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COMMENTS

FEDERAL INDIAN BURDEN OF PROOF STATUTE: 5th AMENDMENT DUE PROCESS CONSIDERATIONS

INTRODUCTION

With the emergence of *Bolling v. Sharpe*,¹ the United States legal system underwent a great transformation. For the first time, federal legislation which discriminated on the basis of race was held to be a violation of the 5th amendment's due process clause.²

The impact of *Bolling v. Sharpe*³ in most spheres of our legal system is still very much alive. In the context of Indian law, however, *Bolling's* effect at best has been to provide non-Indian factions with a forum in which to argue their cause: that federal statutes granting preferential treatment to Indians are violative of the 5th amendment's due process clause. These arguments have thus far been unavailing in that a long line of cases exist, some prior to *Bolling v. Sharpe*,⁴ validating such federal enactments.

In the consolidated cases of *Wilson v. Omaha Indian Tribe* and *Iowa v. Omaha Indian Tribe*,⁵ the United States Supreme Court was requested to consider what many legal scholars had thought to be a foreclosed issue: whether federal legislation which singles out Indians for particular and special treatment violates the 5th amendment's due process clause. The Supreme Court granted certiorari, but has refused to address the due process issue.⁶

Conversely, the Eighth Circuit, in hearing these cases, did address

1. 347 U.S. 497 (1954).

2. In *Bolling v. Sharpe*, the Supreme Court held that racial segregation in the District of Columbia public schools was a denial of the 5th amendment due process clause. U.S. Const. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." In essence, *Bolling v. Sharpe* decided, as one student author has aptly stated, that "a governmental act which would violate the 14th amendment's equal protection clause, if taken by a state, might be held to violate the (5th Amendment's) due process clause if taken by the federal government." Note, *Morton v. Mancari: New Vitality for the Indian Preference Statutes*, 10 Tulsa L.J. 454, 456 (1975).

3. 347 U.S. 497 (1954).

4. *Id.*

5. Certiorari was granted in 99 S. Ct. 448 (1978). 28 U.S.C. §1254(1) (1976) is the statutory provision explaining which Court of Appeals' cases may be reviewed through the Writ of Certiorari process: "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

6. Certiorari was granted in 99 S. Ct. 448 (1978). For a discussion of the issues being considered by Supreme Court, see 47 U.S.L.W. 3603 (1979).

the constitutional question presented in a statute entitled "Trial of right of property; burden of proof." The statute provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.⁷

The thrust of this article is to develop the history peculiar to this statute to determine whether it violates the 5th amendment's due process clause. Because the statute is a small part of a larger act known as the "Indian Trade and Intercourse Act of 1834,"⁸ and its legislative history cannot be separated from the whole, the history of the entire act must first be considered.

I. RELEVANT HISTORY OF THE INDIAN TRADE AND INTERCOURSE ACT OF 1834

"Trade was one of the inevitable activities that arose from contact between Indians and whites, two distinct races, engaged in unlike activities and possessed of different types of goods."⁹ To prevent animosity between the two races as well as to address the greed that past white traders had exercised in their commercial transactions with Indian people, the United States Congress, pursuant to its power to regulate commerce with Indian tribes,¹⁰ undertook what was not really a new Indian policy—the regulation of trade between white traders and Indian people.¹¹ Colonial governments has previously regulated in this field by requiring traders who dealt with Indian tribes to be licensed.¹² Many of the early treaties contained similar trade provisions.¹³

One noted scholar has aptly stated that "Indian policy of the government was expressed in the formal treaties made with the Indian tribes, but it took shape primarily in a series of federal laws 'to regulate trade and intercourse with the Indian tribes, and to preserve

7. 25 U.S.C. § 194 (1834).

8. 4 Stat. 729 (1834).

9. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 348, reprinted in Gonzalez, *Regulation of Indian Traders: A Historical Perspective*, 5 Am. Indian L. Rev. 313 (1978).

