

2013

A Most Grievous Display of Behavior: Self-Decimation in Indian Country

David E. Wilkins

University of Richmond, dwilkins@richmond.edu

Follow this and additional works at: <https://scholarship.richmond.edu/jepson-faculty-publications>



Part of the [Indian and Aboriginal Law Commons](#), and the [Leadership Studies Commons](#)

Recommended Citation

Wilkins, David E. "A Most Grievous Display of Behavior: Self-Decimation in Indian Country." *Michigan State Law Review* 2013, no. 2 (June 2013): 325-338.

This Article is brought to you for free and open access by the Jepson School of Leadership Studies at UR Scholarship Repository. It has been accepted for inclusion in Jepson School of Leadership Studies articles, book chapters and other publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Introduction

Vine Deloria, Jr., the greatest indigenous philosopher of his day, wrote *Custer Died for Your Sins: An Indian Manifesto* in 1969.¹ It was a spirited polemic that both galvanized and inspired Native peoples at home and abroad. Simultaneously, the book's powerful and trenchant words sent shock waves through non-Indian society. Deloria articulated a resurgent indigenous-centered understanding of sovereignty that had largely been suppressed by federal policy and law for nearly a century.² Why did he emphasize the word "sovereignty"? Because he knew that Native nations needed to employ such concepts since they were familiar to both federal and state lawmakers. And Natives had learned over the last several centuries that institutional and conceptual familiarity on the part of whites are important if they are to make any headway against the powerful forces that are still arrayed against them.

Largely through the force of his intellectual rigor and wordsmith talents, the terms "tribal sovereignty"³ and the related phrase "self-determination"⁴ became powerful rallying cries for indigenous peoples as they set about the gargantuan, and not yet completed, task of throwing off the yoke of federal domination cloaked in paternalism and fear; state efforts aimed at terminating, belittling, or denying the legitimacy of indigenous governments; and corporate attempts to exploit the few remaining natural resources still under nominal tribal control. Of course, Deloria also skewered other institutions and professions--like churches and anthropologists--who had previously had largely unfettered control to do whatever they wanted to or for Native peoples.

Deloria had this to say about sovereignty in *Custer*:

If responsibility is irrelevant, sovereignty is not. States have sovereignty, counties have sovereignty, cities and towns have sovereignty, water districts have sovereignty, school boards have sovereignty. Why shouldn't tribes

¹ VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1988).

² See *id.* at 144.

³ *Id.*

⁴ *Id.* at 180.

have total sovereignty? Originally they did. Treaties recognize this basic fact of legal existence. Tribes agreed to go to the reservations provided they could have their basic community rights of self-government.⁵

Deloria here was employing a most basic definition of sovereignty--that it is the power to govern--which is why he equated these various political entities together, even though state sovereignty is clearly of a different type than that wielded by school boards.

Later on that same page, he then expounded more specifically upon the distinctive relationship between Native nations and the federal government when he noted:

Congressional policy should recognize the basic right to tribal sovereignty. Such sovereignty should include all promises contained in treaties and should recognize the eligibility of tribal governments for all federal programs which are opened to counties and cities. In this way the onus of having failed the Indian people would not be placed on Interior or Congress. Tribes would be free to develop or not, according to the desires of the people in the tribe.⁶

In both passages, Deloria was acting upon two fundamental ideas that he would adhere to throughout his prolific public life: reaffirming for Native peoples their inherent right to be self-governing; and reminding the federal government that Native nations, as the original, senior, and treaty-signing sovereigns on the hemisphere, deserved respect.

Within a decade of Custer's release, indigenous peoples made significant strides towards resurrecting and exercising increasing amounts of sovereign authority. These strides were aided and abetted by a number of important congressional statutes, presidential policy statements, Supreme Court rulings, and public sentiments that were, for a time, generally supportive of indigenous assertions of rights.⁷ Nevertheless, by the late 1970s, a [*327] swelling backlash by non-Indians and federal policymakers was evident, aimed at corralling or, in some cases, completely terminating Native peoples' recently reasserted rights. This anti-Indian activity corresponded with a slow rise of activity in Indian country by some tribal officials who--having felt empowered by the recent spate of supportive federal laws and favorable court rulings that broadly, if gingerly, affirmed tribal sovereignty--began to issue their own rulings and pronouncements that sometimes had devastating consequences for the rights of individual indigenous citizens.

