Who's to blame for loss of rights

Editor's note – The following piece was researched and written by Steven M. Tullberg and Robert T. Coulter, two attorneys in the Indian Law Resource Center in Washington D.C.

Although the piece is very lengthy, we feel that the issues and specifics raised by the article are well worth the space devoted to them.

With increasing frequency Indians are asking why the lawyers representing Indians in court battles over Indian rights have had such little success in gaining legal protection for the most important Indian rights, the sovereign rights to self-determination, and to ownership and control of Indian land and resources. A close look at some of the Indian rights advocacy which is taking place in the courts today suggests that lawyers representing Indians are in significant part responsible for this failure.

Many had hoped that the past two decades of Indian activism in the United States courts would lead to a new era in which these fundamental rights would finally be given the strongest legal protection available under federal law and the United States Constitution.

Instead, the Supreme Court has issued a series of decisions which dramatically undercut Indian sovereignty and which reaffirm broad, unrestrained powers of Congress to expropriate Indian property. The Supreme Court has even gone out of its way to announce the chilling news that the power to terminate Indian governments is still "legal" under United States law, and that Indian land rights and land claims are not protected by the Fifth Amendment to the United States Constitution from confiscation by the federal government.

The Supreme Court has refused to repudiate the unbridled political power which the law of the United States has permitted the Congress and the Executive to exercise over Indians and all their affairs for well over a century. Rather, the Court has recently again upheld that racially discriminatory power in language which would suggest that almost nothing has been changed since the time when the Court first upheld the "legal" power of Congress to abrogate Indian treaties *(Lone Wolf v. Hitchcock, 1903)*.

The Burger Court has reaffirmed the law of the 1950's Termination era which allowed Congress to deny the self-

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Native rights

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governmental rights of Indian nations and tribes, and the Court has resurrected *Tee-Hit-Ton Indians v. United States (1955)*, the decision which held that aboriginal Indian homelands are not protected by the Constitution.

In a 1978 opinion authored by Justice Thurgood Marshall, the Supreme Court stated that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." That quote, from the case of *Martinez v. Santa Clara Pueblo*, was in the context of a decision by which the Pueblo's laws governing its own membership were upheld only, the Court determined, because Congress had not yet taken away the Pueblo's residual sovereign right to make such laws.

This anti-Indian notion, that one sovereign (the United States) has the legal power to strip other sovereigns (Indian tribes and nations) of their fundamental rights and powers, is today more firmly cemented in United States law than ever before.

What role have lawyers for Indians had in developing this "hand-out" theory of Indian sovereignty?

Sadly, a large role indeed. Lawyers representing Indians at every level have played a part in undercutting their own Indian clients' fundamental rights. Trial court lawyers routinely approach Indian sovereignty with shuffling feet, downcast eyes and hat in hand, and some still talk of Indians as "wards of the federal government." Even some of the most prestigious lawyers who have argued Indian rights cases before the Supreme Court have made arguments which are almost the same as those of their adversaries on certain crucial issues.

In the adversary system of justice, the arguments made by the lawyers for each side are, of course, critical to the outcome of the case. The courts generally pick and choose only between the arguments that are made. Seldom does a court give that which is not requested, and if the lawyers for the two sides agree on an issue – if one lawyer concedes a point made by his opponent – the court almost always accepts that agreement and incorporates it into the final decision.

A review of some of the transcripts of oral arguments made before the Supreme Court in Indian rights cases decided during the past few years shows that lawyers representing Indians have time and again given away at least half of the legal battle and have actively favored a "hand-out" theory of Indian sovereignty which helps erode Indian rights.

In short, lawyers who are supposed to be representing the Indian position have repeatedly conceded that the United States government has virtually unchecked political power over Indians, Indian governments and Indian property.

It is not likely that these concessions have been authorized by the Indian peoples whose cases were being heard, and they certainly have not been authorized by all the other Indian tribes who find the concessions used as precedents to deny their rights as well.

Consider some of the arguments made in the Martinez case during the Santa Clara Pueblo's Supreme Court fight to maintain its sovereign right to make and enforce its own membership laws. The lawyer for the Pueblo's opponent argued that Congress had, in its 1968 Indian Civil Rights Act, taken away the sovereign immunity of the Pueblo which would otherwise have protected these Indians from being forced into the federal courts to defend the Pueblo's membership laws. The lawyer for the Pueblo argued that Congress had not in fact intended to take away that Indian's sovereign immunity, but he did not challenge Congress' power to do so.

