

HOW CONGRESS SNATCHED THE POWER TO SEIZE LAND

by

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You have to hand it to Senate Majority Leader Harry Reid (D-NV). His soft-spoken demeanor and reputation for decorum continue to survive his ad-hominem vitriol like the following,¹ said about rancher, constituent and grandfather Cliven Bundy and friends. "They're nothing more than domestic terrorists." In case you didn't hear that bromide the first time, Reid doubled down. "I repeat: what happened there was domestic terrorism." Even the land dealers looking on from the BLM Hold 'Em table looked shocked but Reid remained unapologetic.² It is hard to believe all this has erupted over disputed desert "grazing" lands that makes the Sahara Desert look fertile. Bundy claims he has legal precedent, tradition and the Constitution on his side. The BLM with lead singer Reid as their frontman claims the edict of a federal judge is clear and final: the land belongs to Uncle Sam and Bundy needs to pay his "federal grazing fees", in arrears since 1993, or move his cattle elsewhere. An analysis of the situation will reveal that Bundy is more correct than not and bring into question just why the Federal Leviathan owns any land to start with. Was that the Founding Fathers' idea or, like most federal acts of aggression, the work of post-Lincoln "industrialists"?

To unravel this mystery, we'll have to put on our Sherlock Holmes caps, arrange the facts then perform some deductions, this should be fun. Let's start with the basics, under what Constitutional power is Congress enumerated to own lands? In Article I, Section 8 we find the first two instances.

CONSTITUTION NARRATOR VOICE

*To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority **over all Places purchased** by the Consent of the Legislature of the State **in** which the Same shall be, **for** the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."*

MIKE CHURCH

Then skipping ahead to Article IV Section 3,

Clause 2 we find the third instance.

CONSTITUTION NARRATOR VOICE

"The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the united states; and nothing in this constitution shall be so construed as to prejudice any claims of the united states, or of any particular state."

MIKE CHURCH

The first clause is clearly written so that Congress can manage what is today, Washington, D.C. and the specific locations of military forts, naval bases, naval ports and any other government installation like the new [NSA data-center monstrosity](#)³ recently erected in the Utah desert (although it is dubious to claim that the NSA is carrying out an enumerated power and has a claim to that land). It is in the third instance that the story starts to become complicated. Were the Framers referring to a specific territory that then belonged to the United States under the Confederation Union or were they referring to any land that could be purchased or acquired and then become U.S. territory? The short answer is the Framers were referring specifically to the recently ratified Northwest Ordinance governing the Northwest Territory which is known to us today as Wisconsin, Ohio, Michigan, Indiana, Illinois and a part of Minnesota. The much maligned government under the Articles of Confederation had passed the act after years of debate and negotiation and no one wanted to see the fruits of that labor rendered moot under the newly proposed Constitution. We have strong evidence of this from the Virginia Ratifying Convention of June, 1788. Future President James Monroe went so far as to claim that the Constitution wasn't needed because

JAMES MONROE

"...this great source of public calamity (the Northwest Territory) has been terminated without the adoption of this [constitution.]"⁴

NARRATOR MIKE CHURCH

James Madison's right hand man at that convention, George Nicholas, got into a heated debate with Patrick Henry over the question of Congress abusing the Article IV power to regulate territories by grabbing "western lands" for a yet unspecified use. Nicholas said this was not

possible because

GEORGE NICHOLAS

"as to the territory of the United States, the power of Congress only extended to make needful rules and regulations concerning it... that the grant of **those lands** to the United States was for the general benefit of all the states."⁵

NARRATOR MIKE CHURCH

This is a clear and direct reference in the first tense to the Northwest Territory. But, if there remains any doubt, on Wednesday, 18 June, 1788 Colonel William Grayson pushed Nicholas on the President and Senate's power to make treaties. That the power might be adjoined to the Article IV power over treaties and thus a majority of 3/4 of the Senate could conspire to grab land for their own benefit that might benefit a state adjoined to the territory in question. Grayson bought Nicholas's explanation and stated to the convention his understanding that the Territory clause

COLONEL WILLIAM GRAYSON

"...related solely to the back lands **claimed by the United States** and different states. **This clause was inserted for the purpose** of enabling Congress to dispose of, and make all needful rules and regulations respecting, the territory, or other property, **belonging** to the United States."⁶

NARRATOR MIKE CHURCH

Before Grayson closed his remarks he reiterated what the Federalists were assuring the Convention about the Article IV Territory clause.

