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# Indigenous Peoples, American Federalism, and the Supreme Court

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# Indigenous Peoples, American Federalism, and the Supreme Court

**by David E. Wilkins**

As America breathes a sigh of relief in the afterglow of the pyrotechnics associated with the first post-September 11 July 4, pondering its global status as the leading agent in its self-proclaimed "War on Terrorism," and its domestic situation with a "War on Federalism" raging between the Supreme Court's redefined notion of states' rights and federal authority, it seems a propitious time to ask where indigenous nations fit in this warlike atmosphere, given that the history of Indian/U.S. relations involved a fair amount of war-related activities.

The battle fronts today include, but are not limited to, gaming, recognition of new tribes, water rights, taxation, trust fund (mis) administration, and sacred sites.

Of course, the U.S. celebration of its first independence in 1776 presaged the slow but inexorable dependence of aboriginal peoples as their political and military power gradually waned. But this weakening had not developed before many First Nations entered into hundreds of ratified treaties and agreements with the U.S. between 1775 and 1912.

Such diplomatic arrangements affirmed the inherently sovereign political character of aboriginal nations even as their geographic and economic independence gradually revealed peoples who had assumed a beneficiary status in relation to their federal trustee.

As the federal government intensified its coercive assimilation campaign against Native peoples in the nineteenth century, with the express goals of individualizing communally held lands, Christianizing Indian souls, and enfranchising Indian citizens, substantial, if inconsistent, federal and state recognition of tribal sovereignty continued in the form of federal case law, sporadic enforcement of the trust doctrine, and state disclaimer clauses (with eleven western states declaring in their organic acts and constitutions that they would forever disclaim jurisdiction over Indian property and persons) confirming that tribal governing powers were not generally subject to the U.S. Constitution.

Tribal fortunes since the founding of the U.S. have frequently hinged on how the balancing contest between the states and the federal government have played out. From the Articles of Confederation to the Indian gaming and recognition controversies of today, the subunit governments of the U.S. have frequently vied with the federal and tribal governments for jurisdictional control of Native peoples, lands, and resources.

First Nations are often frustrated by the repeated federal and state claims of political dominance over their people and resources, but insist on maintaining the nation-to-nation political relationship secured by the treaty process and sustained by the trust doctrine with the federal government.

Such an insistence has proven difficult to sustain in the wake of the Rehnquist Court's recently concluded term where its judicial tsunami on states' rights and federalism continued to rage. Although tribal nations are not direct constitutional partners and are the eldest sovereign entities on these shores, the Rehnquist Court in numerous rulings has effectively reduced tribal sovereignty in the areas of taxation, jurisdiction over non-Indians, and zoning; while simultaneously elevating state sovereignty and sovereign immunity vis-a-vis tribal nations and the tribes' trustee, the federal government.

David Getches recently reported that from 1991 to 2000 the Rehnquist Court rendered twenty-eight Indian law decisions that affected tribal interests. Of that number, Indians secured victories in only five cases. Such a track record does not bode well for tribal governments or tribal sovereignty.

Nevertheless, at the federal appellate level, tribal interests are more often affirmed. On June 24, 2002 the Eighth Circuit reaffirmed inherent tribal sovereignty by ruling in *U.S. v. Lara* that a tribe's power to prosecute non-member Indians derives from its retained sovereignty and is not a delegated power from Congress. Thus, the Constitution's Double Jeopardy Clause is not offended because "two separate sovereigns" convicted the appellant for crimes arising from the same conduct.

Such a ruling, though solidly grounded in history, treaty and statutory law, and prior precedent, might not withstand U.S. Supreme Court review. In the meantime, First Nations will celebrate this moment of contemporary judicial clarity and hope that it is upheld should it make its way to the Supreme Court's chambers.

American Indian nations stand in an extra-constitutional relationship to the federal government because of their preexisting sovereignty and treaty status; but individual Indian citizens are today uniquely situated as state and federal citizens as well. This seeming paradox would appear to give Native peoples certain advantages over their non-Native neighbors. In reality, tribal peoples still occasionally find themselves at the mercy of federal and increasingly state interests which can act with virtually unlimited political power over tribal peoples because of their aboriginal status and notwithstanding their treaty and citizenship rights.