THE CONCEPT OF EQUALITY IN INDIAN LAW

Judge William C. Canby, Jr.*

In order to approach the subject of equality in Indian law, I reviewed Judge Betty Fletcher's numerous Indian law opinions. It has been a privilege to serve as a colleague of Judge Fletcher for nearly thirty years on the United States Court of Appeals for the Ninth Circuit during which time Judge Fletcher has served as the conscience of our court. In examining her opinions I looked for ringing phrases, calling Indian supporters to the figurative barricades, but found none. All of the opinions I read were careful, technically fine-tuned, and seemed to spring sensibly from the precedent they discussed. I have to say that Judge Fletcher is the least self-indulgent judge I have ever read. She seems to think that it is not her place to fill an opinion with her hopes and fears, delirium, or angst. What restraint! What I cannot figure out is how she can make the law come out with such consistently good results.

If you ask someone on the street what he or she thinks of the status of Indians, the answer (if it is a non-Indian) is likely to be: Why are Indians treated any differently from anyone else? The answer, of course, is history. In numerous treaties or other agreements, Indians yielded much of their territory to those of us who now occupy it, reserving small portions to themselves and their tribes—hence the term "reservations." These were government-to-government arrangements, and nothing is more important to the contemporary tribal Indian than recognition of this point, and an honoring of tribal government at least equally with, say, state government. That is the equality upon which the tribes insist. And when we recognize a government in our midst, we cannot treat its constituents exactly as we treat ourselves.

This brings me to Judge Fletcher's opinion in *Nevada v. Hicks*.[1] This decision was reversed by the Supreme Court.[2] It happens to the best of

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* William C. Canby, Jr. is a circuit judge for the United States Court of Appeals for the Ninth Circuit. This presentation is adapted from an address given at the Washington Law Review and the University of Washington School of Law Symposium: *A Tribute to the Honorable Betty Binns Fletcher*. The views stated herein are personal to the speaker and do not represent the views of the court.

1. 196 F.3d 1020 (9th Cir. 2000).
2. Nevada v. Hicks, 533 U.S. 353 (2001).

us. In fact, it seems to happen to the best of us more than anyone else.

In *Hicks*, state officers suspected that a tribal member who lived on trust land on a Nevada reservation had violated game laws off-reservation by taking some mountain sheep. They went to state court for a search warrant. The warrant they received noted that the state court's writ did not run into Indian country, and that the officers would need to get the approval of the tribal court for a search. The officers did, and the tribal court narrowed the scope of the search somewhat. The state officers, accompanied by tribal officers, performed the search and confiscated one mounted sheep head. The sheep was soon determined not to have been a protected variety, and the trophy head was returned. The suspicions continued, however, and about a year later the officers obtained another search warrant, with the same caveat. They went to tribal court and got approval for a search, which, like the previous one, was conducted with tribal officers, and one or more additional trophy heads were removed. They, too, were found not to be illegal and were returned. Later, Hicks sued the officers in tribal court for exceeding the scope of the search and for damage to the trophies. The state officers came to federal court to challenge the tribal court's jurisdiction. The district court determined that the tribal court had jurisdiction. The state appealed, and the opinion fell to Judge Fletcher.

The legal context at the time was framed by a series of Supreme Court decisions, starting with *Montana v. United States*,[3] that had increasingly restricted the authority of tribes and tribal courts over non-Indians. Judge Fletcher carefully pointed out why none of the Supreme Court's restrictions on tribal authority applied to this case. It was a civil case. The claim arose on trust land, owned and controlled by the tribe. The tribe had not ceded any of its jurisdiction by authorizing occasional searches by state officers. "The Tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land."[4] The tribal court could entertain the case. It had already ruled that it had jurisdiction, so there was no need for further exhaustion on that issue. So the case could proceed in tribal court.

