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Indian Sovereign Immunity Should Be Restricted

by James M. Johnson

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It is often claimed that tribes are like separate or even foreign nations over which state or federal courts may not exercise jurisdiction. It is even claimed this status is conferred by treaties with the United States. Neither is historically accurate.

Recognized Tribes

As an important prefatory note, the number of "tribes" in the United States, as "recognized" by the list prepared by the present Assistant Secretary of Interior for Indian Affairs, Ada Deer, has climbed to over five hundred, which she characterizes as entitled to:

[T]he same privileges, immunities, responsibilities and obligations as other Indian tribes under the same or similar circumstances including the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes.

... Two important points should be noted. The list of "tribes" has been growing—in part based on BIA [Bureau of Indian Affairs] determinations to add to the list of their constituencies. Also, those "tribes" now include entities not historically recognized as "tribes," at least through treaties.

Indeed, most of the tribes as currently listed by the BIA are "non-treaty"; the United States government never entered into treaties recognizing such entities. There are a total of 367 ratified treaties entered into between 1778 (Delaware)

From James M. Johnson's testimony in *Tribal Sovereign Immunity: Hearing Before the Committee on Indian Affairs, U.S. Senate*, 104th Cong., 2nd sess., September 24, 1996.

and 1868, when the last with the Nez Perce was entered. Of that number, numerous were entered into with the same tribe or tribes. In that number are not counted the treaties entered into by the Confederacy. The oft-quoted provision that Indian lands would be held in common and not be part of states "so long as grass shall grow and water run" were found only in these Confederacy treaties, which also guaranteed slavery—not in any treaty between the United States and tribes.

Dependent Nations

Second, the treaties themselves generally recognized and specified that any tribal sovereignty was reduced (to control over their own members) as the tribes all became the "dependent nations" of which Chief Justice John Marshall spoke. Francis Paul Prucha notes in *American Indian Treaties* (1994) that the assumption that the Indian tribes were not independent sovereigns was reflected in the treaties through "some such phrases as the following":

[T]he said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States . . . (or later) admitted that they resided within the territorial limits of the United States (and) acknowledged its supremacy.

From pre-revolutionary times, the Indians were not treated as equivalent to foreign sovereign nations. Under the Articles of Confederation, Article VI provided for foreign treaties, and Article IX provided for Congress to regulate trade and manage all Indian affairs and other domestic matters.

Even during the Revolutionary War, Indian affairs were treated as a domestic and military matter, not as foreign or diplomatic questions. The Treaty of Paris (1783) recognized the transfer of sovereignty from Great Britain to the Colonies to western lands reaching to the Mississippi. The tribes were not mentioned, though they had largely sided with the British in the war.

Later major additions of land to the United States were made by treaties with other nations, e.g., the Louisiana Purchase from France, the Treaty of Guadalupe Hidalgo from Mexico, Alaska through the Treaty of Cession from Russia. In some of these areas treaties were made with Indian tribes. In Alaska and California, they were not.

In 1871, Congress passed an Act providing that:

[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.

The Supreme Court jurisprudence from early on distinguished Indian tribes from such foreign "nations."

"The treaties themselves generally recognized and specified that any tribal sovereignty was reduced (to control over their own members)."

Chief Justice John Marshall had written *Johnson v. McIntosh* in 1823 speaking of the tribes' rights to sovereignty as "necessarily diminished" in concluding the Indians could not even convey lands.

Marshall's *Cherokee Nation v. Georgia* (1831), expressly held the Cherokee were not a "foreign state" and so not entitled to sue the State of Georgia for diversity jurisdiction purposes under Article III, Sec. 2. He referred to them as:

[D]omestic dependent nations (whose) relation to the United States resembles that of a ward to his guardian (and) so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

Even these notions of limited sovereignty found in some of these early decisions were later referred to as "platonic notions of Indian sovereignty" by the Supreme Court in decisions in the twentieth century: "Modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes. . . ."

Tribal Sovereignty

Those treaty provisions, as noted above (citing Prucha), assumed, and often expressly provided, that the tribes were not fully "sovereign." *South Dakota v. Bourland* (1993) refers to modern "reality after *Montana* [v. *United States* (1981)], tribal sovereignty over non-members cannot survive without expressed Congressional delegation and is therefore *not* inherent." (Emphasis in original.)

Under the United States Constitution, of course, there are only two sovereigns: the United States and the states which formed that Union. Authority over Indian affairs is vested in Congress as one of its Article I, Section 8 powers through the Indian Commerce Clause.

