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The Government-Government and Trust Relationships: Conflicts and Inconsistencies

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INTRODUCTION

In 1834 the House Committee on Indian Affairs issued a comprehensive report, "Regulating the Indian Department," which analyzed the United States relationship with the Indian nations.[1] Following a review of applicable laws, the committee concluded that Congress had overstepped its authority in legislating for tribes. Only legislation, the committee admonished, which fulfilled treaty obligations and to which tribes had consented in their treaties, was legal. Laws which did not meet these criteria, constituted "indirect and therefore vicious legislation."[2] The committee concluded with the observation that "a recognition of the exercise of power without right is usually followed by the claim of the right. . . ."[3]

Within fifty short years, the committee's prophetic words were reality. In 1885, Congress passed the Seven Major Crimes Act, which provided the federal courts with jurisdiction over Indians committing one of seven major crimes. The *Kagama* decision the following year examined Congress' authority to pass this act and to assume criminal jurisdiction in Indian Country.[4] The Supreme Court admitted that although no constitutional provision granted such jurisdiction, the authority was appropriate given the tribes

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weakened state from which "arises the duty of protection, and with it the power."[5]

By what means was the federal government able to alter so drastically the foundation of its legal authority with tribes in such a short time? In the 1834 report, Congress recognized the inherent sovereignty of the Indian nations and that Congress possessed no power over tribes unless mutually agreed to in treaties. Half a century later in the *Kagama* case, the government asserted total authority over tribes and individuals through the creation of the guardianship doctrine.

The relationship identified in the 1834 report is today called the government-government relationship. It is a political relationship that the federal government maintains with federally recognized tribes.[6] It is between two political entities and is based on and arises from the inherent sovereignty of each party.[7] The vehicle establishing the relationship has varied from the treaty process to executive order to legislation.[8] Special programs and services such as educational benefits and the preferential hiring of Indians in the Bureau of Indian Affairs are available to tribal members because of this special political relationship.[9]

Treated in this fashion, tribes are semi-sovereign and possess a right of self-determination.[10] Tribal governments, because of their inherent sovereignty, retain a primary relation with their tribal members that is "extra-constitutional," i.e., outside the jurisdiction of the federal government. An important aspect of this is the exclusive right of the tribe to define its own membership and to make laws affecting tribal members and non-members within reservation boundaries.[11] The federal government, however, can extinguish tribal powers and assume jurisdiction over tribal members by virtue of its plenary authority to handle Indian affairs.[12] In the final analysis, tribes possess all inherent sovereign powers unless specifically extinguished by Congress or considered to be inconsistent with their dependent status.[13]

The guardianship doctrine has developed today into the trust relationship. It is a relationship that is predicated on international law, treaties, legislation, judicial decisions, and the government's characterization of Indians as a "dependent people."[14] Unlike the government-government relationship, guardianship extends to tribes and individuals.[15] The courts have described Congress' authority in the relationship as plenary.[16] Tribal rights within the

trust relationship obligate the federal government, at a minimum, to protect tribal lands and resources.[17]

The evolution to these two relationships has produced a field of law that can only be described as complex, illogical, and inconsistent.[18] The existence of these two relationships has allowed Congress to swing its Indian policies like a pendulum between legislation supporting tribal sovereignty and laws aimed at the destruction of tribal life.

This article examines the development and administration of these two relationships. The conclusion of this examination is that the trust relationship is most correctly viewed as an aspect of the government-government relationship. By treating the trust and government-government relationship as two separate relationships, the government has created a relationship with Indians based on race rather than political status and has prevented the proper administration of the government-government relationship.

First considered are the source, objectives and mechanisms for the establishment of the government-government relationship. The succeeding section reviews the manner in which the courts altered the guardianship responsibility, which was originally an aspect of the government-government relationship, and established it as a second separate relationship between the federal government and tribes. Following a summary of the current status of the government-government and guardianship or trust relationships, the essay analyzes the inconsistencies produced by the government's administration of these two relationships. The last section analyzes the history of the guardianship relationship and argues that it be redefined as a subset of the government-government relationship.

