

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued May 6, 2008

Decided July 29, 2008

No. 07-5024

MARILYN VANN, ET AL.,  
APPELLEES

v.

DIRK KEMPTHORNE, SECRETARY OF THE UNITED STATES  
DEPARTMENT OF THE INTERIOR, ET AL.,  
APPELLEES

CHEROKEE NATION,  
APPELLANT

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Appeal from the United States District Court  
for the District of Columbia  
(No. 03cv01711)

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*Garret G. Rasmussen* argued the cause for appellant. With him on the briefs were *Raymond G. Mullady Jr.*, *Lanny J. Davis*, and *Adam W. Goldberg*. *Christopher M. O'Connell* entered an appearance.

*Jonathan Velie* argued the cause for appellees. With him on the brief were *Jack McKay*, *Alvin B. Dunn*, *Thomas G. Allen*, and *Ellen C. Cohen*.

Before: TATEL, GARLAND, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: The issue on appeal is the extent to which sovereign immunity protects a federally recognized Indian tribe and its officers against suit. For the reasons that follow, we hold that the suit may proceed against the tribe's officers but not against the tribe itself.

## I.

The Cherokee Nation shares with the United States a common stain on its history: the Cherokees owned African slaves. At the end of the Civil War, during which the tribe sided with the Confederacy, the Cherokee Nation and the United States entered into a treaty reestablishing relations. *See* Treaty with the Cherokee, July 19, 1866, 14 Stat. 799 (“1866 Treaty”). In the treaty, the Cherokee Nation renounced slavery and involuntary servitude, and promised to extend “all the rights of native Cherokees” to the former Cherokee slaves, who came to be known as “Freedmen.” 1866 Treaty, art. IX.

In 1896, Congress directed the Dawes Commission to create membership rolls for the so-called Five Civilized Tribes of Oklahoma, which included the Cherokee Nation. *See* Act of June 10, 1896, ch. 398, 29 Stat. 321, 339. The rolls for the Cherokees were completed in 1907 and resulted in two lists: a “Blood Roll” for native Cherokees, and a “Freedmen Roll” for former slaves and their descendants. These lists serve an important function because the tribal constitution of 1976 provides that citizenship in the Cherokee Nation must be proven by reference to the Dawes Commission Rolls. The citizens of the Cherokee Nation choose their tribal leaders by popular election according to procedures approved by the

Secretary of the U.S. Department of the Interior (“Secretary”). *See* Principal Chiefs Act of 1970, Pub. L. 91-495; *see also* Letter from Neal A. McCaleb, Assistant Sec’y of Indian Affairs, U.S. Dep’t of Interior, to Chadwick Smith, Principal Chief, Cherokee Nation (Mar. 15, 2002) (reaffirming continuing validity of the Principal Chiefs Act), J.A. 150–51; Letter from Neal A. McCaleb, Assistant Sec’y of Indian Affairs, U.S. Dep’t of Interior, to Chadwick Smith, Principal Chief, Cherokee Nation (Apr. 23, 2002) (disavowing letter of March 15, 2002, but reaffirming continuing validity of the Principal Chiefs Act), J.A. 153–54.

Marilyn Vann and other descendants of persons listed on the Freedmen Roll (collectively, “the Freedmen”) allege they were not permitted to vote in two tribal elections because they lack an ancestral link to the Blood Roll. In the May 24, 2003 election, voters reelected Chief Chadwick Smith, chose other tribal officers, and amended the tribal constitution to eliminate a provision requiring the Secretary’s approval of amendments. The July 26, 2003 election saw further constitutional amendments and a run-off for tribal officers. The Freedmen, protesting their alleged disenfranchisement, asked the Secretary to invalidate the May 24 election. The Secretary pressed the Cherokee Nation to address the Freedmen’s concerns and submit its election procedures for federal review. *See, e.g.*, Letter from Jeanette Hanna, Regional Director, U.S. Dep’t of Interior, to Chadwick Smith, Principal Chief, Cherokee Nation (July 25, 2003) (“The [Principal Chiefs Act] provides . . . that the procedures for selecting the Principal Chief of the Cherokee Nation are subject to approval by the Secretary of the Interior. We are aware of no evidence that the Secretary has approved the current procedures for the election of the Principal Chief.”), J.A. 194. Except for writing a few letters, the Cherokee Nation appears to have done little in response. The Secretary

nevertheless recognized Chief Smith's election on August 6, 2003, referring any election disputes to the tribal courts. *See* Letter from Jeanette Hanna, Regional Director, U.S. Dep't of Interior, to Chadwick Smith, Principal Chief, Cherokee Nation (Aug. 6, 2003) (stating that "it is inappropriate and premature for the Department to question the validity of the election of Tribal officials"), J.A. 199–200. The Secretary held the May 24 constitutional amendment under review until Chief Smith eventually withdrew the tribe's request for approval of that amendment in June 2006.

