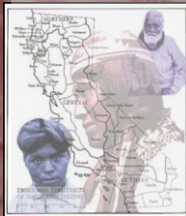


HISTORICAL AND LEGAL FOUNDATIONS THAT SHAPED TRIBAL GOVERNMENTS IN CALIFORNIA



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1

SOVEREIGNTY - DEFINED

- ☞ Sovereignty is the Right of Self-Governance.
- ☞ It is the right of an entity to make its own laws and to be governed by them.
- ☞ It's important to know the difference between Sovereignty and Sovereign Immunity.
 - ... **Sovereign immunity is the right to be free from suit; the right not be sued in court.**
 - ... **"Sovereign" cannot be sued because the Sovereign's assets are the assets of the community as a whole.**



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2

TREATY-MAKING PROCESS

- ✧ For a treaty to become valid after it is signed by U.S. and tribal government representatives, it must be sent back to Washington D.C. and approved or ratified by Congress.
- ✧ Only 374 treaties have been ratified by Congress. (Of the 374 treaties, all have been violated in some form by the U.S.)



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SOVEREIGN STATUS OF INDIAN TRIBES

- ✧ Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.
 - ... The U.S. only negotiates treaties with sovereign entities.
 - ... The U.S. may expand or contracts its recognition of tribal sovereign authority.

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CALIFORNIA INDIAN HISTORY 101

- ✧ U.S. Federal Government negotiated 18 Treaties with California Indians setting aside 7.5 million acres of land
 - ... negotiated from 1850-51
- ✧ California Land Claims Act of 1851
 - ... Resulting in loss of tribal villages and scattered landless Indians in California
- ✧ There are 110 federally recognized tribes in California, more than 30 (possibly as many as 80) that are not federally recognized and very large urban Indian population comprised of non-California Indians.

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TRIBAL SOVEREIGN STATUS

Inherent Tribal Sovereign Authority

- ...Possess Inherent Sovereignty by virtue of being.
- ...Subject to Tribal Powers only.

Legal Sovereign Status of Tribes

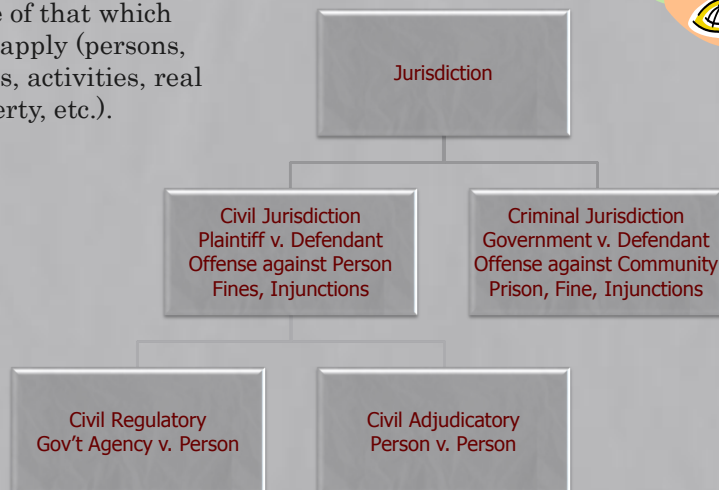
- ...Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.
- ...Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.

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TYPES OF JURISDICTION

Jurisdiction is the scope of that which laws apply (persons, places, activities, real property, etc.).



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JOHNSON V. MCINTOSH (1829)

- ✗ This case applied and adopted the Discovery Doctrine into U.S. case law.
- ✗ Discovery Doctrine gave the U.S. the exclusive right to extinguish the original tribal right of *possession* by purchase or conquest.
- ✗ Discovery Doctrine only left Tribes with the Right to Use and Occupy the Land.
- ✗ This theory gave the discovering Government title to all land as a result of having arrived onto the continent.
- ✗ U.S. Supreme Court held that Indians did not have the power to give (nor could a non-Indian receive from an Indian) title to land upon which Indians lived.
- ✗ This case served to protect federal land grants (federal land patents) which the federal government used to settle the territories.



