

# Starter Kit on Sovereignty

*Prepared by*  
**Darrel Smith, Editor, CERA Newsletter**  
*for*  
**2005 Annual CERA Conference, Washington, D.C.**

<b>Definitions .....</b>	<b>2</b>
<b>Historical Background .....</b>	<b>3</b>
<b>Legal Applications.....</b>	<b>5</b>
<b>The Federalism Dilemma .....</b>	<b>5</b>
<b>An Important Harm .....</b>	<b>6</b>
<b>The Net Effect of the Harm.....</b>	<b>8</b>
<b>What Congress Has Created .....</b>	<b>11</b>

This "kit" contains the findings of several researchers that I believe contribute depth and scope needed for a fundamental understanding of sovereignty and what it means in our daily lives as American citizens. Contributors include: Attorney Lana Marcussen; David Price, author of *The Second Civil War*, and Darrel Smith, Editor of the CERA Newsletter.

## SOVEREIGNTY (OR SELF-DETERMINATION)

We begin with basic definitions:

**Sovereign** n. **1.** A person, body, or state vested with independent and supreme authority; **2.** The ruler of an independent state. - Also spelled sovran. See Sovereignty.

**Sovereignty** n. **1.** Supreme dominion, authority, or rule. **2.** The supreme political authority of an independent state. **3.** The state itself.

**Individual Sovereignty:** The best definition is penned in our Declaration of Independence: "We hold these truths to be self-evident, that **all men are created equal**, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, **deriving their just powers from the consent of the governed...** " (*The "governed" in this case are the individual "sovereign" citizens who elect their representatives*).

**Cultural/Religious Sovereignty** The liberty of every individual to think and act according to the dictates of his conscience, religion or culture.

**Political Sovereignty** The power to make and enforce rules and laws. In the United States we are dedicated to preserving the principles of liberty and equality for every American citizen. To do this we provide every person with equal access to the government and the law, as well as the economic, social and physical landscape.

**True Sovereignty** True sovereignty (independent supremacy) is often considered an exclusive attribute of God. For example, I Tim. 6: 15 says, "...He who is the blessed and only Sovereign..." (NASB, 1978). Who, or what else, is truly independent and supreme? Either all other claimed sovereignty is less than true sovereignty or it is a claim to deity.

**Plenary** Full, unqualified, entire, complete or absolute. "[T]he Congress finds – (1) that clause 3, section 8, article I of the United States Constitution provides that 'The Congress shall have Power \* \* \* To regulate Commerce \* \* \* with Indian tribes and, through this and other constitutional authority, Congress has plenary power over Indian affairs.'"

## **HISTORICAL BACKGROUND**

### ***The Tragedy of Tribal Sovereignty — by Darrel Smith***

In Medieval times (sometimes referred to as the Dark Ages), kings were sovereign. Ordinary people were vassals or subjects. People believed that kings had a divine right to rule their subjects. Sovereign immunity (protecting the sovereign from being sued) protected kings, as God's governmental representatives, from court challenges initiated by their subjects. Actually, absolute sovereign immunity was already being reduced in England as early as 1215 by documents such as the Magna Carta.

After fighting and winning the Revolutionary War against "King George" and the British, Americans totally reversed the concept of sovereignty. American government is based on the concept of popular sovereignty. This concept vests supreme political power in the will of the people. There are many common expressions of this concept such as the state motto, "Under God, the people rule." In the famous Gettysburg Address, Lincoln described ours as a "government of the people, by the people, for the people." Instead of the people being subjects of the king, governmental employees are considered "public servants." Popular sovereignty is why our Constitution starts with the words, "We the People." The American people as a source of American sovereignty took some of their sovereignty and gave it to the government for necessary functions. This transfer of political power was strictly limited by the Constitution. "We the People" also protected ourselves from governmental abuses by balancing powers between the executive, legislative and judicial branches. We further divided political power between federal, state (with their own divided branches) and local governments.