The Freedmen sued the Secretary under the Administrative Procedure Act in the United States District Court for the District of Columbia, alleging that their exclusion from the tribal elections, along with the Secretary's recognition of those elections, violated the Thirteenth Amendment, the Fifteenth Amendment, the Cherokee constitution, the 1866 Treaty, the Principal Chiefs Act, and the Indian Civil Rights Act. The Freedmen sought a declaratory judgment that the Secretary had behaved arbitrarily and capriciously. 5 U.S.C. § 706(2)(A). The Freedmen also sought to enjoin the Secretary from recognizing the results of the 2003 elections, or of any future elections from which the Freedmen would be excluded.

The district court granted the Cherokee Nation leave to intervene for the limited purpose of challenging the suit under Federal Rule of Civil Procedure 19. The Cherokee Nation then moved to dismiss on the grounds that although it was a necessary and indispensable party, sovereign immunity barred its joinder.<sup>1</sup> *See* FED. R. CIV. P. 19(b) ("If a person who is

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<sup>1</sup> The words "necessary" and "indispensable" have become obsolete in the Rule 19 context as a result of stylistic changes to the Rule that have occurred since the proceedings in the district court. *See*

required to be joined if feasible [as defined in subparagraph (a)] cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.”). The Freedmen responded with a motion for leave to file an amended complaint naming as defendants the Cherokee Nation, Chief Smith, and other tribal officers, all of whom were alleged to have violated the Thirteenth Amendment and the 1866 Treaty. After determining that the tribe was a necessary party under Rule 19(a), the district court concluded that the tribe and its officers could be joined because the tribe did not enjoy sovereign immunity against the Freedmen’s suit. Accordingly, the district court denied the motion to dismiss and granted the motion for leave to file.

The Cherokee Nation appeals the denial of its motion to dismiss on sovereign immunity grounds. Under 28 U.S.C. § 1291 and the collateral order doctrine, we may hear an interlocutory appeal from the denial of such a motion. *See Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004) (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993), and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) (“A district court’s determination that a tribe’s sovereign immunity has been waived by the tribe or abrogated by Congress falls within the ambit of the collateral order doctrine . . .”). We review de novo the district court’s conclusion that the Cherokee Nation and its officers do not enjoy tribal sovereign immunity. *See Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1497–98 (D.C. Cir. 1997).

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*Republic of Philippines v. Pimentel*, No. 06-1204, slip op. at 2 (U.S. June 12, 2008) (noting the replacement in Rule 19 of “necessary” with “required,” and the deletion of “indispensable”).

## II.

Indian tribes did not relinquish their status as sovereigns with the creation and expansion of the republic on the North American continent. The courts of the United States have long recognized that the tribes once were, and remain still, independent political societies. *E.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556–57 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17 (1831). “Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘inherent powers of a limited sovereignty which has never been extinguished.’ ” FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a], at 206 (Nell Jessup Newton ed., 2005) [hereinafter, COHEN’S HANDBOOK] (quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978)). That said, Congress may whittle away tribal sovereignty as it sees fit. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (noting that “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess”); *Wheeler*, 435 U.S. at 322 (noting that tribes are “subject to ultimate federal control”); *Fisher v. District Court*, 424 U.S. 382, 390 (1976) (referring to tribes’ “quasi-sovereign status”); *United States v. Kagama*, 118 U.S. 375, 381 (1886) (referring to tribes as “semi-independent”); *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (referring to tribes as “domestic dependent nations” whose “relation to the United States resembles that of a ward to his guardian”).

As sovereigns, Indian tribes enjoy immunity against suits. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okl. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*,

498 U.S. 505, 509 (1991); *Santa Clara Pueblo*, 436 U.S. at 58–59; *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 172 (1977); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940); *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 771 (D.C. Cir. 1986). This immunity flows from a tribe’s sovereign status in much the same way as it does for the States<sup>2</sup> and for the federal government. *See Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (noting the “presupposition . . . that ‘[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent’ ”) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST No. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961))). Congress’s power to limit the scope of a tribe’s sovereignty extends to tribal sovereign immunity. “This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.” *Santa Clara Pueblo*, 436 U.S. at 58; *see also Okla. Tax Comm’n*, 498 U.S. at 510 (“Congress has always been at liberty to dispense with such tribal immunity or to limit it.”). But abrogation of tribal sovereign immunity requires an explicit and unequivocal statement to that effect. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (“To abrogate tribal immunity, Congress must ‘unequivocally’ express that purpose.”) (quoting *Santa Clara Pueblo*, 436 U.S. at 58); *Cherokee Nation*, 117 F.3d at 1498 (“Any waiver of a tribe’s sovereign immunity, whether by Congress or by the tribe itself, ‘cannot be implied but must be unequivocally expressed.’ ”) (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

Has there been an abrogation of tribal sovereign immunity in our case? The district court concluded that

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<sup>2</sup> The States also count the Eleventh Amendment as a source of sovereign immunity. *See* U.S. CONST. amend. XI.