There is no apparent reason why that concession was made. That totally unnecessary concession of federal power was used by the lawyer opposing the Pueblo's membership ordinance in his argument to the Supreme Court:

ATTORNEY FOR MARTINEZ: Now, returning to the sovereign immunity question, the terms of the Act is a limitation on the tribes themselves. Congress, it's conceded, has plenary power to limit the Tribes in this way. Defendants have conceded that . . . the power of Congress to do this isn't at issue; it's only a question of what Congress did do.

In the same 1977 Supreme Court argument, the lawyer for the Pueblo made other remarkable concessions of federal power over his clients when he was asked about the legal power of the Secretary of the Interior to overrule the tribal courts, to impose the Indian Civil Rights Act on Indians, and to invalidate the Pueblo's membership ordinance:

QUESTION By the Court: Well, could you tell me, would a Tribal Court have any authority to invalidate a Tribal Ordinance on the grounds that it was inconsistent with the Civil Rights Act?

ATTORNEY FOR THE PUEBLO: If they did not, the Secretary of the Interior would definitely have it.

* * *

QUESTION By the Court: But if an Indian Tribal Court concluded that the federal Civil Rights, Indian Civil Rights Acts were violated, would not the federal (sic) Tribal Court have a duty to obey the federal statute?

ATTORNEY FOR THE PUEBLO: I think you're correct on that, Your Honor . . . Providing Congress has so indicated.

* * *

QUESTION By the Court: Could the Secretary of the Interior invalidate this particular ordinance?

ATTORNEY FOR THE PUEBLO: I think that that's probable.

These concessions by the lawyer representing the Indians helps explain how Supreme Court Justice Thurgood Marshall, a noted former civil rights lawyer, came to write the outrageous language in the Martinez decision which reaffirms the plenary power to Congress to limit, modify or eliminate Indian self-government. There had simply been no contest presented to the Court about that most important Indian rights issue.

The infamous Supreme Court decision of *Oliphant v. Suquamish Indian Tribe* (1978), denying Indian jurisdiction over non-Indians committing crimes on Indian territory, is also partially explained by a review of the arguments which the lawyers made to the Court.

In opening his argument the lawyer for the Suquamish Tribe first argued that Congress and not the courts should be making the decisions about criminal jurisdiction on Indian lands. He did not argue that Indian jurisdiction over criminal activity on Indian land was a right and power which neither Congress nor the federal courts could deny.

When the question of the extent of Indian sovereignty was pressed by one of the Supreme Court Justices, the same lawyer for the Indians gave a most remarkable answer which suggested his clients had no real sovereignty and which made the task of his opponent, Washington State Attorney General (now U.S. Senator) Slade Gorton, markedly easier:

QUESTION By the Court: To say the Tribe possesses an attribute of sovereignty does not necessarily mean it possesses all attributes of sovereignty.

ATTORNEY For the Suquamish: That is correct. Most attributes, what we call real sovereignty, have been given up by Indian Tribes. There is no question about it. Indian Tribes cannot mint money. They cannot enter into treaties with other nations. But this Court has consistently held that there are powers that have not been taken away.

The Suquamish also were given the very mixed blessing of having the United States government (the self-proclaimed "trustee" of all Indians and all Indian lands) on side in that case. The argument by the attorney from the U.S. Solicitor General's office greatly compounded the Indians' problems because it had much in common with the arguments which were made for the opposing, non-Indian interests:

ATTORNEY For the United States: History and nearly two centuries of legal authority demonstrate that the Tribe's sovereignty is subject to the greater sovereignty of the United States and in the exercise of its own sovereignty, the United States has established a special relationship toward and a unique responsibility to the Indians in the United States, but we do agree with petitioners (the non-Indians), Mr. Justice Stewart, that tribal sovereignty can be and in many respects has been circumscribed by the United States so to that extent it is not a full sovereignty.

QUESTION By the Court: It was tribal self-government but it was not territorial sovereignty, was it? Ever?

* * *

ATTORNEY For the United States: They (the Indians) did not view territories belonging to particular individual tribes – that is a concept to which the European settlers quickly educated them.

QUESTION By the Court: You said they did not have a sophisticated concept of land ownership . . . Did the United States recognize any land ownership rights to the Indians, other than those granted by treaty?

ATTORNEY For the United States: Well, no, they did not.

Again the Court was told that Indian sovereignty is only a remnant or a vestigial organ which Congress has yet to completely remove from the body politic. Making matters even worse are the ill-informed and sweeping statements denying that Indian tribes and nations had a concept of ownership of separate territories before the arrival of Europeans. What, one might ask, were the first Indian treaties all about?

The Supreme Court's decision in the case of *Sioux Nation v. United States* (1980) has not received the almost universal condemnation from the Indian community which has been heaped upon the Oliphant decision.

