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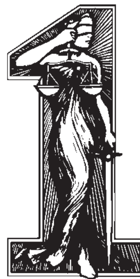

CERA *Journal*

MANY CULTURES • ONE PEOPLE • ONE LAW

VOL. 12, #2 – March 2007

The Questionable Claims of Authority for Federal Indian Policy

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Introduction

Dealing with the federal government about federal Indian policy is like being forced to match wits with a con man running a shell game. The ball under the shells is the authority for federal Indian policy. The shells are the various claims of authority for that policy. Instead of three shells, there are many. Various claims of authority include the Commerce, Treaty or Property Clauses of the Constitution. They also include federal reserved rights, trust responsibilities, federal Indian common law, and various other powers, including delegated, inherent or war powers. Claims for equity are often added to this combination. The very fact that so many claims of authority have been cited, raises the suspicion that there isn't a lot of confidence in any of them.

When the federal government is challenged about a specific authority for their policies, the hands start working. Shells are moved and the eye thinks maybe it sees a blur moving from one shell to another. "It's not under here? Maybe it's under there?" Like any good con man the federal government adds confusion, bluff, intimidation and even claims of victimization to its performance.

CERA finds itself in the position of the little child in Hans Christian Andersen's tale of The Emperor's New Suit who said, "But he has nothing on at all,"

Very few people understand or question the foundations of federal Indian policy. The few who try, soon find it to be complex, confusing, contradictory and intimidating – perhaps purposely so. One Indian attorney thinks it developed primarily by accident. Another very knowledgeable attorney has said the federal government has pulled their authority for federal Indian policy out of thin air. Scholars generally agree that Indian law is a mess. Federal Indian policy is often referred to as pre-constitutional or extra-constitutional. These characterizations are admissions that the policies aren't grounded in the Constitution itself.

Neither law nor policy is stationary. Federal Indian policy has had a huge and growing influence on this country since the federal government allowed Indian citizens to reorganize tribal governments through the Indian Reorganization Act of 1934. Hundreds of thousands of tribal members are directly affected. Because of many past changes in policies, roughly an equal number of non-Indians live on reservations. Indian gambling impacts dozens of states, hundreds of communities, thousands of businesses and millions of citizens. Because tribal gambling is a rapidly-growing, twenty billion dollar a year industry, the impact is swiftly expanding every year. Many citizens were living their lives almost unaware of these policies, only to wake up one day to find their lives have been totally changed by them.

Senator Akaka has introduced legislation to extend the scope of federal Indian policy to include anyone with Native Hawaiian ancestry. If that effort is successful, it may only be a matter of time before Hispanic Americans will be actively seeking a similar status. Advocates for Islamic law have been studying the model of Indian law in an effort to duplicate it for themselves. The legal justifications for federal Indian policy also continue to influence and corrupt structural constitutional law. To get a better idea how these policies affect people's lives, read *Going to Pieces* or watch the DVD. Both are available from our web site.

This issue of the *CERA Journal* will very briefly analyze the federal government's various claims of authority for federal Indian policy. These policies have not been forced on the federal government by the Constitution or any other legal requirements. In fact, they have been chosen in spite of the Constitution and other valid legal arguments. Legal authorities have been stretched in order to accomplish what was thought to be "necessary." If the justification ever really existed, it has long since disappeared. Meanwhile, federal Indian policy continues and expands, more because of a powerful inertia and special interests than anything else.

CERA *Journal* is an educational publication of Citizens Equal Rights Foundation.

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How We Got Here

Editor's note: We are publishing the following history to balance the spin that has been placed on the historical view of Indian law by Felix Cohen. Cohen was paid by the Department of the Interior to compile the revised History of Federal Indian Law. The revision removed war powers from history, making Federal Indian Policy appear more benign for the new Indian Reorganization Act of 1934. The following section is a view of the hard reality of the Federal Indian Policy of the United States. We are not attempting to justify or support the historical reality of Federal Indian Policy that began as a defensive war power policy. We are writing this section only to explain why the promotion of tribal sovereignty by Federal Indian Policy cannot be accomplished without threatening the constitutional structure that protects the rights of all of the People of the United States.

Historically, Indian tribes were treated as quasi-sovereign nations within our territorial boundaries to allow the United States to treat the tribes as military enemies. The Indian Commerce Clause was written in this context. Federal Indian Policy as begun by our first president, George Washington, was to serve two simultaneous purposes. First, it allowed the very new government to defend itself with all available national resources against a potential unification of tribal groups. This potential was particularly possible in the Northern states with the Iroquois Confederacy. Both the British and French had attempted to unify the Confederacy into a major ally against American colonial interests. Second, it allowed the United States to prohibit huge cessions of land made by many Indian tribes to British officers against the interests of our fledgling republic. It was a pragmatic policy developed against a continuing British threat to American independence.

To avoid a British Officer's land claims the Supreme Court created the concept of "Indian title" in the case of *Johnson v. M'Intosh,* 23 U.S. 597-8 (1823). The concept of Indian title is based on the fact that the United States won the Revolutionary War against the British and therefore, as the victor and the prevailing sovereign, all agreements and treaties entered by the Indian tribes with the British were void against the prevailing sovereignty of the United States. This is the same war power acknowledged in *U.S. v. Kagama*, 118 U. S. 375, 378-379 (1886) that could be asserted against any and all Indian tribes with breach of trust cases against the United States or tribes that attempt or commit acts of domestic terrorism in order to terminate their tribal sovereignty. The cases that establish this concept of Indian title use domestic United States policy to avoid the application of common notions of international law. These would have acknowledged the British land claims as validly made to the British government as the preceding recognized sovereign to the United States. By recognizing the separate sovereignty of the Indian tribes,

Welcome to the shell game...

the United States Supreme Court altered international law regarding conquest of new territory and set the United States on a new path that acknowledged the right of occupancy of the land in the indigenous people. It quickly became clear with the case of *Johnson v. M'Intosh*, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823) including the concept of Indian title and its necessary companion concept of inherent tribal sovereignty, that the United States had embarked on a whole new legal path which attempts to balance the war power authority of the federal government with the duty of protecting the Indian tribes as quasi-sovereign "domestic dependent nations."

> **...the United States had embarked on a whole new legal path which attempts to balance the war power authority of the federal government with the duty of protecting the Indian tribes as quasi-sovereign "domestic dependent nations."**

It was this enemy policy based on war powers that Chief Justice John Marshall attempted to convert into a trust relationship between the United States and the Indian tribes in the Marshall Trilogy of *Johnson v. M'Intosh, Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832) By 1830, with the threat of European invasion removed, the very harsh enemy policy against all tribes, even friendly organized tribes like the Cherokee, seemed contrary to our constitutional principles. Marshall's answer was to create, as a matter of federal common law, a constructive trust between the United States and the Indian tribes by interpreting the Cherokee Treaty with the United States in favor of the Indians' understanding. The reasoning of *Cherokee Nation* effectively reversed the almost total deference given to the President as Commander in Chief to deal with the tribes as potential enemies.

Early concepts of tribal sovereignty created so many conflicts between tribes and their neighbors that they led to the harsh Removal Policy of the1830's that culminated in the infamous Cherokee "Trail of Tears." There is no constitutional basis for this Indian trust relationship. It was entirely a judicial creation in an attempt to temper the war powers authority over Indian tribes and would be called "judicial activism" today.

