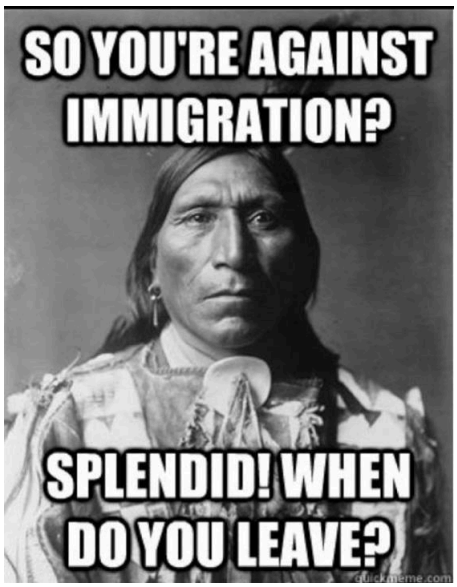

CURRENT IMMIGRATION LAWS AS VIEWED IN THE NATIVE AMERICAN CONTEXT

(*An Opinion by Judge Silver Cloud Musafir*

based on the rule of law)

THE END OF THE BEGINNING

Be mindful of Article 1, section 8, clause 4 of the U.S. Constitution: *The Congress shall have Power . . . To establish an uniform* ***Rule*** *of Naturalization, and uniform* ***Laws*** *on the subject* of Bankruptcies throughout the United States.

There is a *Rule* of Naturalization and *Laws* for Bankruptcies. Isn't that odd? Why not Laws for Naturalization. Are we to believe that the Committee on Detail allowed this oversight deliberately, implied or meant that a Rule and a Law did not mean the same thing. We Indians and our tribes are the cause and the effect. We adored Nature. We lived with Nature. We needed no Laws except for a Code of Conduct. And then, the Europeans found us in our Paradise. *Causa causae est causa causati* – the cause of the cause

is the cause of the effect.

(The Committee on Detail was established by the United States Constitutional Convention on July 24, 1787 to put down a draft text reflecting the agreements made by the Convention up to that point, including the Virginia Plan's 15 resolutions. It was chaired by John Rutledge, and other members included Edmund Randolph, Oliver Ellsworth, James Wilson and Nathaniel Gorham. We are told that these were some of the "movers and shakers" who birthed our Constitution. The Convention adjourned from July 26 to August 6 to await the report of this committee. This report, when made, constituted the first draft of the US Constitution and much of what was contained in the final document was present in this draft.)

I can imagine the enormous task at hand, but maybe the Committee on Detail did not want to use the word 'law' because no uniform rules or laws dealing with immigration and naturalization existed in 1787. They knew they were in America as colonists by the King's grant (*ex donatione regis*), not by immigration or naturalization laws and rules of the thirteen colonies, or international law by any stretch of the imagination. It would be interesting to find such royal immigration grants conferred on Columbus, the conquistadores, the Pilgrim Fathers, and other explorers and adventurers who came to our shores without permission or consent from Indian tribes..

Or maybe, the framers and realized that this was all Indian country, and that they had no legal right to make laws in someone else's land. After all Indian tribes were considered foreign nations in international law which necessitated treaty-making between a superior and a less superior sovereign.

CASES THAT MATTER

In *Nishimura Ekiu v. United States,* 142 U. S. 651, 142 U. S. 659, the Court, in sustaining the action of the Executive Department, putting in force an act of Congress for the exclusion of aliens, said:

> "It is an accepted maxim of *international law* that every sovereign nation has the power, as *inherent in sovereignty*, and essential to self-preservation, *to forbid* the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the National Government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the Government, and may be exercised either through treaties made by the President and Senate or through statutes enacted by Congress." (emphasis added)

The aliens referred to in *Nishimura Ekiu* can apply to the Europeans who came to our lands, settled here, and made laws to "legally" take our lands from us. As Indian tribes and separate sovereigns, international law acknowledges our inherent sovereignty. It then follows that we have a say as a sovereign nation as to who is or is not allowed in their country even though there were no colonial immigration laws except for the King's grant? It has been 217 years. Shouldn't the Indian tribes have a unequivocal say in who is to be allowed into Indian country notwithstanding the United States of America. Should we not insist on enforcing our laws?

Emmerich de Vattel, a Swiss jurist (1714-1767), whose influential treatise *Le Droit des gens* published in 1758 (The Law Of Nations), played a significant role in matters of equality and liberty is eloquently quoted in the American Declaration of Independence, says:

> "Every nation has the *right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury*. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner. . . . Thus, also, *it has a right to send them elsewhere*, if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates." (Vatt. Law Nat. lib. 1, c. 19, §§ 230, 231) (emphasis added)

Manifest injury owing to Manifest Destiny is blatantly evident since the westward tsunami across the Appalachians could not be controlled or regulated notwithstanding the hundreds of treaties entered into between Indian tribes and the US government to protect their lands. Demography trumped diplomacy as the White House and Congress looked on helplessly. European settlers brought their illnesses and diseases that our People had no immunity for, and gradually these maladies took its toll. They forced Christianity upon us to civilize us as though we had none.