I. Deciding Who Belongs and on What Grounds

In 1978, the United States Supreme Court handed down *Santa Clara Pueblo v. Martinez*, which reaffirmed tribal governments' internal sovereignty by declaring that they retained as one of their inherent powers the right to decide who could or could not be citizens of their nations.⁸ This case reverberated through Indian country.⁹ On the one hand, it was a solid pronouncement and reaffirmed one of the essential characteristics of any sovereign--the power to decide who belongs to their polity. On the other hand, it was a stark reminder of how fragile human rights were for individual tribal members who otherwise met the membership criteria established by their nations.

⁵ Id. at 144.

⁶ Id. at 144-45.

⁷ See generally ALVIN M. JOSEPHY, JR., *RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM* (Alvin M. Josephy, Jr., Joane Nagel & Troy R. Johnson eds., 2d ed. 1999); VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (Univ. Tex. Press ed. 1985); MARK N. TRAHANT, *THE LAST GREAT BATTLE OF THE INDIAN WARS: HENRY M. JACKSON, FORREST J. GERARD AND THE CAMPAIGN FOR THE SELF-DETERMINATION OF AMERICA'S INDIAN TRIBES* (2010); GEORGE PIERRE CASTILE, *TO SHOW HEART: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1960-1975* (1998); and EMMA R. GROSS, *CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS* (1989) for good treatments of this halcyon period.

⁸ [436 U.S. 49, 71-72 \(1978\)](#).

⁹ See id.

The same year Santa Clara was decided, another Deloria, Philip (Sam) Deloria,¹⁰ made a powerful, almost prophetic, statement warning about the inherent dangers if Native political leaders blithely invoked the doctrine of sovereignty as a rationale for otherwise problematic decisions involving tribal affairs:

There has been much discussion in recent years about tribal sovereignty and Indian treaty rights. Let me warn you—as in many areas of political discussion, this is a conceptually thick forest. It can be beautiful and contain a lot of riches. It can also be a hiding place for thieves, robbers, and charlatans.

The discussion hasn't often enough moved to a level which is truly helpful to community leaders and community people. The concept of tribal sovereignty means nothing to any of us unless it can help us deal with the survival-threatening problems which we face today, unless it contributes to a richer life as we define it for our people.¹¹

[*328]

Similarly, Russel Barsh, writing in 1986, expressed grave concern for those Native individuals and governments who became enamored of the tribal sovereignty concept.¹² He noted that indigenous peoples

must be on their guard against the seduction of the European state-idea. In their search for conceptual weapons to combat external political interference sic, contemporary native leaders increasingly describe their own traditional institutions as "sovereign" or "state-like," as if it were some kind of defensive shell. But these . . . concepts can become a "Trojan Horse," . . . creating dangerous new systems of power in the name of liberation . . .¹³

Sandwiched by these two apprehensive statements about how the political/legal concept of tribal sovereignty might be misused by tribal officials, Vine Deloria, writing in 1979, offered what might be the most compelling and culturally grounded understanding of the concept from an indigenous perspective and argued that when the phrase was immersed in historic indigenous values it could be a powerful tool that could bind a community together in a most productive manner.¹⁴ He said:

Sovereignty, in the final instance, can be said to consist more of continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty.

When we view sovereignty in this broadly expanded light, new possibilities for constructive action arise. Cultural integrity involves a commitment to a central and easily understood purpose that motivates a group of people, enables them to form efficient, albeit informal social institutions, and provides for them a clear identity which cannot be eroded by the passage of events. Sovereignty then revolves about the manner in which traditions are developed, sustained, and transformed to confront new conditions. It involves most of all a strong sense of community discipline and a degree of self-containment and pride that transcends all objective codes, rules, and regulations.¹⁵

Vine Deloria's definition of a culturally-rooted notion of sovereignty raises the vital question: What are the criteria that define what a Native nation is? What, in other words, does it mean to be Seminole, Mohawk, Yakama, Chukchansi, or Narragansett? What are the definitional markers that make an indigenous nation just that, indigenous and a nation? What is required of each individual to be recognized as a bona fide participant, citizen, or, for lack of a better word, member of a given Native nation? And, most essential for purposes of this Article, what are

¹⁰ Sam Deloria, Vine's younger brother, was a significant intellectual figure in his own right. See Sam Deloria, Introduction, in *INDIAN TRIBAL SOVEREIGNTY AND TREATY RIGHTS* 23, 23 (La Confluencia 1978).

