The Constitution and the American Indian: Past and Prologue

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Introduction

Nineteen hundred and seventy-six is the bicentennial anniversary of the American Revolution and the establishment of the American nation. Such an occasion gives us cause to re-examine America's past, appraise her present, and plan for her future. For most Americans it is a time to celebrate and to rededicate themselves to the American principles of constitutional law and government.

To the American Indian, however, the Bicentennial is something quite different. Most American Indians do not believe that they have cause to celebrate the birth of this nation; they see its creation as having signaled the beginning of the end of American Indian tribal sovereignty, independence, and freedom. Unfortunately, the last 200 years of American history bear out this belief. For the American Indian, the American dream in fact has been a nightmare. For 200 years the Indian nations have suffered cultural and physical genocide. The United States government has applied a deliberate policy whereby Indian people have been exterminated, their lands expropriated, their treaties broken, and their trust betrayed as promises made to them have gone unkept. To ask that American Indians join in the celebration of the American Bicentennial is akin to asking them to celebrate their own funeral.[1]

For the American Indian a more appropriate anniversary to celebrate is the centennial of the battle of the Little Big Horn, or "Custer's Last Stand." This, the Indian community maintains, is a more appropriate cause for celebration for it represents a victory in the Indian's struggle for physical and cultural survival. Apart from its obvious

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1. For further reading on Indians and the Bicentennial, see AMERIND CLUB, THE UNIVERSITY OF ARIZONA, INDIANS AND 1976 (1973).

historical significance, this centennial occasion has tremendous symbolic importance to the Indian community that is now, as it was then, under relentless assault. Its very survival is in question. The Little Big Horn was a military victory. Today the struggle has moved from the battlefields into the political and legal arenas. Whereas the Indian community of the past could and did wage war on those who threatened it, Indian people of today must learn to use the white man's way of law and politics if they are to effectively protect and advance Indian interests.

Although the Bicentennial generally has produced a negative reaction in the Indian community, there is perhaps a lesson to be learned by those concerned with American Indian affairs from the American revolutionary experience. The goals of American revolutionaries 200 years ago were to secure through revolutionary means the creation of a nation and the establishment of individual freedom. American Indian activists today have similar goals in that they seek the regeneration of the Indian nations and the reassertion of individual Indian rights and liberties. Viewed in this light, it is especially incongruous that the Declaration of Independence sought to justify rebellion for these ends and yet 200 years later American Indian activists seeking similar goals of sovereignty for the Indian nations and freedom for the Indian people are crushed by the very government the Declaration of Independence established. Alcatraz, the Bureau of Indian Affairs occupation, Wounded Knee: all of these demonstrated that as far as Indians are concerned America has either forgotten or turned its back on the principles enunciated 200 years ago in the Declaration of Independence.

On the occasion of the American Bicentennial and the Little Big Horn Centennial it is proper that we examine concepts of nationhood and individual freedom—the concepts that formed the foundation of the American Revolution 200 years ago and that are the goals of American Indians today. Although the Bicentennial may not be a cause to celebrate, it can present an opportunity for American Indians to redefine their goals and redouble their efforts to attain them. The Indian Revolution of 1976 must, of necessity, be a peaceful one. To establish and secure tribal sovereignty and individual Indian rights and liberties this revolution must take place within the constitutional framework of American Indian law.

Who is an Indian?

Before discussing Indian law, it is important to consider the problems inherent in determining to whom it applies. There is a con-

tinuing legal debate over the proper identification of individuals as American Indians. In the first instance, it must be recognized that Indian people do not think of themselves as "American Indians". Rather, they are Cherokees, Choctaws, Chickasaws, Creeks, Seminoles, Navajos, Hopi, and so on, identifying primarily with their tribe rather than with their race. The tribes differ from one another as widely as the various cultures of Europe differ from one another. Each has its own unique cultural, religious, political, social, and economic systems. There are over 260 different tribes, bands, and groups of American Indians served by the Bureau of Indian Affairs. In addition, there are approximately 300 native Alaskan groups.[2] Thus, to generalize about American Indians is to do them a disservice.

The term "American Indian" is itself somewhat controversial. It is a white man's term and refers to a case of mistaken identity. A more contemporary term is "Native American," but even this term is the subject of some controversy and confusion, for it can be used to describe any person whose origin stems from any of the indigenous populations of the Western Hemisphere. "American Indian," on the other hand, refers more narrowly to those peoples within the borders of the United States. Both terms are imprecise. There must be, as far as the law is concerned, a more exact means of defining or identifying who is an "American Indian." Various legal standards have been applied to define "American Indian" by different groups for different purposes. The principal means used has been "blood quantum," or the degree of Indian blood a person possesses. This percentage is usually determined by tracing an individual's genealogy through tribal or federal records of tribal membership. For most purposes, the degree of blood quantum is one-quarter, but it may be more or less for other purposes. Agencies of the federal government, in particular the Bureau of Indian Affairs and the Indian Health Service, use the one-quarter degree blood quantum as the definitional standard of an American Indian—those with less are considered non-Indian.

The second legal means of defining an American Indian is that of "self-identification." If a person officially declares himself to be an American Indian, then he is recognized as such for certain purposes. The United States Bureau of the Census uses self-identification to determine racial classification.

