



UNIVERSITY OF
ARKANSAS

School of Law

Tribal Governments & Business Entities

Day 1

January Intersession 2018

Monday, Jan 8:

Tribal Sovereignty 101

- [Cherokee Nation v. Georgia](#)
- [Worcester v. Georgia](#)
- [LoneWolf v. Hitchcock](#)
- [Williams v. Lee](#)

What is an Indian Tribe?

- For our purposes:
 - Who the federal government says a tribe is at a given time
 - Federal recognition
 - Typically not state recognition
 - Perhaps recognition from international body or foreign sovereign

Who is an Indian?

- Simple answer:
 - Citizen/member of a federally recognized tribe
- For our purposes, it's a legal question:
 - Generally an internal matter for tribe
 - Federal definition might differ from tribal definition
 - Federal power to recognize and/or terminate tribal-federal relations can impact this

Federal Indian Law v.

Tribal Law v. Choice of Law Issues

- **Federal Law:**
 - Federal legislation, court cases, regulations, and treaties
- Federal power over tribes and Indians
 - States' rights implications
 - Tribal powers recognized or enforced in other jurisdictions
- **Tribal law:**
 - The laws of the tribes: constitution, codes, regulations, court cases, common law/customary law, other
- **Other laws:**
 - might apply in a particular context (state, another tribe, international)

Cyclical Federal Policies

- Colonial
- Early republic
 - Trade and Intercourse Acts and Federalism
- Removal & Relocation
- Reservation/Assimilation/Allotment
 - Plenary power and inclusion into US
- Reorganization → Termination → Self-Determination

US Constitution

- Indians mentioned/contemplated 3 times:
 - Commerce
 - Treaty powers
 - Apportionment

Trade & Intercourse Act (Goals)

- Implement the policies embodied in Indian treaties
- Provide means to enforce those policies against non-Indians

- Silent as to what Indians can or cannot do
 - Who is the audience?
 - Who is bound by Constitution?

T & I Act (Subjects Matter)

- Trade with Indians (licensing Indian traders & penalties for violations)
- Punishment of whites committing aggressions w/in Indian territories (now the General Crimes Act)
- Federal control of acquisition of Indian lands (25 USC §177)

Trade & Intercourse Acts (Today)

- Indian lands cannot be alienated or sold
 - except to the fed govt or with federal permission
 - This means:
 - No adverse possession
 - No state eminent domain
 - No inherent state taxing authority
- Implications for Doing Business in Indian Country

Cherokee Nation v. Georgia

Consequences of Treaty Making

- Recognizes tribes as sovereign
 - (at least sovereign enough to enter treaties)
- Recognizes tribes as holders of a property rights with authority to convey or cede
 - And to reserve rights as a grantor
- Established federal power to the exclusion of states from process
- Treaties carry the force of law (supremacy clause)

Federal Court Jurisdiction

- Article III, § 2, cl. 1, limited to controversies between:
 - 2 or more states
 - A state and a citizen of another state
 - A state and a foreign state

Is Cherokee Nation a “state” in the sovereign sense?

- Opinions?
 - Yes, a “foreign” state
 - Yes, but not a “foreign” state
 - Not at all

What powers do tribes lose?

- **US won't recognize:**
 - tribe's right to form political connections with another nation -- enter into foreign relations (CN)
 - Tribe's ability to sue in some federal court

Guardian/Ward Analogy

- The Indian Commerce Clause?
- Treaty Language?

The Treaty Provisions

- Art. IX - US has sole/exclusive right to regulate trade and “managing their affairs”
 - What does this mean ?
 - How do we know?

Worcester

Worcester Interrelated Issues

- Whether Cherokee Nation retains any right to self-government (within Cherokee territory) or can some other gov't take jurisdiction over all internal workings?
 - Inside tribal territory?
 - Outside tribal territory?
- To the extent that any US government may govern the Cherokee Nation, which one:
 - Federal?
 - state?

CN and Worcester

- Cherokee Nation has inherent power of self-government which it has never ceded
- The Constitution, laws, treaties of the US do not divest, but recognize and affirm it
- Assertion of state authority in Indian country would violate both tribal self-government and federal law
- *Nonetheless, the states might assert jurisdiction in tribal territories pursuant to acts of congress*

When Can State Law Apply?

- If the tribe and the federal government have given that power to the states by treaty (“in conformity with treaties”)
- If the tribe itself consents to the assertion of state authority (“with the assent of the Cherokees themselves”)
- If the federal government gives that power to the states through “acts of Congress”
 - On what authority?

Principles

- Tribes retain inherent (and treaty protected) right to self-government (ie control internally)
- All dealings between US Citizens and Indian tribe are vested in the federal government to the exclusions of states

Recognized Tribal Powers

- Internal governance
 - but many tribal constitutions have federal approval language
 - Trend away from this
- Jurisdiction over members/citizens and those that consent to tribal civil jurisdiction by their actions
 - Taxation example
 - Contract dispute example
- Dual Role as government/business

Hypothetical

- Tribe A's reservation has convenient store owned by an Individual
- Tribe A wants to regulate waste water lagoon and food safety
- Local county wants to extend it's health code also

Hypothetical

- Tribe wants to tax the income of all people that live and work inside the tribe's territory

Williams v. Lee

State Power in Indian Country

- Historically non-existent
 - State law has no force and effect inside Indian country
 - Tribe's territory is not considered "within" state even though geographically so
- Federal delegation of power to states
 - But, Public Law 280
- Trend toward more state power

LoneWolf

Modern Federal Power

- The federal courts recognize Congressional “plenary power”
 - Following LoneWolf and similar cases
- Tribal powers can be divested if:
 - Tribe consents to give up power, how?
 - Congress expressly takes power, how?

Plenary Power & Individual Indians

- The power of Congress over Indians will be upheld if there is a rationale basis for Congress action
 - Can be a good thing for individual Indians
 - Hiring/promotion preferences on the grounds of political affiliation and not race based distinction
 - Can be a very bad thing individually/collectively
 - Management of land and resources (Cobell and etc) are not afforded strict scrutiny

Hypothetical

- Today, Lower Brule Sioux tribe is the primary producer for Orville Redenbacher popcorn.
- You are the attorney for the tribal corporate entity that owns the farm, and with growing popcorn capacity, they are looking for international markets.
 - Any issue with signing a trade agreement with Brazil for sales directly to the state government?
 - Any issues with a free trade agreement with sales directed only at private entities?

Hypothetical

- Tribe was relocated from their homelands in Arkansas pursuant to treaty and now live in Oklahoma within the boundaries set forth in the treaty
- Tribe re-established their govt and starting issuing tribal license plates for boats/vehicles in 1980s
- The state of OK arrests a tribal citizen for driving with improper car tags

- You are Assistant AG for the State of Oklahoma.
- Discuss enforcement and potential defenses.