10. U.S. Const. art. I, § 8, cl. 3: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes" (emphasis added).

11. COHEN, *supra* note 9, at 348; See also: F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1962).

12. COHEN, *supra* note 9, at 348.

13. *Id.*

peace on the frontier.'"¹⁴ These new enactments were not aberrations from pre-established Indian policy but rather expansions of that policy.

The first of these enactments was passed on July 22, 1790.¹⁵ This act put sole responsibility on the President and his duly appointed officers to determine if licenses should be issued to Indian traders. To enforce the license requirements which were, in actuality, lax during the colonial period, an enforcement provision was included in the act. In essence, this provision allowed the federal government to confiscate all goods of any unauthorized person trading with the Indians. And, by implication, Congress decided to leave trading wholly to private enterprise.¹⁶

In the Trade and Intercourse Act of May 19, 1796,¹⁷ Congress, endeavoring to regulate trade between Indians and non-Indians, designated certain lands as Indian country.¹⁸ Specifically, Congress drew a boundary line between whites and Indians in an attempt to uphold the delineations in the treaties between the United States and various Indian tribes.¹⁹

Although the 1796 Act totally replaced and expanded upon the 1790 Act, it too within a short time was annulled and replaced by the 1802 Act.²⁰ The significance of the 1802 legislation could not be discerned from a substantive standpoint, but rather from the permanence it espoused²¹ for it did nothing more than codify the laws of 1796 and 1799. In fact, one author has stated that "[t]he act of 1802 was no longer a temporary measure; it was to remain in force, with occasional additions, as the basic law governing Indian relations until it was replaced by a new codification of Indian policy in 1834."²²

14. PRUCHA, *supra* note 11, at 2. Not all of the Indian Trade and Intercourse Acts will be discussed, only those which are of some importance to the subject of this paper.

15. 1 Stat. 137 (1790).

16. COHEN, *supra* note 9, at 348. Six years later in the Act of April 18, 1796, 1 Stat. 452, Congress authorized the President to establish governmentally owned and operated trading posts. This system was probably much preferred by the Indians as trade was on a cost basis—although there have been many historical accounts of misfeasance and malfeasance by Indian agents. The Act of May 6, 1822, 3 Stat. 682, however, closed trading posts and trading was again left to the private entrepreneur.

17. 1 Stat. 469 (1796).

18. PRUCHA, *supra* note 11, at 49. 18 U.S.C. § 1151 (1976) is the present day statute defining Indian Country.

19. PRUCHA, *supra* note 11, at 49.

20. Act of March 30, 1802, 2 Stat. 139. Three years earlier the Act of 1799, 1 Stat. 743, amended 1 Stat. 469 (1796), but the effect was de minimus.

21. COHEN, *supra* note 9, at 348; PRUCHA, *supra* note 11, at 50.

22. PRUCHA, *supra* note 11, at 50. The Act of June 30, 1834, referred to in the text can be found at 4 Stat. 729.

By the 1830's, relations between Indians and whites had begun to deteriorate.²³ At the core of this disintegration was President Andrew Jackson's Indian removal policy.²⁴ The purpose of this legislation was to relocate west of the Mississippi, on a voluntary basis, those Indians residing in the eastern portion of the United States.²⁵

The removal policy was a positive goal from the standpoint of the United States because it allowed westward expansion by white settlers.²⁶ For the Indian, however, removal was negative and divisive. Many tribes were forced to leave their aboriginal homelands as well as become separated from tribal members who chose not to leave.²⁷

Approximately one year after the removal policy was implemented, Lewis Cass, then Secretary of the War Department,²⁸ in his 1831 annual report stated that "[a] crisis in Indian affairs has evidently arrived which calls for the establishment of a system of policy adapted to the existing state of things, and calculated to fix upon a permanent basis the future destiny of the Indians."²⁹ To a large degree, Cass was proposing that Congress establish a regulatory scheme which would provide for some permanence as well as deal with the present and future needs of the Indians. In considering Secretary Cass' concerns, one author has stated that "Cass was convinced that this was the only means—given the circumstances in the East and the character of the Indians—by which the Indians could be preserved and improved."³⁰

