



Indian Tribes as Social, Political, and Governmental Entities

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This article is the first of three intended to provide concise, factual information on the enduring place of tribes as governments. It summarizes the historical and legal underpinnings of tribes as distinct political, cultural, and self-governing entities, and describes some of the many governmental functions that tribes carry out today. It is our hope that this and following articles will contribute to a greater understanding of American Indian tribes and their governments and support the cause of Indian self-government.



INTRODUCTION

America is experiencing a growing wave of intolerance that threatens Indian and Alaska Native tribes just as it threatens minorities, immigrants, and others. A systematic attack on the legal rights of tribes as distinct social, cultural, and governmental entities is underway. A prominent part of this attack is the ongoing lawsuit claiming the Indian Child Welfare Act is unconstitutional on the legally erroneous ground that it is racially discriminatory and on other grounds. That suit is still under consideration on appeal.

The attack on tribal rights is about a 1974 Supreme Court decision that tribes are *not racial minorities* but are political bodies that are recognized as such in the Constitution. As a result, laws that benefit tribes and members of tribes are not racial preferences, and, on the contrary, the United States has an obligation to protect and defend American Indian self-government. Not only has this decision

come under assault in the courts, the attack is now moving into political and policy arenas as well. President Trump said in an official statement that certain acts of Congress benefiting tribal governments and others might be unconstitutional because they grant benefits, in his opinion, on the basis of race, ethnicity or gender. A similar legal position was stated publically by the head of the federal Centers for Medicare and Medicaid Services. How far these challenges may go is uncertain.

The stakes for tribes are very high: if laws benefiting tribes are invalid, then most or all of the many federal government programs and funding for tribes would cease, and federal laws protecting tribes and their governments would largely end. Defending laws that benefit tribes and tribal citizens depends in large part on making judges, government officials, lawmakers, and the public familiar with the facts about tribes today, facts that establish tribes' status as political, governmental bodies.



While Indians are relatively well informed about tribes, our broader society is not. Even many of those in government service are very poorly informed about the character of tribes and very few really know what tribes are or how they govern reservation communities or Native villages in Alaska.

Last year, a similar conclusion was made by Reclaiming Native Truth, a Native-led two-year research project concerning the ways Native Americans are portrayed in media and popular culture and how Native Americans are perceived by the general population. Reclaiming Native Truth is a project of First Nations Development Institute and Echohawk Consulting.

Reclaiming Native Truth's Research Findings state, "Even in Congress, most members have little knowledge of Native issues and rely heavily on peers with greater interest and expertise when casting votes." The Research Findings also include these important observations:

Sovereignty is not well understood, either by the public or within the judicial system. Even after gaining a better understanding of the term, few people actually believe tribes are sovereign — or should be sovereign — and cannot conceptualize more than 600 sovereign nations across the United States.

...The lack of understanding about sovereignty extends to federal judges, who most likely have never taken an Indian law course in law school, yet routinely render major decisions affecting tribal nations and their citizens.

This lack of information can easily lead to a mistaken belief that tribes are simply racial minorities living on remote reservations. Reclaiming

Native Truth stated the problem and potential harm to tribes this way:

Across the education curriculum, pop culture entertainment, news media, social media and the judicial system, the voices and stories of contemporary Native peoples are missing. Into this void springs an antiquated or romanticized narrative, ripe with myths and misperceptions.

... Ignorance, bias, stereotyping, overt racism and outright invisibility fuel attacks on tribes. They limit our ability to protect sovereignty and treaty rights, shape and inform public policy, celebrate cultural identity, access resources, and protect the dignity and humanity of Native peoples.

If we want lawmakers, judges, policy makers, and administrators to make good decisions that respect the status of tribes as political, governmental entities, it makes sense to educate and re-educate these decision makers and the non-Indian population about the actual role of tribes as governments today — as a vital part of the system of governments in this country. The fundamental rights of tribes will not be secure unless there is much broader and deeper understanding about tribes among judges, their law clerks, among administration and congressional staff, and among media and the public.