2. BUREAU OF INDIAN AFFAIRS, UNITED STATES DEP'T OF THE INTERIOR, ANSWERS TO YOUR QUESTIONS ABOUT AMERICAN INDIANS 3 (1970).

A third method of defining or identifying an American Indian is that of "community acceptance." In other words, if a person is considered Indian by the Indian community in which he resides, then he is considered Indian for certain legal purposes as well. The Indian community views community acceptance as the most desirable method of identification for tribal determination of its own membership is seen as an act of sovereignty. It is important to determine who is an American Indian because with that status come special legal rights and privileges that are not available to other persons.

American Indian Law

As a discipline, "American Indian law" refers to contemporary American law concerned with American Indians. It does not, as is often mistakenly thought, refer to the traditional or indigenous law of Indian tribes. The scope of American Indian law is all-encompassing, as it extends to every area of American law that has any reference to Indians and includes such varied and traditional subjects as criminal law, civil law, international law, and constitutional law. Its sources cover the legal spectrum, but in particular are: special references to American Indians in the United States Constitution; formal treaties and agreements between the United States government and various Indian nations; special legislation pertaining to Indians; administrative rules and regulations regarding Indian affairs; and court decisions recognizing the special legal status of American Indians and the ensuing special relationship between American Indians and the United States government.[3] The difficulty in achieving a coordinated understanding of American Indian law is further compounded by legal complexities involving the greater Indian community itself. For example, the Indian community may be divided into seven distinct legal categories: (1) federal reservation Indians, (2) state reservation Indians, (3) urban non-reservation Indians, (4) rural non-reservation Indians, (5) federally recognized Indians, (6) non-federally recognized Indians, and (7) terminated Indians (those whose official recognition has been withdrawn).[4] Individuals belonging to each of these categories occupy distinctly different legal positions vis-a-vis the United States

3. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1 (1971) [hereinafter cited as COHEN].

4. Office of General Counsel, United States Commission on Civil Rights, The Indian Project of the U.S. Commission on Civil Rights (unpublished memorandum, undated).

government. Consequently, the rights and liberties available to individuals in the various classifications differ.

American Indian law is particularly concerned with the legal rights of American Indian tribes and of American Indians as individuals. The rights of Indian tribes are based in large part on the concept of tribal sovereignty,[5] whereas the rights of individual American Indians are based on both their United States citizenship and their Indian status. As American citizens, Indians are entitled to all the rights and privileges afforded every American citizen. As Indians, they occupy a special status in the law and maintain a special relationship with the federal government.[6]

Tribal Sovereignty

The concept of tribal sovereignty predates the creation of the United States of America. The European colonial powers recognized the international legal concept of sovereignty and applied it not only in their dealings with one another but in their initial dealings with the Indian nations of North America. The principal evidence of this is that through the treaty making process the European colonial powers dealt with the American Indian tribes in the same manner as they dealt with other sovereign states of the world. Today Indian tribes hold all sovereign powers unless the federal government appropriates such powers to itself and either exercises them accordingly, or delegates them to the states.[7] This has resulted in a three-way struggle for power among the federal government, the state governments, and the Indian tribes themselves.[8] In addition, there is competition within each of these entities.

Legal recognition of American Indian tribal sovereignty was established early in American legal history by two landmark decisions involving the Cherokee nation. The first decision occurred in 1831 in the case of *Cherokee Nation v. Georgia.*[9] In defense of its sovereign existence, the Cherokee nation requested the United States Supreme Court to issue an injunction against Georgia's application of its law to the Cherokee people. The issue before the Court was framed as a jurisdictional question: Did the United States Supreme Court have

5. M. PRICE, LAW AND THE AMERICAN INDIAN 118-19 (1973) [hereinafter cited as PRICE].
6. COHEN, *supra* note 3, at xxiv.
7. *Id.* at 123-24.
8. PRICE, *supra* note 5, at 1-2.
9. 30 U.S. (5 Pet.) 1 (1831).

original jurisdiction in this case? Jurisdiction depended, the Court concluded, on whether the Cherokee nation was a foreign state in the sense intended by article III, section two of the Constitution. If not, the Supreme Court was without original jurisdiction. This gave the Court the opportunity to examine carefully the status of the tribe. The Cherokees contended that the Cherokee nation was not a state of the Union, and that individual Cherokees were aliens not owing allegiance to the United States. Each individual being foreign, the whole must be foreign. Consequently, the Cherokee nation was a foreign state and the United States Supreme Court had original jurisdiction over its controversy with the state of Georgia. Chief Justice Marshall, who delivered the opinion for the Court, noted that the relationship between the Indians and the United States was

> perhaps, unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term *foreign* nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.[10]

Marshall went on to explain the characteristics of this relationship: Indian territory was indeed part of the United States; regulation of commerce between Indians and foreign nations was within the jurisdiction of the United States; the Indian nations themselves acknowledged in their treaties with the United States that they were under its protection; and the Indians admitted that the United States had the sole and exclusive right to regulate trade with them and manage all their affairs as it thought proper. Marshall concluded that Indian tribes within the boundaries of the United States should be "denominated domestic dependent nations."[11]

