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By: Teresa Hawkinson[1]

INTRODUCTION

Having celebrated the one-year anniversary of the 2014 Department of Justice Wilkinson memorandum[2] ("Wilkinson Memo") regarding the Federal Government's discretionary authority in the enforcement of marijuana on Tribal lands, the matter appears to have created more questions than answers.[3] While some Tribes see this as a lucrative business opportunity, many others have a rational fear regarding the uncertainties on how or when Federal, State, and Tribal law may collide, causing greater loss than potential gains.[4] Until Congress establishes changes in Federal

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[2] *Meet the Director*, DEPT. OF JUST. (Sep. 1, 2016: 11:25 PM), https://www.justice.gov/usao/eousa/meet-director (identifying Monty Wilkinson as the Director of Executive Office for U.S. Attorneys (EOUSA)).

[3] Thaddeus E. Swanson, *Controlled Substances Chaos: The Department of Justice's New Policy Position on Marijuana and What It Means for Industrial Hemp Farming in North Dakota*, 90 N.D. L. REV. 599 (2014) (arguing that "the Cole and Wilkinson Memos do not, in fact, clarify existing policy with regards to marijuana cultivation, possession, and sales"); *See also* Emily M. Burkett and Blaine I. Green, *DOJ Memorandum Cracks Open Door to Marijuana on Tribal Lands*, PILLSBURY WINTHROP SHAW PITTMAN LLP, http://www.pillsburylaw.com/publications/doj-memorandum-tribal-lands (last visited Oct. 9, 2016) (reporting of the Cole Memorandum, predecessor to the Wilkinson Memo, that "[w]hile some media have reported the Department's statement as carte blanche for tribes to legalize marijuana, the policy statement raises more questions than it does answers, posing uncertainty and challenges—as well as opportunities—for tribes.").

[4] *See United States v. White Plume*, 2016 WL 1228585, slip op. at 8 (D.S.D., 2016) (Federal District Court's reversal of a permanent injunction preventing Oglala Sioux Tribe members from growing hemp for industrial purposes, but with the disclaimer that "this order does not authorize Mr. White Plume to cultivate industrial hemp or violate the Controlled Substances Act[,] . . . does not resolve whether cultivation of industrial hemp on the Pine Ridge Indian Reservation is legal[, and] does not resolve whether the Agricultural Act of 2014 authorizes cultivation of industrial hemp on the Pine Ridge Indian Reservation."); *See also* Aaron Gregg, *Native American Reservations Now Free to Legalize Marijuana*, WASH. POST: MORNING MIX (Dec. 12, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/12/native-american-reservations-now-free-to-legalize-marijuana/ ("[T]hree . . . tribes — one in California, one in Washington state and one in the Midwest — have said they're interested in legalization.").

law concerning marijuana production, possession, and consumption, the costs to Tribes embarking on this endeavor will inevitably be greater than the benefits.[5]

This Article will first examine the history of Tribal sovereignty in relation to the Federal Government, highlighting the negative impacts Native Americans have experienced as a result.[6] Further, this Article will examine jurisdictional issues within Federal, State, and Tribal law and the potential outcomes the Wilkinson Memo may have on disputes and litigation.[7] Next, it will explain the Wilkinson Memo[8] and the potential benefits and concerns for Tribes willing to venture into the marijuana market.[9] Finally, the article will discuss the concerns with the current Federal-scheduling standard for Marijuana, proposed changes to the Controlled Substances Act ("CSA") and concerns with taxation.[10] The Article will conclude by recommending Tribal governments

[5] *See* Hillary Bricken, *Tribes and Cannabis: This Will Be Big*, HARRIS MOURE: CANNA LAW BLOG (Dec. 17, 2014), http://www.cannalawblog.com/tribes-and-cannabis-this-will-be-big/ ("[J]ust like the 2013 Cole memo, the Wilkinson memo does not represent a change in federal law or stymie in any way the federal government's ability to fully enforce federal drug laws. What this means is that any tribe considering legalizing marijuana should be sure to enact and enforce robust regulations so as to stay in line with the Cole and Wilkinson memos and in order to avoid unwanted federal scrutiny."); *See also* Lori Murphy, *Enough Rope: Why United States v. White Plume Was Wrong on Hemp and Treaty Rights, and What It Could Cost the Federal Government*, 35 Am. Indian L. Rev. 767, 776 (2011) (observing in the context of hemp that "the DEA requires a type of permit for industrial hemp that even the Eighth Circuit acknowledges that the DEA does not, in practice, issue to would-be hemp growers who apply for it, creating a functional bar to regulatory compliance").

[6] *See e.g.*, Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. Rev. 595, 597 (2010) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978)) (holding "the U.S. Supreme Court has systematically stripped tribes of the one attribute that is--perhaps above all else--associated with sovereign status: the power to assert control over events that take place on one's own territory.").

