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In 1988 Congress passed the Indian Gaming Regulatory Act (IGRA).[1] The states, disappointed with certain aspects of the IGRA legislation, launched a war against Indian tribes to stop them from conducting the gaming which Congress had determined was a vital source of economic development for tribes and a proper exercise of tribal sovereignty. In 1994 governors from forty-nine states signed and sent a letter to Congress urging drastic revisions in the law purportedly to protect states' rights. To this day, every Session of Congress brings the introduction of legislation that would curtail or destroy Indian gaming rights.

The states viewed the establishment of tribal casinos within their borders as an intrusion of states' rights that should be stopped or, at a minimum, curtailed. To the tribes, Indian gaming had to be protected and expanded because it was the only known source of economic development that gave tribes the resources to raise themselves from levels of abject poverty that had continued on most reservations for more than a century.

Currently, the Indian gaming war is almost over. In state after state, through negotiation or litigation or some combination of the two, the tribe and the states have been able to agree on the compacts IGRA requires for the conduct of casino gaming. Indian gaming ventures have helped the state and local economy, while affording tribes the economic development they desperately need. At the present time there are 179 compacts negotiated between 160 tribes and 24 states. Last year the California tribes and the State of California entered into a statewide compact approved through the passage of an amendment to the State Constitution that has finally resolved the controversies that have raged in that state for more than ten years.

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1. Indian Gaming Regulatory Act, 28 U.S.C. § 1362 (1988) (stating that "the district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States").

Florida is the most notable exception to the trend of accommodation between the tribes and states. After twenty years of struggle, dating back to the 1981 *Seminole Tribe v. Butterworth*[2] case, which predates IGRA and seven separate law suits, two of which are still pending, there is still no resolution of the scope of the Seminole and Miccosukee Tribes' right to conduct gaming on their Florida reservations.

The Florida tribes maintain that the state allows a broad variety of gaming and that they are entitled to conduct such gaming under a compact or under procedures established by the Secretary of the Interior. The State of Florida maintains that the Florida tribes are trying to establish casino gaming of a kind that goes beyond what is allowed by Florida law. However, Florida has been unwilling to let the courts decide the controversy, successfully establishing in *Seminole Tribe of Florida v. Florida*[3] that Congress could not constitutionally subject them to suit by the Tribes to resolve this matter and related issues.[4] Florida has filed suit to stop the Secretary of the Interior from allowing the Tribes the alternative administrative remedy, which the Court of Appeals for the Eleventh Circuit in the *Seminole* case determined was the necessary alternative to the court suit it ruled to be unconstitutional. The State of Florida does not appear to want a fair minded impartial resolution of the issues. It is content to hide behind its immunity, while doing everything it can to destroy the tribal gaming rights that Congress confirmed in the IGRA.

While it is not possible at this time to know how the controversy over Indian gaming in Florida will be resolved, I think it is important for the citizens of Florida to realize that the State's position in this controversy is founded on a misconception of the role of tribes in the federal system and a failure to recognize the sovereign status of tribal governments.

It must be remembered that the Supreme Court held in *California v. Cabazon Band of Mission Indians*[5] that allowing state regulation of tribal gaming would "impermissibly infringe on tribal government."[6] *Cabazon* recognizes that the regulation of gaming on tribal lands was a matter involving the exercise of tribal sovereign power, subject only to restriction by

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2. 658 F.2d 310 (5th Cir. 1981) (concerning the application of Florida bingo laws to a prospective Seminole bingo hall) [hereinafter "Butterworth"].

3. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that the Indian Gaming Regulatory Act does not abrogate the states' Eleventh Amendment immunity) [hereinafter "Seminole"].

4. *Id.* at 47.

5. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding that the state's interest in preventing tribal bingo halls run by organized crime does not justify infringement upon tribal sovereignty).

6. *Id.* at 222.