Marshall also explained another legal implication of this finding: the United States held the title to Indian territory independent of Indian will; the Indian nations thus had possessory rights to their territory, but not ownership rights or title; and at the United States' discretion this right to possession could cease.[12] Meanwhile, Marshall continued, the Indians are in a "state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[13] Consequently, the Indian nations are under the protection of the United States. Marshall concluded that foreign nations recognized the sovereign dominion of the

10. *Id.* at 16.
11. *Id.* at 17.
12. *Id.*
13. *Id.*

United States over the Indian nations, and any attempt by a foreign nation to acquire Indian lands or to form a political connection with them would be considered an invasion of United States territory and an act of hostility.[14] The Court thus held that the Cherokee nation, though a unique nation, was not a foreign state within the meaning of the Constitution, and the United States Supreme Court therefore lacked jurisdiction in the case.[15]

The extent and nature of American Indian tribal sovereignty was further elucidated the following year in the case of *Worcester v. Georgia*.[16] This case again involved the Cherokee nation and its struggle to preserve its sovereign existence against encroachments by the state of Georgia. The specific fact situation centered around the Reverend Worcester, a white man residing within the Cherokee nation. Reverend Worcester, for political reasons, was convicted and sentenced under a Georgia law to four years in the state penitentiary. He appealed to the United States Supreme Court, alleging that the application of Georgia law was illegal because of Georgia's wrongful exercise of jurisdiction over the Cherokee nation.

Again, Chief Justice Marshall delivered the opinion of the Court. The Cherokee nation, he reasoned, was under the protection of the United States. This, however, did not mean that the Cherokee nation thereby surrendered its national existence. The relationship was seen as that of one nation claiming and receiving the protection of another more powerful nation, and not that of individuals abandoning their national character and submitting as subjects to the laws of a master.[17] Marshall reasoned that the Indian nations had always been considered distinct independent political communities. For example, the Constitution, by declaring treaties to be the supreme law of the land, adopted and sanctioned the previous treaties with the Indian nations. The Chief Justice concluded that since we have applied the words "treaty" and "nation" to the Indians, we mean to accord them the same status as other nations.[18] Therefore, the Cherokee nation was deemed to be a nation in the legal sense as well as a distinct community, occupying its own well-defined territory in which the laws of Georgia had no force, and which the citizens of Georgia had no right to enter without the assent of the Cherokees or pursuant to treaties or acts of Congress.[19] Thus the

14. *Id.* at 17-18.
15. *Id.* at 20.
16. 31 U.S. (6 Pet.) 515 (1832).
17. *Id.* at 555.
18. *Id.* at 559-60.
19. *Id.* at 561.

Constitution was held to confer on Congress unlimited authority to deal with the Indian nations. Therefore, Georgia's laws were inapplicable to the territories of the Cherokee nation and unconstitutional with respect to the United States government, which had sole jurisdiction in the area of Indian affairs.

Federal Power Over Indian Affairs

The aforementioned cases plainly show that although tribal sovereignty was recognized early in American Indian law, it is far from absolute. The federal government, pursuant to its own sovereign authority, can exercise considerable powers over Indian affairs.[20] This federal power emanates from three principal sources. First is the constitutional source; in particular, the presidential treaty and war powers and the congressional commerce powers.[21] The second source of federal power in Indian affairs results from court decisions establishing the guardian-ward relationship. Essentially, this theory is based on the weakness and dependency of Indian tribes in relation to the federal government. The guardian-ward theory originally set out in *Cherokee Nation v. Georgia*[22] has since been interpreted by the federal judiciary as a rationalization for the exercise of federal power against both state and tribal contentions of sovereignty. The theory emphasizes the federal government's obligation to assist and protect the Indian people.[23] The third source of federal power rests with the concept of federal ownership of Indian land. In *Cherokee Nation*, the Supreme Court concluded that the Indians' dependency upon the federal government was a consequence of the federal government's holding title to Indian occupied lands.[24] This doctrine of federal ownership originated in *Johnson v. McIntosh*,[25] in which Chief Justice Marshall maintained that the title to Indian lands was in the United States and derived from the right of discovery exercised by the colonial forerunners of the American nation. Accordingly, Indian tribes held only an ex-

20. COHEN, *supra* note 3, at xxiv.

21. The following sections of the Constitution have been cited as conferring such power or authority: art. I, § 8, cl. 11 (the "war making" power); art. II, § 2, cl. 2 (the "treaty making" power); art. I, § 8, cl. 3 (the power to regulate commerce with Indian tribes); art. 4, § 3, cl. 2 (the power to govern and to dispose of territories or other property held by the United States); and art. I, § 8, cl. 1 (power to tax and spend).

22. 30 U.S. (5 Pet.) 1 (1831).

23. COHEN, *supra* note 3, at 170.

24. 30 U.S. (5 Pet.) at 17.

