

WHEN TRIBES AND STATES COLLIDE

PART I

**A Special Report Prepared for
The Inter-Tribal Study Group on Tribal/State Relations
by
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INTRODUCTION:

THE DRIVE FOR TRIBAL POLITICAL EQUALITY

Since 1964, tribal governments have sought to reclaim their authority to control and regulate their own resources, Often exclusive of U.S. government control. Where the U.S. government asserted its trust obligation to manage the leasing of tribal lands within the boundaries of a reservation, for example, tribal governments have assumed dominant authority over the leasing process on many reservations. In the past, the United States dominated law enforcement on all reservations. In recent years, many tribal governments have begun to maintain law enforcement programs of their own. THE TREND TOWARDS THE RESUMPTION OF TRIBAL GOVERNMENTAL POWERS OVER PERSONS AND PROPERTY WITHIN RESERVATIONS HAS BEEN RAPID AND WIDE-RANGING. THE ASSERTION OF SELF-DETERMINATION AND SELF-GOVERNMENT AMONG TRIBAL PEOPLES HAS RUN HEADLONG INTO MAJOR OBSTACLES, USUALLY INVOLVING FEDERAL AND STATE GOVERNMENTS.

Matters that have long since been considered prerogatives of the federal government's TRUST RESPONSIBILITY are being challenged by the initiatives of tribal governments. This emergence of Indian tribes as self-governing and self-determined political and economic forces has placed a strain on the U.S. federal system. The result has been a growing number of conflicts over legal and political authority between the tribes, the United States and the various states.

Recent efforts by tribal governments to achieve an equal footing with the States has brought into question the validity of the legal relationship between Indian tribes and the United States. State and tribal governments have experienced a greater intensity of conflict arising from efforts by both to more clearly define their separate authorities over water, land, timber, fish and wildlife, minerals and the environment. Controversies between state and tribal governments often relate to the quality of life among tribal peoples. Questions have arisen over child welfare abuses, education and health and social services delivery on reservations. Issues of law enforcement and tribal court systems have affected both tribal and state citizens living within the boundaries of reservations. The state has contended with the tribes over taxation, housing, tribal enterprise development, and zoning within the boundaries of reservations.

To further complicate these disputes, the United States government is faced with increasing conflicts of interest between its obligation to preserve and protect Indian tribes in accord with its trusteeship; its obligation to promote the political and economic self-interest of the U.S.; and its obligation to

ensure the political and economic integrity of the various states of the Union. If tribal territories were geographically located outside the boundaries of the United States, the conflict would not be so complex. Because tribes are within U.S. boundaries, the strains on the U.S. federal system are more pronounced. How the United States resolves this political dilemma will shape the character of the U.S. federal system and the nature of U.S. foreign relations.

Will the tribes become completely absorbed into the United States? Can the tribes co-exist as associated sovereigns? Or will the tribes become wholly independent of the United States? The political dilemma surrounding these questions poses a fundamental controversy. For more than 125 years, the political status of the tribes in relationship to the United States has been clouded by social, legal and political doctrines (sponsored by the U.S. government) which prevent a clear and unbiased understanding of tribal political, economic, social and legal interests. Tribes which once were wholly independent members of the international community are now in the political status of ASSOCIATED TRIBAL SOVEREIGNS. When it concluded treaty agreements with the original inhabitants of this continent, the United States recognized the sovereign authority of tribes to be outside of the federal system. THE QUESTION OF WHETHER THE TRIBES SHOULD BE FULLY INTEGRATED INTO THE U.S. FEDERAL SYSTEM OR WHETHER THE TRIBES SHOULD REMAIN SEPARATE HAS NEVER BEEN RESOLVED.

