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## We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians

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# “WE NEED PROTECTION FROM OUR PROTECTORS”:\* THE NATURE, ISSUES, AND FUTURE OF THE FEDERAL TRUST RESPONSIBILITY TO INDIANS

Daniel I.S.J. Rey-Bear\*\* & Matthew L.M. Fletcher\*\*\*

## ABSTRACT

*The federal trust responsibility to Indians essentially entails duties of good faith, loyalty, and protection. While often thought of as unique to federal Indian policy, it developed from and reflects common law principles of contracts, property, trusts, foreign relations/international law, and constitutional law. However, several issues preclude a greater understanding and implementation of the federal trust responsibility. These include Executive Branch efforts to avoid liability, neocolonial judicial activism, and episodic congressional attention. Enactment of legislation to reaffirm and modernize the federal trust responsibility through greater self-determination, integration, elevation, oversight, and funding should help overcome these issues to improve federal Indian policy.*

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\* Peterson Zah, President, Navajo Nation (1991-1995); Member, U.S. Dep’t of the Interior, Commission on Indian Trust Administration and Reform (CITAR) (2011-2014), as quoted in Letter from Ben Shelly, President, Navajo Nation, to Fawn Sharp, Chair, CITAR (June 4, 2012), <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Navajo-Nation-Response-2012.pdf>. This statement is a declarative form of a rhetorical question possibly first posed by the Satires of Juvenal, a first/second century Roman satirist, “*quis custodiet ipsos custodes?*” which means “who watches the watchmen?” and has common modern applications on the accountability of political power. See *Quis Custodiet Ipsos Custodes*, WIKIPEDIA.ORG, [https://en.wikipedia.org/wiki/Quis\\_custodiet\\_ipsos\\_custodes%3F](https://en.wikipedia.org/wiki/Quis_custodiet_ipsos_custodes%3F) (last visited Apr. 16, 2017).

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## I. INTRODUCTION

Despite concerted federal efforts to address the political, social, and economic status of American Indians over the last two centuries, including hundreds of treaties and an entire Title of the United States Code, Indians continue to suffer disproportionately poor levels of health, education, and employment.<sup>1</sup> During this time, federal policies have varied over many eras, including treaty-making, removal, reservations, assimilation, reorganization, termination, and self-determination.<sup>2</sup> The current self-determination era has lasted for roughly fifty years, and accomplished much, but many basic problems remain. This includes ongoing American Indian struggles for meaningful economic development, sufficient employment opportunities, quality education, decent housing, adequate healthcare, and sound infrastructure. There also are recurring high-profile conflicts between Indian interests and others that require federal decision-making.<sup>3</sup>

1. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 20–23 (7th ed. 2017).

2. MATTHEW L. M. FLETCHER, *FEDERAL INDIAN LAW* §§ 3.1–.15, at 51–116 (2016).

3. Just a few recent examples as of the writing of this Article include the construction of the Dakota Access Pipeline across the Missouri River just upstream of the Standing Rock Sioux Reservation, the possible construction of a wall along the United States-Mexico border within the Tohono O’odham Reservation, and the establishment of Bears Ears National Monument in Utah in part to protect land sacred to five Indian tribes despite the opposition of state leaders. See, e.g., Robinson Meyer, *The Legal Case for Blocking the Dakota Access Pipeline*, *THE ATLANTIC* (Sept. 9, 2016), <https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178/>; Fernanda Santos, *Border Wall Would Cleave Tribe, and Its Connection to Ancestral Land*, *N.Y. TIMES* (Feb. 20, 2017), [https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html?\\_r=0](https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html?_r=0); Robinson Meyer, *Obama’s Environmental Legacy, in Two Buttes*, *THE ATLANTIC* (Dec. 30, 2016), <https://www.theatlantic.com/science/archive/2016/>

What underlies all these evolving efforts and ongoing issues? Also, why is it taking so long for American Indians to achieve a socio-economic status roughly level with other Americans? Thinking prospectively, what basic principles could or should support a new generation or paradigm of federal policy and tribal relations to achieve significant further improvements in Indian welfare? In the field of federal Indian law, one bedrock principle underlying federal-tribal relations may be essential to future policy development but is often misunderstood: the federal trust responsibility to Indian tribes and individual Indians.

The federal trust responsibility in essence entails duties of good faith, loyalty, and protection, and has been variously characterized as a cornerstone of federal Indian law and essentially just a mere platitude.<sup>4</sup> The trust responsibility is a name describing the relationship between Indian tribes and the United States, which involves a duty of protection to Indians and tribes, and defies categorical definition. Also, numerous court decisions, federal studies, and academic reviews have described and assessed the doctrine, and many recent lawsuits based on it have led to billions of dollars in settlements,<sup>5</sup> while many social and economic issues for Indians remain outstanding. Therefore, an improved understanding of the basic principle is needed. For this, it may be helpful to better define how this essential aspect of federal Indian law fits within the larger American legal landscape, and how or why that understanding has been lost, in order to better address ongoing federal-Indian policy issues. Hopefully, a better understanding of

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12/?obamas-environmental-legacy-in-two-buttes/511889/ (discussing the controversy surrounding Bears Ears National Monument).

4. See FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, at XI (1941) [hereinafter COHEN'S HANDBOOK 1941] (noting competing views and that "the theory of American law governing Indian affairs has always been that the Government owed a duty of protection to the Indian in his relations with non-Indians"). Compare Fletcher, *supra* note 2, § 5.2, and FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton et al. eds., 2015) [hereinafter COHEN'S HANDBOOK 2015], with Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227 (1975) (arguing that courts improperly treat the trust duty as "a moral obligation, without justiciable standards for its enforcement"), and *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 36–37 (D.C. Cir. 2008) (citing Chambers, *supra*, in ruling against Indian interests).

5. *E.g.*, *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) (upholding \$3.412 billion class action settlement); Press Release, U.S. Dep't of Justice, Attorney General Holder and Secretary Salazar Announce \$1 Billion Settlement of Tribal Trust Accounting and Management Lawsuits Filed By More Than 40 Tribes (Apr. 11, 2012), <https://www.justice.gov/opa/pr/attorney-general-holder-and-secretary-salazar-announce-1-billion-settlement-tribal-trust>; Sari Horwitz, *U.S. to Pay Navajo Nation \$554 Million in Largest Settlement with Single Indian Tribe*, WASHINGTON POST (Sept. 24, 2014) [https://www.washingtonpost.com/world/national-security/us-to-pay-navajo-nation-554-million-in-largest-settlement-with-single-indian-tribe/2014/09/24/4dc02cc6-434e-11e4-9a15-137aa0153f527\\_story.html?utm\\_term=.783179a639e6](https://www.washingtonpost.com/world/national-security/us-to-pay-navajo-nation-554-million-in-largest-settlement-with-single-indian-tribe/2014/09/24/4dc02cc6-434e-11e4-9a15-137aa0153f527_story.html?utm_term=.783179a639e6).

the federal trust responsibility will help inform and shape future federal Indian policy.

First, while many have defined the federal trust responsibility to Indians as a unique feature in the relatively narrow field of federal Indian law, it may be better understood within a broader legal context. The trust responsibility may be best defined through a combination of basic principles common to many first- and second-year law school subjects: contracts, property, trusts, foreign relations, and constitutional law. Second, this multifaceted legal nature of the federal trust responsibility has been obscured during the current self-determination era by Executive Branch efforts to evade liability, neocolonial judicial activism, and episodic congressional attention, as explained below. This combination of issues allows Indian interests to be marginalized when they could and should be better protected. Moving forward, Congress should reassert its authority to protect and empower Indians in order to better fulfill the federal trust responsibility and lay a foundation for future efforts to improve the status of Indians. This should be done through federal legislation that reaffirms the basic nature and scope of the trust responsibility; recognizes greater tribal sovereignty; integrates, elevates, and provides ongoing oversight for Indian affairs; and provides sufficient funding to accomplish those goals.

## II. THE NATURE OF THE FEDERAL TRUST RESPONSIBILITY

The common characterization of the federal-Indian relationship as “unique” or *sui generis*<sup>6</sup> may not be helpful to understand the relationship. This is especially true for the federal trust responsibility that is the *sine qua non* of federal-Indian relations. For example, merely stating that “[t]he general relationship between the United States and Indian tribes is not comparable to a private trust relationship”<sup>7</sup> does not clarify what the former relationship means, or what the federal duties are in the context of managing specific Indian trust assets. Rather than merely state that the federal-Indian trust responsibility differs from other legal concepts in American

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6. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character.”); *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (“In the sense that there is no other group of people favored in this manner, the legal status of the BIA [(Bureau of Indian Affairs)] is truly *sui generis*.”) (citation omitted); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) (“The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . [and] is marked by peculiar and cardinal distinctions which exist nowhere else.”).

7. *United States v. Jicarilla Apache Nation (Jicarilla VII)*, 564 U.S. 162, 173 (2011) (citation omitted).

jurisprudence,<sup>8</sup> it would be more helpful to consider it in the context of better-understood American jurisprudence in other, more common areas of law.

Basic common-law legal principles in other fields explain and provide sound legal bases for several basic aspects of federal-Indian relations. First, federal-tribal relations necessarily derive from and concern the law of contracts and property because those relations concern agreements between parties about the possession and management of property. Second, because these relations historically came about through dealings between Indian tribes and other sovereigns that assumed responsibility over Indian affairs before the establishment of the United States, another fundamental attribute of the federal trust responsibility is a combination of trust law and the international law of foreign relations. Finally, because the United States Constitution authorized Congress to enact laws governing Indian affairs, the federal trust responsibility also is a matter of constitutional law. Each of these is discussed in turn below.

### A. *Contracts and Property Law*

Federal-tribal relations and the federal-Indian trust responsibility arose from historic dealings involving basic aspects of contracts and property law. The Restatement of Contracts recognizes that a “contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”<sup>9</sup> As any first-year law student should know, a contract consists of an offer, acceptance, consideration, mutuality, competency and capacity and, in some situations, a reduction to writing.<sup>10</sup> Once a contract is established between parties, each has a legal duty to perform their promise as well as a duty of good faith and fair dealing.<sup>11</sup> The latter means honesty-in-fact in relevant conduct,<sup>12</sup> including faithfulness and consistency with the justified expectations of the other party.<sup>13</sup> In layman’s terms, this means loyalty.

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8. Cf. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993) (noting a common view of federal Indian law as “a tiny backwater of law inhabited by impenetrably complex and dull issues”).

9. RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

10. See generally *id.* at ch. 2 (parties and capacity), ch. 3 (mutual assent), ch. 4 (discussing consideration), ch. 5 (statute of frauds).

11. *Id.* §§ 1 (contract defined), 205 (good faith and fair dealing).

12. See, e.g., U.C.C. §§ 1-201(b)(20), 2-103(1)(b) (AM. LAW INST. & UNIF. LAW COMM’N 1999).

13. RESTATEMENT (SECOND) OF CONTRACTS § 2, cmt. a (AM. LAW INST. 1981).

The federal-tribal trust relationship is based in part on these principles, because the treaties which historically provided the basis of federal-tribal relations were fundamentally and necessarily contracts. In particular, federal-Indian treaties and agreements are essentially contracts between sovereign nations, which typically secured peace with Indian tribes in exchange for land cessions, which provided legal consideration for the ongoing performance of federal trust duties.<sup>14</sup> In terms of consideration, it is beyond question that the United States has long reaped the benefit of vast cessions of Indian lands in exchange for its voluntarily and unilaterally imposed trust relationship.<sup>15</sup> Moreover, federal courts “have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise.”<sup>16</sup> This is in part because “non-treaty enactments” and congressionally-authorized Executive Orders often “embody agreements with tribes that would have been handled by treaty in former eras.”<sup>17</sup>

Congress recently has recognized the contractual nature of federal-tribal relations in the following legislative findings:

[T]he fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties; and

. . . the foregoing historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been committed.<sup>18</sup>

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14. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (“A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.”). Formal treaty-making with Indian tribes ended with the Act of March 3, 1871, so subsequent analogous federal-tribal agreements must be approved by legislation, rather than just by the Senate. *See* 25 U.S.C. § 71 (2012).

15. *See Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6 (D.D.C. 1999), *aff'd*, 240 F.3d 1081, 1110 (D.C. Cir. 2001); H.R. REP. NO. 103-778, at 9–10 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3467, 3468–69.

16. *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995) (citing decisions from 1899, 1901, and 1976).

17. *Id.* (quoting Frickey, *supra* note 8, at 421 & n.164).

18. Indian Trust Asset Reform Act, Pub. L. 114-178, § 101(4)–(5), 130 Stat. 432, 433 (2016) (to be codified at 25 U.S.C. §§ 5601(4)–(5)).

In turn, the Supreme Court has characterized the relationship as follows:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation.<sup>19</sup>

Not only did tribes' treaties establish enumerated duties, but treaties are reservations of rights not surrendered by tribes.<sup>20</sup> Also, federal-Indian treaties must be interpreted as the Indians would have understood the terms, with additional rights implied to give effect to treaties.<sup>21</sup>

Accordingly, the federal trust responsibility is not a gratuity, and the assertion that federal Indian policies and benefits are provided to Indians at no cost to Indians<sup>22</sup> is a mischaracterization of historical fact. Rather, federal duties to Indians exist and remain enforceable because "the government 'has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements,' in exchange for which 'Indians . . . have often surrendered claims to vast tracts of land.'"<sup>23</sup> Therefore, provisions of Indian treaties and agreements

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19. *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)); see also *Worcester v. Georgia*, 31 U.S. 515, 548–54 (1832) (discussing treaties securing and preserving friendship and land cessions, and noting that the stipulation acknowledging tribes to be "under the protection of the United States" "is found in Indian treaties generally").

20. *United States v. Winans*, 198 U.S. 371, 381 (1905).

21. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 679 (1979); *Winans*, 198 U.S. at 380–81.

22. *Jicarilla VII*, 564 U.S. 162, 178–79 (2011).

23. Brief for the Federal Petitioners at 22, *Salazar v. Patchak*, 565 U.S. 1092 (2012) (No. 11-247) (citation omitted); see also COMMITTEE ON GOVERNMENT OPERATIONS, MISPLACED TRUST: THE BIA'S MISMANAGEMENT OF THE INDIAN TRUST FUND, H. REP. NO. 102-499, at 6 (1992) [hereinafter MISPLACED TRUST] ("The system of trusteeship . . . is deeply rooted in Indian-US. history."); Statement on Signing Executive Order on Consultation & Coordination with Indian Tribal Governments, 3 PUB. PAPERS 2487 (Nov. 6, 2000) ("Indian nations and tribes ceded lands, water, and mineral rights in exchange for peace, security."); Special Message to Congress on Indian Affairs, 1 PUB. PAPERS 564, 566 (July 8, 1970) (stating that the United States' Indian relationship "continues to carry immense . . . legal force"); AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 11 (Comm. Print 1977), [hereinafter AIPRC REPORT], <http://www.docs.lakotalaw.org/NPR-report-sources/American%20Indian%20Policy%20Review%20Commission,%20Final%20Report,%201977.pdf> (noting same). Accordingly, historic federal-tribal relations established "obligations to the fulfillment of which the national honor has been committed." *Heckman v. United States*, 224 U.S. 413, 431 (1912). "[T]he people as a whole benefit when the Executive Branch . . . protects Indian



with the United States (*i.e.*, contracts) that have not expired or been abrogated by Congress remain enforceable today.<sup>24</sup> Moreover, Indians' justifiable expectations and legitimate reliance on those commitments, as well as the long period of time during which the United States has benefited from Indian land cessions, preclude any current assertion that the federal government does not owe ongoing, enforceable fiduciary duties to Indians.<sup>25</sup> Thus, at least in some circumstances, basic contract law principles apply to federal-tribal relations.<sup>26</sup>

While contracts address relationships between parties, property law governs the legal relations between people and "things," which necessarily includes certain "rights" and "interests."<sup>27</sup> Here, basic duties of reasonable care are automatically established and applied when one holds property for another.<sup>28</sup> This relationship may come about without any formal agreement, based upon parties' relationships with each other and concerning the relevant property, as a matter of bailment.<sup>29</sup> In federal-Indian relations, this may include restricted fee Indian lands or allotments. While these situations concern real property and may be subject to specific laws or overriding constraints,<sup>30</sup> the basic framework of holding onto property for another remains.

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property rights recognized in treaty commitments ratified[ ] by a coordinate branch." Letter from Griffin B. Bell, Att'y Gen., to Cecil D. Andrus, Sec'y of the Interior (May 31, 1979), <https://www.bia.gov/cs/groups/public/documents/text/idc-021688.pdf>.

24. *Tsosie v. United States*, 825 F.2d 393, 399–401 (Fed. Cir. 1987).

25. *See City of Sherill v. Oneida Indian Nation*, 544 U.S. 197, 215–17 (2005); *United States v. Minnesota*, 270 U.S. 181, 201–02 (1926) ("[C]ourts can no more go behind [a treaty] for the purpose of annulling it in whole or in part than they can go behind an act of Congress . . . . The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made 70 years after the treaty . . . .").

26. *See, e.g., Cherokee Nation v. Leavitt*, 543 U.S. 631, 639 (2005) (applying the Restatement of Contracts to federal Indian self-determination contracts); *cf. United States v. Winstar Corp.*, 518 U.S. 839 (1996) (applying general principles of contract construction and breach to contract action between private parties and the United States).

27. *See* RESTATEMENT (FIRST) OF PROP., ch. 1 Introductory Note (AM. LAW INST. 1999).

28. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 813 (2001).

29. Common examples of this include dry cleaning, valet parking, and airport baggage handling. *Id.* at 811.

30. *Compare United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (finding federal trust duties for former military reservation held in trust for tribe subject to a federal use right), *with United States v. Mitchell (Mitchell I)*, 445 U.S. 535 (1980) (finding no enforceable federal trust duties imposed by General Allotment Act).

The basic aspects of bailment lie on the boundary between contract and property law,<sup>31</sup> and date back to *Armory v. Delamirie*,<sup>32</sup> the “Chimney Sweep’s Jewel Case.” In that case, a question of basic duty of care and a corresponding presumption automatically arose. This concept applies in federal-Indian relations<sup>33</sup> because “a fiduciary relationship necessarily arises” “where the Federal Government takes on or has control or supervision over tribal monies or properties.”<sup>34</sup> This is the case even when the authorizing statute or document does not expressly impose a trust or fiduciary connection.<sup>35</sup> Still, not all duties in these situations are judicially enforceable.<sup>36</sup>

It should not be surprising that the federal trust responsibility includes and reflects basic elements of contract and property law. Relations are naturally a matter of contract law, and federal-Indian relations historically have been established and shaped by agreements between the federal government and Indian tribes. Also, the federal trust responsibility naturally reflects basic aspects of property law because American Indians can be distinguished from others in the United States due to their aboriginal connections to real property. Combining these two points, the historical contracts that have shaped federal-tribal relations have typically included provisions to protect particular areas of real property for Indians.

## B. *Trust Law*

Federal-Indian relations are not simply about contracts and property. Rather, the “general trust” and “fiduciary trust” relations of the federal government regarding Indians and their property each involve “trust,” especially with the redundant emphasis in the latter, federally-defined term.<sup>37</sup> As such, these relationships appropriately subject the trustee to certain fun-

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31. See Merrill & Smith, *supra* note 28, at 811.

32. *Armory v. Delamirie* (1722) 93 Eng. Rep. 664 (KB).

33. See, e.g., *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1372 (Fed. Cir. 2001) (applying *Armory*).

34. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (1980)).

35. *Id.*; see also *United States v. Navajo Nation*, 556 U.S. 287, 292–95 (2009); *White Mountain Apache Tribe*, 537 U.S. at 476–77.

