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# Tribes and Indians: With Whom Does the United States Maintain a Relationship?

Sharon O'Brien\*

Federal Indian law itself is a mythical creature because it is composed of badly written, vaguely phrased and ill-considered federal statutes; hundreds of self-serving Solicitor's Opinions and regulations; and state, federal, and Supreme Court decisions which bear little relationship to rational thought and contain a fictional view of American history that would shame some of our country's best novelists<sup>1</sup>

## INTRODUCTION

The legal relationship that the United States maintains with Indians is, at best, described as anomalous, complex, and unique.<sup>2</sup> Scholars have written several major works<sup>3</sup> and over 1300 articles on American Indian law in their attempts to explain and define

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1 Deloria, *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 1203 (1989). See also *Duro v. Reina*, 110 S. Ct. 2053, 2072 (1990) (Brennan, J., dissenting) ("This country has pursued contradictory policies with respect to the Indians.").

2 "The relations of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." *United States v. Kagama*, 118 U.S. 375, 381 (1886).

"The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

"[T]here is nothing in the whole compass of our laws so anomalous, so hard to bring within any precise definition, or any logical and scientific arrangement of principles, as the relation in which the Indians stand toward this government and those of the States." Quinn, *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331 (1990) (citing Hugh S. Legare, U.S. Attorney General (1841-43)).

3 F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1982); D. GETCHES & C. WILKINSON, *FEDERAL INDIAN LAW* (1986); C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* (1987).

this relationship.<sup>4</sup> The task, however, is virtually impossible for the reasons described above by Vine Deloria, a noted scholar of Indian affairs.

The near futility of this endeavor is apparent when one looks at one of the most basic questions in federal Indian law: With whom does the United States maintain relations? More specifically, does the United States maintain relations with and obligations to all tribes; with only some tribes; with Indian individuals as well; and if with individuals, individuals defined how?

The most frequent answer to the above question is that the United States possesses a legally prescribed relationship with 321 federally recognized tribes.<sup>5</sup> The relationship, as the Supreme Court has emphasized, is not defined by race, but is of a political nature, arising from the inherent sovereignty of each party.<sup>6</sup> The relationship is defined in over 370 treaties and agreements,<sup>7</sup> in a multitude of statutes, and in thousands of court decisions. It is a relationship grounded in international law and in the once absolute sovereignty of Indian nations who possessed a desirable land base. Lastly, it is a relationship which obligates the United States to protect tribal lands and resources and to provide certain services and benefits.

The above characterization of the government's relationship with Indians contains a number of inconsistencies. Tribes are quasi-sovereigns, yet Congress possesses plenary control over Indian affairs. The government is responsible for tribal lands and resources, but it can extinguish both at will. The government as-

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4 See, e.g., Fausett & Royster, *Courts and Indians: Sixty-Five Years of Legal Analysis: Bibliography of Periodical Articles Relating to Native American Law*, 7 LEGAL REF. SERVICE Q. 107 (1987).

5 According to Felix Cohen, special legislation governing Indians "refers primarily to persons having a certain social or political status . . ." F. COHEN, *supra* note 3, at 177.

In *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866), the Court upheld the existence of tribal status for the Shawnee, Wea, and Miami tribes, thereby protecting individual tribal members from state taxation. In its decision the Court stated:

If the tribal organization of the Shawnees is preserved intact, and recognized by the political departments of the government as existing, then they are a 'people distinct from others' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union.

*Id.* at 755.

6 "Indian law is founded in the political relationship between the United States and Indian tribes. In most instances, the rights and obligations of Indians peculiar to Indian law derive from their status as members or descendants of an Indian tribe, not solely from their race." F. COHEN, *supra* note 3, at 1.

7 1 C. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* (1904).

serts that it possesses a political relationship with federally recognized tribes, yet it maintains relations with a host of nonrecognized tribes and administers many programs on the basis of racial criteria.

The government's inability to acknowledge or rectify these inconsistencies in administering its relationship with American Indians has led to inequitable treatment among tribes and Indian peoples, has resulted in the courts continuing divestment of tribal authority in an era of self-determination, and has placed the United States in the position of violating evolving international legal norms of indigenous rights.

The intent of this Article is two-fold: To examine why the United States' current understanding of its relationship with American Indians is, by definition and implementation, incorrect and unjust; and to argue that the United States' relationship with and obligations to American Indians must be based primarily and foremost on the tribes' status as indigenous peoples.

Part I of the Article first discusses briefly the historical background of the federal-tribal relationship and reviews the current legal interpretation of this relationship. Part II examines the categories of tribes and individuals, as defined by eligibility requirements, over whom the government exercises jurisdiction and for whom the United States provides services and benefits. The Article concludes by analyzing three major problems inherent in and created by the government's current understanding of which tribes and Indian people it is obligated to serve and to protect.

## I. THE HISTORICAL AND MODERN CONTEXT OF THE FEDERAL-TRIBAL RELATIONSHIP

Early government documents rarely addressed the legal status or relationship of Indian tribes. Rather, Indians were referred to in terms of their size and power, as "nations," "tribes," or "remnants of tribes," (depending upon whether their numbers had dwindled due to war and disease), or, more to the point, as "friendly" or "hostile." By the mid-to-late 1800s, Indians were more frequently characterized by their "race" or "degree of civiliza-

tion:<sup>8</sup> two characteristics which were interrelated in the minds of most government officials.

The first legal interpretations of tribal status and federal-tribal relations appeared in the seminal *Cherokee Nation v. Georgia*<sup>9</sup> and *Worcester v. Georgia*<sup>10</sup> decisions by Chief Justice John Marshall. In *Cherokee Nation*, Marshall characterized the Cherokees as a "domestic dependent nation."<sup>11</sup> A year later in *Worcester*, Marshall elaborated on the notion of a domestic dependent nation, stating that "the several Indian nations [are] distinct, political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is . . . guaranteed [sic] by the United States."<sup>12</sup> By associating with the United States, the Indian nations had placed themselves under the protection of a stronger state. A "weaker state," Marshall emphasized, did not "surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."<sup>13</sup>

As Marshall pointed out, the federal government initially related to Indians as sovereign political communities through the treaty process. Congressional legislation served primarily to execute the government's treaty relations with tribes.<sup>14</sup> By the late 1870s,

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8 See generally, CENSUS OFFICE, U.S. DEP'T OF INTERIOR, REPORT ON INDIANS TAXED AND INDIANS NOT TAXED IN THE UNITED STATES (EXCEPT ALASKA) AT THE ELEVENTH CENSUS: 1890 (1894). Census designation is another example, and one that has varied considerably. The United States' censuses did not include Indians until 1850. *Id.* at 15. Pursuant to the Indian appropriations bill of June 27, 1846, the "Interior Department was directed to take a census . . . of the several tribes of Indians . . ." *Id.* The census of 1860 divided the enumeration of Indians into "civilized Indians" and "Indians in the States and Territories retaining their tribal character." The 1870 census similarly divided Indians into "out of tribal relations" and "sustaining tribal relations." A decade later the 1880 census further broke down the civilized group into "native Indians" and "foreign born Indians." The 1890 census refers to "Indians taxed or taxable" and "Indians not taxed." *Id.*

9 30 U.S. (5 Pet.) 1 (1831).

10 31 U.S. (6 Pet.) 515 (1832).

11 *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

12 *Worcester*, 31 U.S. (6 Pet.) at 557.

13 *Id.* at 560.

14 The major exceptions concerned the issue of criminal jurisdiction, a thorny problem because of the ease with which wanted criminals could escape punishment by disappearing into Indian country. The General Crimes Act (Federal Enclosure Act), 18 U.S.C. § 1111 (1988), makes state criminal laws applicable to areas under federal jurisdiction. In 1881, in *United States v. McBratney*, 104 U.S. 621 (1882), the Supreme Court held that the state possessed jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. See Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981).

however, government proposals to assimilate Indians into American society had achieved pre-eminence.<sup>15</sup> The use of treaties as a means of obtaining new lands was no longer practical. The Plains tribes, the last landholders of large areas, were refusing to cede more of their lands for white settlement, demanding instead that the United States fulfill its previous treaty commitments. In 1871, Congress passed legislation ending the policy of treaty-making with tribes,<sup>16</sup> clearing the way to promote the assimilation of the previously nomadic Indian individuals through legislation.

Legislation espousing and court cases upholding the government's jurisdictional control over Indians increased drastically over the next several decades. The Major Crimes Act provided for federal jurisdiction over Indians committing one of seven (now fourteen) major crimes on reservations. Congress established Indian boarding schools designed to "kill the Indian . . . and save the man."<sup>17</sup> The Bureau of Indian Affairs created Indian police forces and courts on reservations, giving them the responsibility of enforcing penalties against many Indian cultural practices. The 1887 Dawes Act<sup>18</sup> divided Indian lands into individual allotments, hoping in the process to turn previously nomadic Indians into individual landowning farmers.

As the government's objective turned from relating to tribes as national entities to supervising dependent individuals whose future lay in assimilation, the courts increasingly characterized Indians as "wards." *United States v. Kagama*,<sup>19</sup> in upholding the validity of the Major Crimes Act, accurately stated the government's view: "[T]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . .

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15 See, e.g., The Resolution of the Indian Rights Association, Second Annual Address to the Public of the Lake Mohonk Conference, Papers of the Indian Rights Association 3 (1884) ("Resolved . . . that every effort should be made to secure the disintegration of all tribal organizations; that to accomplish this result the Government should . . . cease to recognize the Indian as political bodies or organized tribes.").

16 "[H]ereafter, 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 . . . ." Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 556 (1871) (codified in part at 24 U.S.C. § 71 (1988)).

17 Ward, *Minority Rights and American Indians*, 51 N.D.L. REV. 137, 157 (1974) (quoting T. Nelson, *Efforts to Rehabilitate the Standing Rock Sioux* 38 (1965) (unpublished thesis available in North Dakota State University Library)).

