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MAKING A NAME FOR OURSELVES: THE UNITED NATIONS DRAFT STATEMENT ON THE RIGHTS OF INDIGENOUS PEOPLES

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The Draft United Nations (U.N.) Declaration is a product of the U.N. declaration of the Decade of the World's Indigenous Peoples. This decade ends in 2004. The Declaration addresses many rights of indigenous peoples: affirming indigenous peoples' basic human rights, fundamental freedoms and full equality under the law; affirming indigenous peoples' rights of self-determination and self-government; affirming indigenous peoples' rights of control or ownership over ancestral lands and natural resources; affirming indigenous peoples' freedom to develop their identities and cultures, without assimilation; and advocating that governments take steps toward achieving these ends.

On the surface, these items should cause no great controversy for any national government. However, these items have led to disagreement at all levels. This opportunity to participate in international discourse places Indian Tribes and governments in a completely different environment than the one in which we have been involved since the discovery of the New World and the formation of the United States of America.

The overriding difference is that we now must respond at a new level of understanding. This new level should be one in which we participate as equals, not as a dependent population. Likewise, this places the State Department in a new environment. The State Department has not been involved in Indian affairs because our status has always been deemed as an

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[†] The author has been involved in consultations on behalf of the Cherokee Nation with the State Department for the past four years. At the first meeting at Harvard in July of 1996, the author made this presentation addressing the perspective of the Cherokee Nation in reference to the Draft Statement. The panel discussion included representatives from Indian Tribes and Nations who had spoken to the issue on other occasions. This was the first time the Cherokee Nation was present at the Draft Statement discussion.

internal matter for the Department of the Interior (DOI). The State Department has to create a new mind set to enter discourse with us on these issues. This has been difficult for both sides.

From the Cherokee perspective, far too much time has been spent rehashing old grievances between Indian Tribes and Nations and the federal government. Far too little time has been spent developing a new level of discourse to resolve issues that we will face in the future. I will attempt to place these differences in a perspective that should help resolve some of the disagreements.

I. THE INDIAN GOVERNMENTAL PERSPECTIVE

The overriding issue is SOVEREIGNTY: the most basic right of people to govern themselves without undue external influence. Chief Justice John Marshall of the U.S. Supreme Court provided the internationally accepted legal definition of this notion in 1832 in Worcester v. Georgia.[1] It is "the settled doctrine of the law of nations" that people do not give up their most basic human right, the right to self-government, by the mere association with a stronger power and seeking their protection.[2]

Sovereignty, at a minimum, is the right to self-government. In addition, a group must meet a set of internationally accepted criteria to possess all the attributes of sovereignty:

(1) A group must have citizens;
(2) The group must have territory over which the government has civil and criminal jurisdictional authority;
(3) The group must have a process to establish public policy (i.e.: a governmental structure of some sort to establish laws to govern behavior); and
(4) The capacity to enter foreign relations. That government, then, must have relationships with other "recognized governments.[3]

Intergovernmental relationships are based on the terms and conditions defined in treaties. Most treaties between Indian Tribes and Nations and the U.S. government contained four basic ingredients:

(1) Indians gave up land;
(2) The U.S. government guaranteed certain deliverables on the

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1. 31 U.S. (6 Pet.) 515 (1832).

2. *Id.* at 560-61.

3. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

contract;[4]

(3) The maintenance of a territorial base;[5]

(4) In the Cherokee instance, the promise of protection from intruders, both hostile Indians from the Plains area, and, more important, removal of non-Indians who were illegally in Indian Country doing something considered illegal somewhere else.[6]

To have status as an "Indian," one must possess citizenship in a "federally recognized" Indian Tribe or Nation. This is a singularly important attribute of sovereignty. The status of Indian, therefore, is political and legal. Indian is not a racial category.

Citizenship in two sovereigns places American Indians in a distinct class of persons, both within the United States and the world. This situation occurs in few other places.[7] Knowing this, we wonder why non-Indians have a problem with the notion of dual citizenship. When our patriotism is challenged, we note that, as a percentage of population, more Indians serve in the U.S. military than any other definable ethnic group.

An upcoming issue is the status of so-called non-federally recognized Indians. State legislatures have acknowledged these groups. Most reside in states that, during the 18th and 19th centuries, summarily ejected real Indians. Given recent circumstances, can you imagine a situation in which the state of Oklahoma would entertain granting any measure of acknowledgment that would "recognize" another group as an "Indian Tribe"?