[7] *See generally* 32 AM. JUR. 2D, Federal Courts § 665 (2012) (noting jurisdiction is the lawful authority to decide a case or controversy).

[8] *See* Memorandum from Monty Wilkinson, Director, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf.

[9] *See* Eliza Gray, *Why American Indian Tribes are Getting Into the Marijuana Business*, TIME, (Sep. 4, 2015), http://time.com/4019219/american-indian-tribes-marijuana/.

[10] *See* Respective States' and Citizens' Right Act of 2013, H.R. 964, 113th Cong., (2013) (attempting to amend the Controlled Substances Act ("CSA") to provide that no provision shall be construed as indicating congressional intent to occupy the field or preempt state law); Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 ORE. L. REV. 1029, 1031 (2013) (recommending a framework based on the Netherlands' policies for marijuana which would require Congress to amend CSA and allow retail sales but continue ban on commercial manufacturing and wholesale distribution); Stuart Taylor, Jr., *Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck*, GOVERNANCE STUDIES AT BROOKINGS (April 2013) (proposing a contractual cooperative agreement by the President to permit state-regulated marijuana businesses to operate legally while still protecting federal government interests).

not to proceed in entering the marijuana market at this time until further guidance and incentives are provided through federal law.[11]

1. FEDERAL GOVERNMENT AND TRIBAL HISTORY

When it comes to Native American law, Justice Scalia has reasoned the Supreme Court "sort of makes it up as they go along."[12] Issues of law regarding equal protection, due process, jurisdiction, and constitutional authority remain embedded within the complexity of current and historical Native American laws.[13] Federal jurisdiction over Tribes is codified under 28 U.S.C. § 1362, which determines that federal district courts have original jurisdiction over all civil actions brought by any federally recognized Tribe where the action arises under the Constitution, laws, or treaties of the United States.[14]

Native American law was essentially created through treaties executed by Tribes and the federal government.[15] Tribes have a distinct status as "domestic dependent nations" within the United States, allowing the federal government to maintain criminal jurisdiction over most crimes within Indian country.[16] Tribes are best described as semi-autonomous and as a limited sovereign due to the lack of power allotted for this population to protect themselves from non-Natives.[17] Tribal sovereignty seems to function like a weak lobbying group, which struggles to be represented

[11] *See* 25 U.S.C. §§ 2701–21 (1988); *See generally* 42 C.J.S. Indians § 64 (2016). *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
[12] *See* Zuni. Pub. Dist. No. 89 v. U.S. Dep't. of Educ., 127 S. Ct 1534, 1556 (2007) (Scalia, J., dissenting).
[13] *Id*.
[14] *See* 28 U.S.C.A. § 1362 (1966); *See generally* AM. JUR. 2D *Indians* § 167, (2015).
[15] *See generally* 41 AM. JUR. 2D *Indians* § 11 (2015) (explaining the United States government has a historical policy of encouraging Tribal self-government, allowing the Tribe to retain its sovereignty over its members and Tribal lands, to the extent the sovereignty hasn't been removed by federal statute or treaty).
[16] *Id*.
[17] *See* Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 AM. ETHNOLOGIST 239, 243 (2005) (explaining that Congress continues to hold the authority to reduce tribal powers at will and has a history of doing so).

appropriately in Congress.[18] This lack of sovereignty is because Tribes were excluded from the creation of the Constitution.[19]

The development of Native American policy in the United States arose from the two competing forces of autonomy and assimilation.[20] Currently, the Cohen Handbook of Federal Indian law is recognized as the standard for applicable federal statutory and treaty law.[21] It provides the concept of separate sovereignty for Native Americans Tribes was founded within the Marshall Trilogy.[22] Chief Justice Marshall established the Doctrine of Tribal sovereign immunity in three decisions regarding the Cherokee tribe.[23] The Trilogy provided the idea that Native American nations are sovereign, and as such, are entitled to govern themselves without State interference.[24] Tribes were treated as foreign countries and were excluded from U.S citizenship under the Fourteenth Amendment until the late nineteenth century.[25] Today, Tribes still resemble foreign countries as they maintain dominion over their lands and members.[26] This sovereignty, however, does not