One explanation of Chief Justice Marshall's judicial activism for the Indians was that the slavery debate had heated up by the 1830s. The separation of powers and federalism problems associated with Negro state citizenship, the Fugitive Slave Act and how to characterize freed Negroes were overlapping concerns about Indians. Southerners did not want the President's legal authority over Indians and Indian tribes to apply to Negroes. Chief Justice Marshall, a Virginian, knew that by establishing a constructive trust with the Indians that he was imposing a separation between Indians and slaves. This was especially important because by 1830, Mexican traders were selling captured Indians in the Western territories as slaves.

To make matters worse, the issue of whether slavery could or should spread into the new territories of the West made the overlap between the characterization of Indians and Negroes even more contentious. Indian tribes could be forced to move from Eastern lands to Western lands by military force. The future Western states had no say in whether the United States relocated a tribe from state land in the East to federal public domain lands in the West before statehood. The military authority over Indians overrode all other interests of the future state. By 1850, this power over Indian tribes was a potential weapon for pro-slavery supporters against Northern majority interests that could be used to justify expansion of slavery into the new territories won from Mexico. In 1857, in the infamous case of *Dred Scott v.*

CERF and CERA's Mission Statement

Federal Indian Policy is unaccountable, destructive, racist and unconstitutional. It is therefore CERA's mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States of America.

Sandford, 60 U.S. 393 (1856) another Southern Chief Justice, Roger Taney, guaranteed extensions of slavery to the Western territories by using the authority over Indians.

The treaty era between the United States and various Indian tribes ended March 3, 1871 with an obscure rider to an Indian appropriations bill. It said, "That hereafter 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." This rider did not affect previous treaties and after this change legal agreements continued to be negotiated between the United States and tribes.

After the Civil War and the declaration in the 13th Amendment that all Negroes were now national citizens, it also became necessary to allow Indians to become national citizens. This was addressed in the 14th Amendment. The 14th Amendment distinguishes between Indians as taxed or untaxed. Taxed Indians were entitled to citizenship while untaxed Indians were considered wards of the federal government. Individual Indians had two mutually exclusive choices. They could remain a part of their tribal system which was within the territorial bounds of the United States but largely separate and apart from our constitutional system or they could separate themselves from that tribal system and petition to become citizens of this country with the full and equal protections of state and federal constitutions. The 1884 *Elk v. Wilkins* Supreme Court decision clearly demonstrates these choices:

There is no constitutional basis for this Indian trust relationship. It was entirely a judicial creation in an attempt to temper the war powers authority over Indian tribes and would be called "judicial activism" today.

"Chief Justice Taney, in the passage cited for the plaintiff [112 U.S. 94, 101] from his opinion in *Scott v. Sandford*, 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: 'They' (the Indian tribes) 'may without doubt, like the subjects of any foreign government, be naturalized by the authority of congress, and become citizens of a state, and of the United States; and **if an individual should leave his nation or tribe, and take up his abode among** the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.' But an emigrant from any foreign state cannot become a citizen of the United States **without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation** through such form of naturalization as may be required law…

"[T]wo rolls should be prepared under the direction of the commissioner of Indian affairs, signed by the sachem and councilors of the tribe, certified by the person selected by the commissioner to superintend the same, and returned to the commissioner; the one, to be denominated the citizen roll, of the names of all such persons of full age, and their families, 'as signify **their desire to separate their relations with said tribe** and to become citizens of the United States,' and the other to be denominated the Indian roll, of the names of all such 'as desire to retain their tribal character and continue under the care and guardianship of the United States;' and that those rolls, so made and returned, should be held as **a full surrender and relinquishment, on the part of all those of the first class, of all claims to be known or considered as members of the tribe, or to be interested [112 U.S. 94, 106] in any provision made or to be made by the United States for its benefit, 'and they and their descendants shall thenceforth be admitted to all the rights and privileges of citizens of the United States**.'" [Emphasis added]

Both sides of this equation are important. Once tribal members agreed to the, "full surrender and relinquishment …of all claims to be known or considered as members of the tribe" and were accepted as citizens by the United States, they were entitled "to all the rights and privileges of citizens of the United States."

Congress and the President also clearly confirmed the necessity of this mutually exclusive choice between tribal membership and citizenship with the Dawes Act of 1887 as amended by the Burke Act of 1906. These Acts initiated a trust process that was designed to phase out tribal governments and reservations over a twenty-five year period. The acts established a system to grant Indians individual ownership of land and citizenship with full and equal constitutional protections once they were "separate and apart from any tribe of Indians:" According to the Burke Act:

"…and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law…"

"That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside: and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law….every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens…That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple."

Tens of thousands of Indians became American citizens as a result of the Allotment Acts. The vast majority of modern Indians are descended from these ancestors who were explicitly promised "all the rights, privileges, and immunities of such citizens."

The mutually exclusive choice was necessary because it was, and still is, impossible to provide equal constitutional protections to citizens who are simultaneously tribal members subject to "extra-constitutional" governments. It is also impossible to grant equal constitutional rights to non-members who are significantly impacted by tribal governments and their actions.

These acts also effectively abolished tribal governments as separate political entities because Indians who had **not** been issued land patents and granted citizenship were "subject to the exclusive jurisdiction of the United States" by the same Burke Act. (For an interesting history of tribal courts through this period go to our website at www.citizensalliance.org click on "Legal Issues" in the main menu and scroll down to "A Brief Tribal Court History.") Since tribal governments as separate political entities no longer existed, the granting of citizenship to all remaining Indians with the Citizenship Act of 1924 did not create a constitutional problem.

A serious constitutional problem developed with the Indian Reorganization Act of 1934. As its name implies, this Act allowed American citizens who were Indians to reestablish separate tribal governments. The constitutional problem was created by allowing American Indian citizens to form their own "sovereign" (independent, supreme) governments based on race and ancestry apart from the political structure of the Constitution. The mutually exclusive choice between membership in a tribal government and citizenship is no longer necessary. The Act is correctly considered a major reversal in federal Indian policy.

The challenge of federal Indian policy has been, and continues to be, to find constitutional justification for these policies. Modern federal Indian policy distorts the Constitution to accomplish something that wasn't contemplated by the Founders or the Constitution – dealing with political tribal governments made up of American citizens within our constitutional system.

Until the Indian Reorganization Act (IRA) of 1934, the war powers were used in their traditional manner—to protect the United States from the threat of physical conflict by an enemy. Historically, one enemy was Indian

tribes. The IRA expands the "trust relationship" created by the judicial branch in the 1830's to justify the United States asserting its sovereignty (including the war powers) to "protect" tribal interests. It is very important to understand that if the United States asserted its power to prevent discrimination against Indian individuals rather than for supporting "sovereign" Indian tribal governments, there wouldn't be a constitutional problem.

The Administration of President Franklin D. Roosevelt realized they could fundamentally alter the constitutional structure of separations of powers, and checks and balances that were written to protect the individual rights and sovereignty of each person by allowing the United States to "protect" tribal governments instead of individual citizens. It was the deliberate creation of a socialist leaning government using "trust relationships" enforced to further the "public interest" as defined by the national government. John Collier, the primary author of the IRA, promoted the socialist legislation by asserting that by temporarily recreating tribal governments; tribal members would gain political status and could be integrated within a generation into the main population. The socialist author of the IRA did not foresee the constitutional harm that could be wrought by federal attorneys empowered to represent tribal interests with federal war powers brought against the States and People.