Which court of conscience or justice do we take this to?

Joseph L.E. Ortolan (1802-1873), a French jurist says:

> "The Government of each State has always the right *to compel* foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory *is matter of pure permission*, of simple tolerance, and creates no obligation. The exercise of this right may be subjected,

> doubtless, *to certain forms by the domestic laws* of each country; but the right exists nonetheless, universally recognized and put in force. In France, no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power." (emphasis added)

Ortolan, Diplomatie de la Mer, (4th Ed.) lib. 2, c. 14, p. 297. No tribal consent was ever recorded when Europeans first set foot in Indian country. They just came and took what they could impelled by greed for precious metals.

Sir Robert Phillimore (1810-1885), a British judge and politician says:

> "It is a *received maxim of international law* that the government of a State *may prohibit the entrance of strangers into the country*, and may, therefore, regulate the conditions under which they shall be allowed to remain in it, or may require and *compel their departure* from it." (emphasis added) 1 Phillim. Int.Law, (3d Ed.) c. 10, § 220.

Can we ask these intruders who settled here, made laws, and choked us till now to remain and let us alone, or ask them to leave as is our right under international law? We are constitutionally asphyxiated.

To repeat the careful and weighty words uttered by Mr. Justice Curtis in delivering a unanimous judgment of the U.S. Supreme Court upon the question what is **due process of law**:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that *we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity or admiralty, nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a*

> *subject for judicial determination.* At the same time, there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."
>
> *Murray v. Hoboken, Co*., 18 How. 272, 59 U. S. 284.

By the law of nations, doubtless, aliens residing in a country with the intention of making it a permanent place of abode acquire, in one sense, a domicile there, and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vatt. Law Nat. lib. 1, c. 19, § 213; 1 Phillim. Int. Law, c. 18, § 321; Mr Marcy, in *Koszta's Case,* 2 Whart. Int.Law Dig. § 198. *See also Lau Ow Bew v. United States,* 144 U. S. 47, 144 U. S. 62; Merl.Repert. "Domicile," § 13, quoted in the case above cited, of *In re Adam,* 1 Moore P.C. 460, 472, 473. (emphasis added)

The aliens from Europe, beginning with Columbus, Cortez, Balboa, Hernando, and others who came in hordes to the New World as settlers and immigrants, never sought the consent of Indian tribes. One can suppose that *inter arma enim silent leges* – in the clash of arms the law is silent. Might is right. Our bows and arrows were no match to their superior arms.

> "*The writers upon the law of nations distinguish between a temporary residence in a foreign country for a special purpose and a residence accompanied with an intention to make it a permanent place of abode.* The latter is styled by Vattel 'domicile,' which he defines to be 'a habitation fixed in any place, with an intention of always staying there.' Such a

> person, says this author, becomes a member of the new society at least as a permanent inhabitant, and is a kind of citizen of the *inferior order from the native citizens*, but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicile, he continues, is not established unless the person makes sufficiently known his intention of fixing there, either tacitly of by an express declaration. Vatt. Law Nat. pp. 92, 93. (emphasis added)

Can we consider all these "United States citizens" inferior to us under international law? If they are inferior, shouldn't they be asking us permission to stay permanently?

Hugo Grotius (1583-1645) a Dutch jurist who is considered the father of international law, nowhere uses the word 'domicile,' but he also distinguishes between those *who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause.* The former he denominates *'strangers,' and the latter, 'subjects*.' (emphasis added)

So, we are saddled with aliens who, under international law, are subjects or strangers even though they spawned generations of their progeny.

The rule is thus laid down by Sir Robert Phillimore:"

> "There is a class of persons which *cannot be, strictly speaking, included in either of these denominations of naturalized or native citizens, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode in another.* These are domiciled inhabitants. They have not put on a new citizenship through some formal mode enjoined by the law or the new country. They are *de facto,* though not *de jure,* citizens of the country

> of their domicile." 1 Phillim. Int.Law, c. 18, p. 347. (emphasis added).

Need we say more as to the immigration rights of all these “US citizens’?

In the *Koszta Case*, it was said by Secretary Marcy:

> "This right to protect persons having a domicile, though not native-born or naturalized citizens, *rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard.* Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and, if he breaks them, incurs the same penalties. He owes the same obedience to the civil laws. His property is, in the same way and to the same extent as theirs, liable to contribute to the support of the Government. In nearly all respects, his and their condition as to the duties and burdens of Government are undistinguishable."2 Whart. Int.Law Dig. § 198. (emphasis added)

One can assume that Catholics and Jews permanently residing in the United States owe no allegiance to the Vatican or Israel, respectively. Shouldn’t the Native Code of Conduct be inducted in the hall of fame for law and justice as well since all law was imported from Europe.

