

TRIBAL SOVEREIGNTY

Stephen L. Pevar

Introduction

Tribal sovereignty is the single most important right that Indian tribes possess. If this right is lost, it will be difficult if not impossible for Indian tribes to protect their other rights.

A. What is "sovereignty"?

By definition, a sovereign government is a government vested with "independent and supreme authority." Black's Law Dictionary 1395 (6th ed. 1990). A sovereign government has the power to make its own laws and enforce them, and is not subject to the authority of any other government.

Under this definition, sovereignty is an all-or-nothing proposition. A government cannot be partly sovereign. A government either has supreme authority or it does not.

B. Are state governments sovereign?

The U.S. Constitution creates an *internal* system of sovereignty that does not follow the dictionary definition because in some situations states must comply with federal law, while in other situations they have final and independent authority. The Supremacy Clause contained in Article VI of the Constitution provides that federal law is "the supreme law of the land," that is, federal law trumps state law when the two are in conflict. State governments, therefore, are not sovereign under a dictionary definition. However, the Tenth Amendment to the Constitution guarantees that those powers not given to the federal government by the Constitution are *reserved* to the states. Consequently, in these reserved areas, state law is not limited by federal law, and state law is supreme. Thus, states have attributes of sovereignty.

B. Are tribal governments sovereign?

According to the Supreme Court, Indian tribes fall into a middle ground, too, but for a different reason than do the state governments. In a long line of cases, the Supreme Court has established the following two principles.

Principle # 1. Indian tribes have been sovereign governments since time immemorial. Indian tribes still retain certain *inherent* sovereign powers. As the Supreme Court reaffirmed in 2004, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."

United States v. Lara, 541 U.S. 193, 204 (2004), quoting United States v. Mazurie, 419 U.S. 544, 557 (1975).

Principle # 2. Congress, the Supreme Court has held, has "plenary power" over Indian tribes, full and complete power. Congress may limit the authority that tribes otherwise possess, and thus tribal sovereign power is subject to federal control. Indeed, as a unanimous Supreme Court held in Menominee Tribe v. United States, 391 U.S. 404 (1968), Congress even has the authority to "terminate" an Indian tribe, that is, forbid the tribe from exercising any governmental powers, order the tribe to distribute all of its property to tribal members, eliminate the tribe's reservation, and end the trust relationship between that tribe and the federal government. Thus, according to the federal government, Indian tribes possess sovereign powers, but all of those powers are subject to elimination at the will of Congress.

C. What is the source of federal power over Indians? In other words, how did Congress acquire the power to control Indian tribes?

This is a very controversial question. According to the Supreme Court, the federal government acquired plenary power over Indian tribes due to the doctrine of "discovery and conquest": the "discovery" of North America by Europeans and their alleged "conquest" of the native inhabitants. See Johnson v. M'Intosh, 21 U.S. 543, 574 (1823) (holding that "discovery gave exclusive title [to all the land in the United States] to those who made it.") In other words, "might makes right," and "to the victor belong the spoils." Since 1823, the Supreme Court has consistently held that Congress may exercise plenary power over Indian tribes. As the Court reiterated in 2004: "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" United States v. Lara, 541 U.S. 193, 200 (2004).

D. Is the "plenary power" doctrine subject to challenge?

Indian tribes, many people believe, are as sovereign today as they were centuries ago. Tribal sovereignty has never been diminished, they contend, and the plenary power doctrine is indefensible. A leading proponent of this position is William Bradford, Chiricahua Apache and Associate Professor of Law at Indiana University School of Law. In an extensive law review article published in 2004, Professor Bradford calls upon Indian tribes to do what the colonists did in 1776: issue a Declaration of Independence. See William Bradford, "Another Such Victory and We Are Undone': A Call to an American Indian Declaration of Independence," 40 *Tulsa Law Review* 71 (2004). Indians are, Mr. Bradford states in his article, "citizens of sovereign nations on a formal legal par with the United States." *Id.* at 134. He describes the Supreme Court's "plenary power" doctrine as immoral and without legal foundation, a product of colonialism. *Id.* at 95. Federal Indian law, which presumes that Indian tribes are subject to federal

control, Mr. Bradford argues, is "evil," and only by denouncing the doctrine of discovery and conquest and the plenary power doctrine can the United States regain its moral and legal standing. *Id.* at 105-111.

Similarly, law professor Robert Williams at the University of Arizona School of Law has written that the federal government's policy towards Indian tribes has been driven from its inception "by greed, avarice, and the pursuit of manifest destiny" and is "ultimately genocidal in both practice and intent." See Robert A. Williams, "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence," 1986 *Wisconsin Law Review* 219, 265 (1986).

Thus, the "plenary power" doctrine is subject to challenge. However, it is extremely unlikely that any branch of the federal government will renounce that policy. Therefore, I will discuss tribal sovereignty as the federal government views it. But this should not be seen as my necessarily agreeing that the plenary power doctrine is legally or morally valid. Under this policy, as mentioned above, Indian tribes have certain sovereign powers, but all such powers may be limited or even eliminated by Congress.

II. Recognition by the Federal Government of Tribal Sovereignty

A. As stated in Principle # 1, the federal government has consistently recognized that Indian tribes have *inherent* sovereignty. A tribe's power is not delegated to it by some other government, including the federal government. Tribes have had the right to exercise sovereign authority since time immemorial.

