Concept of Sovereignty Missing In Native Language

by Scott Kayla Morrison, Choctaw Attorney

“Sovereignty” is one of the most misunderstood words in the English language. “English” being the operative word here, as there is no word in any Native language for the concept of sovereignty. Sovereignty is misunderstood by Indians and non-Indians alike. Most don’t understand the source, the purpose or the use of tribal sovereignty.

Tribal sovereignty is, according to tribal leaders, 1) a divine right flowing from God, 2) a treaty right or 3) a constitutional right. The legal source is an inherent right of self-governance pre-dating European contact. With the establishment of the United States, this inherent right has been diminished due to tribe’s “domestic dependent nations” status.

The purpose of sovereignty is to protect unique tribal customs and traditions, and nothing more. Simple. This has been limited to governing the internal relations among tribal members, according to Felix Cohen’s Handbook on Federal Indian Law.

The use of sovereignty is where things get complicated. Tribal sovereignty has been used by Indian leaders as a shield from accountability, from their own citizens and non-Indians alike, and to expand Indian authority to a breaking point. It has been massaged and manipulated beyond recognition to Chief Justice John Marshall who handed down the foundational Indian law cases by the U. S. Supreme Court in the 1820s and 1830s. The limits of tribal sovereignty, as defined by Marshall, were uses not inconsistent with the “domestic, dependent nation” status of Indian tribes.

What the “domestic dependent” status taketh away, tribal sovereignty giveth back. It does not matter what the limits of tribal sovereignty are when no one can enforce them anyway. Tribal sovereign immunity protects tribes from suits; any suits by anyone, Indians and non-Indians alike, in any court, even their own courts.

No industrialized country in the world has absolute immunity from suit. All have allowed a mechanism for suit, with certain limitations, by citizens or non-citizens, in their own courts. Tribes, domestic dependent nations within the boundaries of another sovereignty, have not. Sovereignty is used as a shield from accountability through the mechanism of tribal sovereign immunity.

What is sovereign immunity? It is a legal concept used as a mechanism to protect a governmental entity from frivolous lawsuits when acting in its governmental capacity. Immunity is often confused with the sovereignty of the tribe to convert a legal mechanism to a divine right. Immunity is used as a shield from accountability in actions taken outside of governmental functions. The most noted example is Darrell “Chip” Wadena, former chairman of White Earth Chippewa Reservation, Minnesota. He

asserted sovereign immunity in federal court when he was indicted on numerous criminal charges. The Chippewa people did not elect Wadena to commit fraud and corruption. He was acting outside of his official capacity, yet he used tribal sovereign immunity in his individual actions. This is not the intended purpose or use of sovereign immunity. No sovereign has the right to operate outside of the law or its own constitution.

Very few tribes have waived sovereign immunity for any purpose even in their own courts. Tribes will state over and over that “we can handle our own affairs in our own courts.” This implies that any citizen, Indian or non-Indian, can seek fair redress in a tribal court. That is not the case in the majority of courts.

One of the biggest problems with tribal courts is the lack of separation of powers within the tribal governments. President Reagan commissioned a Report and Recommendations on Indian Reservation Economies in 1984. The commission identified several factors as impediments to business development on reservations. Sovereign immunity was a factor. Tribal courts were another factor. The Report found that tribal courts’ “failure to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law.”

“Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians,” the report continued. “Business uncertainty in situations where law is subordinate to the whims of tribal councils, especially where tribal governments are destabilized by frequent political turnover of elected office holders. There is a fear that tribal courts will not protect the property rights of non-Indians by according them due process of law or protecting individual non-Indian civil rights. Uncertainty increases risk and risk increases the cost of doing business on Indian reservations.”

The Presidential Commission recommended legislation be provided for appellate review of tribal court decisions to the federal court system where constitutional and statutory rights are involved. Respecting self-governance was the motivation for recommending that federal courts review tribal court decisions. “In order to minimize risks attendant to tribal government instability and to promote due process of law for those who live and do business within an Indian reservation, the rule of law also needs to be strengthened on Indian reservations. Accordingly, those tribal court decisions which involve statutory or constitutional rights, like those of the respective states, should be appealable to the federal courts. Such an appellate review system would strengthen tribal court systems, enhance guarantees of fairness, and promote greater certainty for business activity.” The U. S. Supreme Court is moving in a direction in recent decisions to limit tribal court jurisdiction. Even if tribal courts are properly formed, their powers must be limited only to internal affairs involving Indians and Indian lands, not non-Indians on non-Indian lands. Otherwise, non-Indians face the specter of regulation and enforcement by

governments and courts in which non-Indians cannot participate.

On January 5, 1986, the Minneapolis Star and Tribune began a series titled, “Indian Courts: Islands of Injustice.” It documented many civil rights abuses in tribal courts and called for reform. The current bill is nothing new and doesn’t address new problems. They keep coming up and will continue to come up until this unpalatable situation changes. Tribes have not taken steps to voluntarily cease and desist. Congress must act to protect Indians and non-Indians alike.