[18] *See* Martin Papillon, *Adapting Federalism: Indigenous Peoples and Multilevel Government in Canada and U.S.*, 42, PUBLIUS: THE J. OF FEDERALISM, 289 (2011) (noting American tribes "face a more fragmented political system," compared to Canada which provides Tribes the ability to enter into "government-to-government negotiations").
[19] *See* Gregory Ablavsky, *The Savage Constitution*, 63, DUKE L.J. 999, 1002 (2014) (finding "the conquest and dispossession of Native peoples were integral to the Constitution's ratification, shaping subsequent events").
[20] *See* Charles F. Wilkinson, *American Indians, Time, and the Law*, in Cases and Materials on Federal Indian Law, 30-31 (David H. Getches, et al., eds. 4th ed. 1998) [hereinafter Federal Indian Law].
[21] Felix S. Cohen, *The Handbook of Federal Indian Law* (1942). Cohen has been credited with the creation of modern Federal Indian Law, however, the Handbook originated from a survey done during his time as Chief of Indian Law Survey. The Handbook encompasses the United States government's dealings with the Native tribes and focuses on diverse treaties, statutes, and decisions from the past few hundred years.
[22] *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding state law does not extend to Indian Country where it conflicts with federal laws or Indian treaties); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (holding Indian tribes are not "foreign nations" as defined in the Constitution); and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). These are the cases contained in the Marshall Trilogy. *See generally* George Jackson III, *Chicksaw Nation v. Unite States and the Potential Demise of the Indian Canon of Construction*, 27 AM. IND. L. REV. 399, 402-03 (2002-2003). The Marshall Trilogy is also referred to as the Cherokee cases.
[23] *See* Federal Indian Law, *supra* note 20, at 402-03.
[24] *See Worcester*, 31 U.S. (6 Pet.) at 530.
[25] *See* Elk v. Wilkins, 112 U.S. 94 (1884) (holding that naturalization was the only path to citizenship). When Tribes lost their ability to enter into treaties with the Federal Government they lost their non-citizen status. Indian Appropriation Act of 1871, ch. 120, 16 Stat. 544, 566 (1871) (holding that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .").
[26] *See* Russel Lawrence Barsh, *Indian Policy at the Beginning of the 1990s: The Trivialization of Struggle in American Indian Policy: Self-Governance And Economic Development* 55, 56 (Lyman H. Legters & Fremont J. Lyden eds.,

extend to the Federal Government.[27] Sovereignty that is applied to Tribes differs from the international sense of the term, as they are not allotted the authority to enter into treaties and remain subject to the Federal Government's authority and jurisdiction.[28]

Tribes have been deemed essentially wards of the United States, imposing a duty on the Federal Government to protect them by means of a trust relationship.[29] So long as a Tribe does not voluntarily relinquish its sovereign status, or Congress has not terminated them, the rights are reserved.[30] Because Tribes do not own their land, the Federal Government has the sole power to extinguish a Tribe's possession through purchase or conquest.[31] The limitations imposed on Tribes are also evident in their capacity to hold non-Natives accountable for crimes committed against Tribal members on Indian lands and reservations.[32]

It has been stated that, in order to possess sovereign immunity from suits in both Federal and State courts, [33] Tribes cannot exercise jurisdiction over a federally recognized Tribe without a

1994) (likening the remaining Tribal sovereignty after various Supreme Court decisions as a "'country club' doctrine of tribal jurisprudence"); *see generally* Joseph William Singer, *Sovereignty and Property*, 86 NW. U.L. REV. 1, 6 (1991) (explaining that "tribes cannot exercise powers over nonmembers [and that tribes] are merely voluntary associations which can act only in ways that affect their members, rather than sovereigns who can exercise governmental power over any persons who come within their territorial boundaries …").

[27] *See* Federal Indian Law, *supra* note 20, at 403.

[28] *See Frequently Asked Questions*, U.S. Department of the Interior, Indian Affairs http://www.bia.gov/FAQs/index.htm. (last visited Dec. 30, 2016) (stating "limitations on inherent tribal powers of self-government . . . include . . . power to make war, engage in foreign relations, or print and issue currency.").

[29] *Id*.

[30] *See Frequently Asked Questions*, U.S. Department of the Interior, Indian Affairs http://www.bia.gov/FAQs/index.htm. (last visited Dec. 30, 2016) (explaining "the BIA's mission is to …. promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians").

[31] *See Johnson*, 21 U.S. at 543 (1823) (establishing the doctrine of discovery as the foundation for land titles in America).

[32] *See* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 675 (2006) (stating that "the Indian Reorganization Act of 1934 (IRA) represented the first attempt at incorporating Indian tribes as political entities within the legal and political system of the United States").

[33] *See generally* 42 C.J.S. Indians §19 (2016); *See also Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR INDIAN AFF, http://www.bia.gov/FAQs/index.htm (last visited Dec. 30, 2016) (explaining the Bureau of Indian Affairs is the primary Federal agency charged with carrying the United States trust responsibilities to Native Americans and Alaska Natives).

waiver of immunity or consent to the suit by the Tribe themselves.[34] The federal government, however, has exclusive authority to assert jurisdiction over Tribes and its members that cannot be controlled by state laws where the reservations are located.[35] Presently, "the Assimilative Crimes Act makes any violation of state criminal law a federal offense on reservations."[36] However, in recent history, the Supreme Court has diverged from its previous stance that State jurisdiction had no power within reservation boundaries.[37] Justice Scalia, in *Nevada v. Hicks*, claims dual sovereignty should permit concurrent State court jurisdiction over Federal law in Tribal courts.[38] In practice, however, State court decisions regarding a conflict of sovereignty with a Federal law tend to only aggravate the existing conflict.[39] Many scholars view this current trend as an erosion of Tribal sovereignty, vacating the Federal Government's duty to protect Tribal welfare.[40]

