In Defense of Indian Rights

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WHAT SHOULD AMERICA'S policies toward American Indians be as we enter the new millennium? Should Indian tribes be viewed as "sovereign nations," "domestic dependent nations," wards of the federal government, or membership organizations similar to culturally based nonprofit corporations? Should Indians be viewed as full Americans with the same rights and responsibilities as every other American? Or should Indians and tribes attempt to maintain a "separate but equal" status in American life, and should a separate status continue indefinitely?

In fact, today, Indian people are *citizens* of the United States, *citizens* of the state in which they reside, and, in some cases, *members* of a tribe representing some aspect of their genealogical heritage. Tribal membership should not affect the citizenship rights of Indian people, but it often does. And the status of tribal governments, in some cases, even affects the citizenship rights of non-Indian citizens who come in contact with a tribal government.

As of the 1990 U.S. census, there were 1,959,234 people who identified themselves as Indian, 60 percent of whom are enrolled members of one of

the 557 federally recognized tribes, bands, or communities.[1] But many, if not most, people who identify themselves as "Indian" are actually only one-quarter or less Indian, with the balance of their family lineage being of some other racial combination. In fact, many people who consider themselves Indians are of a primarily non-Indian heritage and ethnicity.

The percentage of Indian people living on reservations has been in continuous decline in recent decades. Currently, less than 20 percent (437,431) of the Indian population live on reservations. And 46 percent (370,738) of the total number of people living on reservations are non-Indians.[2] On the nine most populous Indian reservations in the country other than the Navajo, less than 20 percent of the population is Indian. Most Indian reservations are populated primarily by non-Indian families, many of whom were invited to homestead on reservation land in the late 1800s during the "allotment era," when the federal intent was to abolish the system of Indian reservations and merge Indian people and land into surrounding communities. And many reservation families include both Indian and non-Indian family members, resulting in children who have some Indian genealogy but may not have a blood-quantum high enough to qualify for tribal membership, generally considered to be one-quarter.

In light of these facts, what should current and future policies be regarding Indian people, tribes, and reservations? At some point, the federal government must reassess its policy of maintaining so-called "Indian reservations" and treating Americans who have an Indian heritage or identity as a separate class of citizens. Should that occur when Indians are 10 percent, 5 percent, or 2 percent of the reservation population? How long should the federal government maintain a Bureau of Indian Affairs (BIA), Indian Health Service, and other programs solely for citizens with some Indian genealogy? This nation is rapidly approaching a time when there will hardly be any Indians left on reservations, and those Indians who remain there will hardly be Indian.

History: Where We've Been

In the U.S. Constitution, no governmental powers are set aside for, granted to, or recognized as existing for Indian tribes. In fact, no plan was laid out in the Constitution for how to deal with Indian tribes at all, although the United States considered tribes to be under its dominion. Nowhere in the U.S. Constitution, or in any treaty or in any federal statute, are Indian tribes recognized as sovereign. The Supreme Court confirmed this in 1886 when it stated: "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States or of the States of the Union. There exist within the broad domain of sovereignty but these two."[3]

The first American treaty with Indians was signed in 1778 with the Delaware Indians. The last was signed with the Nez Perce in 1868. Over a span of approximately 100 years, nearly 400 treaties were negotiated between dozens of Indian tribes and the U.S. government, most during the westward expansion of the mid-1800s. Nearly a third were treaties of peace. The rest were treaties ceding Indian land to the U.S. government and establishing reservations.[4] During this period, the United States paid more than $800 million for the lands it purchased from tribes.[5]

Treaties were *not* solemn promises to preserve in perpetuity historic tribal lifestyles, lands, or cultures, as is often claimed today. In fact, plans for assimilating Indian people into mainstream American life were spelled out in most treaties, often requiring that treaty payments be used for construction of schools, homes, programs to train Indian adults in agriculture, and promises to aid the transition from a subsistence lifestyle to active citizenship. Rather than being an indication that tribes were sovereign, many treaties specifically noted the lack of tribal sovereignty, and through treaties, many individual Indians and even entire tribes became U.S. citizens.[6] In 1871, Congress ended all treaty making with tribes and stated that the federal government would instead govern Indians by federal policy, acts of Congress, and presidential orders.