Congress in the exercise of its plenary power over Indian affairs.[7] Even before the Supreme Court heard the *Cabazon* case, the Fifth Circuit in *Butterworth* found that "the states lack jurisdiction over Indian reservation activity until granted that authority by the federal government."[8]

When IGRA was passed in the aftermath of *Cabazon* Congress restricted pre-existing tribal rights and partially reversed the result of that decision. Congress made casino gaming subject to a degree of state regulation by requiring a tribe to obtain the consent of the state in which it is located through a compact regulating the conduct of such gaming. However, Congress did not make the tribes fully subject to state law. Under the IGRA compromise, the tribes would be allowed to conduct any form of commercial gaming allowed by a state for any person and for any purpose, without necessarily following the limits of state law. States were not free to arbitrarily refuse to enter into a requested compact. The states were required to negotiate in good faith and were made subject to suit in federal court if they did not comply – a remedy that was ruled unconstitutional in the *Seminole* case.[9]

In passing the IGRA, Congress did not ignore the sovereign status of tribes. However, the war over Indian gaming can only be understood in the context of the historic struggle between tribes and states over the continued sovereign status of the tribes. In order to properly understand the legal basis for Indian gaming, it is essential to examine the underlying basis and history of federal Indian policy and the sovereign status of tribes, which continues to endure until the present day.

I. THE SOVEREIGN STATUS OF INDIAN TRIBES AND THE SPECIAL RELATIONSHIP BETWEEN THE TRIBES AND THE UNITED STATES

When Europeans came to the New World they found a continent populated by many sovereign tribes, all organized in a variety of governmental forms adapted to their needs and circumstances. Under the Articles of Confederation[10] states were given an equal voice in the management of Indian Affairs—a situation that was quickly found to be unworkable. The drafters of the Constitution recognized then what the United States Su-

7. *Id.* at 221-22.
8. Seminole Tribe of Florida v. Butterworth, 658 F.2d at 312.
9. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996).
10. Articles of Confederation, art. 9, § 5.

preme Court states in *United States v. Kagama*,[11] that "[t]hese Indian tribes...owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."[12] Therefore, when the Constitution was adopted, the special status of Indian tribes was confirmed in what is known as the Indian Commerce Clause.[13] The Indian Commerce Clause gave Congress plenary power in the conduct of Indian affairs, therefore recognizing that the regulation of Indian affairs could not be left to the states.

In the early nineteenth century, as white settlement increasingly encroached on tribal lands, the federal courts were called on to define the nature of tribes in the federal system. Chief Justice Marshall spoke for the U.S. Supreme Court in the *Cherokee Nation* cases[14] when he defined the status of tribes as "[d]omestic dependent nations"—a concept that is still valid today.[15]

While the Supreme Court in the *Cherokee Nation* case in the 1830's recognized the sovereignty of tribes, Congress and the Executive Branch were of the contrary opinion that the existence of sovereign nations within the states of the Union was inconsistent with state sovereignty and national policy. Under the removal policy of President Andrew Jackson Congress gave tribes the choice of emigrating beyond the Mississippi or losing their sovereign status. Many tribes, most notably substantial portions of the "Five Civilized Tribes,"—the Choctaws, Chickasaws, Creeks, Cherokees, and Seminoles—were forcibly removed beyond the Mississippi to fend for themselves in a new and hostile environment.

As the United States expanded westward during the mid-nineteenth century, it became impossible to continue to resettle Indian tribes to the west of the white settlements. Thus, the reservation policy began. Under this policy the federal government purported to recognize the sovereignty of tribes within a reservation with clearly defined boundaries surrounded by white settlement, usually in a treaty that provided for a large cession of tribal land. In most cases, however, the government worked in a variety of ways to subvert tribal government and reduce the Indian people to a state of

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11. United States v. Kagama, 118 U.S. 375, 384 (1886) (The case was brought before the Supreme Court by "certificate of division of opinion between the circuit judge and the district judge holding the circuit court of the United States for district of California. The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, the person murdered being also an Indian of said reservation).

12. *Id.* at 384.

13. U.S. CONST. art I, § 8, cl 3.

14. Cherokee Nation v. State of Georgia, 30 U.S. 1 (1831).

15. *Id.* at 17.

dependency and utter poverty.

