

## **Why Indians are Second Class Citizens: Congress' Plenary Power, Tribal Sovereignty and Constitutional Rights**

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An ancient Jewish story tells of a hungry Esau despising "his birthright" and selling it to his brother, Jacob, for a meal of stew.<sup>1</sup> A more recent story tells of Peter Minuit purchasing the entire island of Manhattan from Indians, in 1626, "for a handful of merchandise – mostly trinkets."<sup>2</sup> In a similar way, today's tribal members are giving away their right to constitutional protections – their American birthright, either from ignorance, or for the modern equivalent of a bowl of stew or "a handful of merchandise – mostly trinkets."

### **The U. S. Government as Tyrant.**

The United States Code states, "the Congress finds – (1) that clause 3, section 8, article I of the United States Constitution provides that 'The Congress shall have Power \* \* \* To regulate Commerce \* \* \* with Indian tribes and, through this and other constitutional authority, Congress has plenary power over Indian affairs.'"<sup>3</sup> [emphasis added] The word "plenary" is defined as full, unqualified, entire, complete or absolute. Thus the United States Code is saying that Congress has full, unqualified, entire, complete or absolute power over Indian affairs.

The Supreme Court has recognized this plenary power of Congress on numerous occasions. One recognition is in the Santa Clara Pueblo v. Martinez (1978) decision which states, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."<sup>4</sup> The Santa Clara decision refers back to an earlier Supreme Court decision called Lone Wolf v. Hitchcock (1903). In that decision the Supreme Court stated, "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government...The power exists to abrogate the provisions of an Indian treaty...In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."<sup>5</sup>

This plenary power of Congress over Indian affairs should end the discussion about federal and state constitutional protections for tribal members all by itself. How can it be claimed that a particular group of American citizens who live under the absolute power of Congress also has equal federal and state constitutional protections? The U.S. Constitution was provided by "We the People" to give limited, enumerated, separated powers to the federal government. All other powers and rights are "retained by the people and the states."<sup>6</sup> The Constitution was specifically written to limit absolute power. Isn't Congress' plenary power over Indian affairs contrary to our entire system of limited, federal, constitutional government?

Congress' constitutional authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"<sup>7</sup> doesn't give them plenary power over foreign nations or states. How can this same authority give them plenary power over Indian tribes? How the federal government finds authority for this permanent, absolute, congressional power over a group of American citizens in the Constitution is both sobering and frightening. For more discussion of the possible foundations of this congressional power over Indian affairs read the articles entitled, Where's the Government's Authority for Federal Indian Policy?

## Adding Another Tyranny

Unfortunately, Congress' absolute power over Indian affairs is just one hurdle tribal members on reservations must overcome in an effort to obtain "the equal protection of the law" supposedly guaranteed to all citizens by the Fifth and Fourteenth Amendments to the U.S. Constitution.<sup>8</sup> The exercise of tribal "sovereignty" often creates more immediate, practical problems for tribal members. The U.S. Code also says, "The Congress finds and declares that –

(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems."<sup>9</sup> Notice that these codified declarations are directed toward tribal governments, not tribal members. Black's Law Dictionary defines "sovereignty" as 1. Supreme dominion, authority, or rule. 2. The supreme political authority of an independent state. 3. The state itself."<sup>10</sup> As a part of this "sovereignty" tribal governments possess a high degree of sovereign immunity "precluding suit against the sovereign (government) without the sovereign's consent."<sup>11</sup> Again the U.S. Code says, "Nothing in this chapter shall be construed to affect, modify, diminish, or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes."<sup>12</sup>

The Supreme Court has also supported the concept of tribal sovereignty and said in *Santa Clara Pueblo v. Martinez*, "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed as limitations on federal and state authority. Thus, in *Talton v. Mayes*, 163 U.S. 376 (1896), this Court held that the Fifth Amendment did not 'operat[e] upon' 'the powers of local self-government enjoyed' by the tribes. *Id.*, at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as the Fourteenth Amendment." The limitations on state constitutional authority is also specifically noted in *Santa Clara Pueblo v. Martinez* when the Court says, "States may not assume civil or criminal jurisdiction over 'Indian country' without [436 U.S. 49, 64] the prior consent of the tribe."<sup>13</sup>

