THE FEDERAL POLICY PERSPECTIVE

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I. Introduction

With few exceptions, from the beginning of the interaction with Indian tribes and nations, the federal government has asserted primacy over the states in Indian affairs. This position is based on the principle that Indian nations are sovereign entities and that only the U.S. Congress has the power to limit, or in other ways affect the jurisdictional relationships. The federal government's idea of how this policy should be implemented has shifted repeatedly through the centuries, with significant impact on Indian tribes and nations.

Even before the federal government was a government, and until recent judicial decisions,[2] New York did not agree with the principle of federal primacy, either in theory or practice.[3] Because New York thought it was one of those exceptions, both by default and later by congressional statute, New York's relationships have developed differently, or at least at a different pace, with the Native American tribes and nations located within the state's borders.

Nonetheless, it is important to the understanding of the relationships in New York to understand the history and context of federal Indian policies.

II. Shifting Federal Policies

1. 1779-1871. Policy: Indian Nations and Tribes as Independent Sovereigns

See, the U.S. Constitution, Art. I, § 8 (Congress' power to regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes); and Art. II, § 2 (President's power … to make treaties). The practice of dealing with tribes through treaties continued until 1871 when Congress banned the further signing of treaties with the Indians. 16 Stat. 544, at 566.

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[2] See, e.g., United States v. Cook, 922 F. 2d 1026 (holding that 25 U.S.C. § 232 [granting criminal jurisdiction to New York state] was not a grant exclusive of federal jurisdiction); United States v. Forness, 125 F. 2d 928 (2d Cir. 1942) (holding that New York state law does not apply to the Seneca Nation in connection with tribal leases of Seneca lands); United States v. Boylan, 265 F. 165 (2d Cir. 1920) (holding that Indians could not sell reservation land under the authority of state legislation, without federal consent, rejecting sale of remaining common land of the Oneidas).

[3] Nor incidentally, is there agreement from many Indian tribes and nations.

2. 1817-present. Policy: Limited Criminal Jurisdiction

As early as 1817, Congress limited Indian nations when it passed the General Crimes Act which took away tribal power to prosecute non-Indians committing crimes in Indian Country and gave the jurisdiction to the federal government.[4] 18 U.S.C. § 1152.

3. 1830s. Policy: Removal

In a period overlapping with the treaty period, the federal policy incorporated the concept that Indian tribes were a special kind of "sovereign" (the Supreme Court in Cherokee Nation v. Georgia, 95 Peters [30 U.S.] 1 (1831) ("Domestic Dependent Nations")), giving rise to the idea that Indian people were wards of the government and therefore people to be protected (the genesis of the "trust doctrine" which is extant today). While upholding tribal jurisdiction in this case, the doctrine was used to justify the Removal policy during which Indians were encouraged to "remove" to reservations, many of them far away from original territories. This was a movement which continued through the passage of the Indian Removal Act in 1830 authorizing forced removal of Indians to reservations. See 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

4. 1830s. Policy: Modified Exclusive Jurisdiction

In the wake of Cherokee Nation, in Worcester v. Georgia, 6 Peters [31 U.S.] 515 (1832), the Supreme Court held again that Indian tribes and nations had jurisdiction to police reservations, exclusive of state jurisdiction, except for federal jurisdiction over non-Indians.

5. 1880s. Policy: Modified Limited Exclusive Jurisdiction

Indian jurisdictional power was undercut by the formation of "Courts of Indian Offenses" imposed on reservations in 1883, and managed by the Bureau of Indian Affairs, Department of Interior.[5] This was a western reaction to justice dispensed by traditional and customary native justice systems.[6] Native power was then reduced again in 1885 by the federal Major Crimes Act, giving the federal government jurisdiction exclusive of the states over a list of felonies committed on Indian reservations when committed by a tribal Indian against the person or property of another tribal Indian

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[4] A large exception to the federal jurisdiction claimed by the legislation was judicially created by the Supreme Court in United States v. McBratney, 104 U.S. 621 (1882) (holding that absent treaty provisions to the contrary, the state has exclusive jurisdiction over a crime committed in Indian country by a non-Indian against another non-Indian).