In contrast, the modern concept of tribal sovereignty is an independent sovereignty of tribal governments not a popular sovereignty of Indian people. Like Medieval kings, tribal governments have largely unchecked, centralized power and are generally protected from being sued. In fact, tribal governments have been given sovereign powers that no other government in America, including the federal government, enjoys. Where do these extraordinary powers come from? Many people will say they have been granted by Congress, and in a sense, they are correct. Indian trust land on reservations is considered "territory" and Article IV, Section 3 of the Constitution gives Congress the right to "make all needful Rules and Regulations respecting the Territory." Ultimately, however, Congress can seldom grant powers without first taking them from someone else. Tribal governments' extraordinary sovereign powers have been taken from the people that they govern; primarily from the popular sovereignty of Indian people. It isn't surprising that American Indian citizens on reservations live without the most basic Constitutional guarantees. As Minnesota Appeals Court Judge R.A. (Jim) Randall has noted in a legal opinion:

"It is not known to all reading this opinion that the following list of state and federal constitutional guarantees and rights are not in place for Minnesota Indians domiciled on a reservation: There is no guarantee that the Minnesota Constitution, the United States Constitution and its precious Bill of Rights will control. There are no guarantees that the Civil Rights Act, federal or state legislation against age discrimination, gender discrimination, etc. will be honored. There are no guarantees of the Veteran's Preference Act, no civil classification to protect tribal government employees, no guarantees of OSHA, no guarantees of the Americans with Disabilities Act (1990), no guarantees of the right to unionize, no right to Minnesota's teacher tenure laws, no right to the benefit of a federal and state "whistleblower" statutes, no guarantees against blatant nepotism, no guarantees of a fair and orderly process concerning access to reservation housing, and no freedom of the press and no freedom of speech.

"In other words, **all the basic human rights we take for granted, that allow us to live in dignity with our neighbors, are not guaranteed on Indian reservations under the present version of 'sovereignty.'**" The modern concept of tribal sovereignty involves a great transfer of political power from Indian citizens to their largely unaccountable tribal governments.

The transfer of sovereignty from individual Indians to tribal governments was imposed on reservations by the federal government starting with the Indian Reorganization Act of 1934. This Act was promoted by John Collier, the Commissioner of Indian Affairs at the time, as a grand social-political experiment. Collier and others expected reservations to become "a model of community that all Americans might in some ways follow... because he wanted Indians to offer an alternative way of living for individualistic-oriented white America." Collier continued to demonstrate his preference for powerful centralized government and the communal ownership of assets when he praised an idealized version of communism in Red China in his book, *From Every Zenith*, published in 1963. America's reservations have become demonstration models; demonstrating the opposite of what Collier expected.

Not only is the transferal of sovereignty from American Indians to tribal governments a great reversal of the most basic American concepts established during and after the Revolutionary War, it is also a violation and reversal of the vast majority of Indian traditions. Before being affected by White concepts of government, most Indian societies were characterized by weak tribal governments and high levels of individual freedom. Most Indians lived largely in autonomous bands. Individuals that were dissatisfied with these bands were free to join another band or form a new band. Only very rarely did most tribes act with strong centralized authority. As one chief said, "we are a dispersed people, and have no regular system of acting together."

Confronted with this betrayal, hundreds of thousands of Indians have done the same things their ancestors might have done. In fact, the same thing the pilgrims did, and other people all over the world do, when confronted with tyrannical, oppressive governments. They voted with their feet. In 1990, almost 1,960,000 people classified themselves as Indian. Only 447,400 of them, or less than twenty-three percent, still live on Indian reservations. They have chosen to leave their families, friends, culture, lands, and the many federal, state, local and private benefits provided on reservations. They have chosen a new life off the reservation. As soon as they step outside of the reservation boundaries they have the full protection of the federal and state constitutions and laws.

Tribal sovereignty diminishes the rights of Indian Americans, hundreds-of-thousands of non-Indians who live on reservations, and millions of others who are affected by tribal governments. Federal Indian policy, modern tribal governments and the concept of tribal sovereignty violate the most basic principles of the American Revolution and also the vast majority of early Indian traditions. We can't grant popular sovereignty to Indian people without reducing the current exalted sovereign status of tribal governments. Fortunately, conveying popular sovereignty to American Indians would also return traditional concepts of Individual freedom and dignity to Indians. As Judge Randall also noted. "[T]his country, has the power and the legal right to protect any and all parts of Indian identity, culture, tribal assets, self-determination, religion/spirituality that needs to be protected, and yet do it all within the framework of treating American Indians like we treat ourselves, as normal citizens of this state, of this country. The real issue is, do we have the will?" Granting popular sovereignty and equal constitutional rights to reservation residents is the last truly great civil rights struggle in this country.

