V

Federal Power over Indian Affairs

Most Indian tribes maintained their neutrality in 1775 when the American colonists went to war against Great Britain to gain independence. To the Indians, the conflict between the colonists and England seemed like an internal family dispute. The colonists, however, had frequently stolen Indian land, whereas the British had not. Indeed, just twelve years earlier in 1763, the King of England issued a proclamation forbidding the colonists from forcefully taking any additional Indian land, a protection the king felt he owed the Indians for their having helped England defeat France in the French and Indian War, a seven-year conflict that had ended that year.[1] Therefore, many eastern tribes distrusted the colonists and had friendlier ties with the British.

Not long after the Revolutionary War began, the colonists began destroying Indian villages and their food supplies, fearful that the Indians would support and feed British soldiers.[2] These preemptive strikes had the effect of pushing neutral tribes into the British camp. By the end of the war, "most Indian peoples came around to siding with the British,"[3] although several tribes with whom the Americans had developed close ties supported the colonists, including the Oneida, Tuscarora, Mohegan, and Pequot. Many members of these tribes died alongside their American allies during the war.[4]

The Revolutionary War resulted in "a total war in Indian country" and was disastrous for many eastern tribes.[5] Hundreds of Indians were killed, Indian homes and crops lay in ruins, tribal economies collapsed, and tribal towns and villages were crowded with refugees.[6] Many tribes or portions of tribes fled west, causing a "domino effect" all the way to the Pacific, as each tribe in turn

competed for land already controlled or occupied by another tribe, which sometimes led to armed conflict.[7]

As discussed in Chapter I, in the decades following the Revolutionary War, thousands of white settlers and prospectors moved west, trespassing across and often settling on Indian land, with the U.S. Cavalry supporting them. Indians resisted these encroachments, but by the end of the nineteenth century, virtually every Indian tribe in the country had been placed on a reservation and most of their land was taken and given to white settlers. The United States entered into treaties with Indian tribes but broke those treaties whenever it was expedient to do so.[8]

The federal government's Indian policies, many people claim, have been driven from their inception "by greed, avarice, and the pursuit of manifest destiny"[9] and have been "ultimately genocidal in both practice and intent."[10] The very notion that this continent, on which hundreds of nations were already prospering, was "discovered" by Europeans—as school children in this country have been taught—reflects bigotry.[11] Critics assert that the United States has no legitimate right to regulate tribal governments.[12] Despite these assertions, however, all three branches of the federal government—legislative, executive, and judicial—have consistently upheld the government's power to regulate Indians and their property.[13]

The federal government will probably never permit Indian tribes to regain their complete independence, although it has moved further in that direction in recent years, as discussed in Chapter I. After nearly two centuries of domination and paternalism, Congress "now recognizes self-determination as the guiding principle of Indian relations."[14] Only time will tell how far the government will go in permitting Indian tribes to exercise true independence.

A. THE SOURCE AND SCOPE OF FEDERAL POWER OVER INDIANS

What is the Source of the Federal Government's Power Over Indians?

The United States controls Indian tribes because it has the military power to do so. The ultimate source of the federal government's power over Indians is its military strength. Other justifications are given besides this one, but the fact is that if the United States were not militarily more powerful, Indian tribes today would exercise the same sovereignty they did prior to the arrival of the Europeans.

Over the years, the U.S. Supreme Court has relied on four arguments to justify the exercise of federal authority over Indians. Two of them are based on

provisions in the U.S. Constitution. Article I, section 8, clause 3 (the Commerce Clause) provides that "Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article II, section 2, clause 2 (the Treaty Clause) gives the president and the Senate the power to make treaties, including treaties with Indian tribes. The Supreme Court held in 1832 that these constitutional provisions provide Congress with "all that is required" for complete control over Indians and tribes.[15] It has also held that the fact that Congress decided in 1871, as explained in the previous chapter, to stop entering into treaties with Indian tribes does not eliminate the Treaty Clause as a source of power over Indians,.[16]

The third argument that has been advanced to justify the exercise of federal power over Indians is the rule of international law that states that "discovery and conquest [gives] the conquerors sovereignty over and ownership of the lands thus obtained."[17] In 1823, the Supreme Court held that by virtue of the "discovery" of North America by the Europeans and the "conquest" of its inhabitants, the federal government (as the Europeans' successor) is entitled to enforce its laws over all persons and property within the United States.[18] As the nation in control of this territory, the United States may exercise all powers "necessarily inherent" in any sovereign nation, including the authority to regulate Indians and their property.[19]