36. See, e.g., *Mitchell I*, 445 U.S. 535, 538 (1980).

37. See DEP’T OF THE INTERIOR, COMPREHENSIVE TRUST MANAGEMENT PLAN 1 n.1 (2003), <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/14-2003-03-28-Comprehensive-Trust-Mgmt-Plan.pdf> (defining “fiduciary trust” as concerning trust asset management, as distinguished from “general trust” which concerns appropriated program funds); see also OFFICE OF THE ATTORNEY GENERAL, DEP’T OF JUSTICE POLICY ON INDIAN SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES 4 (1995) (distinguishing between the “broader” and “narrower” senses of the federal trust responsibility to Indians).

damental duties for the benefit of the trustor or beneficiary.<sup>38</sup> The most fundamental of these duties include administration,<sup>39</sup> loyalty,<sup>40</sup> care,<sup>41</sup> and impartiality,<sup>42</sup> as well as the duty to keep and render accounts,<sup>43</sup> furnish information,<sup>44</sup> and limit delegation.<sup>45</sup> Also, while there are many types of fiduciary relationships, one characteristic common to all is that a person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship, including a duty not to profit at the expense of the other.<sup>46</sup> This is essentially the duty of good faith, which means that trust duties include not only a duty of protection from others, but also a duty to protect the beneficiary from misconduct by the trustee itself. Trustees also must protect beneficiaries from maladministration by beneficiaries themselves or others who may partly administer a trust.<sup>47</sup> Of course, how these trust duties should be implemented varies over time and context.<sup>48</sup>

38. See RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2007) (Definition of Trust).

39. See *id.* § 76 (Duty to Administer).

40. See *id.* § 78 (Duty of Loyalty). This is often viewed as the most fundamental duty owed by a trustee. *Id.* It is the duty that binds the trustee to act in the best interests of the beneficiary notwithstanding the trustee's own interests. *Id.*

41. See *id.* § 77 (Duty of Prudence).

42. *Id.* § 79 (Duty of Impartiality).

43. See *id.* § 83 (Duty to Keep Records).

44. See *id.* § 82 (Duty to Furnish Information).

45. *Id.* § 80 (Duty with Respect to Delegation). Typically, a trustee owes a beneficiary a duty to personally carry out the management of trust assets. *Id.* However, there may be a delegation under certain circumstances. *Id.*

46. *Id.* § 80 cmt. b.

47. *Id.* § 81 (Duty with Respect to Co-Trustees); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.").

48. For example, under the general policy of regulating trade and intercourse with Indian Tribes to treat them as nations, respect their rights, and afford protection, federal regulation of Indian trading started in 1790 and has continued to the present. *Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685, 688 (1965). While earlier Indian trader regulation focused on protecting Indians from exploitation by trading post monopolies, see *Rockbridge v. Lincoln*, 449 F.2d 567, 570–71 (9th Cir. 1971), the federal government more recently has proposed modernizing that implementation consistent with federal policies of tribal self-determination and self-governance. *Traders with Indians*, 81 Fed. Reg. 89,015 (Dec. 9, 2016).

These basic fiduciary duties govern many federal-Indian relations, as recognized by Congress<sup>49</sup> and the Department of the Interior (DOI).<sup>50</sup> This also is why courts look to common-law fiduciary principles to determine the scope of liability for Indians under federal statutes or regulations.<sup>51</sup> This corresponds to the recognition of fiduciaries and concerns about conflicts of interests in other contexts, such as for management of retirement investments under the Employee Retirement Income Security Act (ERISA).<sup>52</sup>

As the Solicitor for the DOI Leo Krulitz explained in 1978 letter to the Department of Justice (DOJ), it is “beyond question” that the United States has fiduciary responsibilities towards tribes.<sup>53</sup> The trust responsibility is also legally enforceable and imposes fiduciary standards on all executive branch officials unless Congress acts contrary to Indians’ best interests, though still subject to constitutional limits.<sup>54</sup> That 1978 letter remains the most comprehensive document available on this subject from the DOI.<sup>55</sup> It recognized—consistent with the basic common law of trusts—that “[t]he government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.”<sup>56</sup> That opinion remains in effect today.<sup>57</sup> It also has provided the basis for two Secretarial Orders and the enumeration of basic federal trust responsibilities in the DOI Man-

49. See, e.g., 25 U.S.C. § 162a(d) (2015).

50. U.S. DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL pt. 303, § 2.7 (2000) [hereinafter DOI MANUAL], <https://bia.gov/cs/groups/mywvsp/documents/text/idc-022513.pdf>.

51. Jicarilla VII, 564 U.S. 162, 177 (2011).

52. See, e.g., Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Advice; Best Interest Contract Exemption; Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs; Prohibited Transaction Exemptions, 82 Fed. Reg. 12,319 (Mar. 2, 2017) (addressing the definition of who is a fiduciary under ERISA and the related rule on prohibited conflicts of interest).

53. Letter from Leo Krulitz, Solicitor, U.S. Dep’t of the Interior, to James W. Moorman, Asst. Att’y Gen., U.S. Dep’t of Justice 1 (Nov. 21, 1978) [hereinafter Krulitz Letter].

54. *Id.* at 2.

55. U.S. DEP’T OF THE INTERIOR, PRINCIPLES FOR THE DISCHARGE OF THE SECRETARY’S TRUST RESPONSIBILITY, Order No. 3215, at 2 (Apr. 28, 2000) [hereinafter S.O. 3215].

56. Krulitz Letter, *supra* note 53, at 2.

57. U.S. DEP’T OF THE INTERIOR, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES, Order No. 3335, at 4 (Aug. 20, 2014) [hereinafter S.O. 3335]; see also Memorandum from Solicitor, U.S. Dep’t of the Interior, to Secretary, U.S. Dep’t of the Interior, M-37045, at 1–2 (Jan. 18, 2017) (noting same and reaffirming “longstanding federal Indian law principles concerning the unique legal relationship between the United States and Indian tribes” and “these pronouncements from *Krulitz* even as applied to the contemporary legal landscape”).

ual.<sup>58</sup> Each of those restated and elaborated on a number of common-law fiduciary principles for the discharge of federal trust responsibilities regarding Indian tribes, individual Indian beneficiaries, and Indian trust assets.<sup>59</sup>

More broadly, “[i]t is fairly clear that any Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes.”<sup>60</sup> Therefore, agencies must exercise statutory duties “consistent with their federal trust obligation.”<sup>61</sup> Also, because “the federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies,” they must “take ‘all appropriate measures for protecting and advancing’ . . . tribes’ interests.”<sup>62</sup>

Furthermore, the fiduciary nature of the federal trust responsibility to Indians exists and applies regardless of how it has been mischaracterized during the last 200 years. In particular, “[f]iduciary relationships include not only the relation of trustee and beneficiary but also, among others, guardian-ward . . . relationships.”<sup>63</sup> This is significant because the federal-tribal relationship has been described sometimes as resembling a guardianship.<sup>64</sup> That characterization, while incorrect, does not reduce federal fiduciary duties to Indian tribes. Unlike true guardianships, Indian tribes do not lack legal capacity and the United States holds title to most Indian assets in trust.<sup>65</sup> Also, the United States was not appointed to that position by a court and its powers and duties are not merely fixed by statutes.<sup>66</sup> In

58. S.O. 3215, *supra* note 55, at 2; S.O. 3335, *supra* note 57, at 2; *see* DOI MANUAL, *supra* note 50, pt. 303, § 2.7.

59. S.O. 3215, *supra* note 55, at 2; S.O. 3335, *supra* note 57, at 2; *see* DOI MANUAL, *supra* note 50, pt. 303, § 2.7.

60. *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (citation omitted); *see also* *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 993 (9th Cir. 2005) (federal trust duties to Indian tribes “extend to any federal government action”) (quoting *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990)).

61. *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1101 (8th Cir. 1989) (citing *Washington Dep’t of Ecology v. EPA*, 752 F.2d 1465, 1470 (9th Cir. 1985)).

62. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (citations omitted).

63. RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. B. (AM. LAW INST. 2007).

64. *See, e.g., Jicarilla VII*, 564 U.S. 162, 177 (2011); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

65. *See* 25 U.S.C. § 462 (1934) (continuing periods of trust on Indian lands). *Compare* RESTATEMENT (SECOND) OF TRUSTS § 7, cmt. a (AM. LAW INST. 1959) (“A trustee . . . has title to the trust property; a guardian of property does not . . .”) (“[A] guardian is appointed only when and for so long as the ward is lacking in legal capacity.”) (“A guardian is appointed by a court . . .”), *with* U.S. CONST., art. I, § 8, cl. 3 (Commerce Clause).

66. *Compare* RESTATEMENT (SECOND) OF TRUSTS § 7, cmt. b (“The powers and duties of a guardian are fixed by statutes; the powers and duties of a trustee are determined by the terms of the trust and by the rules stated in the Restatement . . . as they may be modified by statute.”), *with* *Jicarilla VII*, 564 U.S. at 177 (recognizing application of common-law in relation to statutes).

addition, characterizing the federal-tribal relationship as a guardianship does not preclude or limit application of enforceable fiduciary duties because “[t]he relation between [a] guardian and ward, like the relation between [a] trustee and [a] beneficiary, is a fiduciary relation.”<sup>67</sup>

Moreover, the principle that guardianships apply “only when and for so long as the ward is lacking in legal capacity”<sup>68</sup> supports tribal governmental self-determination, a fundamental aspect of federal Indian policy. Retention of sovereign, governmental jurisdiction was surely contemplated by tribes when they entered into treaties with the United States.<sup>69</sup> Also, federal support for Indian self-determination certainly lapsed during the assimilation and termination periods. However, recognizing that the federal trust responsibility includes a duty to promote tribal self-determination, and the lack of conflict between the trust responsibility and self-determination comports with the original formulation of federal-tribal relations as well as current Congressional and Executive policy for almost fifty years.

Most United States Presidents have made these two complementary principles cornerstones of federal Indian policy since 1968.<sup>70</sup> In addition, almost every modern federal law concerning Indian tribes contains a statement reaffirming the federal trust relationship to Indian tribes.<sup>71</sup> In turn, self-determination was the animating principle behind the Indian Self-Determination and Education Assistance Act of 1975, as well as subsequent

67. RESTATEMENT (SECOND) OF TRUSTS § 7, cmt. a.

68. *Id.*

69. *Worcester v. Georgia*, 31 U.S. 515, 557 (1832); AIPRC REPORT, *supra* note 23, at 6–7.

70. *See, e.g.*, Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009); Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004); Exec. Order No. 13,175, 65 Fed. Reg. 67,249, § 2(b) (Nov. 9, 2000) (recognizing self-determination as a fundamental principle in formulating and implementing policies with tribal implications); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Tribal Governments, 1 PUB. PAPERS 662 (June 14, 1991); Statement on Indian Policy, 1 PUB. PAPERS 96, 96 (Jan. 24, 1983) (“In support of our [self-determination] policy, we shall continue to fulfill the Federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.”); Remarks at a Meeting with American Indian Leaders, 3 PUB. PAPERS 2020 (July 16, 1976); Special Message to Congress on Indian Affairs, *supra* note 23, at 565–66 (advocating self-determination without termination as “[t]he first and most basic” goal of any new national policy toward Indians); Special Message to the Congress on the Problems of the American Indian: “The Forgotten American,” 1 PUB. PAPERS 335, 337 (Mar. 6, 1968) [hereinafter *The Forgotten American*] (proposing self-determination).

71. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(3)(a) (Nell Jessup Newton et al. eds., 2012) [hereinafter *COHEN’S HANDBOOK 2012*] (citing examples).

self-governance supplementation of that Act,<sup>72</sup> and numerous additional federal Indian policy enactments.<sup>73</sup> Moreover, Congress has recognized that there is no conflict between the federal trust responsibility and tribal self-determination. For example, Congress has specifically recognized that “the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government.”<sup>74</sup> And just last year, Congress “reaffirm[ed] that the responsibility of the United States to Indian tribes includes a duty to promote tribal self-determination regarding governmental authority and economic development.”<sup>75</sup> Congress also has consistently preserved the trust relationship, even while recognizing self-determination.<sup>76</sup> Indeed, long-standing congressional Indian policy may well be described as nation-building.<sup>77</sup> Prior criticisms of the federal trust responsibility as paternalistic should be able to overcome the historically racist interpretations and applications of the trust responsibility, to recognize its evolution as a sovereign trust designed in part to preserve and promote tribal sovereignty.<sup>78</sup>

Finally, the federal-Indian trust relationship fits into the broader field of trust law and fiduciary relationships insofar as some breaches of the duties are actionable, subject to limits imposed on claims against the United States. For this type of breach, the Supreme Court has affirmed money damage awards against the United States for breach of fiduciary duties to Indians in certain circumstances. Examples include instances where the federal government misappropriated tribal trust fund money,<sup>79</sup> where the

72. See 25 U.S.C. §§ 5301, 5302 (2015). See generally Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal-Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2015).

73. See, e.g., *supra* note 69 and accompanying text; 25 U.S.C. §§ 1451 (financing) (2015), 1601(2) (health care), 1802 (higher education), 1902 (child welfare), 2401 (employment), 2501(b) (schools), 2702(1) (gaming), 3104(a) (forests), 3502(a)(1) (energy resources), 3601(2)–(7) (justice), 3702(1), (4) (agriculture), 4101(7) (housing), 4301 (business development).

74. Indian Tribal Justice Act, 25 U.S.C. § 3601(2) (2015); see also *id.* §§ 2103(e) (2015) (continuing obligations regarding Indian mineral development agreements), 4021 (providing for withdrawal of tribal trust funds “consistent with the trust responsibilities of the United States and the principles of self-determination”); Exec. Order 13,175, § 2 (recognizing both as “Fundamental Principles”); Special Message to Congress on Indian Affairs, *supra* note 23, at 565–55.

75. 25 U.S.C. § 5602.

76. E.g., *id.* § 5329(c).

77. Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 15–17 (2012–2013).

78. Cf. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 471 UTAH L. REV. 1472 (1994) (discussing these two sides of the trust responsibility).

79. *Seminole Nation v. United States*, 316 U.S. 286 (1942).

federal government allowed tribal trust assets to go to waste,<sup>80</sup> and where the federal government mismanaged tribal assets.<sup>81</sup> But in other cases, the Court has deferred to the United States Executive Branch and narrowly construed federal laws to preclude money damages. Most notably, this occurred in the Navajo Nation's \$600 million claim that the Interior Department improperly favored Peabody Coal Company over the Navajo Nation in coal lease royalty adjustments and approvals.<sup>82</sup> However, the fact that "the Government has often structured the trust relationship to pursue its own policy goals,"<sup>83</sup> does not disprove the existence or enforceability of fiduciary duties. Instead, that confirms that those duties historically have been disregarded by Congress or breached by the Executive Branch.<sup>84</sup>

In sum, regardless of how the federal trust responsibility might be characterized, a key way in which federal-Indian relations differ from other relationships is that federal dealings with Indians should be judged by the most exacting fiduciary standards.<sup>85</sup> This idea should not be foreign to attorneys because fiduciary obligations are a basic aspect of lawyer-client relationships.<sup>86</sup> Also, the federal-tribal trust relationship is appropriately enforceable and does not conflict with a duty to promote tribal self-determination.<sup>87</sup> Contrary views misunderstand the nature of this relationship and basic elements of its legal character.<sup>88</sup>

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80. United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).

81. Mitchell II, 463 U.S. 206 (1983).

82. United States v. Navajo Nation, 537 U.S. 488 (2003); see Kevin Gover, *An Indian Trust for the Twenty-first Century*, 46 NAT. RES. J. 317, 352–56 (2006) (detailed case review and critique); U.S. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 22 (2013) [hereinafter CITAR REPORT], [https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform\\_FINAL\\_Approved-12-10-2013.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf) ("The [*Navajo*] decision has been widely criticized and the narrow standard of liability employed by the Court should be changed by Congress.")

83. Jicarilla VII, 564 U.S. 162, 175 (2011).

84. See, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 378 (1980) (finding Executive branch had abandoned "the Nation's treaty obligation to preserve the integrity of the Sioux territory."); COHEN'S HANDBOOK 1941, *supra* note 4, at XI (noting that to the cynic, federal Indian legislation "may frequently appear as a mechanism for the orderly plundering of the Indians").

85. Seminole Nation v. United States, 316 U.S. 286, 297 & n.12 (1942).

86. See generally MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3, 1.4, 1.7 (AM. BAR ASS'N, 2013) (setting out rules for competence, diligence, communications and conflicts of interest).

87. See Wood, *supra* note 78, at 1558 ("[W]hile the trust responsibility should support self-determination, that goal is illusory if it results from a compromised process or undue federal manipulation . . .").

88. See, e.g., United States v. Navajo Nation, 537 U.S. 488, 508 (2003).



### C. Foreign Relations

Related to their foundation in domestic trust law, federal-Indian relations and the federal trust responsibility also derive from and reflect the international law of foreign relations because “dealings between the Federal Government and the Indian Tribes have regularly been handled as part of our international relations.”<sup>89</sup> This should not be surprising because at that time the Constitution was written, Indian Nations governed much of the current United States, had shaped Anglo-, Franco-, and Hispano-American policies for centuries, and motivated and shaped the formation of the United States.<sup>90</sup> Also, early federal officials recognized that the law of nations and customary international law governed federal relations with Indians.<sup>91</sup> In particular, the relationship of Indian tribes with the United States is founded on “the settled doctrine of the law of nations,” that when a stronger sovereign assumes authority over a weaker sovereign, the stronger assumes a duty of protection for the weaker, which does not surrender its right to self-government.<sup>92</sup> This derivation from general principles common to the major legal systems in the world is one of the fundamental sources of international law.<sup>93</sup>

The Supreme Court first acknowledged the United States’ “duty of protection” to Indian tribes in *Worcester v. Georgia*.<sup>94</sup> There, in describing the 1791 Treaty of Holston, the Court stated that “[t]his treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self government; thus guarantying their lands; *assuming the duty of protection*, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.”<sup>95</sup> Similarly, many trea-

89. Pueblo of Jemez v. United States, 790 F.3d 1143, 1152 (10th Cir. 2015) (quoting Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43 (1947)).

90. Gregory Ablavsky, *Savage Constitution*, 63 DUKE L.J. 999, 1003–05 (2014). See generally JAMES KELLY & BARBARA CLARK SMITH, JAMESTOWN, QUÉBEC, SANTA FE: THREE AMERICAN BEGINNINGS (2007) (exploring the similarities and variances in European colonization and interactions with indigenous populations).

91. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1060–61, 1072 (2015).

92. *Worcester v. Georgia*, 31 U.S. 515, 555 (1832); see also *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (Congress “was but continuing the policy which prior governments had deemed essential to the protection of such Indians.”); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“From their very weakness . . . there arises the duty of protection, and with it the power. This has always been recognized . . .”). But see Pueblo of Jemez v. United States, 790 F.3d 1143, 1152–53 (10th Cir. 2015) (discussing the doctrine of Victoria and aboriginal title).

93. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(c) (AM. LAW INST. 1987).

94. *Worcester*, 31 U.S. at 556.

95. *Id.* (emphasis added).

ties between the United States and Indian tribes recognize that the tribes are under the “protection” of the United States.<sup>96</sup> Moreover, through statutes, the United States has recognized that Indian tribes are distinct political communities with territories that were “guarant[e]d by the United States.”<sup>97</sup>

The notion of one sovereign protecting another was not novel or unique when it was first applied to Indian tribes by the Supreme Court in 1832, when the federal trust responsibility in the United States was explicitly founded on established international law. Examples of this were common then in Europe, where tributary and feudal states under the protection of another state did not cause them to cease being sovereign and independent states.<sup>98</sup> The term for this “kind of international guardianship” where a “vassal state” is represented internationally by another state is “suzerainty.”<sup>99</sup> A suzerain is “a nation that exercises political control over another nation in relation to which it is sovereign. . . .”<sup>100</sup> As recognized in Emer de Vattel’s *The Law of Nations* in 1758, and in *Worcester* in 1832, a state which places itself under the protection of another without divesting itself of the right of government does not, because of that, cease to be an independent sovereign subject to the law of nations.<sup>101</sup>

Whether intentional or not, the shared sovereign territory between the federal government and Indian tribes is somewhat like the shared sovereignty between the federal government and the states.<sup>102</sup> The constituent states of the United States also are subordinated in many ways to the federal government while retaining their sovereignty, though they ceased to have international state status through adoption of the Constitution. In contrast, because Indian tribes were not parties to the Constitution, it

96. RESTATEMENT OF THE LAW, THE LAW OF AMERICAN INDIANS § 5, reporter’s notes at 59–61 (Tentative Draft No. 1) (on file with authors).