## LEGAL APPLICATIONS OF SOVEREIGNTY

Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

But these Indians are within the geographical limits of the United States . The soil and the people within these limits are under the political control of the government of the United States , or of the states of the Union . There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies, with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. *U.S. v. Kagama*, 118 U.S. 375 (1886).

In the debate centering on which governments are sovereign, almost no attention has been given to the derivation of tribal authority and the basis of its sovereignty vis-à-vis individual tribal members. . . . Nearly all the Plains Indians lived in relatively independent groups (usually families or clans) where individual freedom was paramount. . . . Before Indian tribes, especially those with a tradition of individualism, can establish their sovereignty, they must establish the nature of the relationship between individual Indians and tribal government. . . . To develop collective sovereignty, Indians will have to return to the basics of individual sovereignty and build from the ground up. . . . Self-determination begins with the individual, as it did prior to European contact, and builds to collective action" Anderson, Terry L. *Sovereign Nations or Reservations*, (San Francisco: Pacific Research Institute, 1995) p. 169-171. Reprinted with permission of the Pacific Research Institute for Public Policy.

## THE FEDERALISM DILEMMA

### **Tribal Sovereignty v. Individual Sovereignty — An Informal Comment by Attorney, Lana Marcussen**

As to sovereignty, this is what the federalism argument addresses. It is the return to the Framers' view of sovereignty embodied in the Constitution. So that there are three sovereigns-federal, state and individual sovereignty. And the greatest was to be individual sovereignty because this is what the concept of self-governance is based on. But the Dred Scott decision changed all the Framers' definitions of sovereignty deliberately placing territorial sovereignty as separate from state sovereignty and rendering personal sovereignty completely subject to the federal government's sovereignty. The Dred Scott decision is overruled but the sovereignty definitions have not been corrected in the law. The argument that needs to be made to correct this problem is to define the various sovereignties. I did this on the Hopi reservation last week with great success.

Here it is in its simplest form. Dred Scott made the federal sovereignty much more supreme than the Framers intended. The Court did this by altering the other two definitions. They severed territorial sovereignty from state sovereignty. Up until Dred Scott, territorial sovereignty was considered to be the precursor of state sovereignty and the feds owed a duty to the future state to protect its future rights and to grant all the authority of the original 13 colonies to the new state upon statehood. This is as it was defined in *Pollard's Lessee v. Hagan*. Personal or individual sovereignty was the concept of inalienable rights from God. Personal sovereignty is the divine right in our system. Dred Scott changes this by placing individual sovereignty as nothing more than citizenship rights defined by the federal government. With these changes you change the entire structural framework of the Constitution as enforced in the courts.

So to fix it, we bring the confrontation between the original definitions and the Dred Scott definitions. Since Dred Scott was as much about Indians as it was Negro slaves this is very easy. To retain territorial sovereignty, individual sovereignty must be prohibited on the territory. There cannot be both. So we need to say this--**as long as there is tribal sovereignty (which is territorial in nature) there cannot be**

**individual rights on the reservations. There cannot be both.** At some point a choice must be made. Do we return to the Constitution or stay with Dred Scott?

Sherrill has brought this confrontation to a head. The Supreme Court has ruled that the Oneidas are to be treated as state citizens by citing *Felix v. Patrick* (1892). If they are state citizens they have individual sovereignty. Tribal recognition then revokes state citizenship by federal law exactly as allowed by Dred Scott. To enforce the tribal recognition the tribes must be territorial sovereigns to avoid the constitutional conflict between the federal and state governments. As Dred Scott laid out, once a tribe is recognized and on federal territory the feds are an absolute sovereign over that area. But now in Sherrill there is no federal territory and arguably no way to get there, at least without arguing Dred Scott was the right decision--good luck.

**There cannot be tribal sovereignty and individual sovereignty.** We must choose. Either all people are persons entitled to individual rights or the feds can take away anyone's rights by reclassifying their citizenship. If they can do it for the Indians they can do it against anyone. And against me they did, using the Navajo Agreement in a state court. Please notice the overlap to the Hawaiian situation as well as to tribal recognition. Every time they recognize a tribe or a new group as being sovereign they are taking away the state citizenship of everyone contained in the group. They are literally removing their individual sovereignty as defined by our Framers.