Great Indian leaders in history, such as Chief Joseph of the Nez Perce, Sitting Bull and Crazy Horse of the Sioux, Geronimo of the Apache, and many others, are remembered for their steadfast resistance to being placed on Indian reservations and becoming wards of the federal government. Chief Joseph expressed a common view of his time when he said in 1879:

> Treat all men alike. Give them all the same law. Give them all an even chance to live and grow. All men were made by the same Great Spirit Chief. They are all brothers. The mother Earth is the Mother of all people, and people should have equal rights upon it. We only ask an even chance to live as other men live.[7]

In 1887, the federal government too decided that attempting to keep Indian tribes separate from the rest of American civilization was not a good idea. The Board of Indian Commissioners wrote in its recommendations to Congress:

> No good reason can be given for not placing . . . [Indians] under the same government as other people of the States . . . where they live. No distinction ought to be made between Indians and other races with respect to rights or duties. No peculiar and expensive machinery of justice is needed. The provisions of law in the several States . . . are ample both for civil and criminal procedure, and the places of punishment for offenses are as good for Indians as for white men.[8]

These words resonate even more today, 135 years after the Civil War resulted in the end of black slavery and 35 years after the civil rights movement ended a separate status for black Americans. Yet America still maintains race-based tribal courts, tribal laws, tribal sovereign immunity, and a policy of tribal "self-governance," cutting off reservation Indians and non-Indians from equal justice under law.

In 1887, Congress passed the Dawes Act, also called the General Allotment Act, with the idea that Indians would fare better living as full citizens and individual members of society rather than as members of tribes. Under the Dawes Act, reservation lands held by the federal government were divided into parcels for individual Indian families after they were deemed

"competent" to handle their own affairs. The stated intent was to merge Indians into American society and to give them the means, through land ownership, of being self-sufficient members of the larger community. When all reservation land had been allotted or sold, the plan was then to abolish the BIA and thus eliminate federal bureaucratic control over Indian life.[9]

The "allotment era" lasted approximately fifty years, during which time tribal land holdings fell from 138 million acres in 1887 to 48 million acres in 1934.[10] Many Indians lost title to their property because their land was arid or untillable or because they were for other reasons unable to make a living for themselves or pay taxes. But allotment also allowed many individual Indians to own land, support themselves through farming, become U.S. citizens, and be active members of the larger community instead of relying on federal handouts for survival.

In 1924, the Indian Citizenship Act extended national and state citizenship to all Indians born within the territorial limits of the United States who were not already citizens and granted them the right to vote. This Act should have made Indians equal to all other citizens of the United States, with the same Constitutional protections, rights, and responsibilities. But the federal government has continued to treat Indians separately from other citizens, especially if they live on reservations.

In 1933, John Collier became commissioner of the BIA under President Franklin D. Roosevelt. Collier initiated a new federal Indian policy called the "Indian New Deal," which became law as the 1934 Wheeler-Howard Act, also known as the Indian Reorganization Act. Collier admired Chinese communism, which he saw as a model for society. He wanted to implement these communist ideals on American Indian reservations, including communal ownership of property and central control of economic, political, and cultural activities.[11] Many of these key aspects of the Indian Reorganization Act are still in effect on reservations today.

The Indian Reorganization Act moved away from assimilation, again made Indians wards of the federal government, and provided for placing previously allotted land back into federal trust, with the federal govern-

ment, not Indian people, holding the title. The law also provided a means through which tribes that did not have a reservation could gain federal recognition and reestablish reservation lands. Under the Indian Reorganization Act, reservations expanded an estimated 7.6 million acres between 1933 and 1950,[12] and BIA authority, programs, and staff were also expanded. Today, there are approximately 53 million acres of land in federal trust status for Indian tribes.[13]

After World War II, President Dwight D. Eisenhower established a "termination policy" in which the "trust responsibility" of the federal government to maintain Indian tribes would be terminated. The resolution that put this policy into effect stated: "It is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States."[14] Full integration was once again the stated federal policy toward Indians.