25. 21 U.S. (8 Wheat.) 543 (1823).

clusive right of occupancy, while actual ownership resided in the United States government.[26]

The potential range of federal power to control Indian affairs is practically unlimited. Its actual exercise, however, has been restrained by the federal judiciary's commitment to tribal sovereignty and by the federal government's own indecision as to how to deal with the American Indian. Whereas the Constitution imposes restraints on the exercise of congressional power with regard to states and individuals, Congress is under no such constitutional restraint with regard to Indian affairs. Not only may the authority of the Indian tribe be withdrawn by the federal government, but the tribe's legal existence likewise hinges on federal recognition. However, as indicated, the federal judiciary has never completely accepted the full implications of congressional plenary power, and has continued to operate under the theory that tribal sovereignty and federal plenary powers are not inconsistent.[27]

Today tribal sovereignty is still a complicated and often misunderstood concept. Obviously, tribal governments are no longer viewed as separate independent nations. On the other hand, they are recognized as political units with governmental powers that, though subservient to the federal government, are nevertheless superior to state governments in their claim to control of Indian affairs.[28] The contemporary meaning of tribal sovereignty was defined in 1956 in *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*:[29]

> It would seem clear that the Constitution, as construed by the Supreme Court, acknowledges the paramount authority of the United States with regard to Indian tribes but recognizes the existence of Indian tribes as *quasi* sovereign entities possessing all the inherent rights of sovereignty excepting where restrictions have been placed thereon by the United States itself.[30]

In summary, tribal sovereignty means that the Indian tribe possesses, in the first instance, all the powers of any sovereign state. However, conquest rendered the tribes subject to the legislative powers of the United States and terminated the *external* powers of sovereignty of the tribe. The *internal* sovereignty of the tribe, *i.e.*, its power of local self-government, remained intact. In other words, absent quali-

26. *Id.* at 604, 605.

27. PRICE, *supra* note 5, at 21.

28. Smith, *The Constitutional Status of American Indians*, 6 CIVIL RIGHTS DIGEST 12 (1973) [hereinafter cited as Smith].

29. 231 F.2d 89 (8th Cir. 1956).

30. *Id.* at 92.

fication by treaties and by express congressional legislation, full powers of internal sovereignty are vested in the Indian tribes through their duly constituted organs of government.[31] Thus, Indian tribes retain all their sovereign powers unless the federal government appropriates such powers to itself for its own use or subsequent delegation to the states. Therefore, the powers that tribes currently exercise are not powers *delegated* by Congress, but rather are powers *emanating* from their inherent sovereignty[32] that have not been abrogated by some congressional action.

Indian Rights and Liberties

The rights and liberties of American Indians as individuals rest on two fundamental bases in law: United States citizenship and Indian status. Due largely to the early acceptance of the concept of tribal sovereignty in American law, American Indians were not originally considered citizens under the Constitution. The original Constitution did not expressly define citizenship, but it did refer to both national and state citizenship.[33] The Constitution, however, did authorize Congress to "establish a uniform rule of naturalization."[34] The Fourteenth Amendment of the Constitution subsequently provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[35] Thus, the Constitution, with the advent of the Fourteenth Amendment, accepted the British common law doctrine *jus soli* in defining citizenship at birth by situs rather than ancestral nationality.[36]

Despite the Fourteenth Amendment's acceptance of the theory that citizenship is determined by one's place of birth, the United States Supreme Court held in *Elk v. Wilkins*[37] that an Indian born within the geographical boundaries of the United States was excluded from citizenship upon birth. The Court said that a tribal Indian owed allegiance

31. COHEN, *supra* note 3, at 123-24.

32. Smith, *supra* note 28, at 12-13. What is not expressly limited often remains within the domain of tribal sovereignty simply because state jurisdiction is federally excluded and governmental authority must be found somewhere. That is a principle to be applied generally in order that there be no failure of governmental control. COHEN, *supra* note 3, at 396.

33. U.S. CONST. art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5 (with reference to national citizenship); and art. IV, § 2, cl. 1 (with reference to state citizenship).

34. U.S. CONST. art. I, § 8, cl. 4.

35. U.S. CONST. amend. XIV, § 1.

36. Johnson, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973, 992 (1973) [hereinafter cited as Johnson].

37. 112 U.S. 94 (1884).

to the tribe from birth and therefore was not born "subject to the jurisdiction" of the United States.[38] Since this is a crucial element of United States citizenship under the Fourteenth Amendment, automatic citizenship by virtue of birth within the United States was denied the American Indian.

The alternative method to citizenship conferred by birth is citizenship achieved by naturalization. Congress has adopted two principal methods of naturalization: (1) through uniform statutory rules of naturalization of individuals, and (2) by treaty or statute under which a group of individuals can be collectively naturalized.[39] Naturalization thus afforded the method by which American Indians could acquire citizenship. Among the different techniques used were: (1) treaties with Indian tribes, (2) special statutes, (3) general statutes naturalizing allottees, and (4) general statutes naturalizing other classes of Indians.[40] By 1924, approximately two-thirds of the Indian population had achieved citizenship status through such procedures.[41] In order to provide citizenship for the remainder of the American Indian population, Congress enacted a collective naturalization law known as the Indian Citizenship Act of June 2, 1924.[42] This legislation provided that all Indians born in the United States were citizens of the United States.

