12-1-1977

Ninth Circuit's Federal Instrumentality Doctrine--A Threat to Tribal Sovereignty

Benedetta A. Kissel

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol53/iss2/9

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
THE NINTH CIRCUIT'S FEDERAL INSTRUMENTALITY
DOCTRINE—A THREAT TO TRIBAL SOVEREIGNTY

I. Introduction

The Supreme Court decision of McCulloch v. Maryland first established the principle that instrumentalities of the federal government were constitutionally immune from state taxation. Subsequent to that decision, the so-called federal instrumentality doctrine rose and declined in popularity both within the general body of American law and within that body of law particularly dealing with Indian tribes.

In its prime, the federal instrumentality doctrine immunized from state taxation Indian land, lessees of Indian property and the leases themselves. These were deemed to be instrumentalities through which the federal government fulfilled its obligations to the Indians. By creating a barrier against state encroachment through taxation, the federal instrumentality doctrine was of financial benefit to the tribe, and, as such, was protective of tribal existence and self-sufficiency.

In recent years, however, the Ninth Circuit has employed the federal instrumentality doctrine in an entirely different context and for a purpose destructive of Indian cultural survival. In lieu of considering Indian lands, lessees of Indian property or the leases themselves as federal instrumentalities, the "new" federal instrumentality doctrine bestows such status upon institutions constituting the tribal government. Thus labeled, those institutions do not enjoy additional benefits. Rather, they have been subjected, in three recent Ninth Circuit decisions, to restraints incumbent upon federal agencies.

Not only does the federal instrumentality doctrine as applied by the Ninth Circuit effectively negate independent tribal authority to self-govern, it also contradicts the proposition endorsed by the Supreme Court that tribal action is not restricted by the United States Constitution. The Supreme Court decision establishing that rule of law is still purportedly followed by the Ninth Circuit itself.

The importance of the "new" federal instrumentality doctrine is not mooted by application of parts of the Constitution to Indian tribes through the Indian Civil Rights Act (ICRA). That legislation, passed in 1968, did not subject...
tribal action to all of the constitutional restraints upon the federal and state governments. By erasing the distinction between tribal and federal action, the federal instrumentality doctrine may subject the tribes to those constitutional and statutory restraints upon the federal government not extended to the tribes by legislation such as the Indian Civil Rights Act. With regard to those restraints extended by congressional act but given a narrow interpretation consistent with tribal sovereignty, federal instrumentality status also remains a crucial issue. Tribal freedom from these restrictions is in jeopardy due to the federal instrumentality doctrine articulated by the Ninth Circuit.

The objective of this note is to examine the Ninth Circuit’s federal instrumentality doctrine against the background of 1) the traditional federal instrumentality doctrine and 2) the cases dealing with constitutional accountability of Indian tribes. The note will discuss the utility of the Ninth Circuit’s doctrine and the propriety of judicially imposing upon tribal government those restraints which limit federal action.

II. The Old Federal Instrumentality Doctrine

The federal instrumentality doctrine is new neither to Indian law nor to United States jurisprudence in general. *McCulloch v. Maryland* first established the proposition that an instrumentality of the federal government is not subject to taxation by the states. Following that landmark decision came a rash of claims by private parties alleging that they fell within the category of “federal instrumentality” because their activities furthered governmental objectives. The number of persons successfully using the federal instrumentality doctrine to obtain

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Section 1303 provides:
The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

federal immunity increased until, ultimately, the Supreme Court began to reject peripheral claims to such immunity.\textsuperscript{12}

A similar pattern occurred in Indian law.\textsuperscript{13} \textit{United States v. Rickert}\textsuperscript{14} established the rule that allotted trust lands\textsuperscript{15} in Indian possession were federal instrumentalities and not subject to state taxation. In prohibiting state taxation the Court stated:

If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians . . . . it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians . . . . \textit{To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference [to it].}\textsuperscript{16}

The \textit{Rickert} Court also regarded permanent improvements upon the land and personal property issued by the federal government as instrumentalities in furtherance of federal goals for the tribe. As such they, too, were immune from state taxation.

In \textit{Choctaw and Gulf RR v. Harrison,}\textsuperscript{17} the Supreme Court extended the federal instrumentality doctrine by holding a lessee of the Choctaw and Chickasaw tribes immune from that portion of a state tax upon gross sales of coal which fell upon sales of coal from Indian-owned mines. Lessee railroad was considered an instrumentality of the federal government through which the United States' obligations under an agreement with the tribes were carried into effect.

The \textit{Choctaw} decision spawned numerous decisions granting federal instrumentality status to other lessees subject to various types of state taxes.\textsuperscript{18} Successful

\textsuperscript{12} For an account of this development, see Ratchford, \textit{Intergovernmental Tax Immunities in the United States}, 6 Nat'l. Tax J. 305 (1953).

\textsuperscript{13} For an account of this development, see Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1950). It should be noted that application of the label "federal instrumentality" to Indian lands, lessees of Indian property, or the leases themselves was an unnecessary, albeit beneficial, tool of the federal courts to establish tribal immunity from state taxation. In \textit{The Kansas Indians}, 72 U.S. (5 Wall.) 737 (1866), such immunity was extended to the tribes because they were sovereign in their own right. Moreover, recent Supreme Court decisions have based immunity from state taxation upon the combined theories of tribal sovereignty and federal preemption. See, \textit{e.g.}, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

\textsuperscript{14} 188 U.S. 432 (1903).

\textsuperscript{15} These terms are defined in F. COHEN, \textit{HANDBOOK OF FEDERAL INDIAN LAW} (1942): "The process of allotment shifted the rights of individual Indians in real property from the rights of participation in tribal property . . . to rights of ownership in individual tracts." \textit{Id.} at 206.

"Under the General Allotment Act and related legislation, the allottee receives what is called a "trust patent" the theory being that the United States retains legal title to the land. Alienation of the land, therefore, requires either the consent of the United States to the alienation or, as a prerequisite to a valid conveyance, the issuance of a fee patent to the allottee." \textit{Id.} at 109.

\textsuperscript{16} 188 U.S. at 437 (emphasis added).

\textsuperscript{17} 235 U.S. 292 (1914).

\textsuperscript{18} Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522 (1916), followed \textit{Choctaw} and held the assignee of an Indian oil and gas lease immune from state taxation of the lease's value. The lessee, and possibly the lease itself, according to Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1948), was apparently a federal instrumentality. Two \textit{per curiam} decisions, Howard v. Gypsy Oil Co., 247 U.S. 503 (1917) and Large Oil Co. v. Howard,
use of the federal instrumentality doctrine, however, began to wane in the 1930's. The ultimate coup de grace was Oklahoma Tax Commission v. Texas, which overruled Choctaw and similar cases granting lessees of Indian land immunity from state taxation.

The "old" federal instrumentality doctrine merits attention in this note, not because of its ultimate fate in the courts, but because of the contrast between it and the newer version created by the Ninth Circuit.

First, under the "old" doctrine, entities other than the tribe itself or the tribal government were considered federal instrumentalities. In Rickert, tribal property was so considered because of its importance to the United States in discharging its duty to the Sisseton Band of Sioux Indians. Similarly, in the Choctaw line of cases, the lessee of tribal lands, or the lease itself, not the tribal government or its institutions, was a federal instrumentality through which the federal government attempted to achieve its goals.

Secondly, the old federal instrumentality doctrine was a benevolent tool of the courts, used to reinforce tribal sovereignty. By immunizing tribal property, or tribal lessees from state taxation, the court conferred a financial benefit upon the tribe.

III. The New Federal Instrumentality Doctrine

In contrast to the old federal instrumentality doctrine, a device protective of tribal existence, the new federal instrumentality doctrine destroys tribal sovereignty. Unlike its predecessor, the new doctrine considers an institution of

---

248 U.S. 549 (1918), relied upon Choctaw and Indian Territory Illuminating Oil, and held similar lessees immune from state taxation of gross production. Justice Holmes, over three dissents, extended the immunity even further in Gillespie v. Oklahoma, 257 U.S. 501 (1921), by immunizing a lessee from state tax upon the net income it derived from sales of oil and gas from Indian-owned land. Then, in Jaybird Mining Co. v. Weir, 271 U.S. 609 (1926), a lessee-federal instrumentality was immunized from an ad valorem tax levied upon ore mined from restricted Indian lands.

19 In Indian Territory Oil Co. v. Board, 288 U.S. 325 (1933), a lessee who had already paid for and removed oil from restricted Indian property was held subject to the state's ad valorem tax. The oil being taxed, unlike that in Jaybird, supra note 18, was deemed to be "awaiting disposition at petitioner's pleasure" and "was for its sole advantage." Id. at 328. The Court rejected the claim of tax immunity and distinguished Choctaw and the other federal instrumentality cases on the theory that any immunity the lessees enjoyed as a federal instrumentality extended no further than necessary for the protection of its operations as a governmental tool.

State power to levy a non-discriminatory ad valorem tax upon equipment used by a lessee in production of oil and gas from restricted Indian lands was upheld in Taber v. Indian Territory Co., 300 U.S. 1 (1936). In 1937, Helvering v. Producers Corp., 303 U.S. 376 (1937) overruled Gillespie, supra note 18, and required a "direct and substantial interference" with the performance of the government's obligations in order to sustain tax immunity. Id. at 384.

