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Legal Warfare
Cultural Rights versus Civil Rights

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Summary

In 1831 the Chief Justice of the U.S. Supreme Court, John Marshall, ruled that Indian tribes are domestic dependent nations. Since that date, Congressional legislation has moved consistently in the direction of limiting tribal sovereignty. This paper argues that both the 1968 Indian Civil Rights Act and legislation currently pending before Congress continue this trend and seek to reduce even further what little tribal sovereignty remains.

To paraphrase Mr. Bumble of the Pickwick Papers, «the law is an ass». many Native Americans would find sympathy with Mr. Bumble's emphatic phrasing. Since the founding of the United States, Indians have been the object of extensive law making. in the last count that I am aware of, made in 1983, over 5'000 laws directly pertained to them. Over 2'000 court decisions interpreting those laws also affect the Indian population. If this were not enough legal restriction, tribal peoples are also subject to 400 treaties, 250 tribal constitutions, and, of course, tribal customs and traditions (DELORIA and LYTLE 1983: 110). These are a lot of laws for a people who make up about less than two percent of the population.

One recent law is especially noteworthy since, in a way, it constitutes a «time bomb» for tribal cultures. This law is the Indian Civil Rights Act of 1968. Why do I call this piece of legislation a time bomb ? Why is it significant for tribal cultures ? Why should a law whose purpose is to protect the civil rights of tribal peoples be detrimental to their cultural identity ? And finally, what is implied in my title «cultural rights vs. civil rights» ? This paper will explore these issues and argue that the Indian Civil Rights Act and recent congressional moves holds a potential danger for destroying much of what is left of the sovereignty of tribal cultures.

But let me start with a story by way of example. For many tribal people, stories are important for they serve to identify values and beliefs; because they are acts of imagination they are more real than reality itself. As the Kiowa writer, N. Scott MOMADAY (1970: 55) reminded us several years ago, «our very existence consists in our imagination of ourselves». And so my story.

In the 1970s a young Harvard law graduate eager to spend some time helping to right the world's wrongs, at least as they concerned Indian peoples, took a position for a few years with a legal defense organization on the Navaho reservation. Soon after arriving on the reservation, he noticed an old woman being held in a tribal jail. Asking why she was behind bars, he was told that she was a witch. Indignant, the young lawyer demanded her release. He heatedly argued that witches did not exist, that belief in witches had long ago disappeared and such beliefs were crude superstitions and could no longer be tolerated in the twentieth century. When the Navaho refused to release the witch, the young lawyer went off the reservation and got a court to issue a writ of *habeas corpus* forcing her release. With a sense of misgiving the Navahos set her free. The next morning she was found dead. The young lawyer did a splendid job of protecting her civil rights but his concern for her civil rights killed her. For the Navaho, who obviously still believe in witches, you either remove witches from the community or you kill them. Is the story true ? Is it false ? It is a story and so by definition it can be both. The point is, it raises the important issue or question of the community versus the individual. Are community rights more important than individual rights or should individual rights prevail ?

Historical background of the 1968 indian civil rights act

The 1968 Indian Civil Rights Act is not the first such act. A century earlier, many Americans interested in bringing reform to Indian affairs, argued that Indians should have the same rights as those then being extended to the former slave population. As a result, Congress passed the Indian Civil Rights Act of 1866. This act, however, had only limited coverage. It did not apply to Indians still on the reservation and thus to Indians who were not taxed (BERKHOFER 1979: 176). In 1924 Congress made all Indians born in the United States citizens. So the 1968 act is far more embracing than the previous act and affects all Indians on or off the reservation, taxed or not taxed.

Before I look at the implications of this act for tribal cultures, I want to explore briefly, as a means of providing a context for how this act will impact on Indian groups, the role of law and justice in traditional tribal cultures and how they served to buttress the needs and goals of the community. Obviously, I cannot represent traditional judicial systems for all Indian tribal groups. I do want, however, to present a general

synthesis that will stress less the regulations than the ends or goals of such judicial policy and their cultural implications.