Citizenship produced significant effects on the legal status of individual American Indians. For example, via the Fourteenth Amendment, Indians, as citizens of the United States, automatically became citizens of the state of their residence. Consequently, they were both state and United States citizens and entitled to all the rights and privileges accorded any other citizen. It was also determined that citizenship and tribal membership were not incompatible, and that citizenship did not impair tribal law or tribal existence. Furthermore, citizenship for tribal members was held not to be incompatible with federal powers of guardianship, nor did it impair the trust relationship between the federal government and Indian tribes and individuals.[43]

38. *Id.* at 102.

39. Johnson, *supra* note 36, at 993.

40. PRICE, *supra* note 5, at 220-23. Examples of general statutes naturalizing other classes of Indians include the following: Indian women marrying citizens became citizens by the Act of August 9, 1888, ch. 818, § 2, 25 Stat. 392, and Indian men who enlisted to fight in World War I could become citizens under the Act of November 6, 1919, ch. 95, 41 Stat. 350.

41. COHEN, *supra* note 3, at 153.

42. 8 U.S.C. § 3 (1970).

43. PRICE, *supra* note 5, at 225-27.

Indians, then, are citizens of their tribal entities, of the United States, and of the state in which they reside—three separate political sovereignties. Even after the passage of the Indian Citizenship Act, however, the sovereignty of the individual tribes was still considered a barrier to application of constitutional restraints upon tribal governments. Thus, United States citizenship did not bring the same constitutional protections to individual Indians in their relationships to their tribal governments that it brought from encroachment upon their individual liberties by the federal government, and, through the Fourteenth Amendment, by the state governments. The constitutional restrictions upon governmental power were held to be inapplicable to tribal governments unless specific provisions in the Constitution itself or in congressional acts or treaties directly referred to Indian tribes.[44]

In *Native American Church v. Navajo Tribal Council,*[45] the Native American Church sought an injunction against enforcement of a Navajo Tribal Council ordinance prohibiting the sale, use, and possession of peyote. The Native American Church contended that its use of peyote was religious in nature and therefore should be protected by the First Amendment from the interference of Indian tribal authorities just as it is from regulation by federal and state governments. This contention was rejected. The court held that constitutional restraints upon Congress and state governments were not applicable to Indian tribal governments. Relying on Felix Cohen's *Handbook on Federal Indian Law,* the court stated: "The provisions of the Federal Constitution protecting personal liberty or property rights, do not apply to tribal action."[46] The court explained that the First Amendment placed limitations upon the actions of Congress and upon the states, but:

> Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress. No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations,

44. Smith, *supra* note 28, at 14.
45. 272 F.2d 131 (10th Cir. 1959).
46. *Id.* at 134; *cf.* COHEN, *supra* note 3, at 181.

even though they may have an impact to some extent on forms of religious worship.[47]

Congress responded in 1968 to a growing concern regarding the abuse of the constitutional rights of American Indian citizens by their tribal governments with passage of the 1968 Indian Civil Rights Act.[48] The Indian Civil Rights Act (ICRA) selectively incorporates portions of the United States Constitution's Bill of Rights. It includes, for example, a free exercise of religion provision, a freedom of speech provision, a freedom of the press provision, an assurance of the right of the people to peaceably assemble and to petition, and a prohibition against the taking of property without just compensation. Furthermore, in the area of criminal law it includes a prohibition against unreasonable search and seizure, a double jeopardy provision, a protection against self-incrimination, assurances of the right to a speedy and public trial, and assurances that a defendant is to be informed of the nature and cause of an accusation. Also included are the rights to be confronted with witnesses, to have compulsory process for obtaining witnesses in one's favor, and to have, at one's own expense, the assistance of defense counsel. Additional provisions prohibit excessive bail, fines, and cruel and unusual punishments. A limitation on the penalty or punishment that a tribal court may impose is established at six months imprisonment or a fine of $500 or both. Still other provisions include an equal protection clause and a due process clause. Bills of attainder and ex post facto laws are prohibited, and a trial by jury of not less than six persons is mandated. Despite its seeming comprehensiveness, the ICRA omits several important constitutional guarantees. For example, a prohibition against laws respecting establishment of religion and a right to an indictment by a grand jury are absent.[49] Congress, exercising its plenary power in Indian affairs thereby brought to individual Indians civil rights and civil liberties protections vis-a-vis their tribal governments.

A Regeneration of Tribal Sovereignty and a Reassertion of Indian Rights and Liberties

Confronted with the legal condition of the American Indian, modern day proponents of the Indian cause argue for a regeneration

47. 272 F.2d at 134-35.

48. 25 U.S.C. §§ 1302-03 (1971).

