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A REVIEW OF THE 1990s AND A LOOK AT WHAT'S AHEAD*

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With the end of the decade advancing, a review of the Indian law cases decided by the Supreme Court in the 90s is timely. I begin where Reid Chambers left off in his 1991 FBA speech entitled "Indian Law in the United States Supreme Court — Experiences in the 1980s and Prospects for the 1990s." Chambers took as his starting point Louis Claiborne's 1980 FBA speech, entitled "The Trend of Supreme Court Decisions in Indian Cases."

I then briefly address the question of what lies ahead. As part of this discussion, I suggest the need for tribal advocates to consider how to enhance the Supreme Court's confidence that decisions supporting Indian rights are correct, not simply as a matter of precedent, but also in light of the real changes that are occurring in Indian affairs and in tribal communities. Stated simply, tribal advocates must show the Court that its Indian law decisions have produced positive changes for Indian tribes, which have benefitted all persons — Indian and non-Indian — over whom tribal authority, and thus responsibility, extends.

I. An Overview of the Indian Cases in the Supreme Court in the 1990s, the Number of Unanimous Decisions and Those Favorable to Indian Interests

A. In the Period from 1991 to the Present, the Supreme Court Decided Thirteen Indian Law Cases. Of These Cases, Five Were Unanimous, and Five Were Generally Favorable to Indians

1. This continues the downward trend that Chambers noted in 1991, in which he reported that in the 1980s (including 1990) the Court decided forty-seven Indian law cases, of which eight were unanimous or per curiam decisions, and twenty of which were generally favorable to Indians. In contrast, in the 1970s and 1960s, a majority of the decisions were favorable to Indians. As Chambers reported, in the 1970s, thirty-five decisions were handed down, of which twelve were unanimous or per curiam, and twenty were favorable to Indians. In the 1960s, thirteen decisions were issued, of which eight were unanimous or per curiam, and nine were favorable to Indians.

B. The 1991 - date cases also suggest that Chambers' prediction that fewer Indian law cases would be decided in the 1990s will prove to be correct. He

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based his prediction on the view that much of the substantive doctrine in Indian law has been established, and that the field has become more mature and well-settled, lessening the need for Supreme Court review of lower court decisions.

1. The 1991- date cases show less unanimity than the cases decided in the 1960s, but more than in the cases decided in the 1970s and 1980s. This may be attributable to the clarity developing in the field.

2. The 1991- date cases also appear to be reflective of certain foundational doctrines of federal Indian law, namely that tribal sovereign authority is inherent and continues unless expressly withdrawn, that the federal-tribal relationship is based on the trust responsibility, and that the rules of construction applicable to Indian enactments are essential to their proper interpretation.

II. The Decisions Since 1991, and Their Significance in Light of Prior Predictions

A. Tribal rights of self-government, tribal civil and criminal jurisdiction over members, and the tribal immunity from state taxation. Claiborne predicted that the Court would continue to recognize tribal rights of self-government and tribal authority over members in civil, criminal, and civil regulatory matters, and that the Court would reject state attempts to interfere with such authority. In this regard, he saw the tax immunities of Indians and Indian property on-reservation, and then-existing exemptions for trust lands outside reservation boundaries, as secure.

Chambers reported that this trend was confirmed and continued in the 1980s. It has continued since then as well. The issues in these cases have principally arisen from state efforts to collect taxes, rather than from an issue of self-government, reflecting the continuing battle between tribes and states.

1. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991): In a unanimous decision written by Chief Justice Rehnquist (Justice Stevens concurring), the Court reaffirmed the doctrine of tribal sovereign immunity, and rejected the State Tax Commission's claim that it could, by counterclaiming in an action brought by the Tribe for injunctive relief, sue to collect taxes on tribal cigarette sales to non-Indians. In so holding, the Court rejected the State's argument that tribal sovereign immunity should be limited to tribal courts and internal affairs, and should not insulate tribal business ventures from State authority to administer State laws. This is an important affirmance of tribal sovereign immunity. The Court also rejected the State's attempt to distinguish trust land — on which the cigarette sales occurred — from reservation lands. Both are Indian country, the Court held, and tribal trust land qualifies as a reservation for purposes of tribal immunity.

