

INDIAN TRIBAL SOVEREIGNTY

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I - THE FLAWED CORNERSTONE OF FEDERAL INDIAN POLICY

More than 160 years ago, two decisions handed down by the Supreme Court of the United States describing the relationship between the Indian tribes, and the state and federal governments, and the concept of a separate limited sovereignty for the tribes, were to become the foundation upon which American federal Indian policy would be built. The two cases, *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832), also known as the “*Cherokee Cases*,” constitute 2 of the 3 cases known as “*Marshall’s Trilogy*,” after Chief Justice John Marshall. Both the relationship and separate tribal sovereignty set forth in these decisions have been described by Alan van Gestel, an attorney that represented the counties during the 1980’s in the Oneida Indian land claims, as “legal fictions” that have “brought to Indian country tax-free gasoline and cigarettes, high-stakes bingo and freedom from many state criminal laws.” They have also brought to non-Indian country, Indian land claims that have created havoc for innocent American landowners.

In *Cherokee Nation v. Georgia*, Marshall described the Indian tribes as “domestic dependent nations,” that are “in a state of pupilage,” and that “Their relation to the United States resembles that of a ward to his guardian.” Marshall said of the Indians, “They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.” It can be safely assumed that the “state of pupilage” of which Marshall speaks refers to a period of learning established for the tribes to learn the ways of the “white man’s” civilization. Isn’t it reasonable to assume that after 168 years the Indian tribes should have long ago graduated from their “state of pupilage,” and no longer be in need of the protection of the federal government? In 1901 the Board of Indian Commissioners stated that, “the Indian Bureau should always aim at its own speedy discontinuance, and “Its success,” it

stated, “is to be shown not in self-perpetuation, but in self-destruction.” It declared its mission to be to “make all Indians self-supporting, self-respecting, and useful citizens of the United States.” A full 98 years later, the bureau is still in existence with no date for its termination in sight.

In the *Granite Valley Hotel v. Jackpot Junction Bingo and Casino* (1997) decision of the Court of Appeals of Minnesota, Judge Randall said of *Cherokee Nation v. Georgia*:

Cherokee Nation is a real case and it sets out two important truths. The first truth is that on the narrow legal issue of whether federally-recognized tribes are the equivalent of a true Sovereign Nation like Canada or Mexico, it is clear that they are not. All of Cherokee Nation 's progeny, from the date of its release to 1997, continue to reiterate that Indian tribes are under the will and defeasance of Congress and that Congress has total "plenary power" over tribes.

The second truth to be taken from Cherokee Nation is that from that day to today, the federal government has engaged in a failed Indian policy; partial failure at times and total failure at others, but always a failure, because both before and after 1924 when the American Indian was finally accepted as an American citizen, the American Indian has never been extended all the rights, privileges, and obligations of statehood and American citizenship. Right today, the rights, privileges, and obligations of the Constitution of the State of Minnesota and the U.S. Constitution are not guaranteed to Indian people domiciled within the boundaries of Minnesota's Indian Reservations.

Judge Randall continues:

The Cherokee Nation nineteenth century, antiquated, questionable, and patronizing "government/ward status" continues to keep Indian people on reservations in a tribal state of dependency on either state and federal handouts or expansion of the increasingly unaccountable gambling.

A year later, in *Worcester v. Georgia*, Marshall stated, “But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend,” but contradictorily stated that a weaker power does not surrender its independence by associating with a stronger power, and taking its protection. This inconsistent view of bestowing upon the tribes a special sovereignty and simultaneously claiming that the tribes were conquered but not conquered, was certain to become a political anomaly that would outlive the anomaly of slavery in this nation.

That problems with the integration and status of Indian tribes were foreseen early on is evident. Even before the Cherokee Cases, in his State of the Union message on December 2, 1828, President John Quincy Adams stated:

But in appropriating to ourselves their hunting grounds we have brought upon ourselves the obligation of providing them with subsistence; and when we have had the rare good fortune of teaching them the arts of civilization and the doctrines of Christianity we have unexpectedly found them forming in the midst of ourselves communities claiming to be independent of ours and rivals of sovereignty within the territories of the members of our Union. This state of things requires that a

remedy should be provided - a remedy which, while it shall do justice to those unfortunate children of nature, may secure to the members of our confederation their rights of sovereignty and of soil.

Concurring in the *Cherokee Nation v. Georgia* decision, and referring to the possible recognition of Cherokee sovereignty, Justice Johnson had this to say:

There is one consequence that would necessarily flow from the recognition of this people as a state, which of itself must operate greatly against its admission.

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny.

Indeed, where is the rule to stop? Today, so-called tribes are now even broken into yet more federally recognized tribes. Where does Congress obtain the right to create Indian tribes and why would it wish to do so?

From a period of our history during which the U.S. Supreme Court had little problem with the fact that human beings of African descent were owned and sold as property, we have inherited the flawed cornerstone of today's federal Indian policy. A policy that has resulted in the existence of some 558 Indian tribes that are sort of sovereign, sort of tax exempt, sort of under state jurisdiction, sort of under federal jurisdiction, but completely lacking the accountability, and checks and balances of state and federal government, and is completely unsupportable by the U.S. Constitution. From the Cherokee Cases to the present, federal Indian policy has been a history of illogical federal programs, buttressed by numerous court rulings, unhampered by common sense or constitutionality, and has finally reached the pinnacle of absurdity with the advent of modern day Indian land claims and Indian casinos.