This article is the first of three intended to provide concise, factual information on the enduring place of tribes as governments. This article summarizes the historical and legal underpinnings of tribes as distinct social, cultural, and self-governing entities, and describes some of the many governmental functions that tribes carry out. We draw together some of the more important



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facts about tribes as they are now. It is especially important to educate people about the present day realities of tribes, because, by almost every measure, tribes, tribal governments, and Indian and Alaska Native communities have changed greatly and grown stronger in the last few decades. This overview of tribal governments today gives strong factual support to the status of tribes as governmental, political bodies.

The second and third articles will explore in greater detail the relationship between tribes and the federal government and the states, including how tribes operate today as modern governments alongside the federal and state governments. It is our hope that these articles will contribute to a greater understanding of American Indian tribes and their governments and provide informational tools that can be used by those who support the cause of Indian self-government.

TRIBES AS “PEOPLES”

When Europeans first arrived and began to settle what is now the United States, they found that Indian peoples were organized as nations, each

nation having a form of government and occupying a more or less defined territory. The colonizing countries, particularly Britain, France, Spain, and the Netherlands, entered into many formal treaties with the Indian nations, establishing peaceful relations, making political or military alliances, establishing boundaries of their respective lands, guaranteeing hunting and fishing rights, and dealing with many other matters. In entering into these treaties, the European countries formally recognized the Indian nations as independent, self-governing nations.

The practice of making treaties with Indian nations continued for almost 100 years after the American Revolution. The treaties made by the United States with Indian nations have always been regarded as valid and legally enforceable, just as treaties with any other nation.

Indian tribes or nations do not exist merely because they made treaties with the United States and other nations. They exist because historically and in modern times they are distinct peoples, that is, they have bonds of kinship, culture, language, and history, and they are typically tied to a territory or homeland. The right of a “people” to be self-governing and to determine its own political status is a core part of the American political tradition and is

now an established part of international law. The United Nations Declaration on the Rights of Indigenous Peoples proclaims, “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” While the term “people” is not a precisely defined concept, Indian and Alaska Native tribes are peoples in the sense that they are deeply rooted in their traditional territories and have maintained their languages, cultures, ways of life, and governments since long before the arrival of Columbus.

Cultures, languages, economic status, and governments vary tremendously amongst tribes. The Navajo Nation, to take one example, is among the largest of tribes with some 350,000 members and a reservation larger than many states. They call themselves “the people” and have always lived on the Colorado Plateau. The Navajo are bilingual, speaking their own language, called Diné Bizaad, as well as English. Like many tribes, the Navajo signed a treaty in the late 1800s guaranteeing them a portion of their ancestral lands. The Treaty of 1868 set aside the Navajo Reservation and ended a brutal period of forced exile.

Today, the Navajo Nation operates a sophisticated and extensive tribal government. The executive branch has ten divisions that manage a wide array of services, from air transportation to housing and utilities. The Navajo Nation Council serves as the legislative branch of government, with 24 elected council members. The judicial branch is comprised of district courts, family courts, a Supreme Court, and a traditional peacemaking process. The Navajo Nation is governed according to an extensive body of statutory, administrative, traditional, and common law.

The Navajo Nation, like other tribes, has survived long periods of displacement and suppression, but has never given up its right to exist

as a distinct people and nation charting its own political, economic, and social future. At the same time, the Navajo are American citizens, and have served with distinction in the defense of their country. Just as it is possible to be both a citizen of your home state and of the United States, with differing laws, rights and obligations, American Indians are citizens of their tribes and at the same time citizens of the state and country in which they live.

TRIBES AS GOVERNMENTS

The status of tribes as separate political bodies is rooted not just in history but in the words of the U.S. Constitution. The Constitution gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Article II, Section 2 of the Constitution vests the President with the power, by and with the advice and consent of the Senate, to make treaties, including treaties with Indian tribes. These two articles of the Constitution recognized certain realities: the Indian tribes of North America were, for the most part, occupying and in control of their lands. The founders understood the tribes as autonomous, self-governing entities, capable of economic and military ties – or conflict – with the new American government and with foreign powers.