[5] 25 C.F.R § 1.100, et seq. These courts employ the western adversarial system. The model is still in existence today on many reservations, although they are no longer controlled by the Bureau of Indian Affairs.

[6] For example, Ex Parte Crow Dog, 109 U.S. 556 (1883) (holding that federal court had no jurisdiction to try an Indian for the murder of another Indian).

or other person in Indian country.[7] 18 U.S.C. § 1153.[8] The Indian Civil Rights Act passed in 1968 (25 U.S.C. § 1302) effectively reduced tribal criminal jurisdiction to misdemeanor level throughout the U.S., a situation that continues today.

6. Late 1800s. Policy: Assimilation

In the late 19th and early 20th century, federal policy took a sharp turn. A campaign began to eliminate tribal governments and reservations, and bring—"assimilate"—Indians into the larger American community as landowners and farmers. The Allotment Act of 1887, ch. 119, 24 Stat. 388 [scattered §§ of 25 U.S.C.] distributed reservation territory to individual members of the tribes, and subjected them to state and local criminal and civil laws. Tribes lost control of millions of acres of land, and their governments were dissolved.

7. 1930s. Policy: Strengthen Tribal Governments

Given the failure of the assimilation policy, the federal government did an about face in the 1930s. A study requested by the Department of the Interior and done by the Institute for Government Research (now the Brookings Institute) resulted in the issuance of The Merriam Report of 1928. This report is often seen as one of the most complete analyses of Native American affairs ever done. It was delivered to Congress highlighting the lack of opportunities in higher education, inadequate services and expenditures in all areas of administration including health care, housing, and education in general.[9] The information contained in the report showed that earlier policies regarding Indian affairs had created an even greater problem. Its several recommendations urged the federal government to step up to its trust responsibilities to Indian tribes and nations by strengthening tribal governments. The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, et seq., was one of the major results.

8. 1953. Policy: Termination of Tribal Governments

The federal government again changed course in 1953 when federal policy makers led a push to push Indians away from their lands and their cultures. Hundreds of small tribes were terminated, their jurisdiction ended, subjecting the terminated tribes to state laws and leading to the conversion of Indian lands into private hands.

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[7] Crimes on reservations by non-Indians against non-Indians are left to state prosecution. Further, United States v. McBratney, 104 U.S. 621 (1881), is regarded as authority for the states' assertion of jurisdiction over a variety of "victimless" crimes committed by non-Indians on Indian reservations. See United States Department of Justice policy re: victimless crimes at United States Attorneys' Manual, Title 9, Criminal Resource Manual, §§ 683, 684. Available on Conference CD ROM.

[8] To the extent the enumerated felonies are not defined by distinct federal statutes, the offenses are to be defined by law of the state where crime occurred. 18 U.S.C. § 1153(b).

[9] For the full text see http://si.unm.edu/bern_2003/lisam/lis_tl/tl.htm.

The Termination Period was accompanied by a relocation program which encouraged Indians to move to the cities for jobs. And, as another blow to tribal governments in some states, in 1953 Congress passed what is called Public Law 280, granting to some states exclusive jurisdiction over criminal and civil matters arising on reservations within the state.[10] Note: Regulatory power was not transferred, thereby denying the states the right to tax tribal property held in trust, and withholding jurisdiction over matters such as hunting and fishing rights.