THE ESTABLISHMENT OF THE GOVERNMENT-GOVERNMENT RELATIONSHIP

Pacta sunt servanda is the international legal principle which regulates state interaction through the process of treaty negotiations and commitments. A treaty creates legally binding norms which describe and regulate such interaction. It was Francisco Vitoria, the noted Spanish theologian, who first suggested in the 1500s that Europe conclude treaties with the Indian nations for land

cessions. The Dutch negotiated the first treaty with the Iroquois in 1613. England continued the practice, concluding more than 500 treaties with eastern tribes. These treaties, like those concluded by England with European states, concerned the conduct of trade, the cession of land, the settlement of disputes and the formation of alliances. The United States signed its first treaty with the Delawares in 1778, establishing a mutual defense alliance between the two nations. By the end of the treaty making period in 1871 the United States had concluded more than 600 treaties (with various tribes) with approximately 370 treaties still legally binding. By relating to the Indian nations through the treaty process, the United States acknowledged that tribes were sovereign, that the United States possessed no jurisdictional authority over their affairs, and that the relationship between the two political entities was consensual. These three elements provided the basic framework for the initial federal-tribal government-government relationship.

The Supreme Court confirmed the tenets of this framework in *Cherokee Nation* v. *Georgia* (1831) and *Worcester* v. *Georgia* (1832), the first cases to review the federal government's relationship with Indian tribes.[19] In 1829, following the discovery of gold on Cherokee lands, Georgia passed a series of laws instituting state control over tribal territory and tribal members. The Cherokees, with the support of several Congressional members sought an injunction against the state of Georgia. The tribe's attorney, former United States Attorney General William Wirt, argued that the Cherokee Nation constituted a foreign state and Georgia's laws were, therefore, inapplicable.

Chief Justice John Marshall ruled the Cherokees were not a foreign state by constitutional standards and denied their motion for an injunction against Georgia. The Cherokees, according to Marshall, were neither foreign nations, nor states, nor conquered subjects. Rather, the Cherokees, were a "domestic dependent nation. . . . Their relations to the United States resemble that of a ward to a guardian."[20] To support his finding, Marshall relied on Article III of the Constitution which granted Congress the power to "regulate commerce with foreign nations and among the several states, and with the Indian tribes." This separate listing of foreign nations and Indian tribes, according to Marshall, was evidence that the constitutional framers considered the Indian tribes' status distinct from that of an international sovereign.[21]

Undaunted, the Cherokees returned to Court the following year. This time their attorney Wirt based his case on the argument that the Constitution granted the regulation of intercourse with the Indians exclusively to the federal government. Any attempt by states to alter or void federal law violated the Constitution. Marshall agreed with the plaintiffs, finding the Georgia laws to be an unconstitutional interference with the United States' treaties with the Cherokees. Marshall's decision elaborated on his earlier description of the Cherokees as a domestic dependent nation. Prior to discovery, Marshall stated, America was "inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own and governing themselves by their own laws."[22] The United States, following the British example, had not advanced a claim to Indian lands or asserted any right of dominion over them. Rather, the United States had acknowledged the Indian nations as "distinct political communities, having territorial boundaries within which their authority is exclusive and having a right to all the lands within their boundaries."[23]

In reviewing the treaties concluded between the United States and the Cherokees, Marshall concluded that the United States "considered the Cherokees as a nation . . . the very term 'nation,' . . . means a 'people distinct from others.' . . . The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth."[24] In reference to the point that the tribes had placed themselves under the protection of the United States, and were in a state of pupilage, Marshall emphasized the " . . . relationship was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[25] In the end, Marshall ruled that Georgia's laws extending jurisdiction over Cherokee lands interferred with United States-Cherokee relations, were in direct hostility to United States-Cherokee treaties, and violated congressional acts which implemented the treaties. It was the sole privilege of the United States to relate to the tribes through its sovereign powers to conclude treaties, wage war and regulate commerce.[26] And this authority vis a vis the states, was plenary.