It is very important to understand that if the United States asserted its power to prevent discrimination against Indian individuals rather than for supporting "sovereign" Indian tribal governments, there wouldn't be a constitutional problem.

With the Presidency of Richard Nixon, the President and Congress asserted the war powers in a series of acts that promoted a radical separate tribal sovereignty. In a July 8, 1970 Special Message to Congress, Nixon proposed policies intended "to break decisively with the past." He called these recommendations a "historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems." He advocated an Indian policy that simultaneously combined increased federal government support with radically sovereign (independent, supreme) tribal governments.

These acts include the Indian Civil Rights Act of 1968 and Indian Self-determination Act of 1975 that assert that the Constitution does not apply to tribal governments. With the Indian Gaming Regulatory Act of 1988, and the massive expansion of the problems it has brought, we now have a full blown constitutional crisis that is pitting fundamental constitutional principles against these assumed war powers to promote tribal sovereignty. Without addressing the fact that the United States paid its Solicitor Felix Cohen to edit out the War Powers when he compiled the treatise known as the Handbook of Federal Indian Law in 1940, we cannot win the cases we must win in the federal courts to prevent the rights of all of the People of the Unites States from becoming subservient to federal war powers.

Modern defenders of federal Indian policy generally seek to ignore much of the law and history between the end of treaty making in 1871 and Nixon's decisive break with the past after 1970. These apologists often seek to jump straight from the modern era of radical tribal sovereignty back, prior to citizenship, to the treaty era before 1871. If the law and history of the century between these eras is mentioned at all, it is generally mischaracterized and slandered. The modern focus on radical tribal "sovereignty" is recreating the same conflicts between tribes and their neighbors that originally led to the harsh removal policy. Eventually, we will have to change these policies again. Will the government then consider full and equal citizenship? The following sections are brief critiques of various claims the federal government uses to justify its authority for federal Indian policy.

The Commerce Clause

The United States Code claims that, "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 the Indian Tribes' and, through this and other constitutional authority, **Congress has plenary power over Indian affairs**." [Emphasis added] The word "plenary" is defined as full, unqualified, entire, complete or absolute. The reference to "this and other constitutional authority," is an allusion to the authority shell game.

For many years, when other authorities such as the war powers were considered adequate, the interpretation of the Commerce Clause was more limited. The original purpose of the Commerce Clause was validly expressed in the six Trade and Intercourse Acts which were passed from 1790 to 1834 and controlled contact and trade between American citizens and Indian tribes.

The word "plenary" is defined as full, unqualified, entire, complete or absolute. The reference to "this and other constitutional authority," is an allusion to the authority shell game.

The Commerce Clause gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" No one would insist that Congress' authority to regulate commerce with foreign nations and states gives them plenary power over foreign nations or states. Why would the parallel passage provide plenary power over Indian affairs? The only way the Indian Commerce Clause can justify Congress' plenary power over Indian affairs is if tribal members themselves are legally considered property. Then total and complete power over their affairs as "commerce" makes sense.

In his concurring opinion in the 2004 *United States v. Lara*, 541 U.S. 193 (2004) decision, Clarence Thomas said:

> "The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it…I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.'…I cannot locate such congressional authority in the Treaty Clause, U. S. Const., Art. II, §2, cl. 2, or the Indian Commerce Clause, Art. I, §8, cl. 3…The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power…I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'…At one time, the implausibility of this assertion at least troubled the Court, see, e.g., *United States v. Kagama*, 118 U. S. 375, 378-379 (1886) (considering such a construction of the Indian Commerce Clause to be "very strained"), and I would be willing to revisit the question."

Justice Thomas is correct when he says, "I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs." There isn't any indication that plenary power over Indian affairs flowing from the Commerce Clause was ever contemplated by either those who created or ratified the Constitution.

Indian activist lawyers essentially admitted the status of Indian law at a 2003 Indigenous Nations Law Symposium. According to an April 14, 2003 posting by Jennifer Hemmingsen in *Indian Country Today*, the scholars agreed that, "There is no question, Indian law is a mess." They were reported to have said:

> "'The four volumes of Indian law have no overarching philosophy or direction. In fact, no Indian law has ever been repealed, even though the federal government has undergone at least six changes in general policy toward Indians in the last 200 years,' the scholars said. 'The result is a hodge-podge of laws and a code that is difficult to understand.'"

The scholars seemed to agree with attorney and Professor Frank Pommersheim when he said, "The only way tribal sovereignty can ultimately be enduring is if it becomes an express part of the United States Constitution." Their discussion and this statement, of course, are powerful admissions that "tribal sovereignty" isn't currently "an express part of the United States Constitution." In his Congressional testimony opposing Senator Akaka's Native

Hawaiian Recognition Bill, nationally known attorney Bruce Fein said simply, "Creating a race-based government is not a regulation of commerce."

Treaties

Many people agree that federal Indian policy is harmful, even racist, but they think that these policies are required by the treaties that have been entered into between the federal government and Indian tribes. The United States Government entered into about 373 treaties with less than 150 Indian tribes between 1778 and 1868.

Many tribes have multiple treaties. For example, there are twenty treaties with the Cherokee, forty-four with the Chippewa and fifteen with the Choctaw. The treaties and agreements with the various Sioux bands are recorded in a three volume book set. The Bureau of Indian Affairs recognizes 561 tribes (March, 2006). There are also, numerous agreements between the government and tribes starting in 1792 and occurring especially after the end of the treaty period in 1871.

The federal government recognizes hundreds of tribes that don't have a single treaty with the government. There isn't a single treaty between the government and Indian people in general. All the treaties were between the government and specific Indian tribes. A treaty with one entity doesn't bind relations with other entities. Treaty provisions with Spain, for example, don't normally control our relations with Denmark. If federal Indian policy is required by treaty provisions why does the government recognize and deal with treaty and non-treaty tribes essentially the same? Why do they deal with different tribes who have different treaties, and treaty provisions, essentially the same? The vast majority of modern federal Indian policy is unrelated to Indian treaties.

The Constitution makes treaties the "supreme Law of the Land" with this clause:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [Art.VI, Cl. 2]

(The "Legal Issues" section of our web site is one of the few places you can find a link to all the Indian treaties.) Indian treaties are valid historical documents equal to the highest law of the land and superior to state constitutions and laws, but are superseded by later federal treaties, legal agreements, laws, and, of course, the US Constitution itself. For example, in *Reid v. Covert*, 354 U.S. 1 (1957) the Supreme Court said:

> "There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. For example, in *Geofroy v. Riggs*, 133 U.S. 258, 267, it declared:
>
> "'The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the [354 U.S. 1, 18] government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.'
>
> "This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument."

Tribal activists often claim a favored provision out of a single treaty while ignoring other provisions of the same treaty and also later treaties, agreements, laws and the Constitution with its Amendments. They then attack anyone who objects to this simplistic approach as anti-treaty and anti-Indian. As this Journal demonstrates, there are some very significant later laws and constitutional provisions that impact treaty interpretations.

These limitations guarantee that treaties cannot provide a valid legal basis for modern federal Indian policy.

The Fourteenth Amendment, the Dawes and Burke Acts, the Citizenship Act of 1924 and many other laws and constitutional provisions legally should take precedence over any inconsistent provisions of earlier treaties. Indians on reservations still do not have the protections of our state and federal constitutions. Not only is the current situation not required by law, it violates any normal understanding of law. For an explanation of the status of tribal members on reservations read the article entitled *Why Indians are Second Class Citizens* available at the bottom of the "Home Page" on our web site at: www.citizensalliance.org.

