

Tribal Sovereignty and State Authority
Basic Principles
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What is American Indian tribal sovereignty?

Black's Law Dictionary defines "sovereignty" as follows:

The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived, the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.

The power to do everything in a state without accountability, - to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce and foreign nations, and the like.(41)

American Indian tribal sovereignty includes some of the attributes included in the general definition of "sovereignty," but with some limitations and modifications that are a consequence of the tribes' being subject to the overriding sovereignty of the United States. The U.S. Supreme Court described this status as follows:

Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.(42)

Thus, the tribes are sometimes described as "semi-sovereign" or "quasi-sovereign" entities that have the power to determine tribal membership and exercise authority over their members within their territory. This authority is subject to the overriding authority of the U.S. government but is generally not subject to the authority of state governments.

What is the origin of the concept of American Indian tribal sovereignty?

It is most significant to recognize that American Indian tribal sovereignty is not dependent on any action by the federal government. Instead, it is derived from the inherent power of the American Indian people that existed because the American Indian tribes were independent nations occupying much of the North American territory when the Europeans arrived here. It has been estimated that at that time, 5 million American Indians resided in what is now the U.S., comprising over 600 tribes or communities.(43) When the United States was created as a nation, the American Indian tribes were perceived as coming under the overriding sovereignty of the federal government, but continuing to be able to exercise self-government powers. Article I, section 8, of the United States Constitution includes a provision commonly referred to as the "Indian commerce clause" which provides that Congress has the exclusive authority "(t)o regulate Commerce . . . with the Indian Tribes." Between 1778 and 1871, Congress ratified 371 treaties with American Indian tribes, in most of which the tribes gave up their rights to land in exchange for the federal government's promises of recognition of tribal rights and reservation areas. These treaties were described by the U.S. Supreme Court in 1905 as not being a grant of rights to the American Indians, but instead a grant of rights from them, which reserve to the tribes the rights that they did not grant under the treaties.(44) This perspective reinforces the concept that the tribes retain their status as sovereign entities. Still, the tribes do not have all powers normally intrinsic

to a sovereign nation; for example, they may not deal directly with foreign nations on a sovereign-to-sovereign basis.

In 1831, the U.S. Supreme Court characterized this unique status as follows: Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the U.S. can, with strict accuracy, be denominated foreign nations. They may more correctly be denominated domestic dependent nations.(45)

How does American Indian tribal sovereignty affect the states' relationships with the tribes?

The states have no power to limit the tribes' sovereign powers. In general, state civil regulatory laws do not apply to American Indians on reservations. A state has authority to act within the reservation only to the extent that Congress explicitly authorizes it to act as it did, for example, in Public Law 280, discussed on pages 43 - 46. Thus, even though a reservation is located within the boundaries of a state, and the state has some responsibilities to the members of the tribe, the state may exercise few of its normal powers of regulation and taxation within that reservation. As noted in a National Conference of State Legislatures publication, "Any state jurisdiction over activities on the reservation creates confusion on the part of the regulated community, jurisdictional disputes between the regulators, and often fuels difficult relations between states and tribes."(46)

Are there any recent developments in the area of American Indian tribal sovereignty?

On February 27, 1998, Senator Slade Gorton (R-Washington) introduced S. 1691, the American Indian Equal Justice Act, which includes a statement of purpose contending that ". . . the doctrine of sovereign immunity frustrates justice and provokes social tensions and turmoil inimical to social peace." The substance of the bill imposes state tax collection duties on the tribes, and explicitly provides that the tribal immunity of the tribe is waived in order to enforce this requirement as well as for purposes related to personal injury claims and contract claims.

Hearings were held on this bill in March and May 1998 in the Senate Committee on Indian Affairs, but no further action was taken on the bill. American Indian leaders have expressed concern that there may be growing receptiveness in Congress to curtailment of certain aspects of American Indian tribal sovereignty.(47)