A. Additional Factors that Merit Further Attention

1. The U.S. Constitution, Article 1, Section 8, Clause 3

American Indians are the only people referenced by name in this document. This is the interstate commerce clause.

2. Treaties

Treaties between the United States and other sovereign entities are, upon approval, incorporated into the Constitution, and, like federal court decisions, become the supreme law of the land. Therefore, Indian treaties, despite the date of negotiation or enactment, are valid today and will remain until abrogated by the parties. The United States cannot unilaterally abrogate a treaty with Indian Tribes absent a consensual agreement or a declaration of war. However, if this were to happen, the response of the

4. Often education, food, housing, medical care, etc.

5. Either a reservation or fee simple jurisdictional area.

6. We continue to have the later problem to this day.

7. Such as Northern Spain, Ireland, and the Vatican.

world would be predictable.

This raises an interesting legal dilemma given recent attacks by Congress on American Indian governmental sovereignty. The most basic principle of constitutional law is "consent of the governed." One can argue the question about whether those Indians who signed treaties gave their full consent without duress. One cannot, however, deny that current actions in Congress are in direct contradiction to those treaties.

3. "States' Rights" and the "Equal Footing Clause"

Directly related to this are issues of "states' rights" and the "equal footing clause" of the United States Constitution. Congress has made a couple of feeble attempts to redress these inequities, but has yet to rectify either. American Indians have been through this before. Public Law 280 was an attempt by the federal government to abrogate treaties and remand civil and criminal jurisdiction to those states with Indian Tribes and Nations within their exterior limits. It was a disaster then, and it will be a disaster now.

The Istook Amendment is a clear example. It passed the House attached to the Interior Appropriations Bill. Originally, it was directed at the Secretary of the Interior. The intent was to not permit the purchase of property with DOI funds and place it in trust. Now they have attached it to all federal funds. It is in the Senate and has become much more mean spirited: one wants to place a moratorium and another wants to require a Senate/House concurrent resolution.

However, we also have a conservative court decision out of the 8th Circuit. This one is an attack on the power of Congress to delegate authority to the Secretary of the Interior to take land in "trust." Conversely, I think in Seminole, the Court has ruled against the so-called "plenary" power of Congress over Indian affairs, not just the 11th amendment rights of states over sovereign immunity. These decisions further complicate the discussion. In the later case, the Court ruled were the legislature sued the governor and invalidated a state-tribal agreement on Class III gaming.

The Constitution says that States reserve those rights not specifically given up by joining the Union.[8] The equal footing clause refers to enabling legislation and state constitutions that contain a clause that says "deemed as having entered on an equal footing with the original thirteen colonies." In reality, that is not possible. Two barriers exist:

(1) The original colonies, and the state of Texas, brought treaty relationships with them when they became parties to the Constitution. Therefore, these states possess powers to negotiate with Indians within their

8. U.S . Const. amend. X.

exterior limits above those who became parties later; and

(2) In clear recognition of this fact, those states with American Indian Tribes and Nations within their exterior limits each have a "disclaimer" clause in the enabling act and constitutions. In my original research I discovered Article One, Section 3 of the Oklahoma Constitution as the "revenge of the Five Civilized Tribes": "[t]he people inhabiting the state, forever, give up an interest to the land of an Indian, tribe, or Nation."

II. THE STATE DEPARTMENT FROM THE CHEROKEE PERSPECTIVE

Most of the issues that Indian Tribes and Nations hold in defining their sovereignty are precisely the same ones used by the United States to describe its rights as a government. The United States, as noted above, has yet to rectify the government to government relationship between itself and federally recognized Indian Tribes and Nations.

Two problems have arisen during the consultations. The first problem involves credentials to participate. The State Department is caught in a catch 22 because individuals have attended the consultations who have no credentials from their "government," and yet speak to the issues as though they had authority.

Many "Indigenous" people claim that the more traditional people are the true representatives, and they do not "recognize" the federally recognized government. The State Department is left with trying to be a good host. This is difficult at best. The true issues of the Draft Statement become totally lost in conversation on collateral issues.

The second problem is an issue mindful of the United Nations Assembly. In theory, all governments are equal. In reality, the issue becomes similar to the concept of economy of scale. Some are more equal than others. For example, what weight of influence would a representative from an Alaskan village with 30 - 50 members have as compared to the Navajo or Cherokee with more than 200,000 members each?