20 336 U.S. 342 (1948). In addition to Choctaw and several other cases, Oklahoma Tax Comm'n overruled Indian Territory Illuminating Oil Co., Howard, and Large Oil, supra note 18, and held that non-discriminatory gross production taxes and state excise taxes were not invalid as applied to petroleum produced under lease of allotted and restricted Indian lands.


tribal government itself as an agency of the federal government. Far from being benevolent, it subjects tribal institutions to restraints incumbent upon the federal government.

The Ninth Circuit's analysis is thus potentially devastating to tribal sovereignty. Moreover, it directly contradicts a long line of authority deriving from the Supreme Court and cited with approval to this day by the Ninth Circuit itself. Some of these cases expressly state that institutions of tribal government are not federal instrumentalities. Others implicitly express that view by refusing to apply the federal constitution to tribal action.

A. Talton v. Mayes

The Supreme Court decision of Talton v. Mayes established the oft-repeated rule that action of an Indian tribal government is not restricted by the United States Constitution. Specifically at issue in Talton was the fifth amendment.

Talton, a Cherokee Indian, was convicted by the Cherokee court of the murder of a fellow Indian within reservation boundaries. The case came to federal court on a petition for habeas corpus which alleged, inter alia, that the Indian grand jury, which in accordance with Cherokee law consisted of only five persons, was not a grand jury within the contemplation of the fifth amendment to the United States Constitution. Further, petitioner asserted that due to the composition of the grand jury he was denied fourteenth amendment due process.

The issue before the Supreme Court turned upon the source of tribal governmental authority. The petitioner argued that since Congress had authority to regulate tribal affairs, tribal authority derived from, and was limited by, the United States Constitution.

The Court's response to that contention was that:

the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers. Federal powers arising from and created by the Constitution of the United States. . . . [A]s the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.

22 Tom v. Sutton, 533 F.2d 1101, 1103 (9th Cir. 1976).
24 See, e.g., Talton v. Mayes, 163 U.S. 376 (1896); Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959).
25 163 U.S. 376 (1896).
26 Id. at 384.
Far from equating Indian government with an agency of the federal government, the Supreme Court, in its only encounter with the question of tribal accountability under the United States Constitution, strongly endorsed tribal sovereignty and independence from restrictions upon federal action. 27

The Talton doctrine has frequently been applied in the federal courts to resolve similar questions concerning application of the constitution to tribal action. Most notable are the following cases.

B. The Talton Progeny

In Martinez v. Southern Ute Tribe of the Southern Ute Reservation, 28 the daughter of a full-blooded Ute male and a non-Indian female petitioned the Colorado District Court for relief, alleging that she was wrongfully denied membership and its benefits by the Southern Ute Tribe. The court dismissed for lack of jurisdiction and the Tenth Circuit affirmed. According to the court, Martinez put forth no claim arising under or requiring interpretation or construction of the Constitution, laws or treaties of the United States. The opinion concentrated upon the contention that the claim arose under the Indian Reorganization Act of 1934. In the course of its decision, however, the court also discussed the theory that a claim such as that of Martinez arose under the fifth amendment:

It is equally clear that the Due Process clause of the fifth amendment does not apply to the activities of the tribe or corporation for, although the Interior Department has ruled that for certain purposes Indian tribes are to be regarded as agencies of the federal government . . . ., the doctrine that an Indian tribe is not a federal instrumentality within the various statutory and constitutional restrictions upon federal instrumentalities has not been changed since it was laid down in Talton v. Mayes, supra. 29

The Talton holding concentrated on negating application of the fifth amendment to the constitution. Martinez too, spoke only in terms of that amendment. The Eighth Circuit, however, in Barta v. Oglala Sioux Tribe of Pine Ridge Reservation 30 directly addressed the question of whether the fourteenth or fifth amendment applied to tribal action. In that case the Oglala Sioux had levied a use tax upon non-Indian lessees of tribal trust lands. When the defendants refused to pay the tax, both the tribe and the United States on behalf of the tribe sued for amounts due. To the defendants' allegations of constitutional violations the court replied:

---

27 Petitioner's fourteenth amendment claim was denied based upon Hurtado v. California, 110 U.S. 516 (1884) and McNulty v. California, 149 U.S. 645 (1893). These cases held that where a state constitution authorized prosecution by information, the fourteenth amendment due process clause did not necessarily require a state indictment by grand jury.
28 249 F.2d 915 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958).
29 Id. at 919. The Interior Department's rulings are Op. Sol. I.D., M 29156, Jun. 30, 1937 and Op. Sol. I.D., M27810, Dec. 13, 1934. In these two opinions of the solicitor, the tribe itself was spoken of as a federal instrumentality in order to exempt it from Social Security tax and state tax respectively.
30 239 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959).
The Fourteenth Amendment places limitations on legislative actions by the states . . . The Indian tribes are not, however, states and these constitutional limitations have no application to the actions, legislative in character, by Indian tribes. Neither may the Fifth Amendment be invoked as against any legislative action of the Indian tribes.\(^{31}\)

In *Native American Church of North America v. Navajo Tribal Council*,\(^{32}\) the Tenth Circuit once again passed upon the question of tribal accountability under the United States Constitution, this time with regard to the first, fourth, and fifth amendments. The Navajo Tribal Council had criminalized the sale, use and possession of peyote, a drug central to the religious ceremonies of the Native American Church of North America. The Church sought injunctive relief from the New Mexico district court against the enforcement of the tribal ordinance, basing its claim upon the United States Constitution. After reviewing with approval opinions espousing the doctrine of tribal sovereignty,\(^{33}\) and precedent denying application of the Constitution of tribal action,\(^{34}\) the Tenth Circuit affirmed the trial court's dismissal of the petition. The court held that the Constitution, "as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress."\(^{35}\) Since the amendments in question did not fulfill these conditions, they did not restrict tribal action.

**C. The Ninth Circuit's Federal Instrumentality Doctrine**

Against this formidable background of precedent the new federal instrumentality decisions\(^{36}\) stand out as aberrations. The theory of those cases is that certain institutions of tribal government derive authority from and are agencies of the federal government.

Two of the new federal instrumentality doctrine cases concern habeas corpus proceedings dealing with arrests occurring prior to the passage of the ICRA. Jurisdiction to hear these claims was predicated upon 28 U.S.C. § 2241(c).\(^{37}\) A detailed analysis of this statute is necessary in order to fully ap-

\(^{31}\) *Id.* at 556-57. The court cited *Talton* and quoted extensively from F. *Cohen*, *supra* note 15.

\(^{32}\) 272 F.2d 131 (10th Cir. 1959).


\(^{34}\) Talton v. Mayes, 163 U.S. 376 (1896); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D. N.M. 1954) (cited for the proposition that constitutional deprivation by tribal government could not be redressed by action under 42 U.S.C. § 1983). The Tenth Circuit discussed F. *Cohen*, *supra* note 15, at 124, as follows: Cohen's Handbook . . . states that restraints upon Congress or upon the Federal courts or upon the States, by the Constitution, do not apply to Indian tribal laws and courts. And . . . it is stated that, "The provisions of the Federal Constitution protecting personal liberty or property rights, do not apply to tribal action."

\(^{35}\) 272 F.2d at 134.

\(^{36}\) See note 6 *supra* for a citation of these cases.

\(^{37}\) 28 U.S.C. § 2241(c) provides:

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
preciate the cases of Colliflower v. Garland and Settler v. Yakima Tribal Court.  

Section 2241(c) lists five bases of federal jurisdiction to hear habeas corpus petitions. Sections 2241(c)(2), (4) and (5) had no possible application to the cases before the Ninth Circuit. Section 2241(c)(1) grants jurisdiction to review custody “under or by color of the authority of the United States or... for trial before some court thereof”; § 2241(c)(3) grants jurisdiction to review “custody in violation of the Constitution or laws or treaties of the United States.”

The rationale of Talton and its progeny would appear to preclude an argument under § 2241(c)(1) that Indian tribunals were courts of the federal government. These cases either expressly ruled to the contrary or held Indian tribunals immune from constitutional restrictions. Similarly, equating tribal custody with custody “under or by color of the authority of the United States” under § 2241(c)(1) could not be squared with the Talton analysis. Talton itself held that tribal authority derived not from federal sources, but from pre-United States Indian sovereignty. More specifically, creation and administration of a judicial system has been held to be an exercise of this inherent tribal authority.

The Talton line of cases would also appear to dispose of the contention under § 2241(c)(3) that custody by an Indian tribe could be in violation of the constitution. According to those decisions the constitution does not protect individuals from the actions of an Indian tribe.

Application of the Talton doctrine would dictate that, if habeas corpus jurisdiction over tribal custody exists at all, it must be under that part of § 2241(c)(3) dealing with custody in violation of federal law or treaties. An Indian tribe could arguably incarcerate someone in violation of a federal law specifically limiting tribal sovereignty or in violation of the tribe’s treaties with the United States. The only inquiry in these pre-ICRA tribal custody cases therefore, should have been whether the custody was in resolution of an internal affair as defined by treaty and federal law. If so, federal courts would have no jurisdictional basis for review.