Most North American Indian groups lived in small communities where face to face recognition prevailed. Community efforts were directed toward maintaining a cohesiveness necessary to exist in an often hostile environment. To insure against social disintegration, communities instituted normative codes to govern behavior. The preservation of the community was considered of much greater importance than the preservation of any individual member. When the cohesiveness of a community was threatened by the acts of an individual, corrective actions took place. As two scholars of jurisprudence have noted, «under Anglo-American notions of criminal jurisprudence, the objectives are to establish fault or guilt and then to punish. The sentencing goals of retribution, revenge, deterrence and isolation of the offender are extremely important» (DELORIA and LYTLE 1983: 111). The traditional Indian approach, however, differed. Here the major objective was «more to ensure restitution and compensation than retribution» (DELORIA and LYTLE 1983: 111). Community actions were directed toward reforming the offending party and compensating the victim.

Under the traditional system, there were seldom judges. Rather, the parties were brought together by a respected mediator: an elder, a medicine man, a religious leader or a chief whose job was to create an atmosphere for decision making. There was no stress on determining right or wrong. Rather, the mediator would strive to keep the negotiations within the bounds of tribal custom and work out a solution or penalty that was right for both parties. Generally this involved making a payment by the offender's family to the victim's family even in the case of manslaughter. The stress was on achieving a satisfactory compromise.

Since banishment was extremely rare, both sides recognized that the offender would continue to live in the community. There were, of course, times when severe punishment was meted out instantaneously by a police organization like the dog soldiers when the actions of an individual placed the welfare of the tribe in critical and immediate danger, as for example when at war or on a hunt, but this was rare. Not so rare, however, were times when the mediator or chief, in order to achieve harmony in negotiations between the offender and the victim's family, offered compensation from his own property. In small cohesive groups feuding between important families or kinship groups could not be tolerated. For many lesser infractions of tribal customs, shame, embarrassment, or «loss of face» proved enough of a punishment to act as a deterrent to wrongdoing (WASHBURN 1975: 271).

With the founding of the United States, traditional jurisprudence, as practiced in Indian communities, was increasingly forced to accommodate itself to new legal structures. This, of course, happened slowly but two events are prominent in this change. The first major event that impacted on tribal sovereignty was the adoption of the United States Constitution. The institution of federal authority, or rather Congressional authority, over Indian tribes stems from the Constitution. Article 1, section 8 gives Congress the power «to regulate commerce with foreign nations, and among several states, and with the Indian tribes» (quoted in TINDALL and SHI 1996: A12; see also COHEN s.d.: 89-90). Subsequent congressional thinking and court decisions have extended the interpretation of this clause to give Congress complete and absolute control over the tribes up to and including abolishing reservations and even the tribes themselves (COULTER 1977: 8-9).

Another major event, or events actually, that influenced tribal sovereignty was a series of Supreme Court decisions by the John Marshall court in the 1820s and 1830s. In what are known collectively as the Cherokee decisions, Chief Justice John Marshall ruled in 1831 that while Indian tribes, Cherokee in this case, were nations, they were also domestic dependent nations. They had sovereignty but it was limited. Although they were not subject to the laws of the individual states in which they found themselves, they were subject as dependent nations to the protection of the United States (COHEN s.d: 123). This ruling made them in a sense wards of the federal government.

I will not here elaborate upon the rather byzantine details of these cases. It will suffice to say that these cases revolved around the attempts by the state of Georgia either to assert state laws and sovereignty over the Cherokee and their reservation or to force their removal from the state. The Cherokee, who having drawn up their own constitution in 1823, and were considered by many whites to be well on the road to civilization, resisted the encroaching powers of the state of Georgia and eventually took their grievances to the United States Supreme Court. What is important about these cases, and what I want to stress here, are the rulings of the court. They constitute a fundamental finding on Indian sovereignty that subsequent court decisions have followed.