The mixed response to the Sioux Nation decision is due partly to the fact that the Supreme Court finally set the historical record straight and acknowledged that the Black Hills had been stolen from the Sioux and partly because Fifth Amendment compensation was awarded for the theft of this treaty-guaranteed, recognized Indian title land.

But only some of the commentators have noted that the Sioux Nation decision has upheld the power of the United States government to make such thefts of Indian land in the first place.

The first part of the taking clause of the Fifth Amendment, which provides that the government may not take private property except for a legitimate public purpose by use of its eminent domain power, was not applied by the Surpeme Court to rule the initial seizure of the Black Hills an unconstitutional act.

That constitutional argument is now being made for the first time by the Sioux lawyer representing the Oglala Sioux Tribe in a new law suit which rejects the offered money damages and which seeks return of the Black Hills instead.

Inexplicably – and certainly without the approval of the Sioux people – the lawyer representing the Sioux Nation in the Supreme Court argument of the *Sioux Nation v. U.S.* case conceded that the United States government has the lawful power to abrogate the Fort Laramie Treaty and to take the Black Hills from the Sioux people, even though the purpose of the taking was to give that Indian land and its gold to non-Indians. (Such taking would obviously not meet the "public purpose" test of the Fifth Amendment.)

All the Constitution required, he argued, is that the Indian people be given monetary compensation, with interest, whenever Indian land is taken by the federal government:

QUESTION By the Court: Under a treaty a reservation is set up for an Indian tribe and at sometime later the Government, the Congress, just says, "Well, we think the reservation is too big. We are going to cut it in half and open the rest up." So it just cuts it in half and redraws the reservation.

Now, is that a breach of the treaty or is it a taking, or both?

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Lawyers study Indian court battles, find many rights given away

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ATTORNEY For the Sioux: It is a breach of the treaty and the United States has the power to breach the treaty.

QUESTION By the Court: That is Lone Wolf.

ATTORNEY For the Sioux: That is Lone Wolf.

QUESTION By the Court: Right.

ATTORNEY For the Sioux: Lone Wolf tells us that Congress – if Congress determines that the reservation should be cut in half, Congress can come in and do it; it can do it without the consent of the Indians and it can do it in violation of the treaty. It is also a taking and when Congress does it, it has to pay for it.

Going even further, the attorney for the Sioux conceded that the United States government, and not his Sioux clients, was the actual owner of all Sioux lands and all other Indian lands as well:

QUESTION By the Court: And the question such as in the DeCoteau case and others as to whether or not the reservation has been terminated is a question of congressional intent. But here this was not an Indian reservation, this was – this belonged to the Sioux Nation, didn't it?

ATTORNEY For the Sioux: Well, this – all reservations, the beneficial ownership and all the incidence of ownership are in the Indian Tribe. The bare legal title is in the United States.

QUESTION By the Court: And that was true here, too?

ATTORNEY For the Sioux: Yes.

QUESTION By the Court: It was.

QUESTION By the Court: But this was more than aboriginal title. Even if originally it had aboriginal title it was recognized by treaty and it constituted a reservation.

ATTORNEY For the Sioux: That is correct, it was recognized by treaty twice over.

QUESTION By the Court: It was Federal land?

ATTORNEY For the Sioux: It was a Federal Indian reservation, recognized title and that –

QUESTION By the Court: That title was in the Sioux Nation and not in the Federal Government.

ATTORNEY For the Sioux: Well, all of the incidence of ownership; if you want to say who has all the incidence of ownership, it is the Sioux Nation. Where does the bare legal title rest, it is in the United States as it is with respect to all Indian lands. That is part of what established the trust.

But when the United States takes it – and Shoshone makes this quite clear – when the United States takes it, the Indians have a 100 percent interest for purposes of determining just compensation. You value it at full value.

Rather than arguing that the Sioux actually held title to the land and rather than arguing that the Sioux land rights should be constitutionally protected from confiscation by the federal government just as all other property is, the lawyer for the Sioux focused on the objective of money damages. (Ten percent of the damages awarded to the Sioux have gone to the lawyers as attorneys' fees – more than $10 million.)

In the same Sioux Nation case the lawyer for the United States agreed that the federal government had the legal power to abrogate the Sioux treaty and to take the Black Hills. The only disagreement was over the question whether the Fifth Amendment to the Constitution required the federal government to pay compensation.

Here the United States, again as self-appointed "trustee" or "guardian" of Indians and Indian property, made the perverse argument that the taking of the Black Hills had been for the Indians' own good.

