

George Waters spoke on “The Relationship Between American Indian Tribes and the Federal Government” at the Lake Barcroft Village Quarterly Meeting on November 15, 2021. George currently consults for five tribes and has had his own firm for 36 years. He has worked with tribes for his entire professional life. His presentation co-mingled some personal anecdotal stories with a history lesson on the vacillating nature of federal/tribal relations since the colonial era.

A myth to be dispelled is that Indians are simply another minority group and wish to be treated as such. American Indians are citizens of Indian nations with whom the U.S. signed treaties which were then ratified by the U.S. Senate. In those treaties, the tribes ceded hundreds of millions of acres of land in exchange for much smaller reservations deemed as permanent tribal homelands, and which were supposed to be for their exclusive use and jurisdiction. The treaties, signed between two sovereign governments, also ensured that certain rights and authorities of tribes would be forever respected. Many aspects of the treaties were violated but some were adhered to, oftentimes at the insistence of federal courts. Perhaps the most flagrant treaty violations were the loss of lands within their reservations by homesteaders. He cited one example of a tribe in Montana that ceded over 12 million acres to the U.S. in their treaty in 1855, with the guarantee that their remnant 1.25-million-acre reservation would be for their exclusive use. Within 50 years of the treaty being signed, the U.S. Congress succumbed to pressure by those who coveted the reservation land and its natural resources. They “allotted” the reservation, gave each Indian 80 acres, and declared the rest of the reservation lands as surplus. Within a short period of time, the tribe and its members had lost 80% of the land it had been guaranteed and an equivalent loss in cattle and horses. Poverty was rampant. In more recent

times, that tribe has been able to pursue a land buy back program and owns about 65% of the reservation and has made great strides in turning around its economy.

Treaty right that has been protected – but only through the intervention of the federal courts and a number of supportive decisions by the US Supreme Court – are fishing rights for those fishing tribes who were able to convince the federal treaty signers to include them. This is especially true in the northwest where language in several treaties ensuring tribes could continue fishing and hunting at “usual and accustomed sites” (such as the right retained by the Yakama Nation in the Columbia River), have been interpreted to create a situation where those sovereign tribal governments are now co-managers of the resource together with the federal and state governments. Those rights will be a major part of the equation as the region determines what to do with massive dams in the Snake River that kill so many fish that major runs of salmon are now threatened with extinction.

He discussed various eras and policies where the federal government’s treatment of tribes varied dramatically, like a pendulum swinging from one side to another. During the Removal Era the Choctaw, Cherokee, Creek, Chickasaw and Seminole tribes from the southeastern U.S. were forcibly marched on the infamous “Trail of Tears” to what was supposed to be a new Indian country west of the Mississippi, only to have that land later become the state of Oklahoma. Many thousands of Indians died on the forced march.

He elaborated further on the Allotment Era during which ninety million acres of reservation land were taken from the tribes and given to homesteaders. This was

of course after the tribes ceded hundreds of millions of acres of land to the U.S. in order to ensure that they would at least have the reservation land for their exclusive use.

From 1945-68 during the Termination Era, the Congress severed the government-to-government relationship with 100 tribes basically abrogating the rights of the tribes and commitments that had been made to them.

The pendulum then swung back again, and the Termination Era ended in the late 1960s and early 1970s culminating in the enactment of the Indian Self Determination and Education Assistance Act, Public Law 93-638, which had been recommended to the Congress by President Richard Nixon. Termination thinking ended and "638" encouraged tribes to take over and manage federal programs themselves.

The biggest change in recent years has been the establishment of casino gambling on a large number of reservations. This began with the Seminole Tribe of Florida who established large high-stakes bingo halls and the Cabazon Tribe of California who added poker. A Supreme Court decision in 1987 stipulated that as sovereign units of government, states did not have civil regulatory authority over reservation gaming. In 1988 the U.S. Congress weighed in with the enactment of the Indian Gaming Regulatory Act (IGRA), statutorily confirming much of the Court's ruling but giving the states somewhat of a role as it required tribes to negotiate gaming compacts with state governments. Gaming revenue has allowed many tribes to prosper and provisions of IGRA have resulted in successful tribes rebuilding the entire infrastructure of their reservations from roads to schools to health care clinics and provide college scholarships to their members. The

Cherokee Nation of Oklahoma, for example, has had great success with gaming and is one the largest employers in the State.

Village members posed a series of questions.

What makes the relationship between the U.S. Government and tribes unusual?

The relationship is that of government to government. The Indian tribes now have tremendous power over what transpires on their own lands and as governments have the rights of taxation, policing, and the structure of their governments. Due to a very troubling Supreme Court decision known as the Oliphant case, Indian tribes have limited jurisdiction over non-Indians which has been problematic, particularly relative to law enforcement where the decision left voids in authority.

Some tribes have been able to utilize the Small Business Administration's 8(a) minority and disadvantaged business program and create businesses that are able to bid on government contracts.

Health concerns were formerly the bailiwick of the Bureau of Indian Affairs but in 1955 the Indian Health Service (IHS) was established under the Public Health Service in the Department of HEW (now HHS). Under the rubric of PL 93-638 and revisions to it, many tribes have taken over the day-to-day operations of on reservations hospitals and clinics and are often doing it more effectively than IHS was able to with federal employees.

There are now 574 "federally recognized" tribes including about 200 Alaska Native Villages. The size of their reservations varies greatly, from the Navajo lands which are the size of the state of West Virginia to small rancherias of not more than a few acres. The Navajo are the largest nation, the Cherokee the second largest.

The Pamunkey tribe of Virginia received federal recognition through an administrative process at the Bureau of Indian Affairs in 2015. Six other tribes in Virginia were recognized by the Federal government in 2018 upon the enactment of legislation supported by the Virginia congressional delegation.