18 Indian General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 338 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 336, 339, 341-342, 348-349, 381 (1988)).

19 118 U.S. 375 (1886).

From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."<sup>20</sup>

The process of assimilation continued virtually unabated until the 1930s when Congress passed the Indian Reorganization Act of 1934 (IRA).<sup>21</sup> Congress sought, by this legislation, to reverse the destructiveness of the allotment era by prohibiting the further alienation of Indian land and by resuscitating and strengthening tribal governments.<sup>22</sup> Tribes were provided with an opportunity to restructure their governments using Bureau-developed constitutions as models, and were given access to a newly created revolving loan fund directed at economic development.

By the late 1940s, the country's mood had again shifted. World War II replaced the depression years with a newfound sense of confidence, strength, and a belief in the American way. Politicians and the general public viewed (to the extent that they thought about it at all) Indian separatism and reservations as increasingly un-American. The Indian's future did not lie in developing his or her identity as an Indian, but in assimilating into the mainstream. The IRA policies, which had encouraged tribal self-government, were now considered inappropriate. Indian "emancipation" and freedom was again to be achieved through legislation promoting the integration of Indian individuals into the American mainstream.

In 1953, Congress passed House Concurrent Resolution 108. This "sense of Congress" statement led to the passage of thirteen separate acts of termination during a fifteen year period.<sup>23</sup> In all, 109 tribes and bands, containing 11,466 individuals (about 3% of

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<sup>20</sup> *Id.* at 383-84.

<sup>21</sup> The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1988)).

<sup>22</sup> According to the IRA, the terms of the Act are open to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . and shall further include all persons of one-half or more Indian blood." *Id.* § 479. The Bureau determined that 258 tribes were eligible to vote under the Indian Reorganization Act. For a discussion of the Bureau's decisions during this period as to which Indians constituted a tribe under the IRA, see Quinn, *supra* note 2, at 357-59.

One hundred eighty-one tribes voted to accept the IRA; another fourteen failed to vote, thereby coming under the Act's provision; seventy-seven tribes (over half the total number of Indian people) voted against the Act.

<sup>23</sup> For a list of termination statutes, see *United States v. Burland*, 441 F.2d 1199, 1202 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971). For a history of termination policy, see D. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960* (1986). See also F. COHEN, *supra* note 3, at 173-74; F. PRUCHA, *THE GREAT WHITE FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1048* (1986).

the Indian population at that time), had their relationship with the federal government terminated.<sup>24</sup> Congress passed other corollary "termination" legislation as well. Public Law 280 granted five, and later six, states criminal jurisdiction over Indian lands. Initial steps to dismantle the Bureau of Indian Affairs witnessed the removal of Indian education and health care to the Department of Health, Education and Welfare, later to become the Department of Health and Human Services.

In virtually all respects, the termination policy proved disastrous, leading to a new orientation in the 1970s. During this important decade of change, Congress passed the most important piece of Indian legislation since the Indian Relief Act<sup>25</sup>—the 1975 Indian Self-Determination and Education Assistance Act.<sup>26</sup> Designed to assist tribes in regaining control over the programs and decisions which affect their existence, the Act provided procedures whereby tribes could contract with the Bureau to administer their own programs. Congress also undertook in 1975 the first major review in fifty years of the state and condition of American Indians. Over the next three years, the American Indian Policy Review Commission (AIPRC) produced eleven volumes of information and recommendations on various topics of federal Indian relations.

The mid-1970s were also a time of judicial activity, bringing forth a number of important rulings on the federal-tribal relationship and the status of tribal rights. Between 1974 and 1977, the Supreme Court decided three cases in which it refined a "political relationship test" to describe the rationale behind the government's legal relationship with tribes. In all three cases: *Morton v. Mancari*,<sup>27</sup> *Fisher v. District Court*,<sup>28</sup> and *United States v. Antelope*,<sup>29</sup> the Court considered whether the separate treatment of Indian people constituted a violation of the equal protection clause. In all three rulings, the Court held that the government's relationship with tribes did not constitute racial discrimination. Rather, the government's relationship to tribes was of a political nature.<sup>30</sup>

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24 Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977).

25 Indian Relief Act, ch. 24, 25 Stat. 642 (1889).

26 25 U.S.C. § 450 (1988).

27 417 U.S. 535 (1974).

28 424 U.S. 382 (1976).

29 430 U.S. 641 (1977).

30 See *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439

In *Mancari*, the Supreme Court, at the request of two non-Indian Bureau of Indian Affairs employees, scrutinized the legality of the Indian preference provision of the 1934 Indian Reorganization Act. The Court, in upholding the provision, emphasized that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . . As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."<sup>31</sup>

In *Fisher*, the Court considered whether allowing exclusive jurisdiction by the Northern Cheyenne courts in an adoption proceeding violated the plaintiffs' equal protection rights. In reviewing the objection that a denial of access to the Montana State Courts constituted impermissible racial discrimination, the Court reiterated that "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."<sup>32</sup>

The Court examined a related issue in *Antelope*. Were Indian defendants, enrolled members of the Coeur d'Alene Tribe, who were tried for murder in federal court, deprived of the equal protection of the law? A non-Indian charged under Idaho state law of the same crime, the plaintiffs argued, would have, in all likelihood, received a lesser sentence for the same charge.<sup>33</sup> The unequal treatment, the Court ruled, though disadvantageous to the plaintiffs in this instance, did not constitute invidious racial discrimination.

[F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classification. Quite the contrary, classification expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution . . . [R]espondents were not subjected to federal criminal jurisdiction because they are of

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U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out [tribes] . . . .").

31 *Mancari*, 417 U.S. at 554-55. See also *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-85 (1977) (upholding the disbursement of claim monies to certain members of the Delaware Tribe).

32 *Fisher*, 424 U.S. at 390.

33 See also *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974) (upholding the transfer of crimes committed by a Klamath Indian from federal to state jurisdiction due to the tribe's terminated status).

the Indian race but because they are enrolled members of the Coeur d'Alene Tribe.<sup>34</sup>

The view that the United States maintains a political relationship with tribes, as emphasized in the previous three cases, is essentially correct. However, as discussed, changing federal objectives leading to conflicting policies have resulted in numerous exceptions to the assertion that the government's relationship is of a political nature with only federally recognized tribes. In truth, the federal government maintains a variety of relationships with Indian tribes and individual Indians, not all of whom are federally recognized, nor members of federally recognized tribes. The rationales for these relationships and the rights and benefits that they confer vary. A brief analysis of these differing relationships reveals the government's inconsistent and variable treatment of tribes.

#### A. *Federally Recognized Tribes*

According to the government's own regulations, "acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes."<sup>35</sup> Each year Congress requires the Bureau of Indian Affairs to publish a list of those tribes eligible for federal services.<sup>36</sup> The last list, published in 1988, contained 317 tribes and bands in the lower United States.<sup>37</sup> Since 1988, the Bureau has added another four tribes to the list—the Coquille of Oregon, the Kickapoo of Texas, the San Juan Paiute of Arizona, and the Ponca of Nebraska, bringing the total to 321.<sup>38</sup>

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34 *Antelope*, 430 U.S. at 645-46.

35 25 C.F.R. § 83.2 (1991).

36 Indian Tribal Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 44 Fed. Reg. 7235 (1979).

37 Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 53 Fed. Reg. 52,829 (1988).

38 Each of these relationships differs depending on individual treaties, legislation and history. The term "recognition" did not appear until the enactment of the Indian Reorganization Act of 1934 and was defined as:

all persons of Indian descent who are members of any *recognized* Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood.

Act of June 18, 1934, ch. 576, 48 Stat. 984, 988 (codified as amended at 25 U.S.C. § 479 (1988)) (emphasis added).

These tribes are eligible for all federal services and programs established to fulfill the government's trust responsibility and to assist Indian tribes in their continued quest for self-determination. Included are a variety of programs designed to strengthen tribal governments, to develop tribal economies, to assist in resource management, and to provide social services, including education, housing, welfare assistance, and health care.

The most common statement of eligibility for Indian programs is in the Indian Self-Determination Act: "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."<sup>39</sup> The identical or similar definition appears in the Indian Civil Rights Act,<sup>40</sup> the Indian Health Care Improvement Act,<sup>41</sup> the Indian Education Act,<sup>42</sup> the Indian Alcohol Substance Abuse Act,<sup>43</sup> and the Indian Child Welfare Act.<sup>44</sup>

While the majority of special Indian legislation is directed at federally recognized tribes, thereby meeting the *Mancari* test, terminated and nonrecognized tribes, or nonpolitically recognized tribes, are also the beneficiaries of a number of special programs and benefits for Indians.

### B. Terminated Tribes<sup>45</sup>

Congress terminated its relationship with a number of tribes in the nineteenth and early twentieth century. The allotment of tribal lands, the dissolution of reservations, and the granting of

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The Bureau determined that 258 tribes were eligible to vote under the Indian Reorganization Act. In determining which tribes were eligible the Bureau considered several points, including: The tribe's historical relationship with the federal government, the tribe's political authority over its members, and the group's "social solidarity." See F. COHEN, *supra* note 3, at 13. See also F. PRUCHA, *supra* note 23, at 35; Quinn, *supra* note 2, at 357-59.

39 25 U.S.C. § 450b(e) (1963), amended by Act of Oct. 5, 1988, 102 Stat. 2285 (1988).

40 25 U.S.C. § 1301 (1988).

41 25 U.S.C. § 1601 (1988).

42 20 U.S.C. § 1001 (1988).

43 25 U.S.C. § 2403(3) (1988).

44 25 U.S.C. § 1901 (1988).

45 See generally, AIPRC, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS: TASK FORCE TEN: TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS: FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION (1976) [hereinafter TASK FORCE TEN].

