

# INDIAN

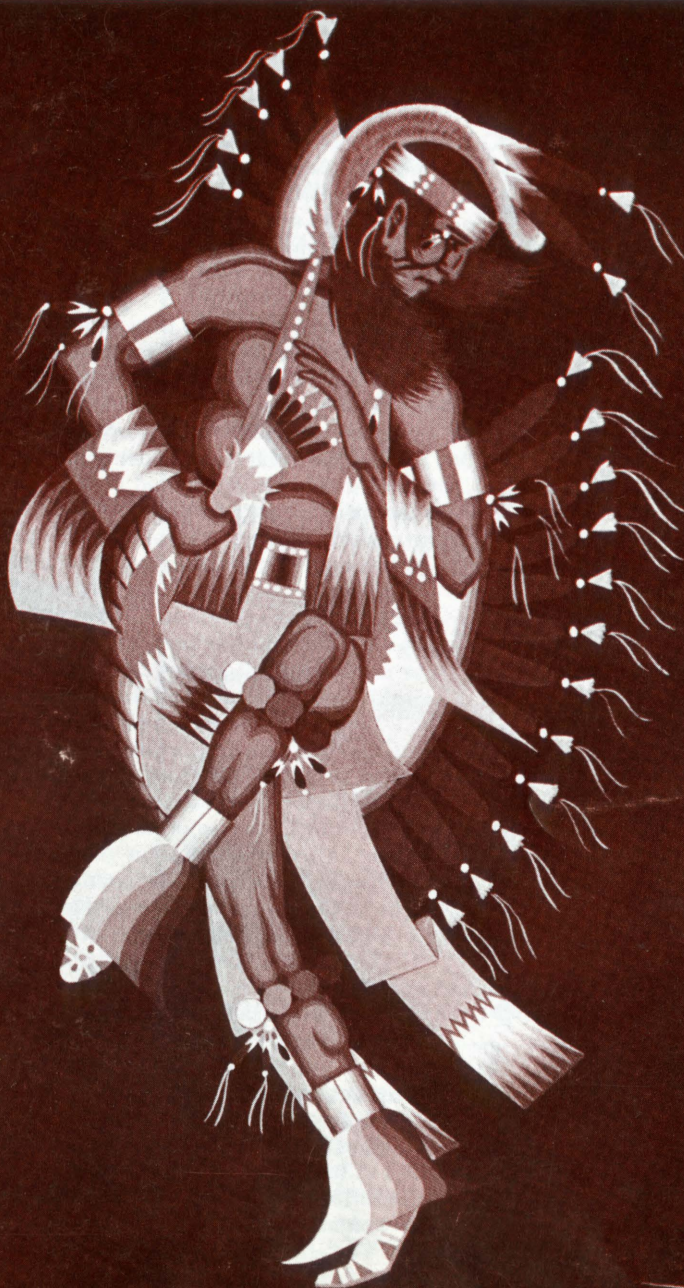
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# VOICE

FEBRUARY 1972

America's All-Indian Magazine

VOLUME 2 NO. 1





## CONSTITUTIONAL POWERS OF THE U.S. IN INDIAN AFFAIRS



It is common knowledge that American Indian people have, for a long period of time, been deprived of many constitutional protections and have been subjected to a pattern of domination by the United States federal government in sharp contrast to the limited authority of the latter relative to non-Indians. *The federal government, in brief, has been able to exercise the powers of local and state governments in relation to Indian tribal territories while, at the same time, being constitutionally prohibited from exercising those kinds of powers in regards to the white population.*

Is this notion of federal supremacy in relation to Indian tribes firmly rooted in the Constitution or is it simply a bureaucratic sideeffect of conquest? What are the constitutional powers of the federal government relative to Indians? Are there any limitations to federal power over Indian territories?

The Constitution is a document which both awards and denies power to the federal government. To be more precise, the Constitution creates a "limited" federal government, that is, one whose powers are limited to those powers specifically enumerated. In addition, the Constitution also limits the power of the federal government by mentioning certain kinds of behavior totally prohibited to that government (as in the Fifth Amendment).

