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## Tribal-State Affairs: The Next Proving Ground?

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# Tribal-State Affairs-The Next Proving Ground?

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## ABSTRACT

While these more profound issues of structure and perception beg for solution, a more immediate problem has arisen with the advent of Republican dominance in the Congress. One of the likely outgrowths of this transference of political power is that Congress, along with the Supreme Court, which has been doing it for some time, may funnel more issues to the States and their subsidiary governments for resolution or administration. Such a transfer does not bode well for tribes. Remember the allotment of Indian lands (1880s-1930s) and the Termination of tribes (1950s-1960s)? Those policies essentially made tribes and their citizens subject to state authority. The results were disastrous. States, after all, for the better part of the United States history, have been, as the Supreme Court once pithily described, the tribes "deadliest enemies."

Third, both tribes and states should avoid issuing ultimatums that insist upon concessions of jurisdictional authority. Neither tribes nor states are usually willing to surrender sovereignty over their territory, citizens, or governmental activities. For example, when the State of Arizona sought to unilaterally impose limits on the type and number of gaming activities tribes could engage in, this immediately was understood as a direct slap at the internal sovereignty of the Indian nations, and caused tremendous and predictable tension.

Finally, it is self-evident that there can be no universal tribal-state blueprint that will work for every tribe in every state. There are simply too many complicating factors: the sheer number and diversity of tribes; the very real political-economic powerlessness of a majority of tribes (excepting a few tribes which are faring well economically because of gaming revenues); and the inherent conflicting goals of the Bureau of Indian Affairs which remains charged with "managing all Indian affairs," but is also charged with assisting tribes become more "self-determined."

## FULL TEXT

Tribal-State Affairs – The Next Proving Ground?.

Since the advent of the conservative Rehnquist Court, tribal nations have been on the receiving end of a number of debilitating Supreme Court decisions which have weakened their political standing vis-a-vis the federal government:

(Lyng vs. Northwest Indian Cemetery Protective Association (1988), and South Dakota vs. Bourland (1993); vis-a-vis State governments (Cotton Petroleum vs. New Mexico (1989), Employment Division vs. Smith (1990), and Department of Taxation vs. Attea (1994); and even vis-a-vis county governments (County of Yakima vs. Yakima Nation (1992).

Fortunately, until a few weeks ago, a Democratic Congress, led by several key members, especially Senator Daniel Inouye (D. Hawaii), could be expected to challenge and in some cases to enact laws to overturn particularly

egregious Supreme Court opinions. For example, in 1991, Congress enacted Public Law 102-137, which legislatively restored tribal criminal jurisdiction over non-member Indians, a power the Court had snuffed out in *Duro vs. Reina* (1990). And on October 6, 1994, Congress in the American Indian Religious Freedom Amendments Act, overrode the Supreme Court's infamous *Smith* (1990) decision and legislatively recognized the right of Indians to use peyote in traditional ceremonies.

However, for every single case Congress has overturned, in an effort to restore judicially-crushed indigenous rights, even more cases bearing even more destructive precedents for tribal rights have been left to stand. Cases like those mentioned at the start of this column are judicial travesties. And they are travesties because of structure as much as because of perception. I say structure because since tribes have a pre and extra-constitutional (our rights are not defined or beholden to the U.S. Constitution) standing in relation to the United States and states, they are without the constitutional protections that said states and individuals enjoy as citizens. It is also a travesty of perception because the West has always had profound difficulty accepting the validity of indigenous ways which differ in substance and in kind from those of Anglo or Euro-Americans.

While these more profound issues of structure and perception beg for solution, a more immediate problem has arisen with the advent of Republican dominance in the Congress. One of the likely outgrowths of this transference of political power is that Congress, along with the Supreme Court, which has been doing it for some time, may funnel more issues to the States and their subsidiary governments for resolution or administration. Such a transfer does not bode well for tribes. Remember the allotment of Indian lands (1880s-1930s) and the Termination of tribes (1950s-1960s)? Those policies essentially made tribes and their citizens subject to state authority. The results were disastrous. States, after all, for the better part of the United States history, have been, as the Supreme Court once pithily described, the tribes "deadliest enemies."

But if I am right, and the Congress joins in support of what the Supreme Court has been doing for some years, delegating federal Indian authority to the States for settlement, what can tribes do to improve their lot if they must deal directly with States?

First, tribes clearly should avoid litigation if possible. State courts, for the obvious reason that they are state not tribal courts have never been hospitable forums for resolution of tribal-state disputes. The federal courts, at all levels, are now manned mostly by Republican nominees who seem to have little respect for tribal sovereignty, tribal religions, and tribal rights.

Second, tribes and their host states should seek out, where it is possible, to locate common ground upon which to base their relationship. This common ground usually takes shape in the form of issues or resources wildlife habitat, endangered fish or animal species, or other issues that cross tribal-state boundaries.

Third, both tribes and states should avoid issuing ultimatums that insist upon concessions of jurisdictional authority. Neither tribes nor states are usually willing to surrender sovereignty over their territory, citizens, or governmental activities. For example, when the State of Arizona sought to unilaterally impose limits on the type and number of gaming activities tribes could engage in, this immediately was understood as a direct slap at the internal sovereignty of the Indian nations, and caused tremendous and predictable tension.

Fourth, if the two parties are pursuing an agreement on some issue, they should directly include all persons to be affected by the agreement in the negotiating process. By involving all the parties, essential community support is developed, credibility and trust are established, and accountability is practically guaranteed.

Fifth, the tribes and states should be willing to pursue appropriate compromises through imaginative discussions in a non-adversarial setting.

Finally, it is self-evident that there can be no universal tribal-state blueprint that will work for every tribe in every state. There are simply too many complicating factors: the sheer number and diversity of tribes; the very real political-economic powerlessness of a majority of tribes (excepting a few tribes which are faring well economically because of gaming revenues); and the inherent conflicting goals of the Bureau of Indian Affairs which remains charged with "managing all Indian affairs," but is also charged with assisting tribes become more "self-determined."

Progress in tribal-state affairs is also slowed by the inevitable misunderstandings, skepticism, and the occasional overt hostility that sometimes erupts. There is no easy answer to whether the historic tension between tribes and states will persist, or whether as a result of as yet unformulated Republican policies, the two parties will find a way to expand their efforts at mutual accommodation. Either way, tribes had best guard their sovereign loins. The next few years promise to be a hoot.