My argument works by using the 14th Amendment to reinforce state citizenship with equal protection of the law on the rights side. The structural side was preventing the land from being defined as territory by defining the land status up front in every suit. Now it has all come together in Sherrill and from Sherrill into all of the (pending) cases.

## **AN IMPORTANT HARM TO INDIVIDUALLY ENROLLED TRIBAL MEMBERS**

### **How Sovereignty Protects American Freedoms**

**by T. David Price, Author of *The Second Civil War*, Copyright (1999) All rights reserved**

Sovereignty is political power. It is the power to make and enforce rules and laws. In the United States we are dedicated to preserving the principles of liberty and equality for every American citizen. To do this we provide every person with equal access to the government and the law, as well as the economic, social and physical landscape. This is political sovereignty. We also protect the liberty of every individual to think and act according to the dictates of his conscience, religion or culture. This is cultural/religious sovereignty.

Democracy as we know it cannot exist without a delicate balance between the principles of cultural/religious and political sovereignty. Cultural/religious sovereignty protects our right to live without undue interference from the government or from groups of people who do not agree with our lifestyle. When people practice religion they can believe whatever they chose. We can worship one god, many gods, no god, or the devil. Culturally, we can make the woman the head of the household, the man, or have the man and woman share domestic power equally. Cultural/religious sovereignty protects our right to be as different as we choose without undue interference from anyone else. Cultural/religious sovereignty is discriminatory, groups practicing cultural/religious sovereignty can decide who is or is not a member. Without cultural/religious sovereignty there would be no cultural diversity because people could be forced to think, behave and associate in a manner proscribed by the ruling group.

Political sovereignty cannot be given exclusively to any particular group in our culturally diverse nation. To do so would create a ruling group that could interfere with the civil rights of anyone who was not a member. All general governmental functions are equally accessible to people regardless of their cultural, religious, ethnic, sexual or other status. Anyone can vote, hold office, practice law, or speak out against injustice. General government (political sovereignty) must be accessible to people of any group but must

not dictate the beliefs or prejudices (religious, cultural etc.) of any particular group of people. Government by the people means the human race, not any particular race or culture. Political sovereignty is nondiscriminatory; everyone who is an American citizen has the right to participate in the government.

Cultural/religious sovereignty allows people to form groups and to practice limited governmental power within that group. A religious or cultural group can form a constitution or by-laws and require the members of the group to abide by those laws or rules. The Amish, for instance, could have a ruling council of elders that decides group mores such as the length of women's skirts or what mode of transportation is allowable when going to town (foot or horse) or the hospital emergency room (any method). The Amish cannot impose their rules or laws upon people who are not part of their sect and they cannot be the general governmental power in a geographical area. The Amish cannot form a government for Wright County, Minnesota.

Cultural/religious sovereignty allows groups to live as they please (liberty) even if their culture, religion or belief system is sexist, racist, or in any other way intolerant of others. But this sovereignty is applicable only to the internal relationships of the group members. General governments (political sovereigns) cannot exclude people based on their group status and also cannot discriminate against anyone based on group status. Political sovereignty also requires that the economic, educational, geographic and natural resources of the United States are equally accessible to everyone regardless of their group status. Thus housing, land, natural resources, jobs and public education cannot be denied to anyone based on cultural, religious, philosophical or other group status.

Indian policy and law defies the democratic principles of liberty and equality by giving Indians as a group political sovereignty. Indians say that they must have political sovereignty in order to protect their unique culture and religion. This argument was valid for much of the history of the United States when the dominant White Christian society tried to force Indians to assimilate into society. A primary example of assimilation was sending Indian children to missionary schools where they were forced to adopt Christianity and the dress and culture of White European society.

It is essential to note that slavery, Black segregation, the forced assimilation of Indians into White Christian society and the subjugation of women are all examples of giving political sovereignty to White males in America. In the 19th and 20th centuries the courts and legislature of the United States gradually came to realize that political sovereignty cannot be given to any one group (i.e. White males) without violating the most basic principles of the U.S. Constitution.

Since the landmark Supreme Court case of *Brown vs. the Board of Education* in 1954 (347 U.S. 483) and the Civil Rights Act of 1964 it has been recognized that discrimination, segregation and forced assimilation are unconstitutional. The hallmark of this new attitude is the concept of integration, which mandates that no matter how different you are (Indian, female, Amish, etc.) you must have equal access to the law and the social and economic landscape. Integration is the legal concept that allows cultural diversity to exist within a nation. Contrarily, assimilation allowed Indians access to the benefits of American society only if they adopted the culture and religion of the predominant White Christians.

