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Can Tribal Nations Regain Their Lost Sovereignty Through Diplomacy?

Even before the establishment of the United States (US), Native tribes have been treated as sovereigns or nation-states, later recognized as such by early US documents such as the Constitution and Supreme Court decisions.[1] Beginning with the treaty of Fort Pitt, there have been 374 treaties between the US government and Native tribes in total.[2] Although tribes are recognized as sovereign in theory, in practice, many tribal nations cannot exercise their sovereignty due to restrictive acts passed by Congress, Court Case precedents, and lack of jurisdiction for tribal courts.[3] For Native Nations to successfully thrive as economically and socially independent entities, they need their sovereignty to be recognized and respected. Since the establishment of the US, every president has supported sovereignty as a necessity for tribal governments; despite this, little progress or diplomacy has occurred to allow Native Nations to truly be sovereign.[4] The passing of repressive acts by Congress and the limited jurisdiction tribal courts possess diminishes the sovereignty of tribal nations; however, through integrating tribal nations' voices in diplomacy with the US government, Native Nations can strengthen their sovereignty.

Sovereignty, most simply defined as self-rule, is the essential force for Native American legitimacy in political, economic, and cultural spaces. Without this recognition as distinct political entities outside of the US, Native Nations struggle to preserve their own cultural practices.[5] By refusing to collaborate with tribal nations within its borders diplomatically, the federal government (a non-Indian government) exercises significant authority over strictly Indian affairs, thereby infringing on tribal sovereignty.[6]

A series of treaties dating back to the 16th century were diplomatically formed and supported by Native Americans and governed long before the United States was established.[7] The US pledged to respect tribal sovereignty over reserved land and recognized that Native land would be governed by tribes, not by state governments.[8] However, Native Nations currently lack the exclusive rights granted to them. Treaties made were easily broken.

The creation, recognition, and respect of treaties have formed the basis of diplomatic relations between the federal government and tribes.[9] The US government's refusal to respect their treaty obligations with Native tribes, unlike other sovereign nations it forms treaties with, demonstrates how the US fails to recognize Native Nations as sovereign states.

Empty promises between American and tribal governments, disguised as diplomacy, reflect the true nature of American relations with tribes. During President Andrew Jackson's administration, Congress passed the Indian

[1] Gloria Valencia-Weber, "Tribal Courts: Custom and Innovative Law," *New Mexico Law Review* 24, no. 2 (Spring 1994): 227, accessed December 6, 2021, https://digitalrepository.unm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2024&context=nmlr.
[2] Donald Fixico, interview by the author, Hudson, OH, January 28, 2022.
[3] Frank Pommersheim, Broken Landscape: Indians, Indian Tribes, and the Constitution (Oxford: Oxford University Press, 2009), 7, https://www.proquest.com/legacydocview/EBC/472077?accountid=49314.
[4] Joseph P. Kalt and Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, 1, accessed December 6, 2021, https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf.
[5] Kalt and Singer, *Myths and Realities*, 4.
[6] Kalt and Singer, 6.
[7] Kalt and Singer, 9.
[8] Kalt and Singer, 9.
[9] Kalt and Singer, 16.

Removal Act in 1830, appeasing Southern Democrats who longed for more land.[10] Native Americans were forced to vacate their homes through cession treaties bolstered by the Indian Removal Act. Although many Native Nations (ie. the Cherokee) opposed this forced removal from their land, the federal government refused to consider their sovereignty.[11] Rather than engaging diplomatically with tribes in order to satisfy both parties, the US pushed Native Americans aside while advancing westward.[12] The US thrived off of the oppression of Native Americans. These were not acts of diplomacy between Native Nations and the US federal government; instead, the federal government collaborated with Southern states to forcefully remove Native peoples from their land. Rather than adequately collaborating with Native Americans and keeping their promises, the federal government viewed tribal sovereignty as an obstacle to Western Expansion.[13] The American government capitalized on millions of acres of aboriginal lands forcibly taken from Native Nations. The US continued in its quest to seize all Native land, even the small allotments they had promised to Native Americans.[14] By failing to respect treaties diplomatically formed between tribal governments and the US federal government, the US refuses to recognize the sovereignty of Native Nations.

