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Tribal Courts: Providers of Justice and Protectors of Sovereignty

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Tribal courts: providers of justice and protectors of sovereignty

Tribal courts are now the premier institutions that struggle to analyze and identify the extent of tribal jurisdiction and sovereignty.

by Frank Pommersheim

Tribal courts are the frontline institutions that most often confront issues of American Indian self-determination and sovereignty. At the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them. They also constitute a key entity for advancing and protecting the rights of self-government.

Tribal courts are of growing significance throughout Indian country, especially in light of the Supreme Court decisions in *National Farmers Insurance Cos. v. Crow Tribe of Indians*[1] and *Iowa Mutual Insurance v. LaPlante.*[2] As Justice Thurgood Marshall wrote in *Iowa Mutual,* "Tribal courts play a vital role in tribal self-government...and the Federal Government has consistently encouraged their development."[3] As a result of this continued and growing recognition, tribal courts are now the premier institutions that struggle to analyze and identify the extent of tribal jurisdiction and sovereignty.

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Despite these important trends, the history and development of tribal courts remain little known outside the confines of the special field of scholarship and practice known as Indian law. This is unfortunate. The issues confronting tribal courts have broad significance not only for what happens on the reservation and in Indian country, but also for the meaning and integrity of the dominant legal system and society as a whole. These larger themes include the history of Indian-non-Indian relations and the development and understanding of sovereignty within the national republic, which is most often thought to contain only two sovereigns, but in reality contains three.

Without increased attention to these matters, there will continue to be a woefully incomplete and distorted picture of history and legal reality. In essence, there is a need to extend our foundational webs of legal beliefs to include a strand that is grounded in a

For elaboration of the issues identified in this introduction, see Pommersheim, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE, (University of California Press, 1995).

1. 471 U.S. 845 (1985).
2. 480 U.S. 9 (1987).
3. *Id.* at 14-15.

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basic recognition and understanding of tribal sovereignty and tribal courts. This is the rationale for this symposium on tribal courts.

In this period of rapid and exciting change, the challenges facing tribal courts are essentially twofold and interdependent: Tribal courts must strive to respond competently and creatively to federal and state pressures coming from the outside, and to cultural values and imperatives from within. These themes are addressed in the symposium.

First, U.S. Attorney General Janet Reno articulates the efforts of the Justice Department to develop an increased understanding of tribal sovereignty and to encourage support of tribal courts. Professor Judith Resnik then probes the relationship of tribal court activities in the context of the history of federal court jurisprudence and its varied response both to "difference" and to the quite distinct constitutional narratives evoked by state and tribal claims of sovereignty.

Ada Pecos Melton of the U.S. Department of Justice and Chief Judge Carey Vicenti of the Jicarilla Apache tribe focus on what tribal courts are now doing to ensure they remain culturally informed by, and relevant to, the traditions that have nurtured and sustained them. Douglas Endreson, an attorney who represents Indian tribes, provides a comprehensive survey of what tribal courts are doing in their decisional law, with particular focus on the challenges of defining the scope and existence of tribal power within the dictates of the exhaustion rule, procedural claims and individual rights, and the development of substantive tribal law.

Chief Judge Elbridge Coochise of the Northwest Intertribal Court System and Joe Myers, executive director of the National Indian Justice Center, recount the history and funding problems of the Indian Tribal Justice Act of 1993. The issue concludes with articles by Chief Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit and Arizona Chief Justice Stanley Feldman and David Withey, which describe efforts within the federal and state judiciaries to advance cooperation, communication, and understanding in their interaction with tribal courts.

A historic moment

All of this, it should be noted, is taking place at an important historic moment that needs to be considered carefully so as not to repeat a crucial error of the past. At the turn of the century, in the case of *Lone Wolf v. Hitchock*,[4] the Supreme Court announced the startling

4. 187 U.S. 553 (1903).

