

SPEECH AT THE 50 YEARS OF THE INDIAN CIVIL RIGHTS ACT SYMPOSIUM*

Battling for Human Rights in Indian Country

Presented by David Wilkins**

Good afternoon. I'm pleased to be back in Albuquerque. I thank John LaVelle for inviting me to this important conference.

I am a citizen of the Lumbee Nation and a political scientist by training, although I incorporate big doses of history and law in my teaching and research, following the good advice of my mentor, Vine Deloria, Jr.

We have gathered to reflect on the Indian Civil Rights Act (ICRA)¹ in its 50th year of existence—to question and ponder where we go from here. That discussion must include the meanings of consent, citizenship, due process, civil rights and liberties, human rights, democracy, and, of course, sovereignty.

Until enactment of the ICRA in 1968, while the Congress had frequently exercised plenary power over native nations, it was generally understood that neither the U.S. nor state constitutions nor their amendments applied directly to tribes.

But with the enactment of the ICRA—credited in part to a Lumbee, Helen Maynor Scheirbeck, who was an aide to Senator Sam Ervin on the Subcommittee on Constitutional Rights—tribal governments had imposed upon them certain specified restraints phrased in language taken from the U.S. Bill of Rights but modified to fit the unique pre and extra-constitutional status of our nations. While some of our nations and individual citizens embraced the act, many did not.

I was fortunate to know Helen and worked for her for a time, but I came to more fully appreciate the Act's long-term importance in the early 1980s when I studied under Vine Deloria, Jr. at the University of Arizona, and a few years later, when as an instructor at Navajo Community (now Dine) College, I witnessed the Navajo Nation's battles to protect their lands, treaties, and sovereignty from federal and especially state intrusions.

In the mid-90s, I began to hear about controversies surrounding the issue of citizenship. Banishment, at first, and later disenrollment, were the

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¹ 25 U.S.C. §§ 1301-04 (2013).

terms used to describe a new method of depopulation that were beginning to occur in parts of Indian Country. I found the practice so shocking that I began to use the term “dismemberment” to describe the act of cutting off a part of the tribal body—doing harm to both the politically discarded individual and the Nation itself—taking place behind the cloak of native sovereignty.

Native nations have always possessed the inherent authority to denationalize any tribal member. Moreover, they wield the power, unknown to any other sovereign in the United States, to formally exclude non-natives from their territorial homelands. But far too many tribal nations are engaging in banishment or disenrollment practices in clear violation of their own historic values and principles, which at one time utilized peacemaking, mediation, restitution, and compensation to resolve the inevitable disputes that occasionally arose.

While I’m focusing on disenrollment today, it is interesting to note that federal courts have sometimes allowed banished members to challenge their punishment; but they have thus far refused to provide any substantive justice to those who have been disenrolled, arguably the greater sanction.

Disenrollment was first used by Native governments against whites who had acquired tribal citizenship dating back to 1897. In one case, the Chickasaw Nation acted to disenfranchise a white man who had been adopted. The Supreme Court in *Roff v. Burney*² upheld the right of the nation to decide who could be a citizen. The Cherokee and Osage also disenrolled whites during this era.

The two earliest disenrollment cases I have found of native nations seeking to permanently cast out their own citizens involved the Northern Ute and the Confederated Salish and Kootenai Tribes of Flathead—both in the 1950s—as they internally battled over claims funds, termination, and blood quantum.³

Today, dismemberments are happening for a variety of reasons, but the two most apparent factors associated with the practice are increased gambling revenue and civil violations or criminal activity that presumably threatens community stability. Interestingly, there tends to be a correlation between per capita distribution of large financial windfalls and *disenrollment*, that is the legal and political termination of a tribal member’s citizenship; whereas civil violations or criminal activity (malfeasance, drug involvement, gang activity, etc.) in many cases lead to *banishment*—the physical exclusion or expulsion from tribal lands without loss of tribal citizenship. These two concepts are often conflated, but they are in fact distinctive terms. In some contemporary tribal cases, however,

² 168 U.S. 218, 222 (1897).

³ DAVID WILKINS & SHELLY WILKINS, *DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS* 61-62 (University of Washington Press) (2017); *See also*, Deputy Solicitor Edmund T. Fritz, 65 I.D. 97, M-36476 (March 3, 1958).

they have become functionally similar.