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.

38 342 F.2d 369 (9th Cir. 1965).
40 See note 23, supra.
41 See note 24, supra.
42 Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).
43 The thirteenth amendment, which has been held to apply generally within the United States, may be an exception to this rule. See In Re Sah Quah, 31 Fed. 327 (D. Alas. 1886).
44 Some may argue that even in this situation the federal court has no jurisdiction since custody by an Indian tribe in violation of treaty or laws is analogous to such custody by a private person or by a foreign nation. Neither of these were affected by passage of § 2241(c)(3), which only spoke to federal or state custody.
The Ninth Circuit in *Colliflower v. Garland*[^45] and *Settler v. Yakima Tribal Court*[^46] disagreed with this analysis.

1. *Colliflower v. Garland*

*Colliflower v. Garland* was the first of the Ninth Circuit cases to equate Indian court action with federal action. In 1965, Madeline Colliflower, a member of the Gros Ventre Indian tribe of Fort Belknap Indian Community, sought a writ of habeas corpus from the United States District Court for the District of Montana. Colliflower had been incarcerated after being found guilty by the Fort Belknap Court of Indian Offenses of disobeying an Indian court order to remove her cattle from reservation land leased by another. Her petition to federal court alleged violations of her federal constitutional rights to counsel, trial, confrontation of the witnesses against her, and due process. When the district court dismissed for lack of jurisdiction, Colliflower appealed to the Ninth Circuit.

Under the above analysis of § 2241, the Ninth Circuit would have had difficulty granting habeas corpus jurisdiction. The offense of which Colliflower had been convicted by the Indian court was plainly within the jurisdiction of the Fort Belknap Court under applicable treaties and laws of the United States. Therefore, assuming that the above analysis of § 2241 is correct, the court should have dismissed for lack of jurisdiction.

Instead, the Ninth Circuit reversed and remanded, holding that the federal court, under §§ 2241(c)(1) and 2241(c)(3), had jurisdiction to hear Colliflower’s petition for habeas corpus. After reviewing the history of the Fort Belknap Court of Indian Offenses, most notably its organization by the Commissioner of Indian Affairs[^7], its use of the federally created laws for Courts of Indian Offenses[^8], and its federal funding, the Ninth Circuit held that:

In spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government.[^49]

Tribal action under the label “federal instrumentality” thus fulfilled both §§ 2241(c)(1) and (3). Custody by this arm of the federal government was “by color of” United States authority, and could be in violation of the United States Constitution.[^50]

The Ninth Circuit did not ignore precedent under the *Talton* doctrine. It attempted, unpersuasively, to distinguish it. Neither *Native American Church*...
nor Barta, according to the court, decided the issue of habeas corpus jurisdiction. Although that statement is correct, the Tenth and Eighth Circuits in those cases held that the tribe was not restricted by the Bill of Rights, and thereby implicitly denied federal instrumentality status. Under the rationale of these decisions, jurisdiction under § 2241(c)(1) (custody by color of United States authority), and § 2241(c)(3) (custody in violation of the Constitution), should have been denied.

Talton, on the other hand, did deal with a petition for habeas corpus. In an attempt to circumvent the reasoning of that case, the Ninth Circuit in Colliflower argued that the Supreme Court’s decision on the merits rather than on jurisdictional grounds confirmed that claims such as that of Colliflower are cognizable under § 2241, even though ultimately the Constitution was held not applicable. The Ninth Circuit apparently reasoned that the Supreme Court must have considered the tribe either a federal instrumentality or otherwise subject to the constitution for the purpose of fulfilling the habeas corpus jurisdictional statute, even though the Talton Court in its decision on the merits did not consider the tribe subject to the Constitution. In thus using Talton to justify separation of the threshold issue of habeas corpus jurisdiction and the ultimate issue of constitutional accountability, the Ninth Circuit failed to acknowledge a fact which was brought out elsewhere in the Colliflower opinion: the Cherokee treaty relevant in Talton specifically required that tribal law be consistent with the United States Constitution. Unfortunately, the Talton court did not explain why it had jurisdiction. With the aid of this express treaty provision, however, it is arguable that habeas corpus jurisdiction would extend in behalf of one alleging detention by the tribe “in violation of the Constitution . . . or treaties of the United States.” No similar provision was present in Colliflower.

Even assuming the validity of dissecting the “federal instrumentality” analysis, one might question the utility of such a move. A court relying upon Colliflower to establish jurisdiction will at the trial on the merits find itself constrained by precedent to reject the claim of constitutional violation until such time as Talton is overruled.

2. The Settler Litigation

a. Settler v. Yakima Tribal Court

One such futile exercise was the Settler litigation. In 1969, the Ninth
Circuit held that, under Colliflower, the federal court had jurisdiction to hear Settler’s habeas corpus claim. The tribal court was deemed a federal instrumentality for the purposes of fulfilling § 2241. In its 1974 decision on the merits, the Ninth Circuit did an analytical about-face and denied Settler’s claim. The court concluded that before passage of the ICRA the tribal court was not restrained by the fifth and sixth amendments. It could not, therefore, have been considered a federal instrumentality. Although the Settler litigation ultimately reinforced the Talton doctrine, in the course of its disposition the court utilized and extended the new federal instrumentality doctrine as a device to acquire habeas corpus jurisdiction.

Alvin Settler had been arrested before the effective date of the ICRA, and convicted of violating off-reservation tribal fishing regulations and of disobeying the orders of the tribal court. His petition for a writ of habeas corpus alleged violations by the tribal court of fifth and sixth amendment rights to counsel and to freedom from double jeopardy.

The district court decided that the issues before the tribal court were within the tribe’s exclusive jurisdiction. It distinguished Colliflower on several grounds and dismissed Settler’s petition for habeas corpus.

On appeal, the Ninth Circuit conceded that “as a general rule the regulation of Indian fishing was an internal affair of the Yakima Nation under the authority of the Treaty of 1859.” Such being the case, the court could have followed the district court’s lead by concluding that tribal resolution of an affair within the tribe’s jurisdiction was not subject to attack through a federal habeas corpus petition alleging constitutional violation. The Ninth Circuit, however, chose to grant habeas corpus jurisdiction relying on its version of the federal instrumentality doctrine and the following reasoning:

We concede that as a general rule the regulation of fishing is an internal affair of the Yakima Nation under the authority of the Treaty of 1859. The Indian Nation has exclusive authority to regulate the time, place and manner of Indian fishing on the reservation (just as the several states have exclusive authority to exercise the police power) in the absence of the exercise of paramount authority by the United States. The very definition, however,

53 If his claim had arisen after the effective date of the ICRA, jurisdiction would have been under 25 U.S.C. § 1303 (Supp. 1977) for violations of 25 U.S.C. § 1302 (Supp. 1977). See note 10 supra, for the text of these provisions.

54 Mr. Settler alleged multiple prosecutions by the tribal court. This claim should be distinguished from that in Walking Crow, Elk and Wheeler, infra, in which defendants challenged the propriety of federal prosecution after trial by tribal authorities.

55 The court noted several differences between the Colliflower case and that of Mr. Settler. The Fort Belknap court was supported by federal funds while the Yakima Tribal Court was not. The exclusive right of taking fish was reserved to the Yakima nation by treaty; Mr. Settler’s right to fish derived from his membership in the tribe. Moreover, the treaty referred to the Yakima tribe as a sovereign nation. The court stated its holding as follows:

The Court can only conclude from the language of the treaty, the peculiar status of the Yakima Tribal Court, the fact that the specific right is delineated in the body of the treaty, and the use of the word nation when referring to the authorization of the signators, that it was intended to confer to the sovereign Yakima nation exclusive jurisdiction of the fishing rights set forth in the body of the treaty, and that this last vestige of sovereignty should be preserved.

This Court, therefore, concludes that it has no jurisdiction to hear the petition. Settler v. Yakima Tribal Court, No. 68-2378 at 7 (E.D. Wash. Feb. 1, 1968).

56 419 F.2d at 488.
indicates that the Indians' exclusive authority is not boundless. The attempt by a state to prosecute its citizens in a summary and arbitrary fashion may be successfully attacked, as may an attempt to regulate certain activities of its domiciliaries without the state. Likewise (without expressing any opinion on the merits of the constitutional issues in the present case), although the Fourteenth Amendment may not apply to tribal courts, there must be and is a limit to the "exclusive" authority of the Yakima Nation to regulate Indian fishing when that regulation becomes so summary and arbitrary as to shock the conscience of the federal court, or goes beyond the scope of authority originally contemplated by the Treaty of 1859.\textsuperscript{57}

There are two ways to view this ambiguous passage. First, the court may have fashioned two additional non-federal instrumentality doctrine grounds upon which to interfere with tribal action. Federal courts could, under this view, restrain tribal activity when that action shocks the conscience of the court or when that action exceeds the scope of authority contemplated by treaty. Second, the court may have told us\textit{when} the tribe would be considered a federal instrumentality. According to this interpretation, a tribal body will be considered a federal instrumentality when its action shocks the court or exceeds the scope of its authority.