According to law historians Vine DELORIA and Charles LYTLE (1983: 33), «two aspects of sovereignty emerge: 1st, tribes are under the protection of the federal government and in this condition lack sufficient sovereignty to claim political independence; 2nd, tribes possess, however, sufficient powers of sovereignty to shield themselves from any intrusion by the states and it is the federal government's responsibility to ensure that this sovereignty is preserved.»

Gradually, however, over the 200 plus years of the nation's existence, congressional laws and court decisions have compromised and eroded tribal sovereignty and in the process, traditional tribal jurisprudence was restricted. In truth, the goal and the actions of the United States from the very beginning were always directed toward dissolving Indian communities, as Indian communities, and incorporating Indians into the presumed mainstream of American culture. It is to this end that Congress moved many crimes from tribal Jurisprudence to federal courts. This is seen in the Major Crimes Act of 1885 where Congress established that such crimes as, for example, murder, kidnapping, rape, assault with a deadly weapon, burglary, among others, would be handled by federal courts (DELORIA and LYTLE 1983: 168-173).

The history that led up to the passage of the Major crimes Act is noteworthy from the point of the slow eclipse of tribal jurisprudence. In 1883, a Sioux by the name of Crow Dog killed a popular Sioux chief named Spotted Tail. The United States government considered Spotted Tail a complient chief who acted as a buffer between the traditional element of the tribe and the pro-government or pro-acculturation Indians. To make restitution in accordance with Sioux custom, the relatives of Crow Dog met with the relatives of Spotted Tail and goods were offered by the former and accepted by the latter thus precluding more strife on the reservation. Word shortly got out in the white community, that the killer of Spotted Tail was not punished for a crime that many whites thought deserved a severe sentence. Crow Dog was arrested by federal marshals and stood trial and was sentenced to death. His case, however, raised such a public outcry that it was taken to the Supreme Court. In Ex Part Crow Dog, as the case was titled, the court decided that the federal courts had no jurisdiction since Congress had never established federal jurisdiction over such crimes. Crow Dog went free (CROW DOG, EX PARTE 1883; DELORIA and LYTLE 1983: 168-170).

Many who were anxious to move the Indian down the road of civilization protested and Congress, as a rider to an appropriation bill, passed the Major Crimes Act. With this legislation, according to one historian (WASHBURN 1975: 271), «the native legal tradition had [...] been eroded by white refusal to accept Indian values, and the law of white society was substituted for Indian law.»

At the same time, that the Crow Dog case advanced through the federal courts, the Courts of Indian Offenses were being introduced on reservations. These courts were staffed by Indian judges selected by the government agent on the reservation and were under the latter's control. They were considered more as cultural educational programs to prepare Indians for entry into American society than as effective law enforcing agencies. The status of these courts was always unclear since they operated under the Code of Federal Regulations and not under the jurisdiction of traditional tribal law or Anglo-American jurisprudence (DELORIA and LYTLE 1983: 113-116).

In 1924, all American Indians born in the United States were made citizens. This posed certain problems and raised new questions for law enforcement for both Indians and non-Indians. Since Indians were American citizens, did the Bill of Rights in the United States Constitution pertain to them as it did for other American citizens? If so, who would enforce such rights – tribal courts or federal courts? Do the rights as enumerated in the Bill of Rights supercede traditional tribal customs and laws or the reverse? How would citizenship affect tribal sovereignty? Can tribal courts waive the right of *habeas corpus*, that is, the right to trial by jury and due process in the courts, or must they uphold those rights guaranteed in the Bill of Rights?