In the United States written brief to the Supreme Court the government's position is blatantly racist:

> The Court long recognized that the Indian tribes have been incapable of prudent management of their communal property, and that the United States must undertake this duty as fee owner of tribal lands and pursuant to its power to deal with Indian affairs.
>
> A disposal of tribal property in the discharge of this responsibility to manage the property for the tribe's benefit is an act on behalf of the tribe and, in effect, a disposal by the tribe. A proper exercise of this power is no more a taking than would be a sale by the tribe itself, were it freed from historical disabilities. The Court of Claims was in error in declining to so treat the Act of 1877 by which the Black Hills were severed from the Great Sioux Reservation.

The same Deputy Solicitor General who penned those degrading words made equally scandalous statements during the oral argument in the Supreme Court:

QUESTION By the Court: Is there any relationship of sovereign to sovereign between the United States and any group of white people within our boundaries?

ATTORNEY For the United States: I think –

QUESTION By the Court: And the United States is not and never has been a trustee for any category of white people, have they?

ATTORNEY For the United States: I –

QUESTION By the Court: Comparable to the Indian relationship?

ATTORNEY For the United States: But that trustee relationship, Mr. Chief Justice, carries both obligations but also unusual powers, the power to dispose (of Indian property) against the will and without exercising the power of eminent domain –

QUESTION By the Court: There is no such power, comparable power over any white category?

ATTORNEY For the United States: That is –

QUESTION By the Court: These were all results to treaties in the first instance, were they not, these rights and duties and powers?

ATTORNEY For the United States: Well, this Court has held that independently of treaties the inherent situation of the Indian place them within the protection of the United States.

QUESTION By the Court: The Constitution itself recognizes Indian tribes as sovereigns, does it not?

ATTORNEY For the United States: Yes, but the Constitution perhaps also recognizes the dependent status of Indian tribes, their inability to alienate their land which accordingly, if it must be done in their interest, may occasionally have to be done against their will by their guardian.

* * *

ATTORNEY For the United States: I think the Court can find that the dealings were not wholly honorable and that results in a moral claim which would not bear interest and yet find that Congress was in good faith seeking to benefit the Sioux tribe at the time and accordingly there was an exercise of the Indian power and not of the eminent domain power. And, accordingly, no taking with the meaning of the Fifth Amendment.

As strange and illogical as it may be, the argument made by the United States is that it has extraordinary legal powers to seize and dispose of Indian lands – powers which it does not have over any non-Indian lands – because Indian nations and tribes are sovereign. An undefined and apparently never-ending "guardianship" or "trusteeship" is said to justify the exercise of that power when the federal government decides it is in the best interest of its Indian "wards" who are presumed to be incapable of determining their own best interest.

Given the arguments presented to the Court, and the broad concessions of federal owner-

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Exceptional lawyers argue Indian self-determination

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ship and power over Indian lands made by the lawyers for the Indians, it is no surprise that the Sioux Nation decision of the Supreme Court expressly approves of *Tee-Hit-Ton v. U.S.* (1955), the Supreme Court decision which categorically denies constitutional protection (including the Fifth Amendment right to compensation) to aboriginal Indian homelands which have not been expressly recognized by Congress through treaty or statute for permanent Indian occupancy.

The arguments made in Sioux Nation were close in tune with those presented twenty-five years earlier by the United States government in its brief in the Tee-Hit-Ton case in which it was successfully argued that the right of Indians to their aboriginal title homelands is "comparable to that of a mere licensee, e.g., a squatter on the public lands."

The Crow Indians recently learned the very real dnager in conceding that Indians are not in fact the owners of their lands and resources, that somehow the United States has come to own all Indian lands in trust for the Indians.

In the Supreme Court decision of *Montana v. United States* (1981), the Crow lost their legal fight to maintain their ownership of and control of fishing on the Big Horn River which flows through Crow territory. This territory, Crow land for some 400 years, had been guaranteed by treaty to the Crow people for their "absolute and undisturbed use."

The Court ruled that the river in Crow territory had been held in trust by the United States and that the United States had, by operation of a technical legal presumption, given that river to the State of Montana when that state was later created out of the public domain.

The attorneys for the Crow had stated that the river was held in trust by the United States and had thereby permitted the Court to completely avoid the central question in this and all other litigation over Indian lands and resources: By what legal right does the United States assert its ownership and its administrative power over Indian lands and resources?

In the latest Indian rights case, *Merrion and Amoco v. Jicarilla Apache Tribe*, the lawyers representing the Indians have again accepted and agreed to broad federal power over their clients. This case, which is pending before the Supreme Court, involves the issue whether Indian nations and tribes have the legal power to impose severance taxes on mineral extractions by non-Indian corporations from Indian territory.