97. *Worcester*, 31 U.S. at 557. Given that the early interactions between the United States and Indian nations varied widely, it may be unfair to generalize the extent to which the agreed protection of the United States was more “a guardian’s solicitude” or a “demand for subordination. Cf. Ablavsky, *supra* note 91, at 1067; *Worcester*, 31 U.S. at 557.

98. *Worcester*, 31 U.S. at 520.

99. Rob Dickinson, *The Global Reach and Limitations of Self-Determination*, 20 CARDOZO J. INT’L & COMP. L. 367, 375 n.46 (2012).

100. Kunani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 42 (2002) (citing BLACK’S LAW DICTIONARY 1447 (6th ed. 1990)).

101. *Worcester*, 31 U.S. at 561; EMER DE VATTIEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 83 (Knud Haakonssen ed., 2008).

102. See Ablavsky, *supra* note 91, at 1076 (“Native nations’ position within the United States was conceived similarly to federalism. The restrictions imposed on tribal sovereignty resembled state limitations under the Constitution.”).

would be absurd to suggest that the adoption of the Constitution eliminated Indian tribes' sovereign status.<sup>103</sup> Of course, tribes and states are dissimilar in that the United States previously gained sovereign authority and a duty of protection over Indian tribes through purchase, possession, and conquest,<sup>104</sup> and even war with England.<sup>105</sup> However, international law has since evolved such that states (in the international sense) are obligated not to recognize or accept the incorporation of a state into another state as a result of conquest in violation of the United Nations Charter.<sup>106</sup>

For additional international context, another significant historical example of suzerain relationships was the hundreds of indigenous princely states recognized in India by the British imperial government.<sup>107</sup> It was estimated that there were between 562 and 693 princely states (*i.e.*, likely more than the number of currently federally recognized American Indian tribes), covering more than a third of India and encompassing about a quarter of the population.<sup>108</sup> Similar to Indian tribes in the United States, the Indian princely states were protected by the imperial government, and "retained significant control over internal affairs while being stripped of rights to engage in foreign relations."<sup>109</sup> British rule was based on a political arrangement founded on prior indigenous political forms, with dependent states held by subordinate or tributary chieftains.<sup>110</sup> These native political relations were congruent with the European understanding that sovereignty could be held in degrees, rather than signifying a binary quality that a state either categorically possessed or failed to retain.<sup>111</sup> Unsurprisingly, international lawyers and colonial officials in the nineteenth century embraced the

103. Cf. *United States v. Lara*, 541 U.S. 193, 210–11 (2004) (Stevens, J., concurring) ("The inherent sovereignty of the Indian tribes has a historical basis that merits special mention. They governed territory on this continent long before Columbus arrived. In contrast, most of the States were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years."); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.").

104. Ablavsky, *supra* note 91, at 1072.

105. *Id.* at 1078 (noting that the peace treaty for the War of 1812 "enshrined the principle that American Indian nations were lesser sovereigns solely under U.S. protection").

106. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 cmt. e (AM. LAW INST. 1987).

107. LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400-1900*, 238 (2010).

108. *Id.*; Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4,915 (Jan. 17, 2017) (listing 567 federally recognized Indian tribes).

109. BENTON, *supra* note 107, at 239.

110. *Id.* at 245.

111. *Id.*

comparison between American Indian tribes and the Indian princely states because the status of domestic dependent nations in the United States, in their broadest outlines, resembled that of British paramountcy in India.<sup>112</sup>

Moreover, the international legal context for the federal trust responsibility is not just a historic artifact. A modern example of suzerainty can be found in the European Union (EU).<sup>113</sup> This includes the EU's exercise of "indirect power of its populations and requires the mediation of those vassal states which acknowledge its dominium."<sup>114</sup> While the EU's relationships with its member states do not perfectly match the current federal-tribal relationship, they nonetheless reflect "a de facto supremacy over the country"<sup>115</sup> akin to the federal-tribal relationship. Indeed, the concern about suzerainty is a large part of what motivated the debate in the United Kingdom which culminated in a vote to exit the EU.<sup>116</sup>

Former and current United States territories also have had suzerain relations with the United States' federal government.<sup>117</sup> Hawaii, Guam, and Puerto Rico, through various agreements, relinquished their sovereignty to the United States for territorial status.<sup>118</sup> Similar to judicial application of the doctrine of discovery for Indian tribes, the Supreme Court in the *Insular Cases* "devised the doctrine of 'territorial incorporation' to help lay th[e] 'imperial groundwork'" for federal authority over overseas territories.<sup>119</sup> While one of these territories has become a state and others did not, all those who inhabited or still live in these territories were or continue to be

112. *Id.* at 271–72.

113. See Alain Supiot, *The Public-Private Relation in the Context of Today's Refeudalization*, 11 INT. J. CONST. L. 129, 141 (2013) (discussing same, as well as similar issues regarding the International Monetary Fund).

114. *Id.*

115. See Nihipali, *supra* note 100, at 42 n.26 (first quoting COMM. FOREIGN RELATIONS, MORGAN REPORT, S. REP. NO. 53-227 (1893) (discussing the annexation of Hawaii and its relationship with the US); then quoting BLACK'S LAW DICTIONARY 1447 (6th ed. 1990)).

116. See, e.g., Ivana Kottasova, *Brexit Voters: Why I Want to Leave the EU*, CNN MONEY (June 20, 2016), <http://money.cnn.com/2016/06/20/news/brexit-eu-referendum-arguments/> (talking about British citizens' concerns about democracy and national sovereignty); Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Mar. 20, 2017), <http://www.bbc.com/news/uk-politics-32810887> (talking about how sovereignty and democracy were reasons why people voted to leave); BBC NEWS, *Q&A: What Britain Wants from Europe* (Feb. 17, 2016), <http://www.bbc.com/news/uk-politics-32695399> (talking about how David Cameron's proposed objectives to reform UK's relation with EU include sovereignty).

117. See Gustavo Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i and the Philippines*, 58 FED. LAW. 22, 25 (2011).

118. See *id.* at 22.

119. Gelpi, *supra* note 117, at 22–23.

subject to an unequal application of laws, courts, and treatment.<sup>120</sup> “Not surprisingly, the *Insular Cases* have been, and continue to be, severely criticized as being founded on racial and ethnic prejudices that violate the very essence and foundation of our system of government” and as “a thoroughly ossified set of cases marked by the intrinsically racist imperialism of a previous era of United States colonial expansion.”<sup>121</sup>

While the criticisms of the *Insular Cases* correspond to criticism of some historic federal Indian case law and policy, the current prospects for extra-territorial colonies may differ from those for Indian tribes, which have been incorporated into existing states.<sup>122</sup> For Puerto Rico, its citizens continue to face the question of whether to maintain the status quo or pursue statehood or independence.<sup>123</sup> For Indian tribes, the trust responsibility supports self-determination, as noted above. Yet, it remains to be seen whether that ultimately may result in more complete territorial sovereignty, as states within or independent of the United States.

Just as federal-Indian relations and the federal trust relationship were founded in part on international law over 200 years ago, the more recent evolution of federal Indian policy parallels, and may be further informed by,

120. *Id.* at 24 (discussing electoral limits for Puerto Rico); *see also* *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (“Abstaining from questions involving forward sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.”); *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 475–76 (1979); *Examining Bd. of Eng’rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 574 (1976); *Balzac v. Porto Rico*, 258 U.S. 298, 309–11 (1922) (comparing U.S. incorporation of Puerto Rico, Alaska, and the Philippines, and stating that they were done “to secure them more certain protection against the world”); *Downes v. Bidwell*, 182 U.S. 244, 282, 378–90 (1901) (“grave questions will arise from differences of race, habits, laws and customs of the people”); *United States v. Laboy Torres*, 553 F.3d 715 (3d Cir. 2009); *Leneuotti Fiafia Tuau v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (American Samoa); *Commonwealth of Northern Mariana Islands v. United States*, 670 F. Supp. 2d 65 (D.D.C. 2009); *Puerto Rico v. Northwest Selecta, Inc.*, 185 D.P.R. 40 (P.R. 2012) (dormant commerce clause applies to Puerto Rico); REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS (2011), [https://obamawhitehouse.archives.gov/sites/default/files/uploads/Puerto\\_Rico\\_Task\\_Force\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf).

121. *Ballentine v. United States*, No. CIV-1999-130, 2001 WL 1242571, at \*6–7 (D.V.I. Oct. 15, 2001); *Igartúa v. United States of America*, 626 F.3d 592, 612–13 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (noting among other things that “changed conditions have long undermined the foundations of these judge-made rules, which were established in a by-gone era in consonance with the distorted views of that epoch”).

122. *But see* Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TULANE L. REV. 509, 555–56 (2007) (discussing possible original constitutional views regarding “internal” and “external” Indian tribes).

123. *See Puerto Rico’s New Governor Vows Push for Statehood*, BOSTON GLOBE (Jan. 2, 2017), <https://www.bostonglobe.com/news/nation/2017/01/02/puerto-rico-new-governor-vows-push-for-statehood/Rrw6B?NppYXsNFu1XREgkRP/story.html>.

the evolution of relevant international law. Notably, the United Nations was chartered with an express purpose of relations among nations based on the self-determination of peoples.<sup>124</sup> This included a recognition that U.N.-member states with responsibilities for the administration of non-self-governing territories—*i.e.*, those whose peoples have not yet attained a full measure of self-government—have “as a sacred trust the obligation” “to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying states of advancement.”<sup>125</sup> This parallels the domestic federal trust responsibility to support American Indian tribal self-determination.

The U.N. Charter also established an international trusteeship system for the administration and supervision of trust territories.<sup>126</sup> This system served

to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.<sup>127</sup>

Thus, the U.N. Charter expressly recognizes that trusteeship in international law supports self-determination, unlike prior international and domestic interpretations, which had applied it “to wean native peoples from their ‘backward’ ways and to ‘civilize’ them.”<sup>128</sup> Also, the U.N. Charter recognizes that self-determination does not necessarily mean independence. This provided for decolonization, but not necessarily complete independence, even though the political theory that had supported colonialism had long since been discredited.<sup>129</sup> Moreover, decolonization per the U.N. Charter applies only to geographically separate territories based on historic colonial boundaries. Therefore, the self-determination right that is recog-

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124. U.N. Charter art. 1, ¶ 2.

125. *Id.* art. 73(b).

126. *Id.* arts. 75–85.

127. *Id.* art. 76(b).

128. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 24 (1996).

129. *Id.* at 43.

nized in decolonization was an advancement, but it did not apply to indigenous groups within established countries.<sup>130</sup>

This basic, but limited, international right of self-determination has been reaffirmed in subsequent international covenants.<sup>131</sup> Through these agreements, international law has affirmed “the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>132</sup> However, until recently, international law did not apply the principle of self-determination to indigenous peoples.

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration). While it has not been ratified by member states as a treaty, it does reflect core principles that are widely accepted and therefore constitute customary international law.<sup>133</sup> The UN Declaration recognizes that indigenous peoples have collective rights, including the right to self-determination, which includes “the right to autonomy or self-government in matters relating to their internal and local affairs.”<sup>134</sup> Moreover, every international state has a duty to provide effective mechanisms for prevention of and redress for any action that has the aim or effect of dispossessing them of their lands, territories, or resources.<sup>135</sup> Additional rights and obligations recognized in the UN Declaration include the following, among many others:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures . . . .

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

. . . .

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.

130. See *id.* at 43, 129.

131. See, e.g., International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, art.1, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171.

132. G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples, pmbl., para. 16 (Sept. 13, 2007).

133. See ANAYA, *supra* note 128, at 56.

134. G.A. Res. 61/295, *supra* note 132, arts. 1, 3, 4.

135. *Id.* art. 8(2)(b).

In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

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Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

• • • •

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.<sup>136</sup>

Through these provisions, the UN Declaration recognizes corresponding indigenous rights and state duties of consultation, self-determination, self-governance, and redress—all of which relate to the common-law of trusts discussed here. Still, the UN Declaration includes the material caveat that nothing therein may be interpreted as implying any right to or authorizing or encouraging any action that would dismember or impair “the territorial integrity or political unity of sovereign and independent States.”<sup>137</sup> Thus, unlike the long-established international trusteeship system or the current political prospects for Puerto Rico, international law does not recognize that the right of self-determination for indigenous peoples includes a right to independence. Also, the current international law of indigenous rights has yet to be incorporated into United States law.

In 2010, the United States Department of State announced that the United States supported the UN Declaration.<sup>138</sup> While this was not a ratification, it was still an important step. This support also came with several notable caveats. First, the Department of State regarded the UN Declara-

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136. *Id.* arts. 18, 19, 23, 28(1), 40; *see also id.* art. 32(2) (providing for state consultation, good faith cooperation and free, prior, and informed consent for approval of projects affecting indigenous lands, territories, or resources).

137. *Id.* art. 46(1).

138. U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2010), <https://2009-2017.state.gov/documents/organization/184099.pdf>.



tion as only aspirational, notwithstanding its specific mandatory language.<sup>139</sup> Similarly, notwithstanding the language of the UN Declaration, the Department of State asserted that the requirement for free, prior, and informed consent only meant “meaningful consultation” with tribal leaders, but not necessarily the concurrence of tribal leaders to federal government actions.<sup>140</sup> Finally, cognizant of the qualification in the UN Declaration itself, the Department of State characterized the UN Declaration’s recognition of the right of self-determination for indigenous peoples to be “a new and distinct international concept of self-determination specific to indigenous peoples . . . that is different from the existing right of self-determination in international law.”<sup>141</sup> The Department of State thus recognized the UN Declaration right of self-determination as consistent with existing federal policy to support, protect, and promote tribal governmental authority over a broad range of internal and territorial affairs.<sup>142</sup> More recently, the DOJ has stated in its guidelines for working with Indian tribes that it “promotes and pursues the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>143</sup>

The federal trust responsibility therefore may be on a path to coming full circle in its relation to international law. As was true at the beginning, the federal trust responsibility may become re-domesticated from international law, but qualified as before to not controvert “the actual state of things” in the United States.<sup>144</sup> Therefore, as with incorporation of common law principles from the law of trusts, this updated incorporation of international law may be appropriate and helpful, though it may have limited impact in disrupting the status quo.<sup>145</sup> Still, there is a sound basis for this, especially for originalists, because the Founders originally intended for all the branches of the federal government to use contemporary international law as an interpretive framework in defining Indian rights in the United States.<sup>146</sup>

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139. *Id.* at 1.

140. *Id.* at 5.

141. *Id.* at 3.

142. *Id.*

143. Attorney General Guidelines Stating Principles for Working with Federally Recognized Indian Tribes, 79 Fed. Reg. 73,905 (Dec. 12, 2014).

144. *Worcester v. Georgia*, 31 U.S. 515, 543 (1832).

145. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 165–66 (2005).

146. *Id.* at 193–95.

### D. (Pre)Constitutional Law

Indian affairs were long-standing and significant issues at the time of the constitutional convention, were inseparable from other critical constitutional issues for the Framers, and ultimately elevated to constitutional status.<sup>147</sup> In *Worcester v. Georgia*, international law was “inextricably linked” to the Constitution in Indian affairs.<sup>148</sup> Also, as explained in *United States v. Lara*, federal power to regulate Indian affairs—like other federal powers—derives from the Constitution.<sup>149</sup> Namely, the commerce and treaty clauses have been recognized as the basis for the “plenary and exclusive” power of Congress over Indian affairs.<sup>150</sup> The Indian Commerce Clause in particular “clearly . . . designated [Indians] by a distinct appellation” from foreign Nations and states so that they were considered ‘entirely distinct.’<sup>151</sup> This “clause is not limited to regulation of trade or economic activities, or laws that are interstate in character or impact.”<sup>152</sup> Instead, it provides to Congress and divests the states of “virtually all authority over Indian commerce and Indian tribes.”<sup>153</sup> Especially following the end of treaty-making with Indian tribes in 1871,<sup>154</sup> the Indian Commerce Clause “has become the linchpin in the more general power over Indian affairs” and is the most often cited basis for modern legislation regarding Indians.<sup>155</sup> Thus, modern federal authority over Indian affairs, including the federal Indian trust responsibility, typically reflects either direct constitutional authority by Congress<sup>156</sup> or authority delegated by Congress to the Executive Branch.<sup>157</sup>

It is no stretch to argue that core federalism principles embedded into the Constitution derive directly from the Framers’ concerns about Indian

147. See Ablavsky, *supra* note 90, at 1004–08, 1080–85.

148. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36, 37 (1996).

149. *United States v. Lara*, 541 U.S. 193, 200 (2004) (citing cases).

150. *Id.*; cf. U.S. CONST. art IV, § 3 (Congress’ authority to create and admit new states and administer territories).

151. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831).

152. COHEN’S HANDBOOK 2012, *supra* note 71, § 5.01(3) (citing *United States v. Lomayaoma*, 86 F.3d 142, 145 (9th Cir. 1996) (noting that the Indian Commerce Clause powers are “more extensive” than interstate commerce clause powers)).

153. *Id.* (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996)).

154. See *supra* note 14 and accompanying text.

155. See, e.g., COHEN’S HANDBOOK 2012, *supra* note 71, § 5.01(3) (citing cases where the Indian Commerce Clause served as the basis for legislation ranging from gaming to cultural preservation).

156. *United States v. Lara*, 541 U.S. 193, 196 (2004) (affirming Congress’s constitutional power to relax restrictions on Indian tribes’ inherent legal authority).

157. See *South Dakota v. U.S. Dep’t of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005) (rejecting nondelegation challenge to trust-land acquisition by the Department of the Interior).

affairs. As Professor Ablavsky has noted, “[t]he most pressing issue for early Americans was federalism: would the states or the national government possess authority over Indian relations?”<sup>158</sup> After the Revolution, the vast western lands desired by the Americans were possessed by Indians, and the states made conflicting claims to those lands that threatened to destroy the nascent American republic.<sup>159</sup> Ablavsky adds that “the background principle that motivated federal constitutional supremacy over Indian affairs—the concern that states’ attempts to assert jurisdiction over Native nations were legally dubious and would lead to conflict—has been vindicated by American history. . . .”<sup>160</sup> In short, federal superintendency over American-tribal relations dominated Indian affairs at the Founding.

Hence, federal power over Indian affairs and the federal trust responsibility also predate and continue beyond the Constitution. In the Northwest Ordinance of 1787, the United States adopted the first important law on Indian relations and established national policy towards Indians, two months before the draft Constitution was presented and signed and two years before it became effective. The Northwest Ordinance declared the following:

[t]he utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.<sup>161</sup>

This assertion of preconstitutional federal power to legislate to protect Indian lands and interests became the guiding principle of federal Indian law,<sup>162</sup> which has expanded exponentially following adoption of the Constitution.<sup>163</sup> Also, this general authority of the federal government to legislate regarding Indian affairs may constitute a “necessarily inherent” national power that predates and survives the Constitution to the extent that it was not “squeezed” into the Constitution.<sup>164</sup> Therefore, to the extent that the

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158. Ablavsky, *supra* note 91, at 1019.

159. *Id.* at 1018–19.

160. *Id.* at 1052.

161. NORTHWEST ORDINANCE art. III (July 13, 1787).

162. Pueblo of Jemez v. United States, 790 F.3d 1143, 1153 (10th Cir. 2015) (quoting Cohen, *supra* note 89, at 45).

163. See generally Title 25 U.S.C. §§ 1–5636 (2015).

164. United States v. Lara, 541 U.S. 193, 201 (2004); United States v. Kagama, 118 U.S. 375, 384 (1886) (basing federal authority over Indians on the duty of protection that arose

federal trust responsibility is not a principle of constitutional law, it is still a surviving principle of preconstitutional law.