If the first interpretation is accurate, the Ninth Circuit may have created two new grounds upon which subsequent courts could, without using the federal instrumentality doctrine, justify federal habeas corpus intervention in tribal action. Four years earlier the \textit{Colliflower} court had decided that for purposes of habeas corpus jurisdiction, action of the Fort Belknap Court of Indian Offenses was to be considered federal action. Under the first interpretation, however, the \textit{Settler v. Yakima} court constructed two new limitations upon tribal action \textit{qua} tribal action, as distinguished from\textit{federal action through the tribe}. According to the first limitation, even assuming that resolution of disputes involving off-reservation fishing rights was an internal affair, tribal courts could not act arbitrarily. As with states, there must be\textit{some} limit upon arbitrary action. What limit? The court's only response was: perhaps not the fourteenth amendment, but\textit{some} limit that puts a halt to tribal action which shocks the conscience of the court. A simple answer to this contention is that nothing in 28 U.S.C. \textsection 2241 entitles a tribal prisoner whose confinement shocks the conscience of the federal court to a writ of habeas corpus.

The second non-federal instrumentality limitation proposed by the Ninth Circuit is equally fallacious. The court opined that there must be a limitation on the exclusive authority of the tribe to regulate Indian fishing "when that regulation \ldots goes beyond the scope of authority originally contemplated by the Treaty of 1859."\textsuperscript{58} The tribe could, apparently, handle an internal matter in such a way as to exceed the scope of its authority by violating certain rights which individuals have against the federal government.\textsuperscript{59} This new peg upon which

\textsuperscript{57} Id. at 488-89.

\textsuperscript{58} Id. at 489.

\textsuperscript{59} This argument should be distinguished from the argument that the court has habeas corpus jurisdiction if the tribe oversteps its jurisdiction as defined by treaty and federal law. \textit{See} text accompanying note 44 \textit{supra}. The Ninth Circuit is arguing here that even though by reference to all the relevant treaties and federal law the issue is "internal," the tribe could be exceeding some undefined boundary by handling an internal affair in an unsatisfactory manner.
to hang constitutional application to tribal action would, however, entail reading into the treaty language a requirement that in exercising control over internal affairs the tribe act within the confines of the federal constitution. Such a requirement is not to be found in the Yakima treaties, and its creation by the Ninth Circuit could not be squared with present canons of treaty interpretation.60

The second and less revolutionary interpretation of the Settler v. Yakima language postulates that it was used merely to bolster the court's reliance on the federal instrumentality doctrine. In other words, when the court said that "there must be and is a limit" it was referring to the federal instrumentality doctrine as that limit. Under this interpretation the Ninth Circuit's message was that the tribal court would be considered a federal instrumentality when there was need for a limit upon its action, i.e., when its action shocked the conscience of the court or exceeded the scope of its authority contemplated by treaty.

In Settler v. Yakima the Ninth Circuit relied on the federal instrumentality doctrine as applied in Colliflower. It also extended that doctrine. Colliflower dealt solely with the status of the Fort Belknap Court of Indian Offenses. The Ninth Circuit specifically limited its holding by stating that "We confine our decision to the courts of the Fort Belknap reservation. The history of other Indian courts may call for a different ruling, a question not before us."661

In order to fully appreciate the implications of Settler v. Yakima, a brief discussion of Indian courts is in order.62 Indian courts fall into three general categories: traditional courts, Courts of Indian Offenses and tribal courts. Traditional courts are semi-religious courts not conforming to any Anglo-American model, and found only on several Pueblo reservations in New Mexico. The action of these courts has not been challenged as federal action before the Ninth Circuit.

In 1883, due to the breakdown of traditional Indian systems of justice upon some reservations, the Department of the Interior created Courts of Indian Offenses.63 Judges of such courts are appointed by the Bureau of Indian Affairs

60 The canons of treaty interpretation are well established and were fully reiterated by the Ninth Circuit in Settler v. Lameer, 507 F.2d 231, 236-37 (9th Cir. 1974). According to United States v. Winans, 198 U.S. 371 (1904), a treaty constitutes a grant of rights from the tribe to the United States government; any rights not granted are retained by the tribe. Even if the tribe has granted rights to the federal government, the court must in interpreting the treaty consider "[h]ow the words of the treaty were understood by the unlettered people, rather than their critical meaning." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832). "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation...." Carpenter v. Shaw, 280 U.S. 365, 367 (1930). Throughout the years these canons have been repeatedly quoted with approval. The Supreme Court, in the recent decision of McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973), quoted the Worcester and Carpenter rules with approval and used them in conjunction "with the tradition of Indian independence" to interpret the treaty there in question.

61 342 F.2d at 379.

62 The following discussion of Indian courts was taken from Kerr, Constitutional Rights, Tribal Justice, and the American Indian, 18 J. Pub. L. 311, 320-23 (1969) and 18 St. Louis L. J. 461 (1974). See also Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

63 By setting up Courts of Indian Offenses, the Commissioner of Indian Affairs did not create tribal authority to administer a system of justice. That authority was an integral part of pre-United States tribal sovereignty. Cf. Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). It may justifiably be argued that executive action of the United States government merely organized the tribes' judicial power at a time when, due to non-Indian intrusion upon tribal life, the traditional tribal systems of justice had broken down. Courts of Indian Offenses, under this view, derive their authority, if not their structure, from the tribes themselves. But see Indian Tribal
upon approval by the tribal council, and are paid with federal funds. Federal law, as well as consistent tribal law and customs, is enforced by the Courts of Indian Offenses.

Today, the majority of Indian courts are tribal courts. These are established by the tribes themselves in exercise of their inherent tribal sovereignty. They operate independently of the Department of the Interior and enforce tribal codes. The Eighth Circuit in *Iron Crow v. Oglala Sioux Tribe* held "that tribal courts are not creations of the federal constitution or of federal statutes, and that their jurisdiction is inherent with respect to all matters that have not been taken away from them."

The Fort Belknap court at issue in *Colliflower* was probably not a "true" Court of Indian Offenses within the meaning of 25 C.F.R. 11. *Oliver v. Udall* held that adoption by the Navajo Tribal Council of the Department of Interior's law and order code transformed that law into tribal law. Adoption and use of tribal law appears to be the crucial distinction between a Court of Indian Offenses and a tribal court. At the time of the *Colliflower* controversy the Fort Belknap community had adopted its own law and order code, yet the Fort Belknap court retained an important incident of a Court of Indian Offenses: its judges were paid by the federal government.

It is unclear whether the Fort Belknap court was considered by the Ninth Circuit as a Court of Indian Offenses. The *Colliflower* court used the title "Fort Belknap Court of Indian Offenses" and dwelt upon the history and characteristics of such courts in the course of its decision. If *Colliflower* revolved around the status of a true Court of Indian Offenses, *Settler v. Yakima* significantly extended the scope of the federal instrumentality doctrine by applying it to a tribal court, i.e., a court established and administered by the tribe itself in exercise of inherent tribal sovereignty.

Even if the *Colliflower* court considered the court at Fort Belknap a tribal court, resolution of the plight of Alvin Settler was another step toward general federal instrumentality status of all Indian courts. Settler's complaint was against a court whose judges were paid by the tribe rather than by the federal government. The Ninth Circuit rejected the argument advanced by the Yakima Tribal Court that it was substantially different from the Fort Belknap Court of Indian Offenses. The court of appeals noted that, although not directly funded by the federal government, the Yakima court was not financially independent. Even if it were financially independent, federal funding of the Fort Belknap court was "merely one factor considered in finding that such courts were at least in part a federal agency." In failing to distinguish between the more independent

---

64 231 F.2d 89 (8th Cir. 1956).
65 This paraphrase of the *Iron Crow* holding is found in *United States v. Walking Crow*, No. 77-1136 (8th Cir. Aug. 10, 1977). See note 63 supra, where it is argued that the Courts of Indian Offenses derive their authority from the tribe. *A fortiori*, Indian tribal courts, organized by the tribes themselves in exercise of their inherent power, need no authority from the United States to justify their existence.
67 The trial court noted that the Yakima Tribal Court is not federally funded, unlike the financially dependent Fort Belknap court. *No. 68-2378 at 5* (E.D.Wash. Feb. 1, 1968).
68 419 F.2d at 489.
Yakima Tribal Court and the federally funded court of the Fort Belknap community, the Ninth Circuit effectively extended the \textit{Colliflower} doctrine.\textsuperscript{69}

The conclusion of the Ninth Circuit in \textit{Settler v. Yakima} was consistent with that in \textit{Colliflower}: the district court had jurisdiction under § 2241 to review tribal custody even though it was pursuant to resolution of an internal affair. The Yakima Tribal Court, like the Fort Belknap Court of Indian Offenses, was a federal instrumentality. Custody required by its decisions was therefore "under color of" United States authority, and could be "in violation of the constitution."

The Ninth Circuit did not, however, consider the tribal court a federal instrumentality for all purposes. Although in \textit{Settler v. Yakima} the court was a federal instrumentality for purposes of habeas corpus jurisdiction, it was held free from constitutional restriction in the subsequent trial on the merits. The latter result is inconsistent with federal instrumentality status; it is, however, consistent with the \textit{Talton} doctrine.

\textbf{b. Settler v. Lameer}\textsuperscript{70}

On remand from the Ninth Circuit for decision on the merits, the district court denied Settler habeas corpus relief because regulation of off-reservation fishing rights was an "internal affair."\textsuperscript{71} The Ninth Circuit affirmed.

