VI

Tribal Self-Government

INDIAN TRIBES WERE SOVEREIGN NATIONS centuries before Europeans arrived on this continent, and they continue to exercise the powers of a sovereign government. Indian tribes, the Supreme Court has recognized, "exercise inherent sovereign authority over their members and territories."[1]

The Supreme Court discussed the inherent right of tribal sovereignty in 1832 in *Worcester v. Georgia*.[2] The issue in *Worcester* was whether the state of Georgia could impose its laws on the Cherokee Indian Reservation, located within the state. In holding that Georgia could not extend its laws to the reservation, the Court stated:

> Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States . . . Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial . . . The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and the citizens of Georgia, have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[3]

The *Worcester* doctrine of inherent tribal sovereignty has undergone some modification over the years, but its basic premises remain the same.

Indian tribes have the *inherent* right of self-government. Congress has the supreme authority to limit or abolish tribal powers, but the powers that tribes possess are not delegations of authority from the United States; rather, tribes possess them as a consequence of their historic status as independent nations, and the United States supports the exercise of these powers.[4] As President Bill Clinton stated in an executive order in 2000, "Indian tribes exercise inherent sovereign powers over their members and territory . . . The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."[5]

In December 2010, President Barack Obama signed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[6] More than 140 nations have pledged to support the UNDRIP. The Declaration, discussed in more detail in Chapter XIII, recognizes that indigenous peoples around the world have a right to political and cultural autonomy. The Declaration rests on the principle, which the United States supports, that strengthening the political, cultural, and economic independence of native communities is beneficial both for these communities and for the nation states in which they live.[7] Thus, the concept of inherent tribal sovereignty is consistent not only with federal law but also with international law. The international community is dedicated, just as the United States is dedicated, to improving and supporting improved relations between all nations and their indigenous populations.

A. THE SOURCE AND LIMITS OF TRIBAL POWER

What is the Source of Tribal Power?

The source of an Indian tribe's power is its people. Indian tribes have the inherent right to govern themselves, a right they have possessed "from time immemorial."[8] As a federal appellate court stated in 2002: "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate. [Indian tribes are] qualified to exercise powers of self-government . . . by reason of their original tribal sovereignty."[9]

What are the Limits of Tribal Power?

The Supreme Court has consistently held that although Indian tribes have inherent sovereign powers, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[10] If it wanted to, Congress could abolish all tribal governments and all Indian reservations. This principle of law—called the "plenary power doctrine"—is

ultimately based, as explained in the previous chapter, on the superior military power of the federal government.

The plenary power doctrine has been extensively criticized on both legal and moral grounds.[11] Critics assert that Indian tribes are as sovereign today as they were prior to the arrival of Europeans, and that the United States has no right to limit their powers.[12] Scholars of history report that none of the authors of the Constitution envisioned that the federal government would claim to possess plenary power over Indian tribes. On the contrary, "the Founders wished to safeguard Indian sovereignty."[13] The Founders recognized that Indian tribes were independent nations, which explains why the United States entered into treaties with them, just as the United States did with other independent nations. These critics point out, as discussed in Chapter V, Section A, that there is nothing in the Constitution that confers federal power over Indians, or even implies that those who wrote the Constitution considered Indian tribes as subject to federal authority. Only decades later did Congress assert, and the Supreme Court approve, plenary power over Indians.

Indian tribes, the Supreme Court has stated, have two types of limitations on their governmental powers: *express* and *implied*. Congress has expressly prohibited tribes from exercising certain powers, such as selling tribal land without the federal government's permission.[14] These express limitations are discussed in Chapter V. In addition to these express limits, "Indian tribes have lost many of the attributes of sovereignty" by implication, the Supreme Court has held, due to their "dependent status," that is, by virtue of their "incorporation into the United States."[15] Once the territory of the United States surrounded Indian tribes, tribal powers were necessarily diminished so that they would not "conflict with the interests of the overriding sovereignty."[16] For instance, Indian tribes may no longer declare war on a foreign government or exercise certain powers over non-Indians (as discussed later in this chapter); tribes have impliedly lost those powers, the Supreme Court has stated, due to their subordinate position as "conquered" nations under the control of the federal government.[17] However, those powers not expressly extinguished by Congress or lost by implication—and there are many of them—remain within the tribe's sovereign authority to exercise.

