It's Not About Federalism #16: Tribal Sovereign Immunity

Earlier today, the Supreme Court heard its latest state sovereign immunity case. This line of cases, which dates to 1996, says that even though state governments are bound by federal law, Congress cannot authorize individuals to sue states for damages when they violate federal law. The only exception—so far—is when Congress exercises its power to enforce the guarantees of the Fourteenth Amendment, such as due process and equal protection (though that has not stopped the Court from striking down civil rights laws like the Age Discrimination in Employment Act that try to make the states pay for employment discrimination).

Today's case, *Tennessee Student Assistance Corporation v. Hood*, will decide whether there is another exception for Congress's constitutional power "to establish uniform Laws on the subject of Bankruptcies throughout the United States." The smart money is on the states; of the six federal appeals courts to decide this question since the revolution of 1996, only one has ruled in favor of Congress. The Solicitor General, who usually intervenes to defend the constitutionality of federal statutes in the Supreme Court, declined to participate in *Hood*.

Krystal Energy Company v. Navajo Nation, decided in February by the Court of Appeals for the Ninth Circuit, makes an interesting counterpoint to *Hood*. The Ninth Circuit, interpreting the same section of the Bankruptcy Code involved in *Hood*, found that Indian tribes can be hailed into Bankruptcy Court against their will. Indian tribes, like states, are sovereigns of a sort, but *Krystal Energy* confirmed that they are second-class sovereigns in the eyes of the courts (this is not to criticize the Ninth Circuit panel, which merely restated well-established principles of Indian law that the Supreme Court has laid down over the centuries). The Navajo Nation did not even bother to raise a constitutional argument in *Krystal Energy*, because it would have been futile. How is it that the states have an almost slam-dunk winner where the tribes have a sure loser on sovereign immunity?

One might think that if either type of entity had ceded more sovereignty to the federal government, it would have been the states. After all, as the Supreme Court has repeatedly noted, "tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" The Constitution does not grant the federal government any greater power over Indian tribes than over states; the only power expressly granted is the right to regulate commerce with the tribes, and it is quite clear (or at least it has been for the last eight years) that the parallel power to regulate interstate commerce does not permit Congress to override states' sovereign immunity.

The federal government historically dealt with Indian tribes, unlike states, in a manner befitting true sovereigns: by treaty and war. The Court's earliest pronouncements on the subject described Indian tribes as "nations" and "independent political communities" distinct from the United States. Unlike states, tribal governments are not bound by the Fourteenth Amendment nor, by extension, by the Bill of Rights. Indeed, when the Fourteenth Amendment declared that all persons born in the United States are citizens of the United States and the state in which they reside, the Court held that this rule did not apply to Indians; while it was possible to be a citizen of both New York and the United States, one could not owe loyalty simultaneously to the Cherokee Nation and the United States. It was not until 1924 that all Indians, by Act of Congress, be-

came U.S. citizens. Even then, some Indians objected because, in the words of Tuscarora Chief Clinton Rickard, "This was a violation of our sovereignty. Our citizenship was in our own nations."

It therefore seems a bit odd that states' sovereign immunity should be impervious even to explicit abrogation under a law that is indisputably within Congress's enumerated powers, while Congress can revoke Indian tribes' sovereign immunity at will under a nontextual "plenary power" over Indian affairs. Yet not only is that the law, but the Court seems to think that even the flimsy sovereign immunity accorded to tribes goes too far. The *Kiowa Tribe* case of 1998, for example, noted: "Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident." The Court—in an opinion authored by Justice Kennedy and joined by three of the other four "federalist" justices—went on to say that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." These words must seem painfully ironic to the victims of state torts like employment discrimination and patent infringement who have been denied justice by the Court's state sovereign immunity jurisprudence.

(This area of law is replete with ironies. The 1996 case that announced the Court's new, robust immunity theory rejected a suit brought *by* a sovereign Indian tribe *against* a state and authorized by federal law. The presumably fortuitous list of states in which the state sovereign immunity cases have arisen is also quite interesting: Florida (*Seminole Tribe*, *Florida Prepaid*, and *Kimel*); Alabama (*Garrett*); and South Carolina (*Federal Maritime Commission*). Outside the Confederacy, only Maine (in *Alden*) has managed to push the immunity envelope. This Term, Tennessee, lagging the Deep South as it did in 1861, is trying to make up for lost time by pulling off a double: besides *Hood*, it is also asking the Court to rule in *Tennessee v. Lane* that Congress exceeded its Fourteenth Amendment powers in trying to abrogate sovereign immunity for states that violate Title II of the Americans with Disabilities Act.)

As Justice Kennedy wrote for the Federalist Five in *Alden*, sovereign immunity is needed to preserve the "dignity" of sovereign states. Some might question whether Florida really has more dignity than the Seminole Tribe, let alone whether Georgia has more dignity than the Cherokee Nation it sent on the genocidal Trail of Tears in spite of an explicit Supreme Court order to the contrary.

It's not about federalism; it's about the indignity of being an Indian tribe.

On the Internet:

Professor Mary Wood's "Crash Course in Indian Law":
http://comitia3.uoregon.edu/~outlines/2nd3rdYr/indianfroz.pdf

The University of Oklahoma College of Law's Native American Legal Resources page:
http://www.law.ou.edu/indian/

The Indian Law Resource Center's Sovereignty page: http://www.indianlaw.org/sovereignty.htm

The Sixth Circuit's *Hood* decision, now under Supreme Court review:
http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=03a0038p.06

The Supreme Court's *Kiowa Tribe* decision:
http://supct.law.cornell.edu/supct/search/display.html?terms=Kiowa&url=/supct/html/96-1037.ZO.html

The Ninth Circuit's *Krystal Energy* decision:
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/870518214FB0104888256E35007B83BD/$file/0217047.pdf?openelement