A Potpourri of Treaties, Agreements, etc.

Good day. On November 18, 2021 the Governor of Virginia, Ralph Northam, signed into law an *executive order* which ensures that the State will engage in meaningful consultation with the seven federally-recognized Native nations in the region when State’s actions might have potential impacts to the environmental, cultural, and historic resources of the Native nations. The executive heads of various State agencies will now be required to “consult on a government-to-government basis with federally recognized Tribal governments” when their actions and decisions affect Tribal interests. The Secretary of the Commonwealth is required, with advice from the Native nations, to designate an Ombudsman for Tribal Consultation to ensure that these consultations are engaged in.

This is an important, if insufficient response on the part of Virginia, as it seeks to improve its political relationship with Nations it has been engaged with since 1607. Executive orders have been used by *state* and *federal* officials for many years to make policy, establish reservations, and create opportunities and the institutional structures for more meaningful dialogue between Native folk and non-Native governments. In fact, several U.S. presidents in the late 20th and early 21st centuries (Clinton, Bush, Obama, and Biden) have utilized executive orders to fortify political relations with Tribal governments based on consultation and coordination (though not consent) and to address key issues like Tribal education, access to eagle feathers, and sacred sites.

The earliest types of political arrangements and the ones with the most legal, political, and cultural force are ratified and proclaimed bilateral and multilateral *treaties* that were negotiated between the U.S. and several hundred Native nations from 1778 to 1871. Treaty-making, from the official position of the federal government, ended in 1871, although almost immediately *agreements* began to be made with Indigenous leaders, continuing on until 1911. The only legal difference between a treaty and an agreement, according to Felix Cohen, the so-called father of federal Indian law, is that agreements “were ratified by both houses of Congress instead of by the Senate alone.”[[1]](#endnote-1)

The scholarly work containing the most comprehensive collection of diplomatic documents that Native nations engaged with is the two-volume study compiled and edited by Vine Deloria, Jr. and Raymond J. DeMallie titled *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979*, published by the University of Oklahoma Press in 1999. In the introduction, the compilers established sixteen categories which they say “comprehensively cover the diplomatic engagements of Indian tribes from approximately June 1775 until the present.”[[2]](#endnote-2)

The categories include many familiar types of treaties and quite a few that most non-experts will be unfamiliar with. Here is a sample of the categories (each with its own chapter): 1. Revolutionary War and Articles of Confederation treaties with Indian nations. 3. Treaties made with Texas when it was a republic. 4. Treaties made with the Confederate States of America. 5. Treaties made between Indian nations. 8. Ratified agreements made with Indian nations. 10. Treaties and agreements rejected by the Indian nations. 11. Railroad agreements. 13. Land grants given to private individuals by Indian nations. 16. Miscellaneous treaties, agreements, and contracts made between Indian nations and a variety of other parties, including congressional ratification of the acts of tribal governments.

In 1994 William Clinton created a *memorandum* in which he and the executive departments and agencies under his leadership pledged to support treaties, recognize Tribal sovereignty, and adhere to a more collaborative approach in political dealings with Native nations. Clinton sought to assure Tribal leaders that his administration would operate within a government-to-government relationship with federally-recognized Native nations. Obama also utilized a memorandum to build upon Clinton’s policy based on consultation and collaboration.

*Apologies* have also been utilized by the federal government in an effort to bring a measure of justice and closure to Indigenous peoples. From the U.S. official apology to Hawaiian Natives for the illegal annexation of their lands in 1993, to the apology issued to Japanese Americans for their forced internment during World War II. Interestingly, African Americans have yet to receive an apology despite centuries of slavery and Jim Crow laws.

Native nations, while provided opportunities to sue the federal government for violations of treaties via various claims processes, did not receive an official apology for their ill treatment by the U.S. until 2009 when President Obama, as part of a defense appropriation bill, signed into law a watered-down version of a resolution authored by Senators Sam Brownback (R-KS) and Byron Dorgan (D-ND). The perfunctory nature of the process, lack of publicity, and concluding disclaimer that seemed to contradict the sentiment of the statement upset many in Indian Country.

Finally, *negotiated settlements* have become a common instrument used by the federal government to address critical issues like land claims, water rights, restoration of federal recognition for an Indigenous group, railroad rights-of-way, etc. Two primary goals emerge from such settlements: the U.S. attempts to repair damages for old wrongs and a proposal for future cooperative action is established. The first goal of correcting historic wrongs, found mostly in the land-claims settlements, has been fairly generous but has been used primarily for Indigenous groups not previously related to the federal government in a formal manner (i.e., Alaskan Natives, the Passamaquoddy, Penobscot, and Maliseet of Maine, the Narragansett of Rhode Island, the Wampanoag of Massachusetts, etc.). Both Vine Deloria, Jr. and Daniel McCool,[[3]](#endnote-3) have referred to negotiated settlements as modern-day equivalents of treaties.

Native peoples and prominent Native activists like Deloria, Hank Adams, and many others have argued since the 1960s that until and unless the formal treaty process is revived Native nations will continue to be at a political, legal, and constitutional disadvantage in relation to other racial and ethnic groups. This is because Indigenous peoples remain extra-constitutional polities, having never been formally incorporated into the federal constitutional structure and therefore still not generally subject to the U.S. Constitution or state constitutional provisions.

As Deloria and Wilkins noted in *Tribes, Treaties, and Constitutional Tribulations*, “[t]he problem is that unless the treaty-making process is continued in some formal manner, the treaty-making clause does not apply and there is no protection under the Constitution for Indian tribes at all. Tribal rights of self-government predate the Constitution and derive not from the American people or the Constitution but from the inherent sovereignty of a given tribe.”[[4]](#endnote-4) While “Indian Tribes” are explicitly recognized in the U.S. Constitution under the Commerce clause, without the authority to negotiate treaties, they are in a perpetual defensive state having to respond to the policies and laws of state and federal lawmakers but without any means to formally adjust their political standing vis-à-vis those bodies. As U.S. Supreme Court justice John Paul Stevens stated in matter of fact terms in the 1982 decision *Merrion v. Jicarilla Apache Tribe*, “Tribal sovereignty is neither derived from nor protected by the Constitution.”[[5]](#endnote-5)

Until something changes structurally, this constitutional reality leaves Native nations in a tenuous position at best.

1. Felix S. Cohen, *Handbook of Federal Indian Law* (reprint ed. Albuquerque, NM: University of New Mexico Press, 1972): 67. [↑](#endnote-ref-1)
2. Deloria & DeMallie, *Documents of American Indian Diplomacy*, p. 4. [↑](#endnote-ref-2)
3. See especially McCool’s book, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (Tucson, AZ: University of Arizona Press, 2002). [↑](#endnote-ref-3)
4. (Austin, TX: University of Texas Press, 1999): 70. [↑](#endnote-ref-4)
5. p. 168. [↑](#endnote-ref-5)