Indian tribes occupy a unique position in U.S. society. No other political entity possesses the same status. The Supreme Court has described Indian tribes as "quasi-sovereign" and "semi-independent,"[18] possessing "attributes of sovereignty over both their members and their territory," while also subject to the plenary power of Congress.[19]

The recent assertion of hunting, fishing, and water rights by certain tribes, as well as the success of some tribes that have lucrative gaming casinos, has

prompted many non-Indians to urge Congress to dilute tribal rights even further. Whether Congress will bow to this pressure remains to be seen. For the past several decades, as explained in Chapter I, Congress has acted under the assumption that it is in the best interests of Indian tribes and the United States to promote tribal self-government and enhance tribal economic opportunities.

Are Tribal Powers Limited by the U.S. Constitution?

No. The Supreme Court held more than a century ago that the Constitution does not limit (or even apply to) the exercise of tribal powers.[20] The right of Indian tribes to self-government predates the Constitution, and nothing in the Constitution requires Indian tribes to conform their powers to its provisions. Tribal governments thus may enact laws that would violate the Constitution if enacted by the federal or state governments.[21]

B. THE SCOPE OF TRIBAL POWERS

Tribal governments have the same powers as the federal and state governments to regulate their internal affairs, with a few exceptions. The remainder of this chapter examines the eight most important areas of tribal authority: (1) the right to form a government, (2) the right to determine tribal membership, (3) the right to regulate tribal land, (4) the right to regulate individually owned land, (5) the right to exercise criminal jurisdiction, (6) the right to exercise civil jurisdiction, (7) the right to regulate domestic relations, and (8) the right to engage in and regulate commerce and trade.

1. The Right to Form a Government

Does an Indian Tribe have the Right to Form a Government?

Yes. The right to form a government is the first element of sovereignty, and Indian tribes have this right as part of their sovereign powers.[22]

Historical accounts indicate that some European settlers mistakenly believed that Indian tribes lacked formal governments. In truth, as Vine Deloria, Jr., has explained, tribal governments were both complex and well-organized "but they differed so radically from the forms used by the Europeans that few non-Indian observers could understand them," and Europeans were "blinded" by their prejudices.[23] Indian tribes "had highly complicated forms of government" long before the arrival of Europeans.[24] The League of the Iroquois, a confederation of six powerful Indian tribes in the Northeast, had a written constitution prior to the fifteenth century. Indeed, aspects of the Iroquois Constitution—including

such democratic concepts as initiative, referendum, and the right to vote—appear to have "provided a model for the framing of the United States Constitution."[25]

The right to form a government includes the right to establish the qualifications for tribal office, to determine how tribal officials are chosen, and to define their powers. A tribe can require that candidates for tribal office be enrolled in the tribe and speak the tribe's language,[26] and the tribe can disqualify for office persons with felony convictions or those who engaged in misconduct during a prior term in office.[27] Also, each tribe has the power to determine who may vote in tribal elections.[28] As with all other tribal powers, a tribe's ability to form and operate a government is subject to the plenary authority of Congress,[29] but Congress has rarely interfered with this aspect of tribal sovereignty.[30]

What Types of Governments do Indian Tribes Have?

Tribal governments vary. Differences exist in the structure of government, court systems, election procedures, requirements for membership, and rights afforded tribal members. Today, many tribes have the same three governmental branches ("separation of powers") as the federal and state governments: legislative (the tribal council), executive (the chairperson), and judicial (the tribal courts), although tribes are not required to separate the powers of government, and some tribes do not.[31] Most tribes elect their leaders by popular vote, but a few tribes determine their leaders by heredity. Most tribes have a centralized government, with the reigns of power resting in a tribal council and one chairperson. Some tribes, though, have other systems. For example, the Hopi Tribe in Arizona is a union of nine self-governing villages, with each village deciding for itself how it shall be organized,[32] while the Saint Regis Mohawk Tribe in New York is governed by three tribal council chiefs, with one chief elected each year for a three-year term.[33]

The nature of tribal government was dramatically altered by the Indian Reorganization Act of 1934 (IRA)[34] and by similar laws passed in 1936 applicable to tribes in Alaska and Oklahoma.[35] As explained in Chapter I, the IRA was intended to put an end to the destructive policies of the General Allotment Act of 1887 (GAA) and help revitalize tribal governments by providing a mechanism by which Indian tribes could modernize their governmental structure.