United States citizenship, were all procedures used to end federal recognition of tribal existence. But, as discussed previously, Congress initiated its most direct termination policy in 1953. Although Congress' intent was the ultimate dissolution of its relationship with tribes and the Indians' complete assimilation into the mainstream, the courts have ruled that elements of the federal-tribal relationship have survived termination and remain intact.

The Menominee of Wisconsin and the Klamath of Oregon were among the largest and most self-sufficient tribes with whom the United States terminated its relationship.<sup>46</sup> Both tribes brought suit in federal court alleging that Congress had not terminated their rights to hunt and fish on their former reservation lands. The courts agreed, holding in *Menominee Tribe v. United States*,<sup>47</sup> and *Kimball v. Callahan*,<sup>48</sup> that the federal termination legislation had not extinguished the tribes' hunting and fishing rights as guaranteed in their treaties.<sup>49</sup>

In addition to providing continued protection of rights held by terminated tribes, Congress is increasingly including terminated

46 See, e.g., H.R. 1344, 99th Cong., 1st Sess. (1985) (recognizing the Alabama-Coushatta Tribe and Tigua Pueblo (or Yselta del Sur) tribes of Texas).

47 391 U.S. 404 (1967).

48 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974).

49 The Termination Act, which states that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe," plainly contemplates the termination of federal supervision. Act of June 17, 1954, ch. 303, 68 Stat. 250, 252 (repealed 1973). The use of the word "statutes" is potent evidence that the Act does not apply to treaties.

"We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists (see *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67) 'the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.'" *Menominee*, 391 U.S. at 412-13.

See also F. COHEN, *supra* note 3, at 812 n.11. ("[T]he federal trust responsibility to protect these [tribal] resources seems to continue, like the [treaty] rights themselves, despite the termination legislation.")

As legal trustee over these rights, the Department of Interior subsequently provided the tribe with funds to manage its hunting and fishing rights. These funds allowed the tribe to write a game code, and to establish a court system and tribal police to enforce their gaming laws. *Id.*

Members of terminated tribes are eligible for some federal services. See, e.g., Indian Education Assistance Act, 20 U.S.C. § 1001 (1988); Indian Health Care Improvement Act, 25 U.S.C. § 1601 (1988).

As mentioned, the AIPRC recommended that the government promptly restore all terminated tribes to full status. Congress has declined to do this, and in fact has only recently rescinded the original termination legislation. Congress has, however, individually restored some tribes, including the Menominees and Klamaths.

tribes in legislative provisions directed at federally recognized tribes. Among the programs for which terminated tribes are eligible, are the Indian Child Welfare Act,<sup>50</sup> the Health Care Improvement Act,<sup>51</sup> and the Indian Education Act,<sup>52</sup> all programs of vital interest to continued Indian existence.

### C. *Nonrecognized Tribes*<sup>53</sup>

Following Congress' passage of the 1871 legislation terminating treaty-making with the Indian nations, the Commissioner of Indian Affairs, Francis Walker, wrote: "How are Indians, never yet treated with, but having every way as good and as complete rights to portions of our territory as had the Cherokees, Creeks, Choctaws, and Chickasaws, for instance, to the soil of Georgia, Alabama, and Mississippi, to establish their rights?"<sup>54</sup>

Over the next decades, Congress partially addressed this problem by establishing reservations for some tribes through legislation.<sup>55</sup> Other tribes received executive order reservations, a presi-

50 25 C.F.R. § 23.1 (1991).

51 See, e.g., Scholarships under Indian Health Care Improvement Act, 42 C.F.R. § 36.301 (1990).

52 34 C.F.R. § 250.1 (1990).

53 Another possible category, but one which appears to overlap with those mentioned above, is that of "dependent Indian communities." In general, federal jurisdictional rights extend to "Indian country." "Indian country" is defined as:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . .
- (b) all dependent Indian communities within the border 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 . . . .

18 U.S.C. § 1151 (1988).

Section 1151(b) remains somewhat vaguely defined. This paragraph, an outgrowth of *United States v. Sandoval*, 231 U.S. 28, 46 (1913), was originally intended to cover Indian lands, such as those held by the Pueblos, or, communally owned lands held in fee simple by the tribe, and not federally owned reservation lands. Whether the statute can be construed to include the land upon which other Indians live, such as terminated or nonrecognized, remains speculative.

For a discussion of this statute, see Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); Sentelle & Morris, *Criminal Jurisdiction on the North Carolina Cherokee Indian Reservation—A Tangle of Race and History*, 24 WAKE FOREST L. REV. 335 (1989); Note, *The Meaning and Implication of "Indian Country": State v. Dana*, 131 ME. L. REV. 171 (1979).

54 Quinn, *supra* note 2, at 347 (citing Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior 83 (1872)).

55 See, e.g., An Act Ratifying an Agreement with the Colville Tribe, ch. 140, 27 Stat.

dential right revoked by Congress in 1919.<sup>56</sup> The random nature of these two procedures, however, left many tribes without a federally recognized land base or federal services. California tribes, for example, inhabitants of the state today with the largest Indian population, were the victims of nonratified treaties. The California bands had agreed in these treaties to relinquish large areas of land for smaller reservations and the provision of federal services. The government adhered to the taking of California tribal lands, but failed to provide federal recognition and services.

Other tribes and bands, such as the Stillaguamish Tribe in Washington State,<sup>57</sup> and a number of eastern tribes who avoided removal, such as the Pokagon Band of Potawatomis, located in Michigan and Indiana, were the signatories to treaties, but never were provided with the promised services and lands. Still other tribes, because of their peacefulness or desire to escape governmental notice, were forgotten.

The public's awareness of the plight of nonrecognized tribes became a fashionable news report in the mid-1970s when the Passamaquoddy and Penobscot sued the federal government<sup>58</sup> for failure to protect their lands under the provisions of the Trade and Intercourse Act of 1790. The Act prohibited the purchase of Indian lands from "any Indians, or nation or tribe of Indians within the United States . . . except through a federal treaty."<sup>59</sup> Ignoring the law's existence, a number of the original thirteen states concluded their own treaties with tribes for land.

Before the court in could consider whether Massachusetts (the forbearer to Maine's lands) had violated the Nonintercourse Act, the court first had to determine whether the Passamaquoddy, a nonrecognized tribe, were protected by the Act, or whether the Act covered only those tribes with whom the federal government had a formal relationship. Using the Supreme Court's definition of a "tribe" in *Montoya v. United States*,<sup>60</sup> one of the few legal statements as to what constitutes a tribe,<sup>61</sup> the Court held that

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62 (1892) (executive order reservation).

56 43 U.S.C. § 450 (1919).

57 See *United States v. Washington*, 50 F.2d 676, 692-93 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (finding that the tribe retained its fishing rights guaranteed under Treaty of Point Elliott despite the tribe's lack of recognition by the federal government).

58 *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

59 Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 138 (codified as the Indian Nonintercourse Act, 25 U.S.C. § 177 (1988)).

60 180 U.S. 261 (1901).

61 See also *United States v. John*, 437 U.S. 634, 650 (1978); *Chippewa Indians v.*

the Passamaquoddy were indeed "a body of Indians of the same or similar race, united in the community under one leadership or government, and inhabiting a particular, though sometimes ill-defined territory."<sup>62</sup> The Nonintercourse Act,<sup>63</sup> the court concluded, had established a trust relationship between the federal government and all tribes. Federal recognition was not a prerequisite for protection under the terms of the Act.<sup>64</sup>

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United States, 307 U.S. 1 (1939); *Perrin v. United States*, 232 U.S. 478, 487 (1914); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 316 (1911); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *United States v. Wright*, 53 F.2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932).

62 *Morton*, 528 F.2d at 377. See also *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Sandoval*, 231 U.S. 28 (1913) (overturning *Joseph*); *United States v. Joseph*, 94 U.S. 614 (1877), *rev'd*, *Sandoval*, *supra*.

63 25 U.S.C. § 177 (1988). See also Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138; Act of March 1, 1793, ch. 19, § 8, 1 Stat. 330; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 472; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 746; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (codified as carried forward at 25 U.S.C. § 177 (1988)). See generally *Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 29-42 (1979); Note, *Tribal Property: Defining the Parameters of the Federal Trust Relationship under the Nonintercourse Act: Catawba Indian Tribe v. South Carolina*, 12 AM. INDIAN L. REV. 101 (1984); Comment, *Land Claims Under the Indian Nonintercourse Act* 25 U.S.C. § 177, 7 B.C. ENVTL. AFF. L. REV. 259 (1978).

64 "We emphasize what is obvious, that the 'trust relationship' we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act." *Morton*, 528 F.2d at 379.

The government's assumption of responsibility for Indian lands, as illustrated in the Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 138 (codified as the Indian Nonintercourse Act, 25 U.S.C. § 177 (1988)), and the Indian Claims Commission Act, Act of August 13, 1946, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. § 70 to 70v-3) (terminated 1978), extends to all tribes. Presumably, such an interpretation would mean by extension that nonfederally recognized tribes are eligible for other federal land related protection and services. See F. COHEN, *supra* note 3.

The decision, which ruled that the federal government possessed an obligation to protect the land claims of all tribes, led to a new flurry of suits, especially among eastern tribes who had had their lands taken through colonial treaties.

The government, with the passage of the Indian Claims Commission in 1946, confirmed, in essence, the court's finding that the government possessed a trust relationship with all tribes through the land exchange process. 25 U.S.C. § 70 to 70v-3. The Indian Claims Commission provided relief for claims against the United States on behalf of "[a]ny Indian tribe, band, nation, or other identifiable group of American Indians . . . ." The Indian Claims Commission expired in 1978. The remaining 102 outstanding dockets were transferred to the Court of Claims. See Native American Rights Fund, Inc., INDEX TO INDIAN CLAIMS COMMISSION DECISIONS BIBLIOGRAPHY (1973).

