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Sue Salmon

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The status of Indian tribes as a part of the American government and society has caused constant problems since the United States Supreme Court considered the problem in *Worcester v. Georgia*[1] in 1832. This note considers the problem of tribal status as reflected in the federal courts' application of the exhaustion of remedies doctrine, with respect to tribal courts.

In defining tribal legal and political status, the courts have been faced with assimilating many conflicting federal policies: the preserving of tribal culture and the independent political character of the tribes,[2] a duty to protect the Indian nations as dependent peoples,[3] and a concern with extending protection of individual civil rights to Indians.[4] The tribes were originally separate sovereign nations antedating federal and state governments. From the first European settlements in New England, the Indians were brought under the jurisdiction and control of the United States' government by conquest. In return for retaining their tribal identity, receiving federal monetary aid, food and medical assistance, and grants of land, the Indians were forced to give up a portion of their independence in the form of external sovereignty, that is, they were no longer allowed to declare war nor treat with foreign countries as independent nations.[5] The federal government thus assumed a position of guardian to the tribes, with an obligation to protect their remaining internal tribal sovereignty from encroachment by itself or the states.

The Supreme Court had the opportunity to express this obligation in *Worcester v. Georgia, supra.* In that case, the state of Georgia sought to impose state laws upon Cherokees living on Indian lands within the state. In Chief Justice Marshall's opinion, the Cherokee Nation was described as a "distinct community"[6] with its own territory, and immune from the laws of Georgia, the state in which the reservation was located, except as expressly authorized by treaties, acts of Congress, or the Indian nation itself.[7] Because of its peculiar status, all dealings with the tribe would be performed by the federal government alone.[8] Tribal status was thus designated as being somewhere between that of the states and the federal government. This opinion has been construed to support the definition of the tribes as quasi-sovereign political entities not subject to the laws of the states in which they reside, except as authorized by Congress,[9] and with all

inherent rights of internal sovereignty, save only the restrictions placed thereon by the federal government.[10] The practical result of the decision was that the internal governing of the Indians was left to the tribes, including the power to determine their own form of government, draft qualifications for administrative officials and provide for the manner of their election and removal, and promulgate laws for the ordering of their society.[11] While the problem of tribal status thus seemed neatly settled, later legal developments placed many qualifications on the above doctrine so that tribal status often varies from case to case.

In contrast to this policy of favoring tribal autonomy, congressional policy has been the assimilation of the tribes into the "mainstream of American society."[12] The congressional goal has been to see all Indians as full-fledged members of American society with all attendant individual rights.[13] The process has been gradual, beginning with the granting of full citizenship to Indians as a result of Section 1401(a)(2) of Title 8 of the United States Code.[14] This has been continued with the passage of such bills as the 1953 amendments of sections 1151 and 1161 of Title 18, in which state jurisdiction was extended over crimes and civil actions involving Indians in certain areas of Indian country in California, Minnesota, Nebraska, Oregon, and Wisconsin.[15] The transition has been a gradual one in which the states have been encouraged to assume the burdens of jurisdiction over the tribes as soon as the educational and economic status of each tribe permits the change without working hardship on the tribe.[16]

Recent emphasis on assimilation has been prompted by the courts' concern over protection of individual Indian rights. In that area, individual Indians have been caught in a "legal no-man's land."[17] As discussed above, the tribes are not states,[18] and they are not usually treated as arms of the federal government.[19] No state or federal laws, including the Constitution and Bill of Rights, are applicable to Indians, unless expressly applied by Congress.[20] To resolve the resulting legal hiatus in which tribal members were denied civil rights unless granted by their tribal government, Congress passed the Indian Bill of Rights[21] with the purpose of "vindication in federal courts if necessary of civil rights heretofore denied tribal members."[22] The Indian Bill of Rights, which does not include all rights guaranteed by the Constitution, is the result of a compromise between the conflicting congressional policies discussed herein: tribal autonomy versus concern over the individual rights of tribal members.[23] The efficacy of the compromise in achieving its twin goals has been heightened by its careful application by the courts.

The nature of Indian nation sovereignty is important in a discussion of exhaustion of remedies in tribal courts. It directly affects the route a tribal case must follow on its way to federal court and the scope of application of the exhaustion doctrine along the way. The doctrine is applicable only where tribal courts and administrative agencies have jurisdiction over the suits and Indian parties. The jurisdiction will depend on the authority of the tribe to confer it on those courts and agencies.[24] This authority is an inherent power of internal sovereignty.

