

INTER-TRIBAL STUDY GROUP ON TRIBAL/STATE RELATIONS

A SEPARATE PEOPLE

TRIBAL PEOPLE'S CITIZENSHIP WITHIN THE U.S.

Tribal powers are not and never have been delegated from the United States government. Indian Tribes have inherent sovereignty based upon the consent and will of Tribal citizens.¹ Treaties have been signed that limit the inherent powers of tribes. But Indian tribes remain separate sovereigns from the federal government united by these treaties into a confederation with the United States.

A basic principle of U.S. law is that tribal reservations are as sovereign as states. Indian tribes are not states, they have a status higher than that of states and equal to a territory.² The U.S. Supreme Court ruled in 1978 that:

"Although physically within the territory of the United States and subject to ultimate control, they (Indian Tribes) nonetheless remain a separate people, with the power of regulating their internal and social relations."³

As a 'separate people' residing within the boundaries of the United States, seeking health and other services, the question of tribal peoples' citizenship within the larger political structure of the United States arises. The following paper, based on the brief for the Oglala Sioux of the appeal of Georgia White v. Joseph Califano, Jr., will attempt to clarify tribal peoples' citizenship.

The Historical Development Of Federal Citizenship For Tribal Citizens

Originally, tribal citizens were not citizens of either the federal government or state governments. An 1856 opinion of the Attorney General of the United States to the Secretary of the Interior on the issue of Indian citizenship stated:

"The fact, therefore, that Indians are born in this country does not make them citizens of the United States."⁴

Moreover, the Attorney General pointed out that to become a citizen of the United States, an Indian must cease to be a member of his tribe and must throw off the privileges of tribal membership.

Tribes resisted the exchange of tribal allegiance, tribal property rights, and federal services to become U.S. citizens. "The Indian (except in rare

individual cases) does not desire citizenship."⁵

This situation was not changed by the adoption of the Fourteenth Amendment, The amendment was interpreted as not including members of the Indian tribes owing direct allegiance to their several Tribes.⁶ Then, in 1924, Congress offered tribal people the right to become federal citizens without the loss of tribal citizenship. The Act specifically stated:

"That all non-citizen Indians born within the territorial limits of the United States be and they are hereby declared to be citizens of the United States That the granting of such citizenship shall not in any manner impair or otherwise affect the rights of any Indian to tribal or other property."⁷

The House Report of the Act illustrates that "full citizenship was rejected for the phrase 'be a citizen'". The purpose or intent of the Bill was stated as follows:

"At the present it is very difficult for an Indian to obtain citizenship without either being allotted and getting a patent fee simple, or leaving the reservation and taking up his residence apart from any tribe of Indians. This legislation will bridge the present gap and provide a means whereby an Indian may be given citizenship without reference to the Question of land tenure or the place of his residence"⁸

The Indian Citizenship Act, as it is now called, did not force federal citizenship on tribal citizens nor did it grant citizenship to whole tribes at once. As a fundamental principle of law, citizenship could only be offered to the individual citizens of the tribes; it could not be imposed arbitrarily without the consent of the individual regardless of race or prior political allegiance. A 1915 court held:

"It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."⁹

The Indian Citizenship Act presents a rather thorny problem. It is unknown exactly which tribal citizens chose to accept federal citizenship. Of course, the offspring of tribal citizens who became federal citizens now hold a dual citizenship. Children of tribal citizens not accepting federal citizenship in 1924 are now only citizens of their tribe. For the purposes of this paper, we will only be discussing those tribal citizens who are dual citizens.

Once tribal citizens became federal citizens, they were granted all the privileges and immunities of the U.S. Constitution.

"General federal laws are said to apply to Indians in the absence of express exemption."¹⁰

Tribal Citizens Are Not Necessarily State Citizens

The Indian Citizenship Act did not offer state citizenship to tribal individuals. As Justice Miller observed in 1873:

"(T)he distinction between citizenship of the United States and citizenship of a state is clearly recognized and established by the first section of the 14th amendment. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."

"It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."¹¹

Did the Fourteenth Amendment apply to tribal peoples? The central purpose of the Fourteenth Amendment was to convey both federal and state citizenship to black people under the common law of the United States.¹² Initially, Congress tried to give black people citizenship but finally realized that an amendment to the Constitution was the only sure way to guarantee such a result. The first attempt to grant black people a right of citizenship was in the Civil Rights Act of 1866. This act provided:

"(A)II persons born in the United States and subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, shall have the same rights, in every state and territory in the United States..."¹³

"Indians not taxed" is a Constitutional category excluded from political representation in the House of Representatives.¹⁴ This provision has been interpreted to mean that tribal citizens were not part of the political community of the United States or the states or territories from which their reservations were exempted.¹⁵ The Fourteenth Amendment is considered to have amended this section of the U.S. Constitution, although it still exists within the Constitution.

To ensure both federal and state or territory citizenship to black people, the Fourteenth Amendment was passed. It stated:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁶

By contrast, the Indian Citizenship Act, only an act of Congress, offered only federal citizenship and not state citizenship. There is, in Indian legislation, no

similar provision to that found in the Fourteenth Amendment which grants tribal citizens the citizenship "of the State wherein they reside."