After deciding that the tribe had authority to arrest on the reservation violators of off-reservation fishing regulations, the court quickly disposed of Mr. Settler's constitutional arguments. Noting the lack of pre-ICRA cases guaranteeing the right to counsel in actions before Indian tribunals, and citing the legislative history of the ICRA,\textsuperscript{72} the views of Senator Ervin, the sponsor of the 1968 Act,\textsuperscript{73} and the many cases following the \textit{Talton} lead,\textsuperscript{74} the court concluded:

\begin{itemize}
  \item The court also found that modification of the Yakima laws and court system, like those of Fort Belknap, required federal approval. Although this is technically true, it is not a federal requirement. Rather, it is a requirement self-imposed by § 41 of the Yakima Indian Tribal Law and Order Code.
  \item 507 F.2d 231 (9th Cir. 1974).
  \item \textit{Id.} at 233. Settler had been arrested on the reservation for violation of off-reservation fishing regulations. During the same year, Settler's wife, Mary, arrested \textit{off} the reservation for violating off-reservation fishing regulations, pressed a claim with Mr. Settler in federal court for habeas corpus. The district court granted Ms. Settler's petition for habeas corpus holding that arrest outside the reservation was "unauthorized and unlawful." The district court's disposition of these two cases is consistent with the view that the propriety of habeas corpus relief turned upon that part of § 2241(c)(3) dealing with custody in violation of federal law or treaty, and not upon federal instrumentality status or allegations of constitutional violations.
  \item \textit{Id.} at 241 (quoting from the legislative history): "The Federal courts generally have refused to impose constitutional standards on Indian tribal governments, on the theory that such standards apply only to State or Federal governmental action, and that Indian tribes are not States with the meaning of the 14th Amendment."
  \item \textit{Id.} (quoting Senator Ervin): "The reservation Indian now has no Constitutional rights. The purpose of the amendment is to give these Indians constitutional rights which other Americans enjoy."
  \item Talton v. Mayes, 163 U.S. 376 (1896); Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958), \textit{cert. denied}, 358 U.S. 932 (1959); Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (10th Cir. 1957), \textit{cert. denied}, 356 U.S. 960 (1958). The court also quoted from F. \textit{Cohen}, \textit{supra} note 15, at 181, as follows:
    \begin{quote}
    Many important prohibitions, including the Bill of Rights of the Federal Constitution, are limitations only on the power of the Federal Government. Other provisions limit the activities of state governments only, or of the federal and state governments, and hence are inapplicable to Indian tribes, which are not creatures of either the federal or state governments.
    \end{quote}
\end{itemize}

507 F.2d at 241.
Here the proceedings in Tribal Court occurred prior to the enactment of the Indian Civil Rights Act of 1968. Accordingly we find no merit in the contention that the Tribal Court deprived petitioner of his constitutional rights by denying him representation by professional counsel. 75

Similarly, the court held that upon the facts alleged double jeopardy did not take place, 76 and in a footnote reiterated that "the constitutional prohibition against double jeopardy would not have been applicable since the tribal proceedings occurred prior to the Indian Civil Rights Act of 1968."

The protracted Settler litigation illustrates the futility of the federal instrumentality doctrine as applied by the Ninth Circuit to federal habeas corpus petitions. Settler v. Yakima was precedent only upon the jurisdictional question. According to the Ninth Circuit, the regulation of off-reservation fishing was an internal matter, but even so, the federal court had habeas corpus jurisdiction. In order to fulfill 28 U.S.C. § 2241 the court relied on the federal instrumentality doctrine of Colliflower, using it this time against the action of a tribal court. In addition, two alternative grounds may have been created, neither of which constitutes a viable basis for habeas corpus jurisdiction: that arbitrary action exceeded the scope of authority contemplated by treaty, and that there must be a check upon action which shocks the conscience of the court.

The 1974 Settler decision on the merits, Settler v. Lameer, added the conclusion that once the controversy was determined to be an internal affair, habeas corpus to challenge lack of procedural safeguards would be denied since the Constitution did not apply to tribal action. 78 For purposes of granting or denying the writ on the merits the tribe was not considered a federal instrumentality, or in any other way subject to the Constitution. The Settler litigation, therefore, exemplified the awkward situation first created in Colliflower. The federal court had jurisdiction under § 2241 and the Colliflower doctrine to hear a habeas corpus claim alleging violation of constitutional rights by a tribe acting upon an internal matter. Since the tribe could not, however, violate constitutional rights, the court necessarily denied the petition on its merits.

3. United States v. Wheeler 79

The actual holdings of Colliflower v. Garland and Settler v. Yakima Tribal Court may seem unimportant due to the passage of the ICRA, which specifically

75 507 F.2d at 241-42.
76 When the tribal court discovered that the prosecutor had mistakenly testified to the allegations of an offense which took place on a different date, it set aside the conviction and retried the defendant upon the same charge, but with a corrected recitation of allegations. The federal court held that upon these facts the retrial did not violate the prohibition against double jeopardy.
77 Id. at 242 n.26. In the 1974 case the court considered it crucial that Mr. Settler claimed violations by the tribe of constitutional rights which had not yet been extended to tribal action by the ICRA. Contrast the result in Settler v. Yakima, in which the court ignored the fact that at the time of the tribal proceedings the ICRA had not yet extended habeas corpus jurisdiction to reach tribal action.
78 Put another way, the court implicitly acknowledged that habeas corpus could only be granted to the confinee in this case in one situation: when the tribe's action was in violation of treaties or laws of the United States.
grants habeas corpus review of tribal custody in violation of that statute. Unfortunately, however, these decisions retain their precedential vitality. In addition, their reasoning has proved influential in other areas of the law, areas which were not affected by the ICRA. Therein lies the danger of the new federal instrumentality doctrine.

In 1974 Anthony Wheeler, a Navajo Indian, was brought before the Navajo Tribal Court upon charges arising from an incident on the Navajo reservation. He pleaded guilty to contributing to the delinquency of a minor and disorderly conduct. The same incident spawned a subsequent federal indictment for carnal knowledge of a female Indian under sixteen years of age. The Ninth Circuit concluded that the subsequent prosecution violated the constitutional prohibition against double jeopardy.

Two determinations are necessary to establish double jeopardy. First, the defendant must be charged twice with the same offense. This was true of Anthony Wheeler. Second, the prior decision must have been rendered by a court of the same sovereign as the subsequent tribunal. It was this issue, directly challenging tribal sovereignty, with which the Ninth Circuit struggled in United States v. Wheeler.

It was early established in Moore v. Illinois that both the state and federal governments could try a defendant for a single transaction, the theory being that the defendant owed allegiance to both and could by one act violate each of their laws. This dual sovereignty doctrine has been unceasingly criticized from without and within the Court, and has been confined to the state-federal relationship. Thus, territorial courts could not try a person for an offense previously disposed of by a federal military court, nor could both state and municipal courts prosecute for a single transaction.

From these governmental relationships, the Ninth Circuit was forced to choose an analogy befitting the relationship between the federal government and Indian tribes. The court acknowledged on the one hand that tribal courts are sui generis and “not merely a political unit of the federal government.” If it accepted this theory completely, however, it was faced with the prospect of perpetuating the unpopular and strictly construed dual sovereignty exception to the guarantee against double jeopardy. Its decision reflected the latter concern. Congress’ plenary control over the tribe’s criminal jurisdiction helped distinguish the federal-state relationship, and allowed the Ninth Circuit to select a different analogy:

If forced to choose a relevant analogy by which to guide our decision in this case from amongst the courts considered by the Supreme Court in the double jeopardy—“dual sovereignty” context, we would select territorial courts, described in Grafton v. United States, supra, as “civil court[s] proceeding under the authority of the United States.”

80 See text accompanying notes 115-17 infra.
81 55 U.S. (14 How.) 13 (1852).
82 Id. (dissenting opinion); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847) (dissenting opinion).
85 545 F.2d at 1257.
86 Id. at 1257-58.
The *Wheeler* court found support for its analogy in *Colliflower v. Garland*. According to the Court, the history of the Navajo and Fort Belknap courts was substantially similar, and the latter had been considered "in part at least" an arm of the federal government. The court concluded that:

Indian tribal courts and the United States district courts are not arms of separate sovereigns. Indian tribes are not states. Thus, the defendant in the instant case could not be tried in federal district court for the same offense that he was previously convicted of in Navajo tribal court without violating the Double Jeopardy Clause of the Fifth Amendment.

At best *Wheeler* stands for the proposition that for purposes of double jeopardy Indian tribal courts and federal district courts are arms of the same sovereign. The broad language of the opinion could, however, be taken to mean that for all purposes tribal court identity is subsumed in the federal court system. This latter interpretation is doubtful given the conflicting view of the Supreme Court expressed in *Talton*, and given *Talton*’s following, including the Ninth Circuit decision of *Tom v. Sutton*.

### D. The Aftermath of the New Federal Instrumentality Doctrine

The first of the Ninth Circuit opinions which equated Indian court action with federal action came down in 1965. Subsequent decisions in other circuits either wholly disregarded the Ninth Circuit’s views, as did the Ninth Circuit itself in *Settler v. Lameer*, or addressed and expressly rejected them in their opinions.