Modern federal Indian policy is entirely dependent on the existence of tribal governments in order to function. If treaties didn't prevent the end of tribal governments as political entities as mandated by the Dawes and Burke Acts, then these same treaties certainly can't require the reestablishment of political tribal governments by the Indian Reorganization Act of 1934.

Justice Clarence Thomas referred to this while concurring in *United States v. Lara*:

> "Next, the Court acknowledges that '[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.''… (quoting U.S. Const., Art. II, §2, cl. 2). This, of course, suffices to show that it provides no power to Congress, at least in the absence of a specific treaty. Cf. *Missouri v. Holland*, 252 U. S. 416 (1920). The treaty power does not, as the Court seems to believe, provide Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty. Such an assertion is especially ironic in light of Congress' enacted prohibition on Indian treaties.
>
> "The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'"

Not only is Judge Thomas correct in his analysis that you need a specific treaty provision, as has been noted above, you also need a specific treaty that hasn't been voided by later treaties, agreements, laws or the provisions of the Constitution itself. Then that treaty only controls relations with the specific tribe involved. These limitations guarantee that treaties cannot provide a valid legal basis for modern federal Indian policy. Just one question should be sufficient to clearly demonstrate this fact. Where are the treaty provisions that authorize the federal government to hold the deed to all "Indian land?" Very simply, they don't exist. Many of the most common and important treaty provisions would be fulfilled by finally granting full and equal citizenship rights to all Indians.

The Property Clause

The Property Clause became one of the primary justifications for federal Indian policy when the United States ended treaty-making with Indians by statute in 1871. The Property clause in Article IV, Section 3, and Clause 2 of the Constitution says, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory…" The power given to Congress to make "all needful Rules and Regulations" is certainly extensive. This sounds very much like "plenary power." It may explain why the federal government has maintained a unique category of land called "Indian country" and jealously held the deed to all "Indian land" for all these years. Does retaining federal ownership of the land then allow the federal government to classify "Indian country" and "Indian land" as "territory?" If so what are the implications for Indian policy?

This Article (Article IV) of the Constitution controls various relations between the federal government and states and between the various states themselves. The Property Clause was written to regulate huge land cessions and

purchases, like the Northwest Territories, and was intended to transform new land – territory – that had not previously been under the jurisdiction of the United States into new states. The first part of this Clause says that "The Congress shall have Power to dispose of…" The great power granted by this constitutional provision was never intended to be a permanent power over the land and people. "The Power to dispose of" is not a power to permanently hold and it certainly isn't the power to acquire land that is already under the jurisdiction of states. Congress was expected to dispose of the land. Congress was given the authority to regulate these lands until they had sufficient people, infrastructure and organizational ability to become equal states of the Union. With the vast regulatory power came a trust responsibility to the future states and their people. Maintaining huge chunks of land permanently in territorial status, primarily in the west, not only violates the intention of this power but also violates the trust responsibility to the states and the people associated with them. In the western United States, over fifty percent of the land is still under some form of federal control. In Nevada the federal government controls over eight-five percent of the land and less than twelve percent is private land. In Utah almost seventy percent of the land is federal and about twenty-one percent is private.

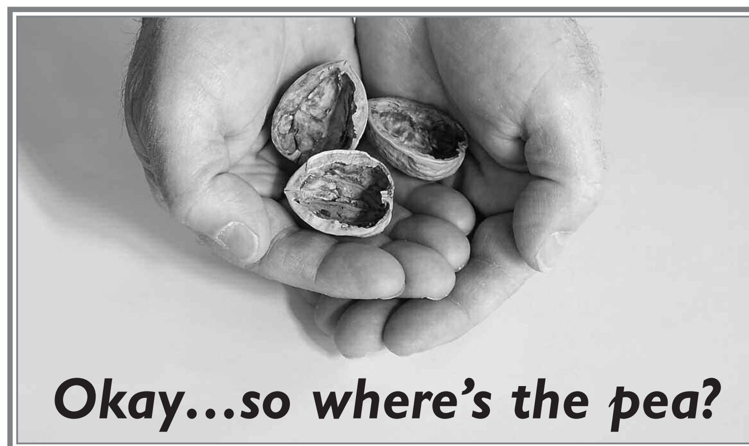
In territories, Congress has the entire dominion, authority and sovereignty. This means that tribal governments, their actions, courts and sovereignty, all function as substitutes for the federal source of their authority. This has some unpleasant implications for both the federal government and the tribal governments. If this is the justification for federal Indian policy then tribal powers under the Indian Reorganization Act and later acts are powers delegated from the US government who remains fully responsible. As the *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) decision clearly stated, the government and its actions must remain subject to the Constitution and its protections, including the Fourteenth Amendment even in the territories. For these, and other, reasons both the federal government and the tribes are hesitant to openly claim the Property Clause as the authority for federal Indian policy.

Reserved Rights

The federal government reserved rights to land, water and sovereignty when territories became states. This was done in two different ways. The simpler method was with the passage of congressional acts that allowed the territories to become states. An example is the Enabling Act of February 22, 1889 that enabled the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments.

Part of this enabling act says, "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States…nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

There are several interesting features of this enabling act. First, note that it says, "[t]hat the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof…" This enabling act was an act of Congress without even a voting representative from these territories. Without any actual consent of the people of these territories, the Congress simply pronounced in law that the people of these future states "agree and declare that they forever disclaim all right and title" and then continued, "until the title thereto shall have been extinguished by the United States…[and] said



Okay…so where's the pea?

Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Finally this is "until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

The Indian lands were to "remain under the absolute jurisdiction and control of the Congress of the United States" which was consistent with both the Dawes and Burke Acts and the federal policies of the times. When the reservation was extinguished the territorial lands were to be "restored to, and become a part of, the public domain."

This enabling act was passed in 1889, two years after passage of the Dawes Act of 1887. As previously mentioned, the Dawes Act established a formula to phase out all tribes and reservations over a twenty-five year period. This history, and the requirement in the Property Clause for Congress to dispose of territory, might explain why the enabling act twice refers to the reserved land status eventually being "extinguished."

The second type of reserved rights has even more serious negative impacts on the states and their people. The other types of reserved rights are Winter's doctrine claims. The Winters and Winans cases established as a matter of federal Indian common law that any rights claimed to be reserved by the United States for an Indian tribe when a reservation of federal land was made could be pursued at any time against rights claimed to have been given by a territorial or state government. (*Winters v. U. S.*, 207 U.S. 564 (1908); *U.S. v. Winans*, 198 U.S. 371 (1905)) These federal reserved rights claims have applied mostly to water rights and fishing rights. All reserved rights claims are territorial war power claims that arise under the Property Clause.

Because of continuing conflicts caused primarily by early federal Indian policies and the original quasi-sovereign nature of tribes, the original states chose to solve these problems with a harsh removal policy. Tribes were relocated into western territories. As western territories were becoming states, federal Indian policy changed toward ending reservations and incorporating individual Indians into American society as equal citizens. Then after statehood, the federal government again changed policies, reorganizing tribal governments after passage of the IRA in 1934 and then with Nixon's decisive break with the past to a modern radical "sovereignty." These policy changes manipulated western states into the same untenable conflict that eastern states found themselves in prior to their removal policies of the 1830s and continue to raise questions about whether western states really are on an equal footing with their eastern counterparts.

