

# **"The American Indians and Civil Rights," American University, October 4, 1965**

Ladies and Gentlemen:

In talking to you on the subject of The American Indians and Civil Rights there comes to my mind the story about the old miser who had just died and how his neighbors were conducting the ceremonies in honor of the deceased. The minister called on various neighbors to give testimony in regard to the good deeds of the deceased but no one spoke up. Finally someone in the back of the room stood up and said; "If no one else has anything to say I'd like to talk about urban renewal."

He was only trying to put in a plug for his favorite subject but I hope I will be able to speak to the point on a subject of major interest to all of us, namely the role of civil rights in relation to the American Indian.

It would be well to start out with the facts of life so far as the Indian and the white man are concerned.

In the first place the Constitution of the United States was adopted by a people whose philosophical and political roots were deeply embedded in the history of England and Western Europe. Many of the restraints and limitations on the sovereign power (paragraph cut off)...

Now, secondly, The United States is a sovereign nation among the great powers of the world and beholden to no one. The adjective "sovereign" requires substantial qualification before it is applied to Indian tribes. Far from being sovereign today they are under the control of a Government which is dominated by non-Indians. This makes us think that what might be appropriate restrictions and limitations on the United States of America could be quite inappropriate restrictions and limitations upon an Indian tribe.

Thirdly, we may note that the Constitution of the United States established a form of government which is in many respects quite unique. It provided for a federal system and set up limitations and restrictions on the power of the central or Federal Government for the benefit of the States, rather than for the benefit of individuals. Hence we cannot guarantee rights to the individual members of Indian tribes in the same way as we guarantee the rights of individuals in the various States.

Looking constructively into the civil rights problems of the Indian we perceive that the tribesmen have certain special relationships to the Federal Government, now embodied in statutory law, known as the Indian treaties. The House Committee on Interior and Insular Affairs, of which I am a member, has just published a survey of Federal Opinion on the need for an Indian Treaty Study. Now, the significance of rights of Indians was one of the items which was reported as a value of an Indian treaty study. We, here today operate under the shadow of these contractual obligations incurred many of them over a century ago in the Indian treaties. The treaties, more than any other factor (paragraph cut off)...

### **SPECIAL AREAS OF INDIAN CIVIL RIGHTS PROBLEMS:**

1. Most problems in Indian civil rights stem, not from discrimination by the white man, but from the peculiar, dual-citizenship which Indians have, first as members of tribes, and second as citizens of the states in which they reside and of the United States.

While Indians enjoy all the privileges of citizenship, including the franchise, their constitutional rights are vague and undefined within the tribal organization and before the tribal courts. In fact, Chairman Ervin of the Subcommittee on Constitutional Rights of the U.S. Senate has said: "... it appears that a tribe may deprive its members of property and liberty without due process of law and not come under the limitations applicable to federal and state governments as stated in the Bill of Rights."

This whole area requires attention. While the quasi-sovereignty of Indian tribes undoubtedly should continue, if that is what the Indians want, the rights of Indians within these tribes should be protected. These certainly should include:

- The writ of habeas corpus should be available to individual Indians.
- Tribes should be prohibited from passing bills of attainder or ex post facto laws.
- There should be freedom of religion, of speech and press. Indians should be guaranteed the right to assemble and petition the government (tribal government).
- They ought to be protected against unlawful search and seizure.
- They should be protected from double jeopardy in criminal proceedings.
- They should be protected against self-incrimination .
- Their property should be protected against the taking for public purposes without just compensation.
- They should be guaranteed due process of law, speedy and public trials.
- They should be guaranteed that charges against them must be stated with definiteness, and they should be assured the opportunity to face their accusers.

- There should be compulsory attendance of witnesses.
- They should be assured of representation by counsel.
- They should be protected from cruel and unusual punishment.
- They should be guaranteed equal protection of their laws.

Surprisingly for this late date most Indians in this country do **not** enjoy such rights **within their tribes** today. This is not to say administration of Justice in Indian courts is unfair or unjust, but that it is lacking in a code such as the Indian would find when going before state or federal courts.

