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NATIVE AMERICAN SOVEREIGNTY AND TREATY RIGHTS: ARE THEY HISTORICAL ILLUSIONS?

Robert A. Fairbanks*

Introduction

Native American peoples, and their governments, steadfastly claim they possess "sovereignty." Moreover, they vociferously demand that local, state and federal governments honor and respect their sovereignty. However, given the conservative political climate that has swept the United States, Native American peoples can expect strong challenges to the sovereignty of their governments. These challenges will be resilient and imaginative. They will take many forms and come from expected and unexpected sources. In turn, Native American peoples, and their governments, must be prepared to repel these attacks. Otherwise, they can expect continued erosion of their sovereignty and pendent treaty rights.

Sovereign Capacity

A claim of sovereignty implies ability and willingness to exercise the supreme powers of government. Therefore, assuming a sufficient population and adequate land base, the inquiry becomes whether Native American governments possess the institutional capacity to exercise jurisdiction over the population resident on reservation territory.¹

Inspection reveals that Native American governments, in fact, are able to exercise very little sovereign power over people — native and non-native alike — residing within, or merely passing through, reservation boundaries. According to federal law, a tribal government cannot prosecute a non-reservation member for a crime committed within the boundaries of its reservation no matter how heinous or trivial.² Moreover, a tribal government cannot even prosecute a reservation member for murder, rape, robbery or any other felony.³ The revealing truth is that tribal governments

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1. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1965).

2. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

3. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §

are incapable of exercising the police power of government within the boundaries of their reservations, except in minor, almost insignificant ways.

It is inescapable, therefore, that most Native American governments have no police power over the majority of people within the boundaries of their reservations. For example, Leech Lake Reservation in north central Minnesota is populated by nearly 10,000 individuals; only about 3700 of the reservation residents are members of the Leech Lake Band of Ojibwe.⁴ Most reservations across the country are similarly situated.

Similarly, it is doubtful that tribal governments can effectively regulate land use within their reservation boundaries. There is little question that tribal government can enact zoning regulations for land held by reservation members on the reservation. However, on many, if not most, reservations the vast majority of land is owned by non-reservation members. Again using Leech Lake Reservation as an example, only about 30,000 of over 677,000 acres is owned by a reservation member or the tribal government.⁵ Therefore, tribal government's ability to regulate use of reservation land is, indeed, negligible.

Foregoing consideration of other indicia of sovereign power for now,⁶ it becomes apparent Native American governments exercise little in the way of legitimate sovereign power. Moreover, mere casual inquiry reveals that by and large the governmental powers actually exercised by contemporary tribal governments are those gratuitously granted by the federal government. Those powers are found in the Indian Reorganization Act of 1934,⁷ an act of the United States Congress. Besides being severely limited in scope, those powers can be amended, or eliminated for that matter, at the whim of Congress. Thus the sovereign powers exercised by contemporary tribal governments are more illusion than real.

Even more significantly, the Self-Determination and Educational Assistance Act⁸ is also illusory. In substance, self-determination under the Act means no more than permission to administer housing, education, health, and community development and other programs of the Bureau of Indian Affairs and the Public Health Service. Moreover, administration of those programs must conform to the rules, regulations and guidelines of the federal government. Furthermore, reservation casinos — the alleged economic salvation of the Native American peoples — are subject to

1153, 3242 (1994)); see *United States v. Kagama*, 118 U.S. 375 (1886).

4. Telephone Interview with Johnny M. Fairbanks, Leech Lake Reservation Tribal Engineer (Nov. 1, 1995).

5. *Id.*

6. See KIRKE KICKINGBIRD ET AL., *INDIAN SOVEREIGNTY* 4-5 (Institute for the Development of Indian Law 1977).

7. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 416-416j (1994)).

8. Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450a-450n (1994)).

extensive federal regulation and reluctant state acquiescence.⁹ Given federal plenary power,¹⁰ Native American self-determination and sovereignty are illusory.

Federal plenary power notwithstanding, the rancorous chorus of "inherent" sovereignty is often heard. Does tribal government have any political capacity independent of the federal government? Much insight into this question can be gained by examining the political maturity of Native American governments.

By analogy, governments are just like people. The sovereignty powers of governments can be compared to citizenship rights of individuals. For instance, when a child is first brought into this world, it is totally dependent upon its parents for survival. If the parents do not feed, clothe and shelter the child, it will soon die. But, if the child is appropriately nurtured, it will grow physically, emotionally and intellectually, and it may eventually acquire the worldly skills necessary to survive in the community in which it finds itself.