¹¹ *Id.*

¹² Russel Lawrence Barsh, *The Nature and Spirit of North American Political Systems*, 10 AM. INDIAN Q. 181, 195-96 (1986).

¹³ *Id.* at 196.

¹⁴ See Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in *ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS* 22, 22 (Roxanne Dunbar Ortiz ed., 1979).

¹⁵ *Id.* at 27.

the conditions and consequences that can, and increasingly do, lead to recognized tribal members [*329] being stripped, exiled, banished, or disenrolled of their indigenous political, legal, and cultural identity by their own governments?

Historically, indigenous lands, languages, spiritual values and traditions, and kinship systems provided the most recognized frameworks that enabled each Native nation, and the individuals, families, and clans constituting those nations, to generally rest assured in their collective and personal identities and not have to wonder about "who" they were. The bonds of organic connections were so strong, in fact, that identity crises--be they national or individual--were most likely rarely encountered within aboriginal communities.

Of course, four centuries of interactions with foreign powers have taken a mighty toll on Native peoples, and by the last three decades of the twentieth century there were increasing questions regarding how indigenous peoples understood who they were and how they were or were not related to one another. Writing in 1974, Deloria succinctly noted as much when he stated: "The gut question has to do with the meaning of the tribe. Should it continue to be a quasi-political entity? Or it could become primarily an economic structure. Or it could become, once again, a religious community. The future, perhaps the immediate future, will tell." ¹⁶

Native nations, of course, like all human communities, are in a constant state of flux. No nation remains static, and when nations, like indigenous peoples, are continuously confronted by more powerful military, economic, and constraining legal and political systems like that of the United States, then the changes they experience--those demanded of them by the State or generated internally as coping mechanisms--can lead to massive psychological, social, cultural, political, and economic alterations that can have a profound impact on the central identity of Native peoples. ¹⁷

Such appears to be the case in Indian country over one of the most critical issues there is: Who belongs to a Native nation and what are the grounds upon which that individual's relationship to his or her nation may be severed by the governing institutions of that nation? While not as important as that most fundamental of human rights--the right to life as a free human being--the right to belong to a particular indigenous community, long viewed as a given by bona fide tribal citizens, has been and remains under assault in a number of Native nations. And since the Santa Clara case, an ever-increasing number of tribal communities have disenrolled an ever-increasing number of otherwise legitimate Native citizens. Such expul [*330] sions are happening for a variety of reasons, but two dominant factors appear to be the driving forces behind such dismemberments: gambling revenues and criminal activity.

Native nations have always possessed the inherent authority to denationalize any tribal member. Moreover, they wield a power, unknown to any other sovereign in the United States, to formally exclude non-Natives from their territorial homelands. But this Article argues that far too many tribal nations are engaging in banishment or disenrollment practices in clear violation of their own historic values and principles, which at one time utilized peace-making, mediation, restitution, and compensation to resolve the inevitable disputes that occasionally arose. ¹⁸ Historically, though only on rare occasions, a tribal member might commit a grievous offense (e.g., pre-meditated murder) for which he or she might be killed or, in some cases, banished--forcibly exiled--if all other attempts to resolve the conflict or restore harmony failed. But the available documentary evidence and the oral traditions across the hemisphere suggest that given the powerful kinship structures evident in virtually all Native nations, draconian policies like the formal termination of the political and legal rights of tribal members--legally referred to as disenrollment after that term first appeared in the 1930s after the Indian Reorganization Act was voted on by a number of tribal nations--was rarely utilized.

¹⁶ VINE DELORIA, JR., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 43 (James Treat ed., 1999).

¹⁷ For instance, K. Tsianina Lomawaima conducted an important study on the impact of boarding schools on young native minds and souls. See generally K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994).