49. The omission of a prohibition against establishment of religion was made in deference to tribal cultural considerations.

of tribal sovereignty and the reassertion of Indian rights and liberties. Naturally, they look to the law as the means to achieve these ends. In the area of tribal sovereignty, Indian advocates are pressing for enactment and enforcement of Indian "self-determination" legislation. In the *President's Recommendations for Indian Policy*, dated July 8, 1970,[50] the Nixon administration set forth a new directive for the United States government. Essentially this policy calls for self-determination for Indian people and Indian tribes:

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[51]

Accompanying the presidential message were legislative proposals designed to implement the policy of self-determination.[52] Of particular importance, as far as tribal sovereignty and tribal governmental power and authority are concerned, were those legislative recommendations designed to ensure the right of Indian people to control and operate Indian programs currently administered by the federal government. Thus, for example, the presidential message included the recommendation that an Indian tribe determine for itself whether it is willing and able to assume administrative responsibility for any or all service programs presently administered by federal agencies. To this end, the president proposed legislation that would empower a tribe to take over the control or operation of federally funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare whenever the tribal council or comparable community governing group voted to do so.[53] Numerous safeguards to assure the success of self-determination were included in the legislative package. Indian control of Indian programs was always to be a wholly voluntary matter. It would be possible for an Indian group to select the program or portion thereof that it wanted to run without assuming responsibility for all of the components. The "right of retrocession" would also be guaranteed, meaning that if a local community

50. RECOMMENDATIONS FOR INDIAN POLICY, H.R. Doc. No. 363, 91st Cong., 2d Sess. 1 (1970) [hereinafter cited as H.R. Doc. No. 363].

51. *Id.*

52. The principal self-determination legislation enacted to date is the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203 (1975). *See also* 25 U.S.C. § 450 (Supp. V, 1975).

53. H.R. Doc. No. 363, *supra* note 50, at 4.

elected to administer a program and then later decided to return its administration to the federal government, it would be able to do so.[54]

The advantages of self-determination to Indian tribes and Indian people are apparent. As the presidential message noted:

> A policy which encourages Indian administration of these programs will help build greater pride and resourcefulness within the Indian community. At the same time, programs which are managed and operated by Indians are likely to be more effective in meeting Indian needs.[55]

Self-determination "is a new and balanced relationship between the United States government and the First Americans."[56] This balanced relationship is a recognition of tribal sovereignty and the ability of Indians to control their own lives and destinies. Self-determination can strengthen tribal sovereignty, which in turn will strengthen and preserve the Indian community and the Indian culture.

The Future of Indian Tribal Sovereignty and Individual Rights

Proponents of tribal sovereignty look beyond its recognition by the United States government in terms of constitutional law and federal legislation. Some look to international law and international legal analogies to support more extensive tribal sovereignty. Proponents of the so-called "sovereignty ideology"[57] maintain that contemporary Indian reservations are "island nation societies" and that under international law American Indian tribes are entitled to international recognition, including membership in the United Nations, and to all the other rights and privileges accorded sovereign states. Further, they argue that the American Indian people are entitled to such international legal protections as are established by the United Nations in the Universal Declaration of Human Rights, and in the Convention on the Prevention and Punishment of the Crime of Genocide.[58] Proponents of the sovereignty ideology accordingly contend that any legal controversies involving the various Indian nations and the United States government—disputes over the meaning and effect of treaties, for example—belong before the International Court of Justice at the Hague. More recent developments in this area include an attempt by sovereignty proponents to secure United Nations recognition of Ameri-

54. *Id.*

55. *Id.* at 5.

56. *Id.* at 12.

57. 8 AMERICAN INDIAN LAW NEWSLETTER 54 (1975).

58. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); G.A. Res. 260A (III), U.N. Doc. A/810, at 174 (1948).

can Indian tribes similar to that recently granted by the General Assembly to the Palestine Liberation Organization. To date, these Indian efforts have had negligible success and have received little serious consideration. Nevertheless, they are gaining support and there does appear to be a legal basis for their contentions.[59]

Indian advocates are concerned as much with the protection and advancement of the rights of individual Indians as they are with reestablishing more meaningful tribal sovereignty. Problems arise because of Indians' multiple citizenship, and those concerned with individual Indian rights must concentrate on these special civil rights and civil liberties issues if they are to effect needed changes. Based on their American citizenship, American Indians face traditional civil rights and civil liberties issues in their relationships to state and federal governments. Based on their Indian status, they have unique civil liberties problems vis-à-vis their tribal government by virtue of the provisions of the ICRA, and still other unique civil rights problems involving the federal government and its federal Indian services.

Individual Indian rights based on United States citizenship concern traditional civil rights and civil liberties that are available to all American citizens. The legal basis for such citizen civil liberties is the United States Constitution, and in particular, the Bill of Rights and the Fourteenth Amendment. Civil liberties problems of a general nature affecting the Indian community are often the result of racial discrimination and poverty, problems similar to those experienced by other racial minorities in this country. The Indian community, however, has special civil liberties problems of its own that other groups in this country do not experience. These problems include the use and possession of peyote for religious ceremonies; the wearing of long, braided hair as an expression of speech, culture, and religion; and the possession and exchange of feathers of migratory birds for religious purposes. Recent litigation involving American Indian cultural and religious practices indicates the currency of these problems. In such

59. For a more detailed discussion, see V. DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES (1974). Deloria makes an effective argument for tribal or small nation sovereignty. In response to arguments that the Indian tribes are too small and economically weak to be considered as nations, Deloria refers to historical precedents and some interesting statistics. For example, the Navajo nation is larger in area than each of four members of NATO (Belgium, Denmark, the Netherlands, and Luxembourg), and five of the founding non-European members of the United Nations (Lebanon, Haiti, Costa Rica, the Dominican Republic, and El Salvador). Furthermore, the Hopi nation is larger than Cyprus and Malta combined, and almost forty other Indian tribes are larger than such independent and sovereign states as Barbados. *Id.* at 163-68.