The framers of the Constitution not only regarded tribes as having governments, but they actually admired and adopted the democratic ideals of the Six Nations Iroquois Confederacy and incorporated some of them in the U.S. Constitution. In fact, Congress passed a resolution in 1987 acknowledging this contribution of the Iroquois Confederacy in the development of the United States Constitution, and they reaffirmed the government-to-government relationship between Indian tribes and the United States established in the Constitution. The resolution stated, “[T]he



confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself.”

In the century following the ratification of the Constitution, the U.S. government structured its relationship with the tribes based upon the treaty and commerce clauses. One of the earliest legislative acts of Congress was passage of the Indian Trade and Intercourse Act of 1790, which, among other things, required traders with Indian tribes to be licensed by the federal government and prohibited purchases of Indian land without the consent of Congress. The United States continued to deal with tribes by making hundreds of treaties with the tribes, often gaining huge areas of tribal land and also reserving other lands for tribes, and thereby recognizing tribes as distinct political, economic, and cultural entities. Despite the end of treaty-making in 1871, hundreds of treaties between tribes and the United States continue in force today.

Following the close of the treaty era, the United States pursued decades of disastrous efforts to breakup tribal land holdings. Belatedly recognizing the profound harm inflicted on Indian tribes, Congress changed course in 1934 and passed

the Indian Reorganization Act to aid tribes in rebuilding their governments and to guarantee that these governments would be respected by the federal government. Many tribes chose to adopt constitutions under the Act, but many others did not, choosing instead to maintain their existing forms of government.

In the 1970s, federal policy again turned to supporting tribal self-determination and tribal governments. Congress, for example, passed the Indian Education Act of 1972, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, the Indian Child Welfare Act of 1978, and the American Indian Religious Freedom Act of 1978. These acts all recognize and support tribal self-government. The policy initiatives of the 1970s are now considered the beginning of the modern era of tribal self-governance. In 1974, the U.S. Supreme Court issued its seminal decision in *Morton v. Mancari*, holding that tribes under the Constitution’s commerce clause are political entities, and not racial groups. The Court thus reaffirmed the long history of tribes as self-governing peoples, despite the erratic policy shifts of Congress. This continues to be the federal law and policy today – law and policy that are under attack by extreme conservative groups.

TRIBES AND TRIBAL GOVERNMENTS AND WHAT THEY DO

All of the 573 federally recognized Indian and Alaska Native tribes have their own governments and laws to manage their affairs. There are also many state-recognized and unrecognized tribes that have their own governments. Tribal governments vary widely from tribe to tribe – most of them relatively modern, elected governments, others very traditional. Because there are so many differences between tribal governments, it is impossible to give a general description that fits all tribal governments. Each tribe and tribal government really is unique. Nevertheless, we tried to summarize some of the more prevalent characteristics of tribal governments.

Tribes typically have an elected tribal council or legislative body that has general authority to pass laws and adopt resolutions governing the affairs and the resources of the tribe. The Council usually is the law making and policy making part of the government. The tribe determines its own citizenship requirements. Being a citizen or member of a tribe is practically never a matter of tribal ancestry or race alone, but usually involves a variety of other requirements. According to federal law, the process of creating or adopting a tribal government and making laws and decisions for the tribe is not done or controlled by the federal government – though tribes struggle at times to stop federal interference in their governmental affairs. Tribal governments are long-standing, lawful governments – with extensive authority over their territories and citizens that is recognized by the federal government and by state governments.

Tribes also usually have an executive branch headed by a tribal chairperson or chief executive officer, and many tribes have a large staff working in various tribal agencies, offices, or departments. Many but not all tribes have their own court systems that handle criminal cases on the reservation as well

as civil lawsuits. Decisions of tribal courts are entitled to respect in state and federal courts and, if necessary they can be enforced by state and federal courts. Law enforcement, public safety, and policing are functions of nearly all tribes, larger tribes often having police forces.