II - A SOVEREIGNTY MOST PECULIAR AND UNCONSTITUTIONAL!

While it might be successfully argued that the federal government could legally claim guardianship over the Indian tribes for a specific purpose and specified amount of time, no such argument can logically or legally exist for its power to allow any sort of tribal sovereignty as it exists today, especially after its passing of the Indian Citizenship Act of 1924 conferring citizenship upon all Indians born within the United States.

Legal scholars claim that from the "Commerce Clause" (Article I, Section 8, Clause 3) of the U.S. Constitution, Congress obtains "plenary" power over the Indians. Does such power include the right to ignore other portions of the U.S. Constitution? It does not!

Constitution of the United States of America
Article 1, Section 8, Clause 3

The Congress shall have Power...

To regulate Commerce with foreign Nations, and among the several States, and **with the Indian Tribes;**
(emphasis added)

Constitution of the United States of America
Article 4, Section 3, Clause 1

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

Does the Commerce clause of the U.S. Constitution supercede Article 4, Section 3, Clause 1 of the Constitution? Absolutely not! Only the sovereignty of the people, the states, and that of the federal government is sanctioned by the U.S. constitution. Congress has no power to create or allow any form of semi-sovereign that is not subject to state and federal constitutions within a state, as many tribal governments are not! Indian tribal quasi sovereignty is illegal and unconstitutional in its present form, not to mention unnecessary! In *Granite Valley Hotel v. Jackpot Junction Bingo and Casino* (1997) Judge Randall puts it best:

A semi-sovereign governmental entity is a large category including the 50 states of the United States of America and the many counties, towns, cities, school districts, etc. within a state that are also governmental entities with some limited or qualified immunity from lawsuits. All semi-sovereign governmental entities have carefully structured limited or qualified immunity to make certain discretionary decisions without fear of being sued. All semi-sovereign tribal entities should have a right to this **once their organizations, as law-abiding municipalities subject to state law, including the Minnesota Constitution, and the federal Constitution, are in place.**(emphasis added) This is the only way to give Indian people half a chance to make it to the twenty-first century.

So far, we have not seen fit to require tribal governments to abide by the United States Constitution, its Bill of Rights, and individual state constitutions. This is both morally and legally inexcusable, as it is a race-based distinction—not helping a race, but killing a race.

Do Indian treaties confer sovereignty upon the tribes? They do not! Justice Johnson, again concurring in the *Cherokee Nation v. Georgia* decision of 1831, had this to say, “It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and **there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as a part of the matter ceded.**”(emphasis added) Clearly treaties with the Indian tribes were neither contracts between equals nor contracts granting the tribes sovereignty.

III - THE CONSTITUTIONAL RIGHTS OF INDIANS

After declaring in 1924 that all Indians living in the United States are U.S. citizens, does the Commerce clause give Congress the right to curtail or add to the constitutional rights of Indians? It does not! Fundamental to legal principle is the fact that later law takes precedence over contradictory earlier law. Once declared citizens, Indians (reservation Indians included) **should** have obtained the “equal protection of the laws” of the United States as enumerated by the Fourteenth Amendment of the Constitution.

Constitution of the United States of America

Amendment XIV - Citizenship rights not to be abridged

Passed by Congress June 13, 1866. Ratified July 9, 1868

1. 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 to deny to any person within its jurisdiction the equal protection of the laws.

The single most important concept, upon which the United States is firmly founded, is that expressed by Jefferson in the Declaration of Independence when he wrote, “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” This was a statement of monumental proportions that was destined to revolutionize human government throughout the world. It was a declaration of individual independence that we all must necessarily possess, and that cannot legitimately be taken from any individual by any government. It is the centerpiece of human rights! This “sovereignty of the individual” is being violated by the present form of tribal sovereignty. The unalienable rights of both Indians and non-Indians living on reservations under the jurisdiction of tribal governments are daily being violated around the country.

IV - THE PURPOSE OF INDIAN TRIBAL SOVEREIGNTY

Through his “Trilogy” of decisions, Chief Justice Marshall gave us Indian tribes that were a form of ambiguous domestic, dependent nations whose independence was limited only by their inability to dispose of their lands without federal approval and to treat with foreign governments. While it is generally conceded by American courts that tribal sovereignty is inherent and not derived from the federal government, it is free to act only with federal modification. Today, courts examine such things as judicial decisions, executive policies, statutes, and treaties to determine whether or how tribal sovereignty has been modified. Modification of Marshall’s views

continues, but his flawed views still form the basis of federal Indian policy.

It can safely be said that, tribal sovereignty, as originally envisioned by the courts and the federal government, was supposed to allow the tribes to maintain their traditions and culture. Ironically, state and federal sovereignty would do a much better job of maintaining Indian culture and traditions than tribal sovereignty is now doing and the reason for this is simple: state and federal sovereignty is based upon and supports the “sovereignty of the individual,” while tribal sovereignty is not and does not. What tribal sovereignty has become, is perhaps best described by Judge Randall again in his decision *Granite Valley Hotel v. Jackpot Junction Bingo and Casino* (1997), in which he states:

The present version of "sovereignty" denying reservation residents the benefits of the Minnesota Constitution, the United States Constitution, its Bill of Rights, denying them accountability from tribal government and exempting them from constitutional obligations of due process imposed on the rest of America, is the filthiest piece of misguided patronizing racism this side of hell.