At the same time, the Court stated that, under *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Colville Tribes*,

447 U.S. 134 (1980), the State has the authority to tax sales of cigarettes to nonmembers by the Tribe. These decisions apply, the Court held, without regard to whether the State has asserted jurisdiction under Public Law 280. The Court also identified, in dicta, other means by which the State could seek to collect taxes on nonmember sales.

2. *County of Yakima v. Yakima Nation*, 502 U.S. 251 (1992): In an opinion written by Justice Scalia and joined by seven members of the Court, the Court ruled that state and local governments have been authorized by the General Allotment Act (as amended) to impose real property taxes on fee lands alienated under the Act and owned by Indians within reservations. But the Court also held that states cannot impose excise taxes on the sales proceeds received by Indians who sell fee lands. Justice Blackmun, concurring in part and dissenting in part, would have held both taxes to be barred.

Although the Court sustained the real property taxes, the majority opinion reaffirmed the longstanding rule that states *cannot* tax trust lands or Indian activities within reservations — unless Congress has clearly and specifically authorized the tax, and the rule that ambiguous statutes should be construed in favor of exempting Indians from state taxes. While concluding that in the General Allotment Act (as amended) Congress clearly authorized taxation of land alienated under the Act and owned by Indians in fee, the Court read the statute narrowly — as limited to taxes on land itself. For this reason, it held that taxes on the proceeds of land sold by Indians could not be taxed.

3. *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993): In a unanimous decision written by Justice O'Connor, the Court reaffirmed that tribal tax immunities extend to trust lands on the same basis as they do to reservation lands, and that tribal members residing and earning income on such lands are immune from state income taxation under *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1971). The Court further held that the State's vehicle excise and registration fees were preempted as to tribal members living on trust lands, finding that these taxes — like those involved in *Moe* and *Colville* — were essentially personal property taxes. As to tribal members residing off trust lands but earning income on such lands, the Court indicated that *McClanahan* did not apply. The Court noted, but did not reach the question of whether the right of self-government could preempt the State's ability to tax income earned from work for the Tribe by employees not residing in Indian country.

4. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995): Justice Ginsburg wrote the opinion for the Court, holding that the legal incidence of Oklahoma's motor fuels tax is on the retailer, and that accordingly, a tribal motor fuel retailer operating on trust lands is immune from the tax. The Court also held that tribal members working for the Tribe but living outside the Tribe's jurisdiction are subject to the State's income tax, but did not decide whether the application of these taxes might be invalidated under the self-governance test. The Court also rejected the Tribe's treaty-

based claim that all tribal members working for the Tribe were immune from State tax, whether or not they resided within tribal jurisdiction. Justice Breyer, joined by Justices Stevens, O'Connor and Souter, dissented from the latter holding.

B. *Tribal and State Civil Jurisdiction Over Non-Indians.* Claiborne had predicted that this would be the major unsettled issue to be resolved in the 1980s. As Chambers reported in 1991, there was considerable law development in this area in the 1980s, with results that were somewhat less favorable than Claiborne's expectations, the principal difference being that the balancing test set forth in the decisions of the 80s, such as *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), did not provide a certain basis to decide whether states can tax or regulate non-Indians engaged in commercial or other transactions with Indians on trust land. Claiborne doubted that Indian tribes would be permitted to tax or regulate non-Indians on fee land. Since Chambers' report in 1991, there has been little further development of the law in these areas, the decided cases being *Bourland* and *Attea.* [See the decision in *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997), concerning tribal court jurisdiction over a case involving only non-Indians arising from an auto accident on a federally granted right of way which the Court, after reviewing the granting instrument, treated as non-Indian-owned fee land.]

1. *South Dakota v. Bourland*, 508 U.S. 679 (1993). Justice Thomas writing for the Court in a 7-2 decision, held that the alienation of the Tribe's lands by the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude nonmembers from lands taken by these Acts and its power to exercise regulatory jurisdiction over non-Indians on these lands. The Court also rejected the argument that inherent sovereign authority authorized tribal regulation, relying on *Montana v. United States*, 450 U.S. 544 (1981).