The doctrine of trust responsibility (discussed in Chapter III) was cited in early Supreme Court cases as an additional source of federal power over Indians. Many treaties between the United States and Indian tribes contain a guarantee that the federal government will "protect" the treaty tribe. This promise, the Court has held, gives the federal government both the power and the duty to regulate Indians for their protection.[20]

Each of these justifications for federal control over Indians can be—and has been—strenuously challenged. First, nothing in the express language of the Commerce and Treaty Clauses confers any power on the federal government *over* Indians; instead, these clauses simply identify which federal officials may regulate commerce and enter into treaties *with* the Indians. (After all, when the Constitution was written in 1787, Indian tribes were strong and independent nations. Few government officials could have thought that merely by defeating the British, the United States had somehow acquired power over these independent and powerful Indian tribes, and the Commerce and Treaty Clauses contain no language of that nature.) Next, Europeans did not "discover" this continent; hundreds of independent nations were already thriving here. Lastly, it is a complete misuse of the trust doctrine to say that it supports federal power over Indians. To the contrary, the trust doctrine requires the federal government to support Indians by fulfilling the promises made to them in

exchange for Indian land. No tribe surrendered its right of self-government in any treaty with the United States.

Nevertheless, the Supreme Court announced in 1903 in *Lone Wolf v. Hitchcock*[21] that Congress possesses "plenary" power—full and complete authority—over Indians and tribes. Yet this raw assertion of power does not have a solid basis in the Constitution. Indeed, as Indian legal scholar Walter Echo-Hawk recently stated, "[t]the plenary-power doctrine [announced in *Lone Wolf*] was seemingly plucked out of thin air by the Supreme Court" and its rationale is "dubious."[22] In deciding *Lone Wolf* the way it did, Professor Frank Pommersheim has stated that the Supreme Court ignored what the Constitution actually said and the position that Indian tribes held at the time the Constitution was written, and instead the Court adopted a rationale that justified "federal land acquisition and power in Indian affairs."[23]

What is the Scope of Federal Power Over Indian Affairs?

The federal government takes the position, as just noted, that Congress has plenary power over all Indian tribes, their governments, their members, and their property. As the Supreme Court stated in 2011, citing its earlier decisions: "The United States retains plenary authority to divest tribes of any attributes of sovereignty. Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."[24] Congress, in other words, may assist or destroy a tribal government as it sees fit, and at various times it has assisted tribes while at others it has attempted to destroy them.

Are there any Limitations on the Power of Congress over Indian Affairs?

In *Lone Wolf*, the Supreme Court held that Congress had ultimate authority to legislate over Indians and, therefore, decisions made by Congress respecting Indians were not subject to review by a court.[25] In later cases, however, the Supreme Court slightly modified that principle and held that the "power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."[26] During the past fifty years, the Court has applied two constitutional limitations on congressional power over tribal affairs: the Due Process and the Just Compensation Clauses, both contained in the Fifth Amendment.[27] However, only rarely has the Court limited a congressional enactment involving Indians.

The Due Process Clause provides that no person may be deprived of life, liberty, or property without due process of law. This clause thus prohibits Congress from enforcing any law that is arbitrary, unreasonable, or invidiously discriminatory, including laws that impermissibly discriminate on the basis of race.[28]

The Just Compensation Clause prohibits the federal government from taking private property without paying fair and adequate compensation. As explained in the last chapter, rights and interests given Indians in a treaty or statute are a form of private property protected by the Just Compensation Clause. Thus, any taking of them by the federal government must be compensated. Courts have required that fair compensation be paid for the loss of Indian hunting and fishing rights,[29] the taking of land belonging to an Indian[30] or a tribe,[31] and the loss of a tribe's immunity from state taxation.[32] However, it is important to note that the Just Compensation Clause does not prevent Congress from taking the property or interest; it only requires that Congress pay fair compensation for any confiscation that occurs.

Another limitation on Congress, at least in theory, is the doctrine of trust responsibility, which obligates the federal government to remain loyal to Indians, to act in their best interests, and to fulfill the promises made to them in treaties.[33] But the trust doctrine is not *legally* enforceable against Congress, for reasons explained in Chapter III. A court may not, for example, order Congress to implement a treaty or prevent Congress from abrogating one.[34] Indian tribes can only hope that Congress has the integrity to honor the promises it made decades ago in exchange for Indian land, an integrity that in many instances has fallen short.

As previously noted, the Supreme Court no longer presumes that all acts of Congress respecting Indians are valid. However, the Court's current standard of judicial review has produced nearly the same result. Of the hundreds of laws passed by Congress respecting Indians, only a few (as discussed below) have been found to violate the Just Compensation Clause, and not one has been invalidated as arbitrary, capricious, or unreasonable under the Due Process Clause.