In 2012, over twenty-eight percent of Native Americans and Alaska Natives were living in poverty.[41] There are currently over 5.2 million Americans identified as Native American or Alaska Native in 566 Federally recognized tribes.[42] While the contention is Tribal sovereign immunity does not harm Tribal government, the lack of economic development, paired with the cultural and

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[34] *Id.*

[35] *See generally* 42 C.J.S. Indians §48 (2016).

[36] *See Frequently Asked Questions*, U.S. Department of the Interior, Indian Affairs http://www.bia.gov/FAQs/index.htm. (last visited Dec. 30, 2016); *See also* 42 C.J.S. Indians §48 (2016) (noting that this could be an increased risk and deterrent for any non-Native person who decides to purchase and ingest marijuana on Indian lands of Federal prosecution).

[37] *See* Harold S. Shepard, *State Court Jurisdiction Over Tribal Water Rights: A Call For Rational Thinking*, 17 J. ENVTL. L. & LITIG. 343, 345 (2002) (explaining that tribal rights have been limited in regards to water rights within state territories).

[38] *Id.* at 365 (citing Nevada v. Hicks, 533 U.S. 353, 366-77 (2001)).

[39] *Id.* at 386.

[40] *See generally* Philip J. Prygoski, *From Marshall to Marshall The Supreme Court's Changing Stance on Ttribal Sovereignty*, GENERAL PRACTICE & SMALL FIRM DIVISION: AMERICANBAR.ORG, http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/marshall.html (last visited Dec. 30, 2016) (explaining the development and treatment of tribal sovereignty by the United States Supreme Court).

[41] *See* AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2011, https://www.census.gov/newsroom/releases/pdf/cb11ff-22_aian.pdf (last visited Dec. 30, 2016).

[42] GEOGRAPHIC & DEMOGRAPHIC PROFILE OF INDIAN COUNRTY, http://fcnl.org/issues/nativeam/Nov_2012_Profile_of_American_Indians_and_Alaska_Natives.pdf (last visited Sept. 30, 2016).

environmental protection by the Federal Government indicate otherwise.[43] Over one half of the population resides off reservation land with limited job and resources available to them.[44] In *Brown v. Board of Education Topeka*, the Court addressed the "separate but equal" stance previously held by the Supreme Court in *Plessy v. Ferguson*.[45] This, however, is the reality of Native American Tribes as less than equal sovereigns under control of the Federal Government.[46] Tribes lack direct representation in the Federal Government and their histories and traditions remain notably different from the American population at large.[47]

2. WILKINSON MEMORANDUM

The Wilkinson Memo was designed as a follow up to the original Cole memorandum[48] ("Cole Memo") on outlining the Federal Government's primary emphasis for investigation and prosecution in Indian country as multiple State laws have begun legalizing various laws related to marijuana.[49] The Cole Memo essentially outlined eight priorities for Deputy Attorneys to focus their attention on when determining whether to enforce federal marijuana laws in states that have legalized or decriminalized the drug in some capacity.[50] The memorandum also explicitly

[43] *See* Shepard, *supra* note 37, at 386.
[44] *See Frequently Asked Questions*, U.S. Department of the Interior, Indian Affairs http://www.bia.gov/FAQs/index.htm. (last visited Dec. 30, 2016)
[45] *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (*overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (stating "[s]eparate…facilities are inherently unequal…and deprived [plaintiffs] of the equal protection of the laws guaranteed by the Fourteenth Amendment").
[46] *See, e.g.*, Ninigret Development v. Narragansett Indian, 207 F.3d 21, 29 (1st Cir. 2000) (stating that the sovereignty of Indian tribes is subject to congressional control with the result that tribal sovereign immunity is necessarily a matter of federal law).
[47] *See* Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 662 (2013).
[48] *See* Memorandum from James M. Cole, Deputy Attorney General Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.
[49] *See* Memorandum from Monty Wilkinson, Director, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf.
[50] The priorities outlined in the memorandum included: "(1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or

reiterates the Federal government, does not change its authority or jurisdiction to enforce Federal law in Indian country.[51] The purpose of the memo was limited to providing guidance for Attorneys charged with enforcement of Federal Law on Tribal Lands and Reservations rather than giving authorization for individual Tribes to begin producing and selling marijuana.[52] As of this article, Marijuana remains illegal under Federal law as a Schedule I drug.[53] The Cole Memo[54] applies to both civil and criminal investigations and prosecutions concerning marijuana in all states, regardless of state law.[55]

3. THE IMPACT OF THE WILKINSON MEMORANDUM ON INDIAN LANDS

The marijuana debate has emboldened Brandeisian experimentation throughout the Nation and, most recently, in Indian lands.[56] This form of experimentation allows States to experiment with practices before the Federal Government adopts them.[57] Since 1996, twenty-three States, along with the District of Columbia, have legalized marijuana use for medicinal use.[58] However,

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activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and adverse public health consequences; (7) preventing growing marijuana on public lands and preventing its possession or use on Federal property; and (8) preventing marijuana possession or use on federal property." *See* Cole Memo, *supra* note 48.