The regulations for the Protection of Archeological Resources, for example, acknowledges the government's obligations to protect the historic sites of nonrecognized tribes as well 18 C.F.R. § 1312.7 (1991).

The Passamaquoddy, according to the AIPRC, were but one of more than 200 tribes which were nonrecognized, placing them in a state of political limbo without the federal services, benefits, and protection provided to recognized tribes.<sup>65</sup> In response to the AIPRC's recommendations, Congress in 1978 passed legislation entitled "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe."<sup>66</sup> In the twelve years since the passage of the Federal Acknowledgement Act, the Bureau has processed fully only nineteen of the 120 tribes which have petitioned for recognition.<sup>67</sup> Of these nineteen, the Bureau has recognized

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65 See generally TASK FORCE TEN, *supra* note 45; *Federal Acknowledgement Process: Hearings Before the Senate Elect Committee on Indian Affairs*, 100th Cong., 2d Sess. 77 (1988) [hereinafter *Hearings*, 1988] (BIA Appendix material).

66 Originally promulgated as 43 Fed. Reg. 39,361 (1978) (codified at 25 C.F.R. § 54) (1978). The regulations today appear at 25 C.F.R. § 83 (1991).

The criteria, paraphrased, are as follows: (a) Petitioner must establish a continuous Indian identity from historical times to the present; (b) petitioner must inhabit a specific area or distinctly Indian community, and its members must be descendants of an Indian tribe which historically inhabited a specific area; (c) petitioner must have maintained autonomous political authority over its members throughout history; (d) petitioner must present its governing document or statement describing membership criteria and governance procedures; (e) petitioner must present membership roll with evidence that all members descended from the historic tribe; (f) petitioner's members must not belong to other Indian tribes; and (g) petitioner's relationship with the federal government must not have been terminated by Congress. 25 C.F.R. § 83.7(a)-(g) (1991).

"Although petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations—a political relationship—is indispensable." 43 Fed. Reg. 39,361-62 (1978).

See the standards suggested by the AIPRC in its final report. TASK FORCE TEN, *supra* note 45, at 461-84.

For the most part, the courts have regarded the issue of tribal existence as a political question, left to the executive and congressional branches. See *United States v. Rickert*, 188 U.S. 432, 445 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1865). *But see Mashpee Tribe v. New Seabury Corp.* 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979).

Quinn, *supra* note 2; Weatherhead, *What is an "Indian Tribe"?—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1 (1980); Comment, *The Inprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991).

67 Prior to May 5, 1989, 114 Indian groups had petitioned. *Hearing*, 1988, *supra* note 65, at 47 (statement of Hazel Elbert, Acting Deputy to the Assistant Secretary for Indian Affairs BIA, Department of the Interior). Six groups have petitioned since May 5, 1989. See *Revived Ouachita Indians of Arkansas and America*, 55 Fed. Reg. 27,903 (1990); *Canoncito Band of Navajos*, 55 Fed. Reg. 668 (1990); *Salinan Nation*, 54 Fed. Reg. 50,027 (1989); *Paucatuck Eastern Pequot Indians of Connecticut*, 54 Fed. Reg. 30,474 (1989); *Indian Canyon Band of Coastanoan/Mutsun, Indians of California*, 54 Fed. Reg. 29,948 (1989); *Ohlone/Coastanoan Muwekma Tribe*, 54 Fed. Reg. 27,070 (1989).

eight,<sup>68</sup> denied eleven,<sup>69</sup> and issued petitions against another three.<sup>70</sup>

#### *D. State Recognized Tribes*

State recognized tribes are still another category of tribes eligible for a variety of federal services. State recognized tribes, of which there are over twenty,<sup>71</sup> are found primarily east of the Mississippi River. These are tribes which very early in their interaction with whites came under the protection and jurisdiction of the colonial, and later, state governments. In general, it is the state government which has the responsibility for providing services and benefits and for exercising primary civil and criminal jurisdiction over the tribes.

The degree of federal involvement with state recognized tribes varies depending upon the tribe's particular history. A few tribes, such as the St. Regis Mohawk and the Passamaquoddy, are regarded as both federally and state recognized.<sup>72</sup> As with nonrecog-

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68 San Juan Southern Paiute Tribe, 54 Fed. Reg. 51,502 (1989); Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4,193 (1987); Poarch Band of Creeks, 49 Fed. Reg. 24,083 (1984); Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6,177 (1983); Death Valley Timbi-Sha Shoshone Band of California, 47 Fed. Reg. 50,109 (1982); Tunica-Biloxi Indian Tribe of Louisiana, 46 Fed. Reg. 38,411 (1981); Jamestown Clalloam, 45 Fed. Reg. 81,890 (1980); Grand Traverse Band of Ottawa and Chippewa, 45 Fed. Reg. 19,821 (1980).

69 Machis Lower Alabama Creek Indian Tribe, Inc., 53 Fed. Reg. 23,694 (1988); Samish Indian Tribe, 52 Fed. Reg. 3709 (1987); Tchinouk Indians of Oregon, 51 Fed. Reg. 2437 (1986); Southeastern Cherokee Confederacy, Inc., Northwest Cherokee Wolf Band, and the Red Clay Inter-Tribal Indian Band, 50 Fed. Reg. 39,047 (1985); United Lumbee Nation of North Carolina and America, Inc., 50 Fed. Reg. 18,746 (1985); Principal Creek Indian Nation East of the Mississippi, 50 Fed. Reg. 14,302 (1985); Kaweah Indian Nation, Inc., 50 Fed. Reg. 14,302 (1985); Munsee-Thames River Delaware Indian Nation, 47 Fed. Reg. 50,109 (1982); Lower Muskogee Creek Tribe-East of the Mississippi, Inc., 46 Fed. Reg. 51,652 (1981).

70 Miami Nation of Indians of State of Indiana, Inc., 55 Fed. Reg. 29,423 (1990); Mohegan Tribe of Indians of Connecticut, 54 Fed. Reg. 47,136 (1989); Snohomish Tribe of Indians, 48 Fed. Reg. 15,540 (1983).

71 UNITED STATES DEPARTMENT OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS AND INDIAN TRUST AREAS (1974).

72 For the first major discussion of state recognized tribes, see THE INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 775 (1928).

In addition, the United States technically maintains treaty relations with a few tribes and bands living outside the United States, who as part of larger Indian nations, signed treaties with the United States. For example, see the United States' treaties with the Blackfoot Indians Confederacy, Treaty with the Blackfeet and other Tribes, October 17, 1855, United States-Blackfeet and Other Indian Tribes, 11 Stat. 657, the Seven Nations, Treaty with the Seven Nations, and several with the Six Nations, and the Wabanaki Confederacy.

nized and terminated tribes, the federal government has obligated itself through various legislation to protect the tribal land base. And as in the case of terminated tribes, Congress has included state reservations as eligible recipients for a number of federal Indian programs including: The Food Stamp Program on Indian Reservations;<sup>73</sup> Weatherization Program;<sup>74</sup> Energy Conservation Program;<sup>75</sup> Block Grants;<sup>76</sup> Native American Programs;<sup>77</sup> and Scholarships under Indian Health Care Improvement Act.<sup>78</sup>

### E. *Indigenous Populations and "Colonized" Territories*

Several eligibility provisions now define "Native Americans" to include the following: Eskimos, Aleuts, and Native Hawaiians, indicating the provision of services to Indians on the basis of their status as indigenous populations. Alaskan natives include three distinct groups—Aleuts; Eskimos; and the Tlingits, Haida, and Athabascan Indians. All three groups comprise a special category of federal responsibility,<sup>79</sup> and are eligible for most all programs open to federally recognized tribes in the lower forty-eight states. The Indian Reorganization Act, for example, states: "For the purposes of [this Act], Eskimos and other aboriginal peoples of Alaska shall be considered Indians."<sup>80</sup>

The federal government currently maintains a political, or government-government relationship with 210 Alaskan native governments.<sup>81</sup> Additionally, as stated in the Bureau's annual list of

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During the last several decades, the provision of federal services to tribes is one criteria which the government has used to determine the existence of federal recognition. Whether the recent trend to include state recognized tribes as eligible for federal services will result in the acknowledgement of all state recognized tribes as federally recognized, remains to be seen.

73 7 C.F.R. § 281.2 (1991).

74 10 C.F.R. § 440.3 (1991).

75 10 C.F.R. § 455.2 (1991).

76 45 C.F.R. § 96.44 (1990).

77 45 C.F.R. § 1336.10 (1990).

78 42 C.F.R. § 36.303 (1990).

79 25 U.S.C. § 461 (1988). See e.g., D. CASE, *ALASKA NATIVES AND AMERICAN LAWS* (1984); F. COHEN, *supra* note 3, at ch. 14, § A; INTERIOR DECISIONS 593 (1932). For information on the Alaska Native Claims Settlement Act, see T. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* 155-72 (1985); Lazarus & West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 *LAW & CONTEMP. PROBS.* 132 (1976); Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 *UCLA-ALASKA L. REV.* 89 (1979).

80 25 U.S.C. § 479 (1988).

81 The Alaska Native Claims Settlement Act extinguished all reservation lands in

federally recognized tribes, "unique circumstances have made eligible additional entities in Alaska which are not historical tribes."<sup>82</sup> This oblique reference is to the existence of village and regional corporations established by the Alaskan Native Claims Settlement Act of 1971. These corporate bodies function in some respects as artificial tribes, responsible for the health and welfare of corporate members.