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CHEROKEE NATION V. GEORGIA (1831)

- ✧ State of Georgia attempted to apply state law over Cherokee Nation in an effort to “annihilate the Cherokees as a political society.”
- ✧ Cherokee Nation filed suit as a foreign nation directly in U.S. Supreme Court.
- ✧ U.S. Supreme Court held that Cherokee Nation was not a foreign nation but a Domestic Dependent Nation.

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WORCESTER V. GEORGIA (1832)

- ✧ Two missionaries were sentenced to 4 years hard labor by state of Georgia for residing in Cherokee Nation without a license and without taking oath to support the Georgia Constitution and laws.
- ✧ Worcester challenged the jurisdiction of Georgia Courts.
- ✧ U.S. Supreme Court held that Indian nations were distinct, independent political communities in which state law has no effect.
- ✧ President Jackson purportedly said Marshall has made his decision, now let him enforce it. No mechanism in place to enforce, South Carolina tries to leave the Union, Jackson begs Georgia to let missionaries go. Missionaries pardoned in 1883.

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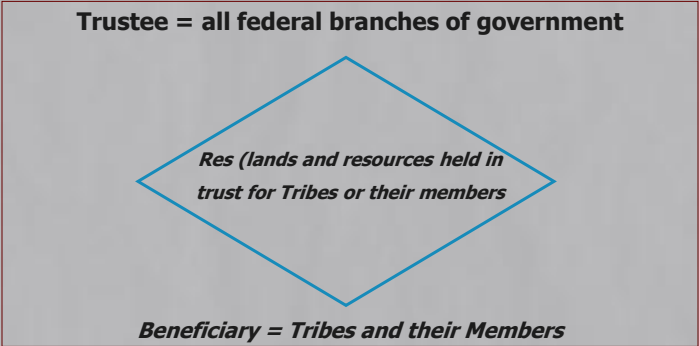
TRUST RELATIONSHIP

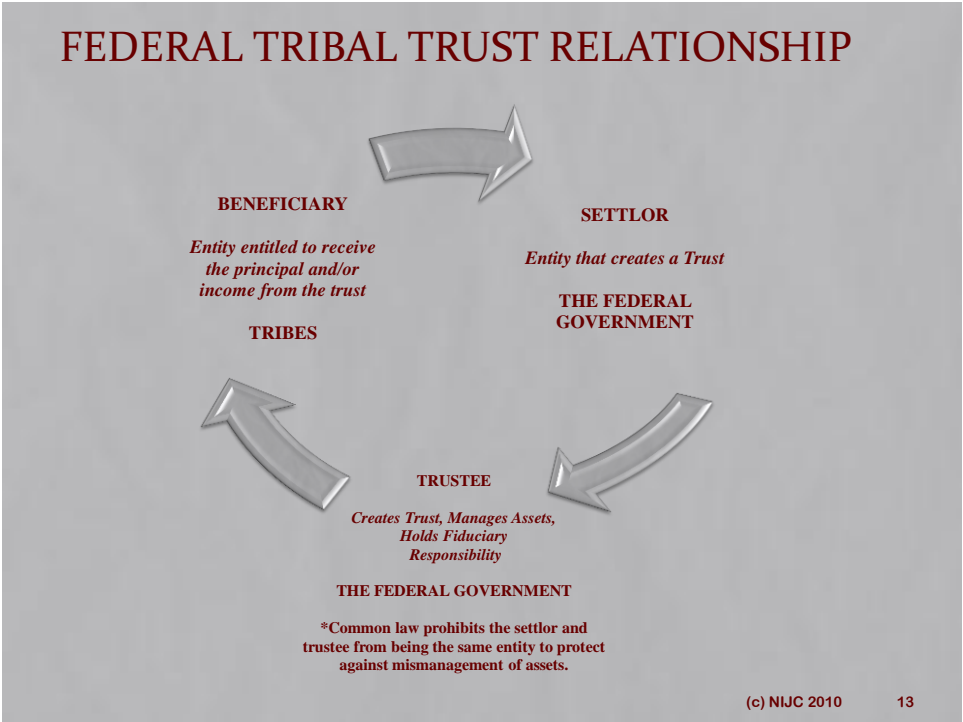
- ✧ The federal government owes a responsibility to the tribes.
- ✧ Initially this responsibility was described as the relationship of a “guardian to its ward.”
- ✧ Now it is called the Trust Relationship.
- ✧ Pursuant to the Trust Relationship, the federal government owes a fiduciary duty to the tribes to protect their interests in the lands and resources held for their benefit.