[51] *Id*.

[52] *See* Wilkinson Memorandum, *supra* note 49 (reiterating the Federal Government's commitment to maintain viable relationship with Tribes on government-to-government basis while maintaining marijuana as a schedule one drug); *see also* United States Dep't. of Justice, *Policy Statement Regarding Marijuana Issues in Indian Country Frequently Asked Questions*, http://www.justice.gov/sites/default/files/faqs_policy_statement_regarding_marijuana_issues_in_indian_country_28jan15.pdf.

[53] 21 U.S.C §§ 801–971. (Listing marijuana as a Schedule I drug is the most severely restricted category, based on the determination it has no accepted medical use and a high potential for abuse. Other drugs listed as Schedule I include ecstasy, GHB, heroin, and LSD, while cocaine and methamphetamine as listed as a Schedule II drug).

[54] *See generally supra* note 48.

[55] *See supra* note 48; *See generally* Controlled Substances Act, 21 U.S.C §§ 812, 844, 846. (Omnibus Budget and CARERS Act do not provide protections for tribe-authorized marijuana activity).

[56] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (explaining the Brandesian theory allows states to experiment novel social and economic ideas that do not harm the United States as a whole prior to the Federal government regulation of the matter).

[57] *Id*.

[58] The twenty-three States legalizing medical marijuana include: Alaska (Ballot Measure 8 (1998)); Arizona (Proposition 203 (2010)); California Proposition 215 (1996)); Colorado (Ballot Amendment 20 (2000)); Connecticut (House Bill 5389 (2012)); Delaware (Senate Bill 17 (2011)), Hawaii (Senate Bill 862 (2000)); Illinois (House Bill 1

four States have decriminalized marijuana altogether.[59] While the Obama administration has continued to utilize discretion of enforcement by allowing these State experiments to play out, marijuana remains an illegal substance under Federal law.[60] The Controlled Substances Act ("CSA") was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which in effect replaced the Marijuana Tax Act of 1937.[61] CSA drug policy has become the main clash of State and Federal laws, as it raises questions of tension and forces, policymakers and courts, to address the preemptive power of Federal drug laws.[62] Because of the discourse between state and Federal governments, the Wilkinson Memo will likely cause Tribes willing to take on the risk, to experience either an economic travesty or a marvelous economic boost within its' sovereignty.[63]

In 1953, Congress passed P.L. 280 granting certain State governments jurisdiction over Tribal lands and reservations, including criminal jurisdictions over offenses committed by or against

(2013)); Maine (Ballot Question 2 (1999)); Maryland (H. Bill 1101 (2013); H. Bill 180 (2013)); Massachusetts (Ballot Question 3 (2012)); Michigan (Proposal 1 (2008)); Minnesota (S.F. 2470 (2014)); Montana (Initiative 148 (2004)); Nevada (Ballot Question 9 (2000)); New Hampshire (House Bill 573 (2013)); New Jersey (Senate Bill 119 (2010)); New Mexico (Senate Bill 523 (2007)); New York (A. 6357/S. 7923 (2014)); Oregon (Ballot Measure 67 (1998)), Rhode Island (Senate Bill 0710 (2006)); Vermont (Senate Bill 76 (2003)); and Washington (Initiative 692 (1998)). *See generally* ProCon.org, *25 Legal Medical Marijuana States and DC: Laws, Fees, and Possession, Limits* http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881&print=true (last visited Dec. 30, 2016).

[59] The four states are: Alaska (Ballot Measure 2); Colorado (Colo. Admin. Code 212-2. 102-1401 (West 2014)); Oregon (Ballot Measure 91); and Washington (Wash. Admin. Code 314-55-005-540 (West 2014)). The District of Colombia joined in 2014 (Initiative 71)

[60] *See generally* Controlled Substances Act, 21 U.S.C. §§ 801–904 (West 2012).

[61] *See* 21 U.S.C. §801 (2012); *see also* Celinda Franco, *Federal Domestic Illegal Drug Enforcement Efforts: Are They Working?*, CONGRESSIONAL RESEARCH SERVICE, July 28, 2009, *available at* https://www.fas.org/sgp/crs/misc/R40732.pdf, at 2.