Native Hawaiians, despite their treaty relations with the United States, are not considered federally recognized, sovereign political entities.<sup>83</sup> The courts have concluded, however, that Congress has assumed a legislative trust relationship with Native Hawaiians through passage of the Hawaiian Homes Commission Act<sup>84</sup> and other legislation. Congress included native Hawaiian organizations and individuals under the definition of Native American in several pieces of legislation in the 1970s. Since then, Congress has incorporated native Hawaiians into a number of major bills passed for American Indians, for example, The American Indian Religious Freedom Act,<sup>85</sup> small business development programs, employment and training programs, environmental protection agency grants, and social service programs.<sup>86</sup>

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Alaska, except the Annette Island Reserve of the Melaklatla Indian Community. 43 U.S.C. § 1618 (1988).

Whether or not Alaskan native groups are recognized as sovereign remains unclear. *See* *Native Village of Stevens v. Alaska Management and Planning*, 757 P.2d 32 (Alaska 1988) (finding that the Village of Stevens did not possess sovereign immunity in a contract dispute).

The federal courts, conversely, have held that Native villages do constitute "tribes." *See* *Board of Equalization v. Alaska Native Bhd. and Shd.*, 666 P.2d 1015 (Alaska 1983) (holding in part that the Ketchikan Indian Corporation is not a tribe although organized under the IRA).

*See generally* NATIVE REVIEW COMMISSION 155-72 (1985); Note, *Tribal Sovereignty: Alaskan Native Exercise of Sovereign Power*, 12 AM. INDIAN L. REV. 245 (1987).

82 Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 47 Fed. Reg. 53,133 (1982).

83 *See generally* Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848 (1975); D. GETCHES & C. WILKINSON, *supra* note 3, at 820-47.

84 Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921).

85 42 U.S.C. § 1996 (1988).

86 Interestingly, the most frequently used definition of "native Hawaiian" is "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands before January 1, 1978 . . ." 24 C.F.R. § 203.43(i) (1991).

*See also* 13 C.F.R. § 124.100 (1991) ("[i]ndividual whose ancestors were natives prior to 1778, of the area which now comprises the State of Hawaii"); 34 C.F.R. §§ 410.4, 771.4, 771.20 (1990). Eligibility for several programs within the Office of Education includes the definition of native Hawaiian. *See also* Minority Small Business and Capital Ownership Development, 13 C.F.R. § 124.100 (1991); Employment and Training Programs, 20 C.F.R. § 632.10 (1991); Hawaiian Volcanoes National Park, 36 C.F.R. § 7.25

Indian tribes find themselves as corecipients in one final category of legislation—legislation directed at United States owned and governed territories: Puerto Rico,<sup>87</sup> Guam, the Virgin Islands,<sup>88</sup> and American Samoa.<sup>89</sup> A few programs, i.e., the Railroad Retirement Act<sup>90</sup> and the Indian Housing and HUD regulations concerning foreclosures,<sup>91</sup> are specifically targeted at tribes and overseas territories.

## II. FEDERAL-INDIAN RELATIONSHIP<sup>92</sup>

As previously discussed, the government's earliest relationships with Indians were maintained with the Indian Nations through the treaty process—not with Indians as individuals.<sup>93</sup> Indian individuals, unless they separated from their tribes, were considered as members of alien nations,<sup>94</sup> over whom the federal government

(1990); E.P.A. Superfund, 40 C.F.R. § 35.6015 (1990); Native American Programs, 45 C.F.R. § 1336.10 (1990); Small Disadvantaged Business Concern Representation, 48 C.F.R. § 52.219-2 (1990).

87 Originally won from Spain in the Spanish-American War, along with Guam, (and Cuba and the Philippines) Puerto Rico is currently a commonwealth.

88 The United States purchased the Virgin Islands from Denmark in 1917.

89 American Samoa, with whom we signed the Treaty of 1878, is an unincorporated unorganized territory, administered directly by the Department of Interior. See Treaty between the United States of America and the Government of the Samoan Islands, Jan. 17, 1878, United States-Samoan Islands, 20 Stat. 704, T.S. No. 312; Convention Between the United States, Germany, and Great Britain to Adjust Amicably the Questions Between the Three Governments in Respect to the Samoan Group of Islands, Dec. 2, 1899, United States-Germany-Great Britain, 31 Stat. 1878, T.S. No. 314.

90 20 C.F.R. § 295.2 (1991).

91 24 C.F.R. § 905.102 (1991).

92 The distinction between tribes and individuals in reality is relatively artificial. Although some programs are directed specifically at tribes and others at individuals, a number of programs include benefits and services for both tribes and individuals.

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[W]e must give to the term "Indian" a liberal and not a technical or restrictive construction. It must be construed in its historical and not in its ethnological significance . . . Any other conclusion announced now as a binding rule . . . would result in invalidating treaties and agreements, disregarding vested rights, and introducing confusion into the entire Indian question.

13 House Exec. Cong., 2nd Sess., 52 Cong. 36 (1892-93).

94 *Elk v. Wilkins*, 112 U.S. 94 (1884) (finding that John Elk, though voluntarily separated from his tribe, was ineligible to vote). Indians were not citizens, but members of distinct, alien nations. Their allegiance was not to the United States, but to their tribes. Individual Indians were not subject to the United States' jurisdiction unless Congress expressed a clear intent to bring them under federal jurisdiction.

But the question whether any Indian tribes or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a

had little control. The goal of separating members from their tribes and assimilating them into the dominant society, however, was a government objective enunciated very early in the nation's history. Thomas Jefferson's words to the Wea, Miami, and Potawatomi Indians serve as an example:

[W]e shall with great pleasure see your people become disposed to cultivate the earth, to raise herds of useful animals and to spin and weave, for their food and clothing . . . . We will with pleasure furnish you with implements for the most necessary arts, and with persons who may instruct how to make and use them.<sup>95</sup>

To this end, Congress, in 1819, appropriated ten thousand dollars for the civilization of the Indian tribes adjoining the frontier settlements.<sup>96</sup>

Early governmental attempts to "civilize" the Indian most often took the form of promises in treaties to provide teachers and agriculturists to the tribes.<sup>97</sup> Following the Civil War, the assimilation of the individual Indian became the government's cherished goal. Congress ended treaty making and passed a variety of bills designed to destroy the tribes' political, economic, and cultural life. The courts, in case after case, legitimized the government's objectives to secure jurisdictional control over individual Indians.

Early congressional legislation, supported by the decision in *United States v. Rogers*,<sup>98</sup> provided the United States with control over non-Indians within Indian country. The government, by virtue of its treaty making power and its authority to manage and to regulate federal lands, possessed some jurisdictional control over tribes and individual Indians within the reservations. The courts next examined whether Congress could also claim jurisdiction over Indian individuals who lived off the reservation. In 1865, in *United States v. Holliday*,<sup>99</sup> the Supreme Court answered this question in the affirmative, ruling that the individual was the ultimate benefi-

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question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.

*Id.* at 106-07.

<sup>95</sup> Thomas Jefferson's 1802 speech to the Miamis, Potawatomis, and Weas, as quoted in F. PRUCHA, *supra* note 23, at 142.

<sup>96</sup> Act of March 3, 1819, ch. 85, 3 Stat. 516.

<sup>97</sup> See 1 C. KAPPLER, *supra* note 7, at 193, (treaties with Winnebagos, Menominees, Kickapoos, Creeks, and Cherokees). See also F. PRUCHA, *supra* note 23, at 145-58.

<sup>98</sup> 45 U.S. (4 How.) 567 (1846).

<sup>99</sup> 70 U.S. 407 (1865).

ciary of the government's trust responsibility. *Holliday* considered whether the liquor prohibition laws extended to a Winnebago tribal member living off-reservation in Minnesota. Ruling that the commerce clause necessitated regulating commerce with individuals, the Court held that Congress' responsibilities extended to Indian individuals.<sup>100</sup>

Exactly which Indian individuals are under congressional jurisdiction, and for which purposes, is not an easily answered question. The Court in *Mancari* and *Antelope* implied that only tribal members of federally recognized tribes were the recipients of special federal programs and jurisdiction. Enrollment in a federally recognized tribe, however, is not the only eligibility criteria employed by congressional legislation. According to a 1978 congressional survey, federal legislation contained thirty-three definitions of Indians. A general perusal of current laws and regulations indicates that Indians must fulfill one or more of the following eligibility requirements.

#### A. *Membership in a Class Denoted as Indian*

Early legislation, very often, simply referred to "Indians."<sup>101</sup> The Snyder Act of 1921, for example, appropriates funds to the Bureau of Indian Affairs for the "assistance of Indians throughout the United States."<sup>102</sup> The 1934 Johnson O'Malley Act provides that the "Secretary of Interior is hereby authorized . . . to enter into a contract . . . for the education, medical attention, agricultural assistance, and social welfare . . . of Indians in such State or Territory."<sup>103</sup> The Major Crimes Act states that "[a]ny Indian who commits [the named crimes] . . . shall be subject [to] . . . the exclusive jurisdiction of the United States."<sup>104</sup>

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100 See also *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943); *United States v. Nice*, 241 U.S. 591 (1916) (An individual's land is protected against state taxation by virtue of the trust relationship.).

101 Article IX of the Articles of Confederation states:

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating . . . the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its limits be not infringed or violated. . . .

102 Act of Nov. 2, 1921, ch. 115, 42 Stat. 208 (codified at 25 U.S.C. § 13 (1988)).

103 Johnson-O'Malley Act, ch. 147, 48 Stat. 596 (1934) (§ 4 repealed and reenacted as amended 1975) (§ 5 omitted and reenacted as amended 1975) (codified as amended at 25 U.S.C. §§ 452-57 (1988)).

104 18 U.S.C. § 1153 (1984).

More recent legislation, however, requires that Indians meet one or more of the following requirements: Membership in a federally recognized, recognized state, or terminated tribe; the possession of a certain degree of Indian blood; or inhabitation of a certain defined area.<sup>105</sup>

*B. Membership in a Federally Recognized,  
State Recognized, or Terminated Tribe*

The most common criteria for the service eligibility of Indian individuals is their membership in a federally recognized tribe. It is also the only definition of an Indian which can withstand the test established by the *Mancari-Morton-Fisher* trilogy—that special benefits and services to Indians are a proper fulfillment of Congress' special relationship to federally recognized tribes.