9. Late 1960s-present. Policy: Support Tribal Government Self-Determination.

Finally, in the late 1960s and 1970s federal policy returned almost full circle. Thus began an era of federal policy designed to support native governments and the resurgence of the concept of tribal sovereignty.[11]

A. 1968. President Johnson rejected the termination policy and described a new policy of self-determination on March 6, 1968.[12] This policy focused on Indian involvement in providing for community needs and opportunities for education and development to improve leadership.[13] The statement also addressed civil rights for Indians.[14]

B. 1970. President Nixon reiterated this policy on July 8, 1970, emphasizing that Indian tribes should have a choice of whether to accept federal involvement in their affairs.[15]

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[10] 18 U.S.C. § 1162(a); 28 U.S.C. § 1360. This statute is said to have been inspired by earlier grants of jurisdiction to New York. 25 U.S.C. §§ 232, 233. These federal statutes were passed in 1948 and 1950 after fierce lobbying by New York after United States v. Forness, supra, made it clear that New York did not have the independence it had asserted against federal jurisdiction with respect to New York reservations. The statutes granted New York jurisdiction concurrent with federal jurisdiction (a proposition resisted by New York to this day).

[11] Although the new policy did not change the jurisdictional landscape, many tribes rejuvenated their own justice systems premised on traditional and customary law. Bear in mind that federal jurisdiction in criminal law, asserted in the General Crimes Act of 1817 and the Major Crimes Act of 1885, continued in force, although in New York it was concurrent with state jurisdiction. See, infra.

[12] The Forgotten American: The President's Message to the Congress on Goals and Programs for the American Indian, 4 Weekly Comp. Pres. Docs. 438 (Mar. 6, 1968).

[13] Id.

[14] Id. at 446.

[15] Indian Affairs: The President's Message to the Congress, 6 Weekly Comp. Pres. Doc. 894 (July 8, 1970).

C. 1975. By Joint Resolution, Congress formed the "American Indian Policy Review Commission" charged with "conduct[ing] a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." The findings prefacing the resolution criticized the constantly changing policy toward American Indians.[16]

D. 1975. Congress passed the Indian Self-Determination and Education Assistance Act reflecting President Nixon's policy. 25 U.S.C. §§ 450, et seq. Among other things, the act gives tribal governments the option to operate and control federal government programs themselves.

E. 1983. President Reagan, in a statement on January 24, 1983, also adopted a policy of self-determination.[17] In addition, he emphasized the importance of strong, self-sufficient tribal governments and sought a reduction of the paternalistic relationship of the federal government to the tribes.[18] This new definition of the relationship as one between governments represents the next step in federal policy.[19]

F. 1991. President George H.W. Bush reiterated this policy on June 14, 1991.[20]

G. April 1994. President Clinton reiterated this policy through a memorandum to the executive branch departments and agencies requiring that they "undertake activities affecting Native American tribal rights or trust resources… in a knowledgeable, sensitive manner respectful of tribal sovereignty."[21] Underlining the policy, President Clinton speaks with tribal leaders at the White House.

G. May 1994. The National American Listening Conference was convened by Attorney General Janet Reno (DOJ) and Secretary Bruce Babbitt (DOI) in Albuquerque, New Mexico, implementing President Clinton's Memorandum. More than 200 tribal leaders came from all over the country and for two days talked about Indian affairs while high-level officials of the Clinton Administration listened. The Conference led to major changes in the federal relationships with American Indians and the federal government. The only New York Indian Nations sending representatives were the Oneida and the Seneca.

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[16] P.L. 93-580, 88 Stat. 1910 (1975).
[17] Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983).
[18] Id.
[19] See Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc. 783 (June 14, 1991).
[20] Id.
[21] Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 Weekly Comp. Pres. Doc. 936 (Apr. 28, 1994).

H. 1998. President Clinton issued Executive Order 13084, requiring departments and agencies to provide means for tribal governments to give input in agency decisions affecting them.[22] This Order was revised and strengthened by Executive Order 13175 on November 6, 2000.[23]

F. 2004. President George W. Bush, on the same day as the opening of the National Museum of the American Indian, issued a similar memorandum to cabinet departments and agencies directing them to maintain the government-to-government relationship and respect tribal sovereignty.

[22] Exec. Order No. 13084, 63 Fed. Reg. 27,655 (May 19, 1998).
[23] Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).