Williams v. Lee[25] is often relied on by courts in a discussion of exhaustion of remedies as affecting the scope of tribal and state jurisdiction. In this case, Lee, the plaintiff and a non-Indian, was the operator of a general store on a Navajo reservation. He brought suit against Williams and his wife, both Indians living on the reservation, for goods sold to them on credit. The defendants moved to dismiss on the grounds that jurisdiction properly belonged in the tribal court, rather than in state court.[26] The Supreme Court held that the exercise of state jurisdiction would undermine tribal authority over reservation affairs.[27] While citing the autonomy policy of *Worcester*, the Court noted that Congress had modified this policy, notably where essential tribal relations were not involved and the rights of individual Indians were not jeopardized, as in suits by Indians against non-Indians in state court and state criminal jurisdiction over crimes between non-Indians on reservation lands.[28] The determining factor in the decision about whether to allow state jurisdiction was to be whether such action would interfere with the right of Indians to govern themselves.[29] The plaintiff, although not an Indian, was subject to the tribal courts because his business was conducted on Indian lands and with Indians.[30] This strict insistence on tribal court independence supports an inference of an exhaustion of remedies doctrine applying to removal of such cases to federal court.

Following *Williams*, one of the first considerations of the exhaustion doctrine was in *Dodge v. Nakai*.[31] At issue in that case was whether exhaustion of available tribal remedies was an implied condition for reliance on Title II of the Indian Civil Rights Act (28 U.S.C. § 1303) in federal court. The Court found exhaustion to be well supported as a general rule on three grounds[32]: (1) such action would support the congressional policy of investing tribal governments with responsibility for their own affairs;[33] (2) an independent tribal judiciary would be enhanced by placing primary responsibility for vindication of Indian civil rights with the tribe, and (3) such

action would insure federal court intervention only when local actions could not be handled by the tribal court. The Court declined to enforce the exhaustion requirement in this instance, however, in order to avoid a multiplicity of suits.[34]

As in *Dodge*, many recent cases dealing with exhaustion of tribal court remedies are suits involving the Indian Bill of Rights, or the Indian Civil Rights Act.[35] Two cases, *O'Neal v. Cheyenne River Sioux Tribe*,[36] and *United States ex rel. Cobell v. Cobell*[37] will serve to illustrate the problems encountered here. In *O'Neal*, the plaintiff alleged federal court jurisdiction under the Indian Bill of Rights for alleged wrongful seizure of his cattle by order of the Junior Court of the Cheyenne River Sioux Tribe based on the foreclosure of a loan made by the tribe to the plaintiff.[38] In *Cobell*, plaintiff was appealing a temporary restraining order staying the transfer of child custody pursuant to a writ of habeas corpus sought by the Indian father after a divorce upon refusal of the mother to surrender the children. In both cases, additional tribal remedies were available. In *O'Neal*, the plaintiff contended he should not be required to exhaust his tribal remedies because other non-Indian citizens were not required to exhaust their state court remedies when bringing civil rights suits in federal court.[39] The Court agreed with plaintiff's authorities, but held, as concerning Indian civil rights, that Congress had decided the preferred method of protecting Indian rights was by "maintaining the unique Indian culture and necessarily strengthening tribal governments."[40] The Court also noted that the plaintiff had efficacious tribal remedies remaining in either an appeal to the Cheyenne River Tribe Superior Court or an original suit in the same superior court upon dismissal of the instant suit.[41] It was noted that the exhaustion of remedies doctrine was not an inflexible requirement.

In each case, a balancing process was necessary, weighing the need to immediately determine alleged deprivations of individual rights.[42] This flexibility was demonstrated in the *Cobell* case. Although plaintiff father had two alternative tribal remedies available,[43] the Court refused to require exhaustion, citing the particular remedies as "ineffective" and "meaningless."[44] The Court held that mere availability of tribal remedies in theory did not automatically result in a decision that plaintiff had failed to exhaust remedies.[45] The tribal remedies, then, must not only be available but effective. Other reasons cited in various cases for refusal to apply the exhaustion doctrine to the particular case under consideration have been inadequate tribal court structure to deal with the case,[46] avoidance of multi-

plicity of suits in federal court,[47] and when use of tribal procedures would result in great delay of plaintiff's case.[48]

Conclusion

In applying the exhaustion of remedies doctrine to tribal cases in federal court, the courts have attempted to follow the doctrine as it is applied to state courts. Several factors prevent blanket application in this manner to Indian tribes. The special quasi-sovereign status of the tribes, as with the sovereignty of the states, must constantly be balanced with the congressional and constitutional policy of immediate adjudication of individual rights. A great determining factor in the Indian cases, though, is the great variance in the size, structure, and quality of the judicial structures among the tribes.[49] It would work great hardship on a defendant to require him to exhaust his tribal remedies in a situation as found in *McCurdy v. Steele.*[50] In that case, the plaintiff was a member of the Goshute Tribe, which had no judicial arrangement to try civil cases and was forced to share a judge with another tribe regarding any civil or criminal matters as they occurred, often resulting in great delays in determination of Goshute cases.[51] In comparing this with the excellent tribal judicial system of the Navajo Tribe, as relied upon in *Williams v. Lee,* the federal courts have done well in dealing with this difficult problem. The present approach to the exhaustion of remedies doctrine should be continued in order to avoid inequities to less culturally advanced tribes, which are neither ready to submit to state jurisdiction nor organize their own judicial system.

