

American Indians and the United States Constitution

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The United States Constitution provides that “Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.” It is no surprise that American Indian tribes are mentioned in our Constitution. Indian tribes have always played a major part in the non-Indian exploration and settlement of this country. When Christopher Columbus thought he had discovered the "New World" in 1492, it is estimated that 10-30 million native people lived in North America, that is, present day Mexico, United States, and Canada. These millions of people lived under governments of varying sophistication and complexity. These native governments were viable and fully operational political bodies which controlled their citizens and their territories and were an important factor in the development of the United States government we live under today.

The European countries that colonized North America dealt with tribal governments as sovereign governments, that is, as governments that had independent and supreme authority over their citizens and territories. Especially in the area of the present day United States, the European powers interacted with American Indian tribal governments through official diplomatic means. England, France, Spain, and other European countries negotiated with Indian tribes through official government to government council sessions and by entering treaties which recognized tribal governmental control over their territories. The European countries had a selfish motive perhaps for dealing with American tribes in this fashion. Europeans wanted to legitimize the transactions they made to purchase tribal lands. They wanted to make the transactions look

official and legal by buying Indian lands through governmental treaties so that other European countries could not contest or object to these land sales.

The United States adopted this tradition of dealing with Indian tribes as sovereign governments from the European powers. From the very beginning of its existence, the U.S. dealt with tribes on an official governmental and treaty making basis. Political involvement in Indian affairs was a very important part of governmental life in early America. Indian tribes were very powerful in the 1700s and early 1800s and were a serious threat to the new United States. Hence, the U.S. government was heavily involved in negotiating and dealing with tribes as part of its official policies. The United States ultimately negotiated, signed, and ratified more than 390 treaties with American Indian tribes. Almost all of these treaties are still valid today. The United States did not give tribes anything for free in these treaties. Instead, the treaties were formal governmental negotiations regarding sales of land and property rights that the tribes owned and that the United States wanted to buy. The United States Supreme Court stated in 1905 that U.S. Indian treaties were “not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.” Thus, while tribal governments sold some of their rights in land, animals, and resources to the United States for money, goods, and promises of peace and security, the tribes held onto or reserved to themselves other lands and property rights that they did not sell in the treaties. The United States Supreme Court has likened Indian treaties to contracts between “two sovereign nations.”

When the thirteen American colonies decided to rebel against England, they formed the Continental Congress to manage their national affairs. This Congress operated from 1774 to 1781 and dealt with tribes on a diplomatic and political basis. This Congress signed one Indian

treaty with the Delaware Tribe in 1778. The political interest of the United States at that time was to keep the tribes happy with the new American government and to keep Indians from fighting for the English in the American Revolutionary War. This Congress also engaged in diplomatic relations with tribal governments by sending envoys to the tribes bearing gifts and promises of peace and friendship to keep the tribes neutral in the United States' war with England.

The thirteen American colonies then adopted the Articles of Confederation in 1781 and convened a new Congress to manage their national affairs. This Congress also had to manage Indian affairs attempt to keep the tribes from fighting against the United States. The new Congress also sent diplomatic representatives to the tribes and promised friendship and peace, and ultimately it signed eight treaties with Indian tribes between 1781 and 1789, including treaties with tribes in the Iroquois Confederacy, the Cherokee Nation, the Shawnee Tribe and numerous other tribes. However, this Congress' power in Indian affairs was limited because the Articles of Confederation did not clearly give Congress the exclusive power to deal with tribal governments. Consequently, various states meddled in Indian affairs and even caused wars for example between tribes and Georgia, New York, and South Carolina because the states were encroaching on Indian lands. The problems caused by states getting involved in Indian affairs led many people to call for the formation of a new and stronger federal government wherein the exclusive power over Indian affairs would be placed in the hands of the national government and would be taken completely away from the states.

When the representatives of the thirteen states started drafting the United States Constitution, to form the United States government we now live under, the "Founding Fathers"

of this nation had to carefully consider the role of Indian tribes in the political arrangements of the nation. As James Madison pointed out, much of the trouble that England and the thirteen colonies had suffered with Indian tribes from the 1640's forward arose when individual colonists and colonial governments tried to take Indian lands. In those instances, the colonies and individual colonists would negotiate with tribes without the permission or the involvement of the English King or the American national leadership. The drafters of the U.S. Constitution tried to correct this problem by taking Indian affairs out of the hands of the states and individuals and placing the sole power to negotiate with tribes in the hands of the U.S. Congress. Thus, Indian governments and their citizens, and the United States relationship with tribes were addressed in the U.S. Constitution.