The Indian Trust Relationship

As we mentioned earlier, the trust relationship developed from the *Cherokee Nation v. State of GA*. Supreme Court decision that said Indians, "are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." The *United States. v. Kagama* Supreme Court decision, amplified the ward/guardian/trust relationship. Indians were "spoken of as 'wards of the nation;' 'pupils;' as local dependent communities…dependent largely for their daily food; dependent for their political rights." The Court referred to tribes as under the protection of the United States. The Burke Act of 1906 allowed the Secretary of the Interior to issue fee patents to Indians who were, "competent and capable of managing his or her affairs."

A ward is a person whom the law regards as incapable of managing his own affairs, and over whom a guardian is appointed. The entire trust relationship of the federal government toward tribal members is based on the fiction that tribal members are incompetent and incapable of managing their own affairs. If this relationship was ever truly valid, its transition from a temporary status to a permanent one, long ago became an embarrassment at best. Today most tribal government budgets dwarf those of their comparable neighbors. Tribal members are Harvard and Yale educated attorneys. They run multimillion dollar casinos and other businesses and they have some of the best legal, public relations and lobbying counsel available in this country.

The Indian Trust Relationship is based on all of the federal powers asserted by the federal government. It is not possible to discuss the Indian Trust Relationship without discussing the means by which the federal government claims the power to enforce this relationship. The Indian Trust is interpreted in the context of the "plenary powers" of Congress. Plenary power was defined in *United States v. Kagama* as being a combination of the Indian Commerce Clause, Treaty Clause and Property Clause. As explained in other sections in this issue, these constitutional powers through federal Indian common law have been greatly expanded by using federal war powers. The "plenary

powers" have been traditionally enforced through the "reserved rights doctrine." The United States is saying that Congress has full, unqualified, entire, complete or absolute power over Indian affairs. Given this essentially unlimited federal authority, until the continuing *Cobell v. Kempthorne* case, the Indian trust relationship was defined any way the United States wanted to define it – solely at the whim of the federal government and what they could get a federal judge to agree to. This is what the pleadings filed by the Secretary of Interior in the Cobell case actually assert. The Indian trust relationship is not a true trust because it has no express duties assumed by the United States in any statute or treaty. There is no corpus or body of a trust ever expressly created. The Indian trust is purely a judicial creation in federal Indian common law that began with the concept of Indian title and was converted into a constructive trust relationship in *Worcester v. Georgia* (1832).

Federal Indian Common Law

Common law is based on judicial precedents (court decisions) rather than legislative enactments (statutes) and is derived from judicial principles rather than laws passed by the Congress. Common law precedents may be overruled by the enactment of legislation on the subject, unless the precedent was an interpretation of the Constitution. Federal Indian common law is simply judicial precedents about Indian legal cases that have come before the federal courts. The nebulous world of Indian law is a perfect realm for judge-made principles to flourish. Federal common law is no longer considered appropriate legal authority in most areas of law.

The limited nature of federal Indian common law makes it impossible for it to be a valid source for federal Indian policy. Because federal Indian policy is not enumerated within the Constitution or is effectively banned by provisions of the Constitution, federal Indian policy relies on authority from federal Indian common law precedents that ignored or did not foresee the problems of allowing the creation of unequal "tribal" rights.

Delegated Power

Delegated power as a justification for federal Indian policy works primarily in conjunction with some other power like the Commerce Clause or the Property Clause. Under this theory, the Commerce Clause, the Property Clause or some other power provides Congress with plenary power over Indian affairs and with this plenary power, Congress then delegates "sovereign" powers to tribal governments.

Many of the problems with this theory were discussed in the sections on the Commerce and Property Clauses. A simple rule of delegated power is that you can't delegate more than you have. The federal government receives its authority from the people through the Constitution. It is entirely a creature of the Constitution. Its scope and power are based solely on that document. It can't escape the constraints of that document by establishing other governments apart from, and unconstrained by that document. There is certainly not anything in the Constitution that requires the establishment of tribal governments and federal Indian policy. Neither does the federal government have the authority to establish "sovereign" race-based governments unconstrained by the Constitution using some kind of nebulous, delegated power. Another rule of delegated power is that you can delegate authority but you can't delegate responsibility. Even if the power could be somehow claimed, the governments and courts created would be bound by the same restraints as the federal government. If federal Indian policy is based on delegated authority, the federal government is responsible for the results. The delegation can also be modified or rescinded at the will of the federal government.

"If federal Indian policy is based on delegated authority, the federal government is responsible for the results."

As Justice Thomas said in the *Lara* decision:

> "The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'"

Inherent Power

The claim that tribal governments have a special status because they have an inherent authority that predates the Constitution is a bold assertion. According to its strongest adherents, the sovereignty (independent supremacy) of tribal governments should not be subject to either the federal government or federal or state constitutions because these tribal governments existed before the founding of our American government. Like so many other justifications for federal Indian policy, the argument for inherent tribal power mixes various truths with fatal errors.

Certainly, tribal governments did exist before the establishment of the United States and our Constitution. This argument, however, skips over almost 150 years of history. In the cases of *Worcester v. Georgia* (1832), *Ex Parte Crow Dog* 190 U.S. 556 (1883) and *Talton v. Mayes*, 163 U.S. 376 (1896), the United States Supreme Court recognized an inherent sovereign authority in the Indian tribes to be self-governing like all communities. The sovereign powers of tribes did not include dealing with international governments or selling their land without express federal permission. Until 1934, Indians had to separate from their tribes before they could become citizens. The Dawes Act of 1887, as amended by the Burke Act of 1906, effectively abolished independent tribal governments by subjecting non-citizen Indians "to the exclusive jurisdiction of the United States." All remaining non-citizen Indians then became citizens through the Indian Citizenship Act passed in 1924. Modern tribal governments have been reorganized and recognized since the 1934 passage of the Indian Reorganization Act. Modern tribal governments only exist because of the authority and recognition provided as a result of that 1934 Act. This delegated power was deemed not to increase the inherent sovereignty of the Indian tribes in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Oliphant*, the Supreme Court interpreted the earlier rulings allowing inherent sovereignty in light of the 1934 Act and ruled that inherent tribal authority did not extend to criminal jurisdiction over non-Indians. In fact, the *Oliphant* Court interpreted the previous cases as granting only power "necessary to tribal self-government or to control internal relations."

Making a special exception to this general rule for one group of people isn't functioning according to law; it is functioning in violation of law.

We, in turn, question the constitutional validity of the Indian Reorganization Act of 1934. What constitutional authority does the federal government have to reach into the body politic of American citizens and create race and ancestry based governments that aren't bound by either state or federal constitutions? This question was addressed in *Montana v. United States*, 450 U.S. 544 (1981), beginning a legal challenge to newly claimed tribal powers. Now, with the ruling in City of *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Supreme Court is openly reconsidering the assumptions of the authority of the federal government "to rekindle embers of tribal sovereignty that long ago grew cold."

In legal affairs, the latter takes precedence over the earlier. A later law takes precedence over an earlier law. An amendment to the Constitution takes precedence over the original Constitution. A later status of citizenship takes precedence over an earlier citizenship status. It could not be otherwise or countries would be locked into an increasingly distant past unable to adapt to either the present or the future. While tribal governments existed in this country before our Constitution, so did many other groups including Native Hawaiians, Hispanics, French, Spanish, Dutch and English. For example, White European males certainly also had governments in this country that predated the Constitution. While all this is true, it is also meaningless because the development of our country with its Constitution and citizenship essentially rendered these preexisting statuses irrelevant. Making a special exception to this general rule for one group of people isn't functioning according to law; it is functioning in violation of law. Indians, like all humans, do have valid preexisting inherent rights as explained in the Declaration of Independence and guaranteed in the Constitution and as individual American citizens these rights should be recognized fully and equally by our government.