Three years later, in direct response to the Indian removal policy and Secretary Cass' 1831 annual report,³¹ Congress passed the "Indian Trade and Intercourse Act of 1834."³² In most respects, the act was a recodification of previous legislation dealing with Indian

23. H.R. REP. NO. 474, 23rd Cong., 1st Sess. 1 (1834); PRUCHA, *supra* note 11, at 256.

24. The removal policy was enunciated in the Act of May 28, 1830, 4 Stat. 411.

25. COHEN, *supra* note 9, at 72. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and the Cherokee Nation's subsequent history for an account of how the removal policy became involuntary.

26. PRUCHA, *supra* note 11, at 236-249.

27. *Id.* at 248. For a full explanation of what removal meant to the Indians, the reader should research the Cherokee's removal to Oklahoma, which has been entitled the "Trail of Tears."

28. At this time, the War Department was in charge of Indian affairs.

29. PRUCHA, *supra* note 11, at 256.

30. *Id.* at 257. Cass also recommended that an Indian Agency be created. *Id.* at 255. Relying on Cass' recommendation, Congress, a few years later, enacted "An Act to provide for the organization of the Department of Indian Affairs," 4 Stat. 735 (1834). *Id.* at 258.

31. H.R. REP. NO. 474, 23rd Cong., 1st Sess. (1834) provides a thorough analysis of the 1834 act.

32. 4 Stat. 729 (1834). See PRUCHA, *supra* note 11, for a thorough discussion of the act.

affairs. Where changes in past legislation were deemed necessary, much reliance was placed on Secretary Cass' 1831 proposals.³³

The greatest change came in the definition of Indian country:

[T]hat all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the Territory of Arkansas, and also, that part of the United States east of the Mississippi river, and not within a state to which the Indian title has not been extinguished, for the purposes of this act, (shall) be taken and deemed to be the Indian country.³⁴

The significance of this provision was specifically to delineate which lands were subject to the federal government's regulation of trade and intercourse between Indians and non-Indians. The act also provided "[t]hat any superintendent or agent may refuse an application for a license to trade if he is satisfied that the applicant was of bad character. . . ."³⁵

Although the 1834 legislation contained other slight modifications, they added little to the scheme of the act. The enactment did, however, include a provision entitled "Trial of right of property; burden of proof."³⁶ As the heart of this article, this provision must be read in the context of the entire Indian trade and intercourse policy of safeguarding and promoting the welfare of the Indian.

II. 25 U.S.C. §194: RECENT DEVELOPMENTS

In 1975, in the consolidated cases of *Wilson v. Omaha Indian Tribe* and *Iowa v. Omaha Indian Tribe*,³⁷ the Omaha Indian Tribe, a federally-recognized corporate body organized under the Indian Reorganization Act,³⁸ filed suit against Roy Tibbals Wilson, the State of Iowa and others, seeking injunctive relief and a judgment quieting title to lands which had been reserved for the Tribe in a March 16, 1854 treaty³⁹ with the United States. In the treaty 2900 acres were reserved for the Tribe, in return for which the United

33. PRUCHA, *supra* note 11, at 261. In 1829, Secretary Cass, along with General Clark, had made proposals regarding the Indian situation. These proposals were also heavily relied upon. *See generally*, PRUCHA, *supra* note 11, at 261-265.

34. 4 Stat. 729, §1 (1834). "The law accepted the removal of the Indians as an accomplished fact." PRUCHA, *supra* note 11, at 262.

35. 4 Stat. 729, §3 (1834).

36. *Id.* at §22; 25 U.S.C. §194 (1976). This provision was an exact restatement of the Indian trade and intercourse act of 1822, 3 Stat. 682, §4. There is no legislative history for this provision in either of these two acts.

37. 433 F. Supp. 57 and 433 F. Supp. 67 (D. Iowa 1977).