Since the tribes are neither wholly separate, nor wholly absorbed, their political status in the United States and the global community has remained vague and uncertain. Because the tribes appear to be both partly in and partly outside of the United States (by virtue of a somewhat unclear trust relationship with the U.S. government), the U.S. has been able to transfer some of its powers over Indian affairs to state governments. These transfers of power have occurred exclusive of any new agreements with tribal governments. The United States has justified such actions under the guise that it can act as the trustee of Indian affairs even without the consent of the tribes. States and tribal governments have increasingly been drawn into conflicts because of this "de facto" and "de jure" transfer of Indian affairs responsibilities from the national government to the states. In the face of such maneuvers by the federal government, tribes have had to collide with both the States and the United States in their efforts to regain tribal authority over tribal lands and peoples.

Jurisdictional conflicts between tribes, the States and the federal government have become a common feature of the political landscape. State, federal and tribal courts have been unable to effectively resolve intergovernmental conflicts arising from claims to authority over tribal peoples, property and natural resources. The executive and legislative branches of the three governments have similarly been engaged in attempts to resolve jurisdictional conflicts. Unfortunately, these conflicts are often dealt with in isolation. That is, attempts to solve specific controversies in one area of

dispute, usually occur outside of similar disputes in other areas of governmental authority. Rather than resolving inter-governmental conflicts, attempts within isolated government agencies often result in increased tensions and new rounds of conflict. This is because the fundamental issue of relations between the U.S., the tribes and the States has not been specifically addressed. Neither has the basic problem of the tribes being politically and structurally outside of the United States been understood or considered. This failure to recognize the political status question as fundamental and the failure to recognize the need for formal inter-governmental mechanisms between the three governments threaten to frustrate and undermine the U.S. federal system. Moreover, the very existence of tribes as distinct sovereign entities is severely threatened.

PART ONE

TRIBES ARE OUTSIDE OF THE U.S. FEDERAL SYSTEM

Tribal governments exist as separate and distinct political organisms which derive their powers from tribal communities. They were not created by either the United States government or the state government. The foundations of tribal government were established long before either the formation of the United States or the creation of the State of Washington. **DESPITE THE FACT THAT TRIBAL LANDS ARE GEOGRAPHICALLY SURROUNDED BY THE UNITED STATES AND VARIOUS STATES, TRIBAL GOVERNMENTS HAVE THE DISTINCTION OF BEING POLITICALLY SEPARATE FROM THE FEDERAL SYSTEM WHICH JOINS THE STATES AND THE NATIONAL GOVERNMENT TOGETHER.**

The United States federal system consists of three primary parts - national, state and local (county and municipal) governments. Each of these governments exercise a degree of authority over people, lands and natural resources through a maze of civil and criminal laws. The effective exercise of governmental authorities is made possible through a system of charters and constitutions which serve as the basis of the United States federation. There is a very important element missing from the preceding description of the U.S. federal system - THE TRIBES. A myth that tribes are somehow a part of that system has continued for generations. It is true that the State of Washington is bound to the United States through a system of constitutions and enabling acts. But where do tribal governments fit into the federal system? Where do tribal governments fit into the state system of governments? The simple and uncomplicated answer to these questions is that tribal governments do not fit into the U.S. system of governments. They are outside of the U.S. federal system.

Within the boundaries of the State of Washington, there are 33 tribal governments, 39 county governments and 265 incorporated cities and towns. In addition, there are the state government and the United States

government which also exercise governmental powers within the Washington State boundaries. To understand why these 33 tribal governments in the State of Washington are absent from this description of the U.S. federal system, we need to look into the history of the United States and the tribes.

The issue of the external character of the tribes was a serious matter in the late 1700's and early 1800's. A number of formal attempts to include tribes as full-fledged members of the Union were attempted. One such attempt was the first treaty concluded by the Continental Congress with the Delaware Nation on September 17, 1778. Contained in the treaty was a proposal for the creation of a Delaware tribal state "where the Delaware Nation shall be the head, and have representation in Congress". In a 1785 treaty with the Cherokee Nation, it was provided that "they shall have the right to send a deputy of their choice, whenever they think fit, to the Congress". Public sentiment among U.S. citizens continued to favor making tribal nations into states for 100 years until 1871 when the U.S. formally ceased to make treaties with Indian tribes. DISCUSSIONS TO INCLUDE TRIBES IN THE UNION WERE NOT RESUMED BECAUSE THE TRIBES PREFERRED TO MERELY ASSOCIATE WITH OR SEEK INDEPENDENCE FROM TIES WITH THE NEW COUNTRY RATHER THAN JOINING THE U.S. FEDERATION.