TRUST RELATIONSHIP

- ✧ A legal trust comes to an end. The Trust Relationship will end only when the tribes cease to exist (legally or otherwise).





CRIMINAL JURISDICTION

1881	U.S. v. McBratney	Allowed Colorado to assert jurisdiction over Non-Indian v. Non-Indian crime committed on reservation, without action by Congress
1883	Ex Parte Crow Dog	Tribes retain exclusive jurisdiction over Indian v. Indian crimes. Murder of one Indian by another Indian. Tribe opted for traditional punishment (filling-shoes-of-victim).
1885	Major Crimes Act	Exclusive Federal Jurisdiction over enumerated crimes. Case law allows concurrent jurisdiction.

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CRIMINAL JURISDICTION

1886	U.S. v. Kagama	Hoopla challenged Major Crimes jurisdiction. Guardian-wardship power.
1887	General Allotment Act	Break up of Indian Country. Loss of 90 million acres.
1896	Talton v. Mayes	5th Am. Of U.S. Bill of Rights does not apply to Cherokee Nation such that a grand jury is required. Finds that Tribal authority is from inherent source not federal power.

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CRIMINAL JURISDICTION

1903	Lone Wolf v. Hitchcock	Ruled that treaties could be abrogated/breached if Congress deems it in tribes' best interests. Established plenary power of Congress.
1978	Oliphant v. Suquamish	Non-Indian assaults tribal officer and resists arrest, includes high speed chase during Chief Seattle Days Celebration on reservation. Court held that tribe had no inherent sovereignty to assert criminal jurisdiction over Non-Indians without an explicit act of Congress.
1968	Indian Civil Rights Act	Congress adopts ICRA to ensure that Tribal Governments do not violate certain civil rights.
1978	U.S. v. Wheeler	The Double Jeopardy Clause of the U.S. Constitution does not bar federal prosecution under the Major Crimes Act of an Indian defendant following earlier conviction in tribal court of lesser included offense arising from the same acts.

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CRIMINAL JURISDICTION

1990	Duro v. Reina	Non-member Indian fires a gun killing a Non-member Indian child. Duro flees to Calif. U.S. Attorney declines prosecution. Tribe attempts to assert jurisdiction based upon tribal law regarding unlawful firing of a firearm. Duro fights tribal jurisdiction. U.S. Supreme Court held that tribe cannot assert criminal jurisdiction over Non-member Indians, leaving jurisdictional void.
1991	Congress' Duro-fix	Tribal leaders lobby Congress and get an amendment to Indian Civil Rights Act which recognizes the inherent sovereignty of tribes to assert jurisdiction over all Indians.
2004	U.S. v. Lara	Lara, non-member Indian ignored Spirit Lake Tribe's order excluding him from its reservation. He struck a federal officer arresting him. He pleaded guilty in Tribal Court to the crime of violence to a policeman. The Federal Government then charged him with the federal crime of assaulting a federal officer. Lara claimed that, because key elements of that crime mirrored elements of his tribal crime, he was protected by the Double Jeopardy Clause. Held: Because the Tribe acted in its capacity as a sovereign authority, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete federal offense.