But while the power of Congress over Indian affairs may be plenary, “this power to control and manage is not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it is subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions.”<sup>165</sup> Consistent with the standard first set out in the Northwest Ordinance, the government’s dealings with Indians must be judged by the traditional rule that the trustee must act in good faith toward its beneficiary based on relevant evidence, and not just the government’s simple assertion.<sup>166</sup> Moreover, while the Supreme Court previously presumed congressional good faith based on the idea that Indian affairs were a political matter not subject to judicial review, that view has long since been discredited.<sup>167</sup>

The “limitations inhering in . . . a guardianship” are of course the federal government’s duty of protection, essentially as an inherent limit on the exercise of federal Indian affairs authority. This corresponds to the “limitations on the commerce power . . . inherent in the very language of the Commerce Clause,”<sup>168</sup> and the inherent “presupposition of our constitutional structure,” under the Eleventh Amendment.<sup>169</sup> This understanding of the federal trust responsibility corresponds to protection of state sovereignty based on the Constitution’s “history and structure” beyond any specific provision.<sup>170</sup> Here, courts must consider “whether a particular measure

from the assertion of that authority); Fletcher, *supra* note 122, at 544, 554–55; see Ablavsky, *supra* note 91, at 1082 (stating that the Supreme Court has “dragged in the Indian Commerce Clause post hoc to sanitize” the plenary power doctrine to avoid unenumerated powers and the racist basis of *Kagama*).

165. United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980) (quoting United States v. Creek Nation, 295 U.S. at 103, 109–10 (1935)) (and citing additional cases) (citations omitted); see also United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (“The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.”).

166. *Sioux Nation*, 448 U.S. at 416–17. Because *Sioux Nation* was a congressional reference case concerning congressional action, it is one of the few modern cases to apply the “general” trust responsibility outside the limits of the Indian Tucker Act or the Administrative Procedure Act. *Id.*

167. *Id.* at 413 (citing Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

168. United States v. Lopez, 514 U.S. 549, 553 (1995); see United States v. Morrison, 529 U.S. 598, 608 n.3 (2000) (quoting *Lopez*, 514 U.S. at 556–57).

169. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991); see Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (quoting same). See generally *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“The powers of the legislature are defined and limited . . . and those limits may not be mistaken, or forgotten”).

170. Ablavsky, *supra* note 91, at 1085–86, 1086 n. 397 (citing *Alden v. Maine*, 527 U.S. 706, 714 (1999); United States v. Windsor, 133 S. Ct. 2675, 2689–92 (2013) (questioning the Defense of Marriage Act for departing from the constitutional “history and tradition of

was appropriate for protecting and advancing the tribes' interests" and properly "taken in pursuance of Congress's power to manage and control tribal lands for the Indians' welfare" via "a thoroughgoing and impartial examination of the historical record."<sup>171</sup>

As Felix Cohen explained, "the theory of American law governing Indian affairs has always been that the Government owed a duty of protection to the Indian in his relations with non-Indians" and "the entire body of federal legislation on Indian affairs . . . may be viewed in its entirety as the concrete content of the abstract principle of federal protection of the Indian."<sup>172</sup> Under this paradigm, the federal trust responsibility constitutes a foundational basis for, not merely a function of, congressional legislation regarding Indians. And it imposes constitutional limits on the exercise of congressional Indian affairs authority, just as there are inherent limits in the Interstate Commerce Clause.

As may be confusing to observers, the federal trust responsibility is also a source of federal power at the same time it limits federal power. The American Law Institute's ongoing project to develop a Restatement of the Law on the Law of American Indians explicitly acknowledges that the general trust relationship is a source of federal legislative authority.<sup>173</sup> The current draft Restatement notes:

The United States' trust relationship with Indians and tribes authorizes the federal government to provide services to Indians and tribes. Through the treaty process, and the federal government's acquisition of and control over Indian and tribal trust assets, the United States agreed to provide Indians with access to governmental services, including without limitation education, housing, health care, and the preservation of law and order. Congress is fulfilling

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reliance on state law to define marriage")); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623–24 (2013) (invalidating a portion of the Voting Rights Act for violating the "fundamental principle of equal sovereignty among the States) (internal quotations and citations omitted); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602–03 (2012) (limiting congressional power to condition grants to states under the Spending Clause because "[o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government"); *Printz v. United States*, 521 U.S. 898, 906–12 (1997) (holding that, although "there is no constitutional text speaking to this precise question," the federal government may not "commandeer" state officials based on "historical understanding and practice . . . the structure of the Constitution, and . . . the jurisprudence of this Court").

171. *Sioux Nation*, 448 U.S. at 415–16.

172. COHEN'S HANDBOOK 1941, *supra* note 4, at XI, XIII

173. RESTATEMENT OF THE LAW, THE LAW OF AMERICAN INDIANS § 7(d) cmt. d (Tentative Draft No. 1) (on file with authors).

what it perceives as a special obligation to protect Indian tribes and their members.<sup>174</sup>

The fact that the federal trust responsibility is a source as well as a limit for federal Indian authority reflects its multifaceted legal origins. As explained above, rather than merely being *sui generis*, the federal trust responsibility has roots in and ongoing ties to a number of other basic areas of common law. Identifying and explaining these connections helps to clarify the federal trust responsibility. Professor Philip Frickey once encouraged the Supreme Court to take federal Indian law cases more seriously by arguing that the constitutionally based relationship between Indian tribes and the United States is central to understanding American public law.<sup>175</sup> For Professor Frickey, the Supreme Court lost its way in navigating how international law informs federal Indian law in order to seek “coherence” rather than embrace the full character of this area of public law.<sup>176</sup> Federal Indian law is the body of law arising from the federal government’s trust responsibility to Indian tribes and Indian people, not another messy area of law that the Court should clean up.

### III. ISSUES PREVENTING GREATER CLARITY OR RECOGNITION OF THE FEDERAL TRUST RESPONSIBILITY

Providing a better understanding of the broader common-law foundation for the federal trust responsibility raises the question of what has impeded understanding and better recognition of that principle in the current era of self-determination. Those issues are explored in this section.

#### A. *Executive Liability Evasion*

Notwithstanding the established law and policy of the federal trust responsibility in the self-determination era, and the many positive efforts by Congress and presidents over the last five decades, the Executive Branch has repeatedly sought to avoid, reduce, and repudiate the federal trust responsibility to Indians. This has been done by misrepresenting relevant facts and law in Indian trust litigation in an effort to limit federal liability. As explained below, this is part of a broader effort to protect the public fisc and prevail in litigation. These efforts have sought systemic changes in law to diminish recognized federal responsibilities and the corresponding enforceable rights of Indians. This stems in part from a statutory designation

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174. *Id.* § 4 cmt. e.

175. Frickey, *supra* note 8, at 381, 439–40.

176. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 435–36 (2005).

that the DOJ controls litigation in which the United States is a party<sup>177</sup> and the DOJ's denial of the clear existence of potential conflicts in representing the United States in dealings with Indians.

In his seminal 1970 Special Message to Congress on Indian Affairs, President Nixon recognized that federal-Indian conflicts present a key problem in federal Indian policy:

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.<sup>178</sup>

To correct this problem, President Nixon proposed to establish an Indian Trust Counsel Authority,<sup>179</sup> and legislation to establish that office was considered several times by Congress.<sup>180</sup> However, that proposal was never enacted despite the continuing need to find a viable means for resolving these conflicts of interest, in part because of concerns that the Executive Branch viewed the proposal as a means by which it "would simply be relieved of any trust responsibility."<sup>181</sup> In the end, the Executive Branch

177. 28 U.S.C. §§ 516, 519 (2015).

178. Special Message to the Congress on Indian Affairs, *supra* note 23, at 573.

179. *Id.* at 573-74; RICHARD NIXON, RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 9-10 (1970).

180. See *Indian Trust Counsel: Hearings on S. 2035 Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 92d Cong. (1971) [hereinafter *Hearings on S. 2035*]; *Indian Trust Counsel Authority: Hearings on S. 1012 and S. 1339 Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong., S. Hrg. Rep. 441-56 (1973); *Creation of the Indian Trust Counsel Authority: Hearings on H.R. 6106, H.R. 6374, and H.R. 6494 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 93rd Cong., H. Hrg. Rep. 441-11 (1973); *Trust Counsel for Indian Affairs in the Dep't of the Interior: Hearing on S. 2451 to Establish in the Department of the Interior a Trust Counsel for Indian Assets Before S. Select Comm. on Indian Affairs*, 101st Cong., S. Hrg. Rep. 101-1011 (1990) [hereinafter *Hearing on S. 2451*].

181. *Hearing on S. 2451*, *supra* note 180, at 10 (statement of Sen. McCain, Vice Chairman, S. Select Comm. on Indian Affairs); see *Hearings on S. 2035*, *supra* note 180, at 12 (letter from Richard G. Kleindienst, Deputy Att'y Gen.); see also Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1385-90 (2003).

shared the goal “to ensure that every policy decision of [the Department of] the Interior and other Federal agencies and bureaus with an impact on the trust obligation of this Government has fully measured that decision in respect to carrying out its trust obligation.”<sup>182</sup> But the Executive Branch specifically opposed the legislation as “not . . . necessary to accomplish this goal,” and instead explored “accomplishing and institutionalizing this goal” within the DOI.<sup>183</sup> Thus, the Indian Trust Counsel Authority remains the only proposal in Nixon’s Special Message to Congress which has not been enacted.<sup>184</sup>

Notably, the Executive Branch in the early 1970s sought to address this concern pending legislation by filing in Indian trust litigation what became known as “split briefs.” This was done at the direction of the White House, as reflected in two 1972 letters, one from the Attorney General to the White House and another from the Solicitor General.<sup>185</sup> Under this arrangement, in cases involving a federal conflict of interest with Indians, the United States would file a single brief in which DOI would function like an Indian Trust Counsel by presenting arguments as a trustee in support of Indian interests separate from arguments in the brief by DOJ against Indians.<sup>186</sup> This was done six times, and each time, the DOI position prevailed over DOJ’s position.<sup>187</sup> In *Critzer*, the court even noted the government’s “com-

182. *Hearing on S. 2451, supra* note 180, at 11.

183. *Id.* at 12, 65 (testimony and statement of Eddie Brown, Assistant Sec’y for Indian Affairs).

184. Compare Special Message to Congress on Indian Affairs, *supra* note 23, at 567–74 (proposing rejection of termination, tribal right to control and operate federal programs, restoring Blue Lake to Taos Pueblo, Indian education self-determination, Indian economic development, Indian health funding, helping urban Indians, an Indian Trust Counsel Authority, and an Assistant Secretary for Indian Affairs), with 25 U.S.C. §§ 5301–5423 (2015) (general and education self-determination), 5361–5368 (self-governance), 1451–1546 (economic development), 1601–1685 (health care including for urban Indians), 2000–2026 (education), 2401–2455 (alcohol and substance abuse treatment including for urban Indians), and 43 U.S.C. § 1453a (2015) (additional Assistant Secretary), and Act of Dec. 15, 1970, Pub. L. 91-550, 84 Stat. 1437 (1970) (Blue Lake restoration).

185. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, TASK FORCE NO. 9, LAW CONSOLIDATION, REVISION, AND CODIFICATION 6–7, App. II at 180–81 (1976), reproduced at *Hearing on S. 2451, supra* note 180, at 52, 54–59 (describing arrangement and reproducing the text of those letters); see also Reid Peyton Chambers, *Implementing the Federal Trust Responsibility at the Interior Department After President Nixon’s 1970 Message to Congress on Indian Affairs Supporting Tribal Self-Determination*, 53 TULSA L. REV (forthcoming 2017) (manuscript at 6–7) (on file with authors).

186. *Hearing on S. 2451, supra* note 180, at 10 (statement of Sen. McCain).

187. See *Federal Government’s Relationship with American Indians: Hearings Before the S. Spec. Comm. on Investigations of the Select Comm. on Indian Affairs*, 101st Cong., S. Hrg. Rep., at 41–43, 50, 53, 66–67, 458–60 (1989) (discussing Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976); United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir.



mendable forthrightness” in including the statement by DOI which made clear that “the government was in dispute with itself.”<sup>188</sup> DOJ viewed that as a criticism and used that as a basis to seek to be relieved of split-briefing in 1976, which DOI and the National Congress of American Indians (NCAI) opposed.<sup>189</sup> This DOI/DOJ division even arose in cases where split-briefing did not take place, with DOI reminding DOJ that “Congress has reposed principle authority for ‘the management of all Indian affairs and of all matters arising out of Indian relations’ with DOI and expressing “serious reservations” about a proposed statement by DOJ in litigation on the nature of the trust relationship between the United States and Indian tribes.<sup>190</sup> Finally, in 1979, Attorney General Griffin Bell ended this practice, so that there would be “a single position of the United States” in Indian trust litigation.<sup>191</sup>

Since then, the DOJ has continued to assert that it has no conflict of interest in addressing federal trust responsibility matters because it only represents the United States.<sup>192</sup> This issue of federal-Indian conflicts has reached the Supreme Court several times, with the Supreme Court siding with the DOJ in each instance.<sup>193</sup> Also, in 2007, the DOJ and DOI joined with the White House Office of Management and Budget to urge that Congress enact “trust reform” legislation to implement an “Indian-owner managed trust relationship” that would relieve the government of trust obligations and close loopholes tightly to prevent potential future misman-

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1976); *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974); *Stevens v. Comm’r*, 452 F.2d 741 (9th Cir. 1972); *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Ore. 1977)); *Hearing on S.2451, supra* note 180, at 18–20, 56–60 (testimony of Reid Chambers and correspondence documenting the split brief practice including *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), as an example).

188. *Critzer*, 498 F.2d at 1160–61.

189. *Hearing on S. 2451, supra* note 180, at 59–63 (reproducing text of correspondence, including DOI comment that the Administrative Conference of the United States had recognized the problems caused by this conflict of interest).

190. Krulitz Letter, *supra* note 53, at 1 (quoting 25 U.S.C. § 2).

191. Letter from Griffin B. Bell to Cecil D. Andrus, *supra* note 23; see also Michael J. Berrigan, Assoc. Solicitor, Division of Indian Affairs, Office of the Solicitor, U.S. Dep’t of the Interior, *Navigating the Ethical Landscape in Pursuit of Federal Justice: Azimuths, and Back-Azimuths*, Presentation at 37th Annual Fed. Bar Ass’n Indian Law Conference, April 20, 2012, at 316 (discussing the unitary executive theory).

192. See, e.g., Juliano, *supra* note 181, at 1326 & n.124; David I. Gold, *I Know You’re the Government’s Lawyer, But Are You My Lawyer Too? An Exploration of the Federal-Native American Trust Relationship and Conflicts of Interest*, 19 BUFF. PUB. INT. L.J. 1 (2000-2001); G. William Rice, *Federal Trust Responsibility and Conflicts of Interest: Environmental Protection or Natural Resource Development?*, Panel discussion at North Dakota Law Review Symposium Conference, in 71 N.D. L. REV. 365, 378 (1995).

193. See, e.g., *Jicarilla VII*, 564 U.S. 162 (2016); *Nevada v. United States*, 463 U.S. 110 (1983); *Arizona v. California*, 460 U.S. 605 (1983).

agement claims and preclude future government exposure to liability for any residual responsibilities.<sup>194</sup> That proposal sought to address the structural problems that gave rise to significant Indian trust mismanagement claims by eliminating federal responsibility and liability, rather than improving the quality of federal management.<sup>195</sup> Not surprisingly, Indian advocates characterized the proposal as repudiating or terminating the federal trust responsibility<sup>196</sup> and it was not enacted.<sup>197</sup> Instead, the Claims Resolution Act of 2010 was enacted, which only settled individual Indian trust mismanagement claims and provided funding to reduce fractionation of individual Indian trust land ownership.<sup>198</sup>

More recently, the DOI has reaffirmed that it has an obligation to “[w]ork with Indian tribes and individual Indian beneficiaries to avoid or resolve conflicts to the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.”<sup>199</sup> Meanwhile, the DOJ’s published guidelines for working with Indian tribes only states that the DOJ honors and strives to act in accordance with the general trust relationship between the United States and Indian tribes, while the DOJ will handle litigation involving tribes only “in a manner that is mindful of the government-to-government relationship.”<sup>200</sup> Thus, even the most recent official public pronouncements, the DOI and DOJ illustrate differing views regarding the federal trust responsibility. Also the long history of federal efforts and policy statements regarding fulfillment of the federal trust responsibility belies the denial of those duties by the department charged with defending the United States.

This important problem recognized by President Nixon that has not gone away is evidence of a broader problem. The Executive Branch some-

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194. *Indian Trust Fund Litigation: Hearing on Oversight Hearing on Indian Trust Fund Litigation Before the S. Comm. on Indian Affairs*, 110th Cong., S. Hrg. Rep. 110-71, at 176–78 (2007) [hereinafter *Indian Trust Fund Litigation: Hearing on Oversight*] (letter & enclosures from Dirk Kempthorne, Sec’y of the Interior, and Alberto R. Gonzales, Att’y Gen., to Hon. Byron Dorgan, Chairman, S. Comm. on Indian Affairs (Mar. 1, 2007)).

195. *Id.* at 174.

196. *Id.* at 27, 28, 38.

197. S. REP. NO. 114-207, at 4–5 (2016) (reviewing Indian trust reform legislation in previous Congresses).

198. Claims Resolution Act of 2010, Pub. L. 111-291, § 101, 124 Stat. 3064, 3066 (2010).

199. S.O. NO. 3335, *supra* note 57, § 5, princ. 5.

200. Attorney General Guidelines Stating Principles for Working with Federally Recognized Indian Tribes, 79 Fed. Reg. 73,905 (Dec. 12, 2014); *cf.* Memorandum from Janet Reno, Att’y Gen., on Dep’t of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes § III.D. (June 1, 1995), <https://www.justice.gov/archives/ag/attorney-general-june-1-1995-memorandum-indian-sovereignty> (“The trust responsibility, in both sense, will guide the Department in litigation . . . affecting Indian country.”).

times has difficulty in providing justice for those who assert claims against the United States, especially in the Court of Federal Claims, where significant monetary claims against the federal government must be brought.<sup>201</sup> This is the basic issue expressed in the epigraph here. This broader problem also has been well-summarized by the then-Chief Judge of the Court of Federal Claims concerning the *Winstar* savings and loan cases,<sup>202</sup> which resulted in multi-million dollar damage awards against the United States:

[b]ecause the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic. While the court can appreciate the concerns of the government's attorneys to protect the public treasury, . . . it must severely criticize the tactics and approach of the government . . . .<sup>203</sup>

This issue also has arisen in other cases, including spent nuclear fuel cases where the United States has faced numerous plaintiffs asserting very large damage claims.<sup>204</sup>

Moreover, it has been documented and the DOJ has sometimes admitted, through what are called “confessions of error,” that it has made misrepresentations in the Supreme Court.<sup>205</sup> This is especially significant because

201. See Tucker Act, 28 U.S.C. §§ 1491(a)(1), 1346 (2015).

202. *United States v. Winstar Corp.* 518 U.S. 839, 932–34 (1996).

203. *California Fed. Bank v. United States*, 39 Fed. Cl. 753, 754–55 (Fed. Cl. 1997), *rev'd sub nom. on other grounds*, *Suess v. United States*, 535 F.3d 1348 (Fed. Cir. 2008); see also *S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 57 Fed. Cl. 598, 641–42 (Fed. Cl. 2003) (awarding over \$65 million in damages to institutional plaintiffs, concluding that the Court was “dismayed at the Government’s tactics in the liability phase . . . despite a clear finding of breach and obvious harm” and “Defendant continued to ignore the clear precedents of earlier *Winstar*-related damages cases”), *affirmed regarding institutional damage award and reversed and vacated on other grounds*, 422 F.3d 1319 (Fed. Cir. 2005).