“Congress clearly indicated its intent to abrogate the Cherokee Nation’s immunity with respect to violations of the Thirteenth Amendment as evidenced by the Treaty of 1866.” *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 70 (D.D.C. 2006). The district court reasoned as follows. *See id.* at 66–70. The Thirteenth Amendment, which applies to Indian tribes, eradicates the badges and incidents of slavery. The 1866 Treaty implements similar principles for the Cherokee Nation. *See* 1866 Treaty, art. IX (abolishing slavery and granting Freedmen “all the rights of native Cherokees”); *id.* art. VI (declaring that the Cherokee Nation’s laws “shall be uniform throughout said nation”); *id.* art. XII (acknowledging supremacy of federal law). Later historical developments, including an 1888 statute forcing the Cherokee Nation to share its assets with the Freedmen, further demonstrate Congress’s intent to protect the Freedmen against discrimination. “By repeatedly imposing such limitations on the sovereignty of the Cherokee Nation in order to protect the Freedmen, Congress has unequivocally indicated its intent to abrogate the tribe’s immunity with regard to racial oppression prohibited by the Thirteenth Amendment.” *Vann*, 467 F. Supp. 2d at 69. Denying the Freedmen the right to vote in tribal elections violates the Thirteenth Amendment and the 1866 Treaty, so the Cherokee Nation cannot claim tribal sovereign immunity against a suit complaining of such a badge and incident of slavery.

The district court is mistaken to treat every imposition upon tribal sovereignty as an abrogation of tribal sovereign immunity.<sup>3</sup> Sovereignty and immunity are related, *Alden v.*

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<sup>3</sup> The Freedmen make a similar error in arguing that the “overriding interest” of the United States implicitly abrogates tribal sovereign immunity. Freedmen’s Br. at 9–15 (citing *Wheeler*, 435 U.S. at 323; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–10 (1978); *Washington v. Confederated Tribes of the Colville Indian*

*Maine*, 527 U.S. 706, 715 (1999), the latter being an attribute of the former, *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146. But it is possible to cut back sovereignty in a way that leaves sovereign immunity intact. *Cf. Kiowa Tribe*, 523 U.S. at 755 (“To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them.”). Congress can impose substantive constraints upon a tribe without subjecting the tribe to suit in federal court to enforce those constraints, as the Supreme Court made clear in *Santa Clara Pueblo*. In that case, an individual Indian sued her tribe in federal court, alleging gender discrimination in violation of the equal protection guarantee of the Indian Civil Rights Act (“ICRA”), 25 U.S.C. § 1302. Despite the ICRA’s imposition of substantive constraints upon the tribe, the Supreme Court held the suit barred by tribal sovereign immunity and sent the plaintiff to pursue her claim in tribal court. *See* 436 U.S. at 58–59; *see also Nero v. Cherokee Nation*, 892 F.2d 1457, 1461 (10th Cir. 1989) (noting the *Santa Clara Pueblo* distinction between a substantive constraint and an abrogation of sovereign immunity). Absent explicit and unequivocal language to the contrary, the imposition of substantive constraints upon a tribe’s sovereignty cannot be interpreted as an abrogation of its sovereign immunity.

We must determine for ourselves whether anything in the Thirteenth Amendment or the 1866 Treaty worked an abrogation of the Cherokee Nation’s sovereign immunity.

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*Reservation*, 447 U.S. 134, 153 (1980)). The cases cited speak to implicit limitations on tribal sovereignty and have nothing to do with tribal sovereign immunity, which is not subject to implicit abrogation. *Santa Clara Pueblo*, 436 U.S. at 58.