The most common definition is the one that appears in the Indian Self Determination Act<sup>106</sup> and Indian Education Assistance Act.<sup>107</sup> The Bureau of Indian Affairs provides that "'Indian' means a person who is a member of an Indian Tribe and is eligible to receive services from the Secretary of the Interior because of his/her status as an Indian."<sup>108</sup> Other statutes adopting political criteria as the primary eligibility requirement include the Indian Land Consolidation Act<sup>109</sup> and the Grants to Tribally Controlled Colleges.<sup>110</sup> The government's definition of service eligibility in terms of membership in a federally recognized (or state recognized or terminated) tribe, however, is far from consistent. Instead, many statutes require only the possession of a speci-

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105 Enrollment in a federally recognized tribe, however, is not a determinant criteria for federal jurisdiction to occur. *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938). See also *United States v. Sandoval*, 231 U.S. 28 (1913) (permitting extension of a federal liquor prohibition to nonreservation Pueblo communities based on the history of relations between those groups and the executive and legislative branches of the federal government); *United States v. John*, 437 U.S. 634 (1978) (permitting jurisdiction of a federal criminal statute over tribal member defendant despite lapse of previous federal supervision over tribe); *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974).

106 25 U.S.C. §§ 450-450n (1988). See also 42 U.S.C. §§ 2004b, 4762(5) (1988).

107 25 U.S.C. §§ 455-458e (1988).

108 25 C.F.R. § 41.3 (1990).

109 The Indian Land Consolidation Act states: (1) 'Indian' means a person who is a member of a tribe or any person who is recognized as an Indian by the Secretary of the Interior. . . . 25 U.S.C. § 2201 (1988). See, e.g., 42 C.F.R. § 36.120 (1989) (limiting Indian Health Service eligibility to members of federally recognized tribes).

110 Grants to Tribally Controlled Colleges states: "'INDIAN' means a person who is a member of an Indian Tribe and is eligible to receive services from the Secretary of the Interior because of his/her status as an Indian." 25 C.F.R. § 41.3(h) (1991).

fied blood quantum. Other statutes require both federal recognition and blood quantum.

*C. Membership in a Group Racially Defined as Indian*

The government has always characterized its relationship to Indians partly in terms of race. In *United States v. Rogers*, the Supreme Court refused to accept the argument that a white man, adopted by and living with the Cherokees as a citizen, came under the exclusive criminal jurisdiction of the Cherokee courts. The Cherokees' treaty guaranteeing the tribe jurisdiction over all criminal matters, the Court ruled, was "confined to those who by the usages and customs of the Indians are regarded as belonging to their race. *It does not speak of members of a tribe, but of a race generally . . .*"<sup>111</sup> Several other decisions have confirmed this view: Pueblo Indians are a tribe of Indians because "[a]lthough sedentary, industrious and disposed to peace, they are Indians in race;"<sup>112</sup> land grant is to a member of a race which is in a "state of pupillage;"<sup>113</sup> "[t]he term 'Indian' . . . is one descriptive of race."<sup>114</sup>

Although the government now disclaims the use of race as a component of its relationship with Indians, the government has previously used, and currently uses race, or blood quantum, as a requirement for allotments,<sup>115</sup> awards, services, and benefits.<sup>116</sup> The most outstanding (although largely historical) use of race is in regard to competency. Whether or not the Bureau was willing to declare an Indian individual competent, thereby capable of alienating his or her land, depended upon the person's possession of one-half or more blood quantum.<sup>117</sup> Individuals possessing less

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111 *United States v. Rogers*, 46 U.S. (4 How.) 567, 573 (1846).

112 *United States v. Candelaria*, 271 U.S. 432, 441 (1926).

113 *Taylor v. Brown*, 147 U.S. 640, 646 (1893).

114 *Westmoreland v. United States*, 155 U.S. 545, 548 (1895). For a comparative discussion of the racial identity of African-Americans, see F. DAVIES, *WHO IS BLACK?* (1991).

115 In some instances, the courts have recognized that federal jurisdiction and tribal rights are based on a combination of racial heritage and recognition by the tribe as a member. See, e.g., *Sully v. United States*, 195 F. 113 (C.C.D.S.D. 1912) (a one-eighth blood quantum was a necessary requirement for allotments).

116 A number of treaties make specific reference to "mixed-bloods." See F. COHEN *supra* note 3, at 3 n.14.

117 The courts have also considered the reverse question: Is a person who is half white and half Indian blood eligible for citizenship? See *In re Camille*, 6 F. 256 (C.C.S. Or. 1880).

than one-half Indian blood were considered "more competent" than those with one-half or more.<sup>118</sup>

Several acts, of which the Indian Reorganization Act is the most prominent, provide services to recognized Indians, and in addition, to those one-half blood quantum or more.<sup>119</sup> Other Bureau programs which incorporate or include Indians of one-half or more blood quantum, include: Indian preference;<sup>120</sup> The Employment Assistance for Adult Indians;<sup>121</sup> Vocation Training for Adult Indians;<sup>122</sup> the right of free entry under the Jay Treaty;<sup>123</sup> creation of Trusts for Restricted Property of Five Civilized Tribes;<sup>124</sup> a number of regulations dealing with Osage property;<sup>125</sup> Land Acquisition;<sup>126</sup> and Certificates of Competency.<sup>127</sup> In addition, the Indian Health Services (IHS), which is within the Department of Health and Human Services, extends hiring preferences to Indians of one-half or more blood quantum.

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118 "Statutory and administrative distinctions in the determination of competency to alienate freely often hinge on the quantum of the Indian blood of the allottee." F. COHEN, *supra* note 3, at 169.

In one instance, Congress terminated its relationship with a tribe, based purely on racial grounds. The Ute Termination Act of 1954, 25 U.S.C. §§ 677-77a (1988) divided the tribes into full-bloods and mixed-bloods. Congress' relationship with the mixed-bloods was terminated, while its relationship with the former remains. In *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985), the courts upheld the survival of the mixed-blood's right to hunt and fish on their former reservation.

119 The Indian Reorganization Act defined "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . and shall further include all other persons of one-half or more Indian blood." Act of June 18, 1934, 25 U.S.C. §§ 461-79 (Supp. VII, 1934). See Krieger, *Principles of the Indian Law and the Act of June 18, 1934*, 3 GEO. WASH. L. REV. 279 (1935).

120 25 C.F.R. § 5.1(c) (1991).

121 25 C.F.R. § 27.1(i) (1991).

122 25 C.F.R. § 27.1(i) (1991).

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Nothing in this subchapter [dealing with admission of aliens, deportation, and alien registration] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

Immigration and Nationality Act of 1952, ch. 477, § 289, 66 Stat. 163, 234 (1952) (codified at 8 U.S.C. § 1359 (1988)).

For a more thorough discussion of the immigration rights of American Indians under the Jay Treaty and Treaty of Ghent, see O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economics and Families*, 53 FORDHAM L. REV. 315 (1984).

124 25 C.F.R. §§ 116.4(a), 213.45 (1991).

125 25 C.F.R. §§ 117.26-28, 154.1(d), 154.3, 154.5 (1991).

126 25 C.F.R. § 151.2(3) (1991).

127 25 C.F.R. § 154.5 (1991).

Health benefits, as well, are provided in part on the basis of degree of Indian blood. Administrative regulations for admission to hospitals state that hospitalization is available to persons "who are enrolled Indians, . . . [h]owever, preference should be given to those of higher degree of Indian blood."<sup>128</sup>

Ironically, Indian preference regulations, which precipitated the "political relationship test," require that preference be given to members of federally enrolled tribes, or to those Indians possessing one-half blood quantum.<sup>129</sup> The order, as originally written, permitted the appointment of Indians of one-quarter or more blood to positions within the Indian Service without examination.<sup>130</sup>

Several other programs define one-quarter blood quantum as necessary, either as the sole eligibility criteria or as a corollary to additional criteria. The Indian Child Welfare Act, for example, defines Indian as "any person who is a member of any Indian tribe."<sup>131</sup> The Bureau's Indian Education policies define eligibility for services as Indian and Alaskan Native students who are "recognized by the Secretary of the Interior as eligible for Federal servic-

128 25 C.F.R. § 85.2 & § 85.4. See also 25 U.S.C. § 677a (1963) ("'Full-blood' means a member of the tribe who possesses one-half degree of Ute Indian blood . . .").

129 *Tyndall v. United States*, No. 77-0004 (D.D.C. Apr. 22, 1977) (consent decree). See generally Funke, *Educational Assistance and Employment Preference: Who Is an Indian?*, 4 AM. INDIAN L. REV. 1, 29-30 (1976).

130 Exec. Order No. 8043, 25 C.F.R. § 85.2 and § 85.

131 25 C.F.R. § 23.2 (1991). The Indian Appropriations Act of May 25, 1918 provides that funds (unless stipulated by treaty) would be used to educate children of 1/4 or more blood quantum. A number of regulations require Alaskan Natives to show proof of one-quarter or more blood quantum. See e.g., Minority Small Business Program, 13 C.F.R. § 124.100 (1991); Loan Guaranty Program, 25 C.F.R. § 103.1(d) (1991); Indian Business Development Program, 25 C.F.R. § 286.1 (1991); Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.3.

A number of state laws also require one-quarter blood quantum for the provision of state services, for example, the Minnesota law concerning treatment for alcohol and drug abuse, defines "American Indian" as "a person of one quarter or more Indian blood." MINN. STAT. § 254A.02 subd. 11 (1990). See also ALASKA STAT. § 45.65.070(4) (1986); MINN. STAT. §§ 116J.64, 325F.43 (1990); NEB. ADMIN. R. & REGS. 69-1803 (1989); OKLA. STAT. tit. 74, § 1201 (1990); S.D. CODIFIED LAWS ANN. § 58-11-44 (1990).