COLONEL WILLIAM GRAYSON

"Its **sole intention** was to obviate all the doubts and disputes which existed, under the Confederation, **concerning the western territory** and other places in controversy in the United States."

NARRATOR MIKE CHURCH

In other words, the Northwest Territory would have to be included in the new union's charter because the member states of the new compact, The Constitution, had already agreed to an equitable distribution of that land. This should answer the question of why Congress was granted a territory power in the Constitution, it clearly was, and, like the other enumerations, the power was

limited and specifically was meant to apply to the Northwest territory. I must now offer a disclaimer to the reader that your humble correspondent has reached the same conclusion on the intention of the territory power reached by Justice Taney in the infamous Dred Scott case. Taney's decision, properly read, was not entirely based upon race, but was based upon the observations made above over the extent of the power granted to Congress by Article IV's "territory clause." Taney wrote, in part.

JUSTICE TANEY

*"The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but, in the judgement of the court, that provision had no bearing on the present controversy, and **the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States,** and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more."*⁷

NARRATOR MIKE CHURCH

I could wrap up the discovery of the intent of the territory power there but let's cite another Constitution caveat that reinforces the plain language and meaning of the Territory clause, the Thirteenth Amendment. That amendment was ratified on the 6 December, 1865, after a years long struggle to gain it's passage in Congress.

CONSTITUTION NARRATOR VOICE

*"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, **or any place subject to their jurisdiction.**"*

MIKE CHURCH

This is a key point to recognize. Taney had ruled Congress had no power to forbid slavery over the territories of the United States because they had no legislative power over those lands. The 38th Congress is recognizing this and granting that

power through the 13th Amendment viz Taney's definition of the Territory clause is correct. Another way to put this point is that if Congress did have an original, implied power over all its Territories, there would be no need to include in the 13th Amendment the second instance where slavery was to be abolished i.e. "place[s] subject to their jurisdiction" and so that should be that. But, like an Apple press event hosted by the late Steve Jobs, "there's one more thing." The Constitution prohibited the States of the Union from acquiring land in Article I, Section 10 by a. treaty or compact with a foreign power or b. engag[ing] in war. This would seem to imply that the Federalists were being less than sincere in conceding such a narrow purpose for Article IV's territory powers. Looking back on the names and reputations of Federalist leaders like Hamilton, Adams, Wilson and King, does that surprise anyone?

Given what we've just learned, how then could future Congresses claim the power to not only permanently own lands INSIDE any of the several states (excepting the enumerated powers cited previously) but regulate the agriculture and livestock activities that are at the heart of the Bundy dispute? Indeed, this is the question conspicuously missing from nearly all the Bundy saga's media coverage and one that there is no quick and easy answer for, but there is an answer. The abridged story starts with the Homestead Act of 1862 that establishes some of the precedents Bundy is citing, namely the Pre-emptive Right to use the "public lands" to graze livestock. This use, like mining or farming is covered under what were called the "split-estate" property right which does not confer ownership but does confer usage. In 1890 the [Supreme Court affirmed this policy in *Buford vs Houtz*](#).⁸

SUPREME COURT NARRATOR

"We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years that the public land of the United States, especially those in which the native grasses are adapted to the growing and fattening of domestic animals, shall be free to people who seek to use them where they are left open and uninclosed and no act of government forbids this use...The government of the United States, in all its branches has known of this use, has never forbidden it, nor taken any steps to arrest

*it.... Congress by a system of laws called the **Preemption Laws**, recognized this right so far as to confer a priority of the right to purchase on the persons who settled upon and cultivated any part of this Public Domain"*

NARRATOR MIKE CHURCH

The Court in *Buford* also left us this nugget which applies directly to the claim of cattle ranchers, like Cliven Bundy, who claim a historical use of the land AT NO COST.