No Express Prohibition

Unlike the XI Amendment providing for the states' immunity from suit in federal courts, there is no such express prohibition with respect to the tribes. Indeed, historically both in statute and treaty, there has frequently been specific provision for such actions against tribes.

As noted in the original *Handbook of Federal Indian Law*, by Felix S. Cohen (1942):

[T]here are a number of statutes which authorize suits against Indian tribes . . . (some) authorized suits against Indian Tribes and allowed, in effect the execution of judgment upon the tribal funds in the United States treasury.

(He then refers to previous chapter, sections 1 and 3, which include numerous such statutes.) As only one example: a general provision for Court of Claims jurisdiction over "all claims for property of citizens . . . taken or destroyed by Indians belonging to any band, Tribe, or nation" he refers to as "an outgrowth of the

collective responsibility imposed by early statutes and treaties for the torts of their members." That, and the accompanying text and footnotes, recounts an extensive list of cases brought against tribes under such authorizations by Congress.

In a later section Cohen further noted Congress' historical practice of passing Acts authorizing suit which were specific to a tribe or tribes: "Congress has from time to time authorized various other suits against Indian Tribes by private citizens." Examples follow. The quoted example allowed judgments to be paid either from funds in the United States treasury for the tribe or from any annuities.

Many of the statutes Cohen discussed are no longer in effect. They do give a more realistic idea of the historic practice which included an evolution from a treaty-period practice of providing for paying claims directly from tribal funds held by the United States to allowing suit in courts.

This moderate approach protected tribal assets, allowing recovery up to the amount of funds the United States provides the tribes.

Notwithstanding that the treaties limited such payments, generally to twenty years, today the United States still provides millions to the tribes. Thus it is an added source of friction that persons harmed by tribes feel (correctly) their own tax dollars fund the problem source, where the actions are by tribal agents or employees.

Additionally, many tribes are in the casino gambling business. The millions thus derived add to federal funding, making them relatively wealthy, taking away the major historic argument for shielding tribes by immunity: the fear that tribes would be impoverished.

Immunity Must Be Waived

The general authorization in Acts of Congress allowing tribes to bring suit or the United States to sue on their behalf must be made reciprocal. Tribes of today should be viewed as responsible for their acts and fully subject to suit. This will also allow full consideration and resolution by the same court of counterclaim and cross-claims when tribes bring suit.

Justice Harry Blackmun stated in *Puyallup Tribe v. Department of Game* (1977):

I entertain doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity. . . . I am of the view that the doctrine may well merit reexamination in an appropriate case.

An ironic postscript to this comment is that after it was written, on remand, the Puyallup tribe asserted its immunity and refused to further participate in

that case. Having litigated three times to the United States Supreme Court, the tribe took the benefits of those issues on which it had prevailed, but left the Court rather than accept the burdens and responsibilities (which could be enforced only against individual members).

As previously noted, this practice continues to the present. It is time it be ended by Congress' adoption of a waiver of immunity for all tribes.

States Should Be Allowed to Tax Tribal Revenues

by Lyn Nofziger

About the author: Lyn Nofziger is a Republican strategist and adviser.

It may be time for their fellow Americans to quit feeling sorry for Native Americans.

Thanks to Congress and the national penchant for gambling, Indian tribes and bands are raking in big bucks these days in untaxed and sometimes illegal dollars.

The money largely comes from Indian-owned gaming casinos that gross between \$4 billion and \$5 billion tax-free annually.

At last count, there were 237 tax-free casinos run by 200 tribes and sub-tribes—some with fewer than a hundred members—on reservations in 29 states. The nation's biggest casino in terms of take is not in Las Vegas or Atlantic City; it's in Connecticut, where the Mashantucket-Pequot tribe's Foxwoods Casino rakes in more than \$800 million per year. There are fewer than 500 members of the tribe.

The Indian Gaming Regulatory Act

All this has come about because of a 1988 law called The Indian Gaming Regulatory Act.

The act, laden with loopholes, largely ignores state laws that affect non-Indian gaming, as well as the rights of surrounding communities. It requires any state that permits any form of gaming to negotiate "in good faith" with any of the 557 federally recognized tribes that want to offer similar games.

It is, in fact, an open door for any tribe to open a casino on its reservation. It has led New York Gov. George Pataki to worry publicly about "the proliferation of casinos and entertainment complexes that pay no property taxes, no sales taxes and no income taxes."

Because of the unique relationship between Indians and government, both state and federal, opportunities for corruption and illegal activities abound. A

From Lyn Nofziger, "Indian Gaming's End Run Around Taxes," *San Diego Union-Tribune*, September 8, 1996. Reprinted by permission of the author.