In the pre-self-determination era, the federal government's uneven court rulings on the issues of allotment and membership mirrored the vacillation of federal policy makers regarding tribal sovereignty. While the federal courts were willing, at times, to issue rulings that suggested a grudging respect for tribal self-determination on issues of membership, more often they generally acknowledged in Congress and the executive branch a significant, sometimes absolute, power over native nations' right to decide who belonged in their communities, who were entitled to benefit from tribal resources, and who had the final say over questions of tribal membership.

Although the ICRA extended to all "persons" in Indian Country a modified statutory version of many of the rights laid out in the U.S. Bill of Rights, the only remedy spelled out in that act is the writ of habeas corpus. Habeas corpus, since the *Santa Clara Pueblo v. Martinez*⁴ decision in 1978, has thus far not offered disenrolled Native individuals any substantial justice, though it has provided a measured amount of success in a few cases involving banishment.

The leading case on banishment that relied on habeas corpus is *Poodry v. Tonawanda Band of Seneca Indians* (1996)⁵ where the court concluded that while the five Seneca deserved the right to have the merits of their claims heard by the district court, it also held that the sovereign immunity of the Tonawanda Band must be respected and that the nation could not be sued without its express consent.

But as important as *Poodry* has been, it has also been largely ineffective in providing those facing disenrollment or banishment any protection because in virtually all the litigation since 1996—federal, state, or tribal—courts have generally adhered to the 1978 *Martinez* decision that native governments are the final arbiters of membership decisions. As one court put it "the decision of the [U.S.] Supreme Court in *Santa Clara v. Martinez* reduces the degree of federal interference in tribal government and requires that enforcement of the ICRA rest primarily in the Tribal Courts."⁶

While a few other cases involving banishment have attempted to build upon the logic of *Poodry--Sweet v. Hinzman*, 2008⁷ and 2009⁸; and *Quair v. Sisco I and II*, 2004⁹, 2007¹⁰--and have supported the banished/disenrollees right to invoke habeas corpus, the remedy left to those facing dismemberment was insufficient. In the court's words in

⁴ 436 U.S. 49 (1978).

⁵ 85 F.3d 874 (2nd Cir. 1996).

⁶ *Payer v. Turtle Mountain Tribal Council*, No. A4-03-105, 2003 WL 22339181 (D.N.D. Oct. 1, 2003).

⁷ See 634 F.Supp.2d 1196 (W.D. Wash. 2008).

⁸ See *Sweet v. Hinzman*, No. C08-844JLR, 2009 WL 1175647 (W.D. Wash. Apr. 30, 2009).

⁹ See 359 F. Supp.2d 948 (E.D. Cal. 2004).

¹⁰ See *Quair v. Sisco*, No. 1:02-CV-7891 DFL, 2007 WL 1490571 (E.D. Cal. 2007).

Quair I “[I]f the court concludes that petitioners were denied their rights to procedural due process in connection with the decisions to disenroll them and banish them from the reservation, the remedy is not reinstatement, which would interfere with tribal sovereign immunity and internal tribal affairs but, rather, a direction to provide appropriate due process, essentially a re-hearing.”¹¹ A case involving the United Auburn Tribe of California might redefine how “detention” is interpreted under the ICRA if it’s accepted by the United States Supreme Court.¹²

Generally, today it is safe to say that tribal courts have plenary authority to determine membership for tribal purposes. The Bureau of Indian Affairs (BIA), Congress, and the federal courts will intervene in tribal enrollment determinations in only a limited manner (habeas corpus), if there is specific language in a tribe’s constitution or other organic document requiring such involvement, or for broader reasons such as federal distribution of tribal land (e.g., allotments) or money, or regarding the creation of programs specifically for Indians. In these cases, the federal government determines who is eligible, and may ignore or deny the tribe’s membership policy and devise a standard of its own.