instances, constitutional principles have been or could have been applied to protect the rights of American Indians. For example, peyote is essential to the practice of certain American Indian religions, especially the Native American Church. Under constitutional principles involving freedom of religion, the use and possession of peyote has been legally sanctioned.[60] On the other hand, possession and exchange of feathers restricted by federal conservation legislation continues to cause problems for Indian religious practices.[61]

American Indians have been persecuted for wearing their hair in a traditional, long, braided style. Again, constitutional principles of freedom of speech, freedom of religion, and prohibitions against racial discrimination, can and should be used to protect this practice. Litigation over this issue has resulted primarily from situations involving American Indian students and prison inmates who claimed cultural and religious rights to wear traditional Indian hair styles in violation of dress codes.[62]

Additional civil rights for Indians are established through federal civil rights legislation, which is protective of all American citizens. Indian civil rights problems parallel traditional civil rights concerns, *i.e.*, the equal administration of justice; the rights to equal education, employment opportunities, and housing; and political participation. Despite seeming equality under such laws, American Indians have

60. *See* State v. Whittingham, 19 Ariz. 27, 504 P.2d 950 (Ct. App. 1973); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

61. *See* United States v. Doxtator, No. 74-120M (W.D. Okla., Magis. Ct. 1974). For a more detailed analysis, see Note, *Native American Culture: The Use of Feathers as a Protected Right*, 2 AM. INDIAN L. REV. 105 (Winter, 1974). A policy statement issued by the Secretary of the Interior, released February 5, 1975, stated that there will be limited federal prosecution, harrassment, or other interference with American Indians over the possession and exchange of the feathers of protected species: "The American Indian may possess, carry, use, wear, give, loan or exchange among other Indians, without compensation, all federally protected birds as well as their parts or feathers. However, the Department of the Interior will continue to enforce against all persons those federal laws prohibiting the killing, buying or selling of eagles, migratory birds, or endangered species, as well as those laws prohibiting the buying or selling of the parts of feathers of such birds and animals."

62. New Rider v. Bd. of Education, 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973). In this instance, the federal circuit court rejected the freedom of speech argument advanced by the American Indian students. In his dissent to the Court's denial of certiorari, Justice Douglas argued that freedom of speech should protect this form of expression. The First Amendment principle of freedom of religion could also be used to protect this form of activity. In Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), the court accepted the American Indian prisoners' argument that freedom of religion permitted them to wear their hair in the traditional long, braided style.

problems of a unique character. For example, in the area of the administration of justice, Indians suffer from a double standard regarding arrest and sentencing—especially in regard to charges involving public intoxication. They are subjected to racist and derogatory treatment from law enforcement officials. In addition, they have unique cultural and linguistic problems when forced to deal with the criminal justice system. Another concern is that an Indian community may in itself suffer from a lack of adequate police protection, often resulting from jurisdictional confusion between state and federal authorities. Yet another problem concerns the justice system's failure to employ Indians throughout its various components. Also, Indians are conspicuously absent from juries. Each of the other traditional areas of civil rights also has special Indian problems.[63]

Indians also have unique civil rights and civil liberties problems based on their special status. The legal bases for these "Indian" rights and liberties are specific federal legislation, administrative rules and regulations, and court decisions. As discussed above, the legal infrastructure for Indian civil liberties is found in the 1968 Indian Civil Rights Act.[64] Litigation under the ICRA of general civil liberties claims by individuals against tribal governments has renewed concern for tribal sovereignty and the preservation of cultural integrity. Court interpretations of the ICRA have aroused considerable distress within the Indian community over the Act's ramifications. Initially, passage of the ICRA was viewed as an affront to tribal sovereignty because it was forced on Indian tribes without their consent. It was felt that if the tribal governments had found this type of legislation desirable, they, rather than the United States government, should have been responsible for framing and enacting it. The initial concern crystallized into a strong and persuasive feeling that the ICRA is a threat to the Indian community's cultural integrity and preservation. Because the ICRA reflects European concepts of law and justice, its application can seriously disrupt and possibly destroy traditionally held Indian social concepts. Proponents of individual Indian rights are especially concerned that the interpretation and application of the ICRA are in the hands of non-Indian federal judges, some of whom may be ignorant of Indian problems.

Those who argue against the ICRA are not opposed to the civil libertarian principles behind the Act itself, but rather to the procedures

63. Office of General Counsel, United States Commission on Civil Rights, Check List of Urban Civil Rights Issues (unpublished memorandum, undated) [hereinafter cited as Check List of Urban Civil Rights Issues].

64. 25 U.S.C. §§ 1302-03 (1971).

used to implement it and the impact that results.[65] Opponents of the ICRA claim that it is an arrogant imposition of one culture upon another, and is an extreme example of ethnocentricity. Regardless of Congress' good intentions, they argue, the ICRA is basically offensive to the Indian community and has the effect of seriously eroding and damaging the Indian way of life. It is additionally argued that the ICRA has seriously violated the fundamental rights of Indian people to self-determination for it is an external dictation of internal tribal relationships.