For example, the Navajo Treaty of 1868, a binding sacred agreement respected by the Navajo people, emancipated the Navajo prisoners from the Bosque Redondo Reservation. This treaty reaffirmed the Navajo Nation as sovereign from the US.[15]

During the early 1930s, the commissioner of Indian Affairs, John Collier, created a bill concerning self-government, special education for Indians, Indian lands, and a Court of Indian Affairs.[16] This bill reflected a desire to improve aspects of Indian law and the loss of reservations by allowing Indian Nations to draft their own constitutions, establish their own court systems, and adopt their own laws. Although the original bill awarded Indian Nations with these liberties, the Indian Reorganization Act, passed in 1934, did the opposite, limiting the powers of tribal governments, most notably their constitutions.[17]

The Indian Nations' ability to draft their own constitution was replaced by constitutions drafted by the Bureau of Indian Affairs. Almost one-third of tribes rejected this act, suffering consequences such as losing more land to non-Indians.[18] To many Native Americans, this was a price they had to pay to remain partially self-governing territories.

[10] Lance F. Sorenson, "Tribal Sovereignty and the Recognition Power," American Indian Law Review 42, no. 1 (2017): 100, https://www.jstor.org/stable/26492274.
[11] George William Goss, "The Debate over Indian Removal in the 1830s" (master's thesis, University of Massachusetts, 2011), 6, accessed December 6, 2021, https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1045&context=masters_theses.
[12] Library of Congress, "A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875," American Memory, accessed December 9, 2021, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=004/llsl004.db&recNum=458.
[13] Goss, "The Debate," 5.
[14] Sorenson, "Tribal Sovereignty," 101.
[15] Raymond D. Austin and Robert A. Williams, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*, Indigenous Americas (Minneapolis: University of Minnesota Press, 2009), 6, https://ebookcentral.proquest.com/lib/wra-ebooks/detail.action?docID=485437.
[16] Frank Pommersheim, "The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay," *New Mexico Law Review* 18, no. 1 (Winter 1988): 53-54, accessed December 6, 2021, https://core.ac.uk/download/pdf/151605139.pdf.
[17] The National Archives and Records Administration, "The Indian Reorganization Act of 1934," National Archives Catalog, accessed November 4, 2021, https://catalog.archives.gov/id/299838.
[18] Earl Mettler, "A Unified Theory of Indian Tribal Sovereignty," *Hastings Law Journal* 30, no. 1 (1978): 96-97, accessed December 6, 2021, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2577&context=hastings_law_journal.

If Congress had included Indian tribes while creating this act, rather than only allowing Nations to vote on whether it applies to their respective Nation, this act would have been more popular and successful within Indian Nations.

Previously, individual state governments only possessed limited jurisdiction over Indian issues, therefore consulting with affected Indian Nations.[19] However, in conjunction with other termination policies in 1983, Public Law granted six state governments rights that transferred jurisdiction from the federal government to individual state governments. These states received criminal jurisdiction over Indians on reservations, the ability to amend their laws to exercise power on Indian reservations, and control over a broad range of reservation activities, all without tribal consent.[20] By creating and enacting this law, the government withdrew all federal aid, services, and protection while limiting Indian Nations' jurisdiction over their respective Nations.[21] Congress neither consulted nor received Indian input, failing to recognize the sovereignty of Indian tribes or how tribal jurisdiction was affected.

