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Sovereignty, Native American

For federally recognized American Indian tribes in the United States, of which there are 334 in the lower forty-eight states, sovereignty is the central political issue. This issue is expressed through the treaty relationship that has existed between American Indian nations and the federal government since 1776. In addition to the federally recognized tribes, there are 228 Alaska Native Villages, which are also federally recognized but through the Alaska Native Claims Settlement Act of 1971. As distinct from the tribes in the lower forty-eight states, whose land is held in "trust" by the federal government, the Alaska Native villages are organized into corporations that hold their land. Although the land held in trust, most of which is organized into reservations, is legally defined as "Indian country," the Alaska Native land is not so defined.

Native Hawaiians do not currently have a special relationship with the federal government, though there is currently a movement on the island and in Congress to have Native communities recognized under the same rubric of federal American Indian law as the tribes in the lower forty-eight states. However, this movement is opposed by groups of Native Hawaiians who reason that gaining "trust" status would only limit or co-opt historic Hawaiian sovereignty, which pre-dates the European invasion of the islands in the 18th century.

In fact, the sovereignty of all Indigenous Peoples worldwide, as expressed in the UN Draft Declaration of the Rights of Indigenous Peoples, pre-dates the

European invasions beginning in 1492. But the declaration also recognizes, as it condemns, the limitations placed on this sovereignty by the various European colonizers. Recognizing that it is the aspiration of Indigenous Peoples worldwide to restore in one way or another their precolonial sovereignty, this entry focuses on how the colonial power of the United States has limited and continues to limit this sovereignty for the 334 American Indian tribes in what would become the lower forty-eight states.

Congress and Sovereignty

Tribal sovereignty is inherent and recognized as such under federal American Indian law, the colonial body of statute, and case law that regulates relations between the tribes and the federal government. Under this law, the Supreme Court has recognized Congress as having "plenary power" in American Indian affairs. Although there is an ongoing debate about the source of this virtually absolute power, the Court has historically located it in Article I, Section VIII, Paragraph 3 and Article II, Section II, Paragraph 2 of the U.S. Constitution. The former is the Commerce Clause under which the Congress has the power "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes"; the latter gives the president "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

Until 1871, when Congress abrogated treaty-making with American Indian tribes, the federal government negotiated treaties with Native tribes and in that sense recognized them as independent, sovereign nations. But from the beginning of the Republic, Congress and the Supreme Court, deferring to what was interpreted as the preeminent power of Congress in American Indian affairs as it does to this day, began to limit Native sovereignty.

To that end, between 1790 and 1834, Congress established a series of trade and intercourse acts to regulate political and economic relations with the American Indian tribes. Paramount in these acts, which were expanded and synthesized in the 1834 act, was the federal government's taking control of all sales of American Indian lands to U.S. citizens such that it was illegal for these sales to take place unless they were conveyed through a federal treaty or convention. Further, in Section 25 of the 1834 act, the U.S. government extended its criminal jurisdiction in American Indian country except in the case of Indian-on-Indian crime, something for which it would also assume jurisdiction in the case of major crimes in 1885. Thus, the Trade and Intercourse Acts intruded significantly on two key areas of Native sovereignty: control of land and laws.

The Supreme Court and Sovereignty

Concurrently with the congressional imposition of statute law on American Indian tribes, the Supreme Court began to develop a body of case law geared to expanding federal power in this area. Between 1823 and 1832, the Court, under Chief Justice John Marshall, heard three generative cases in federal American Indian law, known now as the "Marshall trilogy": *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832). Marshall wrote the opinion of the Court in all three cases.

Johnson v. M'Intosh involved a land dispute between Whites over land allegedly sold by the Piankeshaw Indians in 1775 to the forefathers of the plaintiffs (Johnson and Graham) and then resold to the defendant by the U.S. government after the Revolution, the plaintiffs argued that, being sovereigns, American Indian tribes had a right to sell their lands, while the defendant, among other arguments, denied this sovereignty, arguing instead that American Indians were not a part of society. What Marshall did in his opinion was effect a compromise between these two positions, one denying and the other affirming Native sovereignty over land. While acknowledging that American Indian nations were the rightful occupants of the land, their rights to complete sovereignty, as independent nations, were denied. Thus, citing the medieval "doctrine of discovery," which was based in the racist ideal of European superiority to Indigenous Peoples, the Marshall court actually and virtually dispossessed American Indian peoples of the title to their lands, thus affirming and expanding the control of land sales mandated in the Trade and Intercourse Acts. This fundamental limitation of tribal sovereignty (for how can a nation claim sovereignty if it does not control its own land base?) was expanded 8 years later in *Cherokee Nation v. Georgia.*