In at least one instance, the courts have questioned the extension of educational benefits to Indians on the basis of blood quantum. In *Zarr v. Barlow*, 800 F.2d 1484 (9th Cir. 1986), the court held that the Bureau's restrictive one-quarter blood quantum requirement for Indian Higher Education grants was not in conformity with the governing legislation, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451, 1452, 1453 (1988).

According to 25 C.F.R. § 40.1 (1991) "[f]unds appropriated by Congress for the education of Indians may be used for making educational loans and grants to aid students with one-fourth or more degree of Indian blood."

es, because of their status as Indians or Alaska Natives, whose Indian blood quantum is 1/4 degree or more."<sup>132</sup>

*D. Domiciled in a Specified Location: On or Off Reservation*<sup>133</sup>

The issue of domicile has figured prominently in federal Indian law as a requirement for jurisdictional authority. As discussed earlier, one of the Court's justifications for possessing jurisdiction over a white Cherokee citizen who committed a crime on Cherokee lands was the government's right to control its territory. The question presented in *Holliday* turned as well on the issue of domicile, with the Court ruling that the federal government possessed authority over an individual who lived off the reservation.

The pertinent question today is: Does the government have an obligation to provide protection and services to only reservation Indians? Or does the government's responsibility extend to off-reservation Indians as well? The issue is of particular relevance given that over half of all Indians now live off the reservation. This migratory shift is the result of several specific programs including the 1887 General Allotment Act,<sup>134</sup> off-reservation boarding schools,<sup>135</sup> and the urban relocation programs of the 1950s and 1960s. The government undertook these programs to encourage Indians to leave their reservations and to integrate into American society. In the last two decades, the need to find a more economically sustaining life has forced many families to migrate to the cities.<sup>136</sup>

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132 25 C.F.R. § 32.4(2) (1991). See also 25 C.F.R. § 36.3(ee) (1991) (eligibility requirements for students in boarding schools); 25 U.S.C. § 483 (1963) ("[N]o portion of these funds shall be loaned to Indians of less than one-quarter Indian blood.")

133 See *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). See generally AIPRC, REPORT ON URBAN & RURAL NON-RESERVATION INDIANS: TASK FORCE EIGHT (1977) [hereinafter TASK FORCE EIGHT].

134 24 Stat. 119 (1887). In 1890, the Indian Commissioner stated that it was the government's "settled policy . . . to break up reservations, destroy tribal relations, settle Indians upon their own homestead, incorporate them into national life, and deal with them not as nations or tribes or bands, but as individual citizens." COMMISSIONER OF INDIAN AFFAIRS, FIFTY-NINTH ANNUAL REPORT VI (1890).

135 The Bureau established the boarding school system in the 1870s with the intention "to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people." SENATE COMM. ON LABOR AND PUB. WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 501, 91st Cong., 2d Sess. 12 (1969).

136 See generally THE INSTITUTE FOR GOVERNMENT RESEARCH, *supra* note 72, at 667-742

In 1974, the Supreme Court looked at the program eligibility of off-reservation Indians. Ramon Ruiz, a traditional Papago, sued the Bureau for denying him general assistance benefits because he lived fifteen miles from the reservation.<sup>137</sup> The Court found in favor of Ruiz, but shed little light on the more substantive issue of whether off-reservation Indians had a right of equal access to federal services for Indian people. The Snyder Act of 1921,<sup>138</sup> the Court pointed out, authorized the Bureau to provide services to Indians "throughout the United States."<sup>139</sup> "The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions."<sup>140</sup> The Court also stated, however, that the Snyder Act did not require the provision of benefits "to all Indians."<sup>141</sup>

Although it is unlikely that the government will ever extend services to all tribal members, wherever they are domiciled,<sup>142</sup> Congress has proffered, in recent years, a few services to urban Indians.<sup>143</sup> The most direct and potentially important of these is health care. Recognizing that the health of many urban Indians falls below that of even reservation Indians,<sup>144</sup> Congress passed

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(1977); TASK FORCE EIGHT, *supra* note 133.

137 *Morton v. Ruiz*, 415 U.S. 199 (1974).

138 25 U.S.C. § 13 (1988).

139 *Ruiz*, 415 U.S. at 236.

140 *Id.* at 237.

141 *Id.*

142 The government's extension of the trust relationship to off-reservation individuals has been handled haphazardly. Protection of individual trust lands does not require a person to be domiciled on the reservation. *Mott v. United States*, 283 U.S. 747 (1931).

The courts have considered the issue of insufficient funding and equitable treatment among Indians only tangentially. The Court in *Ruiz* suggested that if funding is inadequate to cover all eligible Indians, then the eligibility requirements must be altered. *Id.* at 203. According to the decision in *White v. Califano*, 437 F. Supp. 543, 544-45 (D.S.D. 1977), *aff'd per curiam*, 581 F.2d 697 (8th Cir. 1978), the IHS may exercise some latitude in determining eligibility, but once promulgated, the IHS must follow its own rules. *See also Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 570 (9th Cir. 1980) (finding that the IHS had to apportion its budget equitably among Indians—in this instance, to provide California Indians with a share of the IHS budget proportional to their proportion of the Indian population). Following *Ruiz*, the IHS issued regulations that it would extend benefits to only those Indians living on or near the reservation. 42 C.F.R. § 36.12 (1990).

143 The Occupational Safety and Health Act of 1970 specifically extends the Act's provisions to "Indians and Indian tribes, whether on or off reservations." 29 C.F.R. § 1975.4, (1990). *See also Vocational Training Act*, 25 U.S.C. § 309 (1988) ("adult Indians on or near the reservation."); *Library Services and Construction Act Grants*, 34 C.F.R. § 771.20 (1990).

144 TASK FORCE EIGHT, *supra* note 133, at 71-73.

the Urban Health Services program as part of the Indian Health Care Improvement Act.<sup>145</sup> The program provides for outpatient care and referral services to Indians located in one of thirty-seven cities.<sup>146</sup>

*E. Membership in an Underrepresented Minority Class*

Indian individuals find themselves placed as corecipients in one final category of legislative programs—programs targeted at traditionally underrepresented minorities: Asian Pacific Islanders, African-Americans, Hispanics, and American Indians. This category of programs differs from those referred to above in that the basis for the special services for Indians as an underrepresented minority is not founded upon the quasi-sovereign nature of tribes. These programs, however, have frequently proven to be immensely valuable to tribal development. The Comprehensive Employment Training Act of 1973,<sup>147</sup> for example, is credited with improving tribal economies by providing jobs on reservations and strengthening tribal governments through the provision of administrative training. Other legislation directed at disadvantaged or underrepresented minorities include: Small Business Innovation Research Grants Program,<sup>148</sup> Juvenile Justice Act,<sup>149</sup> Equal Em-

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145 25 U.S.C. § 1601 (1988).

The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to meet the national goal to provide the highest possible health status to Indians and to providing existing Indian health services with all resources necessary to effect that policy.

*Id.* at § 1602.

146 According to the IHS MANUAL, the IHS will provide free services to "persons of Indian descent belonging to the Indian community." *Id.* at § 2-3.5, quoted in Boyum, *Health Care: An Overview of the Indian Health Service*, 14 AM. INDIAN L. REV. 241, 251 (1989). The IHS and the courts, for example, have established that this extends to non-Indian women carrying an Indian child. See *McNabb v. Hecker*, 628 F. Supp. 544 (D. Mont. 1986), *aff'd*, 829 F.2d 787 (9th Cir. 1987) (holding that the Snyder Act, the 1976 Indian Health Care Improvement Act, and the trust doctrine, impelled IHS to provide benefits for all eligible recipients). Members of terminated tribes are barred from obtaining general IHS services, IHS MANUAL, *supra*, at § 2-3.7(c). Specific programs, however, do include members of terminated and state recognized tribes, e.g., health professional recruitment and scholarship programs, alcoholism treatment, and services to urban Indians. 25 U.S.C. § 1603(c)(3)-(4) (1988). See IHS MANUAL, at 253-57 for a review of the types of IHS services available to Indian people.

147 29 U.S.C. § 801 (1988).

148 7 C.F.R. § 3404 (1991).

149 28 C.F.R. § 31.30 (1990).

ployment Opportunity Program Guidelines,<sup>150</sup> Department of Defense Military Equal Opportunity Program,<sup>151</sup> and Affirmative Action Policy and Procedure.<sup>152</sup>

### III. PROBLEMS ARISING FROM THE GOVERNMENT'S USE/MISUSE OF THE "POLITICAL RELATIONSHIP TEST"

There are several problems with the government's definition of those tribes and Indian individuals with whom it maintains a relationship. An examination of the types of protection and services provided to Indian tribes and individuals calls into serious question the validity of the government's claim that it maintains a political relationship with federally recognized tribes. A second major concern is the courts' increasing use of the "political relationship test" to undermine and limit tribal authority. The last issue is the growing gap between the United States' interpretation of Indian rights at the national level and the international community's evolving interpretation of indigenous rights.

#### A. *The Political v. Racial Dichotomy*

Several difficulties arise when one evaluates the assertion that the federal government possesses a political and not a racial relationship with tribes. In the first instance, the government relates to several categories of tribes with whom it maintains no official political relationship: terminated, state recognized, and nonrecognized tribes. The government both extends a modicum of protection over the tribal land base of these tribes and provides a variety of services and programs to these groups. If these tribes are not federally recognized and do not maintain a political relationship with the United States, on what basis does the government relate to these tribes?