A similar event occurred with the passing of the Indian Civil Rights Act in 1968, allowing the federal government to regulate tribal jurisdiction under the pretext of protecting Constitutional rights. Through adopting this act, Congress limited tribal courts to only charging defendants with up to 3 years in prison and fines under $15,000.[22]

These oppressive acts led Native Nations to lose trust in state and federal government agencies. The federal government passed progressive acts to amend previous wrongdoings by increasing tribal jurisdiction and allowing tribal governments to become self-sufficient.[23] For instance, the passing of the Indian Child Welfare Act of 1978 created a series of Congressional mandates granting Indian tribes "exclusive jurisdiction" and authorized States and Indian tribes to enter into agreements together while determining the care and custody of Indian children.[24] By respecting Native public acts, records, and judicial proceedings in tribal courts, the federal government began to value tribal governments in the same manner as other sovereign states.[25] Through regulating gaming, permitted due to the Indian Gaming Regulatory Act of 1988, the federal government encourages state and tribal governments to enter gaming compacts that allow tribes to operate gaming independently while still adhering to state regulations.[26] By passing an act that fosters diplomacy, the federal government assists tribes in becoming self-sufficient while still appeasing the states in which reservations are located. Although recent acts passed by Congress have begun to reaffirm tribal sovereignty, Congress still habitually fails to include Native voices.

American courts, most notably the US Supreme Court, diminish Indian sovereignty and constantly denies tribal governments' judicial power through restrictive precedents. By overruling tribal courts, US state and federal courts fail to view tribal nations as sovereign and legitimate states. Instead, the Supreme Court treats them as mere courts of lesser jurisdiction.

[19] Jerry Gardner and Ada Pecos Melton, "Public Law 280: Issues and Concerns for Victims of Crime in Indian Country," Tribal Court Clearinghouse, accessed November 1, 2021, http://www.tribal-institute.org/articles/gardner1.htm.

[20] United States Government Publishing Office, "Public Law 280," Govinfo.gov, https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg588.pdf.

[21] Gardner and Melton, "Public Law 280," Tribal Court Clearinghouse.

[22] Tribal Law and Policy Institute, "Text of Indian Civil Rights Act," Tribal Court Clearinghouse, accessed November 16, 2021, https://www.tribal-institute.org/lists/icra1968.htm.

[23] Jerry Gardner, "Improving the Relationship between Indian Nations, the Federal Government, and State Governments," Tribal Court Clearinghouse, accessed November 1, 2021, http://www.tribal-institute.org/articles/mou.htm.

[24] Tribal Law and Policy Institute, "Indian Child Welfare Act of 1978 (25 U.S.C. §§ 1901-63)," Tribal Court Clearinghouse, accessed December 9, 2021, https://www.tribal-institute.org/lists/chapter21_icwa.htm.

[25] Tribal Law and Policy Institute, "Indian Child," Tribal Court Clearinghouse.

[26] "Indian Gaming Regulatory Act," National Indian Gaming Commission, last modified 2015, accessed December 9, 2021, https://www.nigc.gov/general-counsel/indian-gaming-regulatory-act.

According to tribal law expert Dr. Fixico, "*Cherokee Nation v. Georgia* is the primary legal precedent on the theory of Indian sovereignty."[27] In this case, the Cherokee Nation debated with the state of Georgia by attempting to file a suit as a foreign state. However, the Supreme Court court held that the Cherokee Nation could not sue in federal court to challenge Georgia's incursions into its sovereignty since it is not considered a foreign state and is therefore not a foreign sovereign.[28] Justice Marshall's decision stated that a tribe was a state with powers of sovereignty over its members and affairs but that it was not a foreign state due to the jurisdictional limits of the congressional power to regulate commerce outlined in the US Constitution.[29]

The Constitution states, "To regulate commerce with foreign Nations, and among the several states, and with the Indian tribes."[30] Although the Constitution recognizes the ability for Indian Tribes to regulate their own commerce, it refers to tribal Nations as "Indian tribes" rather than including them under the umbrella of foreign states.

The 1983 US Supreme Court Case *Ex parte Crow Dog* 109 US 557 debated whether the tribe, not the United States, had jurisdiction in an Indian murder by another Indian.[31] By examining the 1868 treaty, the 1877 agreement with the Sioux, and the Intercourse Act of 1834, the Supreme Court favored greater jurisdiction, legitimizing tribal courts to a degree.[32] Although the Supreme Court recognized Indian treaties in these cases, the issue of broken treaties remains. The US only follows this piece of diplomacy with Native Nations when it chooses to.

