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[Introduction to] Dismembered: Native Disenrollment and the Battle for Human Rights

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DISMEMBERED

Native Disenrollment and the Battle for Human Rights

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Introduction

LIKE ALL HUMAN COMMUNITIES, NATIVE NATIONS AND THEIR GOVerning bodies are in a constant state of flux. They generate from within and absorb from without a bewildering, increasing array of issues that provide opportunities to either evolve and mature or to regress and decay. These issues include the exercise of treaty rights, the complicated dynamics of intergovernmental relations, profound environmental concerns, and the always uneven ground of land claims and sacred site battles. And these are but a few of the multitude of topics that warrant constant Native vigilance, each requiring enormous outlays of time, energy, and resources.

As critical and complicated as these topics are, they pale in comparison to what is arguably the most important question that Native nations have ever faced: what does it mean to be Tulalip, Anishinaabe, Yakama, Lumbee, Narraganset, Pechanga, or Chukchansi? What, in other words, are the defining characteristics that make an Indigenous nation just that: Indigenous and a nation? And what is required of each individual in those nations to be considered a bona fide participant, citizen, or—for lack of a better term—member of a given Native nation?

This set of intimately related questions of what it means to be an Indigenous person in a particular tribal nation has been crucial for every generation of Native nations from the moment they came into existence, as every generation has the inherent free will to self-identify as they choose. Historically, lands, languages, kinship systems, and spiritual values and traditions 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 to not have to wonder about who they were. The bonds of organic connections were so strong and

pliable, in fact, that identity crises—be they national or individual—were most likely rarely encountered within Indigenous communities.

Of course, five centuries of interactions with foreign powers have taken a mighty toll on Native peoples and their lands, cultures, and identities. During the last four and a half decades there have been increasing questions regarding how Indigenous peoples understood who they were and how they were or were no longer related to one another. Writing in 1974, Vine Deloria Jr., a leading architect of the Native sovereignty movement, 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? [Should] it become primarily an economic structure? Or should it become, once again, a religious community? The future, perhaps the immediate future, will tell."[1]

The vital question, therefore, of who belongs to a Native nation and the grounds upon which that individual's relationship to his or her nation may be severed by the governing elites is at the heart of this book. 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 and rest assured of one's integral place in a particular Indigenous community is critical. In an increasing number of Native nations, tribal belonging, long viewed as an absolute given by bona fide Native citizens, particularly since the early 1990s, has become more of a political privilege than a sacred and organic responsibility as defined by tribal officialdom. And since the U.S. Supreme Court's 1978 decision in *Santa Clara v. Martinez* (which affirmed a tribal nation's right to be the ultimate arbiter of its own membership requirements), an expanding list of Native peoples have disenrolled or banished an ever-growing number of otherwise legitimate Native citizens.

Such dismemberments are happening for a variety of reasons, but the two most apparent factors associated with the practice are increased gambling revenue and civil violations or criminal activity that presumably threatens community stability.[2] Interestingly, gambling revenue (or other large financial windfalls that come to some Native nations) and the way it is sometimes dispensed via per capita distribution programs, typically leads to disenrollment—that is, the legal and political termination of a tribal member's citizenship. In contrast, civil violations or criminal activity (e.g., malfeasance, drug involvement, gang activity, etc.) tends in many cases to lead to banishment—that is, physical expulsion from tribal lands and not necessarily the loss of tribal citizenship. These two concepts are often conflated, but they are in fact distinctive terms. In some contemporary tribal cases, however, they become functionally similar.

Disenrollment is a legal term of art that arose most prominently during the Indian Reorganization Act period in the 1930s. Disenrollment can broadly be divided into two categories: nonpolitically motivated disenrollments and politically motivated disenrollments. The former are arguably justifiable when due process is provided because of fraudulent enrollment, error in enrollment, dual membership, or failure to maintain contact with the home community. The latter, we argue, are never justified when driven by economic greed, political power, or personal vendettas, among other reasons. Banishment, in contrast, is an ancient concept that has been utilized by societies and states throughout the world, dating back to at least 2285 BCE.[3]

Furthermore, banishment can also be divided into two categories: nonpolitically motivated banishment for the violation of a criminal law and politically motivated banishment because of crime or purely political reasons. Historically, Indigenous nations rarely banished tribal relatives, save for the committing of grievous offenses, like premeditated murder or incest, and only then after all other attempts—ceremonies, public ridicule, restitution, shaming—had been tried to restore community harmony. When it was employed, it was used largely for rehabilitative purposes.

Native nations have always possessed the inherent authority to denationalize any tribal member. Moreover, they wield the power, unknown to any other sovereign in the United States, to formally exclude non-Natives from their territorial homelands. But this study argues that far too many tribal nations are engaging in banishment or politically or economically motivated disenrollment practices in clear violation of their own historic values and principles, which at one time utilized peacemaking, mediation, restitution, and compensation to resolve the inevitable disputes that occasionally arose within the community.

Although the 1968 Indian Civil Rights Act (ICRA) extended to all persons in Indian Country a modified version of the U.S. Bill of Rights, the only remedy spelled out in that act is the writ of habeas corpus. Habeas corpus has thus far not offered dismembered Native individuals any substantial justice. And since Native nations are also sovereign, they can and frequently do invoke the doctrine of sovereign immunity, leaving disenfranchised tribal members little legal recourse.

Dismembered Native citizens are also citizens of the states they reside in and have federal citizenship as well. Theoretically, these individuals should be the most protected class of individuals in the land, armed as they are with three distinctive layers of citizenship. Such, of course, has not proven to be the case. In regards to Native citizenship, tribal political and judicial elites can

and do wield the absolute power to terminate Native citizenship—a power that not even the federal or state governments can wield over non-Native citizens. As the Supreme Court held in *Afroyim v. Rusk* (1967), citizenship is an inviolable right, and while it can be given away, it cannot be taken away. In other words, involuntary expatriation—that is, the stripping of citizenship—is not an available penalty under any state or federal statute. As the Court held, "in our country people are sovereign and the government cannot sever its relationship to the people by taking away their citizenship."

A central question this book poses and attempts to answer is the following: what does it mean that the United States, a very large, heterogeneous, secular state, has in place laws and policies that protect its citizens' rights far more comprehensively than Native nations, which are much smaller, more homogeneous, and ostensibly more kin-based polities? For if Native nations are indeed communities of kinfolk that are ancestrally, culturally, psychologically, and territorially related, then it would appear that the grounds on which to sever or terminate such a fundamentally organic set of human relationships would have to be unequivocally clear and would, in fact, rarely be carried out given the grave threat that such actions, the literal depopulation of the community's inhabitants, would pose to the continued existence of the nation. A corollary to the central question of the sanctity of U.S. citizenship in comparison to Native citizenship is the following: what does it mean that the only class of citizens in the United States who cannot avail themselves of such sacrosanct rights are Native individuals?[4]