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RECENT SUPREME COURT DECISIONS BRING NEW
CONFUSION TO THE LAW OF INDIAN SOVEREIGNTY

In early 1982, the Supreme Court decided that the Jicarilla Apache Tribe has the authority, as a sovereign government, to impose a severance tax on oil and gas production by non-Indian corporations on its reservation.¹ The practical effect of this decision may be to strengthen the ability of Indian governments to raise money for operating expenses. But a close look at the legal principles espoused by the Court leads unmistakably to the conclusion that while winning this particular legal battle, Indians suffered heavy losses. For the Court once again affirmed the power of Congress to completely eradicate the sovereignty of Indian governments without legal limitation. Indian sovereignty is thus still without real legal protection and the judicial doctrine of Indian sovereignty is still a jumbled mass of confusing rules.

The Supreme Court's rulings on Indian sovereignty in the past four years demonstrate that perhaps the Court has abandoned any pretext of principled decision-making. Rather, the Court has embarked on a result-oriented approach. In order to justify a particular result, the Court has, at various times, ignored unfavorable precedents, discarded or revised old rules and

created new rules without legal or historical support. In some instances this arbitrariness may work to the benefit of Indian nations -- the Court can ignore bad law as well as good -- but in most recent cases, it has resulted in a sharp curtailment of the powers of Indian governments.

The Court has not settled on a coherent legal theory which defines the scope and nature of Indian sovereignty. The Court's result-oriented approach has produced a welter of conflicting theories and doctrines, which are nearly impossible to reconcile.

There is one exception to this lack of conceptual clarity. There has never been any doubt among the present members of the Court that Congress has unrestricted power to abolish completely Indian nations. As a result, the power of Congress to arbitrarily destroy Indian governments by legislative confiscations of their authority has become more firmly entrenched in United States law in the past four years. In no less than six opinions the Court has reiterated the precarious nature of Indian sovereignty. The language of those opinions bears repeating:

"Indian tribes are proscribed from exercising ... those powers of autonomous states that are expressly terminated by Congress." Oliphant v. Suquamish Indian Tribe 435 U.S. 191 (1978).

Congress has "plenary authority to limit, modify or eliminate powers of local self-government" Santa Clara Pueblo v. Martinez 436 U.S. 49,56 (1978).

Indian sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler 435 U.S. 313, 323 (1978).

"the power to tax ... is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law." Washington v. Confederated Tribes of the Colville Indian Reservation 447 U.S. 134, 152 (1980).

Indian tribes have lost many attributes of sovereignty "through specific ... statutes ..." Montana v. United States 450 U.S. 544, 563 (1981).

"... the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the federal government can take away this power." Merrion v. Jicarilla Apache Tribe ___ U.S. ___, 102 S. Ct. 379 (1982).

Perhaps this unanimity is not surprising, in light of the fact that few, if any, lawyers have ever challenged or contested this principle before the Court. Indian governments cannot realistically expect vindication of their rights by law until this basic underpinning of federal Indian law is changed. The power to destroy Indian governments makes illusory many other legal rights and, in effect, is tantamount to a power to destroy Indians as a separate people. A right of sovereignty which can be abolished at the will of another government is largely meaningless as a legal right.

Beyond the largely uncontested premise of plenary power, the legal principles regarding Indian sovereignty are confusing and muddled. This conceptual confusion, which invites judicial abrogation of Indian sovereignty, may be traced to the Supreme

Court's decision in Oliphant v. Suquamish Indian Tribe in 1978.² In Oliphant the Court stripped the Suquamish Tribe of the authority to try and punish non-Indians who violate tribal criminal laws. To justify this result, the Court fashioned an entirely new doctrine of Indian sovereignty, which may turn out to be a greater threat to Indian governments than the plenary power of Congress.

Boldly rewriting law and history, the Court in Oliphant said that Indian nations cannot exercise any power which is "inconsistent with their status," which the Court described as "quasi-sovereign" governments completely subjected to the overriding sovereignty of the United States.³ Implicit in this amorphous concept is the notion that Indian tribes are somehow restrained from exercising any power of government which conflicts with the interests of the United States. What is particularly troubling about the Court's reasoning is its acceptance of the premise that the mere assertion by the United States that it has plenary power is sufficient by itself to restrict the powers of Indian governments.