In *Oliphant v. Suquamish Indian Tribe,* the Supreme Court debated whether the Suquamish Tribe had jurisdiction to arrest and try a non-Indian accused of committing a crime on tribal land. He challenged the exercise of criminal jurisdiction by the Tribe, alleging criminal jurisdiction of tribal courts did not apply to him.[33] The Supreme Court agreed finding:

Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress...Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status."[34]

The statement "inconsistent with their status" never explicitly states what this status is. This comports with Dr. Fixico's comment stating, "Supreme Court decisions are typically not decided on the specific treaties instead on the particular political context in which the decision took place."[35] Two questions arise: Do tribal courts still possess sovereignty if their "status" does not allow them to possess jurisdiction within their own lands? Or are Tribal courts only deemed legitimate when their decisions align with federal and state courts? The Supreme Court fails to consider that certain aspects of tribal law function differently than American law.[36] Unfortunately, this Oliphant decision still

[27] Fixico, interview by the author.

[28] "The Bill Filed on behalf of the Cherokee Nation vs. The State of Georgia," in *The Cherokee Case*, comp. Richard Peters (Philadelphia: John Grigg, 1831), 2, accessed November 16, 2021, https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Case-of-the-Cherokee-Nation.pdf.

[29] Sorenson, "Tribal Sovereignty," 103.

[30] "The Constitution of the United States: A Transcription," National Archives, accessed November 16, 2021, https://www.archives.gov/founding-docs/constitution-transcript.

[31] "Ex parte Crow Dog, 109 U.S. 556 (1883)," Library of Congress, accessed November 16, 2021, https://www.loc.gov/item/usrep109556/.

[32] Kirke Kickingbird, "Striving for the Independence of Native American Tribal Courts," *Human Rights Magazine*, Winter 2009, 1, accessed October 14, 2021, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/winter2009/striving_for_the_independence_of_native_american_tribal_courts/.

[33] Sorenson, "Tribal Sovereignty," 83.

[34] "Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)," Library of Congress, accessed November 16, 2021, https://www.loc.gov/item/usrep435191/.

[35] Fixico, interview by the author.

[36] Sorenson, 86.

speaks volumes today, influencing the Court's approach to analyzing tribal judicial and legislative authority over non-Indians on their land. Similarly, in *Montana v. United States* (1983), the Supreme Court decided in a civil case that the Crow Tribe could not regulate hunting and fishing on their land, finding that a tribe's exercise of sovereign power is "inconsistent with its status.[37]

In *United States v. Bryant*, the Supreme Court debated whether reliance on previous convictions violated the Sixth Amendment of the US Constitution and if uncounseled tribal court convictions could be used in other courts.[38] By questioning tribal courts' ability to sentence defendants to a fair trial, *Bryant* undermined the tribal courts' criminal jurisdiction.[39] The Supreme Court reversed, stating that an uncounseled conviction that violated the Sixth Amendment could not be used as a predicate offense.[40] This 2016 Supreme Court Case favoring the Northern Cheyenne Tribal Court's previous decision demonstrates the Supreme Court's gradually taking strides to recognize tribal courts' criminal jurisdiction over matters on tribal reservations.

The best form of action is writing cooperative agreements between tribal governments and local governments. Through a written collaborative agreement with a common ground for addressing issues, productive relationships between governments and agencies are formed diplomatically.[41]

The Swinomish Cooperative Land Use Program, the first comprehensive plan made between a tribe and a county in Washington, addresses both the concerns of Indians and Non-Indians. This program is based on a memorandum of agreement consisting of a county-tribal land use plan that provides a framework for activities within the boundaries of the Swinomish Reservation. Since 1996, this plan has created a regulatory forum for resolving future issues. Through cooperation amongst many parties, intergovernmental issues are solved diplomatically.[42]

In the Great Lakes Indian Fish and Wildlife Commission, a tribally-chartered intertribal organization, Native Nations collaborate to create a memorandum of understanding with the US Forest Service. By recognizing treaties guaranteeing hunting, fishing, and gathering rights under tribal regulations, the tribal concerns are considered legitimate.[43]

