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First Nations and States: Contesting Polities

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PERSPECTIVES

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GUEST COLUMNIST

The U.S. Supreme Court in an historic case in 1886, *U.S. v. Kagama*, which devastated tribal sovereignty by affirming the legality of the 1885 Major Crimes Act that problematically extended federal criminal jurisdiction over "all" Indians for seven major crimes – murder, manslaughter, rape, etc., (today that number has increased to 14 crimes) – more accurately declared in that same case that state governments could be characterized as the "deadliest enemies" of indigenous nations.

This has been the case ever since the beginning of the American republic. State officials have represented ever-expanding non-indigenous populations that have always clamored for more Indian lands and resources, and which have constantly sought to extend their authority over tribal peoples and their territories. States have consistently clamored for rule over Indian nations despite existing safeguards that deny them such authority – treaties, federal supremacy over the nations' Indian policy (not over Indian peoples), the trust doctrine, and finally state constitutional disclaimer clauses. I'll return to discuss the disclaimers momentarily.

Today, as state governments flail away in an ever deepening economic crisis of their own construction – and denied help from a supposedly states' rights oriented Bush Administration and Republican Congress – the clamoring has expanded to outlandish attempts by state governors and legislatures to compel Indian tribes with successful gaming operations to pay more of their hard-earned proceeds to state coffers to help with their self-inflicted deficit burdens.

Governor Gray Davis of California is currently seeking an additional 1.5 billion in annual revenues from tribes; Governor James Doyle of Wisconsin recently forced six of the 11 tribal nations to sign new compacts that will net the state some 200 million over the next two years, a steep increase from the 24 million the tribes had paid the previous year. Other states are contemplating their own squeeze plays on tribal government revenues.

THIS [THE INDIAN GAMING REGULATORY ACT] WAS A CRITICALLY DEMEANING REQUIREMENT THRUST UPON TRIBAL GOVERNMENT LEADERS BY THEIR FEDERAL TRUSTEE – THAT TRIBES BE REQUIRED TO NEGOTIATE COMPACTS WITH THEIR OFTENTIMES "DEADLIEST ENEMIES."

States have been emboldened to extract these additional monies in part because a series of U.S. Supreme Court decisions since the early 1990s have elevated the questionable notions of states' rights and state sovereign immunity to levels not seen since the 1890s. Furthermore, states have been more audacious in their efforts to pressure tribal nations to surrender more of their revenues because Congress has failed to aggressively respond to the judiciary's usurpation of congressional authority over the field of federal Indian policy. Congressional lawmakers have also failed to respond partly because they, too, benefit from tribal resources and because they enacted the law, the Indian Gaming Regulatory Act in 1988, that actually created the conditions that gave states a heretofore unheard of economic inroad to Indian economic development decisions by requiring tribal leaders to negotiate compacts with states before they could enter the lucrative gaming industry.

This was a critically demeaning requirement thrust upon tribal government leaders by their federal trustee – that tribes be required to negotiate compacts with their oftentimes "deadliest enemies." After all, state governments have never been similarly required to negotiate compacts with tribes for their economic decisions, much less be expected to pay ever escalating percentages of their revenues to tribal nations should Indians fall upon hard economic times (which has been their perpetual status from the late 1800s to the advent of Indian gaming).

States, you see, especially the 11 western states (Alaska, Arizona, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming) home to more than 80 percent of the indigenous nations and a majority of the 278 reservations and trust areas, have no inherent constitutional authority to exercise jurisdiction or any taxation power whatsoever over Indian lands or peoples, absent express tribal and federal consent.

In fact, each of these states have in their constitutions explicit Indian disclaimer clauses that were required by the federal government before the territories could be admitted to statehood. These disclaimer clauses, dating from Wisconsin's territorial disclaimer of 1836, to Alaska's constitutional clause of 1959, explicitly declare that these territories – later states – are not allowed to extend their authority inside Indian country.

While there is some variation in the language of these clauses, they generally contain unequivocal language designed to assure both indigenous nations and the federal government that the territory or state would never, without federal consent and/or a treaty modification, interfere in the internal affairs of indigenous nations.

MORE CRITICALLY WE MUST ASK WHY THE FEDERAL GOVERNMENT, THE INDIANS' SUPPOSED TRUST AGENT AND TREATY PARTNER, HAS NOT STIFLED THE STATES CONSTANT CRIES FOR WHAT IS NOTHING SHORT OF THE LEGALIZED EXTORTION OF TRIBAL REVENUES.

Arizona's disclaimer clause, for example, lodged in Article 20 of the state's Constitution of 1912, reads as follows:

The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted lands, public lands, lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States ... and no taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by any Indian.

The inclusion of such clauses serve to reiterate that the federal government has exclusive authority over the nation's Indian policy, to reaffirm tribal sovereignty *vis-a-vis* states, and to remind the states that their quasi-sovereign status in the federal system does not extend into Indian country, absent express federal law, tribal consent, and the expunging of extant disclaimer clauses.

Since these states lack the inherent authority to impose their jurisdictional or taxation authority over Native nations or properties without express approval, why do they now act as if they have the right to demand additional percentages of Indian gaming proceeds? Although the states' demands are technically not a "tax" on gaming proceeds, the effect of the states extractive attempts amounts to the same thing. More critically we must ask why the federal government, the Indians' supposed trust agent and treaty partner, has not stifled the states constant cries for what is nothing short of the legalized extortion of tribal revenues.

I find it both detestable and ironic that the very peoples, indigenous nations, who for several generations were falsely accused of being economic drains on state welfare and social service systems are now enduring unrelenting pressure from a number of states to share ever greater percentages of their gaming profits, at the same time that several of these same states are seeking to expand their own gaming programs which will only further diminish tribal gaming revenues, the one consistent form of economic development that has enabled a number of tribes to significantly raise their economic, political, and social standards.

Even as these crass developments are intensifying, tribal nations and states, in some respects, have improved their relationship over the years and cooperation between the two unequal polities occasionally breaks out in areas such as cross deputization of law enforcement personnel, environmental regulation, taxation, etc. But the general thrust of tribal/state relations continues to be far more contentious than cooperative.

In fact, John McCain, the conservative Republican Senator from Arizona, accurately summed up the states typical stance *vis-a-vis* tribes when it comes to gaming and intergovernmental relations: "The state and gaming industry have always come to the bargaining table with the position that what is theirs is theirs and what the Tribes have is negotiable." Until this attitude changes, and unless the federal government renews its pledge to support American Indian self-determination, the tribal/state relationship will continue to be a profound set of problems in search of an elusive set of equally profound solutions.

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