Under the termination policy, tribes could continue to exist as they chose, but federal supervision of Indian lands, resources, and tribal affairs would end, and the BIA and Indian reservations would eventually cease to exist.[15] In 1953, there were 179 federally recognized tribes.[16] By 1970, when the termination policy unofficially ended, almost 100 tribes, with an approximate total tribal membership of only 13,000 (less than 2 percent of the total Indian population), had their relationship to the federal government terminated.[17] Few tribal members were actually affected by the termination policy, owing largely to resistance in Congress to implement it.

The federal Indian Claims Commission, which existed from 1946 to 1977, paid $880 million to a number of tribes as compensation for instances in which tribes had not received fair compensation for lands they sold to the United States in the nineteenth century. Tribes made over 500 claims before the Indian Claims Commission and won awards in 60 percent of them. Most were property rights claims.[18]

Modern Times: Lack of Accountability in Tribal Governments

The idea that Indian tribes should "govern themselves" as they wish has romantic appeal, but, in practice, tribal sovereignty and self-governance have created many problems.

"The accumulation of all powers—legislative, executive, and judiciary—in the same hands, may justly be pronounced the very definition of tyranny," wrote James Madison, a founding father of the U.S. Constitution.[19] Today, the biggest exploiters and abusers of Indian people are tribal governments, in part because there is no guaranteed or enforceable separation of powers in tribal governments. Many of the largest and best-known American Indian tribes have rampant, continuous, and on-going problems with corruption, abuse, violence, or discord. There is a lack of oversight and controls in tribal governments. Most tribes do not give their members audited financial statements of tribal funds or casino funds, which on many reservations may represent tens or even hundreds of thousands of dollars per tribal member. It is literally impossible for tribal members to find out where all the money is going.

The underlying problem is that true democracy does not exist on Indian reservations. Tribal elections are often not free and fair elections, and typically they are not monitored by any third party. And true democracy includes more than just the presence of an election process. Democracy is also defined by limiting the power of the government by such things as the rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, *due process*, and protection of the basic liberties of speech, assembly, press, and property.[20] None of these exist on most Indian reservations.

Tribal chief executives and tribal councils possess near-dictatorial control over tribal members. Not only do they control the tribal court, police, and flow of money, but they also control which tribal members get homes, jobs, and health care services, and under the Indian Child Welfare Act,

they can claim more control over children who are enrolled members than the children's own family, especially non-Indian family members. If they live on a reservation, Indian people who speak up run the risk of losing their homes, jobs, health care, and other services, making internal government reform even more difficult.

Some try to justify tribal government abuses and denial of civil rights by arguing that tribal members "consent" to being governed by the tribe and therefore willingly give up some of their inherent rights of citizenship. But if asked, the vast majority of tribal members never consented to any such thing.

Unfortunately, many Indian people who remain on the reservation either do not see themselves as having much choice, owing to personal addictions, depression, poverty, and despair, or because they are themselves benefiting from the unaccountable tribal system. Most of those who are in between these two extremes have left the reservation.

With many tribes claiming expanded jurisdiction and regulatory authority, including zoning, licensing, and taxing authority within long-extinguished former reservation boundaries, many non-Indians, too, are finding themselves subject to unaccountable tribal governments, without their consent and without a right to vote in tribal government elections.

The issue of consent might be relevant if tribes were simply membership organizations like any other religious, cultural, or community group, in which it can be assumed that if you don't want to be part of the group, you don't join. But the federal policy of the past thirty years, as described by the American Indian Policy Review Commission, has been to expand tribes from being membership organizations to being literal governments sanctioned by the United States, with actual legal authority over people who may or may not have given their consent to being governed. This expanding authority of tribal governments is dangerous to the rights and freedoms of Indian people.

