

CHAPTER FOUR

FEDERALISM, TRIBAL PERSPECTIVES, AND MULTI-SOVEREIGN RELATIONSHIPS

Introduction

Federalism has had both a dynamic and turbulent history in our nation that has shifted back and forth in trying to maintain the balance of government. This has affected government policies toward tribes that have often pursued a course of action that was expedient by the government. Policies toward tribes have been influenced by each of the three branches of government (executive, legislative, and judicial) throughout the history of our nation. Furthermore, policy relationships with tribes have not been restricted solely to the federal government but have equally involved states and other levels of government as well.

Part I of this chapter will discuss federalism, its historic forms, tribal perspectives of federalism, and the voices of federalism. Part II will discuss the historic antecedents of federalism from a tribal perspective and the administration of government policies toward tribes. Part III will discuss tribal-federal relationships and Part IV will discuss tribal-state relationships.

Part I – Federalism, Historic Forms of Federalism, Tribal Perspectives of Federalism, and the Voices of Federalism

Defining Federalism and its Various Forms

The concept of federalism to the framers of the Constitution was one of a division of political power with member states and a central government, each having their control regarding matters belonging to its sphere.¹ The political argument centered on preventing the abuse of power, creating opposite and competing interests within government, and protecting minorities and individuals from the majorities or governing elites within the state or nation as a whole.²

Barsh and Henderson note that the significance of federalism is in its capacity for greater unity in its balance of centralized power and local power and not in generating greater power through unity.³ They argue that despite the rebellion by the colonies

against a corrupt British monarchy, various ministries, and apportionment problems in Parliament, many Americans still admired the British theory of “mixed” government, in which social classes or estates are balanced institutionally.⁴ Furthermore, they argue that our mixed form of government recognizes the social and commercial argument of the revolution that one body cannot rule a heterogeneous society alone in order to achieve the greatest possible prosperity.⁵ They characterize this by stating that in modern terminology this means “the administration of government and the making of critical choices must take place, for maximum efficiency, at those levels that optimize diversity and coordination.”⁶ Federalism, therefore, to the framers was a defense against tyranny.⁷

Forms of Federalism

There are several forms or models of federalism. However, it is safe to say that in the first century of our nation’s existence the relationship between the states and the central government was one of “dual federalism” where there are two distinct spheres of government – a national and a state sphere.⁸ In this arrangement each is largely autonomous and independent and free from intrusion by the other. Originally, the United States operated under a system of “dual federalism” where the federal government was solely responsible for defense, international affairs, and interstate commerce. States were responsible for issues such as education, welfare, health, and criminal justice. Dual federalism has also been referred to as “layer cake federalism” where you have defined and distinct layers of federal and state sovereignty.⁹

Dual federalism lasted through the nineteenth century and up until about the early 1930s during the height of the Great Depression. President Roosevelt through his New Deal legislation for economic relief transformed dual federalism into the model of “cooperative federalism” where the national and state governments cooperated with each other instead of being adversaries in order to bring relief to the population in the form of many economic and social programs.¹⁰ Cooperative federalism has also been called “marble cake federalism” because unlike “layer cake federalism” the relationship between different levels of government is more like a marble cake with swirls that cut across different levels of governance.¹¹

During the 1950s and 1960s the nation experimented with what is termed “creative federalism.”¹² This type of federalism called for cooperation between state and national governments along with the private sector in order to solve social problems such as poverty.¹³ New and innovative solutions would be developed in one part of the country and exported to other parts of the country with the federal government providing funding, coordination and technical expertise.¹⁴

The “new federalism I” of the early 1970’s shifted “creative federalism” back to more of a state centered federalism where power would be returned from the federal back to the states.¹⁵ The rationale was that the federal government had grown too intrusive into the affairs of the states. This began with President Nixon who did not reduce federal funding to the states. The “new federalism II” which began under President Reagan in the 1980s, emphasized a smaller role for the federal government and more power back to the states but with reduced federal funding to the states that led to states complaining about inadequate funding for federal programs that they had to administer.¹⁶

The era of “fiscal federalism” began around 1995, when categorical grants to states were given but with narrowly defined requirements and little or no discretionary choice as set by Congress. Currently, we are experiencing a period of devolution where administrative control of federal programs is now being handed over to the states.¹⁷

Tribal Perspectives of Federalism

Barsh and Henderson argue the point that “treaties are a form of political recognition and a measure of the consensual distribution of powers between tribes and the United States.”¹⁸ They believe that since Indian tribes do not fit within the scope of federal-state compacts but that they relate to the federal government through the Treaty Clause of the Constitution by way of “treaty federalism” as opposed to “constitutional federalism.”¹⁹ Furthermore, they argue that beyond questions of tribal jurisdiction, Congress is limited to the regulation of “commerce” that is no greater to Indian tribes as that of foreign nations.²⁰ They rationalize that since a tribe in its treaty submits to federal supremacy and cedes a portion of its sovereignty, the political relationship then between tribes and the United States is one based on mutual agreement.²¹ Barsh and Henderson further note that “treaties are political compacts irrevocably annexing tribes to the federal

system in a status parallel to, but not identical with, that of the states.”²² Furthermore, they carefully explain the difference between treaties and compacts. Treaties are agreements between existing sovereigns. Compacts, however, alter the fabric of government and restructure the parties and create new sovereigns and are a constitution of an amalgamated body politic.²³ Compacts are equivalent to a constitutional amendment of either party and once ratified cannot be changed except by the process of amendment.²⁴