¹⁸ See *infra* Part II.

II. The Dismembering Begins

The history, rationale, and consequences of banishment and disenrollments in Indian country have been addressed in previous work,¹⁹ and this Article will not repeat those findings. Suffice it to say that since the Santa Clara opinion in 1978, (but coinciding most directly with the emergence of high stakes gambling operations authorized under the Indian Gaming Regulatory Act of 1988 and with the dramatically increasing levels of criminal activity in Indian country) a number of indigenous governments in over a dozen states have been redefining the boundaries and meaning of what it means to be a Native citizen by initiating either banishment proceedings or disenrollment procedures, leading to a surge of expulsions of previously enrolled members.²⁰ In California alone, the tribal leadership in over **[*331]** fourteen small Native communities is leading the charge in the dismemberment of their own people.²¹ The most disturbing case is that of the Chukchansi people, where more than half the population--1,000-plus individuals--have been formally disenrolled in recent years.²²

Two events in 1996 first brought this issue to my attention; both involved the banishment of enrolled tribal citizens.²³ The first episode centered on the banishment of one individual, George Whitewolf, a Monacan Indian, from Virginia. Whitewolf, a medicine man, and I had been friends for over two decades, but when new leadership was elected he found himself on the wrong side of their political and spiritual ideology, and he was unceremoniously "banished." An outcry from tribal members forced the governing body to reconsider, and within a few months he was reinstated. Nevertheless, that event and our many conversations about how and why the process had unfurled and the psychic pain it caused him and his family left a deep imprint on me.

The second episode, an important federal court ruling also involving banishment, occurred among the Seneca of New York.²⁴ In this case, *Poodry v. Tonawanda Band of Seneca Indians*, a federal appellate court ruled that five Seneca citizens, who had been permanently banished by the tribal government on the grounds that they had allegedly committed "treason" against the Seneca nation, were entitled to federal review of the tribe's action. This was so because banishment was considered a severe enough punishment involving a sufficient restraint on their liberty and because the banished members had been evicted without a trial, prior notice, or any other form of due process.²⁵ In the words of Judge Cabranes, this case placed before the Second Circuit Court of Appeals

a question of federal Indian law not yet addressed by any federal court: whether an Indian stripped of tribal membership and "banished" from a reservation has recourse in a federal forum to test the legality of the tribe's actions. More specifically, the issue is whether the habeas corpus provision of the Indian Civil Rights Act of 1968 ICRA allows a federal court to review punitive measures imposed by a

¹⁹ See David Wilkins, Self-Determination or Self-Decimation? 'Banishment and Disenrollment in Indian Country,' *INDIAN COUNTRY TODAY* (Aug. 30, 2006), <http://indiancountrytodaymedianetwork.com/ictarchives/2006/08/30/self-determination-or-self-decimation-banishment-and-disenrollment-in-indian-country-127773>; David E. Wilkins, Exiling One's Kin: Banishment and Disenrollment in Indian Country, 17 *W. LEGAL HIST.* 235, 235-62 (2004).

²⁰ See generally Mary Swift, Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions, 86 *WASH. L. REV.* 941 (2011); Eric Reitman, An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership, 92 *VA. L. REV.* 793 (2006) (discussing some of the current enrollment disputes).

²¹ See Chris Collins, Severed Bloodlines, *FRESNO BEE*, Mar. 1, 2009, at A1.

²² Telephone Interview with Cathy Cory (Jan. 7, 2012) (disenrolled member of the Chukchansi people).

²³ This Article does not address the equally disturbing trend evident in several tribal nations, most notably the Cherokee Nation of Oklahoma and the Seminole of Oklahoma, that in recent years have engaged in efforts to formally disenfranchise previously lawfully enrolled members of African-American descent.

²⁴ *Poodry v. Tonawanda Band of Seneca Indians*, 85 *F.3d* 874 (1996).

²⁵ *Id.* at 876-77.