204. See, e.g., *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1355–57 (Fed. Cir. 2003) (affirming federal attorney sanction for misquoted judicial opinions in brief to conceal adverse authority, “which intentionally or negligently misled the court”); *Entergy Nuclear Fitzpatrick, LLC v. United States*, 93 Fed. Cl. 739, 743–46, 744 n.4 (Fed. Cl. 2010) (rejecting effort “to circumvent the very clear directive” of a mandamus order, finding, among other things, that “the Government quotes this [relevant] text but carefully omits the patently relevant portion . . . . To note that the Court is highly dismayed with Defendant’s brief in this regard is an understatement. It flatly will not countenance any such misbehavior in the future.”).

205. See Allen Pusey, *A State Secrets Doctrine is Born*, A.B.A. J., March 2015, at 72 (discussing Supreme Court adoption of state secrets doctrine in *United States v. Reynolds*, 345 U.S. 1 (1953), a wrongful death action based on federal assertion that disclosure of files would hamper national security, noting that declassification of those files 43 years later did not reveal state secrets, and suggesting that “the very case that produced the doctrine reveals its potential for abuse”); Neal Katyal, *Confessions of Error: The Solicitor General’s Mistakes*

“[w]hen the Solicitor General of the United States makes a representation to the Supreme Court, trustworthiness is presumed.”<sup>206</sup> In Indian law cases, these errors included a much later confession that the government had employed gross stereotypes to disparage the intelligence and competency of Indians reflecting prejudices to justify federal jurisdiction, in arguments that unfortunately were adopted by the Supreme Court.<sup>207</sup> In a more recent case, the DOJ made “disturbing” arguments which were adopted by the Supreme Court—that original Indian land title was not a compensable property interest under the Fifth Amendment because Indians were warlike, heathens, infidels, and savages that had been conquered.<sup>208</sup>

These problems affect the fulfillment of the federal trust responsibility because the DOJ repeatedly has sought to avoid liability in Indian trust litigation via misrepresentations. For example, a number of federal courts have either imposed sanctions for or strongly rejected unfounded federal assertions in Indian breach of trust cases.<sup>209</sup> Among these cases, three ex-

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*During the Japanese-American Internment Cases*, JUSTICE BLOGS (May 20, 2011), <https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> (admitting failure to disclose key intelligence report that undermined rationale in *Korematsu v. United States*, 323 U.S. 214 (1944)).

206. Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec., 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012) (concerning unsupported representation by DOJ that was expressly relied on by the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009)); Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Security, 868 F. Supp. 2d 284, 288–89 (S.D.N.Y. 2012) (noting that the representation was in need of correction and that DOJ acknowledged this to the Supreme Court in a letter three years after it had decided the case).

207. Neal Katyal, Acting Solicitor Gen., Speech of Acting Solicitor Gen. Neal Katyal, 3–6 (Apr. 8, 2011) (concerning *United States v. Sandoval*, 231 U.S. 28 (1913)), in Stipulation of Dismissal with Prejudice, California Indian Law Ass’n v. U.S. Dep’t of Justice, No. 15-00539 (D.D.C. Nov. 20, 2015), Exhibit 1, [http://www.calindianlaw.org/uploads/2/8/4/5/28458371/neal\\_katyal\\_osg\\_speech\\_transcript.pdf](http://www.calindianlaw.org/uploads/2/8/4/5/28458371/neal_katyal_osg_speech_transcript.pdf).

208. *Id.* at 6–8 (concerning *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)).

209. *See, e.g.*, *Quapaw Tribe v. United States*, 123 Fed. Cl. 673, 676–77 (Fed. Cl. 2015) (“The Court will not employ a twisted interpretation of the 1833 Treaty to allow the Government to escape a promise it so clearly made. . . . Reading the Treaty as the Quapaw Tribe would read it (or indeed as any reasonable person would read it), the Government has breached its promise to make annual educational payments, and should be held accountable . . . . A 2011 case in this Court involving nearly identical facts is dispositive of Defendant’s position . . . . Defendant’s counsel in [that case] was the same as in this case, yet Defendant did not even disclose or discuss [that case] in its brief to the Court.”); *Colorado River Indian Tribes v. United States*, No. 06-901L, slip op. at 7 (Fed. Cl. Sept. 3, 2015) (“Although defendant’s argument has been rejected numerous times in the past, as discussed below, defendant, once again in this case, asserts that this court is divested of jurisdiction upon filing of a complaint in a District Court ‘regardless of the filing sequence of Plaintiff’s district court case and this case.’ ”); *Osage Tribe v. United States*, 93 Fed. Cl. 1, 6–7 (Fed. Cl. 2010) (rejecting assertion that the United States is not bound by prior rulings in case on breach of trust duties, noting that “[t]he court is dismayed by defendant’s approach to the

amples warrant further discussion. First, the Supreme Court and federal appellate courts have repeatedly rejected Executive Branch arguments that there is essentially no enforceable federal-tribal fiduciary relationship because the United States is not subject to any duty that is not expressly stated in statutes or regulations.<sup>210</sup> Notwithstanding those numerous decisions, the Executive Branch has continued to assert this argument.

This argument was most recently rejected by the Court of Federal Claims in *Jicarilla Apache Nation v. United States*, on remand from the Supreme Court,<sup>211</sup> and warrants restatement:

[The United States] would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic-defying feat of legal gymnastics.

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resolution of plaintiff's claims"); *Osage Tribe v. United States*, 75 Fed. Cl. 462, 468–69, 480–81 (Fed. Cl. 2007) (rejecting argument previously rejected six times by the Supreme Court and the Federal Circuit, noting that “Defendant’s argument would . . . ‘reward the government for inaction that violates the government’s fiduciary duties to collect funds and accrue interest’ ”); *Jicarilla Apache Nation v. United States (Jicarilla II)*, 60 Fed. Cl. 611, 613–14 (Fed. Cl. 2004) (rejecting opposition to disclosure of tribes’ own information); *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135–37 (Fed. Cl. 2004) (“[c]ontrary to defendant’s importunings, this court plainly has the authority to issue such orders” to require preservation of relevant evidence.); *Mescal v. United States*, 161 F.R.D. 450, 454–55 (D.N.M. 1997) (sanctioning federal attorney *sua sponte* for factual misrepresentations); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 21 Cl. Ct. 176, 192–93 (Cl. Ct. 1990) (“Such an assertion [by the United States], we find, is shocking, insofar as it is a gross misstatement of the law.”); *Assiniboine & Sioux Tribes of Fort Peck Reservation v. United States*, 16 Cl. Ct. 158, 164–66 (Cl. Ct. 1989) (imposing sanction for federal factual misrepresentation).

210. See, e.g., *Jicarilla VII*, 564 U.S. 162, 177 (2011) (“We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed.”); *United States v. White Mountain Apache*, 537 U.S. 465, 476–77 (2003) (affirming trust duty even though there was not a word in the only relevant law that suggested such a mandate); *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) (under *White Mountain Apache*, 537 U.S. at 476–77, “[o]nce a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation”); *Cobell v. Norton*, 240 F.3d 1081, 1100–01 (D.C. Cir. 2001) (per *Mitchell II*, “[t]he general ‘contours’ of the government’s obligations may be defined by statute, but the interstices must be filled in through reference to general trust law”); *Duncan v. United States*, 667 F.2d 36, 42–43 (Ct. Cl. 1981) (rejecting that “a federal trust must spell out specifically all the trust duties of the Government”); *Navajo Tribe v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980) (“Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . .”).

211. *Jicarilla VII*, 564 U.S. at 162.

That routine would commence with a full jurisprudential gainer—a twisting, backwards maneuver that would allow the court to ignore cases like *White Mountain Apache* and *Mitchell II* that have relied upon the common law to map the scope of enforceable fiduciary duties established by statutes and regulations. The court would then need to vault over *Cheyenne-Arapaho* and a soaring pyramid of other precedents, all of which have found defendant’s argument wanting. Next, the court would be called upon to handspring to the conclusion that Congress’ repeated legislative efforts to ensure the safe investment of tribal funds were mostly for naught—because, if defendant is correct, the provisions enacted were generally not perspicuous enough to create enforceable duties and, even where specific enough to do so, left interstices in which defendant could range freely. Indeed, while egging the court on, defendant never quite comes to grip with the fact that if the government’s fiduciary duties are limited to the plain dictates of the statutes themselves, such duties are not really “fiduciary” duties at all. *See Varsity Corp. v. Howe*, 516 U.S. 489, 504 . . . (1996) (“[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose”). Taken to its logical dismount, defendant’s view of the controlling statutes would not only defeat the twin claims at issue, but virtually all the investment claims found in the tribal trust cases, few of which invoke *haec verba* specific language in a statute or regulation. Were the court convinced even to attempt this tumbling run, it almost certainly would end up flat on its back and thereby garner from the three judges reviewing its efforts a combined score of “zero”—not coincidentally, precisely the number of decisions that have adopted defendant’s position.

This court will not be the first to blunder down this path.<sup>212</sup>

Notwithstanding that strongly worded decision and the “phalanx of . . . precedent” on which it is based<sup>213</sup> the Executive Branch has continued to assert that its trust duties to Indians are limited to express statutory or regulatory mandates.<sup>214</sup>

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212. *Jicarilla Apache Nation v. United States (Jicarilla VIII)*, 100 Fed. Cl. 726, 738 (Fed. Cl. 2011).

213. *Id.*

214. *See, e.g.*, Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendants’ Motion to Dismiss at 5, *Sissteon Wahpeton Oyate v. Jewell*, No. 13-00601 (D.D.C. Sept. 17, 2015); U.S.’s Memorandum of Contentions of Fact and Concessions of Law (Phase 1 Trial) at 3, *Jicarilla Apache Nation v. United States*, No. 02-025 (Fed. Cl. Oct. 28, 2011),

Similar issues apply to the Executive Branch's assertion that its management of Indian trust assets should be subject to an arbitrary and capricious administrative standard of review, rather than a strict fiduciary standard of care, contrary to fifteen decisions by the Supreme Court and lower federal courts.<sup>215</sup> This problem also has existed in tribal contract support claim cases. There:

[r]ather than acting quickly to resolve these claims, which are supported by years of data documenting the government's underpayments, the agencies insisted that in order to settle these claims they must re-audit contracts and re-calculate indirect cost rates according to retroactively adopted accounting rules in an effort to re-determine the amount of underpayments. The result has largely been to further delay justice and further burden tribes with slow, expensive and unnecessary accounting battles . . . .<sup>216</sup>

Next, notwithstanding a heightened duty of candor because of the "special credence" that the Supreme Court gives to the Solicitor General,<sup>217</sup> the DOJ has been neither candid with the Supreme Court nor consistent with prior DOI policy in either of two recent Supreme Court Indian trust responsibility cases. In *United States v. Navajo Nation*,<sup>218</sup> the Supreme Court held that neither the Indian Mineral Leasing Act (IMLA) nor its regulations established enforceable fiduciary duties that precluded the Secretary of the Interior from secretly colluding with a mining company to force extended unsupervised tribal lease negotiations under severe economic pressure, not disclosing material support for a higher royalty, and then approving the resulting lease amendments without assessing their merits.<sup>219</sup>

ECF No. 350; United States' Post-Trial Brief, Proposed Findings of Fact, and Proposed Conclusions of Law at 55 n.1, *Jicarilla Apache Nation v. United States*, No. 02-025 (Fed. Cl. Jan. 23, 2012), ECF No. 380.

215. See *Jicarilla VIII*, 100 Fed. Cl. at 739 (quoting, citing, and discussing prior decisions); *Jicarilla Apache Nation v. United States (Jicarilla III)*, 88 Fed. Cl. 1, 20 & n.28 (Fed. Cl. 2009) (noting "it is often observed that the duty of care owed by the United States 'is not mere reasonableness, but the highest fiduciary standards' ") (citation omitted), *mandamus denied on other ground sub. nom, In re United States*, Misc. No. 09-908, 2011 WL 7447331 (Fed. Cir. Aug. 3, 2011); see also *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the Government's conduct in dealings with Indians "should therefore be judged by the most exacting fiduciary standards.").

216. *Indian Country Priorities for the 114th Congress: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 19 (2015) (statement of Hon. Brian Cladoosby, President, National Congress of American Indians).

217. See generally *Hirabayashi v. United States*, 828 F.2d 591, 602 & n.10 (9th Cir. 1987) (discussing *Korematsu* misrepresentation).

218. *United States v. Navajo Nation*, 537 U.S. 488 (2003).

219. *Id.*

In that decision, the Supreme Court emphasized a distinction under the IMLA between oil and gas versus coal leasing,<sup>220</sup> that the IMLA aimed to enhance tribal self-determination by giving Indian tribes the lead role in negotiating mining leases,<sup>221</sup> and that it was not until later that a regulation first required consideration of Indians' best interests in administrative decisions.<sup>222</sup>

As in other cases, the Supreme Court's decision relied on notable representations by the Executive Branch. Here, the Executive Branch did not admit that during the relevant period the governing regulations provided the following:

[n]o oil and gas lease shall be approved unless it has first been offered at an advertised sale in accordance with [25 C.F.R.] § 211.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 211.3 unless the Commissioner [of Indian Affairs] grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids.<sup>223</sup>

Thus, the governing regulations only treated coal leasing differently by allowing limited negotiations subject to strict federal oversight and supervening control, which the Executive Branch failed to provide. Moreover, the Executive Branch did not acknowledge before the Supreme Court that the subsequent regulation requiring consideration of Indians' best interests in all federal actions under the IMLA, 25 C.F.R. § 211.3, merely "settle[d] the issue of whether the Secretary is limited to technical functions or considerations," to be "consistent with the United States' trust responsibility as defined by statute."<sup>224</sup> The Executive Branch also failed to acknowledge that in the lower court, it had expressly conceded that the IMLA required it

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220. *Id.* at 495–96.

221. *Id.* at 508.

222. *Id.* at 508 n.12.

223. 25 C.F.R. § 211.2 (1958-1996).

224. Assignment of Agency Component for Review of Premarket Applications, 56 Fed. Reg. 58,734, 58,735 (proposed Nov. 21, 1991).



to “take the Indians’ best interest into account when making any decision involving [mineral] leases on tribal lands,”<sup>225</sup> and that the later regulation merely codified the preexisting statutory requirement.<sup>226</sup>

More recently, in *United States v. Jicarilla Apache Nation*, the Supreme Court ruled that the fiduciary exception to the attorney-client privilege does not apply to the federal-tribal trust relationship, including for tribal trust fund management.<sup>227</sup> As noted above, the Executive Branch there asserted—in the face of numerous contrary authorities—that no common-law fiduciary duties apply at all.<sup>228</sup> In addition, the Executive Branch argued there that the United States does not represent tribal interests and does not have duties of loyalty or disclosure in managing Indian trust assets.<sup>229</sup> It also asserted that the performance of federal trust administration is essentially a gratuity not paid for by tribes, and that disclosure there would cause ethics problems and chill critical legal advice.<sup>230</sup> However, the Executive Branch failed to acknowledge any of the foundational history and principles discussed above. It also failed to disclose that all Executive Branch employees have a duty of “loyalty to the Constitution, laws and ethical principles” as a “[b]asic obligation of public service,”<sup>231</sup> that DOI employees must “[c]omply with any lawful regulations, orders, or policies,” and that failure to comply with such policies warrants disciplinary action including removal.<sup>232</sup> In particular, the DOI Manual prescribes those mandatory policies<sup>233</sup> and requires that employees “discharge . . . the Secretary’s Indian trust responsibility with a high degree of skill, care, and loyalty,” “[c]ommunicate with beneficial owners regarding the management and administration of Indian trust assets,” and “[a]ssure that any management of Indian trust assets . . . promotes the interest of the beneficial owner[s].”<sup>234</sup>

Moreover, the DOI Manual defines “Indian Fiduciary Trust Records” as including all documents that are used in the management of Indian trust

225. *Kenai Oil & Gas, Inc. v. Dep’t of the Interior*, 671 F.2d 383, 387 (10th Cir. 1982).

226. *See* *Leasing of Tribal Lands for Mineral Development and Leasing of Allotted Lands for Mineral Development*, 61 Fed. Reg. 35,634, 35,640 (July 8, 1996).

227. *Jicarilla VII*, 564 U.S. 162, 187 (2011).

228. *See generally* Brief for United States, *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (No. 10-382).

229. *See id.* at 36–37.

230. *Id.* at 23–24.

231. 5 C.F.R. § 2635.101(a) (1990).

232. 43 C.F.R. § 20.502 (1998).

233. DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL, PURPOSE AND STRUCTURE pt. 011, ch. 1 (2001), <http://elips.doi.gov/ELIPS/0/doc/456/Page1.aspx>.

234. DOI MANUAL, *supra* note 50, pt. 303, § 2.7, 2.7(B), 2.7(L).

assets.<sup>235</sup> Furthermore, the Secretarial Order that provided the basis for the governing DOI Manual provisions (*i.e.*, their regulatory history) recognized that understanding the Department's nonexhaustive trust responsibilities includes looking to guidance in legal advice by the Solicitor's Office.<sup>236</sup> Thus, communication with Indian beneficiaries about trust asset management logically included the disclosure of supporting legal advice, except where federal and Indian interests diverge, and the United States is defending itself against Indian claims.<sup>237</sup>

In addition, the Executive Branch failed to acknowledge before the Supreme Court that its claims of potential harm from disclosure had "a somewhat hollow ring" because it had "simply complied" with several similar prior disclosure orders over nine years.<sup>238</sup> Indeed, the Executive Branch previously had disclosed almost half the disputed documents at issue in that case—some even in prior litigation several decades previously—all without any identifiable ill effects. Finally, the Executive Branch failed to disclose that the attorney-client privilege "applies only where necessary to achieve its purpose,"<sup>239</sup> which "serves 'broader public interests in the observance of law and administration of justice,'"<sup>240</sup> and that disclosure there—like allowing tribal damage claims—would "deter federal officials from violating their trust duties."<sup>241</sup>

All this illustrates the ongoing problems with the internal conflict that President Nixon first recognized. On one hand, Congress, the President, and DOI have repeatedly recognized the existence of a meaningful fiduciary relationship between the federal government and Indian tribes. Moreover, when federal and Indian interests are aligned, DOJ will strongly assert that the federal trust responsibility applies to all federal actions.<sup>242</sup> On the other hand, the DOJ continues to have difficulty in honoring the federal trust responsibility when Indians bring claims against the United States. This is especially challenging because Supreme Court jurisprudence on the federal

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235. U.S. DEP'T OF THE INTERIOR, DEPARTMENTAL MANUAL pt. 303, ch. 6 (2003), <https://bia.gov/cs/groups/mywmsp/?documents/text/idc-022514.pdf>; *cf.* DOI MANUAL, *supra* note 50, pt. 303, § 2.7(I).

236. S.O. 3215, *supra* note 55, at 2.

237. *See generally* Jicarilla Apache Nation v. United States (*Jicarilla V*), 91 Fed. Cl. 489 (Fed. Cl. 2010).

238. *See id.* at 494 & n.8.

239. Fisher v. United States, 425 U.S. 391, 403 (1976).

240. Mohawk Industries v. Carpenter, 558 U.S. 100, 108 (2009) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

241. Mitchell II, 463 U.S. 206, 227 (1983).

242. *See supra* notes 55–57 and accompanying text.

trust responsibility relies in large part on representations by the Executive Branch.<sup>243</sup>

In sum, it appears that the Executive Branch's response to rejection of its trust repudiation legislation proposal has been to continue to proclaim fealty to the trust responsibility as a moral platitude that can support federal action, while at the same time seeking to avoid that responsibility when it might be used against the Executive.<sup>244</sup> This approach impermissibly ignores foundational American history and commitments, as well as Congress' express constitutional authority and repeated directives. It also undermines federal-tribal government-to-government relationships, as well as federal and tribal positions that should be aligned in issues with third parties.<sup>245</sup> More broadly, a "system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they

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243. Cf. Modrall Sperling, *Professor Kevin Washburn: Reflections on Service as Assistant Secretary-Indian Affairs, the State of Indian Law in 2016, and Returning Home to New Mexico*, NATIVE AM. L. WATCH, Spring 2016, at 2, 5 (commenting on the role of recent Supreme Court decisions on DOI's trust mission), <http://www.modrall.com/Professor-Kevin-Washburn-Reflections-on-Service-as-Assistant-Secretary-Indian-Affairs-the-State-of-Indian-Law-in-2016-and-Returning-Home-to-New-Mexico>.

