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Douglas Nash

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TRIBAL CONTROL OF EXTRADITION
FROM RESERVATIONS

Case law relating to tribal control of extradition from the reservation was practically non-existent until a short time ago. Like so many other areas of Indian law it has lain dormant over the years for various reasons. As will be seen later, provisions regarding extradition are found in many treaties executed in 1868; however, until 1969 the only guidelines available to Indian tribes were the general rules of tribal sovereignty. The purpose of this Comment is to explore tribal control of extradition, primarily through the case of State of Arizona ex rel Merrill v. Turtle1, to ascertain whether that decision provides more definitive guidelines that may be used by Indian tribes across the country to determine the extent of their power to control extradition. It is important to examine previously untouched areas of law pertaining to Indians and provide an analysis of the law for the tribes throughout the country so that they might determine whether the law is applicable to them and whether it should be implemented or enacted by the tribal government.

Apparently, the primary reason for the federal government’s long recognition of the right of Indian tribes to have some type of self-government is that since pre-historic times the various tribes have operated as independent political entities. No tribal governments were organized in the same way, nor were any organized in a very formal fashion, but each functioned in a practical manner and served its own purposes well.2 It may fairly be inferred from history that the operation of the various tribal governments continued undisturbed until the white settlers had organized their own government and were an established military power.

Soon it became necessary for the government of the white settlers to obtain more land for the ever increasing number of immigrants. By means of treaty3 and military victory4 Indian lands were made available to the settlers. This was to be the pattern followed until the government had conquered land from the east coast to the west.

As this procedure was followed and the problem of “what to do

1. 413 F.2d 683 (9th Cir. 1969), cert. denied, 90 S. Ct. 551 (1970).
2. J. Hunter, Manners and Customs of Indian Tribes, 222-39, 305-12, 319-28 (1823); L. Morgan, Ancient Society, 49-204 (1964).
3. See generally, C. Kappler, 2 Indian Affairs, Laws and Treaties, S. Doc. No. 319, 58th Cong., 2d Sess. (1904) [hereafter cited as Kappler], wherein is recorded treaties made by the United States with the Indians. The first recorded treaty is with the Delawares, made in 1778.
with the Indians” was resolved by the institution of the reservation system, the question of what is an Indian reservation and what powers the people living on them have came to the forefront.

One of the earliest cases to consider these questions was *Cherokee Nation v. Georgia.* The Cherokee Nation sought an injunction to restrain the State of Georgia from executing certain laws which took no cognizance of tribal sovereignty, and which, it was alleged, were enacted to seize the land for the use of the state. Before delving into the merits of the case Chief Justice Marshall considered the question of whether the Cherokee’s reservation constituted a foreign state. He found that there were marked distinctions between the relations of foreign states and the United States and those between an Indian reservation and the United States. Indian territory was obviously within the boundaries of the United States. The federal government also had assumed the duties of protecting the Indians and regulating their commercial intercourse with foreign states. These factors would not allow an Indian reservation to be denominated a foreign nation. Chief Justice Marshall deemed them to be “domestic dependant nations,” which remains the most accurate categorization of their political status. The court denied the application for an injunction on jurisdictional grounds.

One year later, in *Worcester v. Georgia,* the court again discussed the status of an Indian reservation. A citizen of the State of Vermont was convicted under the laws of Georgia for residing in Cherokee country without a permit from the state and without having taken an oath of loyalty to the state. These laws, it was contended, were enacted to seize land held by the Cherokees for the use of the state in that they ignored Indian title to the land and assumed state control.

Again Chief Justice Marshall wrote the opinion, but in this case he seemingly retreated from his opinion in *Cherokee Nation v. Georgia,* supra. Throughout his analysis of the status of a reservation in this opinion, he alludes to the possibility that a reservation may have a status higher than that of a domestic dependant nation. Indeed, he considered it as a nation:

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5. “There are three kinds of Indian reservations: those which were created by treaties previous to 1871; those which have been created by acts of Congress since 1871; and those made by Executive Orders whereby the President has set apart public lands for the use of the Indians in order to keep them within a certain territory.” *Sioux Tribe of Indians v. United States,* 94 Ct. Cl. 150, 170 (1941).
7. Id. at 17.
9. These were apparently the same laws that were challenged in *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831).
The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from the others.” The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation,” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.10

It was held that the Cherokee Nation was a distinct community in which the laws of the State of Georgia could have no effect.