In this final developmental stage, an individual adult will acquire some degree of capacity to engage in the spectrum of human endeavor; in varying degrees some will be dependent upon government for food, shelter and clothing and others will be fully independent. Similarly, Native American peoples, and their governments, need to determine where on the scale of political maturity they find themselves. Many, if not most, will find themselves dependent upon the Great White Father in Washington, D.C.

Political Maturity and Meeting the Challenge

The only scrap of sovereignty Native American peoples can claim with certitude emanates from the authority of the United States Congress which passed the Indian Reorganization Act of 1932.¹¹ This act permitted Native American peoples to form "reservation business committees" to conduct their limited affairs with the local, state and federal governments. Although now often called "Reservation Tribal Councils," the form and power of the business committee has changed little since 1932 and the exercise of such power, in large measure, remains subject to approval by Bureau of Indian Affairs officials.

The salient point here is that the business committees can be eliminated by Congress very simply. And given the misconduct of many elected tribal officials and the general ineffectiveness of tribal government,¹² coupled

9. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2721 (1994)).

10. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

11. *KICKINGBIRD*, *supra* note 6, at 21.

12. See, e.g., *United States v. Finn*, Nos. CRIM 5-95-12(01), CRIM 5-95-12(02), CRIM 5-95-12(03) (D. Minn. Apr. 12, 1996), where the Leech Lake Reservation Chairman Alfred

with the political conservatives' desire to slash the cost of federal government and their perception that huge casino profits abound, the vestige of sovereignty exercised by Native American peoples is endangered, indeed.

For the most part, tribal governments appear ill-prepared to rebut challenges to their sovereignty. For example, tribal governments have generally proven incapable of dealing with self-serving and corrupt elected tribal officials. This critical institutional weakness alone may hasten the demise of tribal sovereignty. Similarly, former Cheyenne River Sioux Tribal Chairman Frank Ducheneaux has observed that "today tribal leaders pay little attention to the Constitution and by-laws governing them and they have no knowledge of the history of their tribe, treaties and acts of Congress."¹³ There are exceptions, of course, but generally tribal leaders, for reasons including little formal education, lack political sophistication and are ill-prepared to deal effectively with local, state and federal government officials.

To secure and protect the residual treaty rights of native peoples, Native American governments must begin a swift march toward political maturity and economic independence. To do otherwise will insure the demise of distinct Native American "body politics" and amount to complicity in the historical federal policy of termination.

Acknowledging much federal Indian law rests on questionable political logic, Notre Dame Professor Sharon O'Brien instructs that "[t]ribal governments and individuals must not simply accept the federal government's interpretation of their rights and status. Laws, regulations, and court decisions that limit tribal sovereignty must be questioned and carefully challenged."¹⁴ In other words, if Native American governments are truly "inherently" sovereign, they will, and must, assert their rights of citizenship in the community of sovereign governments.

However, tribal governments must be able and willing to accept the responsibility of governing. Questions abound about whether tribal governments, given their often dictatorial, nonseparation of powers structure and the ill-preparedness of many elected tribal officials, are capable of assuming such responsibility. Furthermore, Native American peoples must ask themselves, given the historic and contemporary performance of their governments, whether they want their governments to assume such responsibility. This inquiry may not be particularly encouraging.

Pemberton, Secretary-Treasurer Myron Ellis and reservation attorney Harold Finn were convicted of multiple felony counts of conspiracy to commit fraud and theft of reservation funds, and *United States v. Wadena*, Nos. CRIM 3-95-102(01), CRIM 3-95-102(02), CRIM 3-95-102(03) (D. Minn. June 24, 1996), where White Earth Reservation Chairman Darrell Wadena, Secretary-Treasurer Jerry Rawley and Representative Rich Clark were similarly convicted.

13. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 294 (1989).

14. *Id.* at 293.

The litmus test of Native American tribal sovereignty is whether Native American governments would wither and die if all non-treaty-mandated federal monies were withdrawn in response to sustained assertions of sovereignty? The answer would reveal the magnitude of any disparity between persistent claims of sovereignty and the ability to perform sovereign responsibilities.

Loss of Native Languages and Sovereignty

As if the foregoing challenges are not daunting enough, there is another, more fundamental, matter that must be addressed if Native American sovereignty is to survive in any reasonable, recognizable form. While it may not be readily apparent to the casual observer, the loss of native languages is by far the greatest threat to Native American sovereignty.

