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2003

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Recommended Citation

Wilkins, David E. "A Constitutional Confession: The Permanent if Malleable Status of Indigenous Nations." *New England Law Review* 37, no. 3 (March 2003), 473-482.

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KEYNOTE ADDRESS:

A Constitutional Confession: The Permanent if Malleable Status of Indigenous Nations

David E. Wilkins*

I appreciate the opportunity to address such an august group of students and faculty. When Amy invited me to join you, and she certainly is a very persuasive person, I debated long and hard on what kind of talk to give since I study politics comparatively. Although much of my work is infused with law and history, and a smidgen of culture, economics, and geography, I work largely at the intersection of politics, history and law, and have coined the awkward, though accurate, term, "Polegalorian," to describe what I do. My research is concerned broadly with how indigenous peoples generate, participate, and are subject to these and other important forces. My research also deals with how and why the American constituent states, international bodies, and the federal government, act in the manner they do towards aboriginal peoples.

I would like to begin with three epigraphs that I have posted on my office door, because you occasionally find snippets that really sort of capture certain ideas and themes that you have in mind. These three epigraphs, I think, typify the deep level of anger and frustration felt about the topics we will be discussing today. The first one is from Ted Moses, who is the ambassador for the Cree nation in Canada. He said, "This is a most peculiar situation. How is it that I, a Cree, whose ancestors lived in the Cree territory of James Bay for at least 5,000 years, find myself and my people suddenly subject to the laws of states that were only established a

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few hundred years ago?"[1] The second one is from Francis Abraham, an Ojibwa. Abraham said, "Where did the MNR [Ministry of Natural Resources] get the right to tell us what we can do and what we can't do on our own land? How come we have to do a land claim while the others who came and took our land never have to prove anything?"[2] Finally, there is the comment from Corn Tassel, a Cherokee, from a speech he made to U.S. Treaty Commissioners in 1785. He said, "Again, were we to inquire by what law or authority you set up a claim [to our land], I answer none! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations and they are both against you."[3]

These are provocative and gut wrenching statements and represent some of the genuine and legitimate moral, emotional, and yes, jurisdictional concerns of aboriginal people. My comments today represent an effort to try and get a handle on the convoluted, and in some respects irreconcilable, nature of the political, legal, and cultural status of indigenous nations as they operate outside, within, and under United States policy and law, and increasingly under state law as well. Before doing this though, it is important from a comparative context to understand that what happens to aboriginal peoples in the United States is not unique to this country.

I would like to share a little from my experience as a Fulbright Fellow last fall. My family and I had the opportunity to spend the fall semester at the University of Calgary, "The Texas of Canada" as I was told going in, and I discovered that characterization to be fairly accurate. It was quite an experience for many reasons, but the primary reason I sought the fellowship was to learn something of what conditions are like for First Nations, Inuit, and Métis peoples in Canada. One hears about how strong the democratic State of Canada is, and how it has a fairly tolerant attitude towards non-white Canadians, but my prior reading of Canadian aboriginal law and politics had shown me a different side, a darker side, a less tolerant side, and I wanted to see firsthand what was happening. Of course, Canada is a massive geopolitical entity, home to over 600 aboriginal communities with a convoluted treaty history and a budding treaty present. It also is home to the Métis, a mixed blood people with their own unique history and legal status, and also is most recently home to a new territorial government, Nunavut, a Provincial-like entity governed by the Inuit of the far north. I knew I would only be getting a taste of what there was to learn, but I was

1. Ted Moses, *Seeking Justice at the International Level*, *in* ABORIGINAL PEOPLES: TOWARD SELF-GOVERNMENT 25 (Marie Leger ed., 1994).

2. SIDNEY L. HARRING, WHITE MAN'S LAW: NATIVE PEOPLE IN NINETEENTH-CENTURY CANADIAN JURISPRUDENCE 273–74 (1998).

3. DAVID E. WILKINS & TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 19 (2001) (quoting Corn Tassel).

excited to begin the process.