Before such questions were answered, Congress in 1934 passed the Indian Reorganization Act that allowed tribes to draw up constitutions and organize themselves as legal entities. More effective tribal courts operating under the new tribal constitutions and independent of state courts replaced the old tribal courts that operated under the code of Federal Regulations. The new constitutions provided tribes the opportunity to bring back some traditional elements of their old system of jurisprudence. This, however, proved for many tribes no longer an option since the traditions, religious practices and social structures that had supported the old legal systems were gone. But there were other problems in bringing back the old ways. Except in the pueblos where traditional religious systems still played a major role in governing social relations, Christian Indians in many tribes were suspicious of reintroducing old customs. At the same time that Congress, through the Indian Reorganization Act gave tribal courts greater visibility and power, it also removed many crimes from their jurisdiction and reduced the penalties that such courts could impose. For example, $500 was the highest fine that tribal courts could now impose, hardly a deterrent for even civil crimes (DELORIA and LYTLE 1983: 175). Overall, the major effect of creating new tribal courts lay not in the revitalization of traditional cultures but in linking them closer to the federal judicial system. This link as we shall see made them more vulnerable to change.

The questions raised by citizenship, constitutional rights, and tribal courts presented difficult issues in some of the tribal cases in the 1940s and 1950s as both tribal and federal courts wrestled over cases and tested the legal waters. In the absence of any directive from Congress eliminating or curtailing Indian sovereignty, federal courts were predisposed to rule in favor of that sovereignty and grant priority to tribal customs over constitutional rights (DELORIA and LYTLE 1983: 45-57). They did so until 1965 and the case of Colliflower vs. Garland where Madeline Colliflower challenged the tribal court on the issue of *habeas corpus*, which refers to due process and the right to appear before a court and be heard and tried by a jury. The Supreme Court ruled in favor of Colliflower and decided that the tribal court had denied Colliflower her rights as a United States citizen. The court dismissed the tribe's argument that tribal courts were independent of federal courts and were not required to respect the due process clause in the Bill of Rights. Since the new tribal courts, those created after 1934, were created under the authority of federal law, that is, the Indian Reorganization Act, the Supreme Court decided that tribal courts were now an extension of the federal judicial system and hence subject to insure the same citizen safeguards as federal courts. This decision shocked tribal leaders across the country who saw the ruling as a major infringement on what they held to be tribal sovereignty and customs (COLLIFLOWER VERSUS GARLAND 1965; DELORIA and LYTLE 1983: 131-132).

The 1968 indian civil rights act

The Colliflower case was a major step toward the passage of the 1968 Indian Civil Rights Act. But there were also other political pressures that influenced the passage of this legislation. The 1960s was a tumultuous decade in the United States. Along with the divisive issue of America's involvement in Vietnam,

were the acrimonious debates over the causes of poverty and the social and psychological effects of racial and gender discrimination. These issues touched off storms of controversy across the land. They were furthered fueled by the assassination of John Kennedy and Martin Luther King.

In the post-World War II years and especially in the 1960s, Americans became increasingly sensitive to minority rights. Congressional actions to terminate Indian reservations and relocate Indians to cities, were promoted as acts of desegregation and integration. This won the support of many white liberals who equated Indian reservations with concentration camps. Middle class whites saw African-American civil rights protests as demonstrations against the infringement or denial of individual rights. Many «friends of the Indians» stood up and called for the passage of civil rights legislation to protect Indian rights. These friends were embarrassed, however, when Indians refused to become involved in African-American protests, or join the National Association for the Advancement of Colored People, or engage in marches that African-Americans and other minorities organized to demand the end of segregation and the achievement of equal rights. Indian refusals to participate in demonstrations and the fears of many Indians of being associated with African-Americans, struck many liberals as racists behavior. Nevertheless, these refusals did not prevent many whites from demanding civil rights laws for Indians and strongly supporting Congressional hearings on an Indian Civil Rights Bill (LURIE 1968: 300-302).