Given that the Constitution Prohibits Race Discrimination, why is Congress Allowed to Treat Indians and Non-Indians Differently?

Congress has passed so many laws applicable only to Indians that it has created a separate volume of the U.S. Code—Title 25—in which to place them. Virtually all of these laws treat Indians differently from non-Indians, sometimes to their benefit, sometimes to their detriment. Federal laws, for example, provide Indians with certain housing, financial, medical, and educational benefits that non-Indians are not eligible to receive, while other laws place unique restrictions on Indians and tribes regarding the sale and use of their land. Yet the Due Process Clause prohibits Congress from invidiously discriminating on the basis of race. Why, then, is Congress allowed to differentiate in this fashion?

The answer, according to the Supreme Court, lies in the fact that these laws are not viewed as race legislation. For one thing, the Constitution expressly authorizes Congress to regulate commerce with Indian tribes; thus, there is a *constitutional* basis for enacting laws unique to Indians. Moreover, there are important historical and political reasons for treating Indians differently. The United States entered into treaties with the Indians not because they were a different race, but because of their political status as the early inhabitants of this territory. Thus, the Supreme Court has explained, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the federal government's relations with Indians."[35] Moreover, the federal government has a trust responsibility to assist Indians and protect them, an obligation the government does not have to other groups.[36]

The Supreme Court's decision in *Morton v. Mancari* (1974)[37] applies these principles. At issue in *Mancari* was a federal law (the Indian Preference Act of 1934, 25 U.S.C. section 472) that requires that members of federally recognized Indian tribes receive a hiring preference for job vacancies within the Bureau of Indian Affairs (BIA). Non-Indians who were denied employment under this law contended that it constituted impermissible race discrimination in violation of the Due Process Clause. In a 9–0 decision, the Court upheld the Indian Preference Act. First, the Court said, the Preference Act was not race legislation. The Constitution gives Congress the power to treat Indians "as a separate people" based on their *political* status.[38] The Preference Act was intended by Congress to achieve political (and not racial) goals: Congress wanted to give Indians greater control within the agency that administers most of the federal government's Indian programs so as to promote Indian self-government.[39] Therefore, the legislation need only satisfy the less stringent "rational basis" test, rather than the more rigorous "compelling interest" test applicable to legislation that discriminates on the basis of race. The Court concluded that the Indian Preference Act was a rational, and therefore permissible, exercise of Congress's plenary power over Indians.[40] Consequently, Congress was permitted to provide this employment preference to Indians in their status as a political group. Relying on *Mancari*, a federal appellate court recently interpreted the Preference Act to require that Indians be afforded a hiring preference for all positions within the Department of the Interior that directly relate to the provision of services to Indians.[41]

Each federal Indian law, then, must be examined in its historical, political, and cultural context to determine if it constitutes race discrimination. Congress is permitted to give Indians special rights and benefits if doing so is a reasonable exercise of Congress's plenary powers over Indians.[42] Likewise, Congress may impose unique restrictions or disadvantages on Indians if they

are reasonably related to a legitimate federal interest. Indeed, it appears that not a single federal Indian law has ever been invalidated on the grounds that it constitutes race discrimination.

Thus, although the Supreme Court no longer defers entirely to Congress on matters of Indian policy as it did in *Lone Wolf v. Hitchcock*, congressional discretion continues to be extremely broad. Any legislation that can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" is a valid exercise of congressional authority.[43]

Does Congress have the Authority to Discriminate Among Groups of Indians?

Yes. Laws that discriminate among groups of Indians are reviewed by courts under the same rational basis test as laws that discriminate between Indians and non-Indians. Thus, Congress can create programs in which only some Indians are eligible to participate, such as programs that condition eligibility on possessing a certain degree of tribal blood.[44]

B. IMPLEMENTATION OF FEDERAL POWER

Congress has nearly unlimited authority to regulate Indians and tribes, as just explained. The rest of this chapter examines the many ways in which Congress has implemented that power through (1) administration of Indian affairs, (2) regulation of tribal governments, (3) termination, (4) regulation of tribal membership, (5) regulation of Indian land, (6) regulation of tribal assets, (7) regulation of individual property, (8) regulation of trade and liquor, and (9) exercise of criminal jurisdiction.

1. Administration of Indian affairs

What Powers have been Delegated by Congress to Federal Agencies Regarding the Implementation of Indian Policy?