Again, we will only acknowledge such an abrogation if the text is express and unequivocal. *See Santa Clara Pueblo*, 436 U.S. at 59 (holding the ICRA not to abrogate tribal sovereign immunity because “[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief”); *Fla. Paraplegic, Ass’n v. Miccosukee Tribe*, 166 F.3d 1126, 1131 (11th Cir. 1999) (holding the Americans with Disabilities Act not to abrogate tribal sovereign immunity and declaring, “Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes’ common law immunity or to subject tribes to suit under the act”); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (holding the Copyright Act not to abrogate tribal sovereign immunity, where nothing on the statute’s face could be so construed).<sup>4</sup>

We find no express and unequivocal abrogation of the Cherokee Nation’s sovereign immunity in the texts upon

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<sup>4</sup> For examples of statutes that satisfy the abrogation standard, see COHEN’S HANDBOOK, § 7.05[1][b] (citing, *inter alia*, the Indian Depredation Act, 26 Stat. 851 (1891) (conferring jurisdiction upon Court of Claims to adjudicate “All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for”); the ICRA’s habeas corpus provision, 25 U.S.C. § 1303 (“The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”); and the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii) (“The United States district courts shall have jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . ”)).

which the Freedmen rely. Nothing in § 1 of the Thirteenth Amendment so much as hints at a federal court suit by a private party to enforce the prohibition against badges and incidents of slavery against Indian tribes. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”). Although § 2 of the Thirteenth Amendment gives Congress the power to generate express and unequivocal language abrogating tribal sovereign immunity to allow for such suits, that promise remains unfulfilled absent some further legislative enactment. *Id.* § 2 (“Congress shall have power to enforce this article by appropriate legislation.”). The 1866 Treaty similarly lacks any clear abrogation of tribal sovereign immunity, as the Tenth Circuit correctly concluded in *Nero*, 892 F.2d at 1461. The Freedmen point to articles VI, IX, and XII of the 1866 Treaty, but these say nothing about federal court suits against the Cherokee Nation.

The Freedmen argue that our search for intent to abrogate is misguided because the Thirteenth Amendment and the 1866 Treaty predate the doctrine of tribal sovereign immunity, such that the drafters of those texts could not have foreseen the interpretive rule requiring express and unequivocal abrogation. Freedmen’s Br. at 15–20. This argument misapprehends the nature of tribal sovereign immunity, which is not the product of any enactment but an inherent attribute of a tribe’s sovereignty. Tribal sovereign immunity existed at the Founding, as surely as did tribal sovereignty, and our only concern is whether the Thirteenth Amendment or the 1866 Treaty later abrogated that immunity. The unequivocal-abrogation rule reflects the belief, as true in the nineteenth century as it is today, that lawmakers do not lightly discard



sovereign immunity. We see no reason to depart from the established interpretive rule based on the vintage of the texts.

Because nothing in the Thirteenth Amendment or the 1866 Treaty amounts to an express and unequivocal abrogation of tribal sovereign immunity, the Cherokee Nation cannot be joined in the Freedmen's federal court suit without the tribe's consent. We reverse the district court's determination to the contrary.

### III.

Having found the tribe's sovereign immunity intact, we must now assess whether tribal officers enjoy the same immunity from suit as does the tribe itself. We do not approach this question from scratch, for *Ex parte Young*, 209 U.S. 123 (1908), and related cases have come to apply to questions of tribal sovereign immunity. See *Santa Clara Pueblo*, 436 U.S. at 59 (citing *Ex parte Young*); *Bassett*, 204 F.3d at 358 (citing *Ex parte Young*); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)); cf. Recent Case, 79 HARV. L. REV. 851, 852 (1966) (suggesting extension of *Ex parte Young* to tribal sovereign immunity context).

“The basic doctrine of *Ex parte Young* can be simply stated. A federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land.” 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4232 (3d ed. 2007) [hereinafter WRIGHT & MILLER] (citations omitted). In *Ex parte Young*, a

private party was allowed to pursue an injunction in federal court against Minnesota's attorney general to prohibit his enforcement of a state statute alleged to violate the Fourteenth Amendment. This result rested upon the fiction that the suit went against the officer and not the State, thereby avoiding sovereign immunity's bar. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) (noting the fiction); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962) (same). The officer, so the reasoning goes, cannot take refuge in the State's immunity if he contravenes federal law, and is "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 159–60. The Supreme Court recently confirmed the ease with which this stripping rationale can be applied. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (citation and quotation marks omitted).

Applying the principle of *Ex parte Young* in the matter before us, we think it clear that tribal sovereign immunity does not bar the suit against tribal officers. *Santa Clara Pueblo*, which relied on *Ex parte Young* to hold a tribal officer "not protected by the tribe's immunity from suit," dictates this result. *See* 436 U.S. at 59. The Freedmen allege that the Cherokee Nation's officers are in violation of the Thirteenth Amendment and the 1866 Treaty, and seek an injunction preventing Chief Smith "from holding further elections without a vote of all citizens, including the Freedmen." Pls.' Second Am. Compl. ¶ 74, J.A. 138. Faced with allegations of ongoing constitutional and treaty