Despite the promises of the treaties, it was not long before the white settlement encroached upon the reservations themselves. Tribes resorted to force in order to protect their remaining territory leading inevitably to defeat at the hands of the U.S. Army and a process of drastic reduction of tribal territory through a succession of treaties, agreements, statutes, and executive orders. At the same time, many tribal economies collapsed due to the disappearance of the buffalo herds and depletion of other game. Destitute and powerless the Indians became dependent upon federal assistance for their survival. Many proud Indian Nations ceased, in effect, to be self-governing as the resident Indian Agent of the Bureau of Indian Affairs exercised near-total control of the reservation. And yet, most tribes–in one form or another–managed to preserve some sort of tribal identity.

From the last quarter of the 19th century forward Indian policy has shifted like the violent swings of a pendulum. During the period stretching from the 1870's to the 1920's the tribes–under a policy of forced assimilation–were to be made a part of the mainstream. One fundamental change occurred in 1871 Congress ended the practice of dealing with tribes as sovereigns by treaty. From that point forward agreements with tribes were to be simply agreements. A variety of other measures were instituted as follows:

(1) Allotting tribal land under the Indian General Allotment Act[16] and similar statutes. (The chief effect of this was to reduce Indian landholding from 140,000,000 acres to 50,000,000, since individuals lost their allotments through a variety of transactions.);

(2) The Major Crimes Act of 1885,[17] which ended tribal power to try tribal members for major crimes;

(3) Stamping out tribal tradition, religion and language through outright prohibition of these activities.

16. Indian General Allotment Act, 25 U.S.C. § 331 (1987).

17. Major Crimes Act, 18 U.S.C. § 1153 (1885) (stating that "[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States").

The net effect of all these measures was disastrous to the tribes. By the turn of the 20th century it was clear that the attempts at assimilation had left the tribes in a dependent state and in conditions of extreme poverty.

Major change began with the publication of the *Merriam Report* in 1928.[18] This report condemned policies of the past, which had subjugated many tribes, and recommended encouraging Indian use of Indian lands and strengthening Indian community life and culture. This change led to the end of the allotment process. Additionally, the 1934 Indian Reorganization Act (IRA) further strengthened tribal government by encouraging tribes to establish or re-establish strong tribal governments.[19]

The next major chapter of federal Indian policy was the temporary setback of the termination period of the 1950's and 1960's.[20] From 1954 to 1962 Congress voted to terminate federal supervision of over 100 tribes. Termination legislation typically ended the special relationship between the federal government and the Indian tribe concerned and discontinued federal programs for that tribe. The legislation imposed state authority over former reservation land, subjected the land to state taxation, and either sold tribal land and distributed the proceeds among tribal members or placed the land in a private trust. Tribal treaty rights were abrogated or curtailed. Finally, tribal government was effectively ended on most terminated reservations, although terminated tribes continued to exist for other purposes.

In his message to Congress in July 1970 President Nixon rejected the policy of forced Termination as both morally wrong and ineffective.[21] President Nixon strongly affirmed that the special relationship between Indian tribes and the United States was based upon solemn commitments that the federal government had made to tribes during the course of our history and could not be unilaterally ended. He stated that to "...terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American."[22] President Nixon also pointed out that in the instances where Termination had been tried the results were harmful and did not achieve the intended result. He also proposed a legislative initiative, which was ultimately enacted as the Indian Self-Determination

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18. See INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (1928) (also known as the MERRIAM REPORT).

19. *Id.*

20. 18 U.S.C. § 1162 (1970).

21. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R.Doc. No. 363, 91st Cong., 2d Sess. (July 8, 1970) (outlining tribal self-determination policy).

22. *Id.*

Act,[23] under which Indian tribes would be given the right to contract with the federal government to carry out the various programs of the Bureau of Indian Affairs and the Indian Health Service. The goal of this initiative was to end the dependence of tribes on the federal bureaucracy and allow Indians to become "independent of federal control without being cut off from federal concern and federal support."[24]

The Self-Determination Act and its progeny have empowered tribes in many ways and caused a sea change in the world of Indian affairs. As intended, the role of the federal bureaucracy has greatly diminished in the years since the Nixon message. Today, tribes operate 50 percent of BIA programs and 44 percent of IHS programs.

