THE STATUS OF SOVEREIGN TRIBAL IMMUNITY OF AMERICAN INDIANS

Let me be a free man, free to travel, free to stop, free to choose my own teachers, free to follow the religion of my fathers, free to talk, think and act for myself — and I will obey every law or submit to the penalty.

—Chief Joseph of the Nez Perce, 1878[1]

An American Indian tribe is immune from suit in any court unless the Congress has expressly consented to the suit.[2] The tribe is considered a dependent sovereign nation, subject to the plenary powers of Congress.[3] This principle was reaffirmed as recently as 1967 by the Eighth Circuit in *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe.*[4] *Twin Cities* involved an attempt to invalidate a tribal election, held pursuant to the provisions of Section 16 of the Federal Indian Reorganization Act[5] for the purpose of amending a tribal constitution and by-laws. The Court denied that there was federal question jurisdiction under either the F.I.R.A. or under 28 U.S.C. §1331, by noting that

> This argument overlooks defendant Minnesota Chippewa Tribe's sovereign immunity, protecting it from suit in the federal courts. Indian tribes under the tutelage of the United States are not subject to suit without the consent of Congress . . . and 28 U.S.C. §1331, 28 F.C.A. §1331 does not operate to waive sovereign immunity . . .[6]

The Federal Indian Reorganization Act provides the authority and procedures by which an Indian tribe may organize itself and adopt a constitution and by-laws for the purpose of formulating a tribal government. In *Twin Cities Chippewa,* plaintiffs challenged the validity of a tribal constitutional amendment adopted and approved under authority granted by tribal and Federal law. The objective of the suit was to forestall implementation of tribal amendments which had been approved by the Secretary of the Interior, following ratification by tribal members. The amendment had been approved originally pursuant to 25 U.S.C. §§2 and 9, and regulations made thereunder, and not under the F.I.R.A., as plaintiff had alleged.

Most Indian tribes have reorganized their governments under the F.I.R.A. However, there are still some tribes which have not exercised their option to reformulate their governments under the act. Merely because the Indian Reorganization Act is not involved, there is no reason for a different result on the immunity issue. In *Green* v. *Wilson,*[7] the Ninth Circuit held that a tribe was immune from suit, in an action

1. Joseph, "On Indians' Views of Indian Affairs," 128 N. Amer. Rev. 412, 433 (1879).
2. See e.g. United States v. U.S. Fidelity and Guaranty Co., 309 U.S. 506, 512 (1940); Haile v. Saunooke, 246 F. 2d 293, 298 (4 Cir. 1957), cert. den. 355 U.S. 893 (1957); Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8 Cir. 1895).
3. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
4. 370 F. 2d 529 (8 Cir. 1957).
5. 48 Stat. 984 (1934), 25 U.S.C. §461 et seq.
6. 370 F. 2d at 532.
7. 331 F. 2d 769 (9 Cir. 1964).

arising out of a tribal constitution adopted and approved only under the authority granted in 25 U.S.C. §2 and subsidiary regulations. Thus, the Courts have recognized the sovereign immunity of non-I.R.A. tribes as well as of I.R.A. tribes in such suits. Nor can the United States be made a party in such cases, since the Congress would not ordinarily have consented to suit against the United States either in the Federal Indian Reorganization Act or in the Administrative Procedure Act.[8]

The Indian Civil Rights Act[9] is as silent on jurisdictional questions[10] as is the F.I.R.A. Enactment of the Indian Civil Rights Act does not constitute the consent of Congress to sue an Indian tribe. The impact of the passage of the Act on the doctrine of tribal immunity from suit has now been considered in two federal district court cases, *Pinnow* v. *Shoshone Tribal Council*[11] and *Spotted Eagle* v. *Blackfeet Indian Reservation.*[12]

The *Pinnow* case involved tribal enrollment procedures, whereby a child born of an Indian couple would be "enrolled" in the father's tribe so that the child might in the future have a right to a voice in tribal government. The *Pinnow* plaintiffs alleged violations of the Indian Civil Rights Act by the defendant tribes in their enrollment procedures, and plaintiffs sought an order to direct the institution and implementation of new enrollment ordinances. The district court dismissed the case for want of jurisdiction, concluding:

> The controversies involved herein are matters solely within the internal governments of the Shoshone and Arapahoe Tribes. Internal matters of tribal government are not within the bounds of federal jurisdiction unless jurisdiction is expressly conferred by Congressional enactment. There is no express provision providing for federal jurisdiction in 25 U.S.C. §1303, giving the privilege of the writ of habeas corpus to any person to test the legality of detention by order of any Indian tribe. In the absence of express Congressional authority conferring jurisdiction in the federal courts, this Court must refrain from assuming jurisdiction where it has none. In view of the immunity of Indian tribes from suit and the absence of a substantial federal question, this Court cannot assume jurisdiction.[13]

The Congress has provided by statute and regulations the means for amending tribal constitutions and has conferred upon the Secretary of the Interior a supervisory authority over the amending process. The Federal courts, however, have no such duty to oversee these procedures.