Cherokee Nation v. Georgia. In this case, the Cherokees came before the Court as a sovereign foreign nation to ask for an injunction against the state of Georgia, which, in violation of Cherokee treaties with the United States, was violently annexing Cherokee land

and abrogating Cherokee laws. Facing intense political pressure from both an executive branch that refused to support the treaties with military force and the state of Georgia, which refused to recognize Cherokee sovereignty, the Marshall Court, sensing an imminent political crisis it feared it could not weather, denied the Cherokee status as a foreign nation and thus its right (at that time) to appear before the Court. In his now famous opinion, with Justices Joseph Storey and Smith Thompson dissenting, Marshall sought a compromise as he had done in *Johnson*, defining American Indian tribes as "domestic dependent nations" and declaring their relationship to the United States as being that of a ward to guardians.

Because in international law a nation is defined as being both independent and foreign, Marshall's definition, which holds today, is oxymoronic. Further, his dictum comparing the tribal-federal relationship to that of "a ward to his guardian" reduces American Indian nations to the status of minors before the law, a relationship now rendered under federal Indian law as one of "trust" in which, in exchange for the abrogation of certain sovereign rights, the federal government assumed certain responsibilities toward its "ward."

Worcester v. Georgia was driven by the same political circumstances as *Cherokee Nation*. In this case, Samuel B. Worcester and six other missionaries to the Cherokees were tried and convicted in the superior court of Gwinnett County, Georgia, of residing in Cherokee territory without a permit. Worcester had pleaded to the Georgia court that the state's laws possessed no validity in Cherokee territory because in signing treaties with the Cherokees, the United States of America, in effect, acknowledged the Cherokee nation to be indeed a sovereign nation. But this plea was rejected, Worcester and the others were convicted, and the case went to the Supreme Court on a writ of error, where the Court found in favor of the plaintiffs.

Reading his majority opinion, one understands that Marshall saw this as a case clearly threatening the sovereignty of the federal government over and against the states in American Indian affairs and beyond. But in upholding the preeminence of the federal government in American Indian affairs, Marshall took it upon himself in his dicta to revise his definitions of the doctrine of discovery and American Indian sovereignty in the previous two cases to the point of almost but not quite reversing himself. In the final analysis, Marshall's language in *Worcester* established a hierarchy of sovereigns in American Indian affairs, which holds to this day, with the federal government at the top and the states at the bottom.

Although the decision, effectively unsupported at the time by the executive branch, could not stave off the federal removal of the Cherokees from their homeland, it remains today the most important tool in the kit of federally recognized American Indian tribes who are continually struggling to maintain what limited internal sovereignty they have in a colonial system grounded in the commerce and treaty-making clauses of the Constitution, the Trade and Intercourse Acts, and in the case law of the Marshall trilogy.

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See also Alaskan Natives, Legislation Concerning; Australia, Indigenous People; Bureau of Indian Affairs; Cherokee; Colonialism; Hawaiians; Internal Colonialism; Native Americans; Red Power

Further Readings

Canby, William C., Jr. 2004. *American Indian Law in a Nutshell.* 4th ed. St. Paul, MN: West.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Cheyfitz, Eric. 1993. "Savage Law: The Plot Against American Indians in *Johnson and Graham's Lessee v. M'Intosh* and *The Pioneers.*" Pp. 109–128 in *The Cultures of United States Imperialism,* edited by A. Kaplan and D. E. Pease. Durham, NC: Duke University Press.

Cheyfitz, Eric. 2006. "The (Post) Colonial Construction of Indian Country: U.S. American Indian Literatures and Federal Indian Law." In *The Columbia Guide to American Indian Literatures of the United States Since 1945,* edited by E. Cheyfitz. New York: Columbia University Press.

Deloria, Vine, Jr. and Clifford Lytle. 1983. *American Indians, American Justice.* Austin: University of Texas Press.

Johnson v. M'Intosh, 21 U.S. 543 (1823).

Prucha, Francis Paul. 1984. *The Great Father: The United States Government and the American Indians.* 2 vols. Lincoln: University of Nebraska Press.

Wilkins, David E. 1997. *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice.* Austin: University of Texas Press.

Worcester v. Georgia, 31 U.S. 515 (1832).