While Indian tribes have worked to revitalize their communities in this, the self-determination era, Indian people as a demographic group are still the most impoverished minority in the United States with the lowest per capita income, highest unemployment rate, and some of the worst living conditions in the United States.[25] This status is a direct result of the pervasive impact of the historic socio-economic marginalization of Indian people that continues today. Indian tribes, faced with this the latest set of obstacles on their road toward self-sufficiency, have sought to utilize their inherent tribal sovereignty to increase their economic development opportunities. For some tribes this resulted in the pursuit of economic development through gaming.

II. THE CABAZON AND BUTTERWORTH CASES—IMPORTANT AFFIRMATIONS OF INDIAN SOVEREIGNTY

Two historic Indian gaming cases serve as important affirmations of tribal sovereignty: the *Butterworth* case from Florida and the *Cabazon* case from California. Both cases involved state assertions of civil regulatory authority over Indian gaming pursuant to Public Law 280.[26] Public Law 280 was enacted during the termination era and specifically extended state civil and criminal jurisdiction to Indian Country in five specified states: California, Nebraska, Minnesota, Oregon, and Wisconsin (with limited exceptions in some states). In addition to these mandatory states, Section 7 of Public Law 280 granted other states the right to assume criminal and civil

23. Indian Self-Determination Act of 1994, 25 U.S.C. 450(e) (1994).

24. *Id.*

25. *See* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., FEDERAL INDIAN LAW 16 (3rd ed. 1993).

26. 18 U.S.C. § 1162 (1970); 28 U.S.C. § 1360 (2000).

jurisdiction over Indian tribes by legislative enactment.[27] This section of Public Law 280 was repealed in 1968, but assertions of state jurisdiction made pursuant to the act prior to 1968 were not effected.

In the *Butterworth* case, the Sheriff of Broward County, Florida, along with the State of Florida as *amicus curiae*, argued that a Florida State statute that regulated the operation of bingo games within the State of Florida could be enforced against the Seminole Indian Tribe of Florida.[28] The key distinction for the Fifth Circuit Court of Appeals was whether the Florida law was civil/regulatory in nature or criminal/prohibitory in nature. This distinction was meaningful following the Supreme Court's decision in *Bryan v. Itasca County*,[29] which found that Public Law 280 did not confer general civil regulatory powers upon the states over reservation Indians.[30] The court in *Butterworth* confirmed that "states lack jurisdiction over Indian reservation activity until granted that authority by the federal government."[31] Therefore, since the Florida bingo statute regulated gaming rather than its prohibition, it simply did not apply to the Seminole Tribe.

In the *Cabazon* case, the Cabazon and Morongo Bands of Mission Indians operated Bingo games and a card club within their reservations in California.[32] The State of California sought to apply its California Penal Code that, like the Florida statute in the *Butterworth* case, did not entirely prohibit the playing of bingo but rather permitted it only in prescribed circumstances for charitable organizations. The Supreme Court in *Cabazon* once again examined the nature and scope of Public Law 280's infringement upon tribal sovereignty, and concluded that where a state law was civil/regulatory in nature, Public Law 280 does not authorize its enforcement on an Indian Reservation.[33] The opinion in this case did not only look at the history of Public Law 280 and its concomitant case law, but also examined the interests of sovereign tribes in pursuing and regulating their own gaming operations weighed against the State's interest in regulating Indian gaming. Of relevance in the case was the fact that the State of California encouraged state-based gaming such as a state lottery, non-Indian card rooms, and significant bingo operations in the State at the same time that the State sought to criminally prosecute individuals involved in similar gaming operations on Indian reservations.[34] The Court in *Cabazon* simply