War Powers

War powers have, and continue to be, controversial and confusing. The debate continues to exist over war power authority in the War on Terrorism. War Powers are based

on Article 1, Section 8 and Article II, Section 2 of the Constitution referring to foreign policy and the Property Clause. The war powers are based on the foreign policy authority of the Congress and President. Historically, war powers have been a significant source of authority for federal Indian policy starting with George Washington. Tribes, who operated as independent political entities in cooperation with other tribes and the French, Spanish and the English, threatened and waged war against the Colonies.

Our popular culture retains hints of this reality. In some old western movies, when the wagon master rode back along the wagon train and announced that they were entering Indian country, it was expected that people would make sure their Winchester was close at hand. Is the continuing legal designation of "Indian country" an attempt to maintain the war powers associated with that original designation?

In contrast to this history, thousands of Indians became citizens before, and as a result of, the Dawes and Burke Acts. They were specifically promised the full and equal protections of state law and United States citizenship and were "entitled to all the rights, privileges, and immunities of such citizens." Most modern Indians are descendants of these early citizens. All remaining American Indians became citizens over eighty years ago with the Citizenship Act of 1924. The legal definition of "citizen" means, "a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges."

…the Supreme Court acknowledged that "the equal protection of the laws" is also a "pledge of the protection of equal laws".

Indians have served in our military since before World War I and have a well earned reputation for patriotism, valor and effectiveness in combat. We don't continue to maintain "war power" authority for dealing with American Germans, Japanese, Italians, or even Iraqis or Afghans. Indian war power authority should have ended long ago including any legal precedence from previous cases that relied on war powers for their original authority. To continue to claim some kind of "war power" authority for dealing with Indian affairs is not only insulting; it is shameful.

Violating "Other Specific Provisions of the Constitution"

We don't believe any of these justifications are valid legal authorities for modern federal Indian policy. But even if every one of them were valid, this policy still violates other provisions of the Constitution.

The Supreme Court claimed in *Reid v. Covert* (1957) that, "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."

The Fourteenth Amendment guarantees:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

The Court has said in *Saenz v. Roe*, U.S. 98-97 (1999):

> "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."

The Fourteenth Amendment "limits the powers of the National Government as well as the States." The Constitution doesn't contain any enumerated, "affirmative delegation" of power that can reasonably be interpreted to provide the federal government with the authority to establish race and ancestry based tribal governments from among American citizens that are then somehow unrestrained by, and yet within, our constitutional system. There isn't any indication that either the Framers or the voters who ratified the Constitution ever contemplated that possibility. Even if enumerated powers could be found, Indian policy clearly "violates other specific provisions of the Constitution."

To continue to claim some kind of "war power" authority for dealing with Indian affairs is not only insulting; it is shameful.

In the *Adarand Constructors Inc. v. Pena*, U.S. (1995) case the Court recognized that the Fourteenth Amendments protections, including "the equal protections of the laws," are personal rights – "the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws."

In the *Yick Wo v. Hopkins* (1886) case, the Supreme Court acknowledged that "the equal protection of the laws" is also a "pledge of the protection of equal laws" and that this protection is available to "any person" and "all persons" "within the territorial jurisdiction…that all persons within the jurisdiction of the United States shall have the same right, in every state and territory:"

> "The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws....that all persons within the jurisdiction of the United States shall have the same right, in every state and territory,"

Neither tribal members nor their non-member neighbors who are impacted by federal Indian policy are protected by "the equal protection of the laws" or "the protection of equal laws."

Federal Indian policy is a massive violation of Fourteenth Amendment protections for everyone affected by those policies. Unfortunately, it is just one of many constitutional violations. Almost all constitutional provisions including most of the first Ten Amendments, the Bill of Rights, don't apply to tribal members on reservations or to tribal governments. For more discussion about this problem see the article *Why Indians are Second Class Citizens* in the "Special Sovereignty Issue" of the *CERA Journal* (Volume 11, #1 March 2006) available in the "CERA Journal" section of the web site at www.citizensalliance.org.

The due process of law is guaranteed to all persons by the Fifth and Fourteenth Amendments. Due Process is that which comports with the deepest notions of what is fair and right and just:

> "If due process is to be secured, the laws must operate alike upon all and not subject the individual to the arbitrary exercise of governmental power unrestrained by established principles of private rights and distributive justice. Where a litigant has the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894)."

As a result of federal Indian policy, laws are created and enforced that certainly don't "operate alike upon all" and those taken to tribal courts don't have the "benefit of a full and fair trial in the state courts, [where] his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition."

The Fifteenth Amendment says, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race..." A related provision in Article IV, Section 4 says, "The United States shall guarantee to every State in this Union a Republican form of Government." The United

States recognizes tribal political governments that deny the right to vote to everyone who isn't an approved Indian with the correct ancestry, thus violating both provisions.

Article I, Section 9, Clause 8 says, "No Title of Nobility shall be granted by the United States:" and Section 10, Clause 1 says, "No State shall…grant any Title of Nobility." The purpose of these clauses was to prohibit different classes of citizenship, especially citizenship classes based on ancestry, in this country. John Randolph Tucker, LL.D., described nobility on page 118 of his book, *The Constitution of the United States* thus, "The Norman nobility, holding the lands in the kingdom by feudal tenure, were vassals of the king but tyrants over the Saxon people." Similarly, the Tribe and its members are under the plenary power of Congress while simultaneously independent and supreme over members. To study more about nobility read "*The Constitution, Nobility and Different Classes of Citizenship*" available in the Vol. 8, #1 CERA News in the "CERA Journal" section of our web site.

It's not under here?
Maybe it's under there?
Like any good con man the federal government adds confusion, bluff, intimidation and even claims of victimization to its performance.

Article III, Section 2, Clause 3 says, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed;" and Amendment VI says, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed;" These provisions bar tribal criminal courts.

The Tenth Amendment says, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution and this Amendment establish a federal system of government including the United States, the various States and the people, excluding tribal governments.

How Did We Get It So Wrong?

Article VI, Clause 3 says, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Those taking that Oath promise, "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same…"

How have those taking this Oath of Office deviated so far from their solemn promise? Analyzing three significant Supreme Court decisions can provide a window into their mindset.

In the *Duro v. Rena*, 495 U.S. 676 (1990) decision, the Supreme Court has said that tribal "retained jurisdiction over members is accepted by the Court's precedents and justified by the voluntary character…of tribal membership." They continued, "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…criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."

They also noted that, "It is significant that the Bill of Rights does not apply to Indian tribal governments." In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) they noted, "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 to the Fourteenth Amendment." The Ninth Circuit Court has said simply, "This holding is consistent with other judicial decisions finding the Constitution inapplicable to Indian tribes, Indian courts and Indians on the reservation."– *Tom v. Sutton*; 533 F.2d 1101, 1102-03 (9th Cir.1976). With the Indian Reorganization Act of 1934, the United States, a government which supposedly "is entirely a creature of the Constitution…[Whose] power and authority have no other source…[and] can only act in accordance with all the limitations imposed by the Constitution," has encouraged and recognized race and ancestry based tribal governments that are not themselves subject to the Constitution.