Corntassel and Witmer note that Indian tribal governments are presently in an era of “forced federalism” where tribes are being “compelled by the federal government to enter into compacts with states and local municipalities for policy jurisdiction in Indian country.”²⁵ According to the authors, this has the potential to endanger the federal trust relationship by undermining existing treaties and executive agreements between tribes and the federal government.²⁶ Furthermore, they argue that this is yet another threat to tribal sovereignty from state governments and that there are vast policy implications for economic development, political autonomy, cultural integrity, and even religious freedom for Indian tribes.²⁷

The Voices of Federalism

Several interviewees contended that American federalism does not incorporate Indian tribes. For example, a political science professor from the University of Arizona stated the following:

Tribes are extra-constitutional sovereigns not tied to the federal structure because of treaties and the government’s trust relationship. There has never been a constitutional amendment generated to incorporate tribes within the federal structure and tribes have always retained their sovereign status. Therefore, I argue that tribes are outside of federalism.²⁸

This statement carries a considerable amount of weight because it supports the notion of a unique arrangement between the United States and Indian tribes. Furthermore, the statement also lends support to the argument that Indian tribes were never brought into the political sovereign structure of the United States by the Constitution. A senior attorney from the U.S. Department of Justice expressed a similar view.

The Constitution views tribes as outside of the constitutional system. Tribes are not like Palau in Micronesia, which was once under U.S. administration and can declare its independence. In 25 U.S.C. 2502, Congress has established that American Indian tribes will continue on. The Supreme Court reads treaties with tribes as bringing them into the U.S. system of governance as distinct governmental entities and retaining their internal sovereignty. The recent executive order by President Clinton affirms this. Treaties extend the protection of the U.S. to tribes; however, tribes cannot deal as sovereigns outside of the U.S.²⁹

Again, this supports the argument that Indian tribes exist outside of American federalism. They exist as sovereigns in their own right but as sovereigns within this nation.

Part II - Historic Antecedents of Federalism from a Tribal Perspective and the Administration of Government Policies Toward Tribes

In a letter dated March 20, 1750, to James Parker, a printing partner located in New York, Benjamin Franklin wrote that friendship with the Indians would be of the greatest consequence to the colonies.³⁰ In this same letter, Franklin states what is considered by several scholars to be an embryonic concept of American federalism.³¹

A voluntary Union entered into by the Colonies themselves, I think, would be preferable to one imposed by Parliament; for it would be perhaps not much more difficult to procure, and more easy to alter and improve, as Circumstances should require, and experience direct. It would be a very strange Thing, if six Nations of ignorant Savages should be capable of forming a Scheme for such a Union, and be able to execute it in such a manner, as that it has subsisted Ages, and appears indissoluble; and yet that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous; and who cannot be supposed to want an equal Understanding of their Interests. Were there a general Council formed by all the Colonies, and a general Governor appointed by the Crown to preside in that Council, or in some Manner to concur with and confirm their Acts, and take Care of the Execution; every Thing relating to Indian affairs and the Defense of the Colonies, might be properly put under their Management.³²

What is remarkable about Franklin's comments was that he recognized that six independent Indian Nations (Mohawk, Onandaga, Oneida, Seneca, Tonawanda, Tuscarora) already had established a unified system of governance in the form of the

Iroquois Confederacy. Furthermore, he realized the possibility for the very independent colonies to unite in a similar form of confederation.

The Albany Congress

At the beginning of the fourth French and Indian War, a meeting of all the colonial Indian commissioners and chiefs of the Iroquois confederacy was held in 1754 in Albany, New York. Known as the Albany Congress of 1754, its purpose was to form an alliance with the Iroquois against the French and to provide a plan of union of the colonies.³³ The Six Nations of the Iroquois Confederacy were the most important of the Indian nations allied to the British, who depended upon the Iroquois to resist what the England considered encroachments by France.³⁴ Existing practice had led to a series of temporary arrangements with the colonies that satisfied neither the Indians nor the British.³⁵ England wanted the colonists to do more for their own defense and improve treatment of Indians. However, the colonial legislatures consistently refused.³⁶

At the July 4, 1774 meeting of the Albany Congress, Canassatego, a chief of the Iroquois tribe, in addition to complaining about unfair treatment and inconsistent policy on the part of the British and the colonists, recommended confederation to the Congress:³⁷

Our wise forefathers established union in amity between the Six Nations. This has made us formidable. This has given us great weight and authority with our neighboring Nations. We are a powerful confederacy and by your observing the same methods our wise forefathers have taken you will acquire much strength and power, therefore, whatever befalls you, do not fall out with one another.³⁸

Subsequently, a meeting in 1774 resulted in a treaty of friendship between the Six Nations and the colonies of Virginia, Maryland, and Pennsylvania. Massachusetts and New York renewed an older alliance with the same Six Nations in 1748.³⁹

Canassatego's recommendation has led to a debate over the years by scholars as to whether the Iroquois Confederacy served as both the model for the American federal system or constituted a mere historical event to which the colonists paid no attention.⁴⁰ Although the debate continues, historical analysis by Bruce Johansen has indicated that

the Articles of Confederation possessed similarities to the Iroquois Confederacy.⁴¹ For example, both require unanimous consent by their members for actions and resolutions.⁴²

As war with France loomed larger, the Crown called for a conference of American colonies in order to prepare for a common defense.⁴³ Based on a plan suggested by Benjamin Franklin, the conference agreed on a voluntary association of the colonies with one general government, although each colony retained its separate existence.⁴⁴ It was clear that theirs was not a homogenous society, or that it could be governed without balancing competing interests. The idea of a voluntary association of the colonies formed the origins for the later development of the Articles of Confederation and eventually the Constitution.

