*49 Orange County Lawyer 32, **



June, 2007

49 Orange County Lawyer 32

FEATURE: INDIAN SOVEREIGNTY -- A BRIEF HISTORY

By Daniel Jacobson

**Daniel Lee Jacobson** is an attorney in Tustin who practices throughout Southern California, and a professor at Pacific West College of Law. He can be reached at dlj@jacobsonlawyers.com.

**TEXT:**

**[*32] With the advent of Indian** gaming the concept of Indian sovereignty has worked its way into the common lexicon. A typical answer to the question as to why Indian Tribes can offer gambling is that those Tribes are sovereigns. While that answer is partially correct, it is not wholly correct. In law, American Indian Tribes are "*dependent* sovereigns." How did Indian Tribes become recognized as dependent sovereigns; what does that designation mean; and how did that designation figure into gambling on Indian reservations?

A sovereign is a "...state in which independent and supreme authority is vested." (Black's Law Dict. (5th ed. 1979) p. 1252.).) Dependent means "relying on someone or something else for aid, support, etc." (Random House Unabridged Dict. (2d ed. 1994) p. 534.) In some respects "dependent sovereign" is an oxymoronic phrase - an independent state that is dependent; without context it would lack logic.

Justice Oliver Wendell Holmes once wrote, "A page of history is worth a volume of logic." (*New York Trust Co. v. Eisner* (1921)256 U.S. 345.) More recently, Ninth Circuit Court of Appeals Judge Jay S. Bybee wrote that certain Indian Court jurisdictional questions are "better explained by history than by logic." (*United States v. Bruce* (2005) 394 Fed.3d 1215.)

While one might trust the United States Constitution to grant or define the sovereignty of an entity domiciled within the U.S. borders, that trust would be misplaced in the case of Indian Tribes. The Constitution expressly mentions Indians only a few times. While each such mention seems to denote some recognition of existing Indian sovereignty, none comes close to granting or defining that sovereignty. (See *U.S. Const.,* art. 1, § 2, cl. 3; art 1, § 8, cl. 3; 14th Amend.)

These constitutional indications of sovereignty seem to exist because the Tribes were sovereign before the Constitution; their sovereignty does not depend on the Constitution, it is simply recognized by the Constitution. "Before the coming of the Europeans, the tribes were self-governing sovereign political communities." (*United States v. Wheeler* (1978) 435 U.S. 313, 323-324.) So, the source of Indian sovereignty is no mystery; the Tribes were self-governing political entities - sovereigns - long before non-Indians set foot on what is now the United States. But, why are they now "dependent sovereigns" or "dependent nations," and what does

that seemingly internally inconsistent phrase mean?

For an explanation, it is best to start with the facts of the U.S. Supreme Court case in which the phrase was first coined. In 1828 the State of Georgia passed a series of laws that purported to strip Cherokee Indians of many of their rights; the Cherokees fought back by filing a lawsuit directly in the United States Supreme Court. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1.) In order for the Court to have original jurisdiction, the Cherokee nation had to be a "foreign state" as that phrase is used in *U.S. Constitution* Article III, Section 2.

In deciding that jurisdictional question against the Cherokees, Chief Justice John Marshall was either patronizing or he was recognizing existing patronization, or both. He said:
[The Cherokees] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. (*Cherokee Nation, supra,* 30 U.S. at 33.)
Justice Marshall concluded:
[I]t may well be doubted whether those tribes which reside within the **[*33]** acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic *dependent nations.*" [Emphasis added.] (*Ibid.*)

The legal reasoning for the Indian Tribes' dependent sovereign status claims to be reflective of, and recognitory of, political and military history. The words are not pretty, but then neither is the history. "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." (*Tee-Hit-Ton Indians v. United States* (1955) 348 U.S. 272.) In *United States v. Kagama* (1886) 118 U.S. 375, the Court said, "[Indian] weakness and helplessness . . . [was] largely due to the course of dealing of the Federal Government with them."

A picture that emerges from studying *Cherokee Nation, Tee-Hit-Ton,* and *Kagama* is the Supreme Court's view that the Indian Tribes have always been sovereigns; that those sovereigns were militarily and politically conquered by the United States government; and that that conquest made the Tribes "weak and helpless" and dependent upon their conqueror, dependent on the United States government. Thus, the Indian Tribes are sovereigns, but sovereigns who are dependent on the United States - dependent sovereigns.

What legal consequences flow from the Indian Tribes' state of dependent sovereignty?

In *Kagama* the Supreme Court recognized that the since Indian Tribe dependency was caused by weakness which in turn was caused by the United States, the United States had the responsibility to protect the Tribes - the burden of the conqueror. The Court said that the United States owed the Tribes "the duty of protection," and that with that duty came commensurate "power." (*Kagama, supra,* 118 U.S. at 384.)

So, we see a neediness that begat "the duty of protection" of the Tribes by their very conqueror. That duty in turn gave the conqueror, the United States, power over the conquered Tribes. This legal reality has been reported over and over by the Supreme Court. "Congress possessed plenary power to deal with ... tribal property." (*Sizemore v. Brady* (1914) 235 U.S. 441, **[*34]** 449.) "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 56.) "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning." (*Lone Wolf v. Hitchcock* (1903) 187 U.S. 553, 565.) In short, "Congress possesses plenary power of legislation in regard to them [the Indian Tribes], subject only to the Constitution of the United States." (*Stephens v. Cherokee Nation* (1899) 174 U.S. 445, 478.)

As many actual wards can attest, being protected is lovely, but the power of the protector can be crippling to the protected. The power of the United States to protect its "wards," the Indian Tribes, included the power to abrogate treaties between the United States and the Tribes. In *Choate v. Trapp* (1912) 224 U.S. 665,671, the Court said, "The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States."

But, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, *not the States.* (citation omitted.)" [Emphasis added.] (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202 at 207.) *Cabazon* was a landmark case that recognized the Indian Tribes' right to offer gambling without interference from State authorities.

The Cabazon and Morongo Tribes had been offering to the general public card games not banked by the house and bingo on their Riverside County reservations. Both the State of California and the County of Riverside sought to enforce anti-gambling statutes against the Tribes. The Tribes sued for an injunction against such enforcement, claiming that the State lacked jurisdiction over them. (Note that counties are merely political subdivisions of the State, so county jurisdiction was not at issue. (See *Gov. Code* § 23002.)

The Court, in *Cabazon,* recognized that Congress had authorized California to apply its *prohibitory* law on Indian reservations. But the Court noted that California did not prohibit gambling generally, and specifically did not prohibit bingo; it only regulated gambling generally, and bingo specifically. The Court cited the State's lottery, parimutuel horseracing, and card games not banked by the house as forms of gambling that California did not prohibit, only regulated.

The Court deemed the anti-gambling statutes to be regulatory of the games then played on the reservations and decided that Congress had not authorized California to apply its *regulatory* law to Indian reservations. The Court thus enjoined enforcement of the anti-gambling statutes for want of state jurisdiction.

Following the *Cabazon* decision the very next year was the Congressional statutory scheme under which the Tribes now operate - the Indian Gaming Regulatory Act or "IGRA". (25 *U.S.C.* 2701, *et seq.*) IGRA categorizes various types of gaming, and allows for State and Federal regulation of some of that gaming. One court said that IGRA, "seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes by giving each a role in the

regulatory scheme." (*Artichoke Joe's v. Norton* (E.D. Cal. 2002) 216 Fed.Supp.2d 1084, 1092.)

Often history explains what logic cannot.