Integration is the law of the land. Indians and Indian tribes are protected by cultural/religious sovereignty in the same way every other culture or religion is protected in the U.S. The Constitution sees all cultures and religions as equally unique under the law. To allow Indians as a group to practice political sovereignty as a general government ruling non-Indians or a geographical territory is wrong. It is as wrong as every other form of 18th and 19th century discrimination.

Indian Tribes counter this argument by saying that the Supremacy Clause of the Constitution puts treaties on equal footing with the Constitution. In other words, one cannot overrule the other. The Supremacy Clause (Article VI) reads:

This Constitution, and the laws of the United States which shall be made in pursuance thereof and all Treaties made ... shall be the supreme Law of the land....

The Supreme Court has ruled that in cases of conflict between constitutional rights and treaties the Constitution overrules. In the case of *Reid v. Covert* in 1957 (354 U.S. 1) the Supreme Court stated that "the United States is entirely a creature of the Constitution. Its power and authority have no other source. ...Accordingly, a President may not negotiate away the civil liberties of American citizens through treaty power."

It is wrong to assume that defining Indian Sovereignty under the guidelines of the U.S. Constitution is an attempt to extinguish Indian tribal sovereignty. The Constitution protects Indian tribal sovereignty on equal footing with the sovereignty of every other group. For all Americans cultural/religious sovereignty is inherent and predates the Constitution - we all have an inherent right to be unique. Being an integrated American does not detract from anyone's ability to live the lifestyle of a unique culture or religion. In a government of the people everyone must have equal access to sovereignty, both cultural/religious and political. This means no single group can claim the right to political sovereignty to the exclusion of any other group. For example, Catholics can't deny Protestants the right to vote in city elections. Finally, no group can deny the right of cultural/religious sovereignty to any other group; thus Protestants can't prevent Catholics from practicing Catholicism. Without this balance, democracy ceases to exist.

#### **THE NET EFFECT OF THE HARM:**

#### **Why Indians are Second Class Citizens: Congress' Plenary Power, Tribal Sovereignty and Constitutional Rights By Darrel Smith**

An ancient Jewish story tells of a hungry Esau despising "his birthright" and selling it to his brother, Jacob, for a meal of stew. A more recent story tells of Peter Minuit purchasing the entire island of Manhattan from Indians, in 1626, "for a handful of merchandise – mostly trinkets." In a similar way, today's individually enrolled tribal members are giving away their right to constitutional protections – their American birthright, either from indifference, apathy, tribal loyalty, or for the modern equivalent of a bowl of stew or "a handful of merchandise – mostly trinkets."

**The U. S. Government as Tyrant.** The United States Code states, "the Congress finds – (1) that clause 3, section 8, article I of the United States Constitution provides that 'The Congress shall have Power \* \* \* To regulate Commerce \* \* \* with Indian tribes and, through this and other constitutional authority, Congress has plenary power over Indian affairs.'" [emphasis added] The word "plenary" is defined as full, unqualified, entire, complete or absolute. Thus the United States Code is saying that Congress has full, unqualified, entire, complete or absolute power over Indian affairs.

The Supreme Court has recognized this plenary power of Congress on numerous occasions. One recognition is in the *Santa Clara Pueblo v. Martinez* (1978) decision which states, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." The *Santa Clara* decision refers back to an earlier Supreme Court decision called *Lone Wolf v. Hitchcock* (1903). In that decision the Supreme Court stated, "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government....The power exists to abrogate the provisions of an Indian treaty.... In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."

This plenary power of Congress over Indian affairs should end the discussion about federal and state constitutional protections for tribal members all by itself. How can it be claimed that a particular group of American citizens who live under the absolute power of Congress also has equal federal and state



constitutional protections? The U.S. Constitution was provided by “We the People” to give limited, enumerated, separated powers to the federal government. All other powers and rights are “retained by the people and the states.” The Constitution was specifically written to limit absolute power. Isn’t Congress’ plenary power over Indian affairs contrary to our entire system of limited, federal, constitutional government?