Part III – Tribal-Federal Relationships

Following its independence, the fledgling United States government found itself with the same problems that had faced the Crown, which was settler intrusion into tribal lands and threatened tribal retaliation. If tribal affairs were left to the individual states, settler land hunger would result in new wars with the tribes, which the young nation was in no position to fight. If stability were to be achieved, it had to be accomplished by placing Indian affairs in the hands of the central government.⁴⁵ We now turn to a discussion of the historical periods of government policies toward tribes.

Consolidating Tribal Affairs (1789 – 1820)

The Constitution, ratified in 1789, delegated all power over Indian affairs to the federal government.⁴⁶ States negotiated treaties with and purchased land from tribes after that time, but the Constitution made those actions ineffective or illegal. Soon after the assembly of its first session, Congress passed the first Trade and Intercourse Act restricting all dealings with Indians to licensed traders, outlawing the purchase of lands directly from Indians and assigning punishments to crimes committed by colonists against Indians.⁴⁷

Congress subsequently passed additional amendments to the Trade and Intercourse Acts between 1790 and 1834.⁴⁸ The central policy embodied in these Acts was one of separating settlers and Indians and subjecting nearly all interactions between

the two groups to federal control. Collectively, these Acts established the boundaries of Indian country and protected against incursion by settlers in several ways. Settlers were prohibited from acquiring tribal lands by purchase or treaty (other than a treaty entered pursuant to the Constitution), or from settling on those lands or entering them for hunting or grazing.⁴⁹ Trading with tribes became subject to federal regulation. Actions by settlers against tribes were considered a federal crime, with federal compensation given to the injured Indians. Similarly, the federal government guaranteed compensation of settlers injured by Indians in non-tribal territory. The Acts made no attempt to regulate the conduct of Indians among themselves in Indian country. That was left entirely to the tribes.⁵⁰

During these years when federal control over tribal affairs was being consolidated, agents were appointed as the federal government's liaison with the tribes. These agents were under the jurisdiction of the War Department. Despite the Trade and Intercourse Acts, friction grew between the expanding settler population and the tribes, particularly as settler demands for land increased. As a consequence, the solution to "remove" the tribes to Indian country beyond the Mississippi became popular and was espoused by Presidents Monroe, Adams, and especially by President Jackson.⁵¹

Government Policy of Relocating Tribes (1828 - 1887)

Federal policies towards Indians changed abruptly when Andrew Jackson became President of the United States. In 1830, Congress passed the Indian Removal Act, which authorized the President to "negotiate" with eastern tribes for their relocation west of the Mississippi River.⁵² Under Jackson's administration, what previously had been an unspoken policy became a publicly stated goal: removal of the eastern tribes to the West.

In 1835, the Cherokees were forced to sign the Treaty of New Echota.⁵³ The treaty ceded all Cherokee land east of the Mississippi River in exchange for land in the Oklahoma Territory. In addition, under certain conditions, reservations of 160 acres of land would be given to Cherokees who chose to remain east of the Mississippi River.⁵⁴ Most Cherokee rejected the treaty, but in 1838 the United States forced the Cherokee to leave their ancestral lands, homes, and possessions at gunpoint. This culminated in the infamous "Trail of Tears" where nearly the entire Cherokee Nation of approximately

17,000 members were forcibly marched from northern Georgia to present day Oklahoma, killing 4,000 Cherokees.⁵⁵

The following two excerpts from the 1838 Annual Report of the Commissioner of Indian Affairs indicate the policy intentions by the Government towards tribes at that time.

The number of Indians on this side of the Mississippi is comparatively small, and it cannot be that much time shall elapse before the entire east country will be relieved of their presence – an event desirable in all aspects of the subject. It is an expensive operation; but it is difficult to withhold any draught upon the public funds in reference to it. Our great purpose is their peaceable and comfortable translation; and in effecting it, the movement should have a liberal infusion of feeling and humanity, and not be misshaped by narrow rules. The different treaties providing for their removal, and the act of 1830, entitle the Indians to receive patents for the lands allotted to them in the West.⁵⁶

To teach a savage man to read, while he continues a savage in all else, is to throw seed on a rock. In this particular there has been a general error. If you would win an Indian from the waywardness, and idleness, and vice of his life, you must improve his morals as well as his mind; and that not merely by precept, but by teaching him how to farm, how to work in the mechanic arts, and how to labor profitably; so that, by enabling him to find his comfort in changed pursuits, he will fall into those habits which are in keeping with the useful application of such education as may be given him. Thus too, only, it is conceived, are men to be Christianized; the beginning in some education, social and moral lives; the end may be the brightest hope.⁵⁷

The policy of removing Indians from their lands became “the dominant federal Indian policy of the nineteenth century.”⁵⁸ At least thirty Indian nations were forcibly relocated to the West but several Indian nations (e.g., Oneida, Seminole, Wampanoag, Catawba, etc.) remained in the eastern region.⁵⁹ In 1849, with the east nearly free of tribes, the Bureau of Indian Affairs, which had existed since 1824, was moved from the War Department to the newly established Department of the Interior.⁶⁰ The removal policy soon gave way in the 1850s to an official policy of confining Indians to reservations.