It will likely set an important and far-reaching precedent for, as the Jicarilla Apache Tribe's lawyer argued to the Supreme Court on November 4, 1981, "one of the powers essential to the maintenance of any government is the power to levy taxes . . . we rely on the inherent sovereign power to tax."

After making this strong and central point, the same lawyer conceded, for reasons unknown, that Congress could simply take away his client's sovereign powers:

> ATTORNEY For the Jicarilla Apache Tribe: The tribal governments are dependent sovereign governments.
>
> They exist – their sovereign powers can be divested by Congress. But until Congress act, they retain those powers.

The attorney for the mineral companies and non-Indian interests agreed but argued in addition that Congress had already taken away the taxing powers which the Jicarilla Apache Tribe were asserting. Should the corporate and non-Indian interests lose this round, they will undoubtedly soon be in Congress asking Congress to divest the Indians of their taxing power, just as the Indians' own lawyer said Congress could do.

The lawyer for the United States government supported the Jicarilla argument that the Tribe had the sovereign power to tax, but he stressed the fact that the Jicarilla taxing ordinance had been approved by the Secretary of the Interior. He took the position that the Secretary had "residual powers" to disapprove and to refuse to implement any such Indian taxing ordinance which was not considered acceptable to the Secretary.

The message which these and many other lawyers are bearing to the Supreme Court and to other federal courts, is that Indian sovereign rights exist solely by legislative grace of the United States government. Even the right of Indian peoples to exist and govern themselves as separate peoples is said to be by virtue of a sort of federal license which may be revoked at the will of the United States Congress.

The lawyers who have made these concessions and who have taken such apparently disadvantageous positions can no doubt find legal precedents to support their arguments. But of the range of valid and practical legal arguments available, some lawyers regularly adopt positions which are least favorable to Indian interests, specially the long-range interests of Indian tribes generally.

It is, unfortunately, the exceptional lawyer who can be heard arguing today in federal courts that Indian peoples have fundamental rights to self-determination and to ownership and control of their lands and resources, rights which arise from the history, separate existence and will of sovereign Indian peoples, rights which cannot be lawfully divested or impaired by the United States or by any other sovereign.

Such argument is not far-fetched or difficult to conceive. It takes no special brilliance or creativity to fashion strong legal support for such argument from the early Indian rights decisions of Chief Justice John Marshall and from the body of constitutional law developed during the past several decades by advocates for civil rights, aliens' rights, women's rights, mental patients' rights, juveniles' rights, and so forth. And a growing body of international law (which is applicable in United States courts), developing human rights standards during the post-colonial era of the United Nations, is also available to support fundamental Indian rights.

Of course, an Indian tribe may deliberately choose in a particular case to adopt a compromising position which concedes broad federal power or which surrenders or declines to assert its sovereign powers. In such a case an attorney must accept his client's position. However, it is wholly unnecessary and improper for lawyers to continue the practice of making concessions of sweeping federal power over Indians and Indian property in general.

The most important work of Indian rights advocates is to challenge – and certainly never to embrace – decisions such as *Lone Wolf v. Hitchcock* (1903) which put the veneer of law and justice on naked federal political power over Indians. One federal judge has already written that Lone Wolf is the Dred Scott decision of federal Indian law, a decision as bad for Indian rights as the notorious mid-nineteenth century Supreme Court decision upholding slavery for blacks.

Neither Indian law, civil rights law nor international law is frozen in the age of Andrew Jackson or Teddy Roosevelt when the leading science, religion and politics of the United States and all white nations presumed the right of white peoples to assert dominion over all the non-white peoples of the world.

How could the United States government, a government of limited powers, defend today a direct legal challenge to its claim of unlimited, plenary

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Lawyers gave away rights

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power over Indians and Indian property? How could a government committed to democratic ideals deny that Indian relations with the United States must be based on agreement alone?

It should not be necessary to note that the ethical obligations of lawyers require that they zealously represent their clients, not whatever the lawyers consider to be in the best interest of their clients. Whenever Indians insist on their fundamental, sovereign rights, there is a legal, ethical duty which the Indians' lawyers must fulfill by zealously advocating those rights. If compromises must be made, it is the Indians and not the lawyers who are entitled to make them.

The totally unsatisfactory state of United States Indian law will continue until Indian peoples and others become aware of its failings and work to bring about the law reform which is so sorely needed. What is clear at this time is that many lawyers representing Indians have not even begun to fight the most crucial Indian rights battles. They have instead helped reinforce the discriminatory notion that Indians are subject to uniquely oppressive and virtually unfettered federal power. Until Indian peoples and the legal profession put an end to this practice, the future of Indian rights appears grim indeed.