The Court offered no guidance for figuring out the precise meaning of this new restriction on Indian sovereignty. That difficult task was left to the lower federal courts and lawyers. The decision gives the courts unprecedented power to deny Indian rights of sovereignty. No longer will it be necessary to point to clear language in a specific treaty

provision or act of Congress in order to limit the powers of Indian governments. After Oliphant the courts have become the final arbiters of Indian sovereignty, with only their own sense of history and justice to restrain them. With Oliphant, the courts joined Congress as double-barrelled threats to Indian sovereignty.

The rule of Oliphant has come to be known by courts and lawyers as the rule of "implicit divestiture," which does little to clarify its meaning. A short time after Oliphant, the Court restated the new rules to mean that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." United States v. Wheeler (1978).⁴ Exactly how anyone was to know when an abrogation of sovereignty followed necessarily from the status of Indian tribes the Court did not say. The Court in Wheeler lamely struggled to define those areas in which an implicit divestiture has or would occur, broadly stating that they would probably include virtually all the "relations between an Indian tribe and nonmembers of the tribe."⁵ Apparently even the Court was somewhat uncertain of the meaning of the new rule, because in the same opinion it took another shot at defining the "necessarily inconsistent" powers, this time saying it would apply to all areas involving "external relations."⁶ This

formulation is an even greater abrogation of sovereignty because external relations would include more powers than those associated with relations among nonmembers. No one is exactly sure what the new rule means.

The Court was presented with an opportunity to clear up some of the confusion in Washington v. Confederated Tribes of the Colville Indian Reservation decided in 1980.⁷ It only made matters worse. In Colville both the tribes and the state taxed on-reservation sales of cigarettes to nonmembers of the tribes. The Court rejected the state's argument that the tribe's lacked this authority. In explaining the rationale of its holding, the Court appeared to retreat from its earlier view that implicit divestiture arises from the dependent status of Indian tribes, especially in those areas involving external relations or relations with nonmembers. Flatly contradicting its earlier statements, the Court said: "Tribal powers are not implicitly divested by virtue of the tribe's dependent status."⁸ Rather, the Court said implicit divestiture arises "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the national government."⁹ This new rule, which was hinted at in Oliphant, is even more vague and difficult to understand than the "divestiture by reason of dependent status" rule. Thus the potential for erosion of Indian sovereignty by the courts is greatly increased. The

Court has not explained its reasons for this departure from its earlier views, if it is even aware that it has done so.

Yet another formulation of the implicit divestiture rule was attempted in Montana v. United States (1981).¹⁰ In Montana the Court denied the power of the Crow Nation to regulate hunting and fishing within its reservation by nonmembers on land not owned by the Nation. The Court, ignoring what everyone thought was the new Colville rule, resurrected the Oliphant-Wheeler rationale that it is the dependent status of Indian tribes which implicitly divests them of sovereign powers over nonmembers. Then, as if that were not confusing enough, the Court added a new twist: "... the exercise of tribal powers beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation."¹¹ Thus the Court has set up at least two different rules for determining whether powers are implicitly divested: Colville-divestiture of all those powers inconsistent with overriding national interests; and Montana-divestiture of all powers not necessary to protect tribal self-government or control internal relations. The Court has made no effort to resolve the apparent conflict between the rules nor has it even acknowledged that such a conflict exists. So careless

is the Court's thinking about Indian sovereignty that it may not even be aware of the conflicting doctrines.

Montana is even more bewildering for its recitation of the circumstances under which an Indian tribe may exercise powers over a nonmember. After having summarily decided that the Crow Nation's regulation of hunting and fishing by nonmembers did not meet the self-government test, the Court delivered up a rambling enumeration of the circumstances where tribal authority over nonmembers would be lawful. The Court said: "A tribe may regulate, through taxation, licensing, or other means the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."¹² Whether these statements, which are not essential rationales of the decision, represent yet more rules for determining the scope of Indian sovereignty over non-Indians remains to be seen. An obvious danger of these tests is their apparent acceptance of the premise that the right to exercise a particular power depends entirely on the kind of conduct sought to be regulated.

The most recent Supreme Court decision on Indian sovereignty adds to the doctrinal confusion. In Merrion v. Jicarilla Apache Tribe (1982),¹³ the Court upheld the power of the tribe to impose a severance tax on oil and gas production on reservation land by non-Indian owned corporations. The Court had the usual confusing array of rules to choose from in making its decision, but, for no apparent reason, it chose to disregard completely the rule of implicit divestiture. Instead, the Court analyzed acts of Congress to determine whether the power to impose the tax had been taken away. In effect, the Court analyzed the case as if there were no limitations on Indian sovereignty arising from implicit divestiture. The only mention of the Oliphant-Montana line of cases is in an obscure footnote where the Court said: "Federal limitations on tribal sovereignty can also occur when the exercise of tribal sovereignty would be inconsistent with overriding national interests. This concern is not presented here."¹⁴

The reason why the Court in Jicarilla Apache Tribe chose to ignore the implicit divestiture rule is anyone's guess. It almost certainly does not mean that the rule has been discarded entirely or that it has been overruled. In all likelihood the rule will continue to play a pivotal role in future denials of Indian sovereignty.