The Supreme Court in its *Nevada v. Hicks* (2001) case stated, "it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes."<sup>14</sup> The U. S. Court of Appeals (Ninth Circuit) has described this lack of constitutional protection very simply when they stated, "This holding is consistent with other judicial decisions finding the Constitution inapplicable to Indian tribes, Indian courts and Indians on the reservation."<sup>15</sup> For more discussion about tribal sovereignty read the article titled *The Tragedy of Tribal Sovereignty*, and others.

Thus, tribal members on reservations live under two contradictory, tyrannical forms of government. Inexplicably, Congress has plenary (absolute) power over their affairs and tribal governments have independent, supreme, dominion, authority and rule over these American citizens as well. Meanwhile, tribal governments are protected from being sued for abuses of civil or constitutional rights by their sovereign immunity. Finally, this absolutist tribal authority is guaranteed and protected by the power of the federal government because of its so-called trust responsibility to tribal governments. Visit the "Real Stories" and "Federal Issues" sections of our web site to read about the kind of practical problems this legal status creates.

## A Secret... “Voluntary Consent”

The Supreme Court in *Duro v. Reina*, (1990), has stated that, “It is significant that the Bill of Rights does not apply to Indian tribal governments.” The Court contends that tribal governments get their “unconstrained” power over tribal members because tribal members voluntarily gave up their Bill of Rights protections, and their Fourteenth Amendment equal protections, when they consented to become tribal members. Specifically they said, “The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.... A tribe’s additional authority comes from the consent of its members.”<sup>16</sup>

Precedents and interpretations from past centuries still impact current Indian policy. One of the historical and philosophical foundations for Indian policy is the belief that Indians, like children or incompetents, “are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”<sup>17</sup> This historical foundation continues to affect modern Indian policy. In contrast, almost all Indians have currently been born as U.S. citizens. The vast majority of tribal members were enrolled as members by their parents when they were very young children. Few if any of these children, or their parents, ever knew of, or gave any kind of informed consent, to this reduction in their rights as U.S. citizens. The vast majority still isn’t aware of this “voluntary consent.”

As tribal members become more aware of their diminished status, will they demand equal rights or will they be mollified by the perceived warm bosom of the reservation system? Will they sell their constitutional birth-right for “a bowl of stew or ‘a handful of merchandise-mostly trinkets’” or will they demand the equal status they deserve as American citizens? Meanwhile, for the federal government to maintain that tribal members gave up their most precious citizenship rights without their knowledge, or any safeguards, is abhorrent.

How can Congress have plenary (complete) power over Indian affairs and tribes have independent supremacy? The simple answer is they can’t. Perhaps, Congress has used its plenary power to delegate “sovereignty” to tribal governments. In this case, tribal sovereignty is really an expression and extension of federal plenary power. The Supreme Court in *Santa Clara Pueblo v. Martinez* describes what happens when these two contradictory, absolutist government concepts conflict with one another. They said, “This aspect of tribal sovereignty [sovereign immunity], like all others, is subject to the superior and plenary control of Congress.”<sup>18</sup>

Congress has demonstrated its superior plenary power over Indian affairs throughout history. Three examples are the Indian Removal Act of 1830, which led to the infamous Trail of Tears; the General Allotment (Dawes) Act of 1887, as amended by the Burke Act of 1906, which set up a gradual policy of disestablishing every tribal government and reservation in the country with the goal of assimilating all tribal members into American society as equal citizens; and the Termination of the Menominee Indians in 1954.