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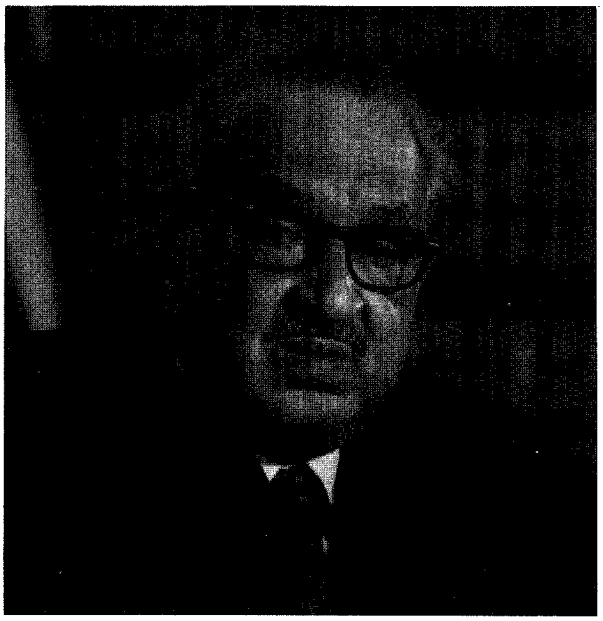

"Tribal courts play a vital role in tribal self-government...and the Federal Government has consistently encouraged their development."
—Justice Thurgood Marshall

doctrine that Congress has "plenary power" to legislate without limitation in Indian affairs, even to the point of unilaterally abrogating treaties. Historically, the plenary power doctrine—unhinged from any constitutional mooring—facilitated the geographical, political, and legal absorption of Indian tribes into the federal republic and enhanced the realization of the national goal of "manifest destiny." This expansive doctrine has no textual constitutional grounding and often serves to incapacitate and destabilize tribal governments because initiatives of tribal governance may be limited or thwarted altogether by the federal government's exercise of this unlimited power. This is in stark contrast, for example, to the Tenth Amendment, which provides a constitutional benchmark for issues involving the allocation of federal and state power.

The destabilizing and constitutionally questionable doctrine of plenary power ought not to be extended into the judicial realm by the Supreme Court or Congress. The Supreme Court in both *National Farmers Union* and *Iowa Mutual* appears to be intent on avoiding the repetition of such a mistake. These recent decisions are marked by their concern for deference, comity, and respect for the actions of tribal courts. In these decisions, since the Court itself has not spoken in terms of plenary power concerns, it is all the more necessary to be aware of the potential dangers. Subordination of tribal courts to a kind of judicial plenary power would be a dramatic, if not fatal, step backward into a kind of judicial "manifest destiny." Knowledge and understanding remain the best hedge against such an occurrence.

In addition to this far-reaching and legal moment, there is the complementary trajectory of the rapid development of tribal courts. Tribal courts have demonstrated an exceptional capacity for growth in competence and sophistication in the last quarter century. They are currently hearing more cases of greater complexity and impact than ever before. As part of this process of significant change, tribal courts are crafting a unique jurisprudence of vision and cultural integrity. In other words, tribal courts are responding competently and creatively to federal oversight pressures and cultural values in order to synthesize the best of both traditions.

Despite the weight of history and the attendant legal complexity that often surrounds tribal courts, there is also a more basic and profoundly human concern. As noted by Vine Deloria Jr., a leading Sioux intellectual, the key to a more benign and morally coherent era is based in the core values of respect and dignity:

> The lesson which seems so hard to learn is that of dignity and respect. Some of the voices...may appear to be complaining about the loss of land, the loss of a way of life, or the continuing propensity of the white race to change the terms of the debate to favor himself. But deep down these are cries about dignity, complaints about the lack of respect. "It is not necessary," Sitting Bull said, "that eagles should be crows."[5]

A basic unity of important purpose dominates the daily workings of tribal courts. It is this unity and commitment that demonstrates both the tenacity and the hope that underpins the struggle to flourish. All of this takes place in small tribal courthouses throughout Indian country, as reservation inhabitants interact with the law in an ongoing effort to construct an enduring future.

The Supreme Court decisions in *National Farmers Union* and *Iowa Mutual Insurance* reaffirm the federal policy of encouraging tribal self-determination and self-government. Tribal courts are properly seen as vital institutions for implementing this important national policy. As a result, they are the very visible explorers charting much of the future of tribal self-determination. As part of this mission, they need greater understanding, growing support, and continued recognition as the enduring forums for rendering justice and fair play throughout Indian country.

5. Deloria, quoted in Nabokov, ed., NATIVE AMERICAN TESTIMONY xviii (Viking, 1991).

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