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# AMERICAN INDIAN LAW REVIEW: PURPOSES AND GOALS REVISITED

Robert A. Fairbanks\*

As an Ojibwe law student at the University of Oklahoma in 1973, I became painfully aware that few lawyers, judges, legal scholars, or citizens appreciated, much less understood, the legal quagmire that Native American governments and individuals confront everyday. Moreover, that same year the ugly specter of racism and political deception haunting places like Sand Creek<sup>1</sup> and the Washita River<sup>2</sup> was reincarnated at Wounded Knee, South Dakota, giving rise to "a tense battleground reminiscent of the Indian wars of yesteryear."<sup>3</sup>

While understanding the expression of rage at Wounded Knee by Native American activists, I believed, perhaps naively, the law and legal process provided a reasoned approach to "red v. white" conflict resolution. I believed dedicated and resourceful Native American lawyers and legal scholars could engage successfully on the legal battlefield and gain, *inter alia*, respect for Native governments and treaty rights. To assist in the engagement, I, along with fellow law students,<sup>4</sup> founded the *American Indian Law Review*.

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1. Hirschfelder and de Montaña have described the Sand Creek Massacre as follows:  
In Colorado, Black Kettle's band of peaceful Cheyennes, confident they were safe from attack by militia, camped at Sand Creek, near Fort Lyon on Territorial Governor John Evan's authorization. On November 29, 1864, they were wantonly massacred by Colonel John M. Chivington, who had ordered his troops to "kill and scalp all, big and little," and his 100 day enlistees.

ARLENE B. HIRSCHFELDER & MARTHA KREIPE DE MONTAÑO, *THE NATIVE AMERICAN ALMANAC: A PORTRAIT OF NATIVE AMERICA TODAY* 16 (1993).

2. The Battle of the Washita has been described as follows:

The Battle of the Washita, an affair which occurred in early winter, as did all major conflicts with the Cheyenne (when the tribe had dispersed into bands), was the second instance of unprovoked military attack. On November 27, 1868, Black Kettle, surviving the Sand Creek affair, was settled along the Washita River in western Indian Territory with a small band of Cheyenne and Arapaho. There Colonel George Custer, commanding nine companies of the Seventh Cavalry, attacked at dawn while only a few Cheyenne warriors were in the camp. The soldiers killed an approximated nine men and 40 women and children; the women and children being vigorously pursued by a force led by a Major Elliot.

Robert A. Fairbanks, *A Discussion of the Nation-State Status of American Indian Tribes: A Case Study of the Cheyenne Nation*, *AM. IND. J.*, Oct. 1977, at 6 (vol. 3, no. 10).

3. C.D. Northcutt, *Prologue*, *AM. INDIAN L. REV.*, vol. 1, no. 1, at vii (1973).

4. Law students Hal William Ellis and Terrill V. Landrum, the second editor-in-chief, were

The primary objective was to provide a forum for scholarly analysis of "Indian law" issues. In 1973, I wrote that

[t]he purpose of the *American Indian Law Review*, a specialized law review devoted exclusively to Indian law, will be to provide a forum for scholarly writing in the areas of the law that particularly affect American Indians. . . . A distinguishing feature of the *Review* will be that the discussion will not be limited to any particular viewpoint. In fact, the *Review* will encourage expression of differing viewpoints concerning American Indian legal problems. . . .

. . . .  
The goal of the *American Indian Law Review* will be to satisfy [the] void in legal writing in the areas of law that affect American Indians and, collaterally, to assist in the alleviation of the numerous problems that confront American Indians because of their unique relationship with the federal and state governments and their different social and cultural backgrounds. By providing a forum for scholarly writing, the *Review* will assist in insuring that thorough analysis is given to American Indian legal problems.<sup>5</sup>

Measured by these standards, as founding editor-in-chief I am pleased to determine that over the course of the past nineteen volumes the primary objective has been handily achieved.

The range and depth of analysis by established scholars and professionals — legal and nonlegal alike — is, indeed, impressive. Besides standard law review fare, there have been important articles by educators,<sup>6</sup> historians,<sup>7</sup> geographers,<sup>8</sup> sociologists,<sup>9</sup> ethicists,<sup>10</sup> environmentalists,<sup>11</sup> anthropologists,<sup>12</sup> and political

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key participants in the laying of the foundation of the future success of the *American Indian Law Review*. Other law students who made significant contributions include Roy Don Folsom, Pamela Lou Aldridge, and Ryland Rivas.

5. Robert A. Fairbanks, *American Indian Law Review: Purposes and Goals*, AM. INDIAN L. REV., vol. 1, no. 1, at 3 (1973) [hereinafter Fairbanks, *AILR Purposes and Goals*].

6. See, e.g., Dean Chavers, *Indian Education: Failure for the Future*, AM. INDIAN L. REV., vol. 2, no. 1, at 61 (1974).

7. See, e.g., Arrell M. Gibson, *Constitutional Experiences of the Five Civilized Tribes*, AM. INDIAN L. REV., vol. 2, no. 2, at 17 (1974).

8. See, e.g., James M. Goodman & Gary L. Thompson, *The Hopi-Navaho Land Dispute*, 3 AM. INDIAN L. REV. 397 (1975).

9. See, e.g., William C. Cockerman & Morris A. Forslund, *Attitudes Toward the Police Among White and Native American Youth*, 3 AM. INDIAN L. REV. 419 (1974).