It would seem clear that those powers denied to the federal government by the Constitution cannot be exercised by that government as regards Indians who are subjects (or citizens) of the United States. Quite obviously, the limiting aspect of the Constitution would become meaningless if one or more classes of the population could be *arbitrarily* exempted from being protected by that document. Of course, it might be argued that the two examples of Negro slavery and Indian wardship (both of which violated the Fifth Amendment and other sections of the Constitution) can serve as precedents for the ability of the federal (and state) governments to set aside or ignore the Constitution more

or less at will. However, it should be noted that Negro slavery was, in fact, recognized by the Constitution (in regards to the apportionment of representatives), although in a "back-handed" manner. Indian wardship, on the other hand, arose as a part of a process of extra-legal military conquest and can be regarded as a bureaucratic, as opposed to a constitutional, development.

What are the *constitutional* powers of the federal government relative to Indians and Indian tribes? First, it is interesting to note that the only reference to federal power over Indians is found in Section Eight which states:

The Congress shall have power... to regulate commerce with foreign nations, and among the several states and with Indian tribes...

This is the "Interstate Commerce Clause" which basically determines the relationship of the states to the federal government. The language of this section is clear: the federal government possesses the authority to regulate commerce (relations as well as trade) with the Indian tribes.

What does this mean? Quite clearly, *the above section does not give the federal government any greater power over the Indian tribes than it has over the states*, since states and tribes are covered by the same language in the same clause. The authority of the federal government as regards the *internal* affairs of a tribe or of a state is limited to the regulation of "interstate," "inter-tribal," "tribal-state," "state-federal," or "federal-tribal" matters, that is, those activities having a direct relationship to "commerce" across state and tribal boundaries.

The above section also means that *no state can exercise any jurisdiction over tribes* since states and tribes are mentioned as equivalent units and since the federal government is specifically granted whatever authority exists in this area. If the federal government does not choose to regulate "commerce" with the tribes it does not mean that a state can step into the breach, any more than a state can establish diplomatic relations with a foreign nation in the absence of federal diplomatic activity.

In this connection another important clause should be cited, to the effect that powers not granted to the federal government are reserved to the states *and to the people*. In brief, a power not granted to the federal government is not automatically possessed by a state but may be possessed by the people and "the people" must, it would seem, include people of American Indian extraction. Clearly, a multitude of Supreme Court decisions (especially *Worcester v. Georgia*) have held that



## THE BUREAU MUST FIND A SENSE OF MISSION

WASHINGTON, D.C.—(AIPA)—To clarify widespread concern surrounding the remarks made by Interior Secretary Rogers C. B. Morton to the press Dec. 2 AIPA provides the transcript relating to Indians and the Indian Bureau:

**Q.** Is the Bureau doing what it is supposed to do, and—if it is obsolete—what should we do?

**A.** I don't think it's doing what it's supposed to do. The Bureau of Indian Affairs has grown up over the years—really, over the century—without a mission, without a clear-cut mission. It's been custodial in a sense, but it hasn't been really forthcoming or progressive in developing the infrastructure in the reservation system that is required so that the Indian can really live up to his potential.

I found in my short term as the Secretary of the Interior a most frustrating situation as far as dealing with the Bureau is concerned. It's not because the people are not dedicated—they are. And it's not because they're not honest—they are. But the real question is: what is the right thing for the Bureau of Indian Affairs to do?

What is the mission of a bureau such as the BIA in connection with the development of the American Indian, or—more importantly now—in connection with helping the American Indian develop himself. I think we've got a long way to go to finally find a sense of mission in that Bureau.

I don't think just abolishing it is the answer. For example, we know that the infrastructure of our general areas—the areas outside the reservations in the states—has proceeded at a far faster rate than it has within the reservations.

We're short of water in many areas, and water development has lagged behind the average for water development in other areas. We're short of roads. No roads were built on Indian reservations between 1900 and 1935. And basically, the highway trust fund in a sense passes over the Indian Reservation system. Only a small percent of the reservation inhabitants have electric power; only a small percent have running water.

In my opinion you can't develop economically unless you have a base

for economic development, and I think one of the basic fundamental missions of the BIA is to provide that infrastructure—and we haven't done it.

Today, the BIA absorbs about 25 per cent of the total appropriated budget for the Department of the Interior—\$500 million or thereabouts. In addition to that, there's \$500 million or thereabouts appropriated for Indian programs in HEW and an additional \$150 million from other agencies. So you've got over \$1 billion being spent for about a half million people on Indian reservations—the highest per capita expenditure of any government for any people in the world.

And yet I don't think we're getting anything for it, and until we can come together with a sense of mission of what we really want to do, what the Indians want to do, and put this together in a new program, I think we're going to continue to falter for a long time, no matter who is the Commissioner and no matter who's the Secretary.