Congressman Lloyd Meeds (D-Washington), wrote in his dissent attached to the American Indian Policy Review Commission's Final Report in 1977:

> The blunt fact of the matter is that American Indian tribes are not a third set of governments in the American federal system. They are not sovereigns. . . . It is clear that nothing in the United States Constitution guarantees to Indian tribes sovereignty or prerogatives of any sort. . . . To the extent tribal Indians exercise powers of self-government in these United States, they do so because Congress permits it. . . . American Indian tribal governments have only those powers granted them by the Congress.[21]

In spite of the American Indian Policy Review Commission's Final Report in 1977 laying out increased tribal "self-determination," "sovereignty," and "self-governance" as solutions to problems plaguing Indian reservations, in spite of the 1988 National Indian Gaming Regulatory Act, and in spite of the thirty-year push for increased tribal governmental power, the statistics show that life is getting worse for Indian people on reservations. Many news stories of late have documented shocking rates of murder, suicide, and violent assault, exceeding even that of the nation's core cities.[22] Claims of tribal sovereign immunity present additional problems. There are numerous cases of tribal casino patrons being injured or abused, businesses contracting with tribal casinos not getting paid for their services, and tribal casino workers being harassed and threatened, with no legal recourse. Any other business can be held accountable for such misdeeds in a state or federal court. But by claiming tribal sovereign immunity, tribal casinos have become the only businesses in the entire world that can totally avoid legal responsibility and liability within the United States.[23]

Many articles describe in detail the problems of trying to get anything resembling a fair hearing in tribal courts, which are not guaranteed to be separate from the tribal administration, where judges may not know anything about the law, where decisions are likely not documented, where *due process* is typically nonexistent, and where cases frequently don't even get a hearing because of claims of tribal sovereign immunity.[24] Yet many well-intentioned advocates for Indian causes mistakenly believe that increased tribal government rights is the same as protecting the rights of Indian people. Nothing could be further from the truth. Past civil rights movements provide lessons for the present. The late Hubert H. Humphrey,

former U.S. senator, vice president, and presidential candidate, said in his famous civil rights speech fifty years ago at the 1948 Democratic National Convention: "There are those who say this issue of civil rights is an infringement on states rights. The time has arrived for the Democratic Party to get out of the shadow of state's rights and walk forthrightly into the bright sunshine of human rights."[25] Replace the word *state* with the word *tribe*, and you get a statement many Indians and non-Indians wish they would hear from their leaders today: "There are those who say this issue of civil rights is an infringement of *tribal* rights. The time has arrived to get out of the shadow of *tribal* rights and walk forthrightly into the bright sunshine of human rights."

The U.S. Supreme Court has in recent years expressed concern about the lack of controls on tribal sovereign immunity, including in May 1998 in its ruling in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*. Even as they upheld tribal sovereign immunity, the majority wrote:

> Though the doctrine of tribal [sovereign] immunity is settled law and controls this case, we note that it developed almost by accident. . . . [The 1919 precedent-setting case of] *Turner* . . . is but a slender reed for supporting the principle of tribal sovereign immunity. . . . Later cases, albeit with little analysis, reiterated the doctrine. . . . There are reasons to doubt the wisdom of perpetuating the doctrine. [W]e defer to the role Congress may wish to exercise in this important judgment.[26]

In this 6-3 decision, the minority was adamant about the need for limiting tribal sovereign immunity:

> Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? [The Court] . . . does not even arguably present a legitimate basis for concluding that the Indian tribes retained or, indeed, ever had any sovereign immunity for off-reservation commercial conduct. . . . [This] rule is unjust. . . . Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.[27]

Through *Kiowa*, the U.S. Supreme Court has in effect sent an open letter

to Congress asking them to correct the legal quagmire, confusion, and rank injustice of tribal sovereign immunity.