Federal policy makers have known the political significance of Native American languages for ages and, consequently, made eradication of native languages a priority in the boarding schools of yesteryear. As a result, a scant few individuals under the age of thirty can speak the native tongue of their ancestors today. Furthermore, history teaches that when a language is no longer heard, cultural distinctiveness soon fades from view.

Perhaps Captain Richard Henry Pratt, who founded Carlisle Indian School, the first boarding school for Indians, expressed the government's assimilation policy best when he said, "In Indian civilization I am a Baptist, because I believe in immersing the Indians in our civilization and when we get them under holding them there until they are thoroughly soaked"¹⁵ The Indian's baptism was swift and the Western civilization catechism was earnestly taught. Today, conversion from ancient traditional teachings is nearly complete, and Native American sovereignty is rapidly becoming a historical matter.

Other than cultural nostalgia, native languages are important because they provide cultural distinctiveness and identification of a "people." As Ojibwe writer and artist Larry Cloud-Morgan has said, "The language is the people; the language is the people!"¹⁶ In other words, for a "people" to exist they must be distinguishable in some significant way. And, the important point here is that there is no "sovereignty" if there is no "people."

Before Native American people can claim any measure of sovereignty according to international law, they must exist as a distinct people that occupy certain territory and they must have a government that is capable of exercising jurisdiction over both the territory and the people and the

15. RICHARD HENRY PRATT, *BATTLEFIELD AND CLASSROOM: FOUR DECADES WITH THE AMERICAN INDIAN, 1876-1904*, at x (1964).

16. AA-NIIN (documentary film produced and directed by Barbara P. Ettinger and Robert A. Fairbanks 1995).

capacity to relate to other sovereign entities.¹⁷ It is evident, in a strict sense, that Native American peoples' claim to international sovereignty is, indeed, tenuous. Few would argue that Native American governments are capable of, for example, maintaining international intercourse in the community of nations or capable of training and equipping an effective military defense establishment.

Nonetheless, the "inherent" sovereignty refrain is heard time and again on every reservation across the country. The measure of this "inherent" governmental power must begin with the identification of a culturally distinct people and as native languages relentlessly march toward death such identification becomes increasingly problematic. Simply put, if there is not a living language, there is no distinctive people; there is no inherent sovereignty.

What are Native American peoples to do? Assuming the cries of "inherent" sovereignty are earnest, then Native American peoples must make the revitalization of their languages and the reinvigoration of their cultural distinctiveness their highest priorities. Moreover, they must take responsibility for language revival into their own hands. Waiting for the federal government or eleemosynary foundations to provide the resources will only hasten extinguishment of Native American sovereignty.

The urgency of this matter cannot be overstated. "At the present rate of decline, it is doubtful the Ojibwe language will survive another generation,"¹⁸ Canadian Ojibwe scholar Cecil King recently stated. If King is correct, the Ojibwe proclamation of sovereignty may well fall on deaf ears. Native American peoples should examine their language situation carefully and act accordingly; their very existence as a distinct, sovereign people depends on it. Otherwise, their descendants will have to read history books to learn about the "Great Indian Nations."

Erosion of Pendent Treaty Rights

Of the many major issues facing Native American peoples today, none is more volatile and divisive than the question of "treaty rights." Many Americans, inspired by the contemporary conservative political climate, vociferously protest the exercise of treaty rights by Native Americans. Even so, Native Americans have achieved some success in protecting their treaty rights. Nonetheless, there has been, and there will continue to be, significant erosion of Native American treaty rights. Why is this so?

The various Native American nations negotiated and executed over three hundred treaties with the United States of America before Congress declared

17. See Convention of Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

18. AA-NIIN, *supra* note 16.

in March 1871 that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty"¹⁹ Since the Constitution requires Senate "advise and consent" to treaties negotiated by the executive branch of government, the congressional enactment amounted to notice to Native Americans that no additional "Indian" treaties would be ratified and they would no longer have equal contracting status under federal domestic law. Presidential approval of this congressional action indicated agreement with this theretofore unprecedented federal policy. Clearly, Congress had concluded that the various Native American peoples no longer deserved, or required, the recognition or respect of a sovereign personality.