Justices Blackmun and Souter dissented, applying the test in *United States v. Dion*, 476 U.S. 734 (1986), finding no abrogation of the Tribe's right to regulate non-Indian hunting and fishing in the taken area, and concluding that the Tribe's inherent sovereign authority was also available to ground the existence of tribal regulatory authority.

2. *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). Justice Stevens writing for a unanimous Court, upheld New York's cigarette regulations, which require the precollection of state taxes on cigarettes to be sold to non-Indians by making the wholesaler responsible for the precollection and payment of the tax. Notably, the Court did not seek to determine the effect of the regulations on Indian retailers or consumers, but focused on the question of whether the Indian Trader Statutes preempted the regulations. The Court used the preemption test to resolve the issue, holding that the regulations were reasonably necessary to collect lawful state taxes and did not impose excessive burdens on Indian traders.

C. *The Interpretation of Federal Enactments in Indian Affairs and State Immunities.* With regard to the federal role in Indian affairs, Claiborne predicted that Congress' power in Indian affairs would not be held to be as "plenary" as had once been believed, pointing to the Court's decision in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), which rejected the view that enactments in Indian affairs are not subject to judicial review. He also thought that the Court would look more closely at federal legislation that was blatantly discriminatory, or that adversely affected Indian property without a rational basis in the trust responsibility. Finally, he predicted that the Court would be more likely to hear judicial challenges to federal actions exercising supervisory control over Indian property or tribal affairs. The question of state immunities was not within the scope of Claiborne's or Chambers' analysis.

Claiborne's prediction concerning the expansion of judicial review of federal enactments in Indian affairs is amply borne out by these cases, which include *Noatak* and *Seminole.* In addition, the Court invalidated the tribal escheat provisions of the amended Indian Land Consolidation Act in the *Youpee* case. The other cases included in this section are difficult to categorize, but taken together may suggest that the Court is less protective of Indian interests than in the past. *Negonsett* upholds the exercise of state criminal jurisdiction over Indian country pursuant to Congressional delegation, suggesting that exclusive federal criminal jurisdiction over Indians in Indian country is seen by the Court as less important now than at the time of *United States v. Kagama*, 118 U.S. 375 (1886). *Lincoln* holds that IHS' termination of the Indian Children's Program is not subject to the requirements of the Administrative Procedures Act, distinguishing *Morton v. Ruiz*, 415 U.S. 199 (1974). *Hagen* finds the Unitah Valley Reservation to have been diminished, in contrast to the result in *Solem v. Bartlett*, 465 U.S. 463 (1984). However, none of these cases shows any major shifts in doctrine, nor do they overrule any prior decisions favorable to Indian interests.

The only other decision, *Department of the Interior v. South Dakota*, 117 S.Ct. 286 (1996), vacates the Eighth Circuit's decision holding that the statute authorizing the Secretary to take lands into trust for tribes and individual Indians is an unconstitutional delegation of legislative power. The Court set the ruling aside and sent the case back to the Secretary to be decided in accordance with Interior's new trust land regulations without ruling on the merits of the case.

1. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). This was a 6-3 decision. Justice Scalia wrote the majority opinion; Justice Blackmun, joined by Justices Marshall and Stevens dissented. The Court held that the State is immune from a suit for damages brought by an Indian tribe. The opinion holds first that sovereign immunity applies to suits brought by sovereigns as well as those brought by individuals, and then rejects the claim that the states consented to suits by tribes in the "plan of convention" for the

United States Constitution. The latter holding emphasized that while the states' consent to suit by sister states was mutual, tribes had not waived their immunity in favor of the states, and thus mutuality was lacking. The Court went on to hold that 28 U.S.C. Section 1362 does not waive state immunity, rejecting the claim that *Moe* compelled a different result, dismissing the theory that Section 1362 delegated the United States' exemption from state immunity to the tribes, and finding that Section 1362 itself was not specific enough to constitute a waiver.