[62] *See, e.g.*, John Hudak, *The Conflict Between Federal and State Marijuana Laws Claims A Victim*, NEWSWEEK, June 20, 2015, http://www.newsweek.com/conflict-between-federal-and-state-marijuana-laws-claims-victim-345099.

[63] *See* Wilkinson Memo, *supra* note 49.

Native Americans within Indian country.[64] The law concedes a State marijuana law may have authority over Indian country.[65]

4. CHALLENGES AND UNCERTAINTIES IN FEDERAL LAW

Tribes in states that have not legalized marijuana have the most to gain, and arguably, the most to lose.[66] As the Wilkinson Memo maintains the Federal Government's authority and discretion to prosecute a Tribe or its' members criminally, the P.L 280, in essence, allows States continuing to criminalize marijuana the same power.[67] Tony Reider, the president of the Flandreau Santee Sioux Tribe, stated that the Tribe aspires to be the first Tribe to grow and sell recreational marijuana on its South Dakota reservation.[68] The Santee Sioux tribe would be placed at a great advantage, as there are no current markets for marijuana in South Dakota.[69] In fact, The Santee Sioux's business plan is already likely to fail, as Marty Jackley, South Dakota's attorney general explained that it is illegal for "non-Indian persons" to possess or distribute marijuana anywhere in South Dakota, including reservations.[70] In August 2015, the Menominee Tribe of Wisconsin voted in favor of medicinal and recreational use of the drug.[71] The elders of the reservation must still

[64] *See* P.L. 280, § 7, 67 Stat. 588, 589, *repealed by* Act of Apr. 11, 1968, Pub.L. 90–284, § 403, Title IV, 82 Stat. 73, 79. (Section 7 of the statute provides "[t]he consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in the Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof").
[65] *Id.*
[66] *See, e.g.*, Caroline Fairchild, *Legalizing Marijuana Would Generate Billions In Additional Tax Revenue Annually*, HUFFINGTON POST, April 20, 2015, *available at* http://www.huffingtonpost.com/2013/04/20/legalizing-marijuana-tax-revenue_n_3102003.html.
[67] *See generally* Wilkinson Memo, supra 49; *see* P.L. 280, *supra* note 64.
[68] *See* Rob Hotakainen, *Indian Tribes Set to Begin Marijuana Sales*, MCCLATCHY DC (July. 29, 2015), http://www.mcclatchydc.com/news/nation-world/national/economy/article29346730.html.
[69] *Id.*
[70] *See* Marty Jackley, *Jurisdictions Over Marijuana in South Dakota and Our Reservations*, South Dakota Office of the Attorney General, (Nov. 13, 2015), https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=1377
[71] *See* Kent Wainscott, *Menominee Tribe members say yes to selling marijuana on reservation*, WISN.COM (Aug.. 21, 2015, 10:35 PM), http://www.wisn.com/news/menominee-tribe-members-vote-yes-to-selling-marijuana-on-reservations/34843154.

decide the fate of the decision as one remarked, "We have to be very, very cautious how we move forward," acknowledging the possible legal consequences and their people's wellbeing.[72]

The Preemption doctrine[73], which is based on the United States Constitution's Supremacy Clause, confirms that Federal law is the supreme law of the land.[74] The Tenth Amendment of the United States Constitution has been established as a limitation to Congress' reach on the States' powers (as well as Tribes' powers) regarding interstate commerce.[75] It has been affirmed that "Congress's preemption power is not . . . . coextensive with its substantive powers, such as its authority to regulate interstate commerce . . . . [it] is constrained by the Supreme Court's anti-commandeering rule."[76] The Federal Government cannot force States to enact laws or require State officers to assist in enforcing Federal laws within it's territory.[77] In *New York v. United States,* it was determined that "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."[78] Although this is true in the rule of law, in practice the broad discretion allotted to the Federal government could cause Tribes to experience civil and criminal suits in both Federal and State courts.[79]

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[72] *Id*.
[73] The Pre-emption Doctrine is taken from the Supremacy Clause of the U.S Constitution. It is an implied Congressional power, reiterating that the "Constitution and the laws of the United States …. shall be the supreme law of the land." *See* U.S. Const., art. VI, cl. 2. *See generally* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (stating "Congress may indicate pre-emptive intent" through either a statute's express language or through its purpose and structure").
[74] *See* U.S. Const., art. VI, cl. 2.
[75] *See* U.S. Const., art. X; *see, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009).
[76] *See* Mikos, *supra* note 75, at 1446.
[77] Printz v. United States, 521 U.S. 898, 912 (1997).
[78] New York v. United States, 505 U.S. 144, 162 (1992).
[79] *See e.g.*, 18 U.S.C.S. § 1162(d)(2).

