

## ***Indian Sovereignty - A Matter of Right***

***By Janice F. Brandt***

The state of Oklahoma brought suit against the Chickasaw Nation in 1989 to recover taxes on bingo games and cigarettes sold on tribal property. Before this case is reviewed, it is necessary to put it in historical perspective. Over the last two centuries, the 1989 case was only the most recent instance of sanctity and right of Native Americans being continually assaulted and challenged.

Once again, important issues regarding federally recognized Indian tribes were raised concerning federal jurisdiction, the doctrine of Indian sovereignty and state' rights. From Osborn v. Bank of the United States in 1824 (wherein the state of Georgia tried to tax a federal entity, the Bank of the United States) to this 1989 case, conflicting interpretations continue over the U.S. Constitution and state laws enacted by state legislatures.

To recognize the inalienable rights of our nation's native inhabitants, the United States Supreme Court first recognized the concept of sovereignty in Cherokee Nation v. Georgia (1831), and in 1982 the U.S. Congress passed Title 25 to address the specific legal rights and privileges of the Native American.

Both federal Indian law and respected judicial doctrine dating from the earliest days of the United States hold that Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government.

The "original natural rights" of self-government are inherent in the tribal legal status because Indian tribes from time immemorial have possessed these rights, and as such, they are not derived from constitutional or statutory sources.

According to S. Bobo Dean, who has served as legal counsel to several tribes and Indian organizations, writing in the "Consent of the Governed- A New Concept in Indian Affairs:

"The Indian tribe is a unique component I our federal system of government. Unlike all other governmental institutions, the tribe is not a creature of the U.S. Constitution, nor of the federal government created by the Constitution, nor of the states which created the Constitution."

Because all Indian tribal governments predate the U.S. Constitution, the tribal power to be self-governing cannot originate from an aspect of the national sovereignty delegated to the tribes from Congress. Similarly, the laws of the states cannot be the source of tribal powers because the Indian tribal governments predate the state governments. As separate sovereigns preexisting the Constitution and the states, Indian tribes have the inherent power of regulating their internal and social relations. This concept of tribal sovereignty is the cornerstone of tribal government powers.

Since the coming of the first Europeans, a constant struggle has existed between tribal, colonial, federal and state governments over who may exercise sovereign governmental powers in particular situations. This struggle, the focus of an extremely complex arena of Federal Indian Law known as jurisdiction, continues to this day.

Jurisdiction is important because it determines who will make and enforce the laws. It also determines who will control the land, the natural resources and the daily lives of the residents of the land. Whether or not an Indian nation has jurisdiction in certain situations affects its ability to continue its political tradition and way of life.

Under Article VI of the Constitution, the national government has more power than the various state governments, thus enabling it to override state actions which conflict with the policies and laws of the national government. Article VI also gives the national government the power to determine the nature of state political institutions and to forbid the states from exercising certain types of powers - those not delegated to the United States by the Constitution nor prohibited by it to the states.

Indian tribes are sovereign nations existing within the boundaries of the United States, which, because of historical circumstances, enjoy a special relationship with the federal government. In fact, within the American governmental system, Indian tribes enjoy a status higher than states. The states cannot interfere in this special relationship, except through representatives they elect to the federal government.

The basis for the relationship between Indian governments and the United States was established by the Supreme Court in the 1830s. In Cherokee Nation v. Georgia (1831), the Cherokee Nation brought suit to prevent the state of Georgia from exercising jurisdiction over the tribe. Chief Justice John Marshall avoided the issue of federal-state supremacy by declaring the Cherokees could not sue in the Supreme Court because they were not a foreign nation within the meaning of the Constitution: "They may, more correctly, perhaps be dominated domestic dependent nations...Their relation to the United States resembles that of a ward to his guardian."

In 1832, in the case of Worcester v. Georgia, the Supreme Court declared that Indian nations "...had always been considered as distinct, independent, political communities, retaining their original natural rights." Writing for the majority, Marshall did not refer to the Indians' dependent status as he had in the above case. On the contrary, he affirmed the sovereignty of the Cherokee Nation when he wrote, "...the settled doctrine of the law of nations is that a weaker power does not surrender its independence - its rights to self-government-by associating with the stronger, and taking its protection..." The court rejected the idea that state laws could have any force and effect on Indians within tribal boundaries. "...that within their boundary, they possessed right with which no state could interfere; and that the whole power of regulating the intercourse with them was vested in the United States."

The United States government considers itself to have a trust relationship with Indian nations and their governments. Established through treaties, agreements, court decisions, executive orders, administrative regulations, federal statutes and the Constitution itself, this trust relationship can be defined as the unique legal and moral duty of the United States to assist Indians in the protection of their property and rights.