In dissent, Justice Blackmun, would have found Section 1362 to be a valid waiver of state immunity.

2. *Negonsott v. Samuels*, 507 U.S. 99 (1993). This was a unanimous decision, written by Chief Justice Rehnquist. The question was whether 18 U.S.C. § 3243 (the Kansas Act) conferred jurisdiction on Kansas to prosecute an Indian for a state-law offense that was chargeable under the Indian Major Crimes Act, 18 U.S.C. 1153. The Court held that the language of the statute resolved the question, finding that it provided an unqualified grant of jurisdiction to the State to define and enforce such criminal laws as it may enact. The federal government, the Court stated, retained exclusive jurisdiction to try individuals under the Indian Major Crimes Act, but this did not effect the State's power to define and enforce its own criminal laws. The Court also found its holding to be supported by the legislative history of the Kansas Act, in a discussion in which Justices Thomas and Scalia did not join. The Court also rejected the petitioner's reliance on the canons of construction, finding the statute to be unambiguous.

3. *Lincoln v. Vigil*, 508 U.S. 182 (1993). Justice Souter wrote the opinion for a unanimous Court, holding that the Indian Health Services decision to terminate the Indian Childrens' Program was not reviewable under the Administrative Procedures Act because it involved the allocation of funds from a lump sum appropriation, which the Court held was a decision committed to agency discretion by law, making APA review unavailable. The Court rejected the assertion that the trust responsibility compelled a different result, stating that whatever its contours, it did not limit IHS' discretion to reorder its priorities from serving Indians in the southwest to serving all Indians nationwide, as the Court found it had done. Finally, the Court rejected the claim that the notice-and-comment rulemaking provisions of the APA applied to the IHS' decision, finding that it was a "general statement of policy" exempt from such requirements. The Court distinguished *Morton v. Ruiz*, 415 U.S. 199 (1974) on the ground that it involved a challenge to a provision in a BIA manual that restricted eligibility for Indian assistance, which the BIA's own regulations required it to publish in the Federal Register, and read *Ruiz*'s discussion of the trust responsibility to be based on these circumstances.

4. *Hagen v. Utah*, 510 U.S. 399 (1994). Justice O'Connor wrote the majority opinion, joined by six members of the Court, holding that the Uintah

Valley Reservation had been diminished by a 1902 Act. In so holding, the Court rejected the Solicitor General's proffered "clear-statement rule" which would have required both explicit language of cession or surrender of tribal interests and an unconditional commitment from Congress to compensate the Indians before diminishment could be found. Instead, the Court adhered to its traditional approach of examining all circumstances surrounding the opening of a reservation.

5. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996). The Court held that states and state officials are immune, under the Eleventh Amendment to the Constitution, from suits brought by Indian tribes to enforce the compact negotiation requirement of the Indian Gaming Regulatory Act. The Court was deeply divided. Chief Justice Rehnquist wrote the majority opinion, which was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice Stevens filed a dissenting opinion. A separate dissenting opinion was filed by Justice Souter, joined by Justices Ginsburg and Breyer. Thus, the case was decided by a vote of 5 to 4.

The tribes advanced two principal arguments in support of their position that states were subject to suit to enforce the compact negotiation provisions of IGRA. First, the tribes argued that by IGRA Congress expressly authorized Indian tribes to sue states and that Congress has the power under the Constitution to do so. Second, the tribes argued that the *Ex parte Young* doctrine permits tribes to bring federal suits against state officials to compel them to comply with federal law — such as IGRA's compact negotiation requirements.

Chief Justice Rehnquist and the other four Justices who rendered the majority opinion in *Seminole* rejected both arguments. As to the tribes' first argument, the majority agreed that in IGRA, Congress clearly intended to subject a state to suit by a tribe to compel good faith negotiations. But the majority concluded that Congress lacks the power, under the Constitution, to subject states to such lawsuits. In reaching this conclusion, the majority overruled the 1989 decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had upheld Congress' power to subject states to suit when acting under the Interstate Commerce Clause. The majority recognized that if *Union Gas* had remained the law, Congressional authority to subject states to suit under the Indian Commerce Clause would also exist. But the Court reexamined the *Union Gas* case, criticized its reasoning, and then overruled it. The Court found that even though the regulation of Indian commerce is "under the exclusive control of the Federal Government," nevertheless state Eleventh Amendment immunity may not be abrogated by Congress, even when acting in the realm of Indian affairs.