In contrast the people of the Indian tribes had their roots in an entirely different cultural matrix, one separated geographically and historically by a great gap from that of western Europe. So we might observe that the political and constitutional devices which were designed to protect the interests and welfare of the Anglo-American of the late 18th Century might not be entirely appropriate to protect the Indian tribal member of the middle-20th Century.

**SUMMARY:** Might make this observation. The Negro and his defenders today look to the time that the Negro will be assimilated in white society and all barriers and distinctions will seem to disappear. Not so with the Indian. The one big thing the Indian possesses is his pride in being an Indian. He doesn't wish to be other than an Indian.

Indians, while they constitute a minority, have high unemployment, are isolated from white society and play only a small part in our electoral process, have very little in common with our Negro minority, about which all of the same statements can be made.

One of these differences is the ability to use the English language. Many tribal elders and influential men in the tribes are only semiliterate in the English language. Many Indians and Alaskan natives have gone beyond the school ages with only a smattering of education. This is a handicap of the gravest import for the Indian. In the Navajo tribe court Interpreters are required to communicate with witnesses. Here is a teaching task of great magnitude, a battle which has not yet been won.

Yet, there is no other group of American citizens who by reason of rural isolated life find it harder to survive. Inaccessible to the benefits of modern civilization, schools, libraries, hospitals and trading centers have been largely unavailable to them.

Economically depressed areas with few large business or other industrial opportunities, preponderate as the basic environment of Indian communities. The more misery and poverty we expose and rout on reservations the more we discover. The Indian problem Is singular to the Indian. He retains his pride in being Indian and

regards non-Indians as foreigners. He does not identify with other disadvantaged groups, not with Negroes, not with the various immigrant or other groups, not with the religious minorities and most definitely not with the white majority.

(Indian unemployment is 7 or 8 times the national average of 5%, whereas Negro unemployment is only about twice the average.)

#### WAYS IN WHICH THEY DIFFER:

1. Unlike Negroes and other minority groups, which are generally landless, most American Indians belong to tribes which own large areas of land set aside as reservations in treaties signed by the U.S. Government and their respective tribes.
4. While the Indians collectively, and in some cases individually, own land, they are not free to dispose of it. It is held in trust by the U.S. Government, a protection not accorded any other group.
4. Land ownership poses many problems. In 1887 the U.S. Government started a program to "de-tribalize" the Indian Population by granting allotments to individual Indians. They were given land which was theirs to dispose of as they liked. The result was that many uneducated and unsophisticated Indians sold their land for little or nothing (for example, the oil lands in Oklahoma). In 1934 the Indian Reorganization Act put an end to this allotment system and halted Indian land sales. Nevertheless, those who had been allotted land continued to own those allotments. Today multiple heirs have come along to fragment nearly all this ownership and complicate any disposition. Other, non-allotted land is held in trust for the tribes as a whole. But what kind of "ownership" is this? And what is to be done to realize any benefit from such land? (Cite Papago reservation and long-term leasing which offers some hope.)
6. The fact that Indian land is not taxed has resulted in resistance on part of some states to provide Indians with the same services accorded non-Indian citizens. In Arizona, problem has been with administration of welfare and health services where federal government funds depended on matching of state funds. Federal pressure has forced semblance of compliance, but problem continues. Would be more acute if it weren't for services of Public Health Service and Bureau of Indian Affairs.
5. Negroes in the South have created a burden on local school systems, particularly in the era of "separate but equal" facilities. But where large numbers of Indians pose a similar burden, the federal government provides them with a separate system of schools.

Another difference affecting Indians is the Federal responsibility for many matters which in other communities are handled by the local government. The Federal Government maintains a school system for Indians which takes up the slack when public schools are financially, incapable of providing services to isolated rural areas or to children with special needs.

6. No other group in the U.S. receives medical care provided Indians through the Public Health Service. (Unless we consider veterans.)

The Indians are different in still other respects. There is no other group of American citizens - except veterans - for whom a full range of Federal hospital and outpatient clinical services are provided (these through the U.S. Public Health Service). There is no other (paragraph is cut off)...