What most whites did not realize was that the situation concerning rights was different for Indians than for the other minorities. Whereas other minorities sought entry into the American mainstream, many Indians preferred to remain apart from this mainstream with their own respective culture and identity as Indians. Indians, unlike other minorities, had little trouble entering the mainstream if they chose to especially if they had some education and were employed in off-reservation jobs. What Indians sought was not the restitution of individual rights due to all citizens, but the safeguarding of their special rights guaranteed by treaty. The «fish-ins» in Washington State, modeled in part after the African-American «sit-ins» in segregated restaurants in the South, were not for rights denied Indians but for upholding special rights they already possessed (LURIE 1968: 300-302).

In the socially charged atmosphere of the 1960s, Congress began hearings on Indians and their relationship with federal, state and local governments and on the protection of their human rights. Some people raised the question of why the Indian's civil rights were protected off the reservation but not on the reservation. The Colliflower case further highlighted this discrepancy. Senator Sam Ervin, a Democrat on the Congressional Judicial Committee, was particular bothered by the absence of procedures to insure due process in tribal courts. The ruling of the Federal Court in the Colliflower case, while finding in favor of Colliflower who had been denied due process, limited its decisions to the tribal court on her reservation, Fort Belknap, and did not comment on the lack of due process in tribal courts on other reservations (COLLIFLOWER VERSUS GARLAND 1965; DELORIA and LYTLE 1983: 131).

At the hearings that Ervin held on the Indian Civil Rights bill, many tribal leaders objected to forcing tribal courts to insure due process as not only being an intrusion into traditional jurisprudence but also being so expensive that such proceedings might bankrupt many tribal communities. Many pueblos, whose judicial proceedings were often closely integrated with traditional religious and clan practices, were sharp in their protests of any such law (DELORIA and LYTLE 1983: 127-128; O'BRIEN 1985: 46-47).

Despite such protests, the Indian Civil Rights bill was passed in 1968 and became law. The act contained many of the provisions of the Bill of Rights. While not all are of equal weight in the detrimental effect they will have on tribal institutions, some are of major importance. No tribes can make or enforce any law prohibiting the free exercise of religion. This could hurt some pueblo groups where religion, government and public duties are intertwined. Another provision is the right of *habeas corpus*, or due process, now guaranteed to all Indians. This provides tribal peoples the right to test the legality of detention imposed by an Indian tribal court in a United States federal court.

As legal scholars (DELORIA and LYTLE 1983: 131) have pointed out, «the most controversial issues that the 1968 Indian Civil Rights Act attempted to resolve was the nature and scope of review that federal courts could exercise over decisions of tribal courts». The use of the writ of *habeas corpus* which is at the root of this review process, that is, the review of tribal court decisions by a United States federal court, while it seems a minor intervention, can be considered «a direct attack on the integrity of the procedures of the court decision it challenges and [...] stands as a major weapon of reform». Furthermore, its effect is made even worse by its use of the federal courts «to contest the validity of tribal council policies as well». This can be seen in several decisions by federal courts since the passage of the Act in 1968.

For example, it can be seen in the 1969 case DODGE VERSUS NAKAI (1969) where the Navaho tribal council sought to remove a non-Navaho lawyer from the reservation. The lawyer, who while working with the Office of Economic Opportunity's legal defense program, had alienated the tribal council and frustrated the carrying out of council policies. In this, the lawyer, as he interpreted his role, was merely doing his job.

The legal defense programs of the O.E.O. are generally antagonistic to tribal councils. Despite their avowal to «uphold tribal integrity», their actions are often just the opposite, that is, the defense of individual rights through a rejection of Indian judicial tradition. As one observer (WASHBURN 1975: 271) put it, the O.E.O. lawyers, «do not see their role as upholding tribal customs and procedures in the same way as interpreted by existing tribal leaders, councils, and courts. They have a larger vision of individual rights which neither tribal chairmen, off-reservation whites, or the federal government can violate.» Like altruistic Americans in the late nineteenth century who pushed through the congressional act to divide up Indian

reservations into private landholdings in the name of progress and capitalism, the O.E.O. lawyers seek to reform tribal practices «to conform to the dominating concepts of private property, individual initiative, and Anglos-Saxon jurisprudence». As historian Wilcomb Washburn noted, the goal is just the same, to destroy either consciously or unconsciously the corporate tribal structure.