The majority also rejected the tribes' argument that a suit to enforce IGRA's compact negotiation provisions could be brought against state officials under *Ex parte Young*. The majority opinion held that since the language of

IGRA specifically provides for detailed remedies directed against the "state," *Ex parte Young* does not provide an additional remedy.

The majority did not address the potential availability of other remedies - such as seeking direct relief from the Secretary of Interior - for tribes which face states which fail to negotiate in good faith.

6. *Department of the Interior v. South Dakota*, 117 S.Ct. 286 (1996). In this case, more generally known as the *Oacoma* decision, the Court of Appeals for the Eighth Circuit had held the principal statute authorizing the Secretary of Interior to take lands into trust for tribes and individual Indians — section 5 of the Indian Reorganization Act, 25 U.S.C. § 65 — to be an unconstitutional delegation of legislative power. The Supreme Court set aside this ruling without addressing the merits of the case and sent the case back to the Secretary to be decided in accordance with the new trust land regulations issued by the Interior Department while the *Oacoma* case was pending.

Justice Scalia, joined by Justices O'Connor and Thomas, dissented from the Court's ruling. Their five page dissent criticized the Government for changing its position during the case on the issue of whether a Secretarial decision on a trust land petition is subject to judicial review. The dissent also contended that the issuance of new trust land regulations by the Secretary was not a sufficient ground for sending the case back to the Secretary – and that the Court's action provided the Secretary with an unwarranted second opportunity to sustain his action. In the view of the dissenting Justices, since section 5 was declared unconstitutional by the Eighth Circuit, the Supreme Court should have agreed to hear the case on the merits. That view, however, commanded only three votes.

7. *Babbit v. Youpee*, 117 S.Ct. 727 (1997). In an opinion written by Justice Ginsburg, and joined by seven members of the Court, the tribal "escheat" provision of the amended Indian Land Consolidation Act, which was designed to deal with fractionated allotments, was struck down. Under this provision, shares of 2% or less in an allotment that produce less than $100 per year escheat to the tribe upon the allottee's death. Its purpose was to avoid perpetuating divided heirship and to help consolidate reservation lands. But no compensation was provided to the allottee for land that escheated to the tribe.

In 1987, the Court held in *Hodel v. Irving*, 481 U.S. 704 (1987) that the Act's original escheat provision, which was enacted in 1983, was an unconstitutional taking of the allottee's land without just compensation. In 1984 — after *Irving* was brought, but before it was decided — Congress amended the Act. The Court's decision in *Irving* did not address the escheat provision as amended. The Court held in *Babbitt v. Youpee* that the amendments were not sufficient to make the Act constitutional. Justice Stevens dissented, as he had in *Irving*, and would have upheld the Act.

The original 1983 Act provided that no fractional interest in any tract of trust or restricted land within a tribe's reservation could be transferred by will or intestate if the share was 2% or less and the tract had not produced $100 or more during the last year. Instead, the Act provided that land escheated to the tribe. That is the provision that the Supreme Court struck down in *Irving*.

The Act was amended in 1984 to change the language about the $100 ceiling to require that the land be *incapable* of producing $100 in any one of the *five* years *after* the decedent's death. Furthermore, instead of a total ban on the property passing by will or intestate, the amended Act allowed a person to leave the share by will to anyone who already had a share in the property, but not to anyone else. Finally, the amended Act allowed tribes to enact their own codes, which can override the provisions of the Act, if approved by the Secretary.

