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Indian Nations and the Federal Government: What Will Justice Require in the Future? Claims Against the Sovereign 20th Judicial Conference of the United States Court of Federal Claims

Charles Wilkinson*

The Court of Federal Claims has asked me to take a few minutes to step back, look out toward the horizon, and even dream a bit, about what the field of Indian law might be and I'm honored to oblige as best I can.

I believe that Indian tribes would receive the high justice they deserve from our courts if judges were to understand two legal doctrines in their full context and to understand them in two different ages. What I will propose is easy to state but difficult to apply. Yet it is realistic and can be done largely or completely by those judges able to invest the time.

I wish that judges could know tribal sovereignty and the trust relationship. I wish further that they could know them under the circumstances at treaty time and under the circumstances today. And I wish that they could *feel* them as well as know them. Lawyers and judges apply most legal rules mechanically. But some patches of law, because of their sensitive content, histories, and human faces, hold elevated places in the law. These are the terrains of the law that we *feel*—free speech, due process in a murder trial, freedom from racial discrimination and others—the ones that touch a judge's soul, the ones that make a judge put in the time, reflect, worry, and insist on pure justice, however that may cut in a particular case. Tribal sovereignty and the trust rightfully belong in that company, the law's highest company.

Sovereignty—otherwise put, governance or self-determination—is not a trickery of judges or lawyers. Societies the world over have given birth to sovereignty, then cherished it and fought for it. The United States, and England and other foreign nations before it, knew that Indian tribes possessed sovereignty. They all made treaties with tribes. Sovereigns don't make treaties

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with corporations, partnerships, or fraternal orders. When sovereigns deal with other sovereigns on matters of power, war, and land, they don't make contracts or memoranda of understanding. They make treaties.

Some of the treaty councils were grand, as when one thousand Nez Perce warriors rode in wearing full regalia and war paint. Others were rag-tag. Tribal military capabilities ranged from mighty to minimal. But all dealt with a central fact, that tribal life would never again be the same, that they would give up most of their land and become occupied nations. The tribal leaders were smart people. They knew as much as the American negotiators. They would retain sovereignty, yes, but in the real world it would be diminished: less territory, a new language, a new economy, a new education, a new diet, a new religion. The United States pledged its honor to help the tribes in this historic, difficult, and profound transition.

Americans have never been directly threatened with becoming an occupied nation. It may be, to understand the past and present of sovereignty and the trust and to do justice by American Indians, that we need to do the hard work of imagining and confronting what it would be like to be occupied, to imagine that occupation, to imagine that transition.

In 1831 and 1832, our nation's greatest jurist addressed this. He explained tribal sovereignty—tribal nationhood—at length, taking it from the beginning, thousands of years ago. Tribes had sovereignty then. "America," John Marshall wrote, "separated by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws." They did not, he continued, surrender their sovereignty at treaty time: "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting to the laws of a master."

What Marshall put down on paper was good history, good political science, good anthropology, and actual practice. The tribes, at treaty time and afterwards, were one of three sources of sovereignty under the Constitution, along with the federal and state governments.

And in another case, as one who lived in those days when Indian affairs were frontline concerns to the American government and who understood the tangled Indian question intimately, Chief Justice Marshall articulated the trust relationship—using the guardian-ward formulation—and squarely addressed the transition tribes faced. "[T]hey are in a state of pupilage. Their relation to the United States resembled that of a ward to his guardian. They look to our government for protection; rely upon its kindness and power; appeal to it for relief to their wants; and address the president as their great father."

I wish that every judge deciding an Indian matter would read Chief John Marshall's words in *Cherokee Nation* in 1831 and *Worcester v. Georgia* a year later. I wish they would read the background—which, with variations, is

the Indian experience generally—the epic struggle between Georgia and the Cherokee that was part of the buildup to the Civil War, that put on such vivid display the valor of the Cherokees against overwhelming odds, and that proved the need for American courts to uphold the rule of law. Those words in the Cherokee cases came from the same pen that wrote *Marbury v. Madison*, *Gibbons v. Ogden*, and the *Dartmouth College Case*. When judges read Marshall's Indian opinions and their backgrounds with open and inquiring minds, my guess is that they will receive the same dignity as the others cases just mentioned.

And I wish that judges would have an understanding of sovereignty and the trust as they exist in the 21st century. This requires a somewhat different kind of knowledge. The key is to gain a sense of what tribal governments, and even tribal culture, are like in modern times. Indian country has undergone many changes since treaty time and law must have the flexibility to evolve with changing times. Law must also have a firmness, or we have no rule of law. How should judges approach tribal sovereignty and the trust one hundred and seventy-five years after John Marshall handed down his decisions?