Yet, the State Department has been extremely gracious in permitting extended discussion on issues unrelated to the Draft Statement. On this, the Cherokee Nation commends the patience shown by the State Department. This is not, however, to say that the State Department is totally "on the side" of federally recognized Indian Tribes and Nations when issues are presented.

I believe that most Indian Tribes and Nations have yet to consider the issues contained in the Draft Statement from a sovereign government perspective. The consultations have become too slanted toward settling old grievances. For example, far too many recount treaty violations that are not part of the Draft Statement.

The State Department should, therefore, prepare a process to verify the credentials of those who attend. Sovereignty resides with the government of federally recognized Indian Tribes and Nations, not the individual. Individuals do not have to be acknowledged because, presumably, they are cared for by their government.

I gave an example at Harvard of an issue contained in the Draft Statement that the Cherokee Nation would more likely agree with the position of the United States than that of most federally recognized Indian Tribes and Nations. The issue is the right of secession. This is not, however, an issue exclusive to the Cherokee Nation. Several other Indian Tribes contain the remnants of multiple Tribes that were formerly independent. Their separation would be an interesting case study.

The Cherokee example is somewhat complex. After the Civil War the Cherokee entered a treaty with the United States that contained a provision for other tribes to move in with the Cherokee. Two groups took advantage of this: the Delaware and the Loyal Shawnee. By Treaty and Act of Congress, they merged with the Cherokee Nation and their descendants became the same as "native-born Cherokee with all rights of citizenship." The Cherokee Nation allotted land to them in the early 1900's as Cherokee citizens, not as members of a separate Tribe.

We are now in federal court over attempts by the Cherokee-Delaware to obtain separate federal recognition. Likewise some of the Loyal Shawnee are moving toward separation. The issue for the Cherokee Nation is the loss of territorial and service jurisdiction for our citizens, which includes the descendants of those Delaware and Loyal Shawnee who merged in the 1800's. One can assume the federal government would take the same stand.

III. SOLUTIONS

The United States should take a stronger move toward correcting the mistakes of the past and resolving disputes with Indian Tribes and Nations in a new way. The US should not only "do the right thing," it should "do things right."

A. Solution Number One

Indian affairs should be moved from the Department of the Interior to the Department of State. Reasoning for this is twofold.

The first problem concerns the status of the Solicitor for the Interior Department. So long as the United States government, through the Department of the Interior, holds land in trust for Indian governments and Indian individuals, the Solicitor is in an inherent conflict of interest. No attorney is supposed to represent both sides in a court action. Yet, the Solicitor is forced into this ethical dilemma on a continual basis. Moving

Indian affairs to the State Department would resolve this inherent conflict of interest in the federal government.

Second, the Department of State is skilled in diplomacy. After four years of observation, I firmly believe that through diplomacy, rather than bureaucratic policy, most of the perceptual problems that divide our governments can be resolved to mutual satisfaction.

For this to happen, Indian Tribes and Nations will have to establish valid mechanisms in their constitutions and governmental operations to meet the fourth criteria for sovereignty in international law - the capacity to enter foreign relations. This will force a new level of maturity and activity within Indian government. For not only does the federal government need to do things right, Indian Tribes and Nations must likewise follow suit.

B. Solution Number Two

The Department of State will have to establish a new category of credentials for Ambassadors from federally recognized Indian Tribes and Nations. This will lead to a new category of "Diplomat" in the international law arena.

The desired outcome could lead to a better definition of indigenous people; the Draft statement addresses issues without definitions. For example, how does one define an indigenous person and people. This is identical to the definition of an Indian. This is an example of part of the problem most countries face in accepting the Draft Statement. Too often it leaves definitions aside as if everyone agrees and yet the problems persist.

Within most nations there are political subdivisions just as there are states in the United States. What is the nature of the relationship between them and indigenous people vis-a-vis the national government? This gets to the very heart of the debate in the United States. The whole range of issues in "states' rights" and the "equal footing" clause of the US Constitution.

Until we, as citizens of the United States and citizens of our respective Indian Tribe or Nation, resolve the perceptual issues that divide us, nothing will come out of the Decade of the World's Indigenous Peoples.

We must, therefore, come together and breathe life into these definitions and bring them forward to the international community of nations.