Minnesota Appeals Court Judge R. A. (Jim) Randall, in his eloquent and thoughtful dissent in *Sylvia Cohen v. Little Six, Inc. (Mystic Lake Casino)*, outlined the way Indian people are being wronged by current federal Indian policies and Indian laws, which give power to tribal governments at the expense of Indian people:

> Why here, are we tolerating segregating out the American Indians by race and allowing them to maintain a parallel court system and further, subjecting non-Indians to it? . . . The American Indian will never be fully integrated into this state, nor into this country, until we recognize this dual citizenship for what it really is, a pancake makeup coverup of *Plessy* which allowed separate but equal treatment. [*Plessy*, 163 U.S. at 551, 16 S. Ct at 1143 (holding that "equal but separate accommodations for the white and colored races" for railroad passengers was constitutional).] . . .
>
> We should have learned by now that this duality in America is so intrinsically evil, so intrinsically wrong, so intrinsically doomed for failure, that we must grit our teeth and work through it. . . .
>
> All bona fide residents of Minnesota, of all races and colors, enjoy identical opportunities for self-determination and self-governance. . . . Why is there this need to single out a class of people by race and give them a double dose of self-determination, and self-governance? . . . Are American Indians entitled to more self-determination than Minnesota gives to its other residents? . . . How can a state give more than it possesses? If this is deemed a federal issue, how does the federal government give more than it possesses? . . . Does that make Indians separate but equal? I suggest that *Brown v. Board of Education* will tell us this is a bad idea, a vicious and humiliating idea. Do we label Indians separate but more equal? . . . Do we label Indians separate but less equal? . . .
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> [T]his issue, is about the future of the United States, and the future of the American Indian. This case is about whether we accept the American Indian as a full U.S. citizen, as a real American, or whether we will continue to sanctify tiny enclaves within a state and tell the individual Indian that if he or she stays there and does not come out and live with the rest of us, we will bless them with the gift of "sovereignty." . . .
>
> For some reason, we continue to insist that American Indians can be the

> last holdout, a race that is not entitled to be brought into the fold, can be left to shift for themselves as long as, from time to time, we pat them on the head like little children and call them sovereign. Sovereignty is just one more indignity, one more outright lie, that we continue to foist on American citizens, the American Indian.[28]

Conclusion: Preserving Our Cultural Past and Future

The nineteenth century view of "assimilation" envisioned that people would be accepted into mainstream American life only if they looked and acted like white Christians. That is quite different from the modern view of "integration," in which people are allowed into mainstream culture even as they maintain their own cultural traditions and identity within racial, ethnic, or religious groups.

The U.S. Constitution provides the greatest opportunity in the world for groups of people to preserve their cultures, religions, and identities, through its protections of speech, assembly, press, and religion. Ironically, the only place Indian people are *not* guaranteed these rights is on an Indian reservation. By denying Indian citizens basic civil rights, tribal governments' claims to sovereign immunity have done more to destroy tribal culture than to preserve it.

Preserving and living one's culture is one's own business. There are many unique groups within the United States, all preserving their own beliefs and cultures as they wish, and our government bends over backwards to protect their right to be different, whether it's the Amish, Mormons, Italians, Moonies, Pagans, Irish, Baptists, Roman Catholics, Greeks, Hassidic Jews, Nation of Islam, Swedes, or any manner of extremist, fundamentalist, traditionalist, or nonconformist. As Americans, we have the right to identify with a group and maintain a unique culture, to greater or lesser degrees, as we wish. Why would Indians and tribes be entitled to anything different?

As Judge Randall wrote in his dissent in *Cohen*:

> There is nothing that Indian people are entitled to as human beings that cannot be afforded them through the normal process of accepting them as brother and sister citizens. . . .
>
> The truly important goals of protecting Indian culture, Indian spirituality, self-determination, their freedom, and their way of life can be done within the same framework and the same system, by which we treat all other Minnesotans of all colors. The real issue is, do we have the will?"[29]

It is time to end the Noble Savage Mentality that keeps tribes in the ambiguous, inconsistent, and untenable position of being simultaneously wards of the federal government, domestic dependent nations, and supposedly sovereign nations. Indian people, whether tribal members or not, should be recognized as full U.S. citizens with all the rights, responsibilities, and protections thereof, nothing more and nothing less.