Lack of education and sophistication of Indians has led to many complaints of denial of rights in jurisdictions near large Indian reservations. Occasional cries of police brutality, etc. How much of this has substantial basis it is hard to say, but it is surely not a widespread problem today.

Due to the various factors we have enumerated in this brief discussion of a vast subject the Indians have far too long occupied a no-man's land with regard to their rights as Americans. The recent Hearings in June of this year before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on S. 961 and other bills to protect the Constitutional Rights of American Indians brought out the range of opinion regarding Indian civil rights presently prevailing among organizations such as The Department of the Interior on the one hand and the American Civil Liberties Union on the other. Both believe that civil rights should be extended to the Indians but each differs from the other on points such as the way in which this can be brought about. The administrative position of the tribe and tribal courts seems to be uppermost as a factor determining the degree of participation of the American Indian in the civil liberties which are exercised by non-Indian citizens. Until or unless the position of the tribe be vis-a-vis State and of the Federal Government vis-a-vis the State can be clearly defined the civil rights of the Indian will continue to occupy a no-mans land so far as reservations are concerned.

2. Indians have the right to vote, and there never has been any great attempt to prevent them from registering and voting. Nevertheless, few Indians do participate in our elections. Language barriers and isolation (paragraph cut off)...

Don't Have Answers --- Play another tune

CONCLUSIONS --- not pat nor specific nor can prescriptions be made which will cover all differing tribes at same time.

Story: Thank God we are not losing any ground, Holding our own. OR Play another tune boys--DONT HAVE ANSWERS

Indian behavior is not unlike that of the old, small, fragile, proud nations of the world community, which cling to nationalism because it seems the only means of preserving a semblance of identity. In addition they exhibit some of the qualities of the new nations of the world.

#### TERMINATION AND INTEGRATION LONG RANGE ANSWER TO not only Civil Rights

Problems, but to economic, as well....

- When we begin to solve Negro civil rights problems we have found lurking behind the curtain an even more severe set of employment, housing and other social problems. Same true here tho not same for reasons given
- Integration into mainstream. is goal, but immediate attainment that goal not in sight. Patience, kindness, good judgment required.
- That integration must come not by the white man's shove, but through a helping hand and only when the Indian is ready to go.

In the case of the Fifteenth Amendment it is provided that the "right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color or previous condition of servitude." In contrast a tribe would naturally want to restrict voting to members and to restrict membership to persons having a certain proportion of Indian blood. Such action would have to be construed as a violation of the restriction just quoted.

There is no doubt that Congress, in extending civil rights to Indians, would want to assure individual Indians, equal protection of the laws of the tribe. These rights would include the writ of habeas corpus for individual Indians, and prohibition on tribes from passing bills of attainder or ex post facto laws. Other rights that would be extended to the Indians would be freedom of religion, of speech, of the press, and the right to assemble and petition the Government.

Certainly the individual Indian should be protected against unlawful search and seizure, against double jeopardy in criminal proceedings, against self-incrimination, and against the taking of his property for public purposes without just compensation. The Indian should be guaranteed due process of law, speedy and public trials, and the

right that in criminal cases the charges should be stated with definiteness. An Indian should have an opportunity to confront his accusers, to have compulsory process to require the attendance of witnesses in their own defense, and to be represented by counsel. The prohibitions of the Eighth Amendment should be extended to Indians, that is, excessive bail and excessive fines and cruel and unusual punishments must be prohibited. Indian tribes should be prohibited from denying to any person within their jurisdiction equal protection of their laws.

We must avoid assuming that all Indian tribes are alike and that a model code of administering justice by Courts of Indian Offenses will achieve anything. A code appropriate for one tribe could very definitely be wholly inappropriate for another. Moreover, Indian codes of justice should conform as much as possible to the substantive and procedural laws of the States in which the Indians live. Since the codes in various States differ, a uniform code for Indian tribes would frustrate this objective.