Turning to substance, ICRA critics note that in many Indian societies there are substantial elements of traditional Indian life that cannot be reconciled with federal constitutional guarantees. For example, eligibility to participate in tribal government may be limited by age, sex, religion, or other traditional Indian considerations. Perhaps more importantly, by encouraging litigation, the ICRA overrides traditional tribal mechanisms for resolving internal problems. Indian tribes have traditionally stood in an entirely different relationship to their members than has a state to its citizens. Many Indian communities are based on extended family principles, and tribal government is a part of that system. To invite litigation in federal courts between a tribe and its members may undermine the integrity of tribal communities. Finally, the critics maintain, Indian tribes should have the right to opt for a closed society, which implies a right to limit external interference.[66]

Because of its controversial nature in the Indian community, the ICRA has been the subject of several repeal and reform efforts.[67] None has been successful, however, and the best alternative seems to focus on obtaining from federal courts a flexible interpretation of the ICRA. This could succeed if sufficient deference is shown to the culture and traditions of the particular Indian community involved in the litigation. In applying the ICRA, federal courts have been urged to use it only as a guideline, and to interpret it within the cultural milieu of the particular Indian community. Courts have also been asked to use experts to formulate a policy for each particular tribal legal system. In interpreting the ICRA, a federal court should realize that a literal interpretation of some of the provisions would seriously under-

65. Indian Rights Committee, American Civil Liberties Union, Report to the ACLU Board of Directors 8-10 (November 20, 1974, unpublished).

66. *Id.* at 9.

67. One reform that has been proposed is the establishment of an inter-tribal Indian court of appeals that would oversee tribal courts administering the ICRA.

mine a tribe's cultural autonomy. The essential question at issue in interpreting the ICRA is whether Congress' use of "constitutional language" is to be understood as requiring modification of tribal government procedures and laws to fully comply with the same constitutional standards imposed on state and federal governments regardless of the disruption to the tribal cultures, or whether the language chosen by Congress merely requires the courts to meet the harder challenge of evolving constitutional standards appropriate to and compatible with individual rights concepts held by Indian tribes. In other words, should the ICRA standards be interpreted in an Indian context and from an Indian perspective? This issue presently remains undecided. However, a trend appears to favor interpretation from the Indian perspective.[68]

Indian civil rights affect the entire Indian community. Indian civil rights problems involved the Bureau of Indian Affairs (BIA), the Indian Health Service, and various other governmental agencies and programs concerned with Indian affairs. Regarding services provided by the government, controversy has centered around standards of eligibility, quantity, and quality of services. More specific problems evolve from Indian programs and services in the areas of: (1) education —such as the Johnson-O'Malley program and the Federal Impact Aid program; (2) federal welfare programs, BIA General Assistance, and various state welfare programs; and (3) health, through the Indian Health Service and various federal health programs such as Medicare and Medicaid. In addition to the traditional civil rights areas, problems arise as Indians seek access to credit and small business operations, as well as utilities or services on reservations. The status of Indian land ownership or possession creates special problems, as do exceptions sometimes granted to hunting and fishing regulations in recognition of Indians' traditional ways.[69]

Conclusion

To understand why these problems exist for the American Indian we must understand that the Indian community is under tremendous pressure, as evidenced by various social and economic indicators of community well-being. Recognizing some internal pressures, it must be noted that most of the problems emanate from the external world, that is, the Anglo-American culture. Internally, the Indian communities have

68. PRICE, *supra* note 5, at 761-78; Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Government*, 82 HARV. L. REV. 1343, 1353-68 (1969).

69. *See* Check List of Urban Civil Rights Issues, *supra* note 63.

governed themselves with considerable success for over 25,000 years. Their problems at present are those of a community under assault—assault from a dominant society that intentionally or inadvertently seems bent on their destruction. Protection from the dominant society, then, is a principal legal need of the Indian community.

Perhaps the American Indian can find justification for celebration of the American Bicentennial in the very principles the Bicentennial represents: revolutionary legal and political change, the creation of a nation, and the establishment of individual rights. These are the same objectives that the Indian community today seeks to achieve. In the spirit of the Bicentennial, then, American Indians may pursue a revolution through law based on constitutional principles. Accordingly, Indian advocates should demand and secure the constitutional right to be Indian. This would involve the right of Indian tribes to exist as tribal sovereignties, operating on a basis of self-determination and with the concomitant rights to protect and enhance Indian cultural life. At the same time, in balance with the right to tribal sovereignty, a right for individual Indians to live their lives with appropriate civil rights guarantees would exist. Thus in interpreting the United States Constitution, the courts and Congress must continue to recognize and protect both tribal sovereignty and existence, *and* individual Indians in the exercise of their rights as Indians and citizens, ever mindful of the delicate balancing of interests that every such case warrants.

After 200 years, the physical genocide practiced by the United States against the Indian people has abated. It must not take another 200 years of American history to see the abatement of the cultural genocide practiced against the American Indian. As the court said in *People v. Woody*:[70]

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians . . . .[71]

There has been, there is, and there must continue to be, the legal right to be Indian.

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70. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
71. *Id.* at 727, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78.