Congress’ constitutional authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;” doesn’t give them plenary power over foreign nations or states. How can this same authority give them plenary power over Indian tribes? How the federal government finds authority for this permanent, absolute, congressional power over a group of American citizens in the Constitution is both sobering and frightening. For more discussion of the possible foundations of this congressional power over Indian affairs read the articles entitled “Where’s the Government’s Authority...” under “Legal Principles” in the “Legal Issues” section of our web site at [www.citizensalliance.org](http://www.citizensalliance.org).

**Adding another Tyranny:** Unfortunately, Congress’ absolute power over Indian affairs is just one hurdle tribal *members* on reservations must overcome in an effort to obtain “the equal protection of the law” supposedly guaranteed to all citizens by the Fifth and Fourteenth Amendments to the U.S. Constitution. The exercise of tribal “sovereignty” often creates more immediate, practical problems for tribal members. The U.S. Code also says, “The Congress finds and declares that –

- (1) There is a government-to-government relationship between the United States and each Indian tribe;
- (2) The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
- (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
- (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems.”

Notice that these codified declarations are directed toward tribal *governments*, not tribal *members*. As a part of this “sovereignty” tribal governments possess a high degree of sovereign immunity “precluding suit against the sovereign (government) without the sovereign’s consent.” Again the U.S. Code says, “Nothing in this chapter shall be construed to affect, modify, diminish, or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes.”

The Supreme Court has also supported the concept of tribal sovereignty and said in *Santa Clara Pueblo v. Martinez*, “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed as limitations on federal and state authority. Thus, in *Talton v. Mayes*, 163 U.S. 376 (1896), this Court held that the Fifth Amendment did not ‘operat[e] upon’ ‘the powers of local self-government enjoyed’ by the tribes. *Id.*, at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as the Fourteenth Amendment.” The limitations on state constitutional authority is also specifically noted in *Santa Clara Pueblo v. Martinez* when the Court says, “States may not assume civil or criminal jurisdiction over ‘Indian country’ without [436 U.S. 49, 64] the prior consent of the tribe.”

The Supreme Court in its *Nevada v. Hicks* (2001) case stated, “it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.” The U. S. Court of Appeals (Ninth Circuit) has described this lack of constitutional protection very simply when they stated, “This holding is consistent with other judicial decisions finding the Constitution inapplicable to Indian tribes, Indian courts and Indians on the reservation.”

Thus, tribal members on reservations live under two contradictory, tyrannical forms of government. Inexplicably, Congress has plenary (absolute) power over their affairs and tribal governments have independent, supreme, dominion, authority and rule over these American citizens as well. Meanwhile, tribal governments are protected from being sued for abuses of civil or constitutional rights by their sovereign immunity. Finally, this absolutist tribal authority is guaranteed and protected by the power of the federal government because of its so-called trust responsibility to tribal governments. Visit the “Real Stories” and “Federal Issues” sections of our web site to read about the kind of practical problems this legal status creates.

**A Secret... “Voluntary Consent.”** The Supreme Court in *Duro v. Reina*, (1990), has stated that, “It is significant that the Bill of Rights does not apply to Indian tribal governments.” The Court contends that tribal governments get their “unconstrained” power over tribal members because tribal members voluntarily gave up their Bill of Rights protections, and their Fourteenth Amendment equal protections, when they consented to become tribal members. Specifically they said, “The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.... A tribe's additional authority comes from the consent of its members.”

Precedents and interpretations from past centuries still impact current Indian policy. One of the historical and philosophical foundations for Indian policy is the belief that Indians, like children or incompetents, “are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.” This historical foundation continues to affect modern Indian policy. In contrast, almost all Indians have currently been born as U.S. citizens. The vast majority of tribal members were enrolled as members by their parents when they were very young children. Few if any of these children, or their parents, ever knew of, or gave any kind of informed consent, to this reduction in their rights as U.S. citizens. The vast majority still isn't aware of this “voluntary consent.”

As tribal members become more aware of their diminished status, will they demand equal rights or will they be mollified by the perceived warm bosom of the reservation system? Will they sell their constitutional birthright for “a bowl of stew or ‘a handful of merchandise—mostly trinkets’” or will they demand the equal status they deserve as American citizens? Meanwhile, for the federal government to maintain that tribal members gave up their most precious citizenship rights without their knowledge, or any safeguards, is abhorrent.