[*332]

tribe upon its members, when those measures involve "banishment" rather than imprisonment.²⁶

In 1992, the federal district court dismissed the applications of the five Seneca, led by Peter L. Poodry, who had been summarily convicted of "treason" and sentenced to permanent banishment from the reservation earlier that year.²⁷ The petitioners, upon the banishment, had filed applications in the district court asserting that the Band's banishment order was a criminal conviction that violated their rights under the 1968 ICRA.²⁸ They unsuccessfully sought habeas corpus relief, which is provided under that Act, with the court concluding "that the threat of permanent banishment was not a sufficient restraint on liberty to trigger the application of the ICRA's habeas corpus provision."²⁹

The banished Seneca then appealed this decision to the Second Circuit Court of Appeals, which vacated the district court's finding by holding that banishment was, indeed, a severe enough punishment involving a sufficient restraint on the liberty of those banished to qualify as "detention" and, thus, to permit federal review under the ICRA's habeas corpus rule.³⁰ The case was sent back down to the district court for a resolution based on the merits.³¹ The Second Circuit said, in effect, that the lower court had erred in dismissing the banished individuals' petitions for habeas corpus on jurisdictional grounds.³² This was an important case because the court appeared to expand the scope of relief under the ICRA to include review of banishment orders.

The Second Circuit rendered a detailed opinion that addressed the relationship between tribal sovereignty and congressional plenary power; the impact of the ICRA and the habeas corpus proviso; and the vitality of the Santa Clara precedent.³³ Of importance for this Article is how the court addressed the issue of "treason" and the meaning of "banishment" for tribal citizens. The Chiefs who had issued the banishment order said that the petitioners had been convicted of treason because they "engaged in 'unlawful activities,' including 'actions to overthrow, or otherwise bring about the removal of, the traditional government' of the Tonawanda Band."³⁴

In describing permanent banishment, Judge Cabranes compared it with denaturalization proceedings that may be started when individuals have obtained U.S. citizenship illegally or through willful misrepresentation and [*333] can be compelled to forfeit their citizenship for having done so.³⁵ Drawing upon Supreme Court precedent, the judge emphasized that "a deprivation of citizenship is 'an extraordinarily severe penalty' with consequences that 'may be more grave than consequences that flow from conviction for crimes.'" ³⁶ And quoting from the former Chief Justice

²⁶ [Id. at 879.](#)

²⁷ [Id. at 876.](#)

²⁸ *Id.*

²⁹ *Id.*

³⁰ [Id. at 876-77, 882.](#)

³¹ [Id. at 877.](#)

³² *Id.*

³³ [Id. at 880-87.](#)

³⁴ [Id. at 889.](#)

³⁵ [Id. at 895.](#)

³⁶ [Id. at 895-96](#) (quoting *Klapprott v. United States*, 335 U.S. 601, 611-12 (1949)).

Earl Warren, Cabranes wrote that denationalization is the equivalent of the "total destruction of the individual's status in organized society."³⁷

Having established how devastating the termination of citizenship was, Judge Cabranes then described the Senecas' banishment as

the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation. To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason.³⁸

In ruling that permanent banishment as a punishment for treason amounted to a sufficient restraint on liberty to invoke federal jurisdiction, Judge Cabranes reiterated that this was a novel question with potentially lasting significance for tribal citizens everywhere.³⁹ He frankly noted: "This is especially true at a time when some Indian tribal communities have achieved unusual opportunities for wealth, thereby unavoidably creating incentives for dominant elites to 'banish' irksome dissidents for 'treason.'" ⁴⁰ This was a slightly veiled reference to the significant gaming resources the tribes were beginning to pull in. Interestingly, there was no discussion in the Cabranes ruling about gaming. Although the Second Circuit concluded that the petitioners deserved the right to have the merits of their claims re-heard by the district court, it also held that sovereign immunity of the Tonawanda Band had to be respected and that the nation could not be sued without its express consent.⁴¹

Finally, Judge Cabranes sent a stern warning to those tribal governments who attempt to use cultural difference to justify what the judge viewed as diminutions of essential civil rights.⁴² In the court's words:

Here, the respondents [Council of Chiefs] adopt a stance of cultural relativism, claiming that while "treason" may be a crime under the law of the United States, it is a civil matter under tribal law; and that while "banishment" may be thought to be

[*334]

a harsh punishment under the law of the United States . . . it is necessary to and consistent with the culture and tradition of the Tonawanda Band.⁴³

The court, however, was not persuaded by these cultural arguments. While acknowledging that tribes are unique political and cultural entities, it more forcefully declared, "The respondents wish to use their connection with federal authorities as a sword, while employing notions of cultural relativism as a shield from federal court jurisdiction."⁴⁴

Judge Cabranes recognized that tribal governments have the right to govern, to establish their own criteria for citizenship, and have the power to regulate their lands and to exclude outsiders.⁴⁵ But he also acknowledged a federal responsibility for those American citizens

³⁷ Id. at 896 (quoting [*Trop v. Dulles*, 356 U.S. 86, 101-02 \(1958\)](#)).

