Cases and Quotes Referenced in March 3, 2022 ACC CLE – Doing Business with Indian Nations

1. U.S. Constitution Reference to power of Congress to regulate tribal matters and the foundation of plenary power, according to U.S. Supreme Court:
   Article one, Section 8 of the United States Constitution -- Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. *De Indis* -- 1537 lecture by Francisco de Vitoria, a 16th century Dominican theologian and philosopher, in which he expounded and espoused foundational doctrines adopted by European nations as policies for interaction with indigenous populations within the latters' homelands.

3. *The Marshall Trilogy*, named after Chief Justice Marshall who wrote the opinions, consists of *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). The three cases established federal primacy in Indian affairs, excluded state law from Indian country, and recognized tribal governance authority. *Johnson*, among other things, recognized the federal supremacy over the states and individuals in the oversight of Indian affairs. The Court reaffirmed the federal supremacy over Indian affairs in *Cherokee Nation* and *Worcester*. In *Cherokee Nation*, the Court held the tribe was a domestic nation, but neither a state nor a foreign nation. This is an important distinction. The Court held in *Worcester v. Georgia* that state laws had "no force" in Indian country and were barred under the Supremacy Clause by federal statutes and the Cherokee Nation's treaties with the United States. 31 U.S. 515, at 561. Chief Justice Marshall, in *Worcester*, asserted the sovereignty of tribes within the relationship between the federal government and Indian nations. The federal law and government, with certain exceptions, "manifestly considers the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guaranteed by the United States." Id. at 557. States were excluded from the federal-tribal relationship in the wake of this holding. Tribes retained a broad grant of sovereignty, inviolable except by express "acts of Congress." Id. at 561.

4. The status of Indian tribes within the American political system is complex. Justice Thurgood Marshall's formulation in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), offers a summation of the historical evolution of this status: "Long ago, the Court departed from Mr. Chief Justice Marshall's view that "the laws of [a State] can have no force" within reservation boundaries, Worcester v. Georgia, 6 Pet. 515, 561 (1832). See *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 [p. 142] (1976); *New York ex rel. Ray v. Martin*, 326 U.S. 498 (1946); *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885). At the same time, we have recognized that the Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). See also *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). As a result, there is

no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as "an anomalous one and of complex character," for, despite their partial assimilation into American culture, the tribes have retained "a semi-independent position..., not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), *quoting United States v. Kagama*, 118 U.S. 375, 381-382 (1886). 448 U.S. 136, 142.

5. Public Law 280:

    a. Public Law 83-280. 18 USC 1162, 28 USC 1360, 25 USC 1321-1326.