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CIVIL JURISDICTION

1959	Williams v. Lee	State court lacks subject matter jurisdiction over dispute between Indian and Non-Indian arising on reservation. Test set forth below.
1981	U.S. v. Montana	Test to determine Civil Regulatory jurisdiction over a non-Indian on non-Indian owned lands within reservation. Case law post- <i>Montana</i> allowed regulatory jurisdiction if only one of the prongs were met. States only need meet #4.
1982	Merrion v. Jicarilla	Tribes have civil jurisdiction over non-Indians on Indian land and regulatory powers over non-Indian land within Indian country

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MONTANA TEST FOR TRIBAL CIVIL REGULATORY JURISDICTION

1. Is there a consensual relationship between the non-Indian and the Tribe? (May include contracts or other dealings.) OR
2. Does the Non-Indian's activity threaten or have a direct impact upon:
 - a. Economic Security of the Tribe,
 - b. Political Integrity of the Tribe, or
 - c. Health, Safety or Welfare of the Tribe.

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TERMINATION AND RELOCATION

- ✧ The U.S. Government sought to move Indians off of the Reservation into the Urban Center
- ✧ Through P.L. 280, the U.S. Government sought to end the Federal/Tribal trust relationship
- ✧ Resulted in loss of land and homelessness



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P.L. 280 CIVIL PROVISIONS: 28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES.

- (a) Each of the States or Territories listed in the following table shall have jurisdiction over [civil causes of action between Indians or to which Indians are parties](#) which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.



28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES.
(P.L. 280 CIVIL PROVISIONS)

<u>State or Territory of</u>	<u>Indian Country Affected</u>
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State



**28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN
ACTIONS TO WHICH INDIANS ARE PARTIES.
(P.L. 280 CIVIL PROVISIONS)**

- (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

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**28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN
ACTIONS TO WHICH INDIANS ARE PARTIES.
(P.L. 280 CIVIL PROVISIONS)**

- (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may possess shall, **if not inconsistent with any applicable** civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

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PUBLIC LAW 280: CRIMINAL PROVISIONS § 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY:

- (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

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§ 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY: (PUBLIC LAW 280: CRIMINAL PROVISIONS)

State or Territory of

Indian Country Affected

Alaska

All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community

California

All Indian country within the State

Minnesota

All Indian country within the State, except the Red Lake Reservation

Nebraska

All Indian country within the State

Oregon

All Indian country within the State, except the Warm Springs Reservation

Wisconsin

All Indian country within the State

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**§ 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY:
(PUBLIC LAW 280: CRIMINAL PROVISIONS)**

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; **or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.**

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**§ 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY:
(PUBLIC LAW 280: CRIMINAL PROVISIONS)**

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

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CIVIL JURISDICTION

1987	Cabazon v. California	If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.
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CABAZON V. CALIFORNIA (1987)

- ✧ California sought to apply its laws governing the operation of bingo games to bingo games operated by the Cabazon and Morongo Bands of Mission Indians.
- ✧ Riverside County also sought to apply its ordinances regulating bingo and card games to the tribal gaming operations.
- ✧ U.S. Supreme Court held that although state laws may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by P.L. 280 or by the Organized Crime Control Act of 1970.

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CABAZON V. CALIFORNIA (1987)

- ✧ The State of California attempted to apply a law from its criminal code governing gaming under the assumption that P.L. 280 would allow state criminal law to apply to Indians on reservations.
 - ✧ The U.S. Supreme Court found that the law was not “Criminal/Prohibitory” but the statute was rather “Civil/Regulatory” in nature.
- ... *If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.*

CIVIL REGULATORY V. CRIMINAL PROHIBITORY

What sort of jurisdiction may the States assert?



INDIAN GAMING REGULATORY ACT

- ✧ IGRA was passed by Congress in 1988 as a response to the Cabazon case.
- ✧ IGRA provides for establishment of or requires:
 - ... All Indian gaming must occur on trust lands;
 - ... National Indian Gaming Commission oversees enforcement;
 - ... Gaming classes I, II, III and allocation of regulatory authority between tribe and state;
 - ... Tribal Gaming Ordinances to regulate operations, use of revenues, audits, contractors, licensing of employees;
 - ... Off-reservation environmental impact statements prior to gaming;
 - ... Tribal-State Compacts for Class III gaming activity