38. 48 Stat. 984; 25 U.S.C. §476 (1934). The United States joined the Tribe as co-plaintiffs.

39. 10 Stat. 1043 (1854).

States had received a cession of the remainder of the Omaha's land west of the "centre of the main channel of said Missouri river."⁴⁰

Although the Missouri River had moved to and fro, east and west, for more than 100 years, there had been no confrontation between the tribe and defendants until 1975.⁴¹ It was then that the Omaha Tribe had seized possession of land that had been originally included in the reservation of 1854.⁴² Such land was now on the eastern side of the Missouri River which by 1923 had traversed more than two miles west of its original boundary line.⁴³

Agreeing with the defendants' argument that the Missouri River had moved west as a result of erosion to reservation lands and accretion⁴⁴ to Iowa riparian⁴⁵ land, the district court went further by saying that the plaintiffs had failed to prove that river movements were dictated by avulsion⁴⁶ concepts.⁴⁷ The district court did not stop there: it then ruled that the burden of proof was on both the Tribe and the United States. In doing so, the lower court ignored the plaintiff's contention that 25 U.S.C. § 194 was applicable,⁴⁸ and instead applied Nebraska's burden of persuasion law which places the burden on one who seeks to quiet title.⁴⁹ In essence, the district court granted the defendants' counterclaim and quieted title in their favor.

Although the plaintiffs-appellants appealed all of the district

40. *Id.* In 1854, when the Omaha Indian Reservation was created, the reserved 2900 acres were part of the Territory of Nebraska known as the Blackbird Bend and was situated on the west side of the Missouri River. In 1867, the Barret Survey was performed on the Blackbird Bend establishing the boundary line of the Omaha Tribe's Reservation.

41. See *Wilson v. Omaha Indian Tribe and Iowa v. Omaha Indian Tribe*, 575 F.2d 620, 623-625 (8th Cir. 1978).

42. It should be noted that the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute from the 1940's until April 2, 1975, the date the Tribe seized possession. *Id.* at 622. Furthermore, the United States through the auspices of the Bureau of Indian Affairs assisted the Tribe in its seizure of the disputed lands. *Id.* at 622.

43. *Id.*

44. Accretion "results from a gradual and imperceptible addition to the shoreline by action of the water to which the land is contiguous." *United States v. Wilson*, 433 F. Supp. 67, 73 (D. Iowa 1977).

45. Riparian: "Belonging or relating to the bank of a river, of or on the bank." *Black's Law Dictionary* 1490 (Rev. 4th ed. 1968).

46. Avulsion "is the sudden shifting of the channel of the river and a body of land must be cut off so that after the shift it remains identifiable as land which existed before the change of the channel and which never became part of the river bed." *United States v. Wilson*, 433 F. Supp. 67, 73 (D. Iowa 1977).

47. See *Wilson v. Omaha Indian Tribe*, 575 F.2d 620, 622 (8th Cir. 1978).

48. See note 7 and accompanying text for the contents of 25 U.S.C. § 194 (1976).

49. *United States v. Wilson*, 433 F. Supp. 57, 65 (D. Iowa 1977). In ruling that 25 U.S.C. § 194 was inapplicable to accretion and avulsion cases the trial court reasoned that this statute would be reasonable and circuitous and inextricably entwined with the merits. *Id.* at 66.

court's rulings, the following discussion will be limited to the Eighth Circuit Court of Appeals' elaboration of the burden of proof issue.⁵⁰ The Eighth Circuit flatly rejected the trial court's reasoning and instead held that 25 U.S.C. § 194 was applicable to the facts of this case.⁵¹ The court stated that apparently the trial court's analysis was based, albeit mistakenly, "on the idea that to apply § 194 would require the court to presume that the land originally occupied by the Indians within the Barrett Survey is exactly the same land in place today."⁵² Unwilling to attribute that meaning to § 194, especially since the two courts which had previously discussed this provision had never expounded upon its effect,⁵³ the Eighth Circuit ruled that to follow the trial court's reasoning would be to presume that the reservation land had been destroyed. To do so would defeat the congressional mandate.⁵⁴