Beyond the major work of making and enforcing laws and deciding disputes in the tribal courts, tribal governments typically handle an enormous number of responsibilities for the tribes and the reservation communities. These reservation communities usually include many non-Indians as well as Indians. The Census Bureau reported that in 2010 non-Indians were 76% of the population on tribal lands and 68% of the population in Alaska Native villages. The role of tribes and tribal governments is more extensive than most people would imagine. The services provided by tribal governments and the economic development activities of tribes not only benefit the reservation communities, but they also often have a major positive impact on the non-Indian communities near the reservation.

Just a partial list of what tribes do (in addition to making and enforcing laws and deciding disputes) goes a long way to show the critical role of tribal governments.

PROMOTING ECONOMIC DEVELOPMENT is a high priority for most tribes. Tribes undertake a wide range of business enterprises, and these are by no means limited to casinos. Tribes also encourage and promote private businesses, and it is not unusual for tribes to invest in off-reservation business ventures. A number of tribes own their own banks to provide financial and banking services on the reservation. Many tribes are major employers of non-Indians as well as Indians. For example, the Mississippi Band of Choctaw Indians owns several businesses, providing permanent, full-time jobs for over 5,000 tribal

members and non-Indian employees with a combined annual payroll of more than \$100 million; the tribe is a major contributor to the state's economy. The tribe's diversified portfolio includes metal fabrication, commercial electrical services, farming, custom printing, plastics and hospitality firms. Many similar examples could be given.



TRIBES MANAGE THEIR LANDS, WATERS, AND OTHER NATURAL RESOURCES, including agricultural lands, timber lands, oil and gas, and mineral resources as well. The federal Bureau of Indian Affairs provides support in this work. Many tribes have their own offices for land and natural resource conservation, to manage fish, wildlife, and wilderness, and other natural areas.



BUILDING, MAINTAINING AND MODERNIZING PUBLIC INFRASTRUCTURE is another function of many tribes. Infrastructure can include roads, bridges, dams, power facilities, water systems, and public buildings on the reservation. The Navajo Nation has established its own public utilities authority, because public utilities were not otherwise available on the reservation. Another tribe, for example, owns an extensive water supply system that serves the tribe and a large surrounding area.



PUBLIC HEALTH AND HEALTH SERVICES are a shared responsibility of tribes and the federal Indian Health Service. Many tribes have programs for suicide prevention and drug treatment. A substantial number of tribes are now taking full control of their health care.

EDUCATION AND SCHOOLS are also a priority for tribes. Many tribes operate schools that, among other things, teach and transmit culture and native languages. More than thirty tribes have a tribal college on the reservation.



TRIBES ALSO PROVIDE A RANGE OF SOCIAL AND FAMILY SERVICES. They provide assistance for those in need, such as food, shelter, and assisted living, home repair, fuel for heating, job training, and many other services, including all kinds of emergency relief and disaster response. Tribes also provide services such as child placement and foster care, child protection, and protection against domestic violence.

MANY TRIBES HAVE ENVIRONMENTAL PROTECTION PROGRAMS. Most larger tribes have environmental protection offices funded by the Environmental Protection Agency. Many tribes adopt, monitor, and enforce environmental regulations to protect air and water quality and to ensure safe drinking water.

TRIBES ALSO MANAGE SOLID WASTE, LANDFILLS, AND WASTE WATER TREATMENT, and deal with toxics and hazardous waste.

The operations and services of tribal governments are in many ways similar to those of state and local governments. In fact, several federal statutes provide that tribes will be treated like states for purposes of implementing and managing certain environmental protection programs. The federal Internal Revenue Code also provides that tribes will be treated like states for certain purposes.

CONCLUSION

As governments and service providers, tribal governments are practically indispensable, especially because there are so few alternatives for those living on reservations. Even more, many tribes create hundreds or even thousands of jobs and millions of dollars in economic activity to areas surrounding the reservation.

The accomplishments and advances made by tribes are remarkable. No doubt many tribes will be able to add much more to this list of tribal functions, programs, and services. Tribal leaders are certainly the most effective voices for describing and advocating for tribes and tribal governments. They are by far the best informed and most credible sources of information. We look forward to seeing tribal leaders and other Native voices carrying on the work of educating and informing the public, policy makers, law makers, government officials, and judges about tribes and tribal governments. The sovereignty and rights of tribes may depend on it.

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