In Article I, the Constitution accomplishes the goal of excluding states and individuals from Indian affairs by stating that only Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" The U.S. Supreme Court has interpreted this provision to mean that Congress was granted the exclusive right and power to regulate trade and affairs with Indian tribes. The very first Congress formed under the new Constitution, in 1789-1791, immediately assumed this power. In the first five weeks of its existence, it enacted four statutes concerning Indian affairs. In 1789, the new Congress established a Department of War with responsibility over Indian affairs, set aside money to negotiate Indian treaties, and appointed federal commissioners to negotiate treaties with tribes. In July 1790, the first Congress passed a law which forbids states and individuals from dealing with tribes and from buying Indian lands. This law is still in effect today.

Indian tribes are also referred to, but are not expressly named, in Article VI of the Constitution where it is stated that all treaties entered into by the United States “shall be the supreme Law of the Land.” In 1789, the United States had entered about twenty-three treaties with foreign countries and had already entered nine treaties with different Indian tribes. The treaty clause of the Constitution, then, clearly provides that the federal treaties with tribal governments are the supreme law of the United States.

Individual Indians are also mentioned in the Constitution of 1789, in Article I, and again in the Fourteenth Amendment to the Constitution which was ratified in 1868. In counting the population of the states to determine how many representatives a state had in the House of Representatives, Indians were expressly not to be counted unless they paid taxes. In effect, Indians were not considered to be federal or state citizens unless they paid taxes. After the Civil War, when citizenship rights were extended through the Fourteenth Amendment to ex-slaves and to “[a]ll persons born or naturalized in the United States,” the Amendment still excluded individual Indians from citizenship and excluded them from being counted for congressional representation unless they paid state taxes. This demonstrates that Congress still considered Indians to be citizens of their own sovereign governments even in 1868 when the Fourteenth Amendment was adopted. This view was correct because it was not until 1924 that all Indians were made United States citizens. For many years after 1924, states were still uncertain whether Indians were also citizens of the state where they lived and in many states Indians were not allowed to vote in state elections.

American Indian tribes have played a major role in the development and history of the United States and have engaged in official, diplomatic governmental relations with other

sovereign governments from the first moment Europeans stepped foot on this continent. Indian tribes have been a part of the day to day political life of the United States and continue to have an important role in American life today. Tribes continue to have a government to government relationship with the United States and they continue to be sovereign governments with primary control and jurisdiction over their citizens and their territories. It is no surprise, then, that the relationship between Indian people, tribal governments and the United States is addressed in the United States Constitution.

The Doctrine of Discovery

From 1492 forward, European countries and the United States justified their dealings with the Indigenous peoples and Indian tribes in North and South America under the Doctrine of Discovery. Under this legal international law principle, the European country that first discovered a new area where Christian Europeans had not yet arrived could claim the territory as their own. This did not mean that Indians and tribal governments lost the right to live on their land or to farm and hunt animals on it but it did mean that Indians could only sell their land to the European country that “discovered” them and that they should only deal politically and commercially with that European country. In most situations, Europeans also enforced the Doctrine against themselves because they recognized and agreed to be bound by the principle that the discovering country earned a protectable property right in newly discovered territories. The audacity of one country “discovering” and claiming lands already occupied and owned by American Indians came from the idea that Christians and white Europeans were superior to other races and religions. When Europeans first came to the New World, they were not strong enough

militarily to just take the land from the Indian tribes. Thus, they entered treaties with tribes to make the transactions look legal and valid, and they bought the lands they wanted.

In expanding its control over the American continent, the United States also used the Doctrine of Discovery. As the U.S. Supreme Court held in 1823, in Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823), the United States acquired the sole right to buy lands from tribal governments under Discovery. Consequently, sales of land that Indians had allegedly made to persons other than to the United States government were held to be invalid. Tribes continued to have the right to use and occupy their lands but their commercial, diplomatic, and sovereign powers were restricted in that they could only sell their lands to the United States. The United States gained these rights under the Doctrine of Discovery from England and other European countries as the U.S. bought or acquired the Discovery rights of these European countries over various parts of the North American continent.

In upholding the U.S. power of Discovery over Indian tribes, the Supreme Court ignored its own opinion that Indians possessed natural rights to their lands. In fact, the Supreme Court refused to say why American farmers, “merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess” or to limit tribal rights. Instead, the Court relied on Discovery to limit Indian rights and increase the powers and rights of the United States.

To read more about Discovery, see Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (Westport CT & London: Praeger Publishers, 2006), hardback, or in paperback from the University of Nebraska Press in 2008.