The Court in *Youpee* held that even with these changes, an allottee's property is still taken from the allottee without payment of just compensation. Although the amendment allowed the property to be left to others by will, only a limited class of people can receive the property. The Court pointed out that this class will usually exclude the allottee's own children. The Court also held that the Act was not saved by the provision allowing tribes to enact their own codes, particularly because no tribe has done so.

III. Looking Ahead

A. As Claiborne and Chambers had predicted, the law with regard to tribal powers of self-government over members, and Indian freedom from state regulation and taxation on trust land, absent Congress having directed otherwise, has remained secure. This is shown by the Court's decisions upholding these immunities and recognizing their application to trust, as well as reservation, lands.

The result is different with respect to the taxability of fee lands allotted under the General Allotment Act (as amended), but the *County of Yakima* decision did not upset the settled principles on which Indian tax immunities rest — as the later decided *Sac and Fox* and *Chickasaw Nation* cases show. The reaffirmation of tribal sovereign immunity in *Potawatomi* is also important, particularly the Court's unanimous rejection of the State's attempt to narrow the doctrine to apply only to tribal courts and internal affairs. This area of the law appears well-settled.

B. The law on tribal jurisdiction over non-Indians is fairly well-settled, particularly with regard to tax and regulatory jurisdiction.

1. The law is clear that tribes may tax and regulate non-Indians on trust land. In some instances, tribal regulatory power over non-Indians on fee lands may be held to have been divested by statute, *see, e.g. Bourland*, but even in these instances the decision in *Montana v. United States*, 450 U.S. 544 (1981) sets forth two potential sources of tribal jurisdiction, as *Bourland* recognizes. This is in accord with Chambers' 1991 prediction.

The existence of jurisdiction under the *Montana* exceptions is fact dependent, and thus tribal success in this area will be as well. This makes the identification of relevant interests and supporting facts, and their presentation extraordinarily important, particularly in cases involving *Montana*'s second exception, under which a threatened or direct effect on political integrity, economic security, or the health or welfare of the tribe must be shown. The exhaustion requirement, which is generally applicable to these cases, means that the factual record in such cases will ordinarily be developed in the tribal court. This increases the responsibility of the tribal courts and underscores the growing importance of the tribal court bar to the future of Indian law.

To succeed in this area, tribal advocates must present a solid factual basis in support of the need for tribal regulation under the *Montana* standard. This is obviously vitally important to success in the trial court, in which the factual record is made. It is also essential to tribal advocates' ability to present a compelling case for tribal regulation on appeal. In marshaling the facts in the trial court and presenting them on appeal, tribal advocates must be aware that when tribal regulation changes the status quo, greater pressure is necessarily placed on the tribal position — and thus on tribal advocates — to show that the change is necessary to protect tribal interests, and that the tribal law enacted to meet this need fairly does so.

When appropriate, the tribe's showing under the *Montana* test should also look to identify threats to tribal interests that may develop in the future if tribal regulation is not sustained. This is an area that has been largely ignored in litigation to date. When such a theory is advanced, it is essential that it be supported by a factual basis that shows the threat to be real, and thus far removed from the speculative.

It should also be noted that, as a result of the increased focus on facts in such cases, there is a greater need for trial advocacy skills in the Indian law bar. Related to this point, the need for expert assistance in such cases has also grown as tribes seek to present a detailed, complete presentation of their affected interests in such cases.

In sum, the importance of a well presented and detailed showing of the existing or threatened impact on tribal interests is vitally important in these cases.[1]

2. With regard to the preemption of state jurisdiction over non-Indians on trust lands, the balancing test, used in *Attea*, is likely to remain in place, despite the limited predictive value that its precedents provide to tribes.

The balancing test is also a fact sensitive inquiry, and thus the identification of relevant interests and supporting facts, and their effective

1. In addition, to the extent possible, the areas of relevant inquiry should, of course, first be identified and examined through the tribal legislative process first, as this will enable the tribal regulatory enactment to better articulate the affected tribal interests and thus to better insure their protection.

presentation is of special importance to tribal success in these cases for the same reasons as it is with regard to cases litigated under the *Montana* test. In these cases, the practical problems — both immediate and long term — resulting from state jurisdiction competing with that of the tribe are vitally important to the full development and presentation of the tribal position in these cases. And, again, the growing importance of trial advocacy skills to success in this area must also be recognized.