TRIBES AND THE U.S. CONSTITUTION

The United States was designed to create a federal system which contains only two sovereign entities - the United States and the states. Any casual observer can clearly see that the U.S. Constitution was not written to create either foreign nations or Indian tribes. Nowhere in this document can it be found that the tribes are defined as a political entity within either the United States or the Washington State system of governments. Where tribes (Indian tribes) are specifically mentioned in U.S. and state documents, they are clearly separated from the internal workings of the U.S. federal system. Formal relations exist between the tribes and the United States by virtue of treaties and agreements. But there is still no formal relationship between the State of Washington and the tribes. Three important historical facts have contributed to this absence of a political relationship between the tribes and the state:

1. The United States Constitution strictly provides, "that states cannot enter into treaties, alliances or confederations with external political entities" (Article I, Section 10, Paragraph 10: States prohibited from the exercise of certain powers).
2. Treaties between the tribes and the United States strictly provide that the states shall have no power over tribes.
3. To become a state of the Union, the State of Washington was required to "forever disclaim" any right or title to lands within its boundaries owned by tribes and to further disclaim any authority over tribal (Indian) people or lands. Relations of jurisdiction and control were to remain in the Congress of the United States in all matters pertaining to

Indian tribes.

THE ORIGINS OF SOVEREIGNTY

To appreciate the argument that the tribes are still outside the United States federal system, one must consider the origins and meanings of the term SOVEREIGNTY. Briefly defined, sovereignty is the supreme power from which individuals and groups derive political power. The notion comes from the days when princes, popes and potentates claimed supreme temporal power by virtue of a mandate from God. The original religious connotations of the term "sovereignty" took a radical shift in the 1700's when the divine power of kings was challenged by the collective will of the people. Indeed, the United States itself owes its existence to this principle of sovereignty. Since 1776, the international order has been based on the view that sovereignty is inherent or inborn in each individual and that the supreme power from which specific political powers are derived comes from within the people and not from a prince, pope or potentate. Such a popular sovereignty cannot be given by one group to another. Next to the tribes, the United States is perhaps the clearest example where sovereign power originates among the people. The U.S. Constitution exists solely because the people chose to create it and abide by it for their collective benefit.

ASSOCIATED TRIBAL SOVEREIGNS within the boundaries of the United States actually secured their own sovereignty long before the United States declared its own. TRIBAL LEADERS WHO SEEK TO PRESERVE AND STRENGTHEN THEIR POLITICAL AUTHORITY OVER TRIBAL LANDS AND PEOPLES DERIVE THEIR AUTHORITY FROM THE TRIBAL PEOPLE THEMSELVES, NOT FROM ANY OUTSIDE POWER.

TREATY RELATIONSHIPS WITH THE U.S.

In exchange for U.S. political and military protection, tribal sovereigns have long agreed not to enter into formal treaty relations with any other countries without first gaining agreement and consent from the United States. Such a treaty relationship between greater and lesser powers is commonly practiced throughout the world. It is certain that tribes are not a part of the U.S. federal system and have never been a part of that system. The associated tribal sovereigns have neither become absorbed into the United States nor have they become wholly independent of the United States. The unique fact of inherent tribal sovereignty has been upheld time and time again in the courts, but the misconception that tribes are not sovereign has been allowed to creep into both at state and national levels of government.