The reasoning of these cases and the historical fact of aboriginal self-government noted therein formed the basis for recognizing the fact that there are substantive powers of self-government which are legally recognized as within the domain of tribal sovereignty. Among these powers is the power to administer justice.11 This power was fairly broad at first, but has been limited somewhat over the years.12 Basically, however, the power remains—used more by some tribes than by others.

The special status accorded to Indian reservations gave rise to criminal jurisdiction distinct from those of a state or other community.13 Although thousands of cases involving Indians have been

10. 31 U.S. (6 Pet.) 515, 559-60 (1832).
12. See, for example, 18 U.S.C. §1153 (1964), as amended, (Supp. V, 1969), making Indians subject to punishment and prosecution by the federal government for the commission of any of the criminal acts listed; and 18 U.S.C. §1152 (1964), which governs the punishment for offenses committed by Indians. It disallows jurisdiction where the offense is committed by one Indian against the person or property of another Indian, where the act is committed by an Indian in Indian country and he has been punished by tribal law, or where jurisdiction is reserved to the tribe by treaty.
13. See, Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963), where it was held that where Congress exercises its plenary power and withdraws tribal jurisdiction as to major crimes listed in 25 U.S.C. §1153 (1964), tribal jurisdiction as to crimes not named is left undisturbed. See also, M. Crosse, Criminal and Civil Jurisdiction in Indian Country, 4
litigated over the years, this special status of the reservations in the area of tribal powers and criminal jurisdiction has yet to be solidified into a clear-cut body of law. As one issue becomes settled another arises that has never before been considered. Such is the question of the powers of a tribe to control extradition.

As with many of the powers that a tribe may potentially possess it is impossible to determine absolutely whether they have a particular power until they attempt to exercise it or until concrete guidelines are established by statute. Although there has been but one case concerning the power to control extradition, it is possible to derive therefrom the factors considered by the court in recognizing that power.

The case of *State of Arizona ex rel Merrill v. Turtle*, *supra*, involved a situation in which a Cheyenne Indian, who was married to a Navajo woman, was sought by the State of Oklahoma on a charge of second degree forgery. Upon finding that the defendant and his wife had moved onto the Navajo reservation, Oklahoma filed an application with the Navajo Tribal Council for the defendant's extradition. The application was denied by the Navajo Tribal Court on the ground that tribal law provided for extradition only to the states of Arizona, New Mexico, and Utah. Oklahoma then made demand on the Governor of Arizona for defendant's extradition. A warrant was issued and was executed by defendant's arrest on the reservation. While being held in custody in Arizona, defendant sought a writ of habeas corpus from the United States District Court for the District of Arizona. The writ was granted on the ground that Arizona authorities had exceeded their jurisdiction by arresting defendant on the Navajo reservation. The State of Arizona argued that article IV, section 2 of the United States Constitution requires that the state retain extradition jurisdiction over Indian residents of the Navajo reservation.

In affirming the District Court's decision, the United States Court of Appeals for the Ninth Circuit considered, among other things, the relationship between the Navajo Tribe, the United States, and the State of Arizona. In this, the court had the benefit of two earlier


15. The pertinent portion of that section reads: “...A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the Crime. . . .”
cases that had explored this relationship: *Williams v. Lee*\(^{16}\) and *Littell v. Nakai*.\(^{17}\)

*Williams* involved a suit to collect for goods sold on the reservation on credit to a Navajo Indian and his wife by a merchant who also resided on the reservation. The Supreme Court of Arizona held that the Arizona courts are free to exercise jurisdiction over civil suits by non-Indians against Indians, even though the action arises on the reservation, since no act of Congress expressly forbids their doing so. In overruling this decision, the United States Supreme Court stated that "essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them. Cf. *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28..."\(^{18}\) The court further stated that to allow the exercise of state jurisdiction would undermine the authority of tribal courts over reservation affairs and thereby would infringe on the right of Indians to govern themselves.

The same reasoning was followed in *Littell*, *supra*, where the court relied heavily on the decision in *Williams*. *Littell* involved a dispute between the Navajo Tribe's general counsel and the tribal chairman who was attempting to force an early termination of a contract between the general counsel and the tribe. It was held that the tribal courts had exclusive jurisdiction under the principles espoused in *Williams*.