Government Policy of Moving Indian Tribes to Reservations (1850 - 1887)

As settlers continued to move westward, further pressures were exerted upon the tribal land base. An excerpt from the 1852 Annual Report of the Commissioner of Indian Affairs reveals the thinking of that time by the government and its policy towards tribes:

Those tribes with whom we have treaty engagements, and who are more closely connected with us, through the medium of agents, continue to receive healthful impulses towards a higher and better condition. And even those who are more wild, and less inclined to cast off their indigenous habits of indolence and improvidence, are beginning to profit by the good example of the other class. The embarrassment to which they are subjected, in consequence of the onward pressure of the whites, are gradually teaching them the important lesson that they must ere long change their mode of life, or cease to live at all. It is by industry or extinction that the problem of their destiny must be solved.⁶¹

The federal government consequently evolved a policy of restricting the tribes to specified reservations. This goal was typically accomplished by treaty, exacted with varying degrees of persuasion and coercion.⁶² Tribes ceded much of their lands to the United States and reserved a smaller portion for themselves. On other occasions, the entire tribe was moved away from its lands and moved to distant lands that formed the reservation.⁶³ At the same time, another government policy emerged which attempted to break tribal culture.

Government Policy of Operating Indian Boarding Schools

During the so-called reservation period and before the allotment policy that went into effect in 1887, an attempt was made by the government to improve the educational program of Indians.⁶⁴ In actual practice, the educational process had been left largely to churches that operated missions among the tribes. The churches sought in a variety of ways to encourage pursuits that would lead the Indians to adopt habits considered “more civilized.”⁶⁵ Its goal was to take Indian children off reservations and place them into boarding schools.

In 1870, \$140,000 was made available for education and other purposes; by 1877, that figure had been increased to \$1,226,415.⁶⁶ There was a reported enrollment of 14,333 with an average attendance of 10,520 in 227 schools.⁶⁷ The Bureau of Indian Affairs operated 163 schools and 64 were operated by private agencies, usually

missionary societies under government contract.⁶⁸ Unusual methods were often used to be certain that there were enough children available to fill the quotas established for the various schools. The growth in attendance may thus have been “forced-fed” to justify increases in expenditure for education.⁶⁹

An experimental program in industrial education was conducted that included both reservation and some non-reservation schools, but there seems to have been little in the way of textbooks for the students or handbooks of instruction to guide school officials. Much of what these boarding schools attempted to achieve in “getting the tribe out of the Indian” was on a trial-error-basis, using varying means, including corporal punishment.⁷⁰ Clearly, with very limited resources and poorly paid staff, the quality of education provided to Indian youth was marginal at best.

Government Policy of Allotment of Tribal Lands (1871 - 1928)

In the 1870s and 1880s, there was increasing dissatisfaction in both governmental and non-governmental circles with the reservation policy.⁷¹ Those groups friendly to the Indians perceived that tribal economies were frequently in a depressed state that left individual Indians living in hopeless poverty, and that no progress was being made toward overcoming these conditions. Others, not so friendly to the Indians, resented large tracts of land being excluded from white settlement. During this period, the focus of federal policy towards tribes changed. Its focus was to divide collectively held tribal lands into severalties for ownership by individual Indians.⁷²

The General Allotment Act, also known as the Dawes Act, authorized the President to apportion or to allot small portions of reservation land to individual Indians.⁷³ Allotments of 160 acres were to be made to each head of a family and 80 acres to others, with double those amounts to be allotted if the land was suitable only for grazing. Title to the land would remain in the United States for twenty-five years or longer, after which it was to be conveyed to the Indian allottee in fee and free of all encumbrances.⁷⁴

This period of time, referred to as the “Trust Period,” was intended to protect the allottee from immediate state taxation and to permit the allottee to learn the art of husbandry and to acquire the capacity to manage lands.⁷⁵ The Act provided that upon

receiving allotments, allottees became United States citizens and were subject to state criminal and civil law. Finally, and perhaps most notably, the Act authorized the Secretary of the Interior to negotiate with the tribes for disposition of all excess lands remaining after allotments, for the purpose of non-Indian settlement.⁷⁶

The intended goal of the General Allotment Act was to bring Indians into the non-Indian culture and its administration was intended to destroy tribal traditions and influence.⁷⁷ The primary effect of the Act, however, was a decline in the total amount of tribal-held land, from 138 million acres in 1887 to 48 million in 1934.⁷⁸ Much of the land was lost by sale as tribal surplus. Allottees who received patents after twenty-five years found themselves subject to state property taxation and many forced sales resulted from non-payment of taxes.⁷⁹

Other circumstances combined to render the allotment system a failure. Leasing of allotted lands to non-Indians became common. The Act had subjected allotted land, whether or not in trust, to state intestacy laws, i.e., not having made a will before one dies, which resulted in highly fractionated ownership that effectively rendered the land unusable.⁸⁰ Since most Indians did not have wills, the passage of many of these fee allotments that were subject to state intestacy laws left out of tribal hands and created large “checkerboard” areas of alternate non-Indian and Indian ownership, making sizable farming or grazing projects impractical. In 1934, the allotment system was abolished.⁸¹

The 1928 Meriam Report Calling for a Reorganization of the Bureau of Indian Affairs

In 1928, the Johns Hopkins University Institute for Government Research published the results of a two-year study of the Bureau of Indian Affairs, which specifically examined the administration of federal policies towards tribes and their impact on tribes.⁸² The study, under the direction of Lewis B. Meriam, Technical Director of the Institute for Government Research in Baltimore, Maryland, (referred to thereafter as the Meriam Report) concluded that the allotment and assimilation policy had failed.⁸³ A central recommendation of the Meriam Report was that government policies be made broad enough for tribes to “be absorbed into the prevailing civilization or be fitted to live in the presence of civilization at least in accordance with a minimum standard of health and decency.”⁸⁴

The Meriam Report reflected attitudes favoring assimilation but gave greater respect to tribal culture than was evident during the allotment era. It defined the goal of government policy to be the development of all that is good in Indian culture “rather than to crush out all that is Indian.”⁸⁵ This spurred a short period in which the federal government shifted away from a policy that encouraged the political and social dissolution of tribes to a policy of encouraging tribal government along the lines recommended by the United States, and protecting tribal resources.