87 *Id.* at 1258. The actual effect of *Wheeler* may appear innocuous or indeed supportive of tribal sovereignty. An Indian tribe could, after *Wheeler*, preclude federal prosecution by prosecuting the defendant itself for a lesser included offense within the tribe’s criminal jurisdiction. Implicit in the power, it may be argued, is a respect for the tribal system of justice. This position fails to acknowledge that the reverse is also true: a tribe would have no opportunity, with regard to defendants already proceeded against in federal court, to vindicate its interests in prosecuting persons violating tribal law. It also ignores the dynamics of the federal-Indian relationship with regard to criminal jurisdiction. Unless specifically restricted by federal legislation, Indian tribes retain jurisdiction over all crimes committed within their territorial jurisdiction. Congress has extended federal jurisdiction to fourteen major crimes committed within Indian territory; all other crimes are handled by tribal authorities, which labor under a limitation of penalties. In its petition for certiori in the *Wheeler* case, the government justifiably argued that tribal power to preempt federal prosecution would not long be tolerated by Congress since perpetrators of serious offenses could be free upon fulfillment of the limited tribal penalties. Legislation further limiting tribal jurisdiction or requiring federal approval of tribal prosecutions would be a likely result of the *Wheeler* conclusion.

There remains a solution to the *Wheeler* dilemma which may in any case endanger residual tribal jurisdiction, but without unnecessarily negating tribal sovereignty through use of the federal instrumentality doctrine. Undoubtedly double federal prosecution is against the United States Constitution, and equally undoubtedly double tribal prosecution is prohibited by the ICRA. When a federal court wishes to try a defendant after an Indian court has done so, the defendant is confronted by an interstitial area not covered by the Constitution or federal law, similar to that encountered in the state-federal relationship. There is authority in Congress to fill this gap through appropriate legislation in the case of tribal-federal prosecutions. Since Congress is the sole body which can restrict tribal freedom, it should be left to that body to work out an equitable distribution of tribal and federal jurisdiction, and to provide the necessary safeguards to individuals within the confines of tribal sovereignty.

88 Although the *Lameer* court must have realized that its jurisdiction was due to *Colliflower* and *Settler v. Yakima*, it did not mention those decisions with regard to the merits. The Ninth Circuit in *Wheeler*, and other courts, such as those which decided *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975) and *Dodge*, either utilized or felt compelled to expressly reject the *Colliflower* analysis in a nonjurisdictional context.
One court which explicitly rejected the Ninth Circuit's federal instrumentality doctrine was the Eighth Circuit in *United States v. Walking Crow*. That Court stated when faced with the identical issue decided in *United States v. Wheeler*: "With all due respect to [the Ninth Circuit] we disagree with its holding and decline to follow it."

John Walking Crow, a member of the Rosebud Sioux Tribe, was indicted in federal court for the crime of robbery after he had pleaded guilty to a lesser included offense before the Rosebud Sioux Tribal Court. In a motion to dismiss the federal indictment, Walking Crow alleged that the subsequent federal prosecution would violate the double jeopardy clause of the fifth amendment to the United States Constitution.

As in *Wheeler*, the decision turned upon whether the tribal and federal courts were arms of the same sovereign. In resolving that question the Eighth Circuit relied upon its decision in *Iron Crow v. Oglala Sioux Tribe* "that the tribal courts are not creations of the federal constitution or of federal statutes, and that their jurisdiction is inherent with respect to all matters that have not been taken away from them." The court noted that while 18 U.S.C. § 1153 "took away from the Indian tribes and their tribal courts jurisdiction over enumerated offenses, the jurisdiction that was left to them was in our view an inherent and original jurisdiction of quasi-sovereign powers." It therefore concluded "that a tribal court in administering its residual jurisdiction is not acting as an adjudicatory arm of the federal government, and that it is not simply an inferior court in the federal judicial system."

The *Walking Crow* court also disposed of an argument that had been raised in *Talton*. The petitioner in *Talton v. Mayes* had argued that potential federal control over tribal jurisdiction in some way negated inherent tribal authority to govern internal affairs. The Supreme Court’s reply was that the existence of Congressional power "does not render such local powers Federal powers arising from and created by the constitution of the United States." When faced with a similar argument, the Eighth Circuit stated:

> It is quite true as the Ninth Circuit points out in *United States v. Wheeler*, supra, 545 F. 2d at 1257, that the United States has plenary control over the criminal jurisdiction of tribal courts. That does not answer the question. While Congress might deprive the tribal courts of all of their residual jurisdiction to try offenses not punishable under § 1153, it has not seen fit to do so.

Thus, the Eighth Circuit concluded, as did the Supreme Court in *Talton*, that

89 No. 77-1136 (8th Cir. Aug. 10, 1977).
90 Id.
91 231 F.2d 89 (8th Cir. 1956).
92 See note 65 supra.
93 No. 77-1136 (8th Cir. Aug. 10, 1977).
94 Id.
95 163 U.S. at 384.
96 No. 77-1136 (8th Cir. Aug. 10, 1977).
the potential power of Congress did not transform inherent tribal authority into authority granted to the tribes by the United States government. The tribe was not a conduit, a mere federal instrumentality.\textsuperscript{97}

The Eighth Circuit decision rejecting the new federal instrumentality doctrine is consistent with the \textit{Talton} analysis and with the numerous decisions espousing the doctrine of tribal sovereignty. The basis of the \textit{Wheeler} decision rests on shakier ground, namely, the aberrational decisions of \textit{Colliflower v. Garland} and \textit{Settler v. Yakima Tribal Court}.

The Arizona District Court in \textit{Dodge v. Nakat}\textsuperscript{98} also refused to adopt the \textit{Colliflower} analysis. That controversy arose when the Advisory Committee of the Navajo Tribal Council excluded a non-Indian from the Navajo Reservation. Plaintiffs argued, \textit{inter alia}, that the exclusion violated their first, fourth, fifth, sixth, and fourteenth amendment rights. In response to the contention that \textit{Colliflower} altered the principles set forth in \textit{Talton}, \textit{Native American Church}, \textit{Barta}, and other pro-sovereignty cases the court stated:

\begin{quote}
In the face of those decisions holding that the internal and social affairs of the Navajo tribe were exclusively within the jurisdiction of whatever tribal government existed, subject only to action on the part of Congress, this Court declines to now decide that these affairs have always been subject to adjudication in this Court as controversies arising under the Constitution of the United States.\textsuperscript{99}
\end{quote}

Two opinions which totally ignore the existence of the new federal instrumentality doctrine came from the Ninth Circuit itself in 1974 and 1976. The first was \textit{Settler v. Lameer}.\textsuperscript{100} The second, \textit{Tom v. Sutton},\textsuperscript{101} affirmed dismissal of a petition for habeas corpus\textsuperscript{102} which alleged violations of the petitioner's sixth and fourteenth amendment rights to the assistance of appointed counsel before the tribal court. The Ninth Circuit cited \textit{Talton} and its progeny and held:

\begin{quote}
Two opinions which totally ignore the existence of the new federal instrumentality doctrine came from the Ninth Circuit itself in 1974 and 1976. The first was \textit{Settler v. Lameer}.\textsuperscript{100} The second, \textit{Tom v. Sutton},\textsuperscript{101} affirmed dismissal of a petition for habeas corpus\textsuperscript{102} which alleged violations of the petitioner's sixth and fourteenth amendment rights to the assistance of appointed counsel before the tribal court. The Ninth Circuit cited \textit{Talton} and its progeny and held:
\end{quote}

\textsuperscript{97} The Eighth Circuit subsequently decided the same issue with regard to double jeopardy in favor of tribal independence from the federal judiciary. That court held in United States v. Elk, No. 77-1263 (8th Cir. Aug. 22, 1977), that the Fort Berthold Tribal Court and the federal district court were not arms of the same sovereign. The claim of double jeopardy was denied.

The Eighth Circuit in \textit{Walking Crow} and \textit{Elk} adopted as the correct approach dicta of that court in United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972), \textit{cert. denied}, 410 U.S. 916 (1973), rejecting the view that tribal courts derive their authority from the federal government.

\textsuperscript{98} 298 F. Supp. 17 (D. Ariz. 1968).

\textsuperscript{99} \textit{Id.} at 23. Other post-\textit{Colliflower} cases which rely upon \textit{Talton} and mention either \textit{Colliflower} or the federal instrumentality doctrine include: Wounded Head v. Tribal Council of the Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975), Groundhog v. Keebler, 442 F.2d 674 (10th Cir. 1971) (where the court stated as dictum that an Indian tribe "is not a federal instrumentality and is not within the reach of the fifth amendment," at 678), Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967), Sturdevant v. Deer, 70 F.R.D. 539 (E.D. Wis. 1976); Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F. Supp. 85 (D. Mont. 1969).

\textsuperscript{100} \textit{See} note 88 \textit{supra}.