Regrettably, there is not a written document where one can find all the specific duties within that trust relationship; they are too ill defined and vulnerable to change for a detailed list to be accurate for all tribes in all situations. However, there are three broad areas in which the trust duties fall: 1) protection of Indian trust property; 2) protection of the Indian right to self-government; 3) provision of those social, medical and educational services necessary for the survival of the tribe.

Only Congress, as the ultimate trustee in the federal - Indian trust relationship, can change or redefine the scope of the relationship. The United States courts have come to describe this power of Congress over tribes as “plenary”, meaning complete or almost absolute. Commenting on the plenary power of Congress, the Court stated in U.S. v. Wheeler (1894):

“But our cases recognize that the Indian tribes have not given up their full sovereignty...In sum, Indians still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status...”

Since the establishment of the Commerce Clause of the Constitution, Indian tribes have been recognized as “distinct, independent, political communities” qualified to exercise powers of self-government, not by virtue of any delegation of powers from the federal government, but rather by reason of their original tribal sovereignty and the powers inherent in their sovereign status.

Congress has established by statute the procedure by which a state obtains jurisdiction over an Indian nation. The statute is section 1322 (a) of Title 25, Assumption by State of Civil Jurisdiction. The statute requires the consent of the tribe occupying the particular Indian country, or part thereof, which would be affected by such assumption.

Pursuant to federal mandate, the Court has ruled accordingly in Puyallup Tribe v. Dept. of Game of the State of Washington (1977). “Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.”

The Chickasaw Nation never gave such a waiver or consent to Oklahoma to assume the nation’s civil jurisdiction. Further, Article I, Section 3 (Oklahoma’s Enabling Act of 1906) of the Oklahoma Constitution would have been amended before the state could assume jurisdiction - even if a waiver or consent were given to the state by the Chickasaw Nation.

Oklahoma joined the Union specifically stating in the Enabling Act that the new state would follow federal law in regard to Indians and their lands. Oklahoma Indian tribes, therefore, were immune from unconsented suit before and after statehood under federal common law (decided by court cases). This should have closed the state jurisdictional question over the Chickasaw Nation.

However, in the Graham case, Oklahoma brought action against the Chickasaw Nation and its tribal employee, Jan Graham, alleging excise and sales taxes were due from sales of tobacco and the operation of bingo games at the tribally owned Chickasaw Motor Inn in Sulphur. The inn was purchased as part of a federally sanctioned tribal economic development project. The tribal legislature authorized the operations at the motel. Jan Graham managed the motel, tobacco shop and the bingo.

The state court granted a temporary restraining order stopping the tribe from selling unstamped cigarettes or operating bingo games. The Chickasaw Nation's request that the case be moved to the federal court was granted. The state unsuccessfully moved to send the case back to the state court. The nation's motion to dismiss for lack of subject matter jurisdiction was granted. The tenth Circuit Court of Appeals affirmed the district court's holding that removal was proper pursuant to section 1343 of Title 28, the Tax Injunction Act. That act did not mandate state court jurisdiction and did not limit or prohibit the federal government's exclusive authority over Indian tribes.

The Tenth Circuit Court also affirmed the district court's dismissal of the action holding that the tribe's sovereign immunity from unconsented suits barred the action. The U.S. Supreme Court vacated the circuit court's judgment and returned the case to the circuit court in light of Caterpillar Inc. v. Williams, which stated jurisdiction was a statutory procedural problem.

But Caterpillar was the wrong controlling case. It should have been Verlinden v. Central Bank of Nigeria because in that case it was held that the bank, being a foreign entity, could not be sued in a state court. The decision in Verlinden binds it to the previously mentioned Osburn, which in an 1824 decision held that a federal entity, the Bank of the United States, could not be sued or taxed by the states.

Graham was not a statutory (state law) procedural problem; rather, it was a constitutional issue which fell under the U.S. Constitution and its jurisdictional mandates. Here, in Graham, because of its very nature as an Indian tribe - a sovereign nation within the boundaries of the United States - the Chickasaw Nation was subject only to the plenary of Congress.

With the ball back in the Circuit court, the appellate justices then reaffirmed its prior holding. On rehearing, the Supreme Court reversed the Tenth Circuit Court and inexplicably ordered it to send the case back to the state court! The circuit court remanded the case to the State District Court in Murray County, Oklahoma (Sulphur is the county seat.) If the state of Oklahoma thought that was a victory, it was short lived because on July 18, 1989, the state court dismissed Case Number C-85-223 against the Chickasaw Nation. The court's ruling was based on the tribe's having sovereign immunity.

*Postscript: That the final decision in this case was made in favor of the tribe by a state court illustrates how capricious the whole area remains. The issue of sovereign immunity is far from settled and continues to create tension between advocates of the states' rights and tribal governments. Over the decades, states have tried to carve out their individual rights within the U.S. That tension, even envy, will always be present as long as the states fail to recognize the rightful place of sovereign Indian nations.*