Although Marshall would not recognize the international

sovereignty of the tribes nor the legal relationships that the tribes maintained with other nations,[27] the basic framework of the federal-tribal government-government relationship remained intact. According to Marshall's analysis, the United States recognized tribes as sovereign and independent from jurisdictional control by federal and state governments. The treaty process, implying equality and based on mutual consent, remained as the mechanism for establishing and regulating the relationship.

Over the next 40 years, however, federal encroachment on Indian sovereignty accelerated. As tribes became less willing to part with their lands in the East and hostilities increased, the government negotiated with the tribes for their removal west of the Mississippi River. Between 1832 and 1842, nineteen tribes were moved to an area known as the "unorganized Indian country." Within a decade it became apparent the tribes would not be secure in lands west of the Mississippi either. The 1840s and 1850s were a period of unprecedented growth for the country. Expansion and growth became national values. In ten short years (1845–1855) the country's population increased by 32 percent and its size by 70 percent. In 1845, Congress annexed Texas and a year later added the Oregon Territory. In 1848, the entire southwest became American territory as a result of the Mexican War. Five years later, the Gadsden Purchase completed the present continental boundaries of the United States. Between 1830 and 1860 Congress added eight states and five territories to the Union. Two of these territories were Kansas and Nebraska, which Congress had set aside twenty-five years earlier for the Indian nations.

Demands from major corporations, especially the railroads and from potential homesteaders, precipitated a change in the government's policy for the disposition of these western lands. To meet the demands of the railroads and homesteaders the government expanded upon a policy it had used first in California: negotiate with tribes for their remaining lands, leaving them smaller areas known as reservations over which the government guaranteed complete tribal control. Between 1853 and 1857, the government, with the help of the military, negotiated 53 treaties with various tribes to acquire more than 174 million acres for settlement. Within less than ten years this too proved insufficient and the government pressed the tribes for more land concessions. Tribes refused and the Plains Wars erupted. In 1867, Congress appointed a Peace Commission to study the situation.

The Commission found that the main cause of hostilities was the government's refusal to keep its treaty commitments and its repeated demands for more tribal concessions. Reaction to the report, however, focused on the treaty process itself, rather than the government's failure to uphold it. The treaty process, critics argued, should be discontinued. Since tribes were not sovereign entities, but wards in need of care by the federal government, treaties should no longer govern federal-tribal relations. The proper manner of relating to the tribes was to bring them within the federal system and to legislate for their moral and physical well-being.

THE CREATION OF THE GUARDIANSHIP DOCTRINE

With the tribes' refusal to cede more of their lands and with the separation of the races no longer a viable alternative, the government adopted a new policy to solve the Indian problem—assimilation through the destruction of tribal ties and communal values and the forced adoption of Anglo concepts of individualism and emphasis on private property. Carrying out assimilation necessitated a radical change in the basic framework of the government-government relationship. As the federal government realized, the treaty process, which implied a consensual relationship based on recognition of mutual sovereignty, was inherently contradictory to assimilation. Hence in 1871, the House of Representatives attached a rider onto an appropriations bill which provided:

> . . . hereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty.[28]

Heretofore, the government had related to the tribes through its power as an external sovereign . . . the power to conclude treaties and wage war. Even its authority under the commerce clause had been considered as more "external than internal," more closely identified with the government's power to regulate commerce with foreign nations than with the states.[29] With the act of 1871, Congress moved to bring Indian affairs squarely under its control as an internal matter. In the future, legislation, rather than treaties, would regulate Indian affairs. Previously, the

implementation of treaty provisions and laws to control non-Indian contact with the tribes had been the only legislation associated with the government-government relationship. Now, the government proposed unilateral legislation which was for the purpose of regulating tribes and individual members.