A vital step in the process of preparation of the Indian for participation in our society lies in the acquisition of skills and experience in the formulation of legislation on such matters as the administration of justice by courts. Of course in putting such important matters in the hands of the Indians there is the risk that they will make mistakes. However, it has been said that we learn only from our mistakes and perhaps it is better that we take these risks than that we perpetuate a paternalistic system which will continue just as long as we do for Indians what they ought to be doing for themselves.

Indian tribal organizations retain distinct remnants of sovereignty and in matters of lesser criminal offenses, the tribal law prevails even today, except in a few States where tribal responsibility for law enforcement has been relinquished in favor of State law.

The Commissioner of Indian Affairs, Dr. Philleo Nash, in a speech delivered at the Institute of Human Relations, Fisk University, Nashville, Tennessee, on June 29, 1965 enumerated the second bill of rights which had to apply to Indians in order to insure individual freedom through economic security and independence. He noted these rights as follows.

1. The right to a useful and remunerative job.
2. The right to earn enough to provide adequate food and clothing and recreation.
3. The right of every family to a decent home
4. The right to adequate medical care and the opportunity to achieve and enjoy good health.
5. The right to adequate protection from the economic fears of old age, sickness, accident and unemployment.

## 6. The right to a good education.

The essential significance of these rights is that through economic assistance and the provision of educational activity the Indian people will attain their rightful status in American society.

No other group of American citizens find it harder to survive than the Indian. There is nothing more rural, more isolated, than the backlands of so many Indian reservations where paved roads, electricity, and plumbing are just beginning to be introduced into areas almost devoid of them. Small farming, once a means of livelihood for many, is no longer economically practical in this day of huge commercial agricultural enterprise. On Indian reservations cattle ranching and sheep herding are a widespread means of Indian livelihood.

The picture is changing now. Lands that were overgrazed and badly eroded are being reclaimed with major conservation and water development projects, but here, as elsewhere in the current economic world, the unit of economic enterprise requires a larger and larger "spread" in both acreage and numbers of stock.

Other tribal reservations are forested and require cultivation on the relatively new lines of sustained yield management. The development of various wood manufacturing industries is a still more recent development for these areas.

Tribal reservations containing mineral resources have been in the past relatively undeveloped for such purposes and only recently have the tribal authorities become interested in leasing their land for other than agricultural development.

To some extent the economic pressures for survival on Indian reservations is relieved by an outmigration of Indian young people into areas where job opportunities are to be found. The Indian Bureau encourages this transition and maintains a program of adult vocational education that is by far the best supported on any available through the Federal Government. All expenses, including travel, are paid for trainee and family during the training period, which may run as long as two years for highly skilled occupations. The Bureau has contracted with more than a hundred public and private vocational and technical schools throughout the country, and last year alone paid expenses for more than 4,000 young men and women. Job placement services, family counseling, and health services are all parts of the same program. The demand is rising at such a great rate that the Indian Bureau went to Congress for an increase in its authorization. Because Congress is vitally concerned for the welfare and needs of our Indian fellow citizens the Indian Bureau received an additional \$3 million to add to its previous \$12 million for adult vocational training. Employment assistance to Indians is also available and services are farflung, with 7 offices operating across the

country, for those tribesmen who are willing to move to the city and need help to relocate.

While 7 out of 10 relocatees succeed, the other 3 become "dropouts" from the Federal program of vocational training and employment assistance. The dropouts are those who find urban living foreign. To these Indians the transition to big-city American life is disconcerting. It is as if they were put down in an alien country where language and customs were remotely, if at all, familiar, with difference magnified into insuperable social obstacles. Indians are indeed people in transition, many of them with their hearts in the past, their desires in the present, and unsure of the future.

Yet, in appraising the civil rights problems of the American Indian the one big thing these people possess is pride in being a member of an Indian tribe and frequently of a clan within that tribe. He does not want to be other than tribesman and clansman and being such, an Indian. He may have problems which seem to resemble those of other groups with civil rights problems but he wants above all to remain a distinctive identity as Indian.