244. Compare U.S. DEPT. OF THE INTERIOR, FISCAL YEAR 2012 INTERIOR BUDGET IN BRIEF DH-66 (2011), <https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2012/highlights/upload/Strengthening-Tribal-Nations.pdf> (quoting Secretary of the Interior: "Indian Country deserves responsive and responsible business practices from Interior that will . . . comply with the obligations of a trustee."), and News Release, U.S. Dep't of Justice, Remarks as Prepared for Delivery By Assistant Attorney General Ignacia Moreno on 2011 Priorities for the Environment and Natural Resources Division (Jan. 13, 2011), <https://www.justice.gov/opa/speech/remarks-prepared-delivery-assistant-attorney-general-ignacia-moreno-2011-priorities> ("I could not be more committed to fulfilling the Division's core mission," including "[c]areful and respectful management of the United States' trust obligations to Native Americans"), with discussion *supra* notes 23, 194 and accompanying text (discussing prior reports and oversight hearings and BIA's failure to comply with congressional directives), and Press Release, President Barack Obama, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference> ("What matters far more than words . . . are actions to match those words. . . . That's the standard I expect my administration to be held to.").

245. See, e.g., Daniel I.S.J. Rey-Bear & Timothy H. McLaughlin, United States v. Jicarilla Apache Nation: *The Executive Branch's Latest Effort to Repudiate Federal Trust Duties to Indians*, THE FEDERAL LAWYER, Mar./Apr. 2011, at 48, 54 & n.8 (discussing proposed Indian Trust Counsel Authority and successful split-briefing practice in the 1970s); CITAR REPORT, *supra* note 82, at 23 ("The Commission acknowledges that the United States must assert valid defenses to litigation brought by tribes and individual Indians, but the usual zealous defense should be tempered and informed by the federal-tribal trust.").

wear everyone else out.”<sup>246</sup> This is especially true “when those intransigent litigants turn out to be public officials.”<sup>247</sup> If the Executive Branch does not take the federal trust responsibility seriously, why would anyone else?

This raises the important question of why the Executive has adopted this posture. It has been suggested elsewhere that this posture is caused by the internal structure at the DOJ and its multiple obligations.<sup>248</sup> Two other issues also likely are at play. First, by statute, the Attorney General shall supervise and DOJ shall conduct all litigation to which the United States, an agency, or officer thereof is a party, except as otherwise provided by law.<sup>249</sup> This reflects the unitary executive theory described above, so that once a claim is in litigation, the DOJ has exclusive authority over that litigation for the Executive Branch. As this has been explained:

[t]here needs to be clarity and a bright-line rule on the Executive Branch’s side who controls litigation and claims of money, and Congress has sensibly made that delegation to the DOJ. Where a rogue [federal agency official] issues a decision after litigation has commenced on a claim that undermines or contravenes the DOJ’s litigation strategy or approach to the settlement process, that decision will be invalid . . . .<sup>250</sup>

In practice, this means that the “DOJ functions as DOI’s litigation counsel but, unlike ordinary outside counsel, does not need to defer to DOI’s wishes as a client.”<sup>251</sup> This is notable because it essentially means that the DOJ may assert a statutory basis for not complying with the Rules of Professional Conduct.<sup>252</sup> Thus, even when the DOI may want to honor federal trust duties, the DOJ may oppose doing so. This was what moti-

246. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1012 (10th Cir. 2015) (concerning arguments by the State of Utah); *see also* *Judicial Watch, Inc. v. F.B.I.*, 522 F.3d 364, 370 (D.C. Cir. 2008) (“Faced with the same argument for the third time, we see no reason to reach a different result today. Indeed, the government’s decision to dust off a thoroughly discredited argument and present it to us anew wastes both our time and the government’s resources.”).

247. *Ute Indian Tribe*, 790 F.3d at 1012.

248. Juliano, *supra* note 181, at 1307.

249. 28 U.S.C. §§ 516, 519 (2015).

250. *Navajo Health Found. v. Burwell*, 157 F. Supp. 3d 1119, 1151 (D.N.M. 2015) (noting that this limit does not preclude federal agencies from acting when “cooperating and working in tandem” with the DOJ).

251. Venus Prince, *Insights from In-House and Interior: Top 10 Lessons From My 10 Years of Experience*, THE FEDERAL LAWYER, Apr. 2016, at 28, 31.

252. MODEL RULE OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2016) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued.”).

vated the Indian Trust Counsel Authority proposal and was reflected in the split-briefing practice. More recently, this happened in *Jicarilla*, where the DOJ's post-hoc litigation defense asserted a "cramped view of [the United States'] fiduciary obligations" compared to those reflected in the DOI Manual, the still applicable Krulitz letter discussed above, and prior DOI memos and opinions, including those that DOJ sought to shield from discovery.<sup>253</sup>

All this leads to what may be the larger underlying reason for DOJ's difficulty in acknowledging broader federal trust duties to Indians. Given that the DOJ's efforts to avoid liability are not limited to Indian claims, it appears that the DOJ has subordinated substantive legal support for the federal trust responsibility to a supervening interest in protecting the public fisc. This has been made clear in a DOJ budget proposal while significant tribal trust mismanagement litigation was pending.<sup>254</sup> It is understandable and laudable that the DOJ wants to protect taxpayer money from undue

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253. Compare *Jicarilla* VIII, 100 Fed. Cl. 726, 736 (Fed. Cl. 2011), and *id.* at 733, 734–39 & nn.10–18 (rejecting DOJ arguments that DOI is not subject to common law trust duties beyond express statutory mandates regarding trust fund management, including duties to maximize income, exercise independent judgment, and consider pooling trust funds for investment purposes, noting among other things that "there are a number of holes in this argument" and that it had been repeatedly rejected by courts), and *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 287, 298–99, 298 n. 41, 299 n.43 (Fed. Cl. 2013) (reaffirming application of common law fiduciary duties after trial "[a]lthough defendant continues to argue otherwise" including that DOI had a duty to exercise independent judgment and not delegate, contrary to DOJ's current claim that DOI was "nothing more than a glorified 'order-taker,'" which was contradicted in part by 1966 and 1973 DOI memos); DOI MANUAL, *supra* note 50 (listing trust duties), and *supra* notes 53–59 and text accompanying note 53 (discussing the Krulitz Letter and S.O.'s 3215 and 3335), and Memorandum from Thomas W. Fredericks, Assoc. Solicitor, Indian Affairs, to Deputy Asst. Sec'y–Indian Affairs (Program Operations) (Jan. 24, 1978) (on file with authors) (applying private trustee standards and finding tribal trust funds pooling appropriate "even in the absence of express statutory authority"), and Memorandum from Tim Vollmann, Assoc. Solicitor, Div. of Indian Affairs, to Asst. Sec'y of Indian Affairs (Feb. 10, 1986) (on file with authors) (reaffirming same), and Memorandum from Tim Vollmann, Acting Assoc. Solicitor, Div. of Indian Affairs, to Asst. Sec'y–Indian Affairs (July 21, 1983) (on file with authors) (emphasizing that the United States must "exercise independent judgment" and "make maximum productive investment" for Indian trust funds), and Memorandum from Assoc. Solicitor, Div. of Indian Affairs, to Deputy Asst. Sec'y of Indian Affairs (May 13, 1985) (on file with authors) (reaffirming same), and Memorandum from William G. Lavell, Assoc. Solicitor, Div. of Indian Affairs, to Asst. Sec'y of Indian Affairs (March 21, 1990) (on file with authors) (relying on common-law trust duties and reconfirming authorization for pooling), *with Jicarilla* III, 88 Fed. Cl. 1, 24, 25, 29, 30, 34 (Fed. Cl. 2009) (listing above memos as documents 13-16, 44, 96, 168, 189-191 in discovery privilege ruling).

254. U.S. DEPT. OF JUSTICE, ENV'T. & NAT. RES. DIV., FY2013 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 2, 12, (2014), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/01/29/fy13-enrd-justification.pdf> (noting "Strategic Objective 2.6: Protect the federal fisc") ("The effectiveness of our defensive litigation" concerning tribal trust litigation is measured in part by "savings to the federal fisc.").

claims. However, that goal should not override centuries of history, treaties, and statutes, as well as almost a half-century of congressional, presidential, and administrative policy, as well as copious governing case law.

### B. *Neocolonial Judicial Activism*

Unfortunately, the institutional problems precluding greater recognition of the federal trust responsibility are not limited to the Executive Branch. Regardless of what the Executive Branch may assert, it could not avoid the federal trust responsibility without a Supreme Court inclined to rule against Indians and skeptical of the federal trust responsibility. This situation may exist in part because some on the Supreme Court do not seem to understand the federal-Indian trust relationship<sup>255</sup> or perhaps “do . . . not care what happens in Indian Country.”<sup>256</sup> Moreover, the Supreme Court has not yet seemed to fully apprehend the original understanding of a robust federal trust responsibility incorporated into the Constitution from international law and derived from the relevant common law of contracts, property law, and trusts, as explained above.<sup>257</sup> This situation also likely derives in part from the fact that support of the Executive Branch is an important condition of and often correlates with the success of Indians before the Supreme Court, and trust responsibility disputes invariably pit Indian interests against the Executive Branch.<sup>258</sup>

As has been explained elsewhere, there is a long, continuing tradition of Supreme Court justices relying in Indian law cases on racial stereotypes based on European colonial-era doctrines of white racial superiority.<sup>259</sup> Whether intentional or not, this ongoing creation of Supreme Court law

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255. David H. Getches, Remarks at Federal Bar Association Indian Law Conference (Apr. 7, 2011), in 84 U. COLO. L. REV. 201, 203–04 (2013); see also Bethany Berger, *Hope for Indian Tribes in the U.S. Supreme Court?*, 2017 U. ILL. L. REV. (forthcoming 2017) (manuscript at 12) (on file with authors).

256. Matthew L.M. Fletcher, *The Supreme Court's Indian Law Problem*, 59 HASTINGS L.J. 579, 582 (2008); see also Berger, *supra* note 255, at 10 (noting that the tribal record at the Supreme Court may be so abysmal in part “due to disparities in the extent to which the justices understand and care about tribal and Native concerns”); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 57–58, 359 (1979) (noting derogatory comments by Supreme Court Justices describing about Indian law cases).

257. See Mathew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 132–33, 132 n.56 (2006) (citing numerous authorities); Berger, *supra* note 255, at 41 (“despite the two-hundred year history of tribes as a third sovereign, the Court has not yet fully assimilated this history into a coherent legal theory.”).

258. Berger, *supra* note 255, at 38.

259. See generally WILLIAMS, *supra* note 145, at xxiv–xxvi; Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 129–34 (1993).

gives a new form of legal sanction to those neocolonial beliefs.<sup>260</sup> This approach is not even honestly colonial, because the original understanding of the federal trust responsibility incorporated from international law into the Constitution viewed it as juridically meaningful, as discussed above. This approach is also subjective, expressing Justices' own values and preferences untethered from the historical moorings of federal Indian law.<sup>261</sup> This effort to redefine federal-tribal relations also diverges from the views of the political branches, which are vested with constitutional authority over Indian affairs, and which for almost fifty years have been more supportive of Indian rights, including the federal trust responsibility.<sup>262</sup> Further, this disregard for history, established law, and congressional policy has been expressed without sound legal reasoning or a basic sense of justice.<sup>263</sup> Most notably, this apparent pursuit of "color-blind" justice subverts the special treatment accorded Indians under historic federal law,<sup>264</sup> even in relation to the federal government alone. To paraphrase Philip Frickey, the Supreme Court has done little to promise effective solutions to practical problems, and seems more normatively concerned about undermining the federal trust responsibility and protecting federal agencies than it does about promoting a viable framework for protecting Indians from federal malfeasance in the twenty-first century.<sup>265</sup>

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260. See WILLIAMS, *supra* note 145, at xxvii; Robert N. Clinton, *Peyote and Judicial Activism: Neo-Colonialism and the Supreme Court's New Indian Law*, 38 FED. BAR NEWS & J. 92, 98–100 (1991); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999).

261. See David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 291, 298 (2001) [hereinafter Getches, *Beyond Indian Law*]; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1573 (1996); see also Elizabeth Ann Kronk Warner, *United States v. Jicarilla Apache Nation: Its Importance and Potential Ramifications*, THE FEDERAL LAWYER, Apr. 2012, at 6 (noting that "historical ignorance" of certain members of the Court may be troubling for Indian Country).

262. See Fletcher, *supra* note 257, at 128; Frickey, *supra* note 176, at 445; Getches *Beyond Indian Law*, *supra* note 261, at 291; Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 779–815 (2014); cf. *United States v. Lara*, 541 U.S. 193, 205 (2004) (noting that prior relevant cases do not "suggest that the Court should second-guess the political branches' own determinations"); Getches, *supra* note 255, at 202 ("How can the government, to paraphrase Chief Justice John Marshall, arrogate to itself these powers over people whom it simply surrounded with a kind of constructive conquest?").

263. Rebecca Tsosie, *A Philosophy of Hope and Landscape of Principle: The Legacy of David Getches's Federal Indian Law Scholarship*, 84 U. COLO. L. REV. 155, 160 (2013).

264. Getches, *Beyond Indian Law*, *supra* note 261, at 267.

265. Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSAL. REV. 5, 8 (2002); cf. Ablavsky, *supra* note 90, at 1085 ("Unlike the [Constitution]'s frequent (albeit oblique) refer-

This is especially challenging for advocates of Indian interests, who are often the prevailing parties in lower courts and respondents before the Supreme Court, so that they cannot simply avoid the Justices.<sup>266</sup> It also means that the Supreme Court is not fulfilling its role as the counter-majoritarian guardian for American Indian rights.<sup>267</sup> Instead, while Congress and the DOI and the DOJ have reaffirmed and sought to fulfill federal trust duties when federal-tribal interests are aligned, the DOJ when defending the United States against claims and the Supreme Court in reviewing such claims seek to limit application of the federal trust responsibility.

Four recent examples illustrate these points, two expressly concerning the trust responsibility and the other two also implicating it.<sup>268</sup> First, in *United States v. Navajo Nation*, the Executive Branch could only avoid liability as discussed above because the Supreme Court accepted the DOJ's misrepresentations. That analysis has been widely criticized.<sup>269</sup> As the late, leading Indian law scholar David Getches summarized the decision, "[n]ever again should we see the travesty of the Navajo coal leasing case, in which the Supreme Court allowed connivance between the Secretary of the Interior and a coal company to suppress competitive pricing of the tribe's coal in a lease where the Secretary was supposed to act as a trustee."<sup>270</sup>

Next, in *United States v. Jicarilla Apache Nation*, the Supreme Court again accepted various DOJ misrepresentations as discussed above. The faulty legal reasoning in that decision is clearly explained by Justice Sotomayor's dissent as well as by several commentators.<sup>271</sup> As one scholar

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ences to slavery, nothing in the constitutional text explicitly mandates an imperialist Indian policy. For a textualist, this may absolve the document from its unpleasant historical associations. Yet in practice this absence has made the effects of this history all the more insidious."); Bethany R. Berger, *Red: Racism and the American Indian*, 56 U.C.L.A. L. REV. 591 (2008).

266. See WILLIAMS, *supra* note 145, at 162 & n.2 (noting strategy urged by various scholars).

267. Steele, *supra* note 262, at 803 & n.223 (citing *Chambers v. Florida*, 309 U.S. 227, 241 (1940)) (courts are "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement").

268. Other critiques of the Rehnquist and Roberts Courts' Indian law jurisprudence focus on tribal jurisdiction cases, but the analysis applies equally regarding federal trust responsibility cases, and is perhaps more pointed because no other competing sovereign is involved.

269. See, e.g., Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. R.J. 317, 352-56 (2006) (detailed case review and critique); CITAR REPORT, *supra* note 82, at 22.

270. Getches, *supra* note 255, at 205.

271. Jicarilla VII, 564 U.S. 162, 188-209 (2011) (Sotomayor, J., dissenting); Daniel W. Hart, *United States v. Jicarilla Apache Nation: Why the Supreme Court's Refusal to Apply the Fiduciary Exception to Attorney-Client Privilege Stands to Diminish the Federal-Tribal Trust Relationship*, 36 AM. INDIAN L. REV. 527, 543-49 (2012).



has noted, it is troubling that the Supreme Court overlooked or disregarded the contracts between Indian tribes and the federal government under which tribes gave up land and external sovereignty in exchange for the federal government's commitment to the federal trust responsibility regarding Indians.<sup>272</sup> Here, however, the Supreme Court compounded those errors by reversing standard presumptions and analysis for privilege claims on the extraordinary remedy of mandamus. Instead of requiring the Executive Branch to show exceptional circumstances and a clear and undisputable basis that it was entitled to a privilege against discovery with no other adequate means to attain the desired relief, as required under its own precedent,<sup>273</sup> the *Jicarilla* decision reads as if the relevant Indian tribe bore the burden of proving a compensable breach of trust under a general trust relationship without regard to the fiscal mismanagement at issue. In this case, it remains unclear how the Executive Branch credibly asserted that mandamus relief was necessary when there were other means of obtaining relief.<sup>274</sup>

For Sotomayor[’s dissent], this [did not] even pass the smell test. The government acts as a trustee and calls itself a trustee, but it won’t abide by any of the traditional duties that go with being a trustee *unless* it affirmatively accepts them. In effect, the government is using the word *trust* without feeling obliged by its definition. “There’s no need to use the word,” Sotomayor tartly noted in oral arguments, “because it wouldn’t be a trust.”<sup>275</sup>

Next, *Adoptive Couple v. Baby Girl* addressed a claim under the Indian Child Welfare Act (ICWA).<sup>276</sup> The Supreme Court ruled in favor of a non-Indian couple in South Carolina that sought to adopt a young Cherokee girl from Oklahoma over the objections of her father. It was clear how the Supreme Court would rule based on the derisive opening line, which disregarded the categorical nature of citizenship or membership in an Indian

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272. Kronk Warner, *supra* note 261, at 4–6. The Supreme Court could not have been ignorant of this despite the Executive Branch’s misrepresentations because the issue was addressing in briefing. See Brief for Navajo Nation and Pueblo of Laguna as Amici Curiae in Support of Respondent, *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (No. 10-382).

273. See *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004) (detailing the exceptional circumstances test for mandamus relief).

274. See *Jicarilla VII*, 564 U.S. at 206 n.11.

275. John Paul Rollert, *A Matter of Trusts*, SLATE (Dec. 20, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/there\\_s\\_a\\_lot\\_to\\_learn\\_from\\_a\\_lonely\\_dissent\\_by\\_sonia\\_sotomayor\\_in\\_a\\_trusts\\_case.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/there_s_a_lot_to_learn_from_a_lonely_dissent_by_sonia_sotomayor_in_a_trusts_case.html).

276. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

tribe as well as the relevant Indian tribe's own authority to set its membership rules.<sup>277</sup> As explained in the *Baby Girl* dissent and elsewhere, this ruling turned the law "upside down" and ignored the clear purpose of ICWA, which was to keep Indian children with Indian families.<sup>278</sup> This decision also overlooked the lower court finding that there was no conflict between the best interests of the child and recognizing the birth father's parental rights.<sup>279</sup> Although this was not a federal trust responsibility case, it nonetheless illustrates the Supreme Court's disregard for a congressional policy designed to protect Indians.