While the general rule is that criminal jurisdiction over Natives in Indian country remains with Tribal and federal government, there are exceptions.[80] These exceptions, in a state that has yet to legalize marijuana, could cause a non-Native state resident that purchases marijuana on a reservation within the state's boundaries by a Tribal business to be prosecuted by state law or federal law.[81] Imagine if a non-Tribal member is involved in a hit and run while on the reservation after driving impaired from smoking marijuana obtain legally on the land. The Tribe could potentially be sanctioned or held liable for its sell. If the victim of the hit and run was a Tribal member, the Tribe would be unable to bring the offender to its own court for justice.

Tribes do not have the jurisdiction to try non-Natives, nor do have jurisdiction over non-member Native Americans in criminal proceedings.[82] This lack of authority and jurisdiction allotted to Sovereign Tribal nations could heighten federal criminal prosecution, limit economic development and overall wellbeing of Natives if tribes decide to legalize marijuana's growth, distribution and consumption on reservations without support from the Federal government.[83] Under Federal law, a simple possession of marijuana constitutes as a misdemeanor with a minimum $1,000 fine.[84] Cultivating and distributing or possession with intent to distribute any amount marijuana under CSA is a felony and provides a maximum sentence of five years and a

[80] *See* Brian L. Pierson, *Exploring Indian Country Marijuana*, Godfrey & Kahn, S.C. (Feb. 2015), http://www.gklaw.com/news.cfm?action=pub_detail&publication_id=1444 (explaining that Pubic Law 280 allows six states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) criminal jurisdiction over the Indian lands within their boundaries).

[81] *See* Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 472 (1976); *See generally* Wash. v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160 (1980).

[82] Duro v. Reina, 495 U.S. 676, 677 (1993); *But see* United States v. Lara, 541 U.S. 193, 197–98 (2004) (holding that "powers to self-government" included "the inherent power of Indian tribes, hereby recognized and affirmed that tribes may exercise criminal jurisdiction over all Indians," including nonmembers).

[83] *See, e.g.*, *An Introduction to Indian Nations In the United States*, NATIONAL CONGRESS OF AMERICAN INDIANS, at 9, *available at* http://www.ncai.org/about-tribes/indians_101.pdf.

[84] 21 U.S.C. § 844(a) (2012). CSA provides federal attorneys the option of treating cases of simple possession civil, rather than criminal offenses. The provision is a narrow one and applies to simple possession of one ounce of marijuana or less and cannot be implemented if the defendant has a prior drug conviction. *See generally* CSA, *supra* note 54.

maximum fine of one million dollars for entities.[85] Tribes maintaining a marijuana business on their reservation could be held liable for all of these Federal crimes, while completely at the mercy of the Federal, and possibly State jurisdiction, for the suits.[86]

Congress, through its enumerated powers established that the Commerce Clause has authority to regulate commerce with Native Americans.[87] Recent trends in Supreme Court holdings have been, at times, contrary to the original trilogy.[88] This includes decisions questioning Federal plenary and exclusive power over Native American affairs where the only provision in the Constitution authorizing Federal control relates to supporting commerce with Tribes.[89] Any Tribe attempting to setup cultivation of marijuana for personal or commercial use should take note of *Gonzales v. Raich* case.[90] Here, the Court determined that non-commercial intrastate activities were entwined with interstate drug trade, requiring the federal government's dominion over both.[91]

Another concern for Tribes engaging in the marijuana business is the concern of taxation.[92] The Supreme Court has recognized a general rule of tribal immunity from state taxation and the sovereign authority of tribes to tax those within their jurisdiction.[93] However, Section 280E of the Internal Revenue Code ("IRC"), which was created in the 1980s, requires marijuana distributors to pay taxes on their gross revenue, rather than their net income.[94] The net income is accomplished

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[85] 21 U.S.C § 841(b)(1)(D) (2012).
[86] 21 U.S.C.A. §841 (2012).
[87] U.S Const. Art. I, § 8, cl. 2 ("Congress shall have Power to…provide for…general Welfare of the United States…[t]o regulate Commerce with…Indian Tribes").
[88] *See generally* Hope M. Babcock, *A Civil-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 445 (2005).
[89] *See Lara*, 541 U.S. at 215.
[90] *See generally* Gonzales v. Raich, 545 U.S. 1 (2005).
[91] *Id.* at 46 (O'Connor, J., dissenting) (stating that "Congress can regulate purely intrastate activity that is not itself 'commercial' …. If it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity").
[92] *See, e.g.*, Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980).
[93] *See Cent. Mach. Co.*, supra note 92.; *See also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
[94] *See* I.R.C. § 280(E) (stating "[n]o deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled

by adding all the income from the business, called gross revenue, and then deducting out all business expenses such as salaries, cost of goods sold ("COGS"), rent, state and local taxes, and accounting and legal services.[95] The law imposes much higher taxes on the marijuana market than any other business, which has the potential to drive legitimate marijuana sellers out of business.[96] Generally, the IRC requires businesses to pay a percentage of its income as tax to the federal government.[97] Tax courts have held that the sale of marijuana constitutes "trafficking," even when the sale is considered legal under State law.[98] Section 280E applies only to income produced from selling a controlled substance as recognized by Federal statute, which has the potential to bankrupt an already lacking Tribal economy.[99]

Many enterprises on reservation lands, including casinos, are owned and operated by Tribal governments, as required by Federal Law.[100] Tribal ownership could reduce the likelihood of a state tax attaching to transactions and possibly increase the share of revenue generated by the Tribe.[101] Various banks, attorneys and potential investors are understandably hesitant to engage

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Substance Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted").