A couple of years ago, the House Subcommittee on Indian Affairs, of which I am a member made a report to the full Committee, The Committee on Interior and Insular Affairs, on Indian unemployment. The body of the report consisted in the returns from a questionnaire sent out to all the Indian agencies in this country inquiring into the details of Indian employment and unemployment. Time and again the returns indicated, the chief cause of unemployment was the physical isolation of Indian reservations, remote from the factories and other industrial enterprises which might employ their services. In 1965, I am happy to say, this isolation is melting away as roads, utilities and schools, libraries and hospitals are extending their availability to reservations and reservation Indians. As this isolation disappears due to the magic of modern applied science so also vanishes the separation of Indians from the mainstream of American life and their non-participation in the rights and duties of other American citizens.

With respect to the land of an Indian reservation, it has never been doubted that, being actually within the geographical limits of the United States, the Federal Government has jurisdiction over it. (United States v. McGowan, 302 U.S. 533, 539 (1938); United States v. Kagama., 118 U.S. 375, 384 (1886); Mickey v. Coxe, 59 U.S. 100, 103 (1855)). It has also been held to be "within the political and governmental boundary of the state" and consequently under the sovereignty of the state and the control of its laws. (Begay v. Miller, 70 Ariz. 380, 222 P. 2d 624t 629 (1950)). The courts have clearly affirmed that "the state retains sovereignty over the territory (of a reservation) although its laws cannot conflict with the Federal enactments passed to protect and guard its Indian wards." (Surplus Trading Co. v. Cook, 281 U.S. 647, 650-51 (1930);

Interior Dec. 295, 296 (1941)). They have again and again stated that "for many purposes a state has civil and criminal jurisdiction over land within its limits belonging to the United States but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them." (United States v. Minnesota, 95 F 2d 468, 471 (8th Cir. 1938)).

If Congress has not enacted special legislation for Indians on a reservation or subjected them to the exclusive jurisdiction of the state, Indians continue to be governed by their own tribal laws and actions.

Loans and grants for farming and industrial enterprises are more readily available to Indians than to other groups, and particularly to others of equal economic and social status.

NOW MUCH OF WHAT I HAVE SKETCHED HAS NOTHING WITH THE TOPIC I AM TO DISCUSS but I give you this to put Civil Rights problems in proper setting. Two more factors will bring us to that subject....

3. Indians are the only minority in our society of which it can be said they are a conquered people. The fact of their being conquered gives them a very special relationship with the government which conquered them, and gives that government a certain set of obligations not extended to any other people.

Like Negroes, Indians have been subject to occasional discriminatory laws in past, but these are now history. Until 1954 one of the most common offenses in Arizona police courts was "selling liquor to an Indian." Arizona constitutional provision outlawing such sales was repealed in 1954.

Conflicting Sovereignty.....In some respects tribes continue to function as separate nations with own laws., own legislatures, own courts and system of justice. They are said by some courts to be "quasi sovereign". No other minority has such status.

Courts and legislatures vary widely..Navajo  
Some judges trained others illerate.

Do we take away these rights granted by treaties and invaluable experiment in self government, or let them profit by mistakes and permit what we would consider kangaroo justice (paragraph cut off)...

(Woodin v. Seeley, 141 Misc. 207, 252 N.Y. Supp. 818, 823 (1931)). Tribal civil law is usually supreme in matters concerning the personal and domestic relations of Indians such as guardianship inheritance and testamentary disposition.

From the material we have just been considering it is quite apparent that an Indian tribe does not exercise exclusive jurisdiction either over the persons within a reservation or over the land therein comprised. The state and federal governments also exercise certain jurisdictions. It is possible for an Indian to be punished for a criminal act committed on a reservation by the federal, state and tribal authorities if each has made the specific act a crime. The plea of double jeopardy cannot be successfully invoked because the Supreme Court said with reference to the state and federal governments:

"We have here two sovereignties deriving power from different sources, capable of dealing with the same subject-matter within the same territory .... Each government, in determining what shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other." (United States v. Canza, 260 U.S. 377, 382 (1922)).

It was decided very early in our history that without permission of tribal officials or federal statutory authority, state officials may not ordinarily enter upon Indian reservations to enforce state law. (Worcester v. Georgia.. 31 U.S. (6 Pet.) 350 (1832)). Consequently, it might be said that judgments against Indians in state courts would be meaningless unless the state has power to enforce them.