And in *Lau Ow Bew v. United States,* 144 U. S. 47, 144 U. S. 61, this Court declared that,

> "*by general international law, foreigners who have become domiciled in a country other than their own acquire rights, and must discharge duties, in many respects the same as possessed by and imposed upon the citizens of the country, and no restriction on the footing upon which such persons*

stand by reason of their domicile is to be presumed."

Indeed, there is force in the contention of counsel for appellants that these persons are "**denizens**", within the true meaning and spirit of that word as used in the common law. The old definition was this:

> "A denizen of England by letters patent for life, entail or in fee, whereby he becomes a subject in regard of his person."*Craw v. Ramsey,* Vaughan 278.

And again:

> "A **denizen** is an alien born, but who has obtained *ex donatione regis* (by the King's grant) letters patent to make him an English subject. . . . A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both of them."1 Bl. Comm. 374.

In respect to this, after quoting from some of the early Constitutions of the States, in which the word "denizen" is found, counsel say:

> "It is claimed that the appellants in this case come completely within the definition quoted above. They are alien born, but they have obtained the same thing as letters patent from this country. *They occupy a middle state between an alien and a native.* They partake of both of them. They cannot vote, or, as it is stated in Bacon's Abridgment, they have no 'power of making laws,' as a native-born subject has, nor are they here as ordinary aliens. An ordinary alien within this country has come here under no prohibition and no invitation, but the appellants have come under the direct request and invitation, and under the 'patent,' of the federal Government. They have been guarantied 'the same privileges, immunities, and exemptions in respect to . . . residence' (Burlingame Treaty, concluded July 28, 1868) as that enjoyed in the United States

> by the citizens and subjects of the most favored nation. They have been told that if they would come here, they would be treated just the same as we treat an Englishman, an Irishman, or a Frenchman. They have been invited here, and their position is much stronger than that of an alien, in regard to whom there is no guaranty from the Government, and *who has come not in response to any invitation, but has simply drifted here because there is no prohibition to keep him out. They certainly come within the meaning of 'denizen,' as used in the Constitutions of the States."* (emphasis added)

But, whatever rights a resident alien might have in any other nation, here, he is within the express protection of the Constitution, especially in respect to those guaranties which are declared in the original amendments. It has been repeated so often as to become axiomatic that this Government is one of enumerated and delegated powers; and, as declared in Article 10 or the amendments:

> "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." Does “people” include Native Americans in the wake of the Snyder Act?

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The Governments of other nations have elastic powers. Ours are fixed and bounded by a written Constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this

Constitution, was not destitute of examples of the exercise of such a power, and its framers were familiar with history, and wisely, and it seems to me, they gave to this Government no general power to banish. *Banishment may be resorted to as punishment for crime, but among the powers reserved to the people, and not delegated to the Government, is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.* (emphasis added)

Thus far, we can see that there are dozens of sanctions and punishments that Native Americans ought to mete out to these denizens who have never been contrite except to invent and unleash such legal sarcasms as “plenary power of Congress,” “trust relationship,” “domestic dependent wards with a limited sovereignty,” “Manifest Destiny,” “discovery and conquest,” among other things.

Profound and wise were the observations of Mr. Justice Bradley, speaking for the court in *Boyd v. United States,* 116 U. S. 616, 116 U. S. 635:

> "*Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches, and slight deviations from legal modes of procedure*. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and *against any stealthy encroachments thereon*. Their motto should be *'obsta principiis*.' (Resist the first advances.) (emphasis added).

By stealth, these denizens deprived us our very own wealth and health. But, we had no militia, no standing army, no resources with

which we could thwart the encroachment in friendly terms.

As said by the U.S. Supreme Court, speaking by Mr. Justice Matthews, in *Yick Wo v. Hopkins,* 118 U. S. 366, 118 U. S. 369:

> "When we consider the nature and the theory of our institutions of Government, the principles upon which they are supposed to rest, and review the history of their development, *we are constrained to conclude they do not mean to leave room for the play and action of purely personal and arbitrary power*. . . . The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to man the *blessings of civilization under the reign of just and equal laws*." (emphasis added)

These denizens who are here permanently used law and justice to suppress, oppress and depress us for the last 217 years. None of the principles of law, nice doctrines, maxims, axioms, tenets and narrow decisions has been of any lasting hope for us.

