

Where's the Government's Authority? . . . Revisited
by Darrel Smith

In the last CERA NEWS [on our website], I wrote an article asking why the protections of the Bill of Rights and the Fourteenth Amendment's guarantee of "the equal protection of the laws" shouldn't take precedence over federal Indian policy. Since that article, the Supreme Court has said, "This Court has consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to a citizen by that Amendment's Citizenship Clause limits the powers of the National Government as well as the States. Congress' Article I powers to legislate are limited not only by the scope of the Framers' affirmative delegation, but also by the principle that the powers may not be exercised in a way that violates other specific provisions of the Constitution." (Saenz v. Roe (1999)). So again my question is—why isn't the Fourteenth Amendment and the Bill of Rights protecting U. S. citizens on reservations? Especially since the purpose of constitutional amendments is to take primacy over policy, laws and the original Constitution.

Recently, I asked a knowledgeable Indian attorney his opinion of where the federal government gets its authority for Indian policy. He mentioned the War Powers. Historically, the War Powers did influence Indian policy because of the so called "Indian Wars." In contrast, however, Indians have now been U. S. citizens for over 75 years. Does the federal government really want to maintain that emergency War Powers permanently overrule the Bill of Rights and Fourteenth Amendment for Indian and non-Indian reservation citizens?

Indian apartheid activists sometimes defend the current situation by claiming that, "we have an inherent authority that predates the U. S. Constitution." This argument is intended to provide tribes with an authority even greater than the U. S. government's. By "we," however, they really mean their ancestors. Many of our ancestors, including at least the English, French, Dutch, Spanish and Mexicans, all had different prior legal statuses within this country. However, just as an amendment takes precedence over the original Constitution and a latter law takes precedence over an earlier law, a later status (U. S. citizenship) takes precedence over an earlier status. If it were otherwise, few modern countries could function as countries.

The Supreme Court in *Duro v. Reina*, 495 U. S. 676 (1990) Sect. IV decided that tribal members voluntarily gave up their Bill of Rights protections, and therefore their Fourteenth Amendment equal protections, when they consented to become tribal members. Most Indians were born U. S. citizens. The vast majority of enrolled tribal members were enrolled by their parents when they were very young children. Few if any of these children, or their parents, ever knew, or gave any kind of informed consent, to this reduction in their rights as U. S. citizens. The vast majority still don't know anything about this "voluntary consent." For the federal government to maintain that tribal members have given up their most precious citizenship rights without their knowledge or any safeguards is abhorrent.

And when did the hundreds of thousands of non-Indians who live on reservations unknowingly “voluntarily consent” to give up their equal citizenship rights? By maintaining these fabrications, the federal government is behaving unscrupulously and deserves the growing contempt that it is receiving in “Indian Country.”

Chief Joseph asked over one hundred and twenty years ago where the federal government got its authority for Indian policy. He didn't receive any credible answers then, and CERA still isn't getting any today. As the attorney said in my previous article, “they have pulled their authority out of thin air”. Like the joke about the four hundred pound gorilla who sits where he wants to sit, the federal government evidently does whatever it wants on reservations because it's the strongest entity around. It's not very funny. In fact, it's very threatening to those of us who live here.