Where does this complete, totalitarian and unaccountable power of both federal and tribal governments come from? Political power is not created out of a vacuum. It comes at the expense of other governments, or the people themselves. In this case, it comes primarily at the expense of the tribal members who live on reservations. Speaking of tribal sovereignty, Minnesota Appellate Judge R. A. (Jim) Randall has said, “[s]overeignty’ is just one more indignity, one more outright lie, that we continue to foist on American citizens, the American Indian.”<sup>19</sup>

## Let's Pretend We Gave Indians Civil Rights

In response to repeated complaints from tribal members about the violations of their fundamental rights by tribal governments, Congress passed the Indian Civil Rights Act (ICRA) of 1968. Passage of this Act was an explicit, legal admission on the part of the federal government that tribal members on reservations are without the protections of the Fourteenth Amendment and the Bill of Rights. According to the Supreme Court in the *Santa Clara Pueblo v. Martinez* case, with this Act "Congress acted to modify the effect of Talton and its progeny by imposing certain restrictions on tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment...a central purpose of the ICRA and in particular of Title I was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans' and thereby to 'protect individual Indians from the arbitrary and unjust actions of tribal governments.'"<sup>20</sup>

It was the conflict between the ICRA and tribal sovereign immunity that was the issue in the *Santa Clara Pueblo v. Martinez* case. In dealing with this same case, the Court of Appeals for the Tenth Circuit had said, "the intention of Congress to allow suits against the tribe was an essential aspect [of the ICRA]. Otherwise, it would constitute a mere unenforceable declaration of principles." In spite of this significant problem, the Supreme Court reversed the Tenth Circuit and said, "that Congress' failure to provide remedies other than habeas corpus was a deliberate one."<sup>21</sup> Thus, together, the Supreme Court and the Tenth Circuit Court of Appeals have said that Congress "deliberate[ly]" passed the ICRA providing rights similar to constitutional protections but that these rights were "a mere unenforceable declaration of principles". Thus except for unjust imprisonment, a tribal member can only seek remedy from the same tribal government that he believes may have already violated his rights. Imagine how effective our federal and state constitutions and our other federal civil rights acts would be if citizens could only seek relief from the government entity that may have already violated our rights. This civil rights problem is worse on reservations because tribal governments are protected from suit by sovereign immunity and very few have separated powers and an independent judiciary.

## Is There Anything Missing from This Picture?

Minnesota Appeals Court Judge R. A. (Jim) Randall has had a long term, special interest in Indian affairs and has spent considerable time reading, visiting reservations and talking to tribal members. He made the following comments about constitutional protections on reservations in the 1997 *Granite Valley v. Jackpot Junction* legal opinion:

"It is not known to all reading this opinion that the following list of state and federal constitutional guarantees and rights are not in place for Minnesota Indians domiciled on a reservation: There is no guarantee that the Minnesota Constitution, the United States Constitution and its precious Bill of Rights will control. There are no guarantees that the Civil Rights Act, federal or state legislation against age discrimination, gender discrimination, etc. will be honored. There are no guarantees of the Veteran's Preference Act, no civil classification to protect tribal government employees, no guarantees of OSHA, no guarantees of the Americans with Disabilities Act (1990), no guarantees of the right to unionize, no right to Minnesota's teacher tenure laws, no right to the benefit of a federal and state "whistleblower" statutes, no guarantees against blatant nepotism, no guarantees of a fair and orderly process concerning access to reservation housing, and no freedom of the press and no freedom of speech. In other words, all the basic human rights we take for granted, that allow us to live in dignity with our neighbors, are not guaranteed on Indian reservations under the present version of 'sovereignty.'"<sup>22</sup>

Judge Randall calls tribal sovereignty “a pancake makeup coverup of Plessy which allowed ‘separate but equal’ treatment. See Plessy, 163 U.S. at 551, 16 S.Ct. at 1143 (holding that ‘equal but separate accommodations for the white and colored races’ for railroad passengers was constitutional).”<sup>23</sup> The Plessy decision and the “separate but equal” concept have been wholly repudiated since the Brown v. Board of Education decisions of the early 1950’s. Current federal Indian policy is even worse than the Plessy concepts, however, because it doesn’t even make a pretense of equality.

## **Is This Citizenship?**

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“The greatest injustice the federal government has imposed on Indian people during the 20th century is to make us citizens, but deny us most of the basic rights of citizenship....”

