

SOVEREIGN IMMUNITY

What is Sovereignty?

- In its simple form, sovereignty is the ability of a people to make their own laws and live by them.
- Since 1492 when Christopher Columbus first landed in what the Europeans called the “New World”, European governments dealt with Indian tribes on a government-to-government basis as sovereigns.
- They entered into treaties with tribes just as they did with other European countries

Treaties:

- Treaties, in essence, are contracts, but they are unique in that they are contracts between sovereign nations.
- The use of treaty making as the means to negotiate and reach agreements with tribes was an explicit recognition by the European nations of tribal sovereignty.
- Between 1789 and 1871, the U.S. formalized about 350 treaties with the Indian tribes. The treaties were primarily used to acquire concessions of rights that the tribes possessed, such as rights to a particular parcel of land.

Tribal Sovereignty:

- The recognition and treatment of tribes as sovereign governments was incorporated into the American legal system by the Founding Father when the original 13 colonies first organized into a new nation.
- The Articles of Confederation adopted in 1781 reserved for the federal government the “sole and exclusive right and power” of regulating trade with tribes. Article IX, § 4.
- In 1789, on the conception of the U.S. Constitution, sovereignty of the American Indian tribes was expressly recognized and respected.
- The Indian Commerce Clause is another area we point to, to establish Tribal Sovereignty. ICC reserves to Congress the exclusive power “to regulate commerce with foreign nations, and among the several states, and the Indian tribes. Article 1, § 8.
- Marshall Trilogy: The fundamental tenets of tribal sovereignty within the American legal system were developed in three U.S. Supreme Court decisions in the early 1800’s. These cases have become known as the “Marshall Trilogy” because Chief Justice John Marshall authored the opinion in each.
 - o Johnson v. McIntosh: The issue at hand in this case was whether private individuals could acquire ownership of land by purchasing it directly from a tribe. Marshall discussed how the principle of discovery gave European governments the sole right to purchase land from tribes, and that the tribes were not free to sell that land to whoever they pleased. In this manner, tribes’ rights to complete sovereignty, as independent nations, were necessarily diminished.
 - o Cherokee Nation v. Georgia: The Cherokee Nation brought a suit against State of Georgia directly in the U.S. Supreme Court under a provision of

Article III of the Constitution that allows a “foreign nation” to bring actions originally in the Supreme Court rather than in the District Court. In this case Justice Marshall held that Indian tribes were not foreign nations and so they cannot bring suit in the Supreme Court as a court of original jurisdiction. Justice Marshall, however, did shed light on the status of Indian nation within the Federal system. Marshall wrote that while not a foreign state, a tribe is nevertheless a “distinct political entity, capable of managing it’s own affairs and governing itself.” Within the federal system, the Indian nations possess a unique status as “domestic dependent nation.” Marshall said that the status of Indian nations within the federal system is similar to that of a guardian to a ward. This unique relationship between the tribes and federal govt. is what is called today the “trust responsibility” of the federal govt.

- Worcester v. Georgia: This case further shed light on the sovereignty of Indian nations and their place within the federal system. The State of Georgia passed a law requiring any non-Indians who traveled within the Cherokee territory to first obtain a state permit and take an oath of allegiance to the state. Several missionaries preaching to the Cherokee who possessed a U.S., but not Georgia, permit were arrested for violating the state law and sentenced to four years of hard labor. While invalidating the Georgia law, Justice Marshall wrote that Indian tribes are distinct political communities, having territorial boundaries, within which their authority is exclusive and having a right to all lands within those boundaries, which is not only acknowledged, but also guaranteed by the U.S.

What is Sovereign Immunity?

- Any Sovereign government has immunity from suit UNLESS:
 - Consent OR
 - Unambiguous abrogation of their immunity
- Tribes, like states and federal govt., are sovereign entities and exercise the doctrine of sovereign immunity.
- Differences in federal/state v. tribal SI doctrine:
 - Federal/state: immunity only when monetary relief is sought
 - Tribal: immunity when either declaratory, injunctive, or monetary relief is sought
- Pros of Sovereign Immunity Doctrine:
 - The Doctrine of Tribal Sovereign Immunity is has it’s roots in sound public policy:
 - Way of promoting tribal sovereignty
 - Protecting precious tribal resources from depletion by money judgment
- Cons of Doctrine:
 - No check on abuse of power by the government officials

Exceptions to the Doctrine of Sovereign Immunity:

- Consent OR

- Unambiguous abrogation of their immunity: Congress can waive the Tribe's immunity from suit but the waiver has to be "unequivocally expressed":
 - ICRA does not waive a tribes immunity from suit in federal court
 - The Supreme Court has rejected the notion that immunity should only be extended to governmental activities of the tribe and not business activities
 - Employment Law:
 - Title VII: Tribes specifically exempted from suits
 - ADA: Tribes exempted from definition of a covered employer
 - ADEA, ERISA, Fair Labor Standard Act, Family Medical Leave Act, do not specifically exempt tribal employers from suits. Courts are split on interpretation of these Acts.

- Tribal official who exceed their authority are not immune from suit. They can be sued in their private capacity, but not as an officer of the government. When an officer exceeds/abuses it's authority, it is no longer seen as wearing the government cloak.

- Gaming operations: Tribes performing functions under the Indian Gaming Regulatory Act are immune from suits. EXCEPTION: Tribe waives its injunctive relief immunity when it distributes per capita payments in violation to IGRA.

- Arbitration Clause: There is a split in the courts on the question of whether an agreement by a tribe to arbitrate a dispute represents a waiver of immunity. Eight Circuit in Rosebud Sioux Tribe v. Val-U Construction Company, held that it does, whereas other courts have held that it doesn't.

- Operation under IRA corporate charter: Tribe waived immunity by operating under IRA corporate charter with a sue or to be sued clause.

- Suits brought by the United States.

- Tribes initiating lawsuit: Tribe waived immunity as to any claim to land by filing a quiet title action regarding land.