\textsuperscript{102} Jurisdiction to hear this petition was based upon 25 U.S.C. § 1303 (Supp. 1977). For the text of this provision see note 10 \textit{supra}.
Although an individual citizen's right to appointed counsel is protected under the Sixth and Fourteenth Amendments in criminal actions brought by the United States and the individual states thereof, Indians on the reservation do not have such protection under the federal constitution when the criminal action is brought under the tribal law in tribal court. Under their sovereign status, the Indian tribes are vested with the inherent power to create and administer a criminal justice system, *Ortiz Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975), and the power to adopt their own constitution and enact laws.\(^\text{103}\)

Nowhere in the decision was any mention of the federal instrumentality doctrine. Instead, *Tom v. Sutton* was another endorsement of tribal independence from federal constitutional restraint, this time from the Ninth Circuit itself.

### E. Critique of the New Federal Instrumentality Doctrine

In addition to being contrary to precedent, and myopic in the case of habeas corpus jurisdiction, the Ninth Circuit's use of the label "federal instrumentality" is undoubtedly result-oriented. Judicial reliance upon such an approach obscured the real issues involved in *Colliflower, Settler v. Yakima*, and *Wheeler*. Even more importantly, it camouflaged judicial creation of law in an area traditionally left to Congress.

That the Ninth Circuit approach is result-oriented is obvious from the limited nature of the holdings. In *Settler v. Yakima* the Yakima Tribal Court was a federal instrumentality for the purpose of habeas corpus. In *United States v. Wheeler* the Navajo Tribal Court was a federal instrumentality for the purpose of double jeopardy.\(^\text{104}\) Logic requires that one entity either is or is not a federal instrumentality. Even the Ninth Circuit would agree that as a general rule no institution of tribal government is a federal instrumentality.\(^\text{105}\) Supreme Court decisions such as *Talton* recognized that Indian tribes have *inherent* power to self-govern and to try defendants under Indian law, power which existed prior to the appearance of any non-Indian upon this continent. Therefore, without regard to the result desired in a particular case, the argument that an Indian Court is a federal instrumentality would have to be rejected upon reasoning consistent with precedent.

The Ninth Circuit has held, however, that for certain limited purposes Indian courts are arms of the federal government. For example, the Yakima Tribal Court was held to be a federal instrumentality for the purpose of habeas corpus, but was not so considered for the purpose of right to counsel or double jeopardy. This result is unsatisfactory. Either the Yakima Tribal Court is or is not a federal instrumentality. Obviously, the characteristics of the court remained the same from one judicial inquiry to the next. The result desired by the Ninth

\(^{103}\) 533 F.2d at 1103.

\(^{104}\) Although the *Wheeler* court's language leaves open the possibility that the Navajo Tribal Court would be considered a federal instrumentality for all purposes, the fact that the Ninth Circuit has adhered to *Talton* on the merits in *Lameer* and *Tom v. Sutton* makes that conclusion unlikely.

\(^{105}\) See *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976); *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).
Circuit in *Settler v. Yakima* was the only crucial difference.\(^{106}\)

The *Wheeler* decision provides yet another illustration of the result-oriented approach of the Ninth Circuit. The issue upon which *Wheeler* turned was whether the Navajo Tribal Court and the federal district court were arms of the same sovereign. In all situations except for two aberrational opinions dealing with habeas corpus jurisdiction, the courts had repeatedly held that Indian tribes and their governmental institutions were not federal instrumentalities. Therefore, proper resolution of that issue, without regard to the outcome of the case, should have been that the Navajo Tribal Court was *not* an arm of the same sovereign as the federal district court. The main concern of the Ninth Circuit, however, was to avoid extension of the highly criticized dual sovereignty exception to the rule against double jeopardy. An easy escape from the dilemma was to label the Navajo Tribal Court a federal instrumentality *for the purpose* of double jeopardy.

The propriety of reaching a desired result at the expense of tribal sovereignty is open to question. Convenient though it may have been to brand this sovereign court an arm of the federal government, the result was a dangerous negation of tribal sovereignty, and not to be tolerated as a mere device by which the court can escape from the effects of a prior unpopular decision.

Another difficulty with the result-oriented approach is that it can obscure the actual decision-making process of the court. According to the Ninth Circuit the Yakima Tribal Court was a federal instrumentality for the purpose of habeas corpus jurisdiction, but not for the purpose of right to counsel or double jeopardy.\(^{107}\) Federal instrumentality status evidently depends not upon a factual connection between the federal government and the tribal court, but upon the restraint to be imposed upon tribal action. If such is the case, the Ninth Circuit must have undertaken an analysis of the particular restraint and its effect upon individual and tribal rights before rendering its decisions in the federal instrumentality cases. The reader, however, received the bare result and was left to wonder why the same Indian court was alternately a federal instrumentality and not a federal instrumentality.

Without the benefit of judicial analysis one can only speculate upon the motivation of the Ninth Circuit in deciding to use or not use the federal instrumentality doctrine. In all likelihood the Ninth Circuit could not tolerate the risk of arbitrary imprisonment by an Indian tribe without remedy in the federal courts. Although Congress had not yet seen fit to extend the writ of habeas corpus to cases of tribal confinement, that writ is *basic* to the United States system of justice, a necessary component of fundamental fairness.\(^{108}\) The need for the writ arguably outweighs the tribal right to self-govern. By contrast, the underlying denial of constitutional rights such as right to counsel may not, given the Indian system of justice, have outweighed the potential disruption to tribal

---

\(^{106}\) One need only look to the passage quoted in the text accompanying note 57 *supra*, to see that the Ninth Circuit was motivated by something other than a factual determination when it identified tribal action with federal action, namely by a desire to vindicate individual rights and to limit tribal power. The federal instrumentality doctrine was merely a tool used to reach this result.

\(^{107}\) See note 54 *supra*.

\(^{108}\) This point was stressed repeatedly in Ms. Colliflower's Second Memorandum Brief For Applicant.
court procedure that would result from introduction of this foreign element.

Perhaps the Ninth Circuit did not weigh competing rights at all. The point of the speculation is that there must be some reason, outside of a factual determination, why a court is sometimes a federal instrumentality and sometimes not. The conclusory decisions of the Ninth Circuit have denied readers the benefit of this analysis.

The more disturbing aspect of the Ninth Circuit's result-oriented approach is that it allows the court to differentiate between various restraints upon federal action and to impose upon tribal government those it considers desirable. By calling an Indian court a federal instrumentality for one purpose and not for another, the court is covertly engaging in judicial legislation, contrary to the rule that tribal authority to act within its jurisdiction remains unbridled unless specifically restrained by congressional act.

The *Settler v. Yakima* decision provides a clear illustration of the Ninth Circuit's dilemma. The court desired to extend habeas corpus jurisdiction to include review of custody by a tribal government. In searching for authority to reach this result the court stated:

The attempt by a state to prosecute its citizens in a summary and arbitrary fashion may be successfully attacked, as may an attempt to regulate certain activities of its domiciliaries without the state. Likewise (without expressing any opinion on the merits of the constitutional issues in the present case), although the Fourteenth Amendment may not apply to tribal courts there must be and is a limit to the "exclusive" authority of the Yakima Nation to regulate Indian fishing when that regulation becomes so summary and arbitrary as to shock the conscience of the federal court, or goes beyond the scope of authority originally contemplated by the Treaty of 1859.

Two aspects of this language warrant attention. First, the court knows *a priori* that there must be some limits upon tribal action. Without relying upon *Colliflower*, however, none could be articulated. All legitimate avenues of extending habeas corpus jurisdiction to tribal custody had been closed. Although it

---

109 One reason may be that the court has felt obligated to follow *Talton* in all cases except those involving habeas corpus jurisdiction, in which it could find a loophole, and those involving double jeopardy, in which it is defining the relationship between the federal government and the tribe rather than applying the constitution to tribal courts. This constraint, if felt, has not been articulated. Unlike many of the other courts deciding issues of constitutionality similar to that in *Lameer* and *Sutton*, the Ninth Circuit has not seen fit to deal with its own doctrine. Instead it has silently perpetuated two lines of precedent. Although reconciliation of the outcome in *Settler v. Yakima* and *Lameer* would be difficult at best, some attempt to analyze the situation would be helpful if use of the doctrine is to continue in the Ninth Circuit.

110 F. COHEN, * supra* note 15, at 123, states:

The whole course of judicial decision on the nature of Indian Tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government (emphasis added).

111 419 F.2d at 489.
had the power to do so, Congress had not yet seen fit to expressly subject the tribe to habeas corpus review. A holding that the tribal court was a federal instrumentality for all purposes was out of the question due to the well-established precedent of *Talton* and its progeny. The "scope of authority" argument would breach all canons of treaty interpretation, and conduct which shocks the conscience of the court has only been considered unconstitutional when the entity whose action shocks the court is itself subject to the Constitution.

The court pointed out that *states* cannot act arbitrarily: federal courts have limited state action by incorporating into the fourteenth amendment the most important safeguards in the United States Constitution. Although the propriety of this judicial creation of law has been hotly debated, no one would deny that there is some authority in the Constitution, namely, the fourteenth amendment, on which to base a judicial extension of the Bill of Rights to state action. Undaunted by a lack of analogous authority, the *Settler* court used the new federal instrumentality doctrine with regard to Indian tribes to this same end, *i.e.*, to ensure that those limitations upon federal action, considered crucial by the Ninth Circuit, were imposed upon tribal action.