NOTES

1. 31 U.S. (6 Pet.) 515 (1832).
2. O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973); McCurdy v. Steele, 353 F. Supp. 629, 632, 636 (D. Utah 1973).
3. Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971).
4. Lohnes v. Cloud, 366 F. Supp. 619, 621 (D.N.D. 1973).
5. Williams v. Lee, 358 U.S. 217 (1954).
6. 31 U.S. (6 Pet.) 515, 561 (1832).
7. *Id.*
8. *Id.*
9. *Id.* at 560; United States v. Forness, 125 F.2d. 928, 932 (2d. Cir. 1942). *See* Haile v. Sannooke, 246 F.2d 293, 297-98 (4th Cir. 1957).
10. United States v. Kagama, 118 U.S. 375, 381 (1886); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Seneca Const. Rights Org. v. George, 348 F. Supp. 51 (W.D.N.Y. 1972).
11. F. COHEN, FEDERAL INDIAN LAW 126 (1942), *quoted in* Wounded Head v.

Tribal Council of the Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975).

12. Williams v. Lee, 358 U.S. 217, 220 (1954).

13. *Id.*

14. 8 U.S.C. § 1401(a)(2) (1970): "Nationals and citizens of the United States at birth.

"(a) The following shall be nationals and citizens of the United States at birth:

". . . (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe. *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property. . . ."

15. 18 U.S.C. §§ 1151, 1162 (1970).

16. 2 U.S. CODE CONG. & ADMIN. NEWS 2409 (1st. Sess. 1953).

17. Solomon v. LaRose, 335 F. Supp. 715, 718 (D. Neb. 1971).

18. United States v. Kagama, 118 U.S. 375, 381 (1886); Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 133-34 (10th Cir. 1959).

19. Groundhog v. Keeler, 442 F.2d 674, 678 (1971). *But see* Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965).

20. For state laws not applicable, see cases cited in note 9, *supra.* Federal laws, including the Constitution, not applicable: United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 512 (1940); Talton v. Mayes, 163 U.S. 376, 384 (1896); Janis v. Wilson, 521 F.2d. 724 (8th Cir. 1975); Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (1959); Groundhog v. Keeler, 442 F.2d 674, 678 (1971).

21. 25 U.S.C. § 1302 (1970).

22. McCurdy v. Steele, 353 F. Supp. 629, 636 (1973).

23. *Id.* at 632.

24. F. COHEN, FEDERAL INDIAN LAW 126 (1942).

25. 358 U.S. 217 (1954).

26. *Id.*

27. *Id.*

28. *Id.* at 219-20.

29. *Id.*

30. *Id.* at 223.

31. 298 F. Supp. 17 (D. Ariz. 1968).

32. *Id.* at 25.

33. *Id.* at 26. The Court cites Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965).

34. *Id.*

35. 25 U.S.C. § 1302 (1970); 28 U.S.C. § 1303 (1970).

36. 482 F.2d 1140 (1973).

37. 503 F.2d 790 (1973), *cert. denied,* Sharp v. Cobell, 95 S.Ct. 2396 (1974).

38. 482 F.2d 1140, 1142 (1973).

39. 503 F.2d 790, 792 (1973).

40. Stradley v. Andersen, 456 F.2d 1063 (8th Cir. 1972), *cited in* 482 F.2d 1140, 1144 (1973).

41. 482 F.2d 1140, 1144 (1973).

42. *Id.* at 1146.

43. *Id.*

44. 503 F.2d 790, 794 (1973).

45. *Id.* at 793. The two remedies were (1) request a hearing on the temporary restraining order before the issuing judge, and (2) appeal the TRO to a special tribal appellate court.

46. *Id.* at 794.

47. McCurdy v. Steele, 353 F. Supp. 629, 636 (1973).
48. Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968).
49. 353 F. Supp. 629, 636 (1973).
50. *Id.* at 629.
51. Compare tribal judicial structures discussed in McCurdy v. Steele, 353 F. Supp. 629 (1973) and Williams v. Lee, 358 U.S. 217 (1954).