³⁸ Id. at 895.

³⁹ Id. at 879, 897.

⁴⁰ Id. at 897.

⁴¹ Id. at 899.

⁴² Id. at 900.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

subject to tribal authority when that authority imposes criminal sanctions in denial of rights guaranteed by the laws of the United States. In sum, there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive "sovereignty" our country has long recognized and sustained. ⁴⁶

III. Where Do We Go from Here?

By the late 1990s, a combination of violent crime and illegal drug activity--and ever-expanding tribal coffers filled with gaming revenue and judgments funds from claims decisions--prompted an increasing number of tribal political elites to look to banishments and, increasingly, disenrollments, as two mechanisms that they would use to address the altered socio-cultural-economic landscape of Indian country. The enormous surge in criminal activity led to a small spike in banishments or exclusions on some reservations, like the Grand Portage Band of Chippewa, who in 2004 adopted a new law titled "exclusion" which declared:

In order to properly secure the peace, health, safety and welfare of the residents of and visitors to the band's territory, it is necessary to establish procedures and standards for the removal and exclusion from the land subject to the territorial authority of the band those persons whose conduct or associations become intolerable to the Community and threaten the peace, health, safety and welfare of the band. ⁴⁷

Importantly, explicit due process stipulations are spelled out, including written notice and a hearing that allows the individual facing exclusion to address the council, call witnesses, present evidence, and question and challenge the witnesses who are testifying against the person to be banished. ⁴⁸ **[*335]**

But it has been the surge of dollars generated by gaming and other revenue producing enterprises that has generated a tremendous spike in the number of formal disenrollments in a large number of Native communities throughout the United States, especially in California. Such denationalizing actions by tribal governing officials have often been of a malicious nature and have been carried out on the most spurious of grounds--personal feuds, greed, political power struggles, etc.--frequently masked by alleged lack of blood quantum or alleged errors in the documentary records that are said to have allowed ineligible individuals to be enrolled in tribes. ⁴⁹

It is this latter category--the much larger category of disenrollments of otherwise bona fide tribal members--that is most problematic, because in many cases such actions clearly violate the human rights of those disenrolled, leaving dismembered individuals tribeless, if not stateless. In many of these cases, tribal officials are--without any concern for tribal traditions, due process, or civil and political rights--arbitrarily and capriciously disenrolling certain tribal members as a means to solidify their own economic and political bases and to winnow out opposed individuals or in some cases entire families who disapprove of the direction the tribal leadership is headed.

At the present time, disenrollees have extremely limited rights to challenge their expulsions under existing federal or tribal law, despite the promise of the Poodry ruling. A detailed review of much of the case law (federal and state) since Poodry ⁵⁰ reveals what Singel noted in her essay: in virtually all of the litigation, federal and state courts have

⁴⁶ Id. at 900-01.

⁴⁷ Grand Portage Band Code, Exclusion (on file with author).

⁴⁸ Id.

⁴⁹ Ian Lovett, Power Struggle over Indian Tribe Splinters into Violence in California, N.Y. TIMES, Feb. 29, 2012, at A9.

