

Accountability and its effect of the law

by Lana Marcussen

A lot of people have noticed that policy towards the Indian Tribes is changing again. For about the last thirty years, the federal policy was to increase "Indian sovereignty." Starting about two years ago, the policy started to change. This time it is more than just Congress or the Secretary of Interior coming up with a new policy. What is driving the change this time is the new federalism analysis of the United States Supreme Court known as "political accountability."

Federalism is a term which describes the relationship between the states and the federal government. The way federalism is supposed to work is to divide or separate the powers between the states and the national government. Basically, the states were supposed to have all of the local powers and direct powers over people for taxation and law enforcement while the national government had all of the powers needed to protect against foreign invasion and to enhance commerce. In fact, this concept was supposed to be so fundamental to our Constitution that our national government is referred to as the federal government. The powers delegated to the state and national governments became their respective "sovereign" powers.

Under the United States Constitution there are two sovereign governments and only one sovereign People. The People gave up part of their inherent natural rights to form this dual sovereignty of our political system. In order for this political system to work, all People must be created equal and endowed with the same rights. The purpose of federalism was to preserve this system by dividing the powers of government. By dividing the powers of government, the government was not supposed to be able to take additional power from the People. A great debate erupted over whether to adopt the Constitution. The debate was about one issue: WHETHER THE FEDERAL GOVERNMENT WAS MADE TOO STRONG. The end result was that the Constitution was adopted with a Bill of Rights to expressly protect the People's rights. The last Amendment, the Tenth, specifically reserves all ungranted powers to the States and to the People.

This political system broke over slavery and we had a Civil War over whether Black persons could be part of the People. The way this concept was stated in 1857, before our Civil War, is still the way it is, only today the persons who are not entitled to ever become citizens are Indians. The words "people of the United States" and "citizens" are synonymous terms. They both describe the political body who, according to our republican institutions, form sovereignty, and, who hold the power and conduct the Government through their representatives. They are what we call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described, Africans in 1857, Indians in 1997, compose a portion of this people, and are constituent members of this sovereignty, the American citizens.

If Indians are sovereign because of their tribal status, they are not people of the United States. The federal government can and does deny to Indian people the rights of citizenship even though Indians were naturalized and made citizens in 1924. The federal government owns all Indian property and money in "trust" under the Bureau of Indian Affairs. The reality is blunt: the federal government will not give up the power which was created to preserve slavery. It is the power to avoid the inconvenience of giving individual rights. More than 130 years after the end of the Civil War we are still living under the infamous Dred Scott decision as perpetuated by the 1884 decision of Elk v. Wilkins which applied the slavery reasoning to Indians. Whole legal doctrines like "reserved rights" have been evolved by government attorneys to expand this power beyond Indians and implicate other parts of the Bill of Rights. The power of the United States government is virtually unlimited when it uses this loophole because the government and not the People, is the supreme sovereign.

The Supreme Court has returned to the original federalism standard to interpret national versus state power. Instead of using the term federalism, they have found an easier more direct word which summarizes all of the explanation of the previous paragraphs. The new word is "accountability." Accountability is not possible without knowing who is responsible to perform a given function. Lawyers call this jurisdiction or separation of powers. Does the Constitution make the power asserted a state or federal power? For example, is Congress or your State Legislature responsible for raising your income taxes? Did your Legislator or Congressman vote for the tax increase? You have to know in order to determine who to vote for or against and what to vote for or against. This concept of accountability is the basis of the power being in the people to hold their government officials accountable. It is the essence of republican government. Accountability is individual rights based federalism. The Supreme Court is literally making the People the supreme sovereign once again. If the law passed by Congress or the President blurs political accountability, it is unconstitutional and is struck down.

Now, lets do a simple application to demonstrate how this works. You decide to go to an Indian Casino and trip over a tear in the carpet. You fall, breaking your hip. The Casino officials apologize but offer no financial compensation for your injury. You want to sue but find out that no lawyer will take your case because of Indian sovereign immunity. You are outraged and want someone to change this system. Who? The States say they have no power over the Indian tribes. The Federal government says the tribes are independent sovereign nations. How can an Indian tribe be held accountable?

Remember, the United States Supreme Court now says one government or the other has to be accountable. Do the tribes fall outside of the basic concepts of federalism? The answer is yes. The Indian tribes as separate sovereigns do not fit into a constitutional design based on federalism. So the solution is to dismantle the federal laws which create Indian sovereignty. An amazing thing happens when tribal sovereignty is dismantled, individual rights for Native Americans are created. So one way to undo Indian sovereignty is to create individual rights in Indian citizens. And this is exactly what the United States Supreme Court is doing. There are presently two cases before the Court this term on individual rights issues; one on the ownership of property and the other on whether the Bill of Rights applies to Indians.

The other side of the equation from the 10th Amendment is that state sovereignty which was taken by the federal government to preserve Indian sovereignty must be restored to the states. The Supreme Court started this process two years ago and has two more cases this term; one on territorial jurisdiction over tribal lands upon statehood and the other on Indian court jurisdiction. Going back to our example, this means the United States Supreme Court could easily overrule the Minnesota Supreme Court decisions which held that the tribes cannot be sued in state court. In order to make this ruling, the Court has to rule that the federal laws which say that the tribes are not subject to the jurisdiction of the State are unconstitutional. Since these laws prevent accountability, they will not stand, and the person who broke their hip should have the right to sue. The individual's right to accountability is greater than the federal governments power to segregate the tribe.

The Supreme Court is changing the policy and the Clinton Administration is resisting the changes at every opportunity. In fact, the Secretary of Interior, Bruce Babbitt, who is the present "trustee" of all of these Indian property rights is attempting to increase his power over the tribes and the resources supposedly held for their benefit. He is doing this through encouraging the tribes to sue to increase their treaty rights, land claims, and tribal sovereignty. Needless to say, his timing is bringing these federalism changes about more quickly, very much to the detriment of the tribes themselves who need the time to adjust. Of course his actions prove the point, this whole federal scheme is not about protecting the Indians since 1884. It is about the federal government maintaining this power over people it is not supposed to have according to the Constitution.

Every time Secretary Babbitt gets a tribe to assert a right like a treaty claim, the U. S. Supreme Court is going to place the asserted right into this federalism analysis. How can citizens have treaty rights? Treaties are documents made with foreign governments. Citizens cannot have treaty rights. Of course, Indians are still denied the rights of full citizens. When these full rights are given, probably by the end of June 1997, the Indian Treaty rights will be permanently relinquished within a year.