10. See, e.g., Rennard Strickland, *Take Us By the Hand: Challenges of Becoming an Indian Lawyer*, AM. INDIAN L. REV., vol. 2, no. 2, at 47 (1974).

11. See, e.g., Jon D. Erickson et al., *Monitored Retrievable Storage of Spent Nuclear Fuel in Indian Country: Liability, Sovereignty, and Socioeconomics*, 19 AM. INDIAN L. REV. 73 (1994).

12. See, e.g., John J. Bodine, *Blue Lake, A Struggle for Indian Rights*, AM. INDIAN L. REV.,

scientists.<sup>13</sup> Moreover, the debate about Iroquoian contributions to the United States Constitution was fascinating.<sup>14</sup> The Hawaiian-Native American comparative analysis was important because it revealed, inter alia, that original Hawaiians experienced the same sinister social and political forces that besieged the original mainland inhabitants.<sup>15</sup> All authors, I believe, have made important contributions to "insuring that thorough analysis is given to American Indian legal problems."<sup>16</sup>

I am even more pleased that some of the best contributions appearing in the first nineteen volumes is student work.<sup>17</sup> For example, the student comment on inherent Indian sovereignty appearing in the fourth volume was informative, comprehensive, and authoritative.<sup>18</sup> This work is, indeed, a primer for anyone new to the tribal sovereignty issue.

Successive editors have been innovative and have made significant contributions to the quality and viability of the *Review*. The establishment of the American Indian Law Writing Competition in 1978 was brilliant and resulted in several outstanding articles by law students from across the country. Perhaps the most notable is a first place note which dissects Congress' court-created plenary power over Indian affairs and finds cultural prejudice, transformed into legal principle, at the root of plenary power.<sup>19</sup>

There is one change, on the other hand, I find difficult to understand and accept. In 1992 the publication of the seventeenth volume introduced a new cover. The new cover featured a balanced scales of justice rather than the previously unbalanced scales. Perhaps the symbolism of the unbalanced scales

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vol. 1, no. 1, at 33 (1973).

13. See, e.g., Theodore Wyckoff, *The Navajo Nation Tomorrow — 51st State, Commonwealth, or . . .?*, 5 AM. INDIAN L. REV. 267 (1977).

14. Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323 (1989); Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295 (1990); see Renee Jacobs, Note, *Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers*, 16 AM. INDIAN L. REV. 497 (1991); Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133 (1993).

15. Richard H. Houghton III, *An Argument for Indian Status for Native Hawaiians — The Discovery of a Lost Tribe*, 14 AM. INDIAN L. REV. 1 (1989).

16. Fairbanks, *AILR Purposes and Goals*, *supra* note 5, at 3.

17. This is especially satisfying to me because in 1973, in addition to questioning the need for an "Indian" law review, the faculty voiced concern whether non-*Oklahoma Law Review* members were capable of "doing law review work." Notably, Drew Kershen, Joseph Rarick, and George Fraser were particularly supportive of a secondary objective of the *Review*: specifically, to give Native American law students research and writing experience similar to that enjoyed by *Oklahoma Law Review* members.

18. Jessie D. Green & Susan Work, Comment, *Inherent Indian Sovereignty*, 4 AM. INDIAN L. REV. 311 (1976).

19. Irene K. Harvey, Note, *Constitutional Law: Congressional Plenary Power Over Indian Affairs — A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117 (1982).

escaped the editors or, perhaps, they believed federal Indian law was no longer weighted against Native Americans. If the latter was the case, a review of the articles, notes, and comments published in the seventeenth volume, and since, would seem to suggest to even a casual observer that federal Indian law remains unfavorable to Native Americans.<sup>20</sup> This unfortunate symbolic change has not, however, diminished the substance, quantity, and quality of the work published.<sup>21</sup>

Looking forward, I perceive the legal challenges to Native American governments and individuals today to be just as great, if indeed not greater, than they were in 1973. Persistent attacks on Native American governmental sovereignty are certain given the current political climate; Bud Grant and his fishing companions will relentlessly cast about to undermine hunting and fishing treaty rights; and Newt Gingrich will pound his plenary gavel in unpredictable ways. Consequently, the role of the *American Indian Law Review* of "providing a forum for scholarly writing (and) insuring that thorough analysis is given to American Indian legal problems" remains significant, indeed.

While twenty-two years have lessened my naiveté somewhat, in large measure I remain persuaded that the law and legal process will provide a remedy for the wrongs inflicted on native-peoples of the North American continent by ethnocentric immigrants armed with the Bible and Manifest Destiny. It is my sense that the *American Indian Law Review* will continue to play an important role in revealing the path to those remedies. Therefore, I look forward to the next decade of publication of the *American Indian Law Review* with much anticipation.

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20. In reviewing the material published since 1992, I have found no suggestion that the fiction of plenary power has been weakened. Just as important, despite pronouncements by President Clinton at a meeting with tribal leaders in April 1994 at Washington, D.C., I have found no substantive indication that the inherent sovereignty of the various Native America governments has been recognized by the courts or the Chief Executive. For example, the U.S. Supreme Court implicitly reaffirmed congressional plenary power in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214 (1995). In regard to Indian tax cases, the Court said, "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced *absent clear congressional authorization*." *Id.* at 2220 (emphasis added).

21. In fact, the seventeenth volume, with over 700 pages, marked a significant increase in the number of pages published per volume.