Dismembered natives are citizens of their states of residence and have federal citizenship, as well. Theoretically, they should be the most protected class in the land, armed as they are with three distinctive layers of citizenship. Such, of course, has not proven to be the case. In regard to native citizenship, tribal political elites can and are wielding a power--the absolute power-- to terminate native citizenship---a power that even the federal or state governments cannot wield over American citizens. As the Supreme Court held in 1967 in *Afroyim v. Rusk*¹³, citizenship is an inviolable right, and while it can be given away, it cannot be taken away. In other words, involuntary expatriation, that is the stripping of citizenship, is not an available penalty under any state or federal statute. As the court held, “in our country people are sovereign and the government cannot sever its relationship to the people by taking away their citizenship.”¹⁴

But in a number of cases, tribal judges have rendered rulings that support the political elite’s right to denationalize native citizens. In one of the more notorious cases involving the Nooksack Nation, a native judge in 2013 issued an opinion that devalued the very essence of native nationhood. To her credit, it appeared that the judge was attempting to console the disenrollees and explain a decision that gravely disappointed them.

¹¹ 359 F. Supp.2d 948, 977 (E.D. Cal. 2004); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

¹² See *Tavares v. Whitehouse*, No. 2:13-CV-02101-TLN-CKD, 2014 WL 1155798, (E.D. Cal. 2007) (holding that temporary punishment from tribal government is not a sufficiently severe enough restraint on liberty to constitute “detention,” a requirement for habeas corpus review under the Indian Civil Rights Act. The Supreme Court has since denied certiorari); *aff’d* 851 F.3d 863 (9th Cir. 2017); *cert. denied*, 138 S. Ct. 1323 (Mar. 26, 2018).

¹³ 387 U.S. 253 (1967).

¹⁴ *Id.* at 1662.

Unfortunately, she also utilized words that profoundly diminished indigenous sovereignty:

While the court recognizes the important entitlements at stake for the proposed disenrollees, this is a fundamentally different proceeding than a loss of US citizenship... In the case of tribal disenrollees, the disenrollee loses critical and important rights, but they are not equal to the loss of US citizenship. A person who is disenrolled from her tribe loses access to the privileges of tribal membership, but she is not stateless. Though she loses the right, for example, to apply for and obtain tribal housing through the Tribe, her ability to obtain housing in general is unaffected; though she loses the right to vote in tribal elections, she does not lose the right to vote in federal, state, and local elections. While the impact on the disenrollee is serious and detrimental, it is not akin to becoming stateless.¹⁵

That a native judge would deem tribal nationhood and citizenship inferior to U.S. statehood and citizenship is an unnerving perception to fathom. It is difficult to believe she intended to weaken the idea of native sovereignty even as her ruling assuredly reaffirmed it. It is this unconscious paradigm shift within indigenous communities that may potentially do the most profound harm to our peoples.

While it may be within a nation's power to purge its own population, it is nothing less than suicidal sovereignty. It is unthinkable that natives now engage in modern versions of the forced removals and political terminations suffered by their own ancestors at the hands of federal (or colonial) lawmakers. It is a tragic example of colonized peoples becoming exquisite purveyors of the same corrupt policies they once endured, all while maintaining the naive belief that their actions are somehow different or justified.

Ultimately, dismemberment policies could prove to be the final stage in the completion of the colonizing cycle—the end of meaningful tribal sovereignty. The power to denationalize natives is already adversely impacting the integrity of the nations' engaging in such tactics and will prove detrimental to all nations if and when the federal government decides to step in via congressional action or judicial opinion—which it did regularly in the late 1800s and early 1900s. Once that happens there is no certainty that our nations will retain the sovereignty that has been defended since first contact.

So, what does it mean that the United States, a very large, heterogeneous, secular state, has in place laws and policies that protect its

¹⁵ WILKINS, *supra* note 3, at 110-111 (citing *Roberts v. Kelly*, No. 2013-CI-CL-003 (Nooksack Trial Court Oct. 17, 2013); *aff'd*, No. 2013-CI-CL-003 (Nooksack Court of Appeals Mar. 18, 2014)).

citizens' rights far more comprehensively than native nations which are much smaller, more homogeneous, and ostensibly more kin-based polities? For if native nations are indeed communities of kinfolk that are ancestrally, culturally, psychologically, and territorially related, then it would appear that the grounds on which to sever or terminate such a fundamentally organic set of human relationships would have to be unequivocally clear and would, in fact, rarely be carried out given the grave threat that such actions—the literal depopulation of the community's inhabitants, would pose to the continued existence of the nation.