One can read about such affairs, but book learning is not like actual visitation or, better yet, residency in a new land. As my principal teacher and good friend Vine Deloria once put it: "We may misunderstand something we hear or read, but we cannot misexperience a lived moment or set of moments."[4] To put it another way, slightly different from what Descartes said when he made the statement, "I think; therefore I am[,]"[5] aboriginal peoples might respond by saying, "I experience; therefore I am." So even though we had only four months to enjoy that breathtaking country and the diverse peoples of that land, we experienced a great deal during our time there.

Since the United States and Canada share some common territorial landmarks, colonial ancestors, and are home to a number of indigenous nations who, historically and today, lived and traveled across the constructed border dividing the two, it has long been one of my avowed goals to continue to expand my research on the similarities and dissimilarities in the historical trajectories, political relations, and legal standings of native peoples towards one another, and in relation to the provinces, states, the national government, and increasingly, vis-à-vis their relations with the international community. Some of the questions that gelled in my mind as a result of my short stay in Canada include the following:

- Why was the treaty process continued, and in fact, recently revived in Canada, while it problematically ended in the United States in 1871 with no clear sign that it will ever be restarted?
- Why do some aboriginal people in Canada now believe that the present treaty process is actually a cooptive ploy by the Canadian State to solidify their already powerful position vis-à-vis First Nations' peoples?
- Why, despite the professed liberal democratic nature of the Canadian State, has indigenous self government largely been denied to First Nations in Canada while in the United States it is, at least theoretically, a reality enshrined in the Constitution, treaty relationships, statutory law, and federal policy?
- How were aboriginal peoples in Canada able to have their treaty rights constitutionally entrenched in 1982, while tribes in the United States who, in theory, enjoy far more self-governance, have not been able to garner a similar constitutional safeguard for our treaty or sovereign rights, notwithstanding that treaties are considered the supreme law of the land?

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4. Personal Communication with Vine Deloria (April 17, 2000).
5. RENE DESCARTES, DISCOURSE ON METHOD (1637).

- Why have both countries been unwilling to jettison the factually inaccurate and morally indefensible "doctrine of discovery" and the theory of federal and, increasingly, state provincial plenary power, despite the fact that these concepts are rooted in pre-colonial notions of European racism and ethnocentrism that essentially deny the humanity and legal standing of aboriginal peoples?
- Finally, how is it that both countries emphasize that they have a fiduciary, or trust relationship, with native nations—a relationship in which the national government promises to protect and support aboriginal peoples and which should protect and shield the First Nations from forces aimed at their destruction or diminution of their treaty resources or civil rights—yet despite this acknowledged trust relationship, aboriginal peoples in both states continue to experience astronomical levels of poverty (except for a few gaming tribes), gross health conditions, poor education attainment levels, and have treaty and constitutional rights that can be wiped out quite easily by the very trust agent charged with protecting aboriginal rights and powers?

In fact, while I was there, a reporter for the *Toronto Globe and Mail*, a leading national newspaper, wrote a fourteen-part series entitled "Canada's Apartheid,"[6] which began just about the time we arrived and concluded just as we were leaving. In the article the reporter graphically depicted the ongoing horrendous conditions that aboriginal nations face in Canada, despite the Canadian government's perception of itself and its projection to the outside world of it being the most just society around. Unfortunately, the reporter concluded his otherwise solid series by asserting that the solution to aboriginal problems was the assimilation of aboriginal peoples. Even George Bush and Gail Norton, as conservative as they are, are not so naïve as to make such a simplistic ethnocentric statement—at least not publicly. These were just some of the comparative questions that came to mind during my stay in Calgary. Other questions are still forming.

While it is premature for me to speak comparatively across these two countries, I would like to take the remainder of my time to provide you with a brief, but I think fairly comprehensive, overview of some of the complex dimensions of aboriginal status in the United States that make for a perpetually insecure world for native peoples.