Immediately following passage of the IRA, the Secretary of the Interior drafted a model constitution containing provisions the Secretary believed would assist tribes in operating an effective government. The model was circulated to Indian tribes, and federal agents went to many reservations to promote its adoption.[36] As required by the IRA, elections were held on each reservation to determine whether the tribe wished to restructure its government pursuant

to the Act. To induce tribes to accept the IRA, Congress created a program under which millions of dollars of federal funds could be loaned to tribes that adopted IRA constitutions.[37] The IRA was accepted by approximately 180 tribes and rejected by fewer than 90. However, the number of tribes that actually agreed to accept the IRA is controversial because it has been reported that tribal members who failed to vote were counted by federal officials as having voted in favor of the IRA.[38]

The IRA allowed each tribe to draft a constitution giving the tribe specific governmental powers. The Secretary of the Interior was directed by the Act to approve constitutions that created a tribal council possessing the authority to employ legal counsel; negotiate contracts with federal, state, and local governments; and prevent the disposition of tribal property without the tribe's permission.[39] In addition, the Secretary encouraged tribes to give their councils the power to borrow money and pledge tribal property as security for loans; to levy and collect taxes and issue licenses; to establish a tribal court system and enact a criminal code; to remove from the reservation nonmembers whose presence was injurious to the tribe; and to create subordinate tribal organizations for economic, educational, or other purposes.

In order to qualify as an IRA tribe, however, the tribe's constitution had to be approved by the Secretary of the Interior,[40] and the Secretary required each tribe to include a provision in its constitution that subjected every tribal law to secretarial approval before it could become effective.[41] This requirement prompted many tribes to reject the IRA. Although ineligible for IRA loans, non-IRA tribes were more autonomous because neither their constitutions nor their laws had to be submitted to the Secretary for approval. (The Secretary has since notified IRA tribes that they may amend their constitutions to delete the requirement of secretarial approval of their laws, and most tribes have done so.)[42]

The IRA helped rejuvenate tribes both politically and economically, and it was a vast improvement over the assimilationist policies of the GAA. The IRA "signaled an attitudinal change toward Indians and tribal governments" that sought to foster tribal self-determination.[43]

However, the IRA was enacted with little input from tribes and it did not seek to harmonize its provisions with tribal custom and tradition. IRA tribes suddenly had to adopt a form of government different from any they had experienced before, and many of these governments became vulnerable to a host of new problems. The requirement that tribal constitutions and laws had to be approved by the Secretary of the Interior was used by the Secretary "as a basis for maintaining control over tribal affairs."[44] Especially in the years immediately following passage of the IRA, many tribal governments were weak and their elected officials untrained and inexperienced, which lent itself to

bureaucratic domination by the Bureau of Indian Affairs.[45] Moreover, traditionalists often disagreed with policies enacted by these new governments, thus creating internal strife.[46] For some tribes, the IRA resulted "in the concentration of power [in the hands of a few tribal officials] that had not previously existed,"[47] and in the adoption of a government that ignored "the unique governing traditions and structures of the Indian nation."[48] On some reservations, there remains today a "crippling division and distrust of tribal government."[49]

This does not mean, of course, that federal officials should intervene in tribal government or that a "crisis" exists. As with other nations, Indian tribes have the right to experiment with different structures, policies, and laws and to fashion through trial and error the government that best suits their needs. After all, as first written, the U.S. Constitution legalized slavery and denied women the right to vote, and it took great struggles to change these policies. Tribal governments should be afforded similar latitude to make changes and adjustments on their own.[50]

Are Tribal Elections Subject to Federal Review?

Indian tribes have the inherent right to choose their leaders. Unless Congress has consented to intervention by federal officials, which has rarely occurred, tribes have the exclusive right to determine who may vote in tribal elections, who may run for tribal office, and how tribal elections will be administered.[51] "The right to conduct an election without federal interference is essential to the exercise of the [tribe's] right to self-government."[52]

There are only two situations in which federal officials may exert some control over tribal elections. Both were discussed in Chapter V, Section B(2), and are briefly summarized here. First, when disputes have arisen within a tribe as to which person or group won the tribal election, federal officials may recognize a temporary government until the tribe resolves the dispute under tribal law. This enables the federal government to carry out its government-to-government relations with the tribe until the tribe resolves the controversy.[53] However, neither federal officials nor federal courts may determine a tribe's permanent leaders or resolve other intratribal disputes concerning tribal government operations. As a federal appellate court stated in 2010: "Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions, and the BIA's recognition of a member or a faction [as temporarily having governmental authority] is not binding on a tribe."[54]

Second, IRA tribes may amend their constitutions only by following an election process supervised by the Secretary of the Interior, and new tribes that form themselves under the IRA must follow the same process when adopting their first constitutions.[55] However, this secretarial power is limited. If the tribe

follows the federal amendment process correctly, the Secretary must accept the result unless the constitutional provision being adopted would authorize the tribe to engage in an activity prohibited by federal law.[56]

What Types of Court Systems do Tribes Have?