Prior to this enactment, all Native American treaties were considered and approved in accordance with constitutional provisions. This irrefutable fact, coupled with the 1871 Act, was explicit recognition that Native American treaties negotiated prior to March 1871, were of the same international character as treaties between the United States and other foreign nation-states and, importantly, acquired the municipal status as the supreme law of the land. In recognition of this obligation, Congress ratified the legal viability of the outstanding treaties by providing that "no obligation of any treaty lawfully made and ratified with any . . . Indian nation or tribe prior to March 3, 1871, shall be . . . invalidated or impaired."²⁰ However, due to the expansionist forces of Manifest Destiny and ostensible capitalistic greed, the efficacy of the Native American treaties was soon called into question; they have not enjoyed the same, or equal, treatment as other treaties.²¹

This disparate situation has been a source of considerable disagreement and friction between the United States, the various States and the various Native American peoples and has raised the inevitable question of the practical (vice legal) efficacy of the treaties. Native American peoples maintain that their treaties ought to be honored as solemn contracts between nations. The various States, seemingly at the behest of special interest groups, consistently refuse or neglect to honor treaty provisions.

In order to address this disparity, the contemporary force and effect of Indian treaties must be decided. Thus, it is necessary to determine what measure of sovereignty power is retained, if any, by the various Native American governments. Although many observe that Native American governments appear incapable of independent existence and, therefore, any treaty rights they may have held are extinguished, individual Indian nations

19. Indian Appropriation Act of 1871, ch. 120, § 1, 16 Stat. 544, 566.

20. *Id.*

21. Congress, exercising its artificially created plenary power, can abrogate "Indian" treaty rights. *See* United States v. Dion, 476 U.S. 734, 738 (1986); Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903).

still regard themselves as independent, sovereign nations "inherently" capable of political and economic intercourse with the United States and the various States. Their position is supported by the decision of the United States Supreme Court in *United States v. Winans*,²² decided shortly after the turn of the century. The *Winans* court determined that the Indian treaty under consideration "was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those (rights) not granted."²³ This case confirms the principle that Indian nations keep, or reserve, certain rights and powers not granted by treaty to the United States and that some measure of sovereignty is retained.

Given the 1871 congressional ratification and the subsequent recognition by the *Winans* Court, why do the various States so uniformly fail to honor treaty provisions at nearly every opportunity? Perhaps it is because the Supreme Court has declared Native American governments as being "domestic dependent nations."²⁴ Or, as Native American scholar Vine Deloria, Jr., has argued, that the various Indian nations ought to seek the status of an international protectorate under the tutelage of the United States.²⁵ These two positions are implicit recognition that Native American peoples, and their governments, have lost contractual, treaty-making parity with the United States.

The most telling factor, however, is that Native American governments lack sufficient institutional strength to require the various States, or the federal government for that matter, to come to the bargaining table whenever treaty disputes arise. To obtain any relief at all, they are required to resort to the courts, and the law, of the United States. The various States recognize this apparent institutional weakness and act accordingly.

Why do the various States perceive this apparent institutional weakness? Perhaps an analogous situation will be enlightening. Consider what happens when Mr. Smith grants title to his land to Mr. Jones, but reserves the right to use the land during the remainder of his life. When Mr. Smith dies, there is absolutely no question his right to use the land is extinguished. After all, he is dead. By analogy, if the sovereign life of a Native American people dies, so does their reserved treaty rights. Many Americans believe "Indian" sovereignty is a simple matter of American history and, therefore, the reserved treaty rights have been extinguished.

Other Americans, especially the politically conservative, believe allowing Native Americans to have special privileges, e.g., hunting and fishing rights on ceded territory, is un-American. After, all, they argue, all "Americans"

22. 198 U.S. 371 (1905).

23. *Id.* at 381.

24. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

25. VINE DELORIA, JR., BEHIND THE TRIAL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 252-55 (1974).

have equal rights under the law. Because of these perceptions, Native American peoples can expect continued challenges to the exercise of their treaty rights.

Conclusion

Native American peoples continue to face significant challenges to the sovereignty which they have so steadfastly claimed. These challenges come from within — through the loss of language and culture — and without — from local, state, and federal political forces. To counter these challenges, Native American peoples must act decisively to insure their governments demonstrate the institutional quality of inherently sovereign political personalities. Otherwise they can expect politically conservative Americans to persist in their ridicule of Native American treaty rights. Moreover, failure to do so with all deliberate speed will complete the intent of Congress expressed in March 1871.

Whether Native American peoples, and their governments, are sufficiently resilient to survive even another generation or so remains to be seen. The challenges are certainly formidable.