As mentioned, the Navaho Tribal Council sensing this attack on their policies, exercised their right to remove the offending O.E.O. lawyer from the reservation. While the court did not rule on the traditional right of the Navaho Nation to remove a non-Navaho from the reservation, it did rule against the Navaho Tribal Council's action in this case as a violation of both the due process and the freedom of speech of the lawyer in question (DODGE VERSUS NAKAI 1969; DELORIA and LYTLE 1983: 172-133).

Perhaps the case most watched to see how the court would move on the diminishing status of Indian sovereignty was the 1978 case of Santa Clara Pueblo versus Martinez. In contention were two explosive issues: the status of women in the Pueblo and the right of a tribe to determine membership.

The case revolved around a tribal ruling passed in 1939 in which the tribe decided that only descendents of male Santa Clarins could be members of the Pueblo regardless of whom the male married. That is, only the descendents of male Santa Clarins had both voting and property rights. Julia Martinez was a full-blooded member of Santa Clara Pueblo but she married a man of the Navaho tribe in 1941, two years after the rule was passed. Julia's daughter thus was not considered a member of the Pueblo. Although she had been raised on the Pueblo and continued to live there, she was excluded from membership and had «no right to remain on the reservation in the event of her mother's death, or to inherit her mother's home or her possessory interests in the communal lands». Julia Martinez, after several unsuccessful attempt to get the Pueblo to change their ruling and allow her daughter membership with all the rights membership involved, took the Pueblo to court on the grounds that she and her daughter were discriminated against because of gender (SANTA CLARA PUEBLO VERSUS MARTINEZ 1978).

The Pueblo argued that it was their sovereign right to determine who could be members of the Pueblo. And since the Pueblo ruling was made in 1939 two years before Julia Martinez's marriage, she was aware of the membership stipulation.

The case eventually went to the Supreme Court. Justice Thurgood Marshall gave the majority opinion that ruled in favor of the Pueblo. As Marshall (SANTA CLARA PUEBLO VERSUS MARTINEZ 1978) pointed out, «where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disservice the other. Creation of a federal cause of action for the enforcement of individual rights [...] plainly would be at odds with the congressional goal of protecting tribal government». In brief, to rule in favor of Martinez, would undermine the authority of the tribal governments. According to Marshall's reasoning, although Congress sought to protect individual rights they did not mean to do so at the expense of tribal sovereignty. Marshall pointed out that Congress had the opportunity to initiate measures that would deprive tribal governments of such powers of sovereignty but rejected them «well aware of the intrusive effect of federal judicial review upon tribal self-government».

Justice Byron White offered a dissenting opinion. He (SANTA CLARA PUEBLO VERSUS MARTINEZ 1978) noted that «while I believe that the uniqueness of the Indian culture must be taken into consideration in applying the constitutional rights granted in the Indian Civil Rights Act, I do not think that it requires insulation of official tribal actions from federal-court scrutiny». He ended his dissent by noting that «although creating a federal cause of action may constitute an interference with tribal autonomy and self-government [...] in my mind it is a further step that must be taken».

While it is true that the Supreme Court ruled in this case in favor of tribal sovereignty over individual rights, the direction of the dissenting opinion is in the opposition direction and calls for Congress to go further and to take that next step in subverting that sovereignty. Some of the justices that participated in the majority decision are now gone and some only agreed with parts of the majority decision. A different court could overturn the basis of Thurgood Marshall's argument and restrict tribal sovereignty which is the basis of their self-government in favor of individual rights. This is a very real possibility. A more likely scenario, however, is for Congress to attack sovereignty directly either through the restricting of funding or some other means rather than to proceed through a reworking of the Indian Civil Rights Act.