Indian tribes had their own systems for resolving disputes and maintaining law and order centuries before Europeans arrived in North America. These differed greatly from European systems. For instance, tribes handled misbehavior of tribal members primarily through public scorn, the loss of tribal privileges, or the payment of restitution to an injured party rather than by imprisonment. Banishment was usually reserved as the extreme punishment, although on occasion a serious offense might be avenged by the injured party's family.[57]

As discussed in Chapter I, by the late nineteenth century federal officials had embarked on a mission to disrupt, if not destroy, tribal governments and to force Indians to assimilate into Anglo-American society. As part of this effort, the federal government sought to impose "white man's law" on Indian reservations. This included the creation of a Court of Indian Offenses on most reservations. These courts were often administered by the tribes but were always under the control of federal agents. The rules and procedures governing these courts were issued by the Secretary of the Interior and published in the Code of Federal Regulations (CFR). These courts, which became known as "CFR courts," tended to be informal, combining Indian custom with western law. Their main function was to provide Indians with a way to prosecute crimes and resolve disputes in a manner acceptable to federal officials.[58]

The IRA of 1934 authorized IRA tribes to establish their own courts and to enact law-and-order codes, subject to the approval of the Secretary of the Interior. The courts created in this fashion are known as "tribal courts." Today, most non-IRA tribes have similar courts, also called "tribal courts." Thus, the vast majority of tribes now have tribal courts, although some tribes still have CFR courts, and some tribes (especially some of the Pueblos in New Mexico) still have "traditional" courts, which rely primarily on the tribe's traditional methods of resolving disputes and enforcing tribal law.[59]

Although tribal courts employ procedures very similar to those employed in state and federal courts, tribal tradition often plays an important role in deciding cases in tribal courts. For instance, when Navajo courts award damages to an injured party, they may consider "a relationship value," paying the injured party "enough so that there are no hard feelings." In other words, an effort is made consistent with Navajo cultural values to restore a good relationship between the litigants and not, as in Anglo-American courts, merely award compensation.[60] Similarly, courts of the Saginaw Chippewa Tribe of Michigan

are expected to decide controversies in accordance with that tribe's "cultural norms of integrity," one of which fosters "mutual respect."[61] In a 2005 case, the court of appeals for the Cheyenne River Sioux Tribe of South Dakota criticized the manner in which tribal officials had evicted a tribal member from his tribal housing assignment on the grounds that their actions were inconsistent with "basic Lakota concepts of respect and fairness" as well as violating principles of law.[62] Similarly, the appellate court for the Little River Band of Ottawa Indians in Wisconsin has held that controversies should be resolved consistent with "tribal customs and traditions."[63] Some tribal courts are authorized to convene a panel of elders to decide whether a particular dispute could be resolved through tribal custom and tradition.[64]

Tribal courts "play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."[65] Tribes are free to fashion their own court systems, except to the extent prohibited by the Indian Civil Rights Act, as discussed in Chapter XIV. Tribal courts vary as a result of such factors as the size of tribes, their wealth, the importance of traditions, and the needs of the community. Many tribes have multileveled, sophisticated judicial systems, with traffic courts, separate courts for criminal cases, and trial and appellate courts.[66] The courts of the Navajo Nation process over forty-five thousand cases a year and publish decisions in an official reporter.

Each tribe sets its own eligibility requirements for judges, which vary from tribe to tribe. Some tribes require that judges be tribal members, and some require that they be state-licensed attorneys. Some tribes elect their judges, while on other reservations they are appointed by the tribal council.[67] Each tribe also determines who may appear as an attorney or counselor in tribal court,[68] and some tribes, such as the Navajo Nation and the Oglala Sioux Tribe, have their own bar examinations that lawyers must pass before practicing in tribal court.

Few tribes have the means to fund their court systems adequately. Congress has not provided sufficient funding for this purpose, resulting in backlogs in deciding cases, deteriorating courtrooms, inability to fully train court staff, and inadequate salaries to judges and other court officials, all of which undermine the judicial system and hamper its proper functioning.

An important decision that tribes need to make is whether to have an independent judiciary possessing the power of judicial review, that is, a judicial branch of government separate from the legislative and executive branches that possesses the authority to declare invalid actions taken by the other two branches. Not long after the United States gained its independence from Great Britain, the Supreme Court declared in *Marbury v. Madison* (1803)[69] that federal courts have the authority to exercise the power of judicial review, even though that power is not expressly conferred in the Constitution. Some tribal constitutions