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## Court must affirm tribes' sovereignty

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The U.S. Supreme Court is that branch of the federal government that historically has been most protective of the interests and sovereignty of Native American tribes. Lately, however, lower courts are ignoring its long-standing precedents and eroding the constitutional protections it has historically provided. Two recent decisions have clearly compromised tribal interests and infringed on tribal sovereignty; fidelity to the Constitution and justice to the tribes demand that the Supreme Court reverse these decisions.

The Supreme Court's protections flow from two early decisions. In *Cherokee Nation v. Georgia* (1831), Chief Justice John Marshall declared that Indian tribes are "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian" and that the federal government therefore has a duty to act in their best interests.

Consequently, the canons of statutory interpretation of federal Indian law differ from those applied elsewhere: Judges are obliged to construe statutes liberally on their behalf, to resolve all ambiguities in their favor and to preserve tribal property rights and sovereignty unless Congress's intent to the contrary is clear and unambiguous.

In *Worcester v. Georgia* (1832), Marshall added to tribal protections by declaring that states have no power over Indian affairs. While the tribes' right of self-determination is limited by their "domestic dependent" status, it is not effaced. As Marshall declared, "a weak state . . . may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."

Thus, Marshall held that state laws "have no force" in Indian country. The only government that can interact with Indian tribes is the federal government, not the states. Congress can, of course, constrict tribal sovereignty: It passed Public Law 280 in 1953, mandating that certain states, including California, enforce their criminal laws on reservations. However, given the canons of interpretation described above, Congress' constrictions must be clear and unambiguous.

Two recent lower court cases, however, challenge the implications of both of these classic decisions.

In *San Manuel Band v. National Labor Relations Board* decided last month, the D.C. Circuit Court of Appeals departed from the canons of interpretation and held that the National Labor Relations Act can be imposed on tribes and their commercial enterprises despite the facts that tribes are nowhere mentioned in the act and that it "was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers." It further disparaged tribal sovereignty by declaring that it simply "exists as a matter of respect for Indian communities, ... thereby giving them latitude to maintain traditional customs and practices."

And, in *Agua Caliente Band v. Fair Political Practices Commission*, decided last December, the California Supreme Court reached an even more egregious conclusion. The court affirmed that California courts have the power to abrogate tribal sovereign immunity and hear a case involving a tribe sued for its refusal to comply with the state's Political Reform Act.

The tribe argued that its sovereign status afforded it immunity, but the California Supreme Court held that since Congress had "not granted the tribe immunity from this suit," it could therefore proceed. Under the canons of interpretation, the court got it entirely backward: Tribes are subject to state suit only when Congress expressly declares that they are, and Congress has expressed no such intention.

In both of these cases, Congress could pass legislation subjecting tribes to the provisions of the National Labor Relations Act or state campaign-reform laws. But Congress has not. Until it does so clearly and unambiguously, the lower courts should act to protect the tribes from the wishes of those who have been unable to persuade Congress to pass such measures. And, when the lower courts fail in their duty to the tribes, the Supreme Court must intervene, repudiate their departures from clear and controlling precedents, and perform its historic role of protecting tribal interests and sovereignty by reversing obvious judicial error.

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