Likewise, in the Chippewa Flowage Joint Agency Management Plan, a government agency of the US state of Wisconsin created a joint management plan with Native American input. By upholding treaty rights, promoting respect for Indian ancestors, and protecting the natural beauty and productivity of the lake, the governmental owners collaborated to create a plan that best serves Native people. By signing a memorandum of agreement beforehand, each party agreed to respect the protection of the Chippewa and recognized the need to collaborate with them.[44]

[37] "U.S. Reports: Nevada et al. v. Hicks, 533 U.S. 353 (2001)," Library of Congress, accessed December 2, 2021, https://www.loc.gov/item/usrep533353/.
[38] "United States v. Bryant," Supreme Court of the United States, last modified 2016, accessed November 16, 2021, https://www.supremecourt.gov/opinions/15pdf/15-420_5425.pdf.
[39] Lindsay Cutler, "Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense," *UCLA Law Review* 63, no. 1752 (2016): 1754, accessed December 6, 2021, https://www.uclalawreview.org/wp-content/uploads/2019/09/Cutler-63-6.pdf.
[40] Cutler, "Tribal Sovereignty," 4.
[41] Gardner, "Improving the Relationship," Tribal Court Clearinghouse.
[42] "The Swinomish Comprehensive Plan," Swinomish Indian Tribal Community, last modified August 6, 1996, accessed December 6, 2021, https://swinomish-nsn.gov/media/5816/swincompplan96.pdf.
[43] U.S. Department of the Interior, "Ensuring Meaningful Input into Infrastructure Development," indianaffairs.gov, last modified November 29, 2016, accessed December 6, 2021, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-055464.pdf.
[44] "Chippewa Flowage Joint Agency Management Plan Memorandum of Agreement," Wisconsin Department of Natural Resources, last modified August 2000, accessed December 6, 2021, https://dnr.wi.gov/files/pdf/pubs/lf/LF0028.pdf.

With approval from the US Environmental Protection Agency (EPA), the Sandia Environmental Department obtained responsibility for water quality regulations on the reservation. The Sandia Environmental Department includes the people of the Pueblo in decisions regarding local water matters in counterarguments to pollution claims made by local dischargers.[45] Through collaboration with this department supported by the State of New Mexico and the Pueblo, Native Americans are included in decisions regarding their Nations and their Nations are therefore recognized as sovereign entities.

These examples demonstrate the importance of including Native Americans in decisions affecting Native Nations.[46] Through diplomacy with governmental organizations, Native Nations can become more self-sufficient, easing concerns that Indian citizens' needs cannot be met by their tribal governments.

These cooperative agreements are essential, especially since tribal governments thrive when self-sufficient. However, diplomatic agreements must consist of Memorandums of Understanding between Indian Nations, the federal government, and state governments. The agreement should, "identify the issue at hand, set out a brief history or purpose of the agreement, provide any necessary definitions of terms used, and clearly state the roles and responsibilities of each of the agencies/governments involved."[47] Native Americans are recognized as US citizens in the social security system, can vote and run for office in state and federal elections, and have all the advantages of other US citizens. However, that does not excuse the abrogation of treaty rights to protect their tribal lands and native identities that the US government has done time and time again. The above kinds of agreements are necessary to protect Native input in acts, domestic relations matters, contracts, torts, repossessions, taxation, economic development, gaming, hunting and fishing, water rights, repatriation, and religious practices.[48] Through the inclusion of tribal governments in the collaboration amongst governments and agencies, Native Nations are recognized as independent sovereign entities whose perspectives deserve recognition and respect.

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[45] "EPA Honors Sandia Pueblo with Partnership for Environmental Excellence Award," United States Environmental Protection Agency, last modified December 17, 1997, accessed December 7, 2021, https://archive.epa.gov/epapages/newsroom_archive/newsreleases/95799fc628384341852570d6005e7e05.html.
[46] Kalt and Singer, *Myths and Realities*, 27.
[47] Gardner, "Improving the Relationship," Tribal Court Clearinghouse.
[48] Gardner, Tribal Court Clearinghouse.

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