The Constitution divides the federal government into three separate branches: legislative, judicial, and executive. The legislative branch (Congress) makes the law. The judicial branch (the courts) interprets the law. The executive branch (whose chief officer is the president) administers the law. Federal administrative agencies, such as those administering Indian programs, are part of the executive branch of government. These agencies are created by Congress but staffed with people appointed by the president or by persons acting under the president's command.

Congress is the only branch of government that has the authority to formulate the federal government's Indian policies. However, the administration of these policies must be performed by the executive branch. Congress creates federal Indian policy and then decides which agency will implement it. That agency must then faithfully perform its duties; it may not act beyond the powers conferred by Congress or ignore the duties delegated to it.[45] Thus, although Congress creates the policies, federal agencies have enormous control over many facets of tribal life because they implement those policies on a daily basis.

The first agency that Congress created to administer Indian policy, the Office of Indian Affairs, was established in 1824 and placed within the now-defunct War Department. In 1849, Congress transferred this agency to the newly created Department of the Interior, where it remains today, although in 1947 the Office of Indian Affairs was renamed the Bureau of Indian Affairs (BIA).

The highest official in the Department of the Interior is the Secretary of the Interior. The next highest official is the Assistant Secretary of the Interior, who oversees two agencies: the BIA and the Bureau of Indian Education. (Prior to 1977, the Assistant Secretary was called the Commissioner of Indian Affairs.) Both the Secretary and the Assistant Secretary are appointed by the president but must be confirmed by the Senate. The BIA employs some ten thousand people, more than 85 percent of whom are Indian (as a result of the Indian Preference Act discussed earlier).

The Department of the Interior administers the majority of the federal government's Indian programs, mostly through the BIA. For example, the Department regulates the sale and lease of Indian land, operates social welfare programs on reservations, controls the use of water on irrigated Indian lands, regulates and approves Indian wills, operates Indian schools, and purchases land for Indians and tribes.[46] The Department of Health and Human Services, the Department of Housing, and the Department of Agriculture also administer Indian programs, including various health care, housing, and food programs for Indians.

What Powers have been Delegated by Congress to the President?

A law passed by Congress in 1834 gives the president the general power to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs."[47] Currently, however, the president has been assigned no specific powers regarding Indians. Instead, Congress has delegated enormous authority to the Secretary of the Interior (as discussed later in this chapter), who is appointed by the president.

Between 1855 and 1919, it was a common practice for presidents to create Indian reservations by issuing an executive order. These "executive order"

reservations were created without congressional approval. In 1919, Congress passed a law prohibiting the president from creating any additional reservations.[48]

As part of the General Allotment Act of 1887, Congress authorized the president to assign parcels of tribal land to tribal members and to sell the remaining ("surplus") tribal land to non-Indians.[49] Congress eliminated that power in 1934 when it repealed the General Allotment Act.[50]

As chief executive, a president can exert tremendous influence in Indian affairs. As discussed in Chapter I, several presidents have used their power and prestige to greatly assist Indian tribes. These presidents include Franklin D. Roosevelt, who supported passage of the Indian Reorganization Act and appointed John Collier to oversee the Bureau of Indian Affairs; Richard Nixon, a strong supporter of tribal self-government who helped end the termination era; and Bill Clinton, who issued two significant Executive Orders that require federal agencies to relate to Indian tribes on a government-to-government basis and to engage in meaningful consultation with them.[51] President Barack Obama has received praise from the Indian community for promoting tribal self-government, including consultation with tribes;[52] for twice convening meetings with representitives of every federally recognized Indian and Alaska Native government, the only president to have convened such a meeting; for increasing the budget of the Indian Health Service; and for signing the United Nations Declaration on the Rights on Indigenous Peoples, an historic agreement discussed in Chapter XIII. No president, however, has done as much as he could have to foster tribal sovereignty and self-determination.

Can Congress Delegate Powers to Indian Tribes?

Yes, and Congress has exercised that power. The single most important law delegating authority to Indian tribes is the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA).[53] The ISDEAA authorizes Indian tribes to submit "self-determination" contracts to the Department of the Interior or to the Department of Health and Human Services to administer "programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law."[54] (These contracts are sometimes called "638" contracts because the statute that created ISDEAA was Public Law 93-638.) The federal agency to which a 638 application is submitted *must* approve the proposed contract unless the tribe's plan fails to meet ISDEAA standards, and the tribe may appeal any rejection to a federal court.[55] If the contract is approved, the agency must then transfer to the tribe all funds given by Congress to the agency for the operation of that program, including administrative expenses.[56] The tribe then administers the program subject only to the agency's general oversight.[57]