A second major stumbling block is the government's assertion that it does not possess a relationship with Indians that is of a racial nature. As discussed, a number of programs are open only to those Indians who possess one-quarter to one-half blood quantum; enrollment in a federally recognized tribe is not required. Other programs require proof of enrollment *and* a certain degree

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150 28 C.F.R. § 42.301 (1990).

151 32 C.F.R. § 51 (1990).

152 36 C.F.R. § 906 (1990).

of Indian blood. In both of these instances, the racial characteristic controls or is equally controlling.

A third and related question concerns the government's interference in the administration of tribal affairs during a time of stated federal support for tribal self-determination. If tribes are eligible for special programs and protections because of their special status and relationship with the federal government, why is it not the tribe that determines which of its members are eligible for these tribal entitlements? By requiring enrollment and the possession of a certain degree of blood quantum or domicile, the federal government is providing services and benefits to only a portion of the tribal citizenship. This not only interferes with the exercise of tribal sovereignty,<sup>153</sup> but treats tribal citizens inequitably.

*B. Use of the Political Relationship Test to Limit Tribal Sovereignty*

The second problem raised by the political relations test is more subtle and indirect. In several recent cases, the Supreme Court has transferred the political relations test from the federal-tribal arena where its use acknowledged tribal sovereignty, to the tribal arena, where its use has divested tribes of their sovereign authority. The test is applied at both levels to the same issue: Over whom does the federal government possess jurisdiction and why? Over whom do the tribes possess jurisdiction and why? Tribes, the courts increasingly rule, possess authority over only those individuals with whom they maintain a close political relationship, i.e., their own members.

The Court's use of the political relations test occurred most recently in *Duro v. Reina*.<sup>154</sup> Duro, a member of the Torres-Martinez Band of Cahuilla Mission Indians of the Gila River reservation, was charged by the Gila River tribal authorities with illegally discharging a weapon within reservation boundaries.<sup>155</sup>

Duro requested that his conviction be set aside on the grounds that the Gila River authorities did not possess criminal jurisdiction over nonmembers. The Court agreed, ruling that "the

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153 The Supreme Court, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), affirmed that the determination of tribal membership lay within the purview of the tribal governments. To allow federal intervention would "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* at 72.

154 110 S. Ct. 2053 (1990).

155 Duro had killed a fourteen year old boy, for which federal authorities had tried him.

retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."<sup>156</sup>

The decision dealt a severe blow to inherent tribal sovereignty as well as leaving a serious vacuum in judicial enforcement on reservations. Secondly, it underscored the Court's willingness to find an increasing array of tribal powers to be inconsistent with the tribes' status of domestic dependent nations. After *Duro*, the political relations test which originally had protected (and still protects) tribes from unwarranted state intervention, can now be added to the judiciary's list of controversial terms, such as "ward," and "domestic dependent nation,"<sup>157</sup> that the Court has reinterpreted and used as rationales for divesting tribes of their authority.

### C. *Incompatibility with Developing Norms of Indigenous Rights*

The final problem relates to the United States' potential inability to adequately respond to developing international standards of indigenous human rights. Indigenous peoples over the last two decades have made remarkable progress in obtaining recognition of their special rights and needs from the international community.

The 1970s and 1980s saw a renewal of discussions at the international level of the condition and rights of indigenous popula-

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156 *Duro*, 110 S. Ct. at 2056. The Court's ruling was consistent with its findings in *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (exemption from state taxation for residents of reservation) and in *Montana v. United States*, 450 U.S. 544 (1981) (regulation of hunting and fishing).

157 Chief Justice Marshall spoke in *Cherokee Nation* of the federal-tribal relationship as that of a "guardian to a ward." The following year in *Worcester*, Marshall emphasized that this guardian-ward relationship did not imply a loss of tribal sovereignty. Within fifty years the Supreme Court had reinterpreted the notion of "ward" into a legal justification for plenary governmental control over Indian individuals.

A similar fate befell Marshall's characterization of Indian tribes as "domestic dependent nations," whose authority was exclusive within their own territories. Although treaties and legislation increasingly chipped away at this once exclusive tribal authority, the courts at least upheld the statement that tribes retained their inherent authority unless specifically ceded in a treaty or expressly rescinded in congressional legislation. The Supreme Court limited this important protection in 1978 in *Oliphant*. Criminal jurisdiction over non-Indians, the Court ruled, was now considered inconsistent with the tribe's status as a dependent nation. Exactly what constitutes "inconsistency with a tribe's dependent status," the Court has never explained.

tions. In 1982, the Cobo Report, a major study commissioned by the United Nation's Economic and Social Council reported on the status and rights of indigenous peoples in thirty-seven different countries. Originally directed at issues of discrimination, the Cobo Report pointed instead to the issues of self-determination and cultural preservation as the most relevant in meeting the human rights needs of indigenous peoples. That same year, pursuant to one of the study's preliminary recommendations, the Commission on Human Rights established the Working Group on Indigenous Populations. The Working Group, which meets annually for several weeks during the summer, has provided a forum for discussion and input by indigenous groups. Currently in the process of drafting a declaration on the rights of indigenous peoples, the Working Group has noted the following characteristics of indigenous peoples:

[I]ndigenous peoples have been the victims of a "long historical process of conquest, penetration and marginalization," resulting in the destruction of their means of subsistence, as well as in their exclusion from national society and the national economy. Social services and education, far from compensating their losses, had further eroded indigenous peoples' cultures, values and institutions.<sup>158</sup>

This is one of two definitions currently employed at the international level. In 1989, the International Labor Organization (ILO) updated ILO Convention 169.<sup>159</sup> Initially drafted in 1957, the original convention had adopted an assimilationist stance, i.e., the ultimate integration of indigenous peoples in the society of their respective countries. Now reflective of the demands of indigenous peoples, the Convention states in article 1 that:

1. This convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

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<sup>158</sup> Barsh, *Current Development: United Nations Seminar on Indigenous Peoples and States*, 83 AM. J. INT'L L. 559, 601 (citations omitted).

<sup>159</sup> International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, *opened for signature* June 27, 1989, 72 INT'L LAB. OFF. OFFICIAL BULL. 59 (Ser. A, No. 2), reprinted in 28 I.L.M. 1382.

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>160</sup>

Using the above definitions as a standard, it is clear that the United States' definition and approach to protecting the rights of its indigenous population is inadequate. By adopting the premise that services and benefits are provided to Indians primarily on the basis of their enrollment in a federally recognized tribe, the United States is failing to adequately meet the rights and needs of approximately half of its indigenous population, i.e., Indians who are members of nonrecognized tribes, terminated tribes, state recognized tribes, or Indians who are not enrolled in any tribe.

Additional requirements of blood quantum and domicile, may further limit the number of indigenous recipients. Ironically, the services and protection that are provided to nonfederally recognized tribes and tribal members, while violating the United States' basic rationale for Indian programs, nonetheless enlarges the pool of Indians eligible for services, thereby bringing the federal government more in line with international norms.

#### IV. CONCLUSION

The government's relationship with Indians is one filled with inconsistencies and conflicts. It is a relationship which rests on long-guaranteed legal responsibilities and competing national objectives. Tribes are recognized as possessing inherent sovereignty and powers of government,<sup>161</sup> but the United States has virtually unlimited plenary authority over them.<sup>162</sup> The United States, as trustee, is legally responsible for the protection of tribal lands, resources, and funds, and for the provision of certain services.<sup>163</sup>

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160 *Id.*

161 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (right to determine membership); United States v. Mazurie, 419 U.S. 544 (1975) (regulatory powers); Bird v. United States, 203 U.S. 76 (1906) (Cherokee Intermarriage Cases); Talton v. Mayes, 163 U.S. 376 (1896) (upholding right to define own governmental structure).

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

163 United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (protection of land base); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (hunting rights); Seminole Nation v. United States, 316 U.S. 286 (1942) (protection of funds);

However, the continued existence of all these obligations and benefits remains at the discretion of the federal government.<sup>164</sup> And finally, the government does not exert jurisdiction over and provide services to all Indians, but to approximately half.

The solution to this maze of contradictions and inconsistencies is for the United States to adopt definitions and procedures which more closely follow the standards and definitions currently being promulgated at the international level. The United States must recognize that it has an obligation to all indigenous peoples within its borders. The source of these obligations does not depend solely upon the existence of treaties and legislation which assist some and not others, or upon the whimsical nature of the judiciary, but is based ultimately upon the status of Indians (and Native Alaskans, Aleuts, and Native Hawaiians) as indigenous peoples. This approach would mitigate against criticism of racial discriminations, of inequitable treatment amongst Indian peoples, and bring the United States in line with international norms of human rights protection.

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United States v. Creek Nation, 295 U.S. 103 (1935) (protection of land); Winters v. United States, 207 U.S. 564 (1908) (water rights); United States v. Winans, 198 U.S. 371 (1905) (fishing rights).

See also AIPRC, TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP, INCLUDING TREATY REVIEW: TASK FORCE ONE (1976); Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975). Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

AIPRC, FINAL REPORT 125 (1977), describes the trust responsibility as follows:

The Federal trust responsibility emanates from the unique relationship between the United States and Indians in which the Federal Government undertook the obligation to insure the survival of Indian tribes. It has its genesis in international law, colonial and U.S. treaties, agreements, Federal statutes and Federal judicial decisions. It is a "duty of protection" which arose because of the "weakness and helplessness" of Indian tribes so largely due to the course of dealings of the federal Government with them and the treaties in which it has been promised . . . .

*Id.* at 126 (quoting United States v. Kagama, 118 U.S. 375, 384 (1886)). Its broad purposes, as revealed through thoughtful reading of the various legal sources, is to protect and enhance the people, property and self-government of Indian tribes.

164 Tiger v. Western Inv. Co., 221 U.S. 286, 315 (1911) (holding that Congress had the authority to determine "when the guardianship which has been maintained over the Indian shall cease.").