The centerpiece of this period was the Indian Reorganization Act of 1934 (IRA), also known as the Wheeler-Howard Act.⁸⁶ IRA stopped further allotment and extended the federal trust status of allotments indefinitely. It authorized return to the tribes of surplus lands and the establishment of new reservations.⁸⁷ IRA also offered template constitutions and government structures (based on the federal government model) to tribes that would accept federal oversight. Fewer than fifty percent of all Indian tribes have IRA governments.⁸⁸ Some tribes found IRA useful in the resuscitation of tribal government, but others found it unacceptable to more traditional tribal structures. However, as time passed, tribal attitudes changed and most tribal governments today are organized under an IRA constitution.

Government Policy of Termination of Indian Tribes (1943 - 1968)

Nearly ten years after passage of the IRA, Congress once again began to embrace the dissolution of tribes as government policy. Many continued to believe that it was tribal existence that kept Indians from integrating into mainstream society. Congressional reports issued between 1943 and 1950 were extremely critical of the reorganization of BIA and funding for BIA was greatly cut during this period.⁸⁹

Prior to 1946, tribes lacked a forum in which to sue the federal government for actions or lack of actions that were considered detrimental to their welfare. Their only recourse was to seek damages through the U.S. Court of Claims.⁹⁰ In 1946, Congress created the Indian Claims Commission as a special court to hear and decide causes of action.⁹¹ Tribes were given five years, or until 1951, to file their claims. No statutes of limitations were to be applied and certain claims not previously recognized were to be allowed and claims could only be against the United States and did not include non-

federal entities such as states, counties and private entities.⁹² Claims were recovered for some tribes but the process was tedious and paternalistic. For example, no interest was allowed on claims based on takings of aboriginal title and tribes had to select attorneys approved by the Secretary of the Interior.⁹³ The Indian Claims Commission was terminated in 1978 and the remaining cases were transferred to the U. S. Court of Claims.⁹⁴

In 1952, the House passed a resolution calling for the formulation of proposals “designed to promote the earliest practicable termination of all federal supervision and control over Indians.”⁹⁵ A year later, another resolution passed which called for the end of special status of Indians, and the termination of federal supervision and control over all tribes in several states and several additional tribes.⁹⁶ Although the resolution was not binding, Congress terminated the federal relationship with many tribes over the next few years. These tribes lost their land and became subject to state authority.

At the same time, the BIA embarked on a large relocation program that granted money to Indians to move to selected cities to find work. In many cases, this amounted to literally providing one-way bus tickets to cities like Chicago, Omaha, and Tulsa. Ironically, after cutting BIA’s budget for so long, Congress had to triple it in order to keep up with the costs of termination and relocation.⁹⁷ Finally, as previously discussed in Chapter Three, Congress enacted Public Law 83-280 that delegated limited jurisdiction over Indian country to several states.

Government Policy of Self-Determination of Tribes (1968 - present)

The self-determination period began with the Indian Civil Rights Act of 1968 (ICRA), an act of Congress that was opposed by the majority of tribes.⁹⁸ The primary purpose of ICRA was to impose upon the tribes, by statute, such basic requirements as the protection of free speech, free exercise of religion, due process and equal protection of the laws, among others. These requirements are very similar to the Bill of Rights. However, there are major differences between the two. For example, ICRA does not prohibit the establishment of religion since this would radically alter the character of some tribes, and it does not guarantee counsel, civil juries, or large criminal juries in recognition of limited tribal resources.⁹⁹ To many tribes, the Act represented a federal

incursion upon the independence of the tribes, and some tribal members have opposed it on that basis.

All tribes, however, welcomed one provision of the Act. The Act amended PL 280 so that states could no longer assume civil and criminal jurisdiction over Indian country unless the affected tribe consented.¹⁰⁰ In addition, the Act set forth a procedure by which states that had assumed PL 280 jurisdiction could revert such jurisdiction back to the federal government.

In 1970, then-President Richard Nixon declared the policy of termination a failure and asked Congress to repudiate it.¹⁰¹ He reaffirmed the trust responsibility of the federal government to the tribes by executive order and he called on Congress to formulate legislation to increase tribal autonomy. Congress agreed, and in 1973, the federal relationship with the Menominee, the largest terminated tribe, was restored.¹⁰² Several other restrictions followed and over the course of the next two decades Congress passed several significant measures that have eliminated many of the barriers to tribal self-government. For example, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA) in 1975.¹⁰³

The Act recognized the federal trust responsibility and acknowledged that the federal domination of tribes stifled self-governance and development. The substance of the Act directed the BIA and the Indian Health Service (IHS) to contract out to tribes most of the services administered by these agencies.¹⁰⁴ The Act also authorized grants to help strengthen tribal management of Indian community services. Of great importance is the Act's explicit disclaimer that the law is in no way a termination of the federal government's trust responsibility to Indian tribes.¹⁰⁵ Congress renewed its commitment by amending the Act in 1988 to include the following:

In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable Tribal governments, capable of administering quality programs and developing the economies of their respective communities.¹⁰⁶

Identified as the congressional act that initiated the tribal/state compact system, the Indian Child Welfare Act (ICWA) of 1978 provides for the adjudication of child custody cases involving Indian children. The Act defers heavily to the tribes. The Act authorizes tribes and states to enter into mutual

agreements or compacts with respect to jurisdiction over Indian child custody proceedings or related matters.¹⁰⁷

Touted as a highly successful but controversial policy relating to Indian economic development, the Indian Gaming Regulatory Act passed in 1988 established three classes of gaming. Class I gaming is defined as social gaming solely for prizes of nominal value. Class II gaming includes: (1) bingo and other games similar to bingo, and (2) banking and nonbanking card games. Class III gaming includes casino games, card games played against the house (e.g., blackjack), etc. Class III gaming requires that tribes and states negotiate a compact in order for a tribe to conduct Class III gaming activities. The Act applies to tribal lands, reservation lands owned in fee by nonmembers, and includes lands outside the exterior boundaries of a reservation held in trust or restricted status if subject to a tribe's governmental power. The Act also established a National Indian Gaming Commission for oversight functions.¹⁰⁸

The requirement for tribes to enter compacts with states is particularly disturbing. McCulloch notes that for tribes, gaming has become a way of exercising tribal sovereignty through economic autonomy whereas states regard Indian gaming as an issue of state sovereignty --- the right of a state to have a say in the forms of domestic policy within its borders.¹⁰⁹ This has caused increased conflict among tribes and states.

Finally, the Native American Grave Protection and Repatriation Act, passed in 1990, prohibits trade, transport or sale of Native American human remains and directs federal agencies and museums to take inventory of any Native American or Native Hawaiian remains and, if identifiable, the agency or museum is to return them to the tribal descendants. Furthermore, the provisions of this Act hold important implications for the religious freedom and autonomy of Indian nations.¹¹⁰

Executive Branch Policies and the National Academy Of Public Administration's Report on BIA

The Executive Branch developed additional policies for its departments and agencies on dealing with Indian tribes from an administrative perspective. On April 11, 1994, Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," was issued.¹¹¹ The Order directs federal agencies to identify and address disproportionately high and adverse human health or environmental effects as a result of their programs, policies, and activities on minority populations and low-income populations. The order applies to all federal agency tribal programs and directed the U.S. Department of the Interior, in consultation with tribes, to coordinate actions to address this issue.

On April 29, 1994, a Presidential Memorandum was issued to all Heads of Executive Departments and Agencies, which outlined a set of principles "to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes."¹¹² The most important principles outlined in the memorandum were that federal agencies had to consult with tribal governments and to assess the impacts of federal plans, projects, programs, and activities on tribal trust resources. Also, tribal government concerns had to be considered.

On May 14, 1998, Executive Order 13084, entitled "Consultation and Coordination with Indian Tribal Governments," was issued.¹¹³ The order affirmed the unique legal relationship with Indian tribal governments as defined by the Constitution, treaties, statutes, executive orders, and court decisions. It directs federal agencies to establish meaningful consultation and collaboration with Indian tribal governments in formulating policies and actions affecting the communities of Indian tribal governments. The order also recognized and held to the principle of respect for Indian tribal self-government and sovereignty. The order went on to encourage the use of flexible policy approaches for statutory or regulatory requirements that are discretionary and encourage consensual mechanisms for developing regulations and rulemaking.

However, all was not well within the federal government in terms of the administration of Indian programs. In the case of *Cobell v. Babbitt*, 1999 U.S. Dist. LEXIS 19494 (D.C. District Ct. 1999), the Court found that the federal government had

mismanaged Individual Indian Money (IIM) trust accounts and that it had breached its fiduciary duties to the beneficiaries of the IIM trust accounts.¹¹⁴ Furthermore, the case revealed mismanagement, ineptness, dishonesty and delay by federal officials. In February 1999, the Secretary of the Interior, the Assistant Secretary for Indian Affairs, and the former Secretary of the Treasury were held in contempt by the U. S. District Court in Washington, D.C. for their departments' repeated delays in producing documents and misrepresentations to the court in sworn testimony.¹¹⁵

In August 1999, the National Academy of Public Administration (NAPA) released its report about the BIA's long-standing administrative and management problems that have been previously identified in numerous reports by Congress, the General Accounting Office, the Inspector General, and others.¹¹⁶ The report revealed an "organization under siege."¹¹⁷ It concluded that BIA did not have the capacity to effectively "perform basic federal functions of accounting, property management, human resources management, procurement, and information resources management."¹¹⁸ The report recommended that within the U. S. Department of the Interior, the Assistant Secretary of Indian Affairs establish a central office to include a comptroller unit, plans and policy unit, human resources unit, information resource unit, and an equal opportunity employer unit. Only with such staff capabilities, the report noted, would the Assistant Secretary be able to exercise effective managerial responsibility of the BIA.¹¹⁹

In many ways, the 1999 NAPA report highlights the failure of the federal government as represented by the BIA to effectively recognize and deal with the many complex relationships that occur both within a sovereign and between sovereigns. Furthermore, it is the reality of institutions like BIA that bear witness to countless federal Executive Orders and other governmental policies that have said much but produced little.

