



ANDRZEL DUDZINSKI

# CONSTITUTIONAL IMPERIALISM

by Jack L. Schwartz

To Native Americans, the United States Constitution was merely one step in the destruction of their nations and the withering of their sovereignty as independent peoples.

Hundreds of countries existed on this land when Europe established settlements and bases for trade. For four centuries, the increasing relative strength of the United States has allowed for a relationship with the Indian nations that either ignored their national sovereignty or tried to replace it with control by the states or the federal government.

In many instances, the federal government forced its jurisdiction upon Indians, and in some cases Indian governments have willingly given up degrees of self-government in treaties and other international agreements.

The Constitution laid the foundation for the use of law in pursuit of control over Indians. It gave Congress and the President the authority that was later used to invade Indian jurisdiction. In the only direct grant of such power, the commerce clause gave Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The President was given treaty making authority, subject to Senate ratification, and Congress' power to make war was also recognized.

Unable to defeat the Indian nations on the battlefield, the United States carefully respected their sovereignty in early post-ratification statutes. The Northwest Ordinance of 1787 stated: "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed... but laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them and for preserving peace and friendship with them."

As late as 1848, the federal government was still claiming honorable treatment. In the act to establish the Territorial Government of Oregon, Congress wrote in the very first paragraph, "That nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such remain unextinguished by treaty between the United States and such Indians." The act then incorporated the Northwest Ordinance for application to Oregon, Washington and Idaho.

These statutes, and the various trade acts of 1790, 1793 and 1796, respected the jurisdiction of Indian governments over their citizens and property.

As the nineteenth century passed into a period of expansion by the United States, much of this sentiment fell to state and federal chicanery. Treaties and agreements were often written and interpreted to the distinct disadvantage of the Indians.

When I first began to practice law on the Pine Ridge Sioux Reservation in South Dakota, I spent one afternoon driving around in a van with some new friends who were telling me of the Lakota history. They remembered the first time they came across attorneys. It was after the Army had taken much of what the Sioux had, and military conquest was no longer the strategy of the whites. At that point, some men were sent out from Washington to make agreements with the Indians, to prevent further outbreaks of hostilities.

The white negotiators promised this and that, and could not quite understand the response of the Indians when their negotiations were not treated respectfully. The Indians, I was told, thought the whites had identified themselves as "liars," instead of "lawyers."

The Indians, I suspect, knew what the lawyers were doing, but were either militarily unable or unwilling to resort to warfare.

The laws were continually used to place a facade of decency upon policies laced with racism. In 1817, Congress passed the Major Crimes Act, which made criminal laws applicable within Indian territories except where to do so would violate treaties or where the crime charged was by an Indian against another Indian. This encroachment upon sovereignty stemmed from treaties between the United States and certain nations, but the act was not limited to those Indians who had agreed.

Today, the act applies to all Indians, and no American court has ever recognized the limitations that should have been applied to its scope.

The courts have also consistently failed to restrict the acts committed by the United States, even when they were blatantly unconstitutional and immoral.

One outrageous invention of the Supreme Court was the "political question doctrine." Stemming from the 1823 case of Johnson and Graham's Lessee vs. McIntosh, the doctrine plainly suggests the courts will not consider whether the federal government has acted illegally.

The rights of Indian nations is one area in which the courts will not rule upon the actions of the legislative and executive branches of the government. Wholesale land thefts and the destruction of native religions and culture have been given the appearance of legality by the invocation of this and other theories.

The theft of Indian land is permitted under an extension of the political power doctrine known by the case name of Tee-Hit-Ton. In 1953, the U.S. Supreme Court ruled that the Tee-Hit-Ton Indians had no recourse against the United States when the government took timber off of the Indians' land without compensation. The court agreed with the executive branch and stated that Indians had no legally recognizable title to land beyond a right of occupancy, "which the sovereign grants (and which) may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

The ruling was supported neither by law nor historic fact and relied on an incorrect reading of McIntosh.

Under a doctrine known as "plenary power," the Constitution is said to be the foundation of

an authority by the United States to have plenary, or absolute, power over Indians and Indian lands. The judiciary refuses to rule if Congress and the executive branch can infringe upon Indian jurisdiction and sovereignty. The courts will not determine if governmental control over the affairs of Indians is constitutional.

Actually, the authors of the Constitution specifically rejected a proposal to give Congress greater powers in Indian affairs. Yet, the government has taken the power.

Only when the federal government wants to stop a state from limiting Indians' rights does it appear to help Indians. Before 1830, it was common for the state to commit illegal acts against Indians. The most publicized encroachments were done by Georgia and New York.

In spite of treaties and federal constitutional law, state and local politicians thought it good politics to allow the subjugation of their Indian neighbors and the taking of Indian property. When the federal government reined in the errant states, it was in the nature of claiming for itself the role of conqueror of the natives.

Such has been the case in the Northwest in recent decades. The federal government entered the fishing and hunting rights struggle only after Oregon, Washington and Idaho consistently and illegally ignored the Indians' treaty rights, and only after Indians acted in a threatening manner.

The Boldt decision, which granted Indians the right to have access to fifty percent of the fish in the Northwest, actually took away a full half of the treaty right to take as many fish as were taken traditionally. It was a political decision designed to calm the state and white fishermen.

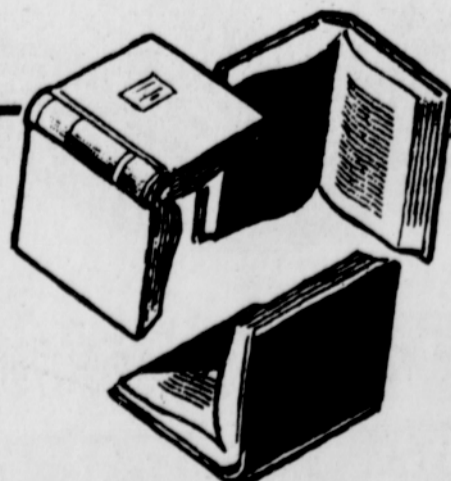
Yet, the law enforcers of the states were still arresting Indians; the state courts were still ignoring the treaties, Constitution and federal court decision; and the Oregon and Washington legislatures were still enacting unconstitutional fishing and hunting regulations. It was only in 1986 that the Oregon Court of Appeals recognized a treaty based defense in hunting and fishing cases.

The damage done to Indians in the name of the U.S. Constitution continues unabated. Even the Constitution's mandate that treaties are to be considered the supreme law of the land is continually and habitually ignored by state and federal governments, and by the courts within those governments.

Many Indians believe that they, as a group, have never won a major court decision, and they do not expect to in the near future. Many now look to international courts and organizations such as Amnesty International and the United Nations for redress of their grievances.

In order to maintain any degree of sovereignty, Indian nations today are developing economic power. As their financial strength grows, so will their political clout, and the judicial systems will begin to respond to that power. Laws and court cases have always been a reflection of power relationships, but until now, that economic and political power was not on the side of Indians.

With time, the law will become a tool in the hands of the Indian people, and they will start to win acceptance by the United States of the rights of Indians.



**CANNON BEACH BOOK COMPANY**

132 North Hemlock, Cannon Beach 436-1301

Jack L. Schwartz is a Portland lawyer. He is the founder of the Columbia River Defense Project and the coordinating attorney for Indians charged with illegally trading salmon. His article is reprinted from The Oregonian.