The court in *Turtle*, *supra*, gave a brief summary of these cases,\(^{19}\) stating that the history reviewed in them shows that Indian tribes historically were regarded as distinct political communities, protected by treaty from the laws of any state and subject only to the plenary power of Congress.\(^{20}\) Thus, the historical fact of self-government by an Indian tribe was an important factor in allowing control of extradition, much as it has been in the establishment of many other tribal powers. As a matter of evidence, it would be no problem to establish the fact of historical self-government in extradition cases.

In dealing with the State's argument that it had extradition jurisdiction over the Navajo Reservation through article IV, section 2 of the United States Constitution, the court first stated that because there was no authority available on this particular point, the Constitutional provision must be interpreted in light of the 1868 Navajo Treaty with the United States, and in light of the historical principle of retained tribal sovereignty. The result was essentially the same as

17. 344 F.2d 486 (9th Cir. 1965).
18. 358 U.S. at 220.
19. 413 F.2d at 684.
20. Id.
that reached in Williams, supra, i.e., that the tribe has a right of self-government that is free from state interference, absent specific Congressional action. There being no Congressional action in this particular area, the question came down to whether the state's action infringed on the tribe's right to make their own laws and be governed by them; and the court held that it clearly did.

That the relationship between the right of self-government and the power to control extradition is essential and intimate was recognized long ago in Kentucky v. Dennison.\(^2\) There it was held that a state is not compelled to exercise its constitutional duty of extradition. Further, it was apparent to the court in Turtle that the Navajo Tribe was intended to have exclusive control over extradition because article I of the Treaty of 1868\(^2\) so provides. The court inferred that control over extradition was intended to be exclusive from the fact that money damages were the only remedy provided by the treaty for the wrongful refusal to extradite. Finally, it was noted that the Navajo Tribe had been exercising its jurisdiction over extradition since 1956, when the Tribal Council adopted a provision controlling procedures for Indian extradition.\(^3\) In light of this tribal code provision, it could not now be said that the state would not be infringing on tribal sovereignty by exercising extradition jurisdiction on the reservation.

From this lone case, four factors emerge that are important in determining whether the power to control extradition exists. These factors are, (1) the general historical background of the Indian people; (2) the existence of Congressional limitations on a tribe's right of self-government; (3) the existence and wording of treaty provisions relating to extradition; and, (4) the existence and extent of present day self-government by the tribe. These four factors would not only be all important in a future case involving a tribe's attempt to have its control over extradition recognized or established, but in any case in which a tribe was attempting to establish its right to some facet of self-government.

That Indians exercised self-government aboriginally is not difficult to establish, there being many historical volumes, anthropological writings and court cases to that effect. A problem might arise when a

\(^{21}\) 65 U.S. 66 (1860).
\(^{22}\) "If bad men among the Indians shall commit a wrong or depradation upon the person of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo Tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse to do so, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this Treaty, or any others that may be made with the United States...."
\(^{23}\) 17 Navajo Tribal Code § 1001 (1969).
tribe is required to show that it was, at some point in time, self-
governed. However, this is unlikely, since American Indians are the
most studied people in the world.24

A more technical question is presented when one attempts to
determine whether Congress has specifically acted to limit the
powers of a tribe with regard to extradition, and to confer increased
jurisdictional powers on the state within which the particular reserva-
tion exists. An example of this type of Congressional action is pre-
sented by 25 U.S.C. § 1321, which provides for state assumption of
criminal jurisdiction over offenses committed by or against Indians in
Indian country. This statute would probably extend to cover state
control of extradition of an Indian from an Indian reservation. Under
this section of the 1968 Indian Bill of Rights,25 the United States
allows criminal jurisdiction by a state over an Indian reservation with
the consent of the Indian tribe(s) to be affected. It should be noted
that the provision requiring the consent of the tribe(s) is a recog-
nition of tribal sovereignty. Retrocession of criminal jurisdiction ac-
quired by a state under 18 U.S.C. § 1162, which was repealed by 25
U.S.C. § 1322 (b), is also provided.

It is apparent from Turtle, supra, that article IV, section 2 of the
United States Constitution is not a limitation on the power of a tribe
to control extradition. Thus, unless a tribe is located on a reservation
within the boundaries of a state that has used 25 U.S.C. § 1321 to
assume criminal jurisdiction, or unless the tribe was the object of
specific Congressional action aimed solely at that tribe, it would have
the right and power to control extradition from its reservation, pro-
vided however that it could satisfy the other requirements enumerated
in Turtle.