By 1903, the courts had accomplished the legal maneuverings necessary to implement the nation's new approach to dealing with Indian affairs. In a series of cases decided between 1883 and 1903, the Supreme Court legitimized federal criminal jurisdiction over Indians, allowed partial state jurisdiction in Indian country, sanctioned the abrogation of Indian treaties and provided for total federal control over Indian lands.[30] The courts accomplished these changes by tranforming Marshall's reference to a guardian-ward relationship in *Cherokee Nation* into a separate independent power to regulate Indians.

In 1883, the Supreme Court ruled in *Ex Parte Crow Dog* that the federal courts did not have jurisdiction to hear a case involving the murder of Spotted Tail by Crow Dog on the Sioux reservation.[31] The federal government argued that the 1868 treaty and an 1877 act authorizing Congress to provide the Sioux with an orderly government, justified federal jurisdiction. In denying the government's claim, Justice Matthew ruled, "An orderly government meant the security of self-government, the regulation by themselves of their domestic affairs."[32] Angry and incredulous at the Court's ruling in *Crow Dog*, Congress quickly proceeded to assume jurisdiction by tacking the Seven Major Crimes Act onto the 1885 appropriations bill. Under the provisions of the Act, the federal courts claimed jursidiction over Indians committing murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny.

A year later in *U.S.* v. *Kagama* (1886) the Supreme Court reviewed Congress' power to assume criminal jurisdiction in Indian country. The Court found that Congress possessed no authority, as the government argued, to claim jurisdiction over crimes between Indians under the commerce clause, but that it could assume jurisdiciton under its authority as guardian to the tribes. Justice Miller admitted that the government had acknowledged the tribes as having a semi-independent position, that the government had recognized them, "not as States, not as nations, but as separate people, with power of regulating their internal social relations and thus not brought into the laws of the Union or of the States within whose limits they resided."[33]

Despite this recognition and the government's previous practice of relating to the tribes by treaties, Miller explained, Congress had changed its approach to one of governing the tribes by legislation. According to the Justice, the tribe's dependent condition warranted this procedural change:

> These tribes are the *wards* of the nation. From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, here arises the duty of protection, and with it the power.[34]

The decision not only distorted the source and parameters of the guardianship relationship as defined under international law and by Marshall, but by separating the guardianship relationship from the government-government relationship and elevating it to an independent power, the Court ran counter to several political and legal doctrines inherent in the American political system. Theoretically, the United States is a government of enumerated powers. Justice Miller admitted that there was no constitutional authority empowering Congress to assume criminal jurisdiction over Indians *per se*. Instead, the authority, according to the Court, arose from a self-imposed and non-constitutionally founded obligation to protect Indians.

The *Kagama* decision similarly undermined the political concept that the United States is a government predicated on consent of the governed. An earlier case, *Elk* v. *Wilkins* (1884) and a later case, *U.S.* v. *Sandoval* (1913) confirmed that the guardianship relationship extended not only to those possessing a treaty or political relationship with the federal government, but to all Indians and tribes as a racial group.[35] Furthermore, these cases emphasized that, unlike the government-government relationship, the decision to establish or to terminate guardianship lay solely with the federal government.

The *Elk* decision considered the status of Indians under the 14th amendment, which assigned citizenship to all persons born in the United States. Elk had voluntarily separated himself from his tribe and sought American citizenship. After being refused the right to vote on the grounds that he was not a citizen, Elk brought suit in federal court. The Supreme Court denied Elk's argument, ruling that Indians were not United States citizens, but citizens of a distinct, alien nation. Their allegiance was to the

tribe, not to the United States. Only the federal government, the Court held, could decide whether any tribe or individual Indian "should be let out of the state of pupilage" and admitted to citizenship.[36]

In *Sandoval*, the Court, in ruling that a liquor prohibition act applied to the Taos Pueblos who had no treaty relations with the United States, stated that although the Taos were "industrially superior, they are intellectually and morally inferior to many (tribes) and therefore required the government's guidance."[37] The 1903 *Lone Wolf* v. *Hitchcock* decision revealed that Congress possessed total authority to determine the nature and extent of this protective control.[38]

