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Opinion No. 07-21

State of Tennessee's Authority to Recognize Indian Tribes

QUESTION

Does the State of Tennessee have authority to recognize Indian tribes, or is that authority solely held by the federal government?

OPINION

The State of Tennessee has authority to recognize Indian tribes.

ANALYSIS

In 2003, the Legislature reestablished the Tennessee Commission of Indian Affairs (Commission). As part of its powers and duties, the Commission must "[e]stablish appropriate procedures to provide for legal recognition by the state of presently unrecognized tribes, nations, groups, communities or individuals, and to provide for official state recognition by the commission of such." Tenn. Code Ann. § 4-34-103(6) (2003). In 2006, the Commission initiated rulemaking to establish Tennessee's recognition criteria and procedure.

The United States Constitution grants Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This provision encompasses what is commonly known as the "Indian Commerce Clause." While the United States Supreme Court has described Congress' power under the Indian Commerce Clause as "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200, 202, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004); *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-1, 99 S.Ct. 740, 58 L.Ed.2d 740 (1978), the Court has also said that the States retain some limited authority over Indian commerce and Indian tribes. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62, 116 S.Ct. 1114, 134 L.Ed. 252 (1996). As the Court explained in *Seminole Tribe of Florida*:

> [O]ur inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. The answer to that question is obvious. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear

> enough from the fact that the States still exercise some authority over interstate trade but *have been divested of virtually all authority* over Indian commerce and Indian tribes.

Id. at 62 (emphasis added). The federal government's authority over Indian tribes is undeniably broad but it is not absolute or all-encompassing. The federal government has not divested states of their power to recognize Indian tribes.

Congress has acknowledged that state governments have the authority to recognize Indian tribes. Congress created a cause of action for the misrepresentation of goods as Indian produced and defined "Indian tribes" to include "any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority" 25 U.S.C.A. § 305e(d) (2000). Tennessee's General Assembly provided the Commission with the authority to recognize tribes under Tenn. Code Ann. § 4-34-103(6). A tribe recognized by the State of Tennessee would be able to bring a lawsuit against a person for offering a good in a manner that falsely suggests it is Indian produced pursuant to 25 U.S.C.A. §305e (2000).

Federal regulations make benefits available to state-recognized tribes. For example, the Department of Health and Human Services provides direct funding for Community Services Block Grants for "organized groups of Indians that the State in which they reside has determined are Indian tribes. An organized group of Indians is eligible for direct funding based on State recognition if the State has expressly determined that the group is an Indian tribe." 45 C.F.R. § 96.44(b) (2006); *see also* 45 C.F.R. § 96.48(c) (2006) (Community Services Block Grants for low-income home energy assistance includes state-recognized tribes as eligible participants). The Department of Health and Human Services also administers the Native American Programs that promote economic and social self-sufficiency for Native Americans and defines an "American Indian or Indian" as " any individual who is a member or a descendant of a member of a North American tribe, band, Pueblo or other organized group of native people who are indigenous to the Continental United States, or who otherwise have a special relationship with the United States or a State through treaty, agreement, or some other form of recognition." 45 C.F.R. § 1336.10 (2006).

States have the authority to recognize Indian tribes as long as there is no conflict with federal laws. There is no conflict between Tennessee's recognition law and federal laws. Currently, Tennessee laws do not provide any direct benefits to Indian tribes that are recognized by the State pursuant to Tenn. Code Ann. § 4-34-103(6). They do provide benefits to Indian individuals by making them eligible to receive scholarships, grants, or any other benefits afforded to minorities from the University of Tennessee system, the board of regents system, or any Tennessee school system. Tenn. Code Ann. § 4-34-201 (1994). The statute defines "Native American" as "an individual recognized as Native American by a federally recognized tribe or a state." *Id.* As discussed, *supra*, federal programs do provide benefits to Indian tribes recognized by states.

The federal government does not have the sole right to recognize Indian tribes. Congress has acknowledged that states have the power to recognize Indian tribes by extending benefits and

rights to state-recognized tribes. The State of Tennessee has the authority to recognize Indian tribes, so as long as there is no conflict with federal laws.

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