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27. 88 Stat. 2205 (1975).
28. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (1981).
29. Bryan v. Itasca County, 426 U.S. 373 (1976).
30. *Id.*
31. 658 F.2d 310, 312 (1981).
32. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
33. *Id.*
34. *Id.*

held that allowing state regulation of tribal gaming would "impermissibly infringe on tribal government."[35]

In short, the *Butterworth* and *Cabazon* cases stand out as reminders that underlying all issues concerning state regulatory authority, federal legislation, and the general regulation of gaming, lies inherent tribal sovereignty. Unless granted specific authority by Congress, states should have no jurisdiction over activities on Indian lands. At the same time, Congress has an obligation to tribal governments to acknowledge the Court's edict in *Cabazon*: allowing state regulation of tribal gaming is an impermissible infringement of tribal government and tribal sovereignty.[36]

III. ATTACKS ON INDIAN GAMING ARE BASED UPON A FAILURE TO RECOGNIZE THE SOVEREIGN STATUS OF TRIBES

Over the past few years strong efforts in Congress have been to attack tribal sovereignty through recurrent IGRA amendment proposals as appropriation riders to stop the Secretary of the Interior from developing and implementing "Secretarial Procedures."[37] The need for these procedures was made all the more certain following the *Seminole* case, which effectively removed a tribe's right to sue a state for failing to negotiate in good faith under IGRA. In other words, without these procedures states would have the absolute right to negotiate, or not negotiate, compacts with tribes as well as absolute veto authority over their terms.

By using this tactic of an appropriations rider, the proponents circumvent the committee hearing process that is normally utilized for substantive legislative proposals. The rider, therefore, eliminates the opportunity for tribal governments to directly weigh in on the potential impacts of such a measure through testimony and presentation of facts. Fortunately, while earlier efforts were successful and delayed the promulgation of necessary regulations, in 1999 an amendment to prevent Secretarial Procedures failed and the regulations went into effect. *Florida and Alabama have filed suit in the Northern District of Florida in an attempt to overturn these cases.*[38]

Proponents of these specific IGRA amendments and those who pro-

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35. *Id.* at 222.

36. *Id.*

37. "Secretarial procedures" are the procedures to be utilized by the Secretary of the Interior in developing a gaming compact in the instance where a state refuses to negotiate with an Indian tribe.

38. Florida and Alabama v. United States, No. 99 Civ. 137-RH (Northern District of Florida).

test Indian gaming argue that allowing the Secretary of the Interior to utilize these procedures to resolve compact disputes between tribes and states improperly tramples on the rights of the states. However, an analysis beyond the surface rhetoric illuminates the fact that the real issue is tribal sovereignty.

IGRA in no way eliminates a state's right to absolutely prohibit gaming within its borders. Although states have this right, only a couple of states have chosen to pursue such a prohibition. The remaining states merely regulate gaming and many participate in gaming through lotteries and actively encourage state-based gaming. IGRA only serves to give tribes within these states the opportunity to negotiate a compact with the state on the basic premise that if gaming is permitted under state law, it should be allowed for tribes under federal law.

IGRA in no way eliminates a state's right to negotiate gaming compacts in good faith with tribes. As previously mentioned, many states and tribes have found an accommodating relationship under IGRA that has led to the negotiation of 179 compacts. The states that allow gaming within their borders, but refuse to negotiate compacts with tribes, are simply trying to assert a state's right to discriminate against tribal governments and further erode tribal sovereignty. IGRA, imperfect as it is, was written in such a way to make the federal trustee for tribes, the Secretary of the Interior, an arbiter to make certain that tribes can have the rights guaranteed them under federal law.

Legislative proposals to curtail Indian gaming will no doubt continue in Congress. Hopefully, these proposals will fail. The key to understanding the impact of such measures is to understand the history of tribal sovereignty and how it relates to this process. States have never had, and were never intended to have by the framers of the Constitution, the right to directly regulate the conduct of Indian tribes except to the extent specifically allowed by Congress. Therefore, IGRA should continue to be implemented in a way that protects tribal sovereignty. To do so does not in any way interfere with the rights of states.