge Joseph J. Wiseman (Chief Judge of the Dry Creek Rancheria Band of Pomo Indians and a member of the Tribal Court-State Court Forum in California), available at <http://www.courts.ca.gov/documents/Key-Federal-Indian-Law-Cases.pdf>
- Federal Law Enforcement Training Centers Office of Chief Counsel Artesia Legal Division, *Homeland Security Indian Law Handbook* (Mar. 2017), available at: <https://www.fletc.gov/sites/default/files/2017%20Indian%20Law%20Handbook.pdf>
- National Congress of American Indians, *Tribal Nations and the United States: An Introduction* (Jan. 2015), available at: http://www.ncai.org/attachments/PolicyPaper_VmQazPEqbvZDMeaDvbupWTSZLmzyzBKOknQRXnUyoVMoyFkEWGH_Tribal%20Nations%20and%20the%20United%20States_An%20Introduction.pdf
- Indian Law & Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States* (Nov. 2013), available at https://www.aisc.ucla.edu/iloc/report/files/Chapter_1_Jurisdiction.pdf