Recent attacks on indian sovereignty

Recent trends in Congress and the courts reflect just such renewed attacks on tribal sovereignty. In his article «Courts cut into tribal rule», Robert MARQUAND (1997: 18) notes that while in the 1970s both Congress and the courts protected tribal sovereignty, of late the Supreme Court had backed away from this position because such sovereignty is at odds with the claims and goals of non-Indians (see also CHURCHILL 1998: 21). MARQUAND (1997: 1) regarding the direction of the Supreme Court, quotes Kevin WORTHEN, law professor at Brigham Young University, «It is clear the court is cutting back from tribal sovereignty these days». Others argue, however, that this attack by the Supreme Court on tribal sovereignty is not recent. In an extensive examination of Supreme Court rulings from 1870 to 1934, legal historian David E. WILKINS (1993: 190-191, 202) claims court decisions have consistently eroded tribal sovereignty. Except in the areas protecting tribal natural resources against state encroachment and in cases of internal tribal discord, the Court has always sided with Congress in «reinforcing congressional powers over tribal property, civil, and political rights». Certainly treaty rights, fundamental to insuring tribal sovereignty, have not proved a deterrent to this trend since, as the Court ruled in 1871, a congressional «statute could override a prior treaty». WILKINS (1993: 187)

notes, «It is a little known fact that ordinary legal doctrines and procedures used in American domestic law generally do not apply to Indian cases». As Republican Senator Slade Gorton (quoted in EGAN 1998: 5) of Washington State, an arch foe of Indian sovereignty, noted, Indian treaties «are peculiar treaties because they are the law of the land but they can also be abolished by Congress at will» (see also COULTER 1977: 5). Tribal people obviously see treaties differently or so argues Native American historian ward Churchill in «The tragedy and the travesty: the subversion of indigenous sovereignty in North America». According to CHURCHILL (1998: 15), Congress's nullification of past treaties flies in the face of rulings by the International Court of Justice, the United Nation's charter, the 1967 Vienna Convention on the Law Treaties, and the 1960 Declaration on the Granting of Independence to Colonial Countries. Rightly or wrongly, the United States continues to claim the right to nullify old treaties [1]. Unfortunately, CHURCHILL (1998: 33-36) claims that tribes have few options open to them to force the United States government to honor old treaties and return native sovereignty beyond making appeals to the United Nations and international courts (see also COULTER 1977: 11; O'BRIEN 1985).

Forcing Congress to reverse direction on tribal sovereignty is unlikely to happen judging from the current political climate. As Timothy EGAN (1998: A 16) writes in *The New York Times*, «The Supreme Court has been rebuffing the tribes of late shrinking the concept of Indian country». According to Egan, at issue is the «concept of one country». Many legislators are questioning «the idea of parallel nations», that is, nations within a nation, and view such a state as an anachronism (see also BALDAUF 1998). Congressman Cook (quoted in EGAN 1998: 22) of Utah agrees. Cook who is upset that Goshute Indians within his district are seeking to use their reservation as a toxic waste dump as a way to create jobs, argues «something is dead wrong when a small group of people can ignore the will of 90 percent of our state». The existence of parallel states and the demands of tribal sovereignty, according to Cook, «is creating a hodgepodge of economically and perhaps politically unviable states whose role in the United States is glaringly undefined in the United States constitution».

Senator Gorton who has fought long to reduce tribal sovereignty has recently gathered converts to his position even among liberal Democrats sympathetic to tribal concerns. With such support, Senator Gorton introduced a bill «designed to drastically weaken sovereignty immunity for Indian tribes» (EGAN 1998: A16; see also SHUKOVSKY 1995: 22-23). As chair of the powerful Interior subcommittee, Senator Gorton has bargaining power by which to negotiate deals thus making it more difficult for those who oppose the bill to defeat it.

