

A BRIEF HISTORY OF TRIBAL SOVEREIGNTY

American Indian tribes enjoy a special status in the United States. Under the Constitution, federally recognized Indian tribes are autonomous entities with a historically and politically unique relationship with the federal government. The basis for this special status is that self-governing Indian nations had existed and occupied their aboriginal lands throughout the Americas before the continent was subsequently discovered and settled by colonists.

By the 1600s, British colonists began negotiating treaties with Indian tribes, thus according them sovereign status. By the time of the American Revolution, the practice of negotiating agreements with Indians through treaties was well established.

In recognition of tribal sovereign status, the new United States constitution reserved the power to regulate commerce with Indian tribes to the Congress. Early court cases solidified this relationship and clarified enduring legal principles. Among them:

- Tribes are sovereigns, and state laws do not apply to them unless Congress consents.
- Tribal rights, including those to land and self-governance, are “inherent,” that is they are not granted to tribes by the United States. Tribes had these rights before America was colonized, and these rights are retained by virtue of prior and continuing sovereign status. Tribes retain rights not affirmatively removed by Congress.

These principles are still in operation today.

Although Congress in 1871 enacted a law prohibiting the making of further treaties with the tribes, existing treaties along with certain statutes, executive orders, and federal court rulings uphold the continuing government-to-government relationship of Indian tribes to the United States.

It should be remembered that treaties were most often made by the federal government in order to win cessions of land from Indians for the settlement of what is now the United States. Under these treaties, certain parts of federal territory were reserved for Indians, hence, the creation of Indian reservations. Upholding treaty rights is basic duty of the federal government, yet it's a duty that was often abrogated.

Indian tribes are not, however, foreign nations. According to seminal Supreme Court opinions written by Chief Justice John Marshall, tribes are considered to be “domestic dependent nations.” While this is a concept that has been interpreted a little differently by various courts from the 19th century until present times, it hasn't lost its basic meaning. They are sovereign political entities, but they are subject to the protection of the federal government; their status can be modified by Congress, even unilaterally. However, states cannot enter into treaties with the tribes, nor can they assert jurisdiction over tribal affairs unless Congress specifically permits it.

Since the founding of the United States of America, Congress has shifted its policies on Indian affairs several times since the Constitution was written, from respect for tribal sovereignty, to attempts to break up tribes and open Indian land to non-Indian settlement, and back again.