**Q.** How do you propose to do this? Is there a plan?

**A.** I think the only way we can do it (and I've been racking my brain on the thing) is to do it on a piecemeal or tailor-made basis. Start with some of the major reservations such as the Navajo for example, and the larger concentrations, and work out a master plan and a viable program for the development of infrastructure on those reservations, and get together the agencies that are involved.

(I mean) the Bureau of Reclamation and the Bureau of Indian Affairs and Interior, HEW, HUD and all the other agencies of government that have Indian programs; and see if we can't come up with a set of milestones for given reservations and make sure that we pass these milestones on schedule.

Other than that, I don't see any real way to proceed. The way we are proceeding now, everybody's worried about their (sic) own position. I've never seen anything like the angling for power within the Bureau of Indian Affairs of personalities. They're more interested in what position they have than in the program, and this concerns me. . . .

I don't think we're going to hurt their culture. We don't want to hurt their culture. We want to give them the opportunity to preserve all the elements of their culture that they would like to. But (under) the present program, the taxpayers are not getting a good return off their investment.

**Constitutional Powers** (From page 8)  
Indian tribal territories are immune from state jurisdiction and cannot, in fact, be a part of any state without a process of formal merger (and this process has never been clarified, constitutionally speaking).

To return to the powers of the federal government, it is clear that the government possesses *only* the same powers in relation to tribes as it possesses in relation to states. But what about the status of Indian individuals.

Indian individuals, as citizens or members of tribal territories ("domestic dependent nations" as the Supreme Court once put it) would seem to be protected from excessive federal or state regulation by virtue of the arguments presented above. In addition, however, the Constitution contains a number of clauses (especially in the "Bill of Rights") which specifically limit the power of the federal and state governments in relation to all classes of persons found within the jurisdiction of the United States.

It is quite clear that Indian individuals residing outside of the boundaries of any tribal territory but within the boundaries of the United States are, and have been, covered by the above clauses of the Constitution (in spite of contrary practice on the part of whites) since even resident "aliens" are covered by most such clauses. But what about Indians residing within a tribal territory or (in more recent terminology) on a reservation?

Supreme Court decisions have made it quite clear that the Constitution is applicable in any region or territory which has been "incorporated" into the United States. Clearly, Indian tribal territories (reservations) within the continental United States and Alaska are "a part of" the United States, from the viewpoint of the United States government. Not only has that government made its jurisdiction and laws felt in those areas but all official publications and maps of the government explicitly assert that such Indian reservations are "incorporated," that is, are part of the "homeland" or the "national territory" of the United States.

To argue that the Constitution and its guarantees do not apply to reservation Indians and their organizations is to argue that Indian reservations are "foreign" territories only "temporarily" under the jurisdiction of the United States. This viewpoint, while perhaps favored by a very few Indians separatists, certainly is not the viewpoint of Congress!





Individual Indians, as citizens and subjects of the United States residing within the national territory of the United States, cannot be denied the full protection of the Constitution. In addition, however, certain clauses of the Constitution, such as the Fifth Amendment, limit the power of the federal government without reference to the geographical area in which the limitation is to be effective.

To summarize the above arguments briefly:

1. *Indian tribal territories* (so-called reservations plus nonceded Indian lands) which have been incorporated within the external boundaries of the United States are *part of the United States but are not generally a part of any individual state.*
2. *Indian tribal territories exist as unique political units*, comparable to the District of Columbia and Puerto Rico. Therefore, when we speak of the *basic units* into which the United States is divided we must speak of a) states, b) tribal territories, c) federal district (District of Columbia) and, d) overseas territories. *The United States is not composed solely of fifty states!*
3. Indian tribal territories possess the same autonomy (local self-rule) in relation to the federal government as do the states.
4. The term "reservation," although utilized generally by the federal government, technically refers only to the "reservation of lands" for Indian use and is not necessarily the correct name to be applied to each and every tribal territory as a political unit (any more than the Commonwealth of Virginia becomes the "State" of Virginia merely because it is generally referred to as a "state" of the United States).

What does all of this mean, in practical terms? Very simply, it means that virtually all of the acquired powers of the Bureau of Indian Affairs and of the Secretary of the Interior over the internal affairs of Indian tribal territories are *without legal basis*. They are derived from the practice of treating Indians as conquered persons, and the Constitution does not (at least since the Civil War) recognize any class of conquered persons residing within the limits of the United States!

by Jack D. Forbes



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