The Supreme Court has said in *Frost v. Railroad Commission of State of California*, 271 U.S. 583 (1926) that:

> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence….And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it…The states cannot use their most characteristic powers to reach unconstitutional results."

If a state can't "compel the surrender of one constitutional right as a condition of its favor" and "the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws" *Adarand Constructors Inc. v. Pena* (1995), how then can the federal government compel the surrender of constitutional rights as a hidden part of becoming a tribal member?

Indians becoming tribal members lose their federal and state constitutional protections when they "voluntarily consent" to become tribal members. 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 about, or gave any kind of informed voluntary consent, to this reduction in their rights as US citizens. The vast majority of tribal members are still unaware of this "voluntary consent" and the loss of their constitutional rights. They join the tribe to be a part of their community and to receive a comprehensive array of benefits. The very definition of "voluntary" requires intentionality, design, agreement and the absence of valuable consideration. What kind of an ethical system sneaks people's constitutional rights away from them without their knowledge?

In the second case, non-Indian employees of the BIA sued against Indian preference laws. They claimed these laws violated the "anti-discrimination provisions of the Equal Employment Opportunities Act of 1972 and deprived them of property rights without due process of law in violation of the Fifth Amendment."

Indians becoming tribal members lose their federal and state constitutional protections when they "voluntarily consent" to become tribal members".

In *Morton v. Mancari*, 417 U.S. 535 (1974) the Supreme Court ruled that Indian employment preferences were legal. The majority of the opinion probably correctly asserted that Congress intended to maintain Indian preference laws. In this section, the Court maintained that, "In order to achieve this end, [the purpose of the Indian Reorganization Act of 1934] some kind of preference and exemption from otherwise prevailing civil service requirements was necessary." The Court noted "the unique legal status of tribal and reservation-based activities. They said that, "The preference is a longstanding, important component of the Government's Indian program." They also said that, "Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique relationship between the Federal Government and tribal Indians."

The Court then responded to the question of whether "the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment." The Court noted:

"Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly [417 U.S. 535, 552] from the Constitution itself. Article I, 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

> 'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. …'"

What a demonstration of the shell game in action! In this one short section, the Court claims authority from "the unique legal status of Indian tribes," "the plenary power of Congress," the Treaty Clause, the Trust Relationship, the Commerce Clause, War Powers, and "necessity." Surely, everyone will think they detect the blur of authority for federal Indian policy somewhere among all these claims. One thing that allows this shell game to be so effective is that there is seldom, if ever, an appropriate official forum where all these claims can be professionally and comprehensively challenged in one venue. The federal government seeks to cherry pick from among these claimed authorities just the powers they desire while ignoring associated limitations.

Notice that the claimed purpose for the "obligation" was temporary. It was to "to prepare the Indians to take their place as independent, qualified members of the modern body politic." How many of us really believe that the minority of Indians – the roughly twenty percent who continue to be tribal members living on reservations – are permanently "uneducated, helpless and dependent people, needing protection?"

The Court then correctly notes that, "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." The "solemn commitment" was "to prepare the Indians to take their place as independent, qualified members of the modern body politic" not to establish a permanent dependency. How many parents would think it was beneficial to establish a permanent dependency for their children, and grandchildren, and great grandchildren, etc. essentially forever…and then have that dependency administered by the federal government? What kind of mindset supports and maintains a federal Indian policy that is fundamentally premised on the proposition that tribal members are permanently "uneducated, helpless and dependent people, needing protection". After over two hundred years of this "special relationship," it is time to either claim victory, or admit defeat, and to abandon these policies in favor of allowing Indians to truly become equal "independent, qualified members of the modern body politic."

Thus, in the opinion of the Tenth Circuit Court of Appeals the ICRA is a "mere unenforceable declaration of principles."

The Court then makes a truly Orwellian statement. They say, "Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference…Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups...The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." "Sovereign" means "independent and supreme" and the "tribal entities" are tribal governments which are based entirely on race and ancestry. You can almost hear the pigs in George Orwell's *Animal Farm* claiming, "All animals are equal, but some animals are more equal than others." It has been noted that it is much easier for governments to talk glowingly about legal equality than it is for them to actually practice it. The U S government has a federal Indian policy, a U S Senate Committee on Indian Affairs, a Bureau of Indian Affairs, and Indian Health Service, Indian sections in every major government agency, so-called Indian country, and exclusively Indian tribal governments ruling on Indian reservations. If the federal government committed itself to protecting White supremacy governments and we substituted the word "White" for "Indian" in the preceding sentence, might some of us consider the possibility of a hint of racism involved with this? Federally recognized, race and ancestry based, "sovereign" tribal governments are unaccountable to either state or federal constitutions and are largely free from challenges because of their "sovereign immunity." It would be difficult to conceive of a situation more appropriate for the application of the personal protection guaranteed by the Fourteenth Amendment's "equal protection of the laws" than federal Indian policy.

What kind of mindset supports and maintains a federal Indian policy that is fundamentally premised on the proposition that tribal members are permanently "uneducated, helpless and dependent people, needing protection".

The Court then correctly notes that, "In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly sui generic [unique]…On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular…and special treatment…This unique legal status is of long standing…and its sources are diverse." CERA believes that this temporary, unique, special treatment should have ended with citizenship in 1924. It has gone on far too long, has become almost unbelievably destructive and its diverse sources are no longer valid.

The third case, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) developed as a response to the Indian Civil Rights Act (ICRA) of 1968. Congress passed the ICRA in response to numerous complaints from tribal members about civil rights violations by their tribal governments. This suit was filed against serious sex and ancestry discrimination that violated ICRA's requirement that tribes grant the equal protection of the law.

One major question was whether federal courts had jurisdiction to hear the case. In reviewing the case, the Tenth Circuit had said that, "since [the ICRA] was designed to provide protection against tribal authority, 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 its opinion the Supreme Court went back to several standard lines of Court opinion running back to *Worcester v. Georgia*, decided in 1832, ruling that tribes are "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." They also said that, "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" citing *Talton v. Mayes*, decided in 1896. These old Indian decisions were made when tribal governments were outside of our constitutional system and their tribal members weren't citizens. The Court noted that, "In ensuing years the lower federal courts have extended the holding of Talton to other provisions of the Bill of Rights,

as well as to the Fourteenth Amendment." The Court then "recognized" that, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." The Court accepted that, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers" before adding that, "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress."

The Court then entered into an extended analysis of Congress' intent in passing the ICRA. They discussed Congress' intention to "balance" on the one hand "strengthening the position of individual tribal members vis-a-vis the tribe," and promoting "the well-established federal policy of furthering Indian self-government." on the other hand. They decided that, "Congress' failure to provide remedies other than habeas corpus for enforcement of the ICRA was deliberate." They closed the opinion by noting that, "Our relations with the Indian tribes have 'always been…anomalous [abnormal]…and of a complex character.'"