Finally, there was no opinion issued by the Supreme Court in *Dollar General v. Mississippi Band of Choctaw Indians* because it resulted in an equally divided Court after Justice Scalia's death.<sup>280</sup> However, the tenor of oral argument made clear that Justice Scalia and others could not seem to countenance Indians tribes exercising jurisdiction over non-Indians on Indian trust lands leased from a tribe on their reservation, even with consent to tribal jurisdiction in the contract at issue.<sup>281</sup> Several Justices seemed to have deep concerns with the fairness of tribal courts for nonmembers, and the lack of removal to federal court or avenue for Supreme Court review.<sup>282</sup> This deep doubt about tribal authority existed even though the Supreme Court has repeatedly recognized broad tribal sovereign authority over their own on-reservation lands,<sup>283</sup> and has strongly supported arbitration for dispute resolution where there is no opportunity for federal appellate review.<sup>284</sup> That skepticism also disregarded the right of contract for Indian Nations.<sup>285</sup> Also, Congress and the Executive Branch through both the DOI and DOJ have expressed and implemented a trust responsibility to support the development, operation, and enhancement of tribal courts, including as "the" or "the most" "appropriate forums for the adjudication of

277. See Lawrence R. Baca, *A Recipe from the Diversity Cookbook: 'First You Hire One Indian,'* THE FEDERAL LAWYER, Jan./Feb. 2017, at 54, 61, 76.

278. *Adoptive Couple*, 133 S. Ct. at 2573; Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 310–18, 325–26 (2015).

279. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 566 (S.C. 2012).

280. *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

281. Transcript of Oral Arguments at 12, 25, 29–30, 34, 35, 38, 42, 45, 50, 54, 56, 57, 58, *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496); Berger, *supra* note 255, at 37.

282. *Id.*

283. *Iowa Mutual v. LaPlante*, 480 U.S. 9, 14 (1987); *New Mexico v. Mescalero Apache*, 462 U.S. 324, 332–33 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140–41 (1982); *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

284. Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, YALE L.J. FORUM, April 11, 2016, at 1 & n.2.

285. Fletcher, *supra* note 284, at 1.

disputes affecting personal and property rights on Native lands.”<sup>286</sup> Therefore, the resolution of *Dollar General* failed to defer to the political branches and may reflect an accidental pause in the long history of Supreme Court bias against Indians.<sup>287</sup> This stalemate on whether to affirm the authority tribal judicial authority on tribal own lands undermines, if not contravenes, the federal trust responsibility to Indians.

Overall, the Supreme Court seems to be engaged in an internal debate over the proper role the judiciary in the federal-tribal trust relationship. Some Justices defer to Congress as the lead policy maker, as delegated by the Indian Commerce Clause, while other Justices view their role as having a more prominent policymaking function.<sup>288</sup> Until this conflict in approaches is resolved, the Court’s decision-making will continue to be driven primarily by outcomes—in other words, whichever party can secure five votes—rather than predictable and sensible rules.

### C. Episodic Congressional Action

Rounding out the branches of the federal government, Congress’ often reactive nature, coupled with its slow processes, has led to episodic congressional action. This understandably inhibits further congressional recognition of the federal trust responsibility and rectification of executive and judicial issues discussed above. The late Senator Edward Kennedy described this issue as follows in 1978:

[f]rom time to time in this Nation’s history, public attention is focused on the American Indian as though he had just arrived on our

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286. 25 U.S.C. §§ 3601(6), 3651(6) (2015). See generally Indian Tribal Justice Act, 25 U.S.C. §§ 3601–3682 (2015).

287. See generally DEWAI IOAN BALL, *THE EROSION OF TRIBAL POWER: THE SUPREME COURT’S SILENT REVOLUTION* 138 (2016) (predicting before oral argument that “the Court may unearth new precedent, founded on presumptions and principles contrary to hundreds of years of history, legislative debate, treaties, inherent sovereignty, and the Indian sovereignty doctrine, to sweep away tribal civil jurisdiction over nonmembers on reservations”); WILLIAMS, *supra* note 145; Getches, *Beyond Indian Law*, *supra* note 261, at 278–79; Tsosie, *supra* note 263, at 161 (noting that the Supreme Court in *Nevada v. Hicks*, 533 U.S. 353 (2001), “stretched to find a justification to disclaim tribal authority to adjudicate”).

288. Compare, e.g., *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014) (noting that precedents “defer” to Congress about whether to abrogate tribal immunity), *with id.* at 2045 (Scalia, J., dissenting) (“Rather than insist that Congress clean up a mess . . . , I would overrule *Kiowa* and reverse the judgment below.”), *and id.* at 2050 (Thomas, J., dissenting) (“In other areas of federal common law, until Congress intervenes, it is up to us to correct our errors . . . . We have the same duty here.”), *and* Memorandum from Justice Antonin G. Scalia, United States Supreme Court, to Justice William J. Brennan, United States Supreme Court (Apr. 4, 1990) (on file with authors) (“[O]ur opinions in this field . . . have rather sought to discern what the current state of affairs out to be.”).

shores with new problems never before contemplated by government. There is a public cry for action. The wheels of government begin to churn. Congress and the Executive Branch deliberate, and then issue nice phrases about the final solutions to the Indian problem. Finally, the difficulty of the task overwhelms us, our sense of immediacy fades, our indignation wanes, and the Indian problem is shelved for another generation.<sup>289</sup>

This same sentiment was echoed 14 years later in a seminal 1992 House Report on the BIA's mismanagement of the Indian trust fund, which played a key role in the legislative history for the American Indian Trust Fund Management Reform Act of 1994:

[t]he subcommittee's review of the Bureau's various management improvement initiatives revealed that comprehensive corrective actions were rarely undertaken and almost never carried through to a successful conclusion. Instead, the Bureau has routinely compiled running inventories of projects and initiatives without even attempting to knit these efforts together into a cohesive framework. Although the Bureau is chronically behind schedule—even on self-imposed deadlines—it rarely bothers to justify or even explain its delays in implementing corrective actions. Indeed, the only thing that seems to stimulate a flurry of activity at the Bureau is an impending appearance by the Assistant Secretary of Indian Affairs before a congressional committee. Afterward, all reform activities appear to suspend until shortly before the next oversight session.<sup>290</sup>

This habit of reacting to public outcries until those cries subside, while doing little to address the underlying problems, may be recurring and obviously fails Indians.

Moreover, these issues likely have become worse over the last 20 years, as the partisan rancor in Congress has increased while its legislative productivity has decreased. As a result, Congress rarely addresses important national Indian affairs issues.<sup>291</sup> For example, a recent empirical study found that between 1975 and 2013, about 10 percent of Indian-related bills intro-

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289. *Hearing Before the Comm. of the Rules and Admin. on S. Res. 405 to make the Select Comm. on Indian Affairs a Permanent Comm. of the Senate*, 95th Cong. 13 (1978) (statement of Sen. Edward Kennedy); see also VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* 13–14 (1969).

290. MISPLACED TRUST, *supra* note 23, at 5.

291. Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 990 (2010).

duced and enacted were pan-tribal in nature, as opposed to tribe-specific bills, appropriations, and general legislation affecting Indians.<sup>292</sup>

Various reasons may account for this limited congressional action. Of course, Indian issues are but one small set of issues on Congress' plate. Also, because Indian tribes and their issues are only located in some states, and American Indian populations are small, many in Congress are not familiar with Indian concerns.<sup>293</sup> It is understandably difficult for Indian issues to become material enough to warrant congressional action. Moreover, many in Congress may lack the sufficient background on the historic and technical issues regarding the federal trust responsibility. In addition, many Members of Congress may not pursue Indian-related legislation because they receive little electoral benefits from doing so, or perhaps even because they only expend their resources and attention on constituents who have donated to or contacted their offices.<sup>294</sup> Furthermore, the limited resources of many tribes may limit their abilities to advocate for legislation, while the large number of Indian tribes and Indian policy issues may dilute the ability of tribal advocates to pursue particular issues.<sup>295</sup>

Indian legislation likely also is affected by the same political forces that affect other legislation.<sup>296</sup> This includes invariable, general issues such as the sometimes fickle nature of Congress<sup>297</sup> as well as "inside-the-Beltway politics, including hidden holds, objections, or trade-offs based on issues entirely unrelated to the merits of particular proposals."<sup>298</sup> Also, executive support is the greatest predictor of legislative success,<sup>299</sup> which may present a particular obstacle here, because the Executive Branch is often averse to most trust responsibility enforcement. Considering all these factors, it is difficult for Indian issues to become material enough to warrant congressional action. Finally, some Members of Congress may share some of the

292. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 126 (2015).

293. See, e.g., Rob Capriccioso, *Rep. Daines Talks Cobell and the Need for GOP to Connect with Tribes*, INDIAN COUNTRY MEDIA NETWORK (July 14, 2014), <http://indiancountrytodaymedia.network.com/2014/07/14/rep-daines-talks-cobell-and-need-gop-connect-tribes-155819?page=0%2C3>; BALL, *supra* note 287, at 154 (making a similar point regarding legislative efforts to address tribal jurisdiction over nonmembers).

294. Carlson, *supra* note 292, at 110 n.143 (citing KRIS MILLER, CONSTITUENCY REPRESENTATION IN CONGRESS: THE VIEW FROM CAPITOL HILL (2010)).

295. See *id.* at 141–42.

296. *Id.* at 136 n.196 (discussing empirical data).

297. Fletcher, *supra* note 257, at 182, 183–84.

298. See Eugene R. Fidell, *Competing Visions of Appellate Justice for Indian Country: A United States Court of Indian Appeals or an American Indian Supreme Court*, 40 AM. INDIAN L. REV. 233, 242 (2016) (noting these issues for proposals discussed there).

299. Carlson, *supra* note 292, at 142 (citing BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 233 (2009)).

executive and judicial concerns and attitudes discussed above. All these circumstances help to explain the outstanding difficulty of congressional action to better implement, explain, and enforce the federal trust responsibility.

#### IV. THE FUTURE OF THE FEDERAL TRUST RESPONSIBILITY

What is the best use of the above information? David Getches offered a sound assessment:

[i]t is tempting to write off the principles that worked to protect tribal rights and lands in the past because they have been corrupted in some applications, because they are imperfect, and because they have questionable pedigrees. But, I urge that these principles be held up as the law of the land and made the benchmark for meeting new and continuing challenges and setting the best practices of the future. . . . Just as the earlier generations did not forget the fundamental principles and fought to return to them, so should future generations.<sup>300</sup>

In light of the issues raised above, one option may be to press Executive Branch officials and agencies to better honor and stop trying to avoid or undermine their “fiduciary trust” obligations. That certainly should be done. However, consistent with the constitutional provision of congressional authority over Indian affairs, it must be recognized that Executive Branch officials are only the “designated trustee-delegates” for Indian trust duties.<sup>301</sup> Therefore, while there is strong reason and good value for advocating to Executive Branch officials for better compliance, the issues noted here are so fundamental and long-standing that more is likely needed, as President Nixon recognized almost 50 years ago.

Another option may be to appeal to federal courts, as many individual Indian and tribal advocates have done many times previously. This of course comports with the democratic necessity for a strong and independent judiciary that should protect those challenging government maladministration. As President Lincoln stated in his first inaugural address, “it is as much the duty of the Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.”<sup>302</sup> However, as should be clear from the discussion above, substantial challenges remain for the foreseeable future in advocating Indian interests

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300. Getches, *supra* note 255, at 206–07.

301. *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001).

302. President Abraham Lincoln, First Inaugural Address (Dec. 3, 1861), THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29502>.

before the Supreme Court. Moreover, while some have urged a “postcolonial” approach to directly confronting Supreme Court with “the racist way they are deciding Indian rights cases in twenty-first century America,” others oppose such a possible approach because it might only make things worse for Indians.<sup>303</sup>

What then should be done when the branch of government to which Indians typically have appealed for protection from the failures of their protectors does not provide the needed relief? Resort to Congress is especially apt given its constitutional authority over Indian affairs and the Supreme Court’s apparent unwillingness or inability to identify or apply the objective legal standards outlined above.<sup>304</sup> As David Getches noted, “[a]bsent a judicial rediscovery of Indian law, Congress will have to legislate to correct the Court’s misadventures.”<sup>305</sup> Resort to Congress also makes sense because Congress is better able to develop prospective solutions that may broadly account for the variety of tribal needs and interests, while the Supreme Court is only able to look at particular cases and is “ill-suited to provide solutions that address the diversity of tribal needs and capacities.”<sup>306</sup>

Fortunately, a consideration of comparative institutional competency suggests that Congress is better suited to make federal Indian policy decisions.<sup>307</sup> Congress is far better suited to addressing this key aspect of the federal-tribal government-to-government relationship than the Supreme Court, especially for consultation with over 500 tribes.<sup>308</sup> Also, data suggests that Congress in fact remains an active force in the creation of federal Indian policy.<sup>309</sup> Not surprisingly, many Indian nations have appealed to Congress, hoping that it will enact more favorable policies.<sup>310</sup> In essence, when the Supreme Court has failed to protect Indians from their designated

303. WILLIAMS, *supra* note 145, at 162–63; *see also id.* at xxi-xxii.

304. Steele, *supra* note 262, at 799.

305. *See* Getches, *Beyond Indian Law*, *supra* note 261, at 269.

306. Steele, *supra* note 262, at 809.

307. *Id.* at 783–84 (concerning the scope and content of inherent tribal authority recognized by the United States, based on constitutional commitment of relevant power, lack of judicially discoverable, objective standards, the need for political accountability, and tailoring solutions to balance competing interests, among others).

308. Compare Exec. Order 1,317, Consultation and Coordination with Indian Tribal Governments, §§ 3(c)–4, 65 Fed. Reg. 67,249, 67,250 (Nov. 9, 2000) (requiring consultation with Indian tribes for agency legislative proposals), *with* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4,915 (Jan. 17, 2017) (listing 567 tribal entities).

309. Carlson, *supra* note 292, at 171.

310. *Id.* at 180.

or delegated protectors, Indian tribes not surprisingly have appealed to Congress, with its governing constitutional authority.

In particular, many in Indian country have long urged that Congress should enact legislation to reform and modernize the federal trust responsibility.<sup>311</sup> Unlike the misguided trust repudiation proposal of 2007, this would constitute an exercise of Congress's "legislative role to advance, support, and protect Indians."<sup>312</sup> If Congress can overcome the institutional problems that hinder its actions, it could significantly ameliorate the executive and judicial issues addressed above.

But what should Congress do? Of course, any congressional action concerning the federal trust responsibility should be undertaken only with substantial input by federally recognized Indian tribes, because such solutions must be tribally driven.<sup>313</sup> Based on the comparative institutional competence of Congress, any action by it here should be in broad terms, leaving more specific application to implementation. Also, the public comments of many tribal leaders over the past several decades of trust reform efforts allow mapping out at least some basic outlines of potential legislation. As explained below, these include strengthening federal trust administration, promoting tribal sovereignty, improving federal management, and enhancing federal-tribal relations, all with sufficient funding and a goal of building prosperous tribal communities.

### A. Reaffirmation

One action that must be taken, and which numerous tribal leaders and others have previously strongly recommended, is to make clear that federal management of Indian trust assets is subject to strict "fiduciary trust" duties consistent with historical commitments. For example, the second recommendation of the American Indian Policy Review Commission in 1977 was that Congress should reaffirm and direct all executive agencies to administer the trust responsibility consistent with a set of specific legal principles.<sup>314</sup> From 2002-2005, when comprehensive trust reform was considered by Congress, reaffirmation of federal trust responsibilities was also a consis-

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311. See, e.g., NATIONAL CONGRESS OF AMERICAN INDIANS, *21st Century Trust Modernization Forum* (Jan. 14, 2016), [http://www.ncai.org/conferences-events/ncai-events/21st\\_Century\\_Trust\\_Modernization\\_Forum\\_Final\\_Broadcast\\_-\\_Sidebar\\_Logos.pdf](http://www.ncai.org/conferences-events/ncai-events/21st_Century_Trust_Modernization_Forum_Final_Broadcast_-_Sidebar_Logos.pdf) (sponsored by National Congress of American Indians (NCAI), United South and Eastern Tribes, Inc. (USET), Affiliated Tribes of Northwest Indians (ATNI), California Association of Tribal Governments, Intertribal Association of Arizona, and the Navajo Nation Washington Office).

312. Getches, *supra* note 255, at 202.

313. Cf. Exec. Order 1,317, Consultation and Coordination with Indian Tribal Governments, §§ 3(c)-4, 65 Fed. Reg. 67,249, 67,250 (Nov. 9, 2000).

314. AIPRC REPORT, *supra* note 23, at 11.



tent theme of tribal recommendations.<sup>315</sup> Almost a decade later, tribal leaders again recognized the “need to define trust and trusteeship. It is long overdue for a very clear, succinct definition of what that means.”<sup>316</sup> Finally, in late 2013, after a two-year review, the Department of the Interior’s Secretarial Commission on Indian Trust Administration and Reform, in its first recommendation, urged that the United States clarify that all federal agencies have a trust responsibility to Indians, that this trust responsibility demands a high standard of conduct, and that each agency is to place Indian interests before those of the agency and outside parties.<sup>317</sup> Further details of this policy recommendation might come from two Secretarial Orders issued by the DOI and provisions of the DOI’s Departmental Manual, which have outlined principles for the proper discharge of federal trust responsibilities.<sup>318</sup>

### B. *Self-Determination*

As noted above, Congress has repeatedly recognized the federal obligation to promote tribal sovereignty. It also should be clear that the federal trust responsibility supports and should not conflict with tribal self-determination. Moreover, promoting tribal self-determination is simply sound policy because Indian tribes are directly accountable to their members and more aware of the problems their communities face.<sup>319</sup> In addition, empirical research has confirmed that empowering tribal governments is an effective way increase economic development in Indian country.<sup>320</sup> Just as important, greater self-determination has long been a key point of tribal proposals and recommendations for federal legislative trust reform.<sup>321</sup> As

315. E.g., *Indian Trust Reform Act: Hearing on S. 1439 to Provide for Indian Trust Asset Management Reform and Resolution of Historical Accounting Claims Before the S. Comm. on Indian Affairs*, 109th Cong. 90–92, S. Hrg. Rep. 109-194, at 164 (2005) [hereinafter *Indian Trust Reform Act: Hearing on S. 1439*] (statements of Tex Hall, President, NCAI, and James T. Martin, Executive Director, USET).

316. *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong., S. Hrg. Rep. 112-637, at 68 (2012) [hereinafter *Fulfilling the Federal Trust: Hearing*] (statement of Hon. Fawn Sharp, President, Quinault Indian Nation).

317. CITAR REPORT, *supra* note 82, at 21, 24–25.

318. S.O. 3215, *supra* note 55, at 2; S.O. 3335, *supra* note 57, at 2; DOI MANUAL, *supra* note 50.

319. *Indian Trust Reform Act: Hearing on S. 1439*, *supra* note 315, at 100 (statement of James T. Martin, Executive Director, USET).

320. THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 123 & n.283 (2007), [http://isites.harvard.edu/fs/docs/icb.topic177572.files/SONN\\_Final\\_01\\_09\\_07.pdf](http://isites.harvard.edu/fs/docs/icb.topic177572.files/SONN_Final_01_09_07.pdf).

321. See *Indian Trust Reform: Hearing on the Views of the Administration and Indian Country of How the System of Indian Trust Management, Management of Funds and Natural Resources*,

NCAI President Brian Cladoosby stated in a recent State of Indian Nations address, quoting President Ronald Reagan from 1988: “Tribes need the freedom to spend the money available to them, to create a better quality of life and meet their needs as they define them. Tribes must make those decisions, not the federal government.”<sup>322</sup> Many in Congress also recognize this point.<sup>323</sup>

Indian tribes already have statutory authority to enter into federal contracts and compacts to administer some federal statutes, regulations, and programs.<sup>324</sup> There are additional mechanisms for tribes to implement their own further trust asset administration, such as for surface leasing.<sup>325</sup> There also is legislation allowing for tribes to manage their own energy resources, but in the more than a decade since enactment, no tribe has used it.<sup>326</sup> There also is recent legislation that may allow broader adoption of tribal trust asset management, the Indian Trust Asset Reform Act of 2016 (ITARA).<sup>327</sup> However, that legislation is still so new it is not yet known if any tribes have even applied for authorization under it. Also, while its self-determination provisions allow tribal trust asset management plans to supersede federal regulations, those plans still must be consistent with federal statutes that are applicable to the trust assets or their management.<sup>328</sup> Therefore, it may be helpful to have broader federal legislation that allows tribes even greater latitude regarding trust asset management. Of course, this should include allowing each tribe to decide whether or how it wants to participate in the management of its own trust assets, because Indian tribes have unique capabilities, goals, and concerns.