To summarize, the Court has used or cited all of the following "rules" over the past four years: (1) Indian governments retain only those powers not expressly taken away by Congress or voluntarily relinquished by the Indian government; (2) Indian governments are implicitly divested of all powers which are inconsistent with their status as quasi-sovereigns completely subordinate to the sovereignty of the United States; (3) Indian governments are implicitly divested of all powers which are inconsistent with the interests of the United States; (4) Indian governments are implicitly divested of all powers other than those necessary to protect tribal self-government or to control internal relations; (5) an Indian government may regulate the activities of nonmembers when they enter into consensual relationships with the tribe; and (6) an Indian government may regulate the conduct of nonmembers on fee lands within its reservation when such conduct threatens or has some direct effect on the political integrity, economic security or health and welfare of the tribe.

This review of the Supreme Court's recent rulings on Indian sovereignty demonstrates the utter confusion in the legal principles governing judicial determinations of Indian powers. This confusion, compounded by the Court's tendency to cavalierly disregard or misinterpret precedent, is evidence

of the Court's result-oriented approach to Indian sovereignty cases. No one can predict with any degree of certainty how the Court will decide a particular case or which legal principles the Court will choose to invoke. However damaging the Court's approach may be, this conceptual confusion may not be the greatest threat the Court poses to Indian sovereignty.

Under any of the recent legal principles on which the Court has relied, Indian sovereignty is subject to unilateral abrogation by Congress or by the courts. The Court's rulings and its muddled pronouncements on Indian sovereignty allow lower courts and apparently the Supreme Court itself, to pick and choose among a variety of legal rules all of which make it easier than ever before to find an extinguishment of Indian sovereignty.

It is apparent that the Court has not carefully constructed a theory of Indian sovereignty nor does it cite rules and principles as controlling precedents, as is common in other cases. That is why it is so difficult to reconcile the conflicting opinions and statements. The Court's language regarding Indian sovereignty is perhaps more correctly regarded as mere explanations or justifications of the

result, rather than hard and fast rules which the Court feels bound to follow. To attribute precedential value to the Court's loose rationalizations in particular cases increases the probability that the declarations which deny Indian sovereignty may in fact become inflexible rules. The danger in this tendency can be seen in what lawyers have done with the Court's decision in United States v. Kagama (1886).¹⁵ In that decision the Court explained that the United States government and federal law had completely excluded state power over Indians. The Court referred to Congress' pervasive power to explain that federal authority ruled out state authority. By citing this language as a principle of law, lawyers and judges have elevated what was originally intended to be an explanation into a rule of "plenary power" over Indians. The Court never intended for its language to be interpreted as granting to Congress unlimited power over Indians, as the plenary power doctrine has come to mean.

The lesson from the Court's recent declarations on Indian sovereignty is that lawyers and others should be extremely cautious in reading into these statements new rules of law. The Court's inclination to randomly change its views presents an opportunity for Indian people and their lawyers to begin building a coherent theory of Indian sovereignty which provides genuine legal protection for Indian governments.

NOTES

1. Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 379 (1982).
2. 435 U.S. 191 (1978).
3. 435 U.S. at 208-209.
4. 435 U.S. 313,323 (1978).
5. 435 U.S. at 326.
6. Id.
7. 447 U.S. 134 (1980).
8. 447 U.S. at 153.
9. Id.
10. 450 U.S. 544 (1981).
11. 450 U.S. at 564.
12. 450 U.S. at 565-566.
13. 102 S.Ct. 379 (1982).
14. 102 S.Ct. at 386.
15. 118 U.S. 375 (1886).

Subject Files: Supreme Court. 1982–1983. MS The Indian Rights Association, 1882-1986: Series 2, Organizational Records, 1881–1989 Box 321, Folder 6. Historical Society of Pennsylvania. Indigenous Peoples of North America, link.gale.com/apps/doc/AHCFMI660584913/INDP?u=umich_law&sid=bookmark-INDP&pg=15. Accessed 8 May 2025.