Part IV – Tribal-State Policy Relationships

In *Braids of a Feather*, Frank Pommersheim notes that there is no constitutional analogy to the Tenth Amendment on federal and state sovereignty when concerning Indian tribes.¹²⁰ He notes that "the tribes and states stand as mutual sovereigns which share contiguous physical areas and some common citizens – tribal members who reside

on the reservation are both tribal and state citizens, while non-Indian residents of the reservation are state citizens but not tribal citizens.”¹²¹ Case law has been equally ambiguous in terms of a clear definition of sovereignty. Federal-tribal relations are such that the federal government must affirmatively assert its authority in order to prevent any potential state claims of authority in Indian country.¹²²

As discussed earlier in Chapter Three, when states joined the Union in the latter part of the nineteenth century, within their respective enabling acts they were required to have disclaimer clauses that stated that Indian land and control would remain under the complete jurisdiction of the United States.¹²³ However, these disclaimer clauses were vague particularly when the government’s allotment policy took effect and non-Indians held tribal lands.¹²⁴ Wilkins argues that the inclusion of such disclaimer clauses in state enabling acts are problematic in terms of tribe and state relations and federalism in general.¹²⁵ He sums up this dilemma as follows:

The common denominator among all is that Congress intended to retain its exclusive relationships with tribal nations based on treaties, trust, and preemption, and that states were completely removed from this dyadic affair. However, because of federalism’s fluidity – sometimes supporting a strong national government, sometimes stressing states’ rights – along with demographic changes (non-Indians moving into Indian country), the independence of federal courts, and state agitation for greater jurisdiction over Indian lands and their inhabitants, there have been congressional and judicial moments when some states have been granted a measure of jurisdiction inside Indian country, despite extant disclaimers and treaty rights, and absent express tribal consent.¹²⁶

David Wilkins argues that unless these disclaimer clauses are removed from state constitutions with both federal and state approval they remain the law of the land and further validate the nation-to-nation status of Indian tribes as preexisting sovereigns.¹²⁷ The many Supreme Court cases that wrestled over the issues of tribal sovereignty and state jurisdiction were actually issues pertaining to individual property rights and the allotment policy altered the jurisdiction between tribes and states.¹²⁸ Furthermore, they emphasized the individual property rights granted by the federal government to non-Indian homesteaders.¹²⁹

Stephen Cornell and Jonathan Taylor note that there is “devolution” of political decision making from the central to local governments.¹³⁰ They imply that relative to

federal power, state sovereignty is growing. At the same time there is a resurgence of tribal sovereignty.¹³¹ New issues are forcing tribes and states to deal with each other on numerous matters of policy. This is very significant because in the past both states and tribes have a historic relationship of being at enmity with each other. Often, the states have viewed tribal governance as corrupt and incompetent. Likewise, the tribes have viewed the states as unconcerned about tribal interests, uncooperative, refusing to listen, even being racist.¹³² Wilkins argues that the states view tribes as “separate geographical, political, and racial enclaves within their borders.”¹³³

New efforts are being made to better the relations between tribes and states through sovereignty accords.¹³⁴ They are political and diplomatic protocols in writing that recognize tribal sovereignty, i.e., the right of tribal governments to exist. They place both the tribes and states on equal political footing.¹³⁵ However, one of the most critical areas needed for reform, according to Pommersheim, is in education so that people are made aware that tribes and reservations are legitimate sovereign governments with governance structures and institutions of their own.

These perceptions are changing, however, as policy issues are becoming increasingly complex and forcing both tribes and states to work with each other. It is important to realize that tribes are administering very complex policy issues and implementation of programs with considerable expertise and finesse rivaling state programs. Both tribes and states need to work cooperatively to improve capacity-building arrangements that can improve tribal governance because in order for tribes to improve economically, there must be tribal control.¹³⁶

As devolution of federal power increases and Indian nations wish to control their own affairs, they have to put in place governing institutions that are capable of exercising sovereignty effectively. Sovereignty must be backed up with good governance.¹³⁷ However, Wilkins notes that even though Congress passes legislation requiring tribes and states to negotiate compacts, such as in the case of the Indian Gaming Regulatory Act, the relationship between tribes and the government is a federal one, and it is the government that has ultimate responsibility for Indian policies.¹³⁸

The recognition and exercise of sovereignty is at the center of many tribe and state disputes. Tribal leaders have alleged that although states may have formally

recognized tribal sovereignty, that status is neither acknowledged nor understood by many state officials. Besides states, there is cooperation that often occurs among tribes and local governments. Frequently, tribes prefer to deal with counties and municipalities rather than with states because local governments tend to deal on a more cooperative basis rather than on a jurisdictional basis. Therefore, cooperation is more feasible when tribes are asked to participate in solution-oriented discussions rather than demands concerning jurisdiction.

Summary

It is only very recently that our government has finally acknowledged that it should respect the will of its tribal citizens to maintain their tribal existence. Yet, despite the many tortured policies towards them, tribes have remained sovereign. However, only when all sovereigns understand the obligations and relationships to each other and conduct themselves in an atmosphere of mutual honor, respect, and trust, can effective and meaningful change take place.

It is in the context of these multiple sovereign relationships that we now move to the subject of Chapter Five. If there was ever a crucible in which the relationships between multiple sovereigns are tested, it is in the area of compliance with environmental statutes and regulations, especially solid waste management.

NOTES

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⁵ Ibid, 22.

⁶ Ibid.