The multiple overlapping and often contradictory manifestations of indigenous status have arisen from the American public's curiously

6. John Stackhouse, *Canada's Apartheid*, THE GLOBE AND MAIL, Nov. 3–Dec. 15, 2001, *available at* http://www.globeandmail.com/series/apartheid (last visited Mar. 31, 2003).

ambivalent views of aboriginal peoples, historically contradictory Supreme Court precedents—I say "historically" because the Rehnquist Court has been remarkably consistent in its successful attempts to diminish tribal authority and jurisdictional authority—vacillating congressional statutes, the long and complicated treaty and agreement record, and thousands of Byzantine administrative regulations. In fact, in keeping with the Bush administration's war-like tenor of the day, we could term the contemporary indigenous situation an "Axis of Insecurity." This is a protean mix of the Bush administration's policies regarding natural resources, trust funds, gaming, and state governments that are forcing themselves deeper and deeper into Indian country despite the constitutional and treaty safeguards set up long ago that have still not been dislodged. This is all held together by the Supreme Court's ideological and practical orientation masked by the alleged neutrality of the rule of law, which is emphatically aimed at the drastic reduction, if not the formal termination, of tribal sovereignty as we once experienced it.

Unlike Bush's problematic characterization of the "Axis of Evil," this "Axis of Insecurity" for tribal nations is real and fluid and has meant a perpetual destabilized set of statuses for indigenous nations. Over time, and in an entirely unpredictable and ad hoc way, the statuses have expanded and multiplied, but their lineage traces to the earliest moments of the United States—although one could easily push the variations back to sixteenth century theological debates in Spain about whether or not indigenous peoples were free persons or slaves. Thus, tribes, as collective bodies, have an inherent racial, cultural, and national status. United States law and policy also has accorded them a dependent ward-like status and later, a corporate status. Tribes have been alternately treated as discrete and insular minority groups and as local governments or sub-units of governments. They also have been viewed as social service agencies, as a result of their poverty, and United States law and policy has regarded tribes as delegated bodies for purposes of carrying out federal mandates. In addition, tribes have been statutorily treated as states for some problematic purposes. These are descriptions of tribes in a collective sense.

Indians and Alaskan natives, as individuals, have a recognized status as tribal, cultural, and political citizens, eligible for distinctive property rights and tax exemptions. Although not initially granted state and federal citizenship due to their pre-existing national status, individual Indians and Alaskan natives now hold that status and are legally entitled to the services and benefits open to every American. Due to their indigenous status, however, native citizens may still be treated as subjects under federal law. The United States can abrogate or diminish their treaties and collectively-held property rights, notwithstanding their sovereign or citizenship status. This subject status is largely due to congressional plenary power, defined

here as unlimited and absolute, which was unilaterally and extra-constitutionally generated in the late 1800s via the *Kagama*[7] decision, and a number of succeeding cases after that aimed at the forcible assimilation of individual Indians and the dispossession of indigenous collective property and other rights. This status continues to affect Indians and tribes through criminal penalties, religious rights, aboriginal title, and treaty enforcement—or more accurately, lack of enforcement—which are some of the issues we will be talking about in the panels today.

As a result of these multiple, inherent, assumed, and imposed statuses, indigenous peoples, as collective bodies and as individuals, are left with an inconclusive and ambivalent understanding of their political, legal, and cultural rights, and their actual status vis-à-vis states and the federal government. In short, the federal government has an indeterminate relationship with tribal nations and their members, sometimes recognizing and supporting tribal sovereignty, and sometimes acting to deny, diminish, or even terminate that status. However, the federal government is always acting as if it were the superior sovereign in the awkward minuet of sovereigns.

On the one hand, such indeterminacy accords to imaginative tribal leaders, American presidents and their agents, federal judges, congressional lawmakers, and state officials a degree of political and legal flexibility. Involved parties may successfully navigate otherwise difficult political terrain by choosing the appropriate indigenous statuses that can benefit tribal nations and individual Indians. On the other hand, and of greater import, such ambivalence deprives aboriginal peoples, collectively and individually, of a clear and consistent understanding regarding the powers and rights they may exercise, thereby contributing to the ongoing tension that frequently clouds the relationship between First Nations and other political or corporate entities.