Because of the legal and political status of the tribes, the state and the federal government, an effective intergovernmental mechanism must be built to bridge the gap between tribes and the state if anarchy is to be avoided. The courts and the legislative branches of the U.S. federal system have been

unable to resolve controversies with external entities like tribes. The federal system is not designed to deal with external political entities. There is an obvious need to create official channels of inter- governmental mediation where none now exist. THE ONLY FIRM RELATIONSHIP WHICH EXISTS BETWEEN THE TRIBES AND ANY GOVERNMENT WITHIN THE UNITED STATES IS THE RELATIONSHIP ESTABLISHED BY TREATIES AND AGREEMENTS BETWEEN THE NATIONAL GOVERNMENT AND EACH OF THE TRIBES.

TRIBES AS ASSOCIATED SOVEREIGNS

Tribes and the United States government have formed a relationship of ASSOCIATION that is similar to the relationship which the U.S. has with Puerto Rico, the Virgin Islands, Guam, Micronesia and Samoa. This relationship is founded in principles of international laws and not in the domestic laws of the United States. It is a relationship between a greater power and a lesser power where the greater power assumes the role of a protector for the benefit of the lesser power. (See DIAGRAM: U.S./Territorial Political Relationships.)

As political entities external to the U.S. political system, tribes have often been described as "domestic dependent sovereigns". This concept was first introduced by U.S. Chief Justice John Marshall when he rendered a decision involving a tribal/state conflict in 1831. Justice Marshall's interpretation of the relationship between the tribes and the United States became an artful way of saying that the tribes were slowly being surrounded by an expanding country. In the process, the tribes came to be separate sovereigns who were becoming dependent on an increasingly more powerful United States. Tribes came to accept a dependence on the United States for their economic, political and military protection. The dependence, once agreed to, created an international association between one sovereign (the U.S.) and many other sovereigns (the tribes).

The political association between tribes and the United States has continued for 200 years with just a few changes. The ASSOCIATED TRIBAL SOVEREIGNS have neither become absorbed into the United States, nor have they become wholly independent. They remain in a separate, protected status. Just as with other trust territories, like Guam, Puerto Rico, Micronesia etc., the United States cannot change the political status of the tribes unless the individual tribal governments agree to a change.

THE POLITICAL STATUS OPTIONS

The options available to the tribes and the United States include separation or independence for a tribe; continued association; or complete absorption into the United States political and governmental system. Tribes are not alone in their desire to clarify their political status. Puerto Rico has been seriously considering the issue of whether to seek statehood or complete

independence from the United States. Micronesia, on the other hand, has completed a ten-year process of negotiations with U.S. officials which resulted in a COMPACT OF FREE ASSOCIATION that provides for the people of the Federation of Micronesia to exercise total internal sovereignty; to conduct its own foreign affairs and to rely on the United States for military defense. Guam (population 100,000 and an area of 209 square miles) is an island territory about the size of Island County in northern Washington State; despite its small size, Guam is considering a change from association to statehood.

If the tribes are to achieve effective solutions to the myriad of conflicts between tribal, state and federal authorities, tribal leaders must recognize that the tribes are not a part of the U.S. federal system until tribal people themselves decide otherwise. In the absence of any action by the tribes, persisting conflicts between the tribes, the state and the federal government can only get worse. For the tribes, the choices are clear:

1. Association by treaty with the United States
2. Statehood by Congressional Act
3. Absorption into the federal system as subdivisions of the states (i.e. county, city or town)
4. Independent Nationhood
5. Complete termination, dissolution

TRIBAL AND U.S. CITIZENSHIP

The question of individual citizenship of tribal people often clouds the otherwise simple relationship between the tribes, the U.S. and the states. Because tribal people have retained the rights and privileges of tribal citizenship and they also have rights associated with being citizens of the United States, there are those who feel Indians are "super citizens" who possess unfair personal advantages as dual- citizens of their tribe and the U.S. The controversy of dual-citizenship has caused tribes and states to clash. It has also increased conflicts between tribal and non-tribal citizens within the boundaries of tribal reservations.