Enter the Supreme Court, in the voice of Justice Scalia. The ruling: it is not essential to tribal self-government that state officers be subject to tribal control when executing a search related to suspected off-reservation crime. Thus the tribe's power over outsiders (even ones who come on trust lands) is restricted to protection of the tribe's self-

3. 450 U.S. 544 (1981).

4. *Hicks*, 196 F.3d at 1028.

government, narrowly construed.

The assumptions underlying the two opinions are 180 degrees apart. Judge Fletcher, following all the precedent up to *Hicks*, assumed that tribes are in control of their own lands unless some legitimate authority has caused them to lose control or they have given it up voluntarily. Justice Scalia, as I have just said, assumed that the tribes can control only those events essential to their self-government. So everyone up to the Supreme Court had been wrong. The state judge who knew that his writ did not run to Indian country had been wrong. The officers who sought permission from the tribal court and engaged the participation of tribal officers had been wrong. The state officers could simply have acted. And nothing in the Supreme Court's analysis prevents application of the same rule to arrests. Over many years, tribes and states had worked out extradition agreements, to provide for the delivery by the tribes of persons wanted by the states. Apparently, this effort, too, had been misguided and unnecessary.

So what has all this got to do with equality? Well, most Indians living on reservations would say that there is a need for equality at the institutional level. The tribe, not the individual, is the primary unit. The tribes want to be treated as equal governments with the states. The tribal Indian, I daresay, would find Judge Fletcher's concern for tribal autonomy a protection of the kind of equality the tribes want. Justice Scalia's opinion for the majority in *Hicks* stated that a search by state officers was no more of an intrusion on tribal self-government than a search by federal officers was an intrusion on state self-government. This misses the point. The tribes understand that the federal government's authority extends directly into the states' and the tribes' domains. In that regard, the states and the tribes are equal. But they are not equal when state officers are permitted to execute searches on tribal lands when the tribes most certainly would not be allowed to execute searches in the states, outside of their reservation. This point may be missed by the Supreme Court; I have often wondered whether the Supreme Court's recent restrictions on tribal authority stemmed more from ignorance or hostility. Judge Fletcher's position reflected neither of those deficiencies.

The need for equal treatment of tribes as sovereign governments able to deal with the federal government on a government-to-government basis explains some of the differences in treatment of Indians and others at the individual level. Take the statutory Indian preference in hiring for positions in the Bureau of Indian Affairs. That preference was

challenged on equal protection grounds in *Morton v. Mancari*.[5] The Court upheld the preference, holding that the preference did not constitute racial or ethnic discrimination, but was a political classification reflecting the relationship between the federal government and recognized Indian tribes.

The political category does not always favor the individual Indian. In *United States v. Antelope*,[6] the Supreme Court dealt with a case in which tribal members had killed a non-Indian during a robbery on the reservation. They were convicted of murder under the Major Crimes Act, which applies only to Indians in Indian country. Their challenge arose from the fact that, if they had been non-Indian and killed the non-Indian victim they would have been tried under state law. State law required proof of premeditation in these circumstances, while the federal law did not. Again, the Supreme Court held that this difference was not the result of invidious discrimination but was simply the result of an entire legal structure that treated Indian tribes as political bodies. The defendants were treated differently from non-Indians, not because they were Indians, but because they were members of the recognized Coeur d'Alene Tribe. It was enough that each legal system treated those subject to it equally; the two systems did not have to have equal results.

One final aspect of equal protection peculiarity in Indian law: Indian tribes as governments are not subject to the Constitution's Bill of Rights or Fourteenth Amendment. Those restrictions are directed at the federal government and the states, and tribes are neither. During the 1960s Congress became concerned about the rights of Indians vis-à-vis their tribes, and accordingly included an Indian Civil Rights Act[7] as part of the 1968 Civil Rights Act. That Act applied the restrictions of nearly all of the Bill of Rights and the Fourteenth Amendment to tribes in the exercise of their jurisdiction. Although this portion of the Act was entitled "Rights of Indians" it applied to all persons within tribal jurisdiction.