> “There is a great deal of confusion in the use of the word ‘sovereignty’ by law writers. *Sovereignty or supreme power is in this country vested in the people, and only in the people*. By them certain sovereign powers have been delegated to the Government of the United States, and other sovereign powers reserved to the States or to themselves. This is not a matter of inference and argument, but is the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the General Government. That Amendment declares that "that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." When, therefore, power is exercised by Congress,

> authority for it must be found in express terms in the Constitution, *or in the means necessary or proper for the execution of the power expressed*. If it cannot be thus found, it does not exist. (*Fong Yue Ting v. United States*, 149 U.S. 698(1893)) (emphasis added)

The people of the United States pride themselves to be sovereigns because there is no monarch here to render them "subjects." When you appear in court *sui generis* to defend your rights as a sovereign, the judge will immediately consider you a crackpot, an extremist, a zealot, maybe a bigot, or worse, label you an "enemy of the state." You will be subjected to intense scrutiny by the FBI and other agencies of the government.

CAN NATIVE AMERICAN TRIBES ADOPT, NATURALIZE AND BESTOW CITIZENSHIP UPON FOREIGNERS?

All said and done, we have international law favoring us. Let's take a look at some decided cases and see where we can, and ought, to go from here:

1. "A tribe's right to define it's own membership for tribal purpose has long been recognized as central to it's existence as an independent political community. A tribe is free to maintain or establish its own form of government. This power is the first element of sovereignty. Tribal government need not mirror the U.S. government but, rather, may reflect the tribe's determination as to what form best fits its needs based on practical, cultural, historical or religious considerations."

Smith v. Babbitt, 875 F.Supp. 1353,1360 (D. Minn. 1995);

Santa Clara Pueblo v. Martinez 436 U.S. 49, 72, n.32 (1978);

United States v. Wheeler, 435 U.S. 313, 322 n. 18 (1978);

Roff v. Burney, 168 U.S. 218 (1897)

Cherokee Intermarriage Cases, 203 U.S. 76 (1906);

Native American Church v. Navajo Tribal Council, 272 F. 2nd 131 (10th Cir. 1959)

Chapoose v. Clark, 607 F. Supp 1027 d. Utah 1985 aff'd 831, Fed 931 (10th Cir. 1987)

2. "**Unlawful aliens** have long been **recognized** as persons guaranteed 5th & 14th Amendments due process of law."

Yick Wo v. Hopkins, 6 S.Ct. 1064 (1886)

Wong Wing v. U.S., 16 S.Ct.977 (1896)

Shaughnessy v. Mezei, 73 S.Ct. 625 (1953)

Mathews v. Diaz, 96 S.Ct./ 1883 (1976)

Plyler v. Doe, 102 S.Ct. 2382 (1982)

3. If an individual is recognized as an Indian by the individual's tribe or community, he satisfies the criterion of being an Indian.

United States v. A.W.L. 117 F. 3d 1423 (8th Cir. 1997);

Ex parte Pero, 99 F.2d 28 (7th Cir. 1938);

United Stets v. Rogers, 45 U.S. 567, 572-573 (1846).

4. These "unlawful aliens" can be adopted or admitted as Enrolled Tribal Members under the Indian Civil Rights Act of 1968; and the Indian Self-Determination Act of 1994. When federal courts pretend to tax their minds over this issue they usually shove it aside and say this is a "political question" which only the legislature or the president can solve. But, in hundreds of cases, these federal courts, and the U.S. Supreme Court, have interfered

in political matters. As Associate Justice Stephen Breyer says in his book *Making Our Democracy Work*, "a court that acts "politically" plays with fire." (p. 45)

5. After Sergio Garcia, an "illegal undocumented alien" was allowed to practice law in the State of California after having passed the California bar examinations, I think we have great hope and promise for issuing qualified persons with Enrolled Tribal Membership status. See the judgment from the California Supreme Court **ISSUED IN JANUARY 2014**.

(Read the decision of the California Supreme Court here).

The State of California, situated in Indian country according to 18 U.S.C. Section 1151, tweaked, massaged and cajoled federal immigration law into state law to allow an undocumented alien to practice law in California. The usual rumor is that immigration is a federal matter. Arizona and California, cheated out of Mexico during the James K Polk watch in the 1840's, decided to do their own thing regarding undocumented aliens.

Logic, reason and plain common sense dictate that while these denizens helped themselves to do whatever they wanted with political football to boot, it is up to Native Americans to become wary of who we allow into (our) Indian country. We must have a say in immigration although we are not represented in Congress as a distinct political community. Just because these denizens "made laws" does not make them right all the time.

With the recent five-prisoner exchange for Sgt. Bowe Bergdahl who was a voluntary captive of the Taliban in Afghanistan, we Native Americans shudder at the thought of what these five Gitmo enemy combatants may plan against Indian country. We have some ideas, too, as to how we can contain the unpredictable proclivities of dedicated jihadists.