Upstate Citizens for Equality
Niagara Frontier Chapter
836 Indian Church Road
West Seneca, NY 14224-1235
http://www.upstate–citizens.org

October 24, 2003

Hon. Charles E. Schumer
313 Hart Senate Building
Washington, DC 20510

Dear Senator Schumer:

On behalf of the membership of Upstate Citizens for Equality I am writing to you regarding your recent statements on the Indian sovereignty issues that New York and most other states are encountering. I was encouraged to see that you are going to look into and hopefully obtain passage of federal legislation to resolve this dilemma. Tribal Sovereign immunity should not extend to the tribes' commercial activity. Below is our reasoning and we ask that you consider these arguments in support of limiting tribal immunity.

Indian Nations/Tribes have inherent sovereign immunity but it is not protected as the State's sovereign immunity. Unlike the State's sovereign immunity the Tribes have no constitutional protection that maintains how its sovereign immunity is to be treated. They are more akin to foreign sovereigns than domestic sovereigns in Our Federalism in this regard. The doctrine of tribal immunity arose almost by accident. Some of the opinions of the United States Supreme Court has stated that this doctrine rest upon the case of Turner v. United States, 248 U. S. 354 (1919). However, Turner, supra, simply does not stand for the position that it is cited as authority for. At best it assumes an immunity from suit, but it is not a reasoned statement of a doctrine. It cannot even be said that the Court or Congress assumed that Congressional enactment was needed to overcome whatever tribal immunity existed. In any event this fleeting reference is what tribal sovereign immunity is based upon. "These Indian Nations are exempt from suit without Congressional authorization." United States v. United States Fidelity & Guaranty Co., 309 U. S. 506, 512 (1940) (citing Turner, supra, at 358) As sovereigns or quasi-sovereigns, the Indian Nations enjoyed immunity "from judicial attack" absent consent to be sued. 309 U. S., at 513-514. Later cases, albeit with little analysis, reiterated the doctrine. E.g., Puyallup, 433 U. S., at 167, 172-173; Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58 (1978); Three Affiliated Tribes, 476 U. S., at 890-891. Tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes and gasoline to non-Indians. In this economic context, immunity 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. For these reasons there is no need to afford tribal immunity to commercial activities. For purposes of its sovereign immunity Indian Tribes and Nations should be treated in the same respects that friendly foreign nations are.

Foreign sovereign immunity began as a judicial doctrine. Chief Justice Marshall held that United States courts had no jurisdiction over an armed ship of a foreign state, even while in an American port. Schooner Exchange v. McFaddon, 7 Cranch 116 (1812). While the holding was narrow, "that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden B. V. v. Central Bank of Nigeria, 461 U. S. 480, 486 (1983). In 1952, the State Department issued what came to be known as the Tate Letter, announcing the policy of denying immunity for the commercial acts of a foreign nation. See id., at 486-487. Difficulties in implementing the principle led Congress in 1976 to enact the Foreign Sovereign Immunities Act, resulting in more predictable and precise rules. See id., at 488-489 (discussing the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. Sections 1604, 1605, 1607).

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In light of Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2 Cir. 1964), cert. denied, 381 U.S. 934, 85 S. Ct. 1763, 14 L. Ed. 2d 698 (1965), an Indian Nation or tribe's purely commercial activity should not be protected by any claim of sovereign immunity. For present purposes, a summary of the general principles emerging from Victory Transport should suffice; the contemporary rationale for sovereign immunity is the avoidance of possible embarrassment to those responsible for the conduct of the nation's foreign relations; in determining the scope of the immunity which a foreign sovereign enjoys, courts have therefore deferred to the policy pronouncements of the State Department, see, e. g., National City Bank of New York v. Republic of China, 348 U.S. 356, 360-361, 75 S. Ct. 423, 99 L. Ed. 389 (1955); the State Department has explicitly indicated that its policy is generally predicated on a "restrictive" theory of sovereign immunity -- "recognizing immunity for a foreign state's public or sovereign acts (jure imperii) but denying immunity to a foreign state's private or commercial acts (jure gestionis)."336 F.2d at 358. See 26 Dept. State Bull. 984 (1952); "the purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts,"336 F.2d at 360.

The United States Supreme Court deferred this questionable policy to be resolved by Congress. The Court stated "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment." Kiowa Tribe of Okla. v. Manufacturing Technologies Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (U.S. 05/26/1998) This issue was most recently presented to the court in Inyo County v. Paiute-Shoshone Indians, 123 S.Ct. 1887, 155 L.Ed.2d 933 (U.S. 05/19/2003). However, the Court did not reach this issue.

As you can see there is no reason why the legal fiction of tribal sovereign immunity as it extends to purely commercial activity should not be abrogated. We look forward to hearing from you on this issue.

Sincerely,

Daniel T. Warren
Chair
Niagara Frontier Chapter of Upstate Citizens for Equality