It is clear that Congress knew how to grant state citizenship if it desired, since the Indian Citizenship Act was enacted after the Fourteenth Amendment. It is problematic whether Congress had the authority without a constitutional amendment.¹⁷

Eligibility For State Provided Services For Tribal Citizens Does Not Imply That They Must Be State Citizens

A state cannot discriminate against residents of a tribal reservation rights/services that it would allow to persons who recently moved to the state. Since tribal residents are federal citizens they are guaranteed the right to travel. Any federal citizen can travel to any part of this land free from the hazards of travel and transfer.¹⁸ This is based on four principles:

1. A state may not deny welfare benefits to residents or transients of less than a year duration; such a discrimination against new residents is insidious and denies equal protection of the law.
2. A one-year waiting period device is well suited to discourage the influx of poor families in need of assistance; "but the purpose of inhibiting migration by need persons in the state is constitutionally impermissible."
3. "(A) mere showing of rational relationship between the waiting period" and legitimate state objectives is not enough to justify such a classification; a compelling governmental interest must be shown.
4. The state may not condition on residence a denial of public benefits "upon which may depend the ability of the families to obtain the very means to subsist -- food, shelter, and other necessities of life."¹⁹

Besides which all federally funded health centers are required by law to bring comprehensive health care to all in need within a specific geographic area regardless of ability to pay.²⁰ The laws controlling federal funding of local health and mental health services are broadly directed at "all Americans" and "every person." Eligibility for services is based only on geographical areas and not political distinctions, State and local agencies cannot deny services to indigents on the basis of local citizenship, residence or alienage.

Concentrating on health care to tribal citizens, the Indian Health Care Improvement Act of 1976, P.O. 94-437, declared that:

"Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government's historical and unique relationship with, and resulting responsibility to, the American Indian

people."²¹

For the purposes of the Indian Health Care Improvement Act, an Indian is any member of an Indian tribe, "irrespective of whether he or she lives on or near a reservation."²²

As for other rights guaranteed a federal citizen, a tribal member can and should vote in state and federal elections. U.S. elections intimately affect tribal rights. The right of tribal citizens to vote is stated in the Fifteenth Amendment to the U.S. Constitution:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Conclusion

While federal citizenship of tribal citizens is accepted if not always technically the case, state citizenship is not necessary for tribal members. As federal citizens, tribal citizens can enjoy all the rights and privileges of any other federal citizen through the rights and privileges clause of the Fourteenth Amendment, as well as the Fifteenth Amendment, when they leave the reservation.

As a citizen of the state, each Indian individual has little value, as a member of a moral and political community whose voice counts in the community's decision-making process, because of lacking conformity to the values of the dominant society and the effects of residual racism. In contrast, as a tribal citizen, an Indian has a responsibility to be involved with tribal life.

To become a state citizen is to trade in being responsible for other members' rights for being a consumer of individual rights. Each tribal citizen does have the right to become a state citizen and enjoy the benefits of that political society. It is a matter of choice.

No concept of citizenship can resolve social problems, but in tribal society each individual Indian can attempt to better him/herself through a unified effort.

The very fact of tribal existence shows the desire of tribal citizens to remain loyal to their tribe. Is there any better test of citizenship?

APPENDIX

1. 1 FEDERAL INDIAN LAW (1958 ed.)

2. 2 Mackey et al v. Coxe, 59 U.S. (18 How.) 100 (1855)
3. 3 U.S. v. Wheeler Slip Opinion No. 76-1629 (U.S.S. Ct., March 6, 1978)
4. 4 70 Op. Attorney General, p. 746 (1856)
5. 5 Effect of the Fourteenth Amendment Upon Indian Tribes, 41st Cong., 3d Sess., Rep. No. 268 (1970)
6. 6 FEDERAL INDIAN LAW, 155
7. 7 43 Stat. 253 (1924); 8 U.S.C. 3 (1926)
8. 8 House Report No. 222, 68th Cong., 1st Sess. (1924)
9. 9 Mackenzie v. Hare, 239 U.S. 299 (1915)
- 10.10 Choteau v. Burnet, 283 U.S. 691 (1931); Squire v. Capoean, 351 U.S. 1 (1956)
- 11.11 Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873)
- 12.12 Dred Scott v. Sandford 260 U.S. (19 How. 393 - 1856)
- 13.13 Civil Rights Act of 1866 Ch. 31, Sect. 1, 14 Stat. 27
- 14.14 U.S. CONST. art. I, Sect. 2, Cl. 3
- 15.15 Effect of the Fourteenth Amendment Upon Indian Tribes, 41st Cong., 3d Sess., S. Rep. Ho. 268 (1870)
- 16.16 U.S. CONST. Amend. XIV, Sect. 1
- 17.17 Ozawa v. U.S., 260 U.S. 178, 195-96 (1922)
- 18.18 Shapiro v. Thompson 394 U.S. 618, 89 S.Ct. 1322, L. Ed. 2d 600 (1969)
- 19.19 Ib. 394 U.S. at 627
- 20.20 Section 32 (a) of P.O. 94-63
- 21.21 Section 2 (a) U.S.C. 1601(a)
- 22.22 Section 4(c), 25 U.S.C. 1603(c)

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Questions may be referred to:

Director of Research
Center for World Indigenous Studies
PMB 214
1001 Cooper Point RD SW Suite 140
Olympia, Washington
98502-1107 USA
360-754-1990
www.cwis.org
usaoffice@cwis.org