### C. *Integration and Elevation*

As evidenced by the fact that not all tribes currently have self-determination contracts or self-governance compacts, not all tribes likely will be able to take over all management of their own federal services and trust

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*Might be Reformed Before the S. Comm. on Indian Affairs*, 109th Cong., S. Hrg. Rep. 109-16, at 17–18, 21 (2005) [hereinafter *Indian Trust Reform: Hearing*]; *Indian Trust Reform Act: Hearing on S. 1439*, *supra* note 315, at 164.

322. Brian Cladoosby, President, NCAI, Remarks to the 15th Annual State of Indian Nations 8 (Feb. 13, 2017), [http://www.ncai.org/NCAI\\_2017\\_State\\_of\\_Indian\\_Nations\\_Address\\_Final\\_-2-.pdf](http://www.ncai.org/NCAI_2017_State_of_Indian_Nations_Address_Final_-2-.pdf) (quoting President Ronald Reagan).

323. See, e.g., Senator James Lankford, Speech at NCAI Tribal Nations Policy Summit 115th Congress Executive Council (Feb. 13, 2017) (noting that the federal responsibility is not to take care of tribes, but to enable tribes to take care of themselves).

324. 25 U.S.C. § 5321 (2015).

325. *Id.* §§ 415(e), (h) (2015).

326. *Id.* § 3504.

327. Indian Trust Asset Reform Act, 25 U.S.C. §§ 5611–5614 (2016).

328. *Id.* §§ 5613(a)(2)(G), 5613(c).

assets for the foreseeable future, if ever. Therefore, it is critical that retained federal administration of Indian trust management and administration be improved. This is needed both to improve the welfare of individual Indians and Indian tribes and to avoid repetition of the problems that have led to so many tribal breach of trust lawsuits. Moreover, while all federal agencies bear trust responsibilities to Indians, the DOI is the primary agency involved in discharging federal trust responsibilities for Indians.

Two key aspects of federal reform long sought by Indian tribes therefore aptly focus on DOI: integration and elevation.<sup>329</sup> These also were addressed in the recently enacted ITARA. First, the ITARA provides for the preparation of a report within one year after enactment regarding the termination of the Office of Special Trustee for American Indians (OST) within the DOI and transition of its functions to other bureaus or agencies.<sup>330</sup> This responds to concerns that “the OST has outlived its statutory purpose and is performing functions outside the scope of its authority,” and that its continued operation has “caused greater confusion, burdens, and delays in the processing of trust asset transactions for Indian tribes.”<sup>331</sup>

Second, the ITARA authorizes the establishment of an Under Secretary of the Interior for Indian Affairs, who shall report directly to the Secretary of the Interior.<sup>332</sup> In addition to other duties that may be directed by the Secretary of the Interior, the Under Secretary (if established and appointed) shall coordinate the transition of OST functions and supervise and coordinate activities and policies of the BIA with activities and policies of the Bureau of Reclamation, the Bureau of Land Management, the Office of Natural Resources Revenue, the National Park Service, and the United States Fish and Wildlife Service.<sup>333</sup> The Under Secretary also would “provide for regular consultation with Indians and Indian tribes that own inter-

329. See, e.g., *Indian Trust Reform: Hearing*, *supra* note 321, at 17–18; *Indian Trust Reform Act: Hearing on S. 1439*, *supra* note 315, at 91–92, 96–97 (testimony by tribal leaders from NCAI and ATNI).

330. 25 U.S.C. § 5634(a)(2)–(3).

331. TO PROVIDE FOR INDIAN TRUST ASSET MANAGEMENT REFORM, AND FOR OTHER PURPOSES, S. REP. NO. 114-207, at 12 (2016). The OST was established by the American Indian Trust Fund Management Reform Act of 1994, but not originally intended to be permanent. See 25 U.S.C. § 4042(c) (2015); see also *Indian Trust Reform Act: Hearing on S. 1439*, *supra* note 315, at 100–01 (testimony by James T. Martin, Executive Director, USET: “the ineffective duplication that has been created by the DOI’s stovepiping its lines of accountability and decision making authority . . . is a critical issue that the trust reform legislation . . . must address”).

332. 25 U.S.C. § 5633(c).

333. *Id.* § 5633(c)(1)–(2)). It is not known why this enumerated list did not include the DOI’s Office of Surface Mining Reclamation and Enforcement or the OST in case it is not terminated.

ests in trust resources and trust fund accounts.”<sup>334</sup> The establishment of the Under Secretary would address long-standing concerns that nearly every agency within the DOI has some significant trust responsibilities, but there currently is no single executive within the Secretary of the Interior’s office who is permanently responsible for coordinating trust administration across all relevant agencies.<sup>335</sup> The establishment of this position therefore could directly address some of the concerns that led President Nixon to propose establishment of the Indian Trust Counsel Authority.

Because the ITARA only requires a report on OST transition and only authorizes the establishment of an Under Secretary for Indian Affairs, it remains to be seen how these recently enacted trust reform provisions will play out.

#### D. Oversight

Next, Indian tribes have recognized that there should be a high-level, independent entity with oversight authority to ensure compliance with federal trust duties.<sup>336</sup> Currently, federal agencies—especially within the DOI—are “in the position of being both ‘pitcher’ and ‘umpire’ for trust administration.”<sup>337</sup> Not surprisingly, Indian leaders have viewed accountability and reaffirmed standards as the cornerstone tenets of meaningful trust reform.<sup>338</sup> As Eloise Cobell testified, “[i]n all other trusts, there are, among other things: . . . clarity of trust duties and standards; . . . and . . . independent oversight with substantial authority to ensure that beneficiary rights are protected.”<sup>339</sup> As tribal leaders have urged before Congress, this entity would allow for review of existing practices to support and improve best practices.<sup>340</sup> Also, because problems with Indian trust responsibility fulfillment are not limited to the BIA or the DOI,<sup>341</sup> such oversight also should not be so limited.

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334. *Id.* § 5633(c)(3).

335. *E.g.*, *Indian Trust Reform Act: Hearing on S. 1439, supra* note 315, at 91–92.

336. *See Indian Trust Reform: Hearing, supra* note 321, at 11–12, 17–18.

337. *Fulfilling the Federal Trust: Hearing, supra* note 316, at 71.

338. *E.g.*, *Indian Trust Reform Act: Hearing on S. 1439, supra* note 315, at 90 (testimony by Tex Hall, President, NCAI: “[t]he very absence of those provisions is why we have the *Cobell* lawsuit and all of the tribal trust lawsuits.”).

339. *Id.* at 234.

340. *Id.* at 92, 97–98, 100–01, 121, 155–62, 166–67 (testimony and submissions from NCAI, ATNI and United Southand Eastern Tribes, Inc.).

341. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-317, HIGH-RISK SERIES: PROGRESS ON MANY HIGH-RISK AREAS, WHILE SUBSTANTIAL EFFORTS NEEDED ON OTHERS 200–03 (2017) (finding that federal agencies have ineffectively administered and implemented Indian education and health care programs); Kevin K. Washburn, *Advice to the Next Assistant Secretary for Indian Affairs*, *Indian Country Media Network*, INDIAN COUNTRY TODAY (Mar. 7, 2017),

It is imperative that effective oversight includes tribal leaders. Indian leaders best understand the problems and needs of their communities, existing issues with federal administration, and the opportunities for improving existing circumstances. For example, the White House Council for Native American Affairs established by President Obama by Executive Order expressly recognized that “[g]reater engagement and meaningful consultation with tribes is of paramount importance in developing any policies affecting tribal nations.”<sup>342</sup> However, that Council only includes the heads of numerous federal departments and agencies, without any Indian or tribal representatives.<sup>343</sup> A number of tribal representatives have noted this deficiency and advocated for addressing it, which the Secretary of the Interior has acknowledged and sought to address in part.<sup>344</sup> As some tribal leaders have noted, using an expression that has been used in other political contexts, “if you are not at the table, you are on the menu.”<sup>345</sup>

Fortunately, there is a strong precedent for direct tribal involvement in broad oversight of federal Indian affairs in the National Council for Indian Opportunity (NCIO). The NCIO was founded by President Johnson by Executive Order coincident with his Special Message to Congress on Indian Affairs.<sup>346</sup> The NCIO was chaired by the Vice President and included key cabinet members, as well as presidentially appointed Indian leaders.<sup>347</sup> President Nixon later expanded the NCIO to add two more Indian representatives and the Attorney General, so that there would be equal tribal and federal representation,<sup>348</sup> and staggered the terms of the Indian-leader

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<https://indiancountrymedianetwork.com/news/opinions/advice-next-assistant-secretary-indian-affairs/> (noting that most of Indian tribes’ complaints concern matters outside the DOI, such as with the Forest Service, the Army Corps of Engineers, and the Departments of Labor, Defense, and State).

342. Exec. Order No. 13,647, § 1, 78 Fed. Reg. 39,539, 39,539 (July 1, 2013).

343. See *id.* § 3.

344. Toward the end of the Obama administration, the Secretary of the Interior allowed tribal representatives to participate in subject-matter specific subgroups of the White House Council and allowed the President of the NCAI to attend a so-called principals meeting of the White House Council itself.

345. See Barry Popik, “*If You’re Not at the Table, You’re on the Menu*” (Apr. 1, 2010), [http://www.barrypopik.com/index.php/new\\_york\\_city/entry/if\\_youre\\_not\\_at\\_the\\_table\\_youre\\_on\\_the\\_menu/](http://www.barrypopik.com/index.php/new_york_city/entry/if_youre_not_at_the_table_youre_on_the_menu/) (citing various uses of this expression going back to 2000).

346. Exec. Order No. 11,399, 33 Fed. Reg. 4,245 (Mar. 6, 1968) (establishing the NCIO); cf. *The Forgotten American*, *supra* note 70 (discussing same, noting that “[t]he Council will review Federal programs for Indians, make broad policy recommendations, and ensure that programs reflect the needs and desires of the Indian people.”).

347. Exec. Order 11,399, 33 Fed. Reg. 4,245 (Mar. 6, 1968).

348. Exec. Order 11,551, 35 Fed. Reg. 12,885 (Aug. 14, 1970).

members.<sup>349</sup> The NCIO's tribal leaders played a critical role in developing the proposals that became President Nixon's Special Message to Congress on Indian Affairs.<sup>350</sup>

Senator Barry Goldwater explained the importance of the NCIO and its membership between when the NCIO Indian leader members presented their proposals at the White House and when President Nixon finalized and presented his resulting Special Message to Congress:

[i]t stands as an elemental truth that an organization which is supposed to be devoted to the supervision and formulation of our national Indian policies and programs should have a significant Indian representation on it. Clearly, the Indian Americans themselves should be consulted and informed before major steps are taken which will affect Indian lives.

Also, if the Council is going to prove capable of living up to its promise, it must have among its membership the Government officials who hold the reins of authority over Indian programs. These members should be able to make commitments and put into operation the actions which will implement these commitments.

This is why the remaining members of the Council are all Cabinet-level officers. Indeed, as I have mentioned, the chairman of the Council is the Vice President of the United States.<sup>351</sup>

As Senator Goldwater reported, "the Vice President feels that the statement of the Indian members of Council is a major document, because it sets forth the definition of, and recommendations on, Indian problems by Indian citizens themselves."<sup>352</sup> This was a pivotal occasion when Indians moved from being the objects of federal policy to the makers of it.<sup>353</sup> Still, the Indian members there were presidential appointees rather than representatives selected by Indians themselves, which may have been politically necessary, though contrary to a basic principle of Indian self-determination.<sup>354</sup>

349. Exec. Order 11,688, 37 Fed. Reg. 325,815 (Dec. 5, 1972).

350. THOMAS A. BRITTEN, *THE NATIONAL COUNCIL ON INDIAN OPPORTUNITY: QUIET CHAMPION OF SELF-DETERMINATION* 162, 264 (2014).

351. 116 CONG. REC. 6,895 (1970) (statement of Sen. Barry Goldwater).

352. *Id.* at 6896, 6896–99. Based on the Vice President's belief that the statement should be available for a nationwide audience, the entire statement by Indian members of the NCIO to the White House was printed in the Congressional Record. *Id.* at 6896–99.

353. BRITTEN, *supra* note 350, at 55 (quoting NCAI Sentinel).

354. *Id.* at 54–55.

Unfortunately, the NCIO terminated along with its appropriation around the time that President Nixon resigned.<sup>355</sup> Also, to date there has never again been a formal mechanism by which Indian leaders had such access to high-ranking federal officials.<sup>356</sup> Now is an appropriate time to revive that institution in an improved form. If this is accomplished, key improvements could include having a legislative mandate and financial independence from member departments, to ensure greater objectivity in reviewing existing programs and considering new policies, as President Johnson recognized.<sup>357</sup> It also would be valuable to have Indian members nominated by Indians themselves and with geographic representation, rather than being purely political appointments, typically from the political party of the President, as was done previously.<sup>358</sup>

### E. Funding

As has long been noted, “all of the reform in the world cannot get the job done without adequate funding.”<sup>359</sup> That is certainly true regarding the federal trust responsibility, because a basis for many past problems with fulfillment of federal trust duties was the lack of sufficient federal funding. As the U.S. Commission on Civil Rights has concluded in a congressional mandated study:

federal funding directed at Native Americans . . . has not been sufficient to address the basic and very urgent needs of indigenous peoples. Among the myriad unmet needs are: health care, education, public safety, housing, and rural development. The Commission finds that significant disparities in federal funding exist between Native Americans and other groups in our nation, as well as the general population.<sup>360</sup>

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355. *Id.* at 260–61, 265 (noting funding ended on June 30, 1974 and Nixon’s resignation in August 1974); see Act of Nov. 26, 1969, Pub. L. 91-125, § 2, 83 Stat. 220 (1969) (“The National Council on Indian Opportunity shall terminate five years from the date of this Act unless it is extended by an Act of Congress.”).

356. BRITTEN, *supra* note 350, at 35.

357. See *id.* at 59 & n. 44.

358. *Id.* at 50, 260.

359. *Indian Trust Reform Act: Hearing on S. 1439, supra* note 315, at 101 (statement by James Martin of USET); see also *id.* at 90–92, 168 (statement of Tex Hall, President, NCAI) (noting chronic underfunding of the Bureau of Indian Affairs).

360. U.S. COMMISSION ON CIVIL RIGHTS, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* iii (2003).

These issues have been noted for decades and not gone away.<sup>361</sup> As the most recent Assistant Secretary of the Interior for Indian Affairs has acknowledged, “many existing programs are ineffectual precisely because they are underfunded.”<sup>362</sup> Moreover, extensive litigation between Indian tribes and the United States has focused on the need for sufficient federal funding for Indian tribes to administer programs formerly handled by federal agencies.<sup>363</sup> Therefore, regardless of whatever else Congress may do to reaffirm and modernize the federal trust responsibility, it must ensure sufficient federal funding to implement it. Not surprisingly, tribal leaders have long recognized this problem and advocated for addressing it.<sup>364</sup> Fortunately, at least some in Congress recognize that this funding problem is a key cause of perennial problems with fulfillment of federal trust duties and must be addressed.<sup>365</sup>

## V. CONCLUSION

One generally does not read court decisions on tort, property, contract, or constitutional disputes that reference moral obligations. Yet moral obligations are referenced in federal-Indian disputes regarding the trust responsibility, often paired with the characterization that it is not legally enforceable. But if the federal trust responsibility to Indians is largely just a moral obligation that is not enforceable beyond the terms of statutes and regulations, then it ought not be discussed in legal decisions. But surely there has been some legitimate legal reason for countless references to the federal trust responsibility in United States court decisions going back almost 200 years.

As explained here, the federal trust responsibility is a fundamental component of federal-tribal relationships, both historically and legally. It

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361. The U.S. Commission on Civil Rights (USCCR) held a briefing in February 2016 for an update on its 2003 report, which remains pending. See News Release, USCCR, U.S. Commission on Civil Rights Announces Panelists for Briefing Related to *Quiet Crisis: Federal Funding and Unmet Needs in Indian Country, 2016 Update* (Feb. 16, 2016), [http://www.usccr.gov/press/2016/PR\\_QuietCrisis2016.pdf](http://www.usccr.gov/press/2016/PR_QuietCrisis2016.pdf); see also DELORIA, *supra* note 289, at 13 (“The conclusion of every TASKFORCEREPORT is that Congress is not appropriating enough money to do an adequate job of helping Indians.”).

362. Washburn, *supra* note 341.

363. See, e.g., *Salazar v. Ramah Navajo School Board*, 567 U.S. 182 (2012).

364. E.g., *Indian Trust Reform Act: Hearing on S. 1439, supra* note 315, at 92 (statement of Tex Hall, President, NCAI) (“[T]he BIA has never been provided with an adequate level of resources, staffing and budgeting to fulfill its trust responsibilities to Indian country.”).

365. Senator Al Franken, Speech at NCAI Tribal Nations Policy Summit 115th Congress Executive Council (Feb. 13, 2017) (noting that federal Indian programs are consistently underfunded, and that Indian tribes are consistently failed by the federal government because of those funding problems).



was what Indian tribes surely understood and expected when they entered into numerous treaties and later agreements with the United States, and what federal officials surely intended when they made commitments of protection in exchange for most of the United States' land and resources. Also, the trust responsibility is fundamentally what distinguishes federal-tribal government-to-government relationships from relationships between the federal government and states and among states. That fiduciary responsibility has a solid legal foundation in a range of well-established legal principles, including domesticated international law, constitutional law, contracts, property, and of course trusts. While the contours of the federal trust responsibility are spelled out and may evolve through case law, there remain some irredeemable minimum and basic aspects of it consistent with its original establishment, even though it has been violated repeatedly and over long periods of time. Finally, while history teaches that the trust responsibility has not been fully honored in the past due to outright racism and subordination of Indian interests to federal prerogatives, it remains a key principle that should guide and shape future development of federal Indian policy, even with ongoing efforts for greater tribal self-governance.

Indeed, many of the various common law threads that underlie the federal trust responsibility to Indians may be identified in a single statement in one for the first leading Indian law decisions:

[f]rom the [preconstitutional] commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians [under the Indian Commerce Clause]; which treat them as nations [as a matter of foreign relations], respect their rights [under contracts and property law], and manifest a firm purpose to afford that protection [i.e., trust duties] which treaties stipulate [under contracts and international law].<sup>366</sup>

So what then for the present and the future? While there are ongoing issues with federal compliance with and enforcement of the federal trust responsibility, it remains a fundamental principle that must shape future federal-Indian relations. Also, having a better definition and recognition of the federal trust responsibility is not just an academic exercise, but has substantial real-world applications.<sup>367</sup> Consistent with the long-standing recommendations by many tribal leaders and some prior experience, there are substantial bases and opportunities for future federal legislation to help ensure that the federal trust responsibility has a vibrant future. The trust

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366. *Worcester v. Georgia*, 31 U.S. 515, 556–57 (1832).

367. *See, e.g., supra* note 3 (concerning the Dakota Access Pipeline and other recent, high-profile Indian issues).

responsibility remains vital for American Indians. Hopefully, with a better appreciation for its legal basis and importance, federal officials will help ensure that it is honored so that Indians may be better empowered and enabled to thrive in the future. The federal trust responsibility should be not just be a weak shield to protect Indians from third parties, but a strong one that also protects Indians from bad faith actions by the federal government, as it was originally intended to do.