⁷ Ibid.

⁸ “Federalism,” In ThisNation.com, (<http://www.thisnation.com>), 1-5.

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¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Barsh and Henderson, 270.

¹⁹ Ibid, 59.

²⁰ Ibid.

²¹ Ibid, 277.

²² Ibid, 270.

²³ Ibid, 271.

²⁴ Ibid.

²⁵ Jeff J. Cornassel and Richard C. Witmer, *Forced Federalism: American Indians Under Siege*, (Norman, University of Oklahoma Press, Unpublished Manuscript Forthcoming in April 2001), 1.

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²⁷ Ibid, 3.

²⁸ Interview, 6 July 1999.

²⁹ Interview, 3 June 1999.

³⁰ J. A. Lamay, *Benjamin Franklin, Writings*, (N.Y.: The Library of America, 1987), 442.

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³² Ibid, 444-446.

³³ Bruce E. Johansen, *Forgotten Founders: How the American Indian Helped Shape Democracy*, (Boston: The Harvard Common Press, 1982), 3-5.

³⁴ Ibid, 7-8.

³⁵ Ibid, 9-11.

³⁶ Ibid, 12-14.

³⁷ Ibid, 60.

³⁸ Ibid, 61-62.

³⁹ Ibid, 63.

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⁴¹ Johansen, *Forgotten Founders*, 8-20.

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- ⁴³ Wildavsky, 80.
- ⁴⁴ *Ibid*, 86.
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- ⁴⁶ David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*, (Austin: University of Texas Press, 1997), 23.
- ⁴⁷ Cohen, 110.
- ⁴⁸ *Ibid*, 111.
- ⁴⁹ *Ibid*, 112.
- ⁵⁰ William C. Canby, *American Indian Law*, (St. Paul, MN: West Group, 1998), 12-13.
- ⁵¹ Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, (New York: Oxford University Press, 1997), 17-19.
- ⁵² Lyman S. Tyler, *A History of American Indian Policy*, (Washington, D.C.: Superintendent of Documents, 1973), 56-57.
- ⁵³ Cohen, 83-84.
- ⁵⁴ *Ibid*, 85.
- ⁵⁵ *Ibid*, 92.
- ⁵⁶ War Department, *Annual Report of the Commissioner of Indian Affairs for the Year 1838*, (Washington: Government Printing Office, 1839), 414.
- ⁵⁷ *Ibid*, 420-421.
- ⁵⁸ Vine Deloria, Jr., *American Indian Policy in the Twentieth Century*, (Norman, OK: University of Oklahoma Press, 1985), 242.
- ⁵⁹ Sharon O'Brien, *American Indian Tribal Governments*, (Norman, OK: University of Oklahoma Press, 1989), 60.
- ⁶⁰ *Ibid*, 245-247.

⁶¹ Department of the Interior, *Annual Report of the Commissioner of Indian Affairs Transmitted with the Message of the President at the Opening of the Second Session of the Thirty-Second Congress, 1852*, (Washington: Robert Armstrong, Printer, 1852), 3-4.

⁶² Vine Deloria Jr. and Clifford M Lytle, *American Indians, American Justice*, (Austin: University of Texas Press, 1983), 6-7.

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⁶⁴ *Ibid*, 11-12.

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⁷⁶ *Ibid*, 169.

⁷⁷ The Curtis Act of 1898 was passed by Congress and extended the provisions of the General Allotment Act over the Five Civilized Tribes. In addition to the allotment of tribal lands and the leasing of tribal lands, the Curtis Act abolished tribal courts and provided for the incorporation of towns so that per capita payments could be made directly to individuals rather than to tribal governments. Both the General Allotment Act and the Curtis Act together were meant to provide the mechanism for breaking up tribes.

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⁷⁸ Gethches, et. al., 171.

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⁸⁰ Cohen, 134.

⁸¹ Ibid, 136.

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⁸⁶ 25 U.S.C. § 461 et. seq.

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⁸⁸ O'Brien, 93.

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⁹³ Ibid.

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⁹⁵ H.R. Res. 698, 82d Cong., 2d Sess., 98 Cong. Rec. 8788 (1952).

⁹⁶ H.R. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).

⁹⁷ Tyler, 175-178.

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- ⁹⁸ Pub. L. No. 90-284.
- ⁹⁹ 25 U.S.C. § 1302.
- ¹⁰⁰ Canby, 239-242.
- ¹⁰¹ Getches et. al., 185-186.
- ¹⁰² Ibid, 186-187.
- ¹⁰³ Pub. L. No. 96-638.
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- ¹⁰⁵ Ibid, 202.
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- ¹⁰⁹ Anne Merline McCulloch, “The Politics of Indian Gaming: Tribe/State Relations and American Federalism,” *Publius: The Journal of Federalism* 24 (Summer 1994), 112.
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¹²² Ibid, 143.

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¹²⁵ David E. Wilkins, “Tribal-State Affairs: American States as Disclaiming Sovereigns,” *Publius: The Journal of Federalism*, 28:4 (Fall 1998), 67.

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¹²⁸ Pommersheim, 151.

¹²⁹ Ibid.

¹³⁰ Stephen Cornell and Jonathan Taylor, “Sovereignty, Devolution, and the Future of Tribal-State Relations,” paper presented at the *National Congress of American Indians – Mid-Year Session*, Juneau, Alaska, 26 June 2000, 1.

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¹³⁵ Ibid.

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¹³⁷ Ibid, 7.

¹³⁸ Wilkins, 78.