In the essay that this talk is drawn from, I examined the origin, rationale, and consequences of several of these collective and individual statuses using a simple chronological format starting with the grandfather of all American policy equivocators, Chief Justice John Marshall, and continuing to the present. The three Indian law cases that Marshall is most noted for, *Johnson v. McIntosh*,[8] *Cherokee Nation v. Georgia*,[9] and *Worcester v. Georgia*,[10] were all written in the early 1800s. In these cases, Chief Justice Marshall openly and deftly manipulated indigenous status by trying to provide some measure of recognition of Indian rights vis-à-vis the states,

7. United States v. Kagama, 118 U.S. 375 (1886).
8. 21 U.S. (8 Wheat.) 543 (1823).
9. 30 U.S. (5 Pet.) 1 (1831).
10. 31 U.S. (6 Pet.) 515 (1832).

while simultaneously elevating the federal government to a superior position in relation to tribes. Even though tribes were *de facto* and *de jure* sovereigns, Marshall spoke of indigenous people not only as national and state-like entities but also as Indians in the conglomerate or cumulative sense, as a race of people, as individuals, and of course, as domestic dependant nations. While the last two cases focused only on one tribal nation, the Cherokee, the principles enunciated have been used to diminish, and sometimes enhance, the rights of all aboriginal peoples.

From a democratic theory and constitutional perspective this is most problematic, since each indigenous nation has its own diplomatic arrangement with the United States—what the President and Congresses of recent years like to refer to as a government-to-government relationship. So why should a judicial ruling involving only a single tribal nation be extrapolated to infringe, or in some cases, affirm the rights of other First Nations? Tribal nations, after all, are not citizens in a constitutional sense, as their relationship with the United States is based on a sovereign recognition of one another's political independence, and individual Supreme Court rulings should have a bearing only on those tribal parties directly involved in the litigation. The various statuses constructed by Marshall—tribes as nations, state-like entities, focusing on individuals, or as Indians in a collective racial sense—are all distinctly different under the law. Marshall and subsequent Courts, lawmakers, and bureaucrats have ventured back and forth, sometimes intentionally, sometimes unwittingly, between these statuses. In a sense, the Court was only amplifying the conflicting statuses of aboriginal peoples specified in the United States Constitution. The Commerce Clause, as we all know, affirms a separate political status of tribes, while the Fourteenth Amendment and Article I make reference to Indians not taxed, which identifies the individual status of Indians who remained out of the political jurisdiction of the United States.

In the essay, I then moved to discuss Justice Taney's Indian law cases, such as *United States v. Rogers*,[11] which strikingly emphasized the racial dimension of Indian law that is still with us today. I talked about the important congressional and judicial actions of the 1860s and 1870s that redefined Indian status and treaty-making and forced assimilation, which became a dominant federal policy and legal paradigm. Next, I examined the notion of American citizenship as it was applied to certain tribal nations and their citizens and discussed how this has affected their status from the allotment policy to the 1924 Indian Citizenship Act.[12]

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11. 45 U.S. 567 (1846).

12. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as 8 U.S.C. § 1401(b) (2000)).

In fact, the layering of federal citizenship onto individual Indian citizenship, later supplemented by various state laws that accorded Indians the right to vote, has proven most troubling for First Nations members. On the one hand, individual Indians are now entitled to exercise a franchise in state elections and in federal elections under the Fifteenth Amendment; on the other hand, individual Indians are not guaranteed Fourteenth Amendment protection from their own tribal governments if the tribal government is acting within its sovereign capacity, as was held in the case *Groundhog v. Keeler*.[13] So what is our status as American citizens, and more broadly, did the United States Congress have the power to unilaterally enfranchise Indians absent our consent?

The 1930s signaled another dramatic shift in indigenous status with the passage of the Johnson-O'Malley Act[14] (JOM) and the Indian Reorganization Act[15] (IRA) in 1934. JOM brought the states into a more prominent role in Indian affairs, while the IRA, the most important piece of legislation dealing with the indigenous status in the past century, was much more comprehensive in its focus. While designed to counteract the ravages of allotment era policies and to encourage, some say to insist, that the tribes establish constitutional-type governments, it also served to dichotomize tribes into federally recognized and non-recognized entities. A vital question for such federally incorporated tribes is this: Does such incorporation make the indigenous polity an instrumentality of the federal government? Not surprisingly, there is conflicting evidence on this important question. In some cases it has been held that tribes, in relationship to states and municipal governments, are to be treated as federal instrumentalities; but in other cases, tribes have been held not to have such status under the meaning of the federal statutes.