“Democracy is not simply the existence of free and fair elections, which I would argue often do not exist in tribal elections. Democracy is also defined by limiting the power of the government by such things as the rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, due process, and protection of the basic liberties of speech, assembly, press, and property. These do not exist on Indian reservations....”

“James Madison, a founding father and signer of the U.S. Constitution, said that government with no separation of powers and no checks and balances is the very definition of tyranny. That is what we have on America’s Indian reservations....”

“Let it be said right now that sovereign immunity has nothing to do with Indian culture or tradition. It is a concept that developed in the Roman empire and was used by European monarchs to protect them from challenge or criticism. Tribal sovereign immunity has essentially told a generation of tribal leaders that once they are in office they are above the law and can do whatever they please. The only culture that tribal sovereign immunity is protecting is a culture of corruption, denial of rights, and unaccountability.”

“In closing, I would like to quote a great American, the late Dr. Martin Luther King. He said, ‘Injustice anywhere is a threat to justice everywhere.’”<sup>24</sup>

## **Why Isn’t the Constitution Good Enough?**

Current federal Indian policy violates this country’s most fundamental values. Tribal governments are political institutions that are based primarily on race and ancestry. The Supreme Court has stated in *Adarand Constructors v. Peña* (1995) that, “[d]istinctions between citizens solely because of their ancestry are by their very nature odious,”... “[A] free people whose institutions are founded upon the doctrine of equality...should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be...analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests”....

“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification” ... “the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws.”<sup>26</sup> It is evident that federal Indian policy doesn’t protect personal rights, is without justification or compelling reasons, and is not narrowly tailored to accomplish any obvious purpose other than the continued cultural, social and economic destruction of reservation areas.

The Supreme Court has also stated in *Saenz v. Roe* (1999) that, “This Court has consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to a citizen by that Amendment’s Citizenship Clause limits the powers of the National Government as well as the States. Congress’ Article I powers to legislate are limited not only by the scope of the Framers’ affirmative delegation, but also by the principle that the powers may not be exercised in a way that violates other specific provisions of the Constitution.”<sup>27</sup>

Whatever flimsy excuses the federal government is using to justify its Indian policy, this policy is obviously being “exercised in a way that violates other specific provisions” of the Bill of Rights and the Fourteenth Amendment. Should not the Amendments to the Constitution take precedence over any laws or policies flowing from the original Constitution? Should not the later status of citizenship take precedence over any earlier status of tribal members? Should not tribal members have been granted the full protection of the Bill of Rights and the Fourteenth Amendment when they became citizens in 1924?

Suppose instead of federal Indian policy, Indian policy had been limited to only one state. Let’s imagine Texas, for example. Suppose Texas had a state Indian policy, a state Bureau of Indian Affairs, Indian governments and Indian reservations. Imagine that citizens lived on these reservations under the plenary power of the state legislature and were without guaranteed federal and state constitutional protections. Now suppose that despite decades of massive infusions of cash, these reservations displayed some of the poorest economic and social statistics in the nation. How long do you think it would take for the Supreme Court to find that state system unconstitutional?

Perhaps, if reservation areas were models of economic and social advancement, some might argue that this fundamental denial of federal, state and tribal constitutional protections is justified. In fact, many observers compare reservations to third world countries. Reservations are associated with some of the poorest counties in the country. Much of the economic and social devastation on reservations flows directly from federal Indian policy, the second class citizenship status of the tribal members who live on reservations, and related jurisdictional problems.

These facts raise some very fundamental questions. Is it the duty of citizens to serve their governments, or is it the function of government to serve the people? Does primary sovereignty rest with governments or the people? Where does the federal government get its authority to classify citizens into groups and then deny certain groups of citizens the equal protection of the law? Is this authority superior to the Fifth and Fourteenth Amendments to the U.S. Constitution?