Whether a tribe has a treaty provision exactly like the one con-
tained in the Navajo treaty, which allows for the discretionary exer-
cise of extradition power, depends to a great degree on the date the
United States government entered into a treaty with the particular
tribe. A perusal of the various treaties indicates that the extradition
provision has been commonly inserted into treaties with Indians
since 1868.26 Although a treaty was made prior to 1868, it may
contain words that may be construed as granting extradition power
to a tribe. Should it be found that a tribe's treaty contained no such

26. See generally, Treaty with the Sioux-Brule', Oglala, Miniconjou, Yanktonai,
Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, April 29,
1868, art. 1, Kappler, supra, at note 3 at 998; Treaty with the Crows, May 7, 1868, art. 1,
Kappler, supra, at note 3 at 1008; Treaty with the Ute, March 2, 1868, art. 6, Kappler,
supra, at note 3 at 991.
provision, the outcome of a case in which such power was asserted would be a matter of conjecture.

It could be argued, under a generally accepted rule of statutory construction, that since the power was not specifically denied to the tribe by the treaty, the power still exists. Besides being a legitimate result legally, it also is a fair result in light of the fact that the treaties were drafted by skilled employees of the federal government, and it is doubtful that the Indians had much influence on, nor an in-depth grasp of, the contents of the document. Also, it would seem unjust to deny to that group of tribes whose treaties were entered into prior to 1868, but which are usually on an equal political level with the group of tribes whose treaties were made subsequent to 1868, the power to control extradition from their reservation solely because they were unfortunate enough to have dealt with the federal government at an earlier date, or because the federal employees who drafted the treaties had not yet conjured up this specific provision as a standard clause.

The necessity for the last requirement; i.e., that a tribe be organized so as to have tribal government and tribal courts, is fairly obvious. There must be some governmental branch to exercise the extradition power. This requirement would eliminate those tribes that have terminated or do not have a tribal government and those tribes having a tribal government but no tribal court system, since as a general rule extradition is a bilateral agreement and a jurisdiction seeking extradition must be competent to try the person being extradited.\(^7\)

It should be noted that there are several aspects of Indian control of extradition that are beyond the scope of this article. Having examined the right of a tribe to control extradition of a person from the reservation to another state, nothing has been said about extraditing a person from a state to the reservation or extraditing a person from one reservation to another. These aspects of extradition are quite important, yet little, if anything, has ever been written about them and they have never been explored in a judicial decision.\(^8\)

Tribal control of extradition is an important step toward the ultimate goal of self-determination. It is not that extradition, in itself, is extremely important; it is that Indian tribes have added one more item to a number of powers that they exercise over their own people. This is self-determination; Indians controlling laws that affect In-

\(^{27}\) 31 Am. Jur. 2d, Extradition, § 1 (1967).

\(^{28}\) The converse of the area explored in this paper is examined in Dep't of Int. Decisions of the Department of the Interior: Extradition to Indian Reservations of Indian Fugitives, 57 Dep't of Int. 344 (1941).
dians, instead of control of laws affecting Indians by people who are unable to comprehend the sometimes vast differences that exist between the two cultures. Odd as it may sound to some people to state that cultural pluralism is, today, a prime cause of the "Indian problem," it is a fact. It is the feeling of the author that at such time as the Indian people are willing and able to take control and the federal government is willing to allow such, the so-called Indian problem will cease to be such a problem. However, self-determination is not something that should be forced on the Indian at a set date, for the Indian rightfully views with suspicion any forced policy of the federal government regardless of whether it is termed beneficial or helpful. The move must come when the Indians themselves determine that they are ready, and to the extent they feel is proper.

From the above discussion it can be concluded:

1. that Indian control of extradition from their respective reservations was contemplated as early as 1868;
2. that there was no case in which the requirements of a tribe's exercising this control were enumerated or discussed until Turtle, supra, in 1969;
3. that Indian tribes have always enjoyed a sovereign status in that they have always exercised some type of self-government;
4. that the right to control jurisdiction is a part of, and closely related to, the right of self-government;
5. that Indian tribes who satisfy the requirements set out in Turtle, supra, have the right and power to control extradition from their reservations.
6. Those requirements are:
   1. that the tribe have a history of self-government;
   2. that there be no act of Congress denying this power to the tribe;
   3. that the tribe having a treaty provision allowing control of extradition (although an argument can be made that this is not absolutely essential);
   4. that the tribe have a presently organized form of government including a tribal court system.

Douglas Nash*

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*Student, University of New Mexico School of Law, and member of the Nez Perce Tribe.