3. The decision in *A-1 Contractors* will address tribal civil adjudicatory jurisdiction in the context of an action brought by a non-Indian against a non-Indian. With regard to this issue, settled law recognizes the existence of tribal civil adjudicatory jurisdiction over actions brought by non-Indians against Indians that arise on trust lands, *Williams v. Lee*, 358 U.S. 217 (1959), thus narrowing the issue.

C. Claiborne's prediction concerning the Court's willingness to review federal enactments in Indian affairs is borne out by a number of recent cases, although the results have been mixed. Overall, it is difficult to predict the fate of this trend, although the Court's interest in such cases suggests its continuation.

1. *Youpee*, and, prior to that, *Irving*, continue the progression begun by *Morton v. Mancari*, 417 U.S. 535 (1974), and then *Weeks* and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) towards establishing the Constitutional boundaries of federal power in Indian affairs. It is now clear beyond question that such boundaries exist and are judicially enforceable. Continued success in judicially defining these boundaries will depend on effective case selection.

2. With regard to the states, their Eleventh amendment immunity from federal statutes enacted pursuant to the Indian and Interstate Commerce Clauses has been upheld, although the impact of *Seminole* is likely to be less than was first suggested, since *Ex parte Young* will remain available in the absence of specific alternative remedies provided by Congress. Thus, cases seeking injunctive relief to enforce treaties and other federal rights of Indian tribes will generally remain unaffected.[2] Other cases concerning review of federal enactments, such as *Negonsott* and *Hagen*, while unfavorable to Indians, will have only a limited impact. The same is true of *Lincoln*.

D. Although nearly three years remain, the Court will almost certainly hear fewer cases in the 1990s than in the two preceding decades. This confirms

2. Some further light may be shed on *Ex parte Young* in the limited context of a tribal suit against state officials to establish both the tribe's title to and sovereign authority over the bed and banks of a navigable river -- this issue is presented by *Idaho v. Coeur D'Alene Tribe* now pending before the Supreme Court. The Ninth Circuit held that *Ex parte Young* was not available to overcome the State's Eleventh Amendment immunity from a suit to quiet title to property claimed by the State. The Ninth Circuit, however, did conclude that *Ex parte Young* permitted the tribe to sue state officials for a determination of the tribe's sovereign authority over the bed and banks of the river.

Chambers' prediction. It is also true that developments in Indian law are increasingly occurring in Congress. However, the result of recent proposals in Congress has been to put tribes on the defensive, although unfavorable enactments with regard to Indian gaming and trust lands have thus far been held off.

1. Claiborne had remarked that the low visibility of Indian cases in the Supreme Court had worked to the tribes' advantage. He commented that the Court's decisions in Indian cases had not received much national press attention, and that as a result the Court was able to consider these cases free from the pressures of public and press attitudes. For the same reason, Claiborne did not see a real risk of the Court's decisions being overturned by Congress.

These conditions may no longer exist, as *Seminole* and recent activity in Congress suggests, and as a result of the press focus on Indian gaming. As a result, it is even more important for Indian tribes to get their message out publicly. In so doing, tribes must show that the Self-Determination policy is working, and that its benefits accrue to Indians and non-Indians alike. Equally important is that Indian tribes show how much more remains to be done — 200 years of federal neglect must be overcome — and that the tribes demonstrate that the Self-Determination policy and the sovereign rights of Indian tribes are both critical components to the tribes' ability to succeed in these endeavors.

The importance of this effort to tribal success in litigation, though difficult to quantify or estimate with any precision, is clear. Stated simply, for Indian rights to continue to be advanced successfully in litigation, Indian tribes must show that the decisions to date have produced positive results, which provide both a reason to continue to follow established precedent, and a solid foundation for the expectation that continued support for Indian rights will continue to produce positive results for Indian tribes, results that benefit all persons — Indian and non-Indian — over whom tribal authority, and thus responsibility, extends.