In the first few years of the Act, lower federal courts regularly implied federal rights of action so that Indians could sue their tribes or tribal officials in federal court for violations of the Act. Then the Supreme Court decided *Santa Clara Pueblo v. Martinez*.[8] There, a female tribal member who had married a man outside the tribe

5. 417 U.S. 535 (1974).

6. 430 U.S. 641 (1977).

7. Indian Civil Rights Act of 1968, Pub. L. 90-284, § 202, 82 Stat. 77 (codified at 25 U.S.C. § 1302 (2006)).

8. 436 U.S. 49 (1978).

complained because her children were not eligible for tribal membership, but if a male tribal member married outside the tribe, his children were eligible. The Supreme Court held that the federal court could not entertain the case. First, the Pueblo itself enjoyed sovereign immunity (most lower courts had held the immunity to be abrogated by the Act). Second, injunctive relief against tribal officers was unavailable because there was no implied right of action. Congress had provided only one federal remedy for enforcement of the Act—habeas corpus—that applied only to challenge custody. Since there was no custody involved in this equal protection violation, that writ did not lie. The fact that Congress provided only that federal remedy meant that there could be no other. The enforcement, if any, had to be in tribal court.

One judge of the Jicarilla Apache Tribe told me that he knew now why the Supreme Court had left the enforcement of the Indian Bill of Rights to the tribal courts: it was because it was impossible. The idea of the Bill of Rights, he said, was to enshrine individual freedoms and protect them from the collective entity, the government. To a tribal member, the health of the collective entity is the primary concern, and the individual's main duty is to respond in ways that support that health. Thus the purpose to protect tribal values, one of the reasons for leaving this matter to the tribal court, frustrated the other purpose, which was to ensure individual rights to Indians. I have not found a solution to his problem.

His comment, however, reflects the tension between the treatment of tribes as political entities and the concept of equal protection, viewed from the other side. To the non-Indian not familiar with the legal history of federal-tribal relationships, distinct treatment of Indians is in tension with the individual-rights assumptions underlying the equal protection clause. To that tribal judge, the individual assumptions behind the equal protection clause were in tension with the very concept of tribal institutions and government. Both sides see a tension, but each considers a different value to be paramount.

I cannot solve the judge's dilemma. I have argued that *Santa Clara Pueblo* was wrongly decided because Congress intended to impose individual rights on the tribes, rightly or wrongly. If there were federal review of civil rights violations by tribes, however, then there ought to be a reversal of the trend that increasingly deprives tribes of jurisdiction over non-Indians. That deprivation is total in criminal law and increasingly broad in civil and regulatory matters. We have to give some recognition to both types of equality, if we are to continue to value a truly pluralistic society that includes tribal governments long recognized.

Perhaps the most central of all tribal prerogatives, which the courts

have refused to intervene in for reasons even beyond the *Santa Clara* decision, is tribal membership. Today, however, there are instances where the two notions of equality are most obviously at war in membership disputes. Membership in some tribes, notably smaller tribes with casinos, has become extremely valuable. If a tribal council decides to expel a dozen members of a tribe with thirty-five members and a casino, the decision inures to the immediate and substantial financial benefit of the members of the tribal council. One has to suspect that a profusion of such instances, or their occurrence under particularly suspicious circumstances, will place great stress on the usual judicial doctrine of non-interference in internal tribal matters of membership. So far, the doctrine has held, but courts so holding have displayed a notable lack of enthusiasm for the result. Perhaps some restraint on more extreme membership expulsions would protect the tribes' long-term viability as institutions. It is not a situation that will be easily resolved, but there may be room for both types of equality to be served by some sort of review of some membership issues.

Well, I have nothing more to add today about the special conditions of equal protection in the setting of Indian law. I hope I have shed a small bit of light on the subject. And I thank Judge Fletcher for her years of sensitivity to tribal interests, and for her recognition of the tribes' rights of self-government. Her work has contributed greatly to the achievement of the kind of equality sought by the tribes—equality with other sovereign governments.