Finally, I looked at the chain of events inspired by the federal government's termination policy, which began in the 1950s, and the stunning political, social, and cultural indigenous activism that termination inspired in the 1960s and 1970s. The rash of events resulting from that era's activism, especially the Civil Rights Movement, revived old indigenous statuses and created new ones that have continuing effect today. These include (i) tribes as discrete and insular minorities that require special protection from discrimination, (ii) tribes as dependant and geographically incorporated communities with reduced governing powers because of their alleged dependency status, (iii) tribes as states (TAS), (iv)

13. 442 F.2d 674 (10th Cir. 1971).

14. Johnson-O'Malley Act, ch 147, 48 Stat. 596 (1934) (codified as amended at 25 U.S.C. §§ 452-57 (2000)).

15. Indian Reorganization Act, ch 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (2000)).

the TAS treatment as states for purposes of environmental and taxation legislation in the shifting arrangement of federalism, and (v) tribes and their members as poverty stricken groups deserving federal assistance, not because of their distinctive treaty or political status, but because of their American citizenship and weakened socio-economic standing. Importantly, these statuses did not supplant the pre-existing ones. They simply were added on, making an already convoluted situation even more confusing. One of the important dimensions that resurfaced powerfully in the 1970s was the question of whether tribes were political or racial entities, although why this was pitched as a zero-sum situation has always eluded me.

In *Morton v. Mancari*,[16] the Supreme Court reaffirmed the political status of tribes by throwing out a challenge to the preference policy operating in the Bureau of Indian Affairs. Despite the anti-affirmative action position of the Rehnquist Court, the *Mancari* decision was reaffirmed in *Rice v. Cayetano*.[17] Ironically, this was a case involving the political and racial status of Hawaiian natives. Kennedy and the majority went to great lengths to distinguish the status of Hawaiian natives from American Indians to the detriment of Hawaiian natives, and, at least in this narrow instance, to the advantage of federally recognized tribes. One of the most important elements of the *Mancari* ruling, cited positively by both Kennedy for the majority and Stevens in dissent, was the notion that federal legislation singling out American Indians, though not Hawaiians, would be upheld as long as the special treatment could be tied rationally to the fulfillment of Congress' unique obligations to Indians—the old "tied rationality doctrine." Here we see the generic word "Indians" figuring prominently into the Court's calculus, not as specific tribes, and certainly not as Hawaiian natives. Of course, the so-called "tied rationality doctrine" hinges entirely upon whether or not the United States acknowledges its trust relationship with tribes. It also assumes that there is some rationality to what Congress or the Court does, although trust and rationality have been the exception, rather than the norm, in federal policy and law.

In conclusion, I suggest that Congress, working closely with tribal governments, should act under its plenary exclusive power to clarify what rights indigenous nations and their members possess and may exercise under treaties, trust, and statutory law based on their sovereign national status. This would include jurisdictional authority over peoples and places in their territories, tax exemptions, rights to hunt and fish, sovereign immunity protections, racial preferences, et cetera. Congress should also clarify, in partnership with tribes, what rights indigenous nations and their members possess and may exercise under their status as federal and state

16. 417 U.S. 535 (1974).

17. 528 U.S. 495 (2000).

citizens, or as sub-units, and as governments, when they are using funds for highways, providing certain social services, such as unemployment compensation, and so on. They should then educate the American public about how these two broad statuses, tribes as sovereign nations whose citizens are also citizens of the United States and the states, are not irreconcilable.

Finally, Congress should clarify its own responsibilities in the field of Indian affairs. When tribes are statutorily accorded a status of corporation, or are treated as states for purposes of environmental and tax laws, are these political statuses that trace back to their aboriginal standing as preexisting sovereigns, or are they devolutions of federal power to the tribes, which, for purposes of the specific statute, act as federal instrumentalities or as arms of the federal government? That is a fundamental question to which we still do not have an answer.

This highlights one of the most important questions that tribal, federal, and state policymakers must address: Are tribes inherent sovereigns acting as policy partners with the United States and the states—which is generally the indigenous view—or are they units of government entitled to exercise only those powers expressly delegated to them by Congress? This is increasingly the view of a small but powerful group of United States policymakers and Supreme Court Justices. Until this fundamental question is resolved and formally incorporated at all governmental levels, the multitude of statuses indigenous peoples have, both collectively and individually, and the verifiable indigenous axis of insecurity will continue to proliferate, leading to even greater political, cultural, and intergovernmental confusion and tension.