So what happened in this decision? Tribal members have somehow become unequal American "citizens" without the protections of either state or federal constitutions. After hearing numerous complaints from tribal members because of this status, Congress passed the ICRA supposedly granting tribal members protections somewhat similar to the Bill of Rights and the Fourteenth Amendment. However, since the ICRA is federal, not tribal law and tribes are protected from suit by "sovereign immunity," tribal members can only sue the tribal government that violated their rights with that same tribal government's permission. The ICRA, which again is federal law, can't be enforced in federal court because "Congress' failure to provide remedies other than habeas corpus for enforcement of the ICRA was deliberate." Thus, in the opinion of the Tenth Circuit Court of Appeals the ICRA is a "mere unenforceable declaration of principles." Tribal members, who are also both state and US citizens, still don't have the protections of either constitution. Congress passed the ICRA to supposedly alleviate the situation but tribal members are "deliberate[ly]" left without any effective enforcement mechanism.

The federal government continues to treat tribal members on reservations as if the Fourteenth Amendment, the Dawes and Burke Acts, and the Citizenship Act of 1924 never happened. As if these tribal members weren't American citizens and as if both state and federal constitutions are meaningless for them. The ICRA is worse than a "mere unenforceable declaration of principles." It is a part of, and similar to, federal Indian policy itself. Behind all the complexity and confusion they are both simply huge racist frauds.

"Let's Just Be Fair"

A large number of American citizens really don't care about the legal technicalities of federal Indian policy. They have heard that tribes "lost" their land – which was "taken" or "stolen" from them, and they just want to "make up for" past injustices. The legal term for what they seek is called equity. Is this understanding of history justified, or is it based primarily on myths which are the result of very purposeful and effective public relations campaigns?

The validity of historical Indian claims against the federal government was studied by the Indian Claims Commission (ICC) for over thirty years. This Commission was established on August 13, 1946 for the purpose of inviting "any identifiable group of Indian claimants" to bring past grievances before it for **final** settlement.

According to the Commission's Final Report, two hundred and thirty treaties involved Indian lands. These treaties and other agreements created 720 land cessions. The Commission Act allowed any identifiable group of Indians to sue the government for any claim in law or equity based on "fraud, duress, *unconscionable consideration*, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;" for lack of payment or "claims based upon fair and honorable dealings." The Commission was very unusual because it could respond even to moral claims. In turn, Congress demanded that this Commission would make the final determination on these claims. Thus, in creating the Commission, Congress also expected this to be the end to Indian claims against the government forever.

The continuing claim of "lost", "taken" or "stolen" lands, however, is mainly a carefully crafted myth to gain political and monetary benefit. There is undoubtedly much more land that has been paid for twice, or even three times, than was ever stolen.

The Commission reported that Thomas Jefferson had studied early treaties and found that the lands of this country were not taken from the Indians by conquest and force as is so generally supposed. He said, "I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found on further search. The upper country, we know, has been acquired altogether by purchase made in the most unexceptional form." The Indian Claims Commission found that, "the United States, through formal treaty or agreement with the Indian tribes, purchased 95 percent of its public domain for an alleged $800 million. This figure and the treaties mitigate the myth of rude conquest and dispossession."

Secretary of the Interior Julius A. Krug wrote to the President in his prepared statement urging the President's signature:

> "The bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes, we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 percent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings – the largest real estate transaction in history – we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made."

The Commission was granted a ten year lifespan. This was eventually extended to over thirty years. The Commission settled 546 claims, granting awards on over 62 percent of them for a total of over 818 million dollars during its existence. Over 70 additional unfinished claims were transferred to the Court of Claims before the Commission went out of existence.

Because of inflation, the original monetary amount of over 800 million dollars plus another over 818 million dollars is fairly meaningless to the modern reader. Two other purchases in a similar time frame can provide some perspective. On Apr. 30, 1803, the U. S. Government bought the Louisiana Purchase which included 828,000 square miles for 15 million dollars, or less than three cents per acre. Since this was just under a fourth of the entire land mass of the current United States, the equivalent cost for the whole country would be 65.5 million dollars. Thus we have paid tribes, just for land purchases from them, well over twenty-five times as much per acre as we paid France for the Louisiana Purchase. Then on October 18, 1867, we bought Alaska which included 656,425 square miles for 7.2 million dollars or about 1.7 cents per acre. Both of these purchases faced significant opposition and the wisdom of the Alaskan purchase was widely questioned and derided as "Seward's Folly."

After careful study, Thomas Jefferson "found that the lands of this country were not taken from the Indians by conquest and force as is so generally supposed," but "by purchase made in the most unexceptional form." Many years later, after reviewing the studies in preparation for the ICC, Secretary of the Interior Julius A. Krug said, "[t]he bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes, we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights." On top of this, we established

the ICC to correct any remaining injustices with the understanding that the ICC would be the end of all these claims forever.

The more significant question may be why the perception of lost, taken or stolen lands is so widespread and persistent? Why are we so much more inclined to know the basic story of Wounded Knee than the Minnesota Massacre, for example? Few people, then or now, begrudge payments to Indians for the real misdeeds of our government. The continuing claim of "lost," "taken" or "stolen" lands, however, is mainly a carefully crafted myth to gain political and monetary benefit. There is undoubtedly much more land that has been paid for twice, or even three times, than was ever stolen. Our country's very commendable concern to be fair can become a weapon to be used against us.

Humans and their dealings with one another are far from perfect. Nothing can make them flawless. Even after great effort, serious injustices definitely happened and some undoubtedly continue to exist. But these injustices weren't all one-sided – Indians also violated treaties. Where has the effort been by tribes, similar to the Indian Claims Commission, to correct the depredations committed by Indians against white settlers or between the many different Indian groups against each other for that matter.

Conclusion

The federal government has changed a temporary trust responsibility designed to help Indian people "take their place as independent, qualified members of the modern body politic" into a permanent system of dependency that fosters a form of bondage for hundreds-of-thousands of tribal members. In the process, the lives of hundreds-of-thousands of non-members who live in "Indian country" are also significantly damaged. Millions more American citizens are negatively impacted by this system. Our entire constitutional system is being perverted to maintain federal Indian policy. The government has done this by stretching questionable constitutional authorities far beyond any original intention, cherry picking various arguments in favor of its policies while ignoring clear limitations and constitutional prohibitions against these policies.

Federal Indian policy couldn't be justified even if these policies were objectively successful. They are not. The defenders of federal Indian policy like to present themselves as enlightened and progressive. They are not. The policies are literally an unfortunate remnant from the 1800s. They weren't very successful then and they certainly aren't now. When challenged about the authority for the policies, their defenders retreat into a series of assertions like con artists operating a shell game.

Both the federal government and tribal governments like this system. Tens-of-billions of dollars are involved annually and through Indian policy, the federal government claims plenary (total) power. Supported by the federal government, tribal governments also inexplicably claim sovereign (independent supreme) power and sovereign immunity. In 1887, Lord Acton said, "Power tends to corrupt, and absolute power corrupts absolutely." The corruption that Lord Acton predicted because of this system vastly dwarfs anything caused by a few mere lobbying scandals regardless of how big those scandals are.

CERA does not believe the government's claims of authority for federal Indian policy are based on any valid enumerated power of the federal government. We also believe the policy clearly "violates other specific provisions of the Constitution," especially the "personal rights" to "the equal protection of the laws" guaranteed by the Fourteenth Amendment. CERA finds itself in the position of the little child in Hans Christian Andersen's tale of The Emperor's New Suit who said, "But he has nothing on at all," Just like the Emperor's new suit, the federal government has "pulled their authority [for federal Indian policy] out of thin air." Meanwhile, the government continues on just like the Emperor who "drew himself up and walked boldly on holding his head higher than before, and the courtiers held on to the train that wasn't there at all."

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