Lastly,⁵⁵ the Court examined the facts to determine if the Tribe had met its § 194 burden. Reviewing the 1854 treaty, the Eighth Circuit stated emphatically that "it is undisputed that [this] treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines"⁵⁶ and has, therefore, sufficiently raised a presumption of title in the Tribe on the basis of its "previous possession or ownership."⁵⁷ The net result of this holding was to shift the burden of proof to the defendants. The Court reiterated that to apply § 194's burden of proof would not decide the merits of the case because the basic issue still remains: "Was there an alteration in the original boundary by reason of the marked movement of the Missouri River in the time periods involved?"⁵⁸ The burden to establish that the boundary had been changed would be borne by the defendants.⁵⁹

50. *Wilson v. Omaha Indian Tribe and Iowa v. Omaha Indian Tribe*, 575 F.2d 620 (8th Cir. 1978). In regards to the other issues, the Eighth Circuit reversed the district court's judgment, finding that the trial court erred in not applying federal law relating to avulsion and accretion and that the evidence was too speculative to show that the reservation boundary shifted by reason of accretion. *Id.* at 623.

51. *Id.* at 631, 632, 633. Although the Eighth Circuit was not presented with this issue, the Supreme Court will have to resolve whether the Omaha Indian Tribe is "an Indian" and the State of Iowa is "a white person" within the meaning of § 194. 47 U.S.L.W. 3603 (1979).

52. *Id.* at 631.

53. See *United States v. Sands*, 94 F.2d 156 (10th Cir. 1938), and *Felix v. Patrick*, 36 F. 457 (C.C.D. Nev. 1888), *aff'd*, 145 U.S. 317 (1892).

54. *Wilson v. Omaha Indian Tribe*, 575 F.2d 620, 631 (8th Cir. 1978).

55. The Court also considered whether § 194 could withstand a due process challenge. This topic, however, will be treated in section III of this article.

56. *Wilson v. Omaha Indian Tribe*, 575 F.2d 620, 631 (8th Cir. 1978).

57. *Id.*

58. *Id.* at 632.

59. *Id.*

III. CONSTITUTIONAL VALIDITY OF FEDERAL LAWS GRANTING SPECIAL TREATMENT TO INDIANS

An additional issue which the Eighth Circuit was asked to resolve was whether §194's preference for Indians constitutes invidious racial discrimination in violation of the due process clause of the fifth amendment. The Court was forthright in deciding that it did not. As noted, such a challenge was not available to the non-preferred plaintiff until the decision in *Bolling v. Sharpe*⁶⁰ was handed down.

Generally, "[r]esolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally-recognized Indian tribes."⁶¹

The source of power that allows the federal government, to the exclusion of the states, to control the affairs of Indians is derived explicitly and implicitly from two legal sources. First, Congress has a constitutional grant pursuant to Article I, § 8, cl. 3, to "regulate Commerce . . . with the Indian tribes." The Supreme Court has already held in *Morton v. Mancari*⁶² that Article I, § 8, cl. 3 provides Congress with the power to "single Indians out as . . . proper subject(s) for separate legislation."⁶³ Further, Article II, § 2, cl. 2 vests the President of the United States with the "Power, by and with the Advice and Consent of the Senate, to make treaties." Together, these constitutional provisions comprise what is known as the federal government's plenary power to deal with the unique problems of Indians.

Congress and the President have not been reluctant to rely on their plenary power to regulate Indian affairs. In fact, one only has to look to the many Indian trade acts that Congress has passed or to the numerous treaties that various United States Presidents have entered into with Indian tribes.