⁵⁰ See, e.g., [Alire v. Jackson](#), 65 F. Supp. 2d 1124 (D. Or. 1999); [Moore v. Nelson](#), 270 F.3d 789 (9th Cir. 2001); [Shenandoah v. Halbritter](#), 275 F. Supp. 2d 279 (N.D.N.Y. 2003); [Payer v. Turtle Mountain Tribal Council](#), No. A4-03-105, 2003 WL 22339181 (D.N.D. Oct. 1, 2003); [Quair v. Sisco](#), 359 F. Supp. 2d 948 (E.D. Cal. 2004); [Lewis v. Norton](#), 424 F.3d 959 (9th Cir. 2005); [Lamere v. Superior Court](#), 131 Cal. App. 4th 1059 (2005); [Alvarado v. Table Mountain Rancheria](#), 509 F.3d 1008 (9th Cir. 2007); [Salinas v. Barron](#), No. E042846, 2008 WL 699205 (Cal. App. 4th Mar. 17, 2008); [Sweet v. Hinzman](#), 634 F. Supp. 2d 1196 (W.D. Wash. 2008); [Sweet v. Hinzman](#), No. C08-844, 2009 WL 1175647 (W.D. Wash. Apr. 30, 2009); [Jeffredo v. Macarro](#), 590 F.3d 751 (9th Cir. 2009); [Cahto Tribe of the Laytonville Rancheria v. Dutschke](#), No. 2:10 CV01306, 2011 U.S. Dist. LEXIS

generally adhered to the Santa Clara precedent that tribes are the final arbiter of membership decisions and that their sovereign immunity broadly shields them from lawsuits filed by tribal members.⁵¹ As the court said in *Payer*, "the decision of the United States Supreme Court in *Santa Clara Pueblo v. Martinez* reduces the degree of federal interference in tribal government and requires that en **[*336]**forcement of the Indian Civil Rights Act rest primarily in the Tribal Courts."⁵² The Ninth Circuit Court of Appeals in *Lewis v. Norton* in 2005 was even more blunt in reminding disenrollees of how limited their rights were: "Although their claim to membership appears to be a strong one, as their father is a recognized member of the tribe, their claim cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes."⁵³

While most of the judicial precedent continues to vigorously enforce the Santa Clara holding, a few judges have more recently begun to contend that disenrollees should have more rights under the law to dispute the legal termination of their tribal citizenship. In a case involving several Snoqualmie tribal members who had been banished in 2008, *Sweet v. Hinzman*, a federal district court ruled that the five banished members' due process rights had, indeed, been violated under the ICRA because they had not been given adequate notice of a tribal meeting where their permanent banishment was determined.⁵⁴ Equally important, the court held that the doctrine of tribal sovereign immunity did not shield tribal officials "in their official capacity for alleged unlawful acts" associated with the banishment proceedings.⁵⁵

And in *Jeffredo v. Macarro*, a case involving the Pechanga Band of Luiseno Mission Indians, Judge Claudia Wilken, in a stirring dissent--after noting that the tribe's membership criteria had not been established until 1979; that the procedures used to disenroll were not put into place until 1988; and that the "Tribal Council did not begin disenrolling large numbers of members until recently, when the Tribe's casino profits became a major source of revenue"⁵⁶--said:

Although with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans. This is more than just a loss of a label, it is a loss of a political, ethnic, racial and social association. Such a loss constitutes a restraint on liberty that, combined with the actual and potential restraints described above, satisfies the detention requirement under § 1303, in my opinion.⁵⁷

The latter two statements may well be a harbinger of a brewing judicial and national sentiment on this critical subject, since Native individuals are not merely tribal citizens but also are state and federal citizens as well. Thus, we turn now to Singel's suggestion for an intertribal treaty that would, if ever devised, create a new human rights framework for treaty sig **[*337]** natories that would theoretically provide an indigenous-based remedy for disenrolled individuals.

The idea for such an intertribal mechanism is not new, of course. Throughout history there have been several intertribal organs created or actively discussed. There have been regional structures like the confederated

54398 (E.D. Cal. May 20, 2011); *Cahto Tribe of Laytonville Rancheria v. Dutschke*, No. 2:10 CV01306, 2011 U.S. Dist. LEXIS 108393 (E.D. Cal. Sept. 21, 2011).

⁵¹ Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, [49 SAN DIEGO L. REV. 567 \(2012\)](#).

⁵² [Payer, 2003 WL 22339181](#), at *6.

⁵³ [424 F.3d at 960](#).

⁵⁴ [2009 WL 1175647](#), at *10.

⁵⁵ *Id.* at *5.

⁵⁶ [590 F.3d 751, 761 \(9th Cir. 2009\)](#) (Wilken, J., dissenting).