When the Ninth Circuit said that "there must be and is a limit" it was wrong. The only limits upon tribal authority are those which are specifically imposed by Congress.\(^{112}\) With regard to those restraints extended to Indian tribes through the federal instrumentality doctrine, Congress had not acted. At the time of the arrests of Colliflower and Settler, Congress had not yet seen fit to create federal jurisdiction to review tribal detention. *Wheeler* was decided after the passage of the ICRA. That statute, however, did not preclude the federal government from trying a defendant on the same charge which he had faced before an Indian tribunal. With such recent congressional consideration of the matter, the judiciary should have been reluctant to create its own law.

The Ninth Circuit may have been legitimately concerned with the protection of individual rights through habeas corpus and the prohibition against double jeopardy. The concept of tribal sovereignty, however, should not have been sacrificed in order to attain an admittedly salutary goal. The District Court of Arizona, in *Dodge v. Nakai*,\(^{113}\) recognized the dangers inherent in the Ninth Circuit's approach. In *Dodge*, the court was confronted with the argument that *Colliflower v. Garland* altered the principles established in *Talton, Native American Church, Barta*, and the other decisions discussed above. The court's reply was that:

*Colliflower* would be analogous to this case only if this Court were able to determine that the Advisory Committee of the Navajo Tribal Council, ..., "functioned in part as a federal agency." *But the establishment of that proposition would not merely act as an inroad on Navajo tribal sovereignty, it would end it.*\(^{114}\)

---

\(^{112}\) See note 110 *supra*. See also Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975) (tribes possess an inherent sovereignty except where it has been specifically taken away by treaty or act of Congress); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).


\(^{114}\) *Id.* at 23 (emphasis added).
When Congressional action is available to protect the individual without destroying tribal sovereignty, judicial creation of individual rights at the price of tribal sovereignty is not the preferred solution.

F. Ramifications

The issue of federal instrumentality status may seem academic given the passage of the ICRA, which subjects tribal action to many of the restraints of the Constitution. It is important, however, to take notice of what the ICRA did not do. The original version of the bill submitted to Congress would have subjected the Indian tribe “to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution.” Due to arguments advanced at the Senate subcommittee hearing by and on behalf of the tribes, the bill was altered and eventually adopted in a form more consistent with tribal sovereignty. The summary of the report of the Senate Subcommittee on the Judiciary, endorsed and adopted by the Senate Judiciary Committee, stated:

The Department of Interior's bill would, in effect, impose the same restrictions applicable presently to the Federal and State governments with several notable exceptions, viz., the fifteenth amendment, certain of the procedural requirements of the fifth, sixth, and seventh amendments, and in some respects, the equal protection requirement of the fourteenth amendment.

The restrictive nature of the ICRA underlies the present importance of the federal instrumentality doctrine. The ICRA specifically granted habeas corpus to review confinement by a tribe in violation of that statute. Because some constitutional rights were omitted from the ICRA, however, custody by a tribe may not be in violation of that statute even though the same action by the federal government would violate the United States Constitution. In these situations jurisdiction under the ICRA does not apply and the defendant's only recourse will be to 28 U.S.C. § 2241 (c) and the Colliflower doctrine.

Even if a court grants habeas corpus jurisdiction under the Colliflower rationale, it must, under the law as it now stands, reject the constitutional claim on the merits. It is possible, however, that as the new federal instrumentality doctrine matures, it will be applied to the merits of such cases. To the extent that the federal instrumentality doctrine becomes entrenched as a valid concept, the sovereign rights left untouched by the ICRA become an endangered species. If the Fort Belknap court is considered a federal instrumentality for jurisdictional purposes, one may logically argue that the tribe should be required to provide counsel to indigent defendants.

Wheeler is a case in point. The ICRA did not speak to the issue of multiple prosecutions involving the federal government and an Indian tribe. Even though the case did not involve habeas corpus jurisdiction, the Colliflower doctrine was

115 The legislative history of the ICRA is reviewed in Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976), and Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).
borrowed from its limited sphere and applied by the Ninth Circuit in order to extend to tribal action a restraint upon the federal government.

Other attempts to subject the tribes, through invocation of the federal instrumentality doctrine, to constitutional restraints not included in the ICRA, have been unsuccessful.\textsuperscript{116} The strategy most often employed in those cases is to argue first that the tribe violated the Constitution, and second that the tribe violated the more general provisions of the ICRA such as the due process or equal protection clauses. Since use of the federal instrumentality doctrine to establish the first proposition would be dispositive in these cases, it is not surprising that the doctrine has been raised, albeit to no avail.

Even though the first argument may fail, the second might prove more and more successful with the increasing use of the federal instrumentality doctrine in other circuits. Courts not adopting the questionable federal instrumentality doctrine may nonetheless become favorable to the anti-sovereignty philosophy it represents, and react by expanding the meaning of ambiguous ICRA clauses to include constitutional rights not extended to the tribe by that statute.

A further danger exists. Even where the ICRA echoes the exact words of the Federal Constitution, courts have expressed a willingness to minimize the harmful effects of that statute by interpreting the language in a manner sensitive to tribal culture. In \textit{Janis v. Wilson}\textsuperscript{117} the plaintiffs claimed that the tribe violated their federal constitutional rights and their rights under the ICRA by terminating their public employment due to participation in political activities during working hours. After the court used the \textit{Talton} doctrine to dismiss the constitutional claim for lack of jurisdiction, it stated with regard to the statutory claim:

\begin{quote}
Although Congress used language in 25 U.S.C. § 1302 from the Bill of Rights, this Court is of the opinion that the meaning and application of 25 U.S.C. § 1302 to Indian tribes must necessarily be somewhat different than the established Anglo-American legal meaning and application of the Bill of Rights on federal and state governments. . . . Therefore the plaintiffs’ remaining claims under 25 U.S.C. § 1302(1) and (8), under the facts of this case, must not be measured by the same standards imposed by the Bill of Rights on state and federal governments, but rather these limitations must be applied with recognition of the Oglala Sioux Tribe’s unique cultural heritage, their experience in self government, and the disadvantages or burdens, if any, under which the defendant tribal government was attempting to carry out its duties.\textsuperscript{118}
\end{quote}

\textsuperscript{116} See, e.g., \textit{Wounded Head v. Tribal Council of Oglala Sioux Tribe}, 507 F.2d 1079 (8th Cir. 1975). In \textit{Wounded Head}, a claim simultaneously alleging illegality under the ICRA and violations of the federal constitution met defeat on both grounds. In response to the allegation that members of the tribe between the ages of 18 to 21 were unconstitutionally denied a vote in tribal elections the court cited cases such as \textit{Talton}, and held that the twenty-sixth amendment did not apply to internal tribal elections. Moreover the equal protection clause of the ICRA did not preclude the tribe from establishing, for tribal elections, a minimum voting age of twenty-one. \textit{See also} \textit{Dodge v. Nakai}, 298 F. Supp. 17 (D. Ariz. 1968), where the federal instrumentality doctrine was rejected. In that case most of the alleged constitutional violations concerned restraints extended to the tribes by the ICRA.


\textsuperscript{118} Id. at 1150-51.
Although other courts have expressed views similar to that put forth in *Janis*, a firm establishment of the federal instrumentality doctrine within other circuits may negatively affect the willingness of these courts to interpret those restrictions extended to tribal government with an eye toward preserving Indian culture and tribal sovereignty.\(^{119}\)

Perhaps use of the federal instrumentality doctrine will be circumscribed by the Supreme Court in the upcoming decision of *United States v. Wheeler*. Perhaps it will no longer be used as a conclusory means to subject tribes to restrictions upon federal action. Regardless of its future application in cases such as *Colliflower, Settler v. Yakima*, and *Wheeler*, the rationale of the federal instrumentality doctrine may undoubtedly be utilized by those who wish, for whatever purpose, to negate existence of independent tribal authority. Such a tool constitutes a substantial threat to tribal sovereignty.

**V. Conclusion**

The Ninth Circuit in several recent decisions has misappropriated a tool utilized by the courts to exempt from state taxation tribal land, lessees of tribal property, and the leases themselves. Its use of the federal instrumentality doctrine has not only generated useless litigation in the habeas corpus context, but, more importantly, has obscured the crucial issue of priority among tribal and individual rights. Moreover, resort to the conclusory label of federal instrumentality for a certain purpose has permitted the court to create individual rights for which there is no basis in the Constitution or in federal legislation pertaining to Indians.

Had the ICRA been made coextensive with the federal Bill of Rights, the source of individual rights against tribal action may have become an academic question.\(^{120}\) Those areas of tribal control left unscathed by the 1968 act, as well as those which, although covered, survive due to restrictive interpretation of that act are, however, put in jeopardy by these unprecedented decisions of the Ninth Circuit.

*Benedetta A. Kissel*

\(^{119}\) Certainly a pronouncement by the Supreme Court in the upcoming case of *United States v. Wheeler* that for certain purposes the tribe is to be considered a mere tool of the federal government would diminish the vigor of those courts which might otherwise act to protect tribal self-government.

\(^{120}\) Even if the ICRA were coextensive with the Bill of Rights, tribal subjection to statutory restraints upon federal agencies would remain a possibility under the federal instrumentality doctrine.
Pages 385-386 are Intentionally Blank.