## **Do We Need a New Constitutional Amendment?**

CERA and CERF have maintained for years that the Bill of Rights and Fourteenth Amendment should protect all citizens equally, including tribal members on reservations. So far, we have been only partially successful. If our present constitutional system isn’t capable of providing every citizen with equal protection, perhaps it’s time for a new constitutional amendment. In order to begin this discussion, we propose a Twenty-Eighth Amendment:

All persons, including Natives and Aborigines, born or naturalized within the United States, including territories, Indian reservations and trust lands are entitled to the full and equal protection of the United States and State Constitutions.

This national discussion about equality for tribal members on reservations is long overdue. Tribal members need to join civil rights groups and demand full and equal constitutional protections. All American citizens and the federal government should be ashamed of, and embarrassed by, the patronizing, destructive, racist nature of federal Indian policy.

Race classifications and racism have always had their defenders, and they have created havoc throughout a long and terrible history...from slavery to the Holocaust, South African apartheid to federal Indian policy. Race classifications divide people in meaningless ways. It's time to end race classifications. They focus our attention on what divides us, rather than what unites us. If we're going to solve the many problems facing the human race, we need to be united in heart and mind in pursuit of common goals. If we continue to focus on skin color and ancestry we can never become "one nation, under God, indivisible, with liberty and justice for all." Instead we find ourselves in pursuit of many nations, under one, many or no God, easily divisible, with liberty and justice for some. Which vision makes more sense for our children and grandchildren? Gaining equal constitutional rights for tribal members on reservations may be the last great civil rights struggle remaining in America. Will you join us in this struggle for equal rights?

1 New American Standard Bible; Thomas Nelson Publishers; Genesis 25:29-34.

2 Britannica Encyclopedia; 15th Ed. 1986; Minuit, Peter; Vol. 8, p. 174.

3 United States Code; Title 25, Chapter 21, Section 1901.

4 Santa Clara Pueblo v. Martinez; 436 U.S. 49 (1978).

5 Lone Wolf v. Hitchcock; 187 U.S. 553 (1903).

6 U.S. Constitution; Amendments IX and X.

7 United State Constitution; Article I; Section 8; Clause 3.

8 Saenz v. Roe; 000 U.S. 98-97 (1999) see also Adarand Constructors, Inc. v. Peña 000 U.S. U10252 (1995).

9 United States Code; Title 25, Chapter 38, Section 3601.

10 Black's Law Dictionary, 7th Ed; Bryan A. Garner, Editor; West Group, St Paul, MN; 1999.

11 Dictionary of Legal Terms; Steven H. Gifis; Barrons, New York, NY.

12 United States Code; Title 25, Chapter 39, Subchapter III, Section 3746, Tribal immunity.

13 Santa Clara Pueblo v. Martinez; 436 U.S. 49 (1978).

14 Nevada et al. v. Hicks et al. No. 991994. Argued March 21, 2001 Decided June 25, 2001.

15 Tom v. Sutton; 533 F.2d 1101, 1102-03 (9th Cir.1976).

16 Duro v. Reina, 495 U. S. 676 (1990).

17 Cherokee Nation v. State of Ga.; 30 U.S. 1 (1831).

18 Santa Clara Pueblo v. Martinez; 436 U.S. 49 (1978).

19 Cohen v. Little Six Inc., d/b/a Mystic Lake Casino; No. C6-95-928; Court of Appeals of Minnesota; Feb. 13, 1996.

20 Santa Clara Pueblo v. Martinez; 436 U.S. 49 (1978).

21 Ibid.

22 Granite Valley v. Jackpot Junction. No. C8-96-1024. Court of Appeals of Minnesota. Feb. 18, 1997.

23 Cohen v. Little Six Inc., d/b/a Mystic Lake Casino; No. C6-95-928; Court of Appeals of Minnesota; Feb. 13, 1996.

24 Oral testimony of William J. Lawrence, J.D; to the U.S. Senate Committee on Indian Affairs in Seattle, Washington on April 7, 1998.

25 The Great Chiefs Fought for Independence by Lisa Morris; CERA NEWS; March 2002; Vol. 7, # 2 .

26 Adarand Constructors, Inc. v. Peña 000 U.S. U10252 (1995).

27 Saenz v. Roe; 000 U.S. 98-97 (1999).