How can Congress have plenary (complete) power over Indian affairs and tribes have independent supremacy? The simple answer is they can't. Perhaps, Congress has used its plenary power to delegate “sovereignty” to tribal governments. In this case, tribal sovereignty is really an expression and extension of federal plenary power. The Supreme Court in *Santa Clara Pueblo v. Martinez* describes what happens when these two contradictory, absolutist government concepts conflict with one another. They said, “This aspect of tribal sovereignty [sovereign immunity], like all others, is subject to the superior and plenary control of Congress.”

Congress has demonstrated its superior plenary power over Indian affairs throughout history. Three examples are the Indian Removal Act of 1830, which led to the infamous Trail of Tears; the General Allotment (Dawes) Act of 1887, as amended by the Burke Act of 1906, which set up a gradual policy of disestablishing every tribal government and reservation in the country with the goal of assimilating all tribal members into American society as equal citizens; and the Termination of the Menominee Indians in 1954.

Where does this complete, totalitarian and unaccountable power of both federal and tribal governments come from? Political power is not created out of a vacuum. It comes at the expense of other governments, or the people themselves. In this case, it comes primarily at the expense of the tribal members who live on reservations. Speaking of tribal sovereignty, Minnesota Appellate Judge R. A. (Jim) Randall has said, “[s]overeignty' is just one more indignity, one more outright lie, that we continue to foist on American citizens, the American Indian.”

## **WHAT CONGRESS HAS CREATED...**

The racism of the federal government in the area of Indian policy is blatant. The U.S. Code [Title 25, Ch. 38, Sec. 3601.] says, "The Congress finds and declares that - (1) there is a **government-to-government** relationship between the United States and each **Indian tribe**; (2) the United States has a trust responsibility to **each tribal government that includes the protection of the sovereignty of each tribal government.**" The definition of the word "sovereignty" confirms the radical nature of these "findings." Black's Law Dictionary (7<sup>th</sup> Ed.) defines "sovereignty" as "1. **Supreme dominion, authority, or rule.** 2. The **supreme political authority** of an independent state. 3. The state itself." In the U.S. Code, the federal government has committed itself to protecting the supremacy of Indian governments. Notice that this commitment is to tribal *governments* not Indian *people*. Black defines an Indian tribe this way:

"A group, band, nation, or other organized group **of indigenous American people**, including any Alaskan native village, **that is recognized as eligible for special programs and services provided by the U.S. government because of Indian status** (42 USCA 9601 (36)); esp., any group having a **federally recognized governing body** that carries out substantial government duties and powers over an area (42 USCA 300f(14); 40 CFR 146.3)....

**"The Indian tribe is the fundamental unit of Indian Law; in its absence there is no occasion for the law to operate...."** William C. Canby Jr., *American Indian Law in a Nutshell* 3--4 (2d ed. 1988)."

The U.S. government provides special programs and services "because of Indian status" The word "Indian" is a racial classification and these tribes must be federally recognized.

These definitions and laws commit the federal government to "protect" racial, specifically Indian, supremacy. They also commit the federal government to "protect" tribal government supremacy. Government supremacy, in contrast to the sovereignty of the people, has always been the definition of government tyranny. In contrast, the supremacy of "The People" has always been the foundation of freedom and democracy. (It's no accident that these "supreme" tribal governments are also not restrained by either state or federal constitutions.) These definitions and Codes demonstrate that the federal government has committed itself by law and policy to the dictionary definition of racism.

Nor are these racist policies limited to academic definitions. The U.S. government has a federal Indian policy, a US Senate Committee on Indian Affairs, a Bureau of Indian Affairs, an Indian Health Service, Indian sections in every major government agency, so-called Indian country, and exclusively Indian tribal governments ruling on Indian reservations. Would anyone have any question about whether we were dealing with racism if the federal government committed itself to protecting White supremacy and we substituted the word "White" for "Indian" in the preceding sentence? Federal Indian policy is racist in both definition and practice.

The government attempts to defend itself from charges of racism by maintaining that tribes are *political* entities, not *racial* entities, but it is obvious by definition and reality that tribes are political entities whose membership is based entirely on race and ancestry. This country's legal commitments to equality, including the Fourteenth Amendment, were not designed to make race-based social, cultural, religious or economic entities illegal. They were designed to make government-sanctioned race-based political entities and actions illegal.

*For additional information and research about tribal sovereignty, see the "Sovereignty" section of the CERA web site at [www.citizensalliance.org](http://www.citizensalliance.org).*