Actually, there is much more to the federal-tribal relationship than the application that these two constitutional provisions suggest. As early as 1831, in the historic case of *Cherokee Nation v. Georgia*,⁶⁴ Chief Justice John Marshall described the relationship between the federal government and Indian tribes: "[T]hey are in a state of pupilage; their relation to the United States resembles that of a ward

60. See note 1, *supra*.

61. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

62. *Id.*

63. *Id.*

64. 30 U.S. (5 Pet.) 1 (1831).

to his guardian."⁶⁵ In *Worcester v. Georgia*,⁶⁶ the words guardian and ward were again used to describe this relationship. The Supreme Court recently reiterated the origin and nature of the special relationship:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.⁶⁷

With this historical sketch as background, the Supreme Court has been reluctant to declare any federal statute dealing with Indian affairs as a violation of the 5th amendment's due process clause. As the Court stated in *Moe v. Confederated Salish and Kootenai Tribes*,⁶⁸ "[a]s 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."⁶⁹ The test to be employed, therefore, has no relationship to any racial classifications, but rather is restricted to whether the statute has at its core a rational basis for fulfilling the unique federal responsibility owed to Indians.⁷⁰

Applying this test to § 194 one can only conclude, based on the legislative history delineated in section I of this article, that this provision was enacted for the sole purpose of safeguarding the Indian. In fact, a 1925 Attorney General's Opinion,⁷¹ using § 194 as an example, states that "[f]rom the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to the question of fact or the construction of treaties and statutes relating to their welfare."⁷²

65. *Id.* at 18.

66. 31 U.S. (6 Pet.) 515 (1832). *See also*: *United States v. Kagama*, 118 U.S. 375, 383-84 (1886), for a further discussion of the guardian-ward relationship.

67. *Board of County Commissioners v. Seber*, 318 U.S. 705, 715 (1943), *quoted in* *Morton v. Mancari*, 417 U.S. 535, 551, 552 (1974).

68. 425 U.S. 463 (1976).

69. *Morton v. Mancari*, 417 U.S. 535, 555 (1974), *quoted in* *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480 (1976).

70. *See also*: *Fisher v. District Court*, 424 U.S. 382, 390-91. *Cf.* *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

71. 34 OP. ATT'Y GEN. 439 (1925).

72. *Id.* at 444. *See also*: *De Coteau v. District County Court*, 420 U.S. 425 (1975); *Antoine v. Washington*, 420 U.S. 194, 199-200; *GETCHES, ROSENFELT & WILKINSON, FEDERAL INDIAN LAW 200-04* (1979).

According to the Eighth Circuit, then, § 194 has fulfilled the rational basis test first employed in *Morton v. Mancari*.⁷³ In fact, the court held that the Indian burden of proof statute was constitutionally valid and without violation of the 5th amendment's due process clause.⁷⁴

Possibly, the only unresolved issue in the Eighth Circuit's consolidated decision of *Wilson v. Omaha Indian Tribe* and *Iowa v. Omaha Indian Tribe*⁷⁵ is whether § 194 has outlived its usefulness. The Eighth Circuit was apparently convinced that it had not. Since Congress has not attempted to amend or annul § 194 they too must be convinced of the vitality and need of this provision.

CONCLUSION

In the consolidated cases of *Wilson v. Omaha Indian Tribe* and *Iowa v. Omaha Indian Tribe*, the Eighth Circuit flatly refused to break with tradition and instead upheld the constitutionality of a federal statute which offers special treatment to Indians. The court, in so holding, reasserted the principle that federal legislation granting special treatment to Indians must be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. While the decision reemphasized the long standing and unique legal relationship between Indian tribes and the federal government, of greater importance was the reassurance that *Bolling v. Sharpe*, which decided that racially discriminatory federal statutes were violative of the 5th amendment's due process clause, remained ineffective as a mechanism to challenge federal legislation granting particular treatment to Indians. Not only does this determination seem sound, but since the Supreme Court has refused to review this issue it is final—whether or not the Eighth Circuit's opinion is reversed on other grounds.

LARRY M. KASEN

73. 417 U.S. 535, 555 (1974).

74. *Wilson v. Omaha Indian Tribe*, 575 F.2d 620, 631, 632 (8th Cir. 1978).

75. *Id.*