SUPREME COURT NARRATOR

*"For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States in all its branches has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement."*⁹

NARRATOR MIKE CHURCH

The ranchers who had dreamed of someday owning the "public lands" they were using were finally given some assurance that would happen and Western states could look toward a day when there would be no "public lands" owned by the Feds left in their states. The very next year, all this was permanently undone by what soon become a bad, constitutional habit, Congress would pick-up: transferring power to the Executive Branch that Constitutionally belonged in the House. *The Forest Reserve Act of 1891's infamous "Section 24"* spelled out the terms of this de facto Article V Convention granting new powers to the President.

CONSTITUTION NARRATOR VOICE

*"That the president of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forest, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the president shall, by public proclamation, declare the establishment of such reservation and limits thereof."*¹⁰

NARRATOR MIKE CHURCH

So there you have it, an implied power, not enumerated by the Constitution, that was never intended to be used to anoint the Federal Government as the Monopoly Man of Western Lands, has done just that. Since this Act, Congress and the White House have kept themselves ingratiated to those who have designs for those lands, often times at the expense of the farmers and ranchers who have historically used them and there has been no effort to liquidate the lands per *Buford* ever since. In fact , in 1911 the SCOTUS reversed *Buford*, ruling.

SUPREME COURT NARRATOR

*"Thus the implied license under which the United States had **suffered** its public domain to be used as a pasture for sheep and cattle, mentioned in *Buford v. Houtz*...was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the [1897] rules and regulations."*¹¹

NARRATOR MIKE CHURCH

I have had to leave many details out because this story is so complicated and rife with the shady deals consummated and lives/careers ruined as a result.

While it may be true that Cliven Bundy, our protagonist in this story, could have made an effort to acknowledge some State authority for the grazing rights and placed what he thought was a fair fee in an escrow account pending the story's resolution. It may also be the opinion of some that Mr. Bundy's future in broadcasting is in question as a result of his archaic values and lack of media-handler-tested eloquence. That does not absolve the clear and now systematic abuse of power exerted by the Federal Government and their own domestic tyranny. The State of NV's legislators need to get their heads out of the desert tortoise's sand and begin the process of legally escorting Uncle Sam's Real Estate Co. out of the state by acquiring those lands, then either selling them or returning them to Pre-emptive Rights status. Anything less makes NV nothing more than a U.S. colony and Senator Harry Reid an unemployed loud-mouthed dictator with a built in tyrant-king name: Dirty Harry.

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¹ Reid said during an appearance at a Las Vegas Review-Journal "Hashtags & Headlines" event at the Paris Hotel, Las Vega, NV.

² 18 April, 2014 Reid is quoted, appearing on Las Vegas, NV's KSNV's "What's Your Point?"

³ http://www.wired.com/2012/03/ff_nsadatacenter/all/

⁴ Jonathan Elliot, The Debates in the Several State Conventions of the Adoption of the Federal Constitution, vol. 3. James Monroe, Tuesday, 10 June, 1788

⁵ Ibid George Nicholas, 14 June, 1788

⁶ Ibid Colonel William Grayson - June 18th, 1788

⁷ <http://www.let.rug.nl/usa/documents/1826-1850/dred-scott-case/chief-justice-taney.php>

⁸ Buford v. Houtz - Opinion of the Court

⁹ Ibid

¹⁰ <http://famguardian.org/Publications/PropertyRights/creativ.html>

¹¹ U.S v Grimaud, 1911. <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=220&invol=506>