Article 12 of the Treaty of Medicine Lodge stipulated that Congress could not dispose of reservation lands without the agreement of three fourths of the adult males of the Kiowa and Comanche tribes. Following the United States confiscation of reservation lands after a tribal refusal to cede the land, Lone Wolf, on behalf of the tribes filed suit charging the government with abrogating the treaty and disposing of tribal property in violation of the Fifth Amendment. The Court declined to support the tribe's position, pointing out that the tribe had overlooked its dependent status and the government's role as its guardian. To hold Congress to the treaty would limit federal authority to care for and protect Indians. The Court conceded that the government had characterized tribal property rights as sacred as fee simple. This description, however, according to the Court, applied only to protecting the tribes against confiscation by states or individuals. The tribe's title could not be protected against the federal government. Citing an earlier case, *Beecher* v. *Wetherby* (1877), the Court emphasized that federal control over Indian lands was plenary by virtue of the guardianship duty. The only limitation on governmental authority to dispose of Indian lands were those " . . . considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."[39]

By the early 1900s, the federal government had clearly established two differing relationships with Indians. The government-government relationship, which was predicated on the inherent sovereignty of each party as political entities, was essentially equitable and consensual, with each party determining through a negotiation process whether to establish the relationship as well as its objectives and parameters. The guardianship relationship

was based on the Indians' "need for protection." The federal authority to provide this protection derived from the government's obligation to protect, and the federal government alone decided when and with whom to establish the relationship. Similarly, the federal government held sole authority to determine what constituted protection and how to implement that protection. Unlike the government-government relationship which originally had precluded interference, the guardianship doctrine provided for full intervention in tribal affairs.

THE CURRENT STATUS OF THE GOVERNMENT-GOVERNMENT RELATIONSHIP

In the late 1800s, as part of its effort to assimilate the tribes, Congress passed leglislation which allotted reservation lands to individual members, established anglo-oriented court systems and police forces, prohibited the practice of Indian religion, and instituted educational systems to "kill the Indian and save the man."[40] The effects of these measures on Indian society, especially the Dawes Act, which divided Indian lands and resulted in a two thirds reduction of the overall tribal land base, were devastating.[41] In 1928, the Meriam Report, undertaken by the Brookings Institute at the request of the Secretary of the Interior, revealed the destruction and impoverishment of reservation society effected by these policies. In response, Congress passed the 1934 Indian Reorganization Act, which reaffirmed the authority of tribal governments and re-established the importance of the government-government relationship.[42] Intended by the Act's principal creator, BIA Commissioner John Collier, to strengthen Indian governments and economies, the act provided for: 1) a prohibition against the further allotment and alienation of Indian lands; 2) a revolving loan fund for economic development projects and the establishment of tribal business corporations; 3) procedures for tribal organization under constitutions and by-laws; 4) the preferential hiring of Indians within the Bureau of Indian Affairs; and 5) procedures by which non-treaty tribes could establish a government-government relationship with the federal government. Unfortunately, the Act's success was mixed, and the underlying philosophy of Indian self-determination was short-lived. Within twenty years, Congress reversed its course

and returned to forced assimilation through the termination of federal-tribal relations.

House Concurrent Resolution 108 passed in 1953 provided that Congress, "as quickly as possible, move to free those tribes listed from federal supervision and control and from all disabilities and limitations specially applicable to Indians."[43] Termination meant the end of the trust relationship and the government's recognition of tribes as distinct legal entities. For most tribes, reservation lands were sold, with proceeds going to the tribes. For those tribes which had their lands placed in private trust, federal protection and aid ended. Termination also ended all special tribal programs and individual state tax exemptions and imposed state civil and criminal authority. Tribes were free to retain their cultural identity, but Congress no longer acknowledged their legal identity and rights to inherent sovereignty. By 1961, Congress had terminated its relationships with 109 bands and tribes including the large and self-sufficient Klamaths and Menominees.[44]