Much of the law of tribal sovereignty comes back to tribal courts. This applies even to cases that do not directly involve tribal court jurisdiction. Should a federal court uphold a tribal tax, zoning ordinance, or fishing or hunting regulation? Non-Indians may be affected. The tribal courts inevitably must be considered because, if the tribe has the substantive lawmaking authority, then disputes will go to tribal court. Can the federal court trust the tribal court?

To a person, state and federal judges know both state and federal courts and how they work. It's second-nature. But very few know much about tribal courts. Given that, it's human nature for federal and state judges to be concerned about upholding the jurisdiction of courts that may be incompetent or unfair. This is important: Tribes own 58 million acres in the 48 continuous states—an area larger than Minnesota—and the tribal land base is steadily growing.

I wish that federal and state judges would find ways to learn more about the actual workings of modern tribal governments. After the treaties, tribes went through a long and dark assimilationist period where the federal government tried to wipe out all that was Indian, certainly including their governments. Somehow, beginning in the 1960s, Indian leaders managed to initiate and sustain a revival that removed the Bureau of Indian Affairs as the real government, rejuvenated tribal sovereignty, and remade Indian country.

Today, there are more than 70 tribes, comprising well over 90 percent of all Indians, with tribal governments that have governmental staffs—excluding gaming operations—totaling 300 or more. Most of these tribal governments are larger than the nearby county governments. Even small tribes have elaborate operations. These are substantial, growing, and permanent governments.

Judges, in addition to reading and talking around with colleagues, are well-positioned to acquire first-hand knowledge. Tribal judges regularly take courses at the judicial colleges and that offers opportunity for interchange. Tribal judges will be glad to make presentations about their courts at judicial conferences. You would enjoy, even if on a side trip on vacation, visiting a reservation to sit in on a hearing and meet the tribal judges. My guess is that you would be most interested in the blend of Anglo law and procedures and cultural values, especially the practice in many tribal courts of using traditional elders in dispute resolution. But however the federal and state cases turn out, that kind of up-close information will lead to more informed and fairer decisions.

This kind of knowledge about Indian country matters. The Supreme Court has mostly been unkind to tribal sovereignty and the trust for nearly 20 years. To my knowledge, among the justices only Breyer and O'Connor have ever visited tribal courts. During that same period and before, Congress has steadily been much more protective of sovereignty. Members of Congress deal with tribes on a regular basis and, as a group, have become considerably comfortable with tribal sovereignty and the trust.

Chief Justice Marshall characterized the needs of Indians and the government's promises at treaty time as creating a special trust relationship to ameliorate the daunting transition that lay ahead for the tribes. That transition has yet to be completed. Anthropologists are not surprised: cultures take many, many generations to make the kind of wrenching change that has been forced upon Native American peoples. Of course, many Indian people have acclimated to the majority society but Indian country still faces more than 20 percent unemployment and significant social and health issues, mostly tracing to the disorientation of living in two worlds.

Because Indian people treasure their sovereignty, land, and communities and are not about to move, the only way to resolve those economic and social ills is through tribal governments, who have made progress on every front; almost incredibly, for example, unemployment was at 60 percent or higher two generations ago. That leaves a main question hanging in the air: With increasingly strong tribal governments, why do we need a trust? It is a fair question, for example, whether the United States should assume breach of trust liability for a failed resource development project mostly planned and carried out by the tribe. One answer, which I suggest is soundly based on the Constitution, is two-fold. At treaty time we promised help until the transition is completed; we promised a measured separatism—a recognition of both tribal sovereignty and the trust. The courts should hold firm to a robust trust as a sacred national obligation. If the trust relationship is to be changed, that is for Congress, which has primary authority over Indian affairs under Article I and which can—and often has—adjusted the federal-

tribal relationship sensitively in the context of an ongoing relationship and comprehensive hearings and debate.

A final aspect of the context for sovereignty and the trust is the inspiring, and perhaps surprising, revival of culture in Indian country. It's broad-based, time-intensive, and joyous and includes, among many other things, the annual canoe journey of Northwest and Canadian tribes, the Zuni runners, elaborate dances, traditional basket and pottery making, the curricula in tribal K-12 schools and tribal colleges, and ambitious language recovery programs. Gaining some sense of that renewal helps provide the kind of real-world context that every judge brings to the bench.

Those are my dreams for what judges might do in Indian law. They fit within a larger dream. Keeping a watchful eye on practices that impact unfairly on dispossessed and underrepresented peoples may or may not be the highest calling of the federal judiciary, but it is a high calling and an essential one. The Cherokee cases are just two of legions of court decisions that protect dispossessed peoples and fly as banners displaying the most luminous ideals of this nation. Many Indian people will tell you tribal sovereignty is their most important civil right. The trust obligation is not far behind. There are plenty of exceptions—there always are in this complicated world—but as often as not our judges have stood tall for these dispossessed people and we should be proud and anxious to do even better by taking the time to gain a fuller, richer understanding of the practices, history, cultures, challenges, and aspirations of the nation's multi-faceted Native sovereigns.