What does it mean that the only class of citizens in the United States who cannot avail themselves of such sacrosanct rights are native individuals?

The very concept of tribal sovereignty means that the people—the tribal community members themselves—are the sovereign, not the governing bodies of those nations. Tribal councils and other native governing institutions have merely been delegated limited authority to fulfill the needs and to protect, not destroy, the rights of the people and should not have the power to sever their relationship to their people by taking away that most important of statuses, the status of belonging to, of having citizenship or membership in, an Indigenous nation and living on the lands of their ancestors.

Of course, for many Indigenous peoples the very notion of sovereignty is rooted in their creation accounts and their lands, suggesting that their core identity flows not from human made constitutions, charters, or ordinances but is directly linked to their ancient origin accounts and the holy beings and sacred lands they are connected to.

The issue of our connection to land is a critical dimension. A while back I spoke with an Aboriginal scholar, Christine Black, who said that for native peoples in Australia there is an implicit understanding that belonging was not just about belonging to a particular group of people, but also belonging to a particular landscape—and to be banished indefinitely from one's own sacred lands had an even more debilitating impact on the mind and spirit of the banished person, so this was something even the offended community knew—that it ultimately did not have the spiritual authority to make a categorical decision on who "belongs to country," as Aborigines say, because all were equally responsible in caring for one's homeland, even those who occasionally violated societal norms. I think too many of our nations engaging in such activities have conveniently forgotten this important reality.

Why, then, is legal, political, and cultural termination of a native nation's own kin occurring at such a heightened level now? Are the tribal governmental officials engaged in such harsh decisions acting in a manner that comports with the traditional notions of identity mentioned earlier, or are they now acting like privileged and exclusive corporate clubs? What

rights do the disenrolled or banished citizens have to contest this most profound of severances? Can Native nations ensure justice and individual civil rights for their citizens and still protect and exercise tribal sovereignty in membership decisions? Finally, what role, if any, should the federal government play in these contentious intra-tribal affairs, since those dismembered also happen to be US citizens and are supposedly entitled to the same basic civil liberties as all other citizens?

The United States purports to have a trust relationship with federally recognized native nations and their citizens, which means it is pledged with protecting the lands, rights, and resources of those peoples. When Tribal governments are violating the rights of their own citizens, including their vested property rights, the federal government as the principal trust agent, I would argue, has a constitutional, moral, and treaty responsibility to assist those individuals suffering such violations.

There are many ideas as to how to tackle this problem, including the formation of an intertribal human rights treaty, an intertribal appellate body, modifications to tribal constitutions or other governing documents, encouraging disenrollees to organize and seek acknowledgment from the federal government as a separate political entity, and utilizing the United Nations Declaration on the Rights of Indigenous People and other international protocols in an effort to provide a measure of justice.

And, in keeping with the theme of this conference, there have been calls for amendments to the ICRA. This could be achieved, some have argued, by waiving a tribe's sovereign immunity if the tribal government fails to fully comply with the due process safeguards outlined in the ICRA and in many of their own organic acts.

Vine Deloria, Jr. prophetically once said of ICRA that, "the act is deceptive in many of its provisions, and even its description in Senate debate left a good deal to be desired as far as clarity was concerned. ... The irony of this situation is apparent. The Constitution does not apply to American Indians in their tribal relations. It does not protect Indian tribes. But, through a legislative act of Congress, some constitutional provisions are made an applicable part of the relationship between an Indian tribe and its members. As long as this situation exists, confusion and injustice will continue to be visited upon Indian tribes."¹⁶

In recent months, a number of positive events have transpired—several nations have amended their constitutions, others have re-enrolled a number of those who had been disenrolled, and a federal court ruled in August 2017 that the Cherokee Freedmen had every right to be reinstated as citizens of the Cherokee Nation.¹⁷

These developments give me cause for cautious optimism. But

¹⁶ VINE DELORIA, JR. & DAVID WILKINS, *TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS* 158 (Univ. of Texas Press) (1999).

¹⁷ See *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86 (D.D.C. Aug. 30, 2017).

there is much yet to be done. Perhaps we start here today, by finding ways to make the ICRA work better for all our relations.