25 U.S.C.A. Section 231 (1963) allows the Secretary of the Interior to permit state agents and employees to enter upon tribal lands, reservations or allotments therein to inspect health and educational conditions and to enforce sanitation and quarantine regulations and penalties of state compulsory school attendance against Indian children and their parents. Even this is not permitted where a tribe has a duly constituted governing body unless it consents thereto. (45 Stat. 1185 (1929), as amended, 60 Stat. 962 (1946)). This statute thus seems to be a clear indication of Congressional intent that other types of state officials are prohibited from entering upon Indian reservations to enforce state laws without tribal consent or federal statutory authority to do so. Further proof of this may be found in the Code of Federal Regulations which provides for the surrender of Indian criminals to federal or state authorities but does not grant such authorities permission to make arrests within the reservation. (25 C.F.R. Sect. 11.2 (b) (1958)).

If a state court without federal authorization may not enforce its decrees within an Indian reservation, nor an Indian court its decrees outside the reservation, can suit be brought in one court based on a judgment of another? What effect will be given to the

decrees of each in the other's courts? It is too well established to admit of any argument that the decrees of federal and state courts properly rendered are duly recognized in each other's courts. They are recognized in Indian courts too. The only real problem is the recognition of the judgment of an Indian court since its procedures and standards are Indian and often quite different from those of state and federal courts. [This part of the paragraph was crossed out.] faith and credit as United States territorial courts. (Cornells v. Shannon, 63 Fed. 305, 306 (8th Cir. 1894); Mehlin v. Ice, 56 Fed. 12, 19 (8th Cir. 1893)). Divorce decrees of Indian courts have several times been duly recognized by state courts on the basis of a sort of comity. (Begay v. Miller, 70 Ariz. 380, 322 P. 2d 624, 62 (1950)).

The following quote from Iron Crow v. Oglalla Sioux Tribe, 129 F. Supp. 15, ql (W.D.S.D. 1955) indicates present opinion.

"If the states assume more and more jurisdiction over Indian affairs, as seems likely, the Indian courts seem destined to lose jurisdiction correspondingly except over purely tribal affairs. Consequently, recognition of their judgments or decrees does not loom as a subject of too vital importance. There have been few decisions in this field but since we recognize the validity of tribal laws, (67 Stat. 589 (1953) 28 U.S.C. Sect. 1360 (1958) it would seem logical and practical that we recognize the validity of Indian court judgments and decrees based thereon, at least insofar as Indian personal and domestic relations are concerned."

I believe that, through economic assistance and educational opportunity, the Indian people will attain their rightful status in American society.

I was perusing not long ago a small volume of selections from the public addresses of Franklin Delano Roosevelt. Among them was one in which he talked of the rights of the common man. (And, by the way, the phrase "war on poverty" appears in it.) FDR said:

"We have come to a clear realization that true individual freedom cannot exist without economic security and independence. We have accepted, so to speak, a second Bill of Rights. Among these are:

1. "The right to a useful and remunerative job...
2. "The right to earn enough to provide adequate food and clothing and recreation....
3. "The right of every family to a decent home;
4. "The right to adequate medical care and the opportunity to achieve and enjoy good health;

5. "The right to adequate protection from the economic fears of old age, sickness, accident and unemployment;
6. "The right to a good education."

All of these rights we still hold to be self-evident. But many of them still beyond the grasp of most Indians as well as many other Americans.

However, I am inclined to belief optimistically, with President Johnson, that we are "moving into a new and creative time in which much that has eluded mans quest before will now be ours to reach."

For the American Indian, this would be fulfillment 'of the prayer of Chief Joseph:

"Treat all men alike. Give them all the same law. Give them all an even chance to live and grow. The earth is the mother of all people, and all people should have equal rights upon it."

"Let me be a free man--free to travel, free to stop, free to work, free to choose my own teachers, free to follow the religion of my fathers, free to think and act for myself--and I will obey every law or submit to the penalty."