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MODERN TRIBAL GOVERNANCE

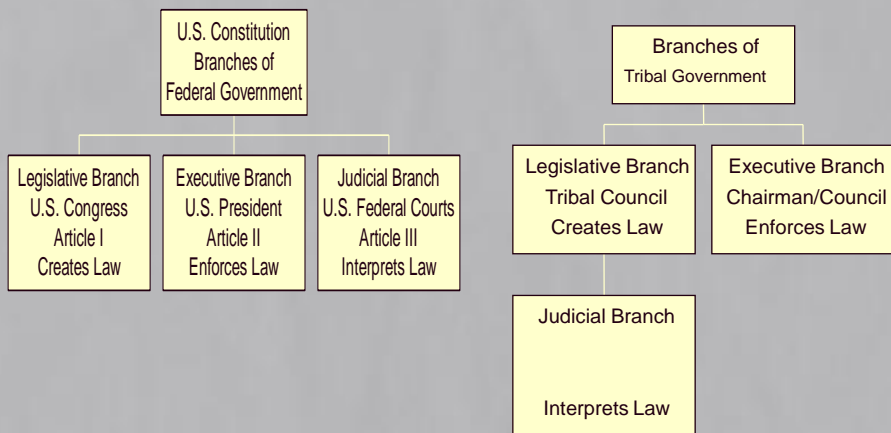
- ✧ Tribal Constitution
- ✧ Legislative Process and Record
- ✧ Code of Laws, Ordinances, Resolutions
- ✧ Consistency establishes the community standard
- ✧ Cooperation and collaboration

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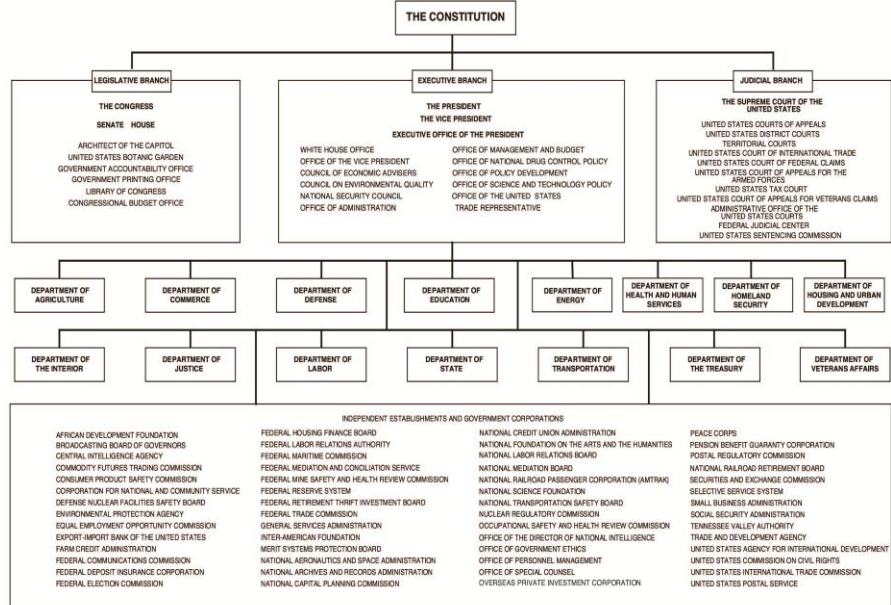
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GOVERNMENT-TO-GOVERNMENT



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THE GOVERNMENT OF THE UNITED STATES



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graph TD
    MD[Museum Director]
    TCP[Tribal Court Program]
    NEPA[NEPA Land Mgt.]
    DNRD[DNR Director]
    DNRS[DNR Staff]
    SS[Social Services]
    BO[Business Office]
    ARB[AR Billing]
    SNC[Senior Nutrition Center]
    ICWA[ICWA/CSW Sub. Abuse]

    MD --- L1
    TCP --- L1
    NEPA --- L1
    DNRD --- L1
    DNRD --- DNRS
    SS --- L2
    BO --- L2
    ARB --- L2
    SNC --- L2
    SS --- ICWA
    BO --- ARB
    L1 --- L2
  
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