If we examine how Indians in the United States came to possess both tribal and U.S. citizenship, we can readily see that tribal claims to dual-citizenship are well justified. For a discussion of tribal citizenship, we must look to the meaning of citizenship and how this idea is expressed in tribal constitutions. The term CITIZEN refers to a person owing loyalty to and entitled by birth or naturalization to the protection of a state or sovereign political entity. By this definition, a citizen of a sovereign entity retains the rights to protection by a sovereign state unless that individual is denied such protection by an act of that sovereign entity. Tribal members, or citizens, possess similar rights and privileges to citizens of many other political entities. Citizenship in a tribe is typically dependent upon being born to a member of the tribe. However, some tribes provide for naturalization processes such as adoption or tribal

legislation.

Among the tribes within the State of Washington, tribal citizenship is exclusive to one tribe. That is, a member or citizen of one tribe must relinquish prior citizenship in another tribe. By virtue of tribal constitutions, rights and protection to individual tribal citizens are specifically limited to the jurisdiction of each tribe. Unless there exists an agreement between tribes providing for mutual or concurrent extension of rights to individuals who travel from one tribal territory to another, a citizen of one Indian tribe cannot expect rights and protection under the jurisdiction of another tribe. Citizenship in a tribe is not dependent upon being born within the boundaries of the United States or any of the States of the Union. Out of thirty-three tribal constitutions in the State of Washington, there is not one which requires a tribal citizen to be a citizen of either the United States or the state. (If one were to interpret these tribal constitutions literally, such provisions as "no persons shall be enrolled as members if they are recognized members of any other tribe" might be construed to mean that persons who are citizens of the United States or individual states, as well as other tribes, are ineligible for tribal citizenship unless subsequent tribal law permits dual citizenship.) In any case, it is important to note that tribal citizenship is determined by domestic tribal law (i.e. tribal constitutions, ordinances, resolutions) and not by sovereigns external to the tribe. Each tribe within the Washington state boundaries has retained its independent authority to determine its own membership.

In many tribal constitutions, review or approval authority over matters pertaining to new citizenship have been conveyed to an agent of the United States government (Bureau of Indian Affairs, Secretary of Interior or the U.S. Congress). In some instances, review and approval authority which has been conveyed to U.S. agents concern only the entry of new tribal citizens, after a tribal government decision. In the case of the Yakima Nation, review authority has only been granted to the United States on matters pertaining to expulsion from the tribe. Still other tribes convey no authority at all to external sovereign agents (U.S. or States). The following chart reveals the REVIEW OR APPROVAL provisions in tribal constitutions regarding tribal citizenship.

TRIBAL CITIZENSHIP REVIEW OR APPROVAL AUTHORITY CONVEYANCES BY TRIBAL CONSTITUTION

New Citizen-ship ONLY	Expulsion ONLY	New & Expulsion	No Conveyance
Puyallup Quileute Shoalwater Bay Skokomish Suquamish	Yakima Nation	Colville Hoh Lower Elwah Lummi Makah Muckleshoot Nisqually	Quinalt Nation Snohomish Snoqualmie Steilacoom Duwamish Samish Cowlitz

Nisqually	Cowlitz
Nooksack	James Town
Port Gamble	Chinook
Sauk-Suiattle	
Squaxin Island	
Swinomish	
Tulalip	
Upper Skagit	
Stillaguamish	
Chehalis	
Kalispel	
Spokane	

Despite these constitutional peculiarities, each tribal government has consistently asserted and proclaimed the original and inherent authority of the tribe to set standards for tribal citizenship. This exclusive authority has never been challenged or altered as a result of relations between tribes, the United States and the various states. In fact, the United States has by virtue of its own legislation, administrative policies and domestic legal decisions perpetually accepted the tribes' inherent and exclusive authority over matters related to tribal citizenship. The granting of review or approval authority to agents of the United States does not alter the original and inherent power of each tribe to define the terms and methods for tribal citizenship.