[95] *See* I.R.C. § 280(E); *see also* Treas. Reg. § 1.61-3(a) (amended in 1992) (stating "in a . . . merchandising . . . . business, 'gross income' means the total sales, less the cost of goods sold . . . ."). For further information on taxation of marijuana businesses, *see* Edward J Roche, Jr., *Federal Income Taxation of Medical Marijuana Businesses*, 66 TAX LAW, 429 (2013) (explaining that marijuana businesses will experience a "Catch 22" situation as their operations are legal under state law but continue to violate federal law which denies them the ability under section 280E to deduct ordinary and necessary business expenses).

[96] *See, e.g.*, Al Olson, *IRS Ruling Strikes Fear in Medical Marijuana Industry*, CANNABIS HEALTH NEWS MAG. (Oct. 5, 2011), *available at* http://cannabishealthnewsmagazine.com/legal/1094/irs-ruling-strikes-fear-in-medical-marijuana-industry/ (quoting an industry insider who stated, "no business . . . . can survive if it is taxed on its gross revenue. The IRS is . . . . tax[ing] us out of existence").

[97] *See* I.R.C. §61; *see also* I.R.C. §162.

[98] Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r (CHAMP), 128 T.C. 173, 182 (2007).

[99] 26 U.S.C.S. § 280(E) (1982). This form of over-taxation from a marijuana business is not due solely on engaging in a federal illegal activity. *See, e.g.*, Comm'r v. Tellier, 383 U.S. 687, 691 (1966) (stating "[i]ncome from criminal enterprise is taxed at a rate no higher . . . . than income from more conventional sources . . . . With respect to deductions, the basic rule . . . . is the same").

[100] *See* Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701 (1988) (establishing the governing structure for Indian gaming).

[101] Kelly S. Croman-Neelands, *Indian Tax Strategies: Structuring Tribal Business Deals to Maximize Tax Opportunities*, Nat'l Conf. St. Legis., at 1, 1 (explaining that a state may not impose its taxes on an Indian tribe or its members in Indian country).

themselves into complex Tribal Law, as they are aware they will be breaking Federal Law in the process.[102] Some critics go as far to state "[i]t puts tribal leadership in a horrible position ….[i]t raises the hops of Indian people for economic development …. [without] any guidance."[103] Some supporters believe the Obama administration appears supportive to the States policy experiments, however a vast majority of Tribes currently lack the same types of economic funding to make this venture successful.[104]

CONCLUSION

The current risks are too great for Tribes to produce long-term success for those braving the new frontier of marijuana commerce. While the Federal government seemingly allows Tribes to experiment with novel regulatory approaches through the Wilkinson Memorandum, there are limited guidelines and criteria to ensure any lasting success in the matter. It is important to acknowledge the fact that 2017 will bring a new administration, and with it, possibly a retraction of the Cole and Wilkinson memorandums. Until Congress decides to drop marijuana from the CSA once and for all, it is highly unlikely a Tribe attempting to create a market for the drug will be successful. Many Tribes already lack basic necessities and financial resources required to establish business success and thrusting those attempting to establish a lucrative economy within their sovereignty into an unresolved quandary will likely encounter devastating results.

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[102] *See e.g*., Eliza Gray, *Why American Indian Tribes Are Getting Into the Marijuana Business*, TIMES (Sep. 5, 2015), *available at* http://time.com/4019219/american-indian-tribes-marijuana/ (stating that proposed new Federal legislature which would prohibit "Indian tribes that 'cultivate, manufacture, or distribute' marijuana on Indian land from receiving federal funding").

[103] *Id*. (Robert Williams, a professor at University of Arizona Law school goes further, stating many tribes see this "marginal, vice-ridden, semi-criminal [opportunity]" as their only hope of economic development).

[104] *See* David Remnick, *Annals of the Presidency: Going the Distance, On and Off the Road With Barack Obama*, NEW YORKER (Jan. 27, 2014), *available at* http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick?currentPage=all (observing President Obama saw the legalization of marijuana in some states to be an important step forward in society due to the unjust situation where "a large portion of people have . . . . broken the law and only a select few get punished").