B. The federal government originally viewed Indian tribes as having the same status as foreign governments, and formal dealings with tribes were conducted through treaties, just as with foreign nations. By definition, a treaty is a contract between nations. The U.S. entered into nearly 400 treaties with Indian tribes from 1785 until 1871, when the practice of treaty making with Indian tribes was halted by an act of Congress. Thus, these treaties implicitly recognize that Indian tribes are sovereign governments.

B. In 1832, the U.S. Supreme Court confirmed the principle of inherent tribal sovereignty in Worcester v. Georgia, 1 U.S. 515 (1832). The Court held in Worcester that Indian tribes are "distinct, independent political communities" that have exercised "original rights . . . since time immemorial." As a result of these sovereign powers, the Court said, a state government has no authority to regulate activities on Indian reservations. The Court held, however, that Indian tribes are subject to the supreme power of Congress. Therefore, Congress may authorize states to regulate activities on Indian reservations.

C. The Supreme Court reaffirmed the principle of inherent tribal sovereignty in Talton v. Mayes, 163 U.S. 376 (1896). In Talton, the Court held that Indian tribes were not limited by the constraints imposed in the U.S.

Constitution and, therefore, they remained free to govern their internal relations as they saw fit. Indian tribes long preceded the founding of the United States, the Court noted, and they exercise original rights. Indian tribes did not obtain their powers from the Constitution and their powers are not limited by it.

D. Another Supreme Court decision affirming tribal sovereignty is Merrion v. Jicarilla Apache Tribe, 455 U.S. 103 (1983), which recognized that Indian tribes have the inherent right to tax activities occurring on Indian land, even activities conducted by non-Indians.

E. As the U.S. Court of Appeals for the Tenth Circuit stated in 2002:

Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate. [Indian tribes are] qualified to exercise powers of self-government . . . by reason of their original sovereignty.

N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (footnotes and citations omitted).

F. The Supreme Court's most recent tribal sovereignty case is United States v. Lara, 541 U.S. 193 (2004). In a 1990 decision, the Duro case, the Supreme Court held that Indian tribes lack the sovereign authority to prosecute non-member Indians in tribal court. In response, Congress passed a law, called the "Duro fix," which states that Indian tribes *do* have this sovereign power. In Lara, the Court held that Congress, with its plenary power, has the authority to effectively overrule the Court's decision in Duro. Indian tribes, therefore, have the inherent right to prosecute non-member Indians. The "good" news about Lara is that it confirms the inherent right of Indian tribes to exercise criminal jurisdiction over non-member Indians, but the "bad" news is that Lara confirms that Congress has plenary power over Indian affairs. Here, Congress used its power to assist tribes, but next time Congress might do the opposite.

III. The Scope of Tribal Powers

A. As a result of the tribe's inherent right of self-government, an Indian tribe has the authority to do most things other governments may do, particularly regarding its internal affairs. Thus, it may form its own government, determine how tribal leaders are chosen, determine who is eligible to join the tribe, tax tribal members, and regulate the marriage, divorce, and child custody of tribal members living on the reservation.

B. The greatest source of controversy regarding the exercise of tribal power concerns tribal jurisdiction over non-Indians. The Supreme Court, in a

series of cases, has drastically limited the ability of Indian tribes to regulate the conduct of non-Indians.

1. Criminal jurisdiction over non-Indians: In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the Supreme Court employed the theory of "implied divestiture," that is, that Indian tribes have impliedly lost certain sovereign powers due to their incorporation into the United States. The Court held in Oliphant that even though Congress had passed no law restricting a tribe's criminal powers over non-Indians, this power was impliedly lost. The "implied divestiture" theory is a very dangerous and slippery concept for Indian tribes, as it permits courts--rather than Congress--to determine what powers tribes have impliedly lost.

2. Civil jurisdiction over non-Indians: In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court extended its "implied divestiture" doctrine. The Court held that Indian tribes have been impliedly divested of its authority to regulate the conduct of non-Indians engaged in conduct on their own land located within the reservation unless the tribe can prove that (a) the activities of the non-Indian are substantially impacting a significant tribal interest, or (b) the non-Indian has entered into a consensual relationship, such as a contract, with the tribe. These are known as the "Montana exceptions."

C. The Supreme Court in recent years has issued a series of decisions limiting tribal jurisdiction over non-Indians. See, e.g., Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (holding that a tribe lacked authority to compel a non-Indian hotel owner located on privately-owned land within the reservation to charge hotel guests a tribal hotel occupancy tax), and Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal courts may not exercise jurisdiction over state law enforcement officials who allegedly violated the civil rights of a tribal member within the reservation).

IV. What the Future May Hold

As a group, Indian tribes today are in the best shape--politically and economically--than at any time in the last 150 years. However, powerful forces are working against Indian tribes, seeking to undermine if not destroy them. During the past 30 years, Congress has passed a number of laws designed to strengthen tribal self-government. However, the pendulum could swing back at any moment to historical eras in which this country attempted to eliminate tribal governments. It will be very important for Indian tribes and their supporters to educate the public, lobby Congress, and motivate Indians and non-Indians to support tribal sovereignty. This is particularly true given that the Supreme Court seems to be going out of its way to reduce tribal sovereignty, especially with respect to jurisdiction over non-Indians.