By the late fifties it was apparent that termination had failed and in the late 1960s and early 1970s, the pendulum swung again. Congress reaffirmed and sought to strengthen the government-government relationship and once again affirmed the core of that relationship, Indian sovereignty. In 1975, because of "a strong expression of the Indian people for self-determination" and because "the federal domination of Indian service programs had served to retard rather than enhance the progress of Indian people," Congress passed the Indian Self-Determination and Education Assistance Act.[45] This act gave all tribes an opportunity to contract for services such as housing, education, community development and law enforcement formerly provided by the BIA.

This Act did not grant but affirmed Indian sovereignty and provided a practical method for its implementation. A number of recent cases have illustrated the fact that, despite the federal government's attempts to diminish Indian sovereignty and tribal governmental powers, tribes have retained their status as domestic dependent nations possessing inherent powers of self-government. In *U.S.* v. *Mazurie* (1975), the Supreme Court acknowledged tribal police power to issue liquor licenses.[46] In *U.S.* v. *Wheeler* (1978), the Supreme Court affirmed tribal sovereignty by ruling that an individual tried in both tribal and federal courts for actions arising from the same crime was unprotected by the double jeopardy clause of the Fifth Amendment because he had

broken the laws of two sovereigns.[47] And in the important *Martinez* (1978) decision, which confirmed the sovereign right of tribes to define their own membership, the Court held that the federal government did not have the jurisdiction to review tribal members' complaints against their tribal government regarding membership disputes.[48]

The Supreme Court affirmed tribal sovereignty most recently in *California et al* v. *Cabazon Band of Mission Indians* (1986).[49] States, the Court rules, did not have the authority to regulate or to prohibit bingo operations on Indian reservations. As the Court emphasized, "Indian tribes retain attributes of sovereignty over both their members and their territory. . . . "[50] Bingo enterprises, currently operated by more than one hundred tribes, are, Justice White wrote, a proper exercise of Indian sovereignty and federal objectives of promoting tribal self-sufficiency and economic development. In sum, tribes possess the authority to establish and administer their own governmental structures; to define their own membership; to regulate the use of their property; to levy taxes; to handle criminal and civil disputes, including marriages, divorces and child custody cases; to provide social services and to establish business corporations.[51]

THE CURRENT STATUS OF THE GUARDIANSHIP RELATIONSHIP

In the 1870s, the government, through a surveying error, granted a section of Creek lands to the Sac and Fox tribe. Twenty years later, the government sold this land along with the rest of the Sac and Fox reservation. The Creeks sued the government for the loss of their lands.[52] The Court ruled in favor of the Creek Nation, finding that although the Creeks were wards of the federal government and subject to the government's authority in the management of their property, governmental control over Creek lands was not absolute. Tribal property rights were not only constitutionally protected by the Fifth Amendment, according to the Court, but the federal government possessed a fiduciary responsibility to the tribe.

Since the determination that the federal government possesses a legally binding obligation toward tribes, the courts have attempted to define the parameters and limitations of this trust responsibility.[53] Tribes have argued that the federal government

promised to protect tribal existence and the remaining tribal resources of all tribes in return for land and friendship. The federal government originally maintained that, despite the authority it derives from the guardianship doctrine to legislate for *all* Indians, its legal responsibility is restricted to protecting the resources of only federally recognized tribes. In response to these assertions, the courts have ruled that the federal government clearly possesses a fiduciary responsibility to protect federally recognized tribal land bases and resources, including tribal funds,[54] and in line with tribal arguments, to provide health care and protect the lands and resources of nonfederally recognized tribes.[55] The latter determination resulted partly from the court's finding in the important Passamaquoddy decision.

In 1975, the Passamaquoddy Tribe sued the federal government for its refusal to press the tribe's land claims against the state of Maine.[56] The tribe