Notes

Julie Shortridge, managing editor of the *Native American Press/Ojibwe News*, contributed to this essay.

1. Bureau of the Census, U.S. Dept. of Commerce, *American Indian and Alaska Native Areas: 1990* (1991).
2. Ibid.
3. U.S. Supreme Court, *U.S. v. Kagama*, 118 U.S., at 375 (1886).
4. Vine Deloria Jr., *Custer Died for Your Sins* (New York: Macmillan, 1969), p. 32.
5. Francis P. Prucha, *American Indian Treaties: A History of a Political Anomaly* (Los Angeles: University of California Press, 1994), p. 153.
6. Charles Kappler, ed., *Indian Treaties 1778–1883* (New York: Interland Publishing, 1972), Wyandot Treaty of 1855, art. 1, p. 677.
7. Helen Addison Howard and Dan L. McGrath, *War Chief Joseph* (Lincoln: University of Nebraska Press, 1941), pp. 298–99.
8. *Board of Indian Commissioners: Annual Report*, 1887.
9. *Commission of Indian Affairs: Annual Report*, 1890.
10. *Editorial Research Reports*, April 15, 1977.
11. John Collier, *From Every Zenith* (Denver: Sage Books, 1963).
12. J. P. Kinney, *A Continent Lost—A Civilization Won: Indian Land Tenure in America* (Baltimore: Johns Hopkins Press, 1937), p. 351.

13. "Federal Lands: Information on the Acreage, Management, and Use of Federal and Other Lands," *Letter Report* (GAO-RCED-96-104, 1996).

14. Ruth Packwood Scofield, *Americans Behind the Buckskin Curtain* (New York: Carlton Press, 1992), House Concurrent Resolution 108, p. 93.

15. Theodore W. Taylor, *American Indian Policy* (Mt. Airy, Md.: Lomond Publications, 1983), p.106.

16. John R. Wunder, *Retained by the People: A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994), p. 100.

17. Congress of the United States, *American Indian Policy Review Commission: Final Report* (Washington, D.C.: U.S. Government Printing Office, 1977), p. 451.

18. Congress of the United States, *Indian Claims Commission: Final Report* (Washington, D.C.: U.S. Government Printing Office, 1977), p. 21.

19. Michael Loyd Chadwick, ed., *The Federalist* (Washington, D.C.: Global Affairs, 1987), p. 260; James Madison, paper no. 47, "Separation of Power Essential for the Preservation of Liberty."

20. Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs*, November–December, 1997.

21. Lloyd Meeds, dissent, Congress of the United States, *American Indian Policy Review Commission: Final Report*. Meeds was vice chairman of the commission.

22. Debra Weyermann, "And Then There Were None," *Harper's*, April 1998.

23. Craig Greenberg, oral testimony, U.S. Senate, Indian Affairs Committee, April 7, 1998.

24. See, e.g., Pat Doyle, "Sovereign and Immune, Tribes Often Can't be Touched in Court," *Minneapolis Star Tribune*, July 24, 1995; Alice Sherren Brommer, "Should You Become Tribally Licensed?" *Minnesota Lawyer*, November 1, 1999; Bill Lawrence, "Tribal Injustice: The Red Lake Court of Indian Offenses," *North Dakota Law Review* 48, no. 4 (summer 1972): 639–59.

25. Hubert H. Humphrey, speech on civil rights at the 1948 Democratic Convention, as reprinted in the *St. Paul Pioneer Press*, June 14, 1998.

26. U.S. Supreme Court, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, majority opinion, May 26, 1998.

27. Ibid., minority opinion, May 26, 1998.

28. Minnesota Court of Appeals, *Sylvia Cohen v. Little Six, Inc., d/b/a/ Mystic Lake Casino*, file no. C9501701, February 13, 1995, pp. D47–D62.

29. Ibid., pp. D42–D62.