On the other hand, in *Spotted Eagle* v. *Blackfeet Tribe,*[14] the court concluded that it had jurisdiction over the defendant tribe in a suit to enforce rights assured under the Indian Civil Rights Act. The *Spotted Eagle* court held that in addition to the qualification of tribal immunity

8. 60 Stat. 237 (1946), 5 U.S.C. §1001 et. seq. See also Motah v. United States, 401 F. 2d 1 (10 Cir. 1968).
9. 82 Stat. 77 (1968), 25 U.S.C. §1301 et seq.
10. With the exception of granting jurisdiction in the federal courts in seeking writs of habeas corpus to test the legality of detention by an Indian tribe. See 25 U.S.C. §1303.
11. 314 F. Supp. 1157 (D. Wyo. 1970).
12. 301 F. Supp. 85 (D. Mont. 1969).
13. 314 F. Supp. at 1160.
14. Supra.

expressly provided in the habeas corpus provision, the Indian Civil Rights Act, together with 28 U.S.C. §1343(4)[15] constituted, in effect, Congressional consent to suit against certain tribal actions mentioned in the act. The court concluded that it did, therefore, have "equitable jurisdiction over the tribe and over its officers,"[16] since the act affords rights which may be protected by the Federal district courts.[17] While the court noted that the opinion "intimates nothing with respect to the doctrine of judicial immunity, nor official immunity from suit,"[18] neither did it suggest that its jurisdiction over the tribal defendant was limited by the doctrine of immunity. The court did not expressly hold that the Indian Civil Rights Act, together with 28 U.S.C. §1343(4) constituted Congressional consent to suit against Indian tribes in civil rights actions. Indeed, the court may have overlooked, like the plaintiffs in *Twin Cities Chippewa,* the doctrine of tribal immunity and proceeded from reasoning which established jurisdiction over the subject matter of the action, the federally protected rights of the plaintiffs. Evidently this reasoning compelled the court to conclude that it had personam jurisdiction over the defendant tribe.

If *Spotted Eagle* stands for the proposition that enactment of the 1968 Civil Rights Act constituted Congressional consent to suit because of a presently existing jurisdictional statute containing no reference to Indian tribes, then it clearly departed from the customary rule of construing doubtful language consenting to suit in favor of the defendant tribes.[19] The court in *Spotted Eagle* relied on *Jones* v. *Alfred H. Mayer Co.*[20] and *Bell* v. *Hood,*[21] both cases which involved neither Indian tribes nor the concept of sovereign immunity. In addition, the court disregarded cases which held that 28 U.S.C. §1343(4) deals solely with subject matter jurisdiction and not with personal jurisdiction.[22]

Sovereign immunity applies where the effect of the judgment sought would interfere with public administration or would have the effect of restraining the sovereign from acting or would compel it to act.[23] It thus prevents suit where the sovereign is the real party in interest, although only individual officers of a tribe are named as defendants. It does not merely bar naming the sovereign as a defendant. It is the essential nature of the suit and the relief sought which determines whether the doctrine is applicable, not the identity of the defendants. In *State of Hawaii* v. *Gordon,*[24] the Supreme Court stated the relevant rule: "[R]elief sought nominally against an officer is in fact against

15. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to recover damages or to secure equitable or other relief under any Act of Congress providing for protection of civil rights, including the right to vote. . . ."
16. 301 F. Supp. at 91.
17. See note 15, supra.
18. 301 F. Supp. at 91.
19. Maryland Casualty Co. v. Citizens National Bank, 361 F. 2d 517, 521 (5 Cir. 1966), cert. den. 385 U.S. 918 (1966).
20. 392 U.S. 409 (1968).
21. 327 U.S. 678 (1946).
22. Smith v. Ellington, 348 F. 2d 1021 (6 Cir. 1965), cert. den. 382 U.S. 998, reh. den. 383 U.S. 954.
23. Land v. Dollar, 330 U.S. 731, 738 (1947).
24. 373 U.S. 57 (1963).

the sovereign if the decree would operate against the latter."[25]

It is true that in two decisions involving forcible exclusion of a non-Indian from Indian land by tribal officers and agents a court has taken jurisdiction.[26] There is no indication in either of these cases, however, that the court addressed itself to the possibility that tribal immunity might shield a tribal chairman and other tribal employees from suit notwithstanding the court's jurisdiction over the subject matter of the suit. It does not appear in either opinion that tribal immunity was asserted by the defendant chairman although he was represented by attorneys for his tribe.

Furthermore, in *Nakai II* the court held that the acts of tribal officers and employees were without lawful authority, being based on unlawful orders of the tribal advisory committee which failed to conform to the tribe's legal code, and was moreover an unlawful bill of attainder under the Indian Civil Rights Act.[27] A well-established exception to sovereign tribal immunity is that an officer of the sovereign can be sued if he acts outside the scope of his statutory powers or if his powers are constitutionally void.[28] This is limited by the rule that immunity from suit protects an official who commits a tort while acting within the scope of his lawful authority.[29] The relief sought by the plaintiff in *Nakai I* and *Nakai II* was an injunction and damages against the named defendants. It appears that the court, or the tribal attorneys, simply overlooked the sovereign immunity of the Navajo Tribe from suit without Congressional consent.

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25. Id. at 58.
26. Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968) [hereinafter referred to as "Nakai I"]; Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969) [hereinafter referred to as "Nakai II"].
27. 298 F. Supp. at 34.
28. Dugan v. Rank, 372 U.S. 609, 622 (1963).
29. Davis v. Littell, 398 F. 2d 83 (9 Cir. 1968), cert. den. 393 U.S. 1018 (tribal immunity to suit extends to official of tribe acting within scope of authority).