Many Indians see further restrictions placed on their sovereignty, or even worse, loss of sovereignty altogether, as tantamount to tribal disasters. Very worried is W. Ron Allen, chairman of the Jamestown S'Klallam Tribe of Washington and president of the National Congress of American Indians. He sees Senator Gorton's bill as a device to «render Indian tribes impotent to protect their lands, resources, cultures and future generations» [2] (quoted in KNICKERBOCKER 1998: 8).

As one scholar has noted, among those tribes where both the cultures and the legal systems «reflect values favoring informality, communal belonging and responsibility and decision by consensus [...] rather than by majority rule», the Indian Civil Rights Act will mean radical changes [3] (WASHBURN 1975: 272). The enactment of current proposals put forth by Senator Gorton and others will also constitute an adverse climate for exercising tribal sovereignty if not the destruction of that sovereignty altogether.

I now would like to return to the lesson of my story about Navaho witches. The federal government is based on the protection of individual rights that are enshrined in the Bill of Rights and serve as the foundation for a liberal philosophy of government. This philosophical view of government is diametrically opposed to a philosophy of government that holds the cohesion of community and community rights paramount over those of the individual. Two philosophical views of government are involved here and they are essentially two cultural views. Whereas in many tribal systems, in theory as well as in practice, religion, work, family life and law are merged, in the American system these are separated if not in theory at least in practice. Historically, the goal of the American government has been to gradually impose the liberal individual view and surplant the communal view. Historically the tribal goal has been, and still is, to resist this development. Even before President Theodore Roosevelt said it, the intention of Congress was to break up the tribal mass. For many, the theory has not changed only the rhetoric where it is now couched in terms of civil rights, due process and curtailed sovereignty. Whatever the future may bring, the Indian Civil Rights Act of 1968 and recent congressional action hang over questions of tribal sovereignty and constitutes potential threats to the relationship between tribes and the federal government as well as among tribal members. The old goal of forcing Indians into the mainstream of American culture may now be at hand.

[1] «The power of Congress to legislate concerning Indian affairs has become practically unlimited largely because the courts have considered Congress' power over Indians to be a political question beyond the scope of judicial reviews [...] Because the issue of the scope of congressional power in Indian affairs was deemed to be a political question, the courts refused to place limits on the exercise of that power.» (COULTER 1977: 8)

[2] The same sort of battle over «rights» is also being carried out in Canada. A. Rodney BOBIWASH (1977: 13-14) makes a close comparison between events in Ontario in 1995 and the activities of Senator Slade Gorton.

[3] «Thus while Congress and the courts have shown some sensitivity to cultural factors in the writing and application of the 1968 Act, the very manner of passage and the contents of the Act may have a long-run, unilaterally created assimilative effect on Indian diversities.» (CHAUDHURI 1985: 31)

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Resumen

En 1831, el presidente del Tribunal Supremo de los EE. UU., John Marshall, pronunció un fallo sobre la cuestión de la soberanía de las tribus indias en el que las decretó naciones dependientes domésticas. Desde esa fecha en adelante, legislación del Congreso ha ido limitando paulatinamente la soberanía de las tribus. Es la tesis de este estudio que tanto la Ley de los Derechos Civiles de los Indios del año 1968 como los proyectos de ley actualmente pendientes en el Congreso siguen la misma tendencia de reducir aún mas la poca soberanía de las naciones indias todavía vigente.

Résumé

En 1831, M. John Marshall, Président de la Cour suprême des Etats-Unis, décida que les tribus indiennes étaient des nations qui dépendent du gouvernement national. Depuis cette date, les lois passées par le Congrès reflètent la volonté de limiter la souveraineté des tribus. Cet article propose de démontrer que la loi de 1968 pour les droits civils des Indiens autant que la législation en cours traduisent cette tendance et cherchent à limiter la faible souveraineté qui reste aux tribus.