By virtue of tribally determined citizenship criteria, individuals are granted rights and protection by the tribe. Tribal citizens (like citizens of other sovereign political entities) are committed to preserve and protect the integrity of the tribe and are dutybound to abide by tribal laws and the tribal constitution. Such primary loyalty to the tribe is often challenged and even undermined when the rights and protections of the United States are invoked by individual tribal citizens who also have U.S. citizenship. Tribal citizens who are also U.S. citizens are often caught up in a serious dilemma when the interests of their tribe conflict with the interests of the United States. As DUAL- CITIZENS, tribal citizens are often faced with divided loyalties and responsibilities; they are forced to make choices between their obligations to the U.S. and to their tribe. This personal dilemma creates a political problem of monumental proportions both for the tribe and the United States. It challenges the imagination to determine how the sovereign integrity of the United States, the various states and the tribes can all be kept intact if the personal will on which that sovereignty is based is divided. This problem is shared among the various peoples in protected territories of the U.S. (i.e. Puerto Rico, American Samoa, Virgin Islands, etc.) due to the fact that while people living in those territories retain their original citizenship, they also have U.S. citizenship. Such dual citizenship has hampered efforts aimed at achieving self-determination for the peoples of those island territories. Indeed, the divided loyalties which result from DUAL-CITIZENSHIP have created substantial internal political turmoil and instability for territorial citizens. Similar internal conflicts between tribal citizens are common within the tribes located in Washington.

Since June 2, 1924, all tribal citizens (Indians) born within the territorial limits of the United States have been citizens; and they enjoy all the rights and protections guaranteed any U.S. citizen by the U.S. Constitution. By virtue of this Congressional act (Pub. No. 853, 76th Cong., sec 201) all tribal citizens were granted U.S. citizenship with the strict proviso that their rights and protection as tribal citizens would not be impaired. With this act, and earlier naturalization statutes passed by the U.S. Congress (see notes), the United States unilaterally offered and granted citizenship to tribal citizens (Indians). U.S. citizenship was unilaterally granted to all tribal citizens among the thirty-three Washington tribes by virtue of the 1924 Congressional act alone. By thus conferring U.S. citizenship on tribal citizens while at the same time recognizing and accepting tribal citizenship, the United States recognized that each tribal citizen may enjoy the benefits of dual-citizenship.

Relationships between individual tribal people, the governments of the U.S. and the States have been the subject of many fictions and misconceptions since the first formal contacts between tribes and the United States. Members of tribes were, until very recently, thought to be something less than human beings by many people in the United States. These highly prejudiced doubts as to the human character of tribal people are reflected in many terms used by U.S. politicians to describe members of a tribe (i.e. ward, incompetents and inferior beings). The paradox revealed by these concepts is that on the one hand, the United States was obliged to deal with tribes as equal sovereigns because of international law; but, on the other hand, prejudices and fears of U.S. citizens have long compelled them to view tribal people as less than equals.

INTERGOVERNMENTAL CONFUSION

The external political character of tribes, their geographical proximity to the United States and the States, and the dual-citizenship of Indians combine to confuse intergovernmental disputes involving the tribes and the state (and even disputes between the tribes and the U.S.). Jurisdictional disputes involving powers to control natural resources like water, timber, fish and wildlife have persisted for more than ninety-one years. The state has engaged in jurisdictional disputes over the exercise of civil and criminal laws; the imposition of taxes; zoning of lands; regulation of the environment; construction of airports, roads, factories, dams and so forth. These intergovernmental disputes typically involve issues that affect the exercise of government inside and outside of tribal territories.

The struggle between the State of Washington and tribal governments to retain powers within their separate political jurisdictions has grown more intense. There has been very little progress in resolving such conflicts. When tribes and the State of Washington collide, both tribal citizens and state citizens have experienced frustration and uncertainty about their social and economic futures. As these conflicts touch more and more people, the stability and integrity of tribal and state governments hangs in the balance.

Solutions to these frustrating problems seem unlikely unless and until responsible public officials first recognize that TRIBAL GOVERNMENTS ARE OUTSIDE OF THE U.S. FEDERAL SYSTEM. The myth that tribes are within the federal system must be set aside.

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