⁵⁷ [Id. at 765](#) (citations omitted).

governing arrangement established by the Haudenosaunee--Six Nations--who created the Gayanashagowa, or the Great Law of Peace.⁵⁸ In the Southwest, nineteen of the Pueblo peoples created the All Indian Pueblo Council in 1598 that enabled them to deal intergovernmentally with the Spanish, Mexican, and later the federal and state governments.⁵⁹ And in 1870, fifteen Native nations centered in what became known as Oklahoma organized an intertribal charter known as the Okmulgee Constitution.⁶⁰ Although it was never ratified by all the tribes, it established a diplomatic precedent that would later reemerge in 1906 with the writing of a constitution for numerous tribes in the same territory who set out to create an indigenous state that would have been called Sequoyah.⁶¹

And historically, Native nations had long engaged in diplomatic affairs with one another, and they vigorously carried on that tradition when European states began to arrive.⁶² While many Native peoples agreed to surrender the right to negotiate treaties with other foreign powers as part of their negotiations with the United States, they never surrendered, as Deloria reminded us on several occasions, the right to negotiate treaties with other Native nations.⁶³ Deloria and DeMallie, for example, in their important treaty study remarked:

Intertribal treaties and agreements represent a wide variety of situations. Sometimes the Indians resolved boundary disputes; at other times they agreed to share hunting and fishing areas. Still other occasions called for sharing annuities or guaranteeing that whites would not be molested in their lands. . . . Intertribal treaties and agreements still have considerable importance. No case law has ever suggested that any Indian nation surrendered the right or power to make treaties with another Indian nation, even though the federal government itself insisted that treaties with Indians could no longer be made by the United States. In these days of consortiums and combinations of tribes for various purposes, tribal councils should seriously consider the feasibility of conducting their own form of diplomacy with other Indian nations.⁶⁴

[*338]

More recently, on August 1, 2007, an even broader based international protocol was adopted by representatives from eleven Native nations from the United States, Canada, New Zealand, and Australia.⁶⁵ This treaty thematically focuses on cultural property, protection of lands and other natural resources, and trade and commerce.⁶⁶ This accord builds upon Deloria's admonitions and could prove a useful model for those U.S. based Native nations who question whether such an international protocol is feasible.

Conclusion

Simply put, there is no shortage of diplomatic precedents available for those Native leaders who might be willing to support the much needed human rights framework that Singel is calling for. The question is whether there is sufficient political and moral will among indigenous leaders for such a treaty? Singel's arguments for why we need such a protocol are compelling to me--as a Native academic. But tribal leaders answer to a different set of constituencies. I am convinced that until and unless the United States Congress or, more likely, the United States

⁵⁸ DAVID E. WILKINS, *DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500S TO 1933*, at 14-37 (2009).

⁵⁹ *Id.* at 37.

⁶⁰ For a copy of this constitution, see WILKINS, *supra* note 58, at 133-41.

⁶¹ See WILKINS, *supra* note 58, at 299-359.

⁶² See generally 1 VINE DELORIA, JR. & RAYMOND DEMALLIE, *DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979* (1999).

⁶³ *Id.* at 680-81.

⁶⁴ *Id.* at 681.

⁶⁵ United League of Indigenous Nations Treaty, Aug. 1, 2007, available at <http://www.indigenouznationstreaty.org/about-ulin/the-treaty/>.

⁶⁶ *Id.*

Supreme Court, steps in and hands down a deeply invasive law or ruling that profoundly diminishes or even eliminates the heart of a core sovereign power, like the power to decide to who belongs to a tribal nation, most Native leaders will be unwilling to yield any of their inherent autonomy to construct such an intertribal protocol for fear that it will hasten the decline of their sovereign authority.

While we live in an increasingly interconnected and interdependent world, far too many tribal leaders are overly committed to an outmoded and archaic definition of sovereignty that refuses to concede that the world is, in fact, interdependent and interrelated. Until and unless we move away from such absolutist definitions and agree to forge a viable intertribal body that provides a much stronger set of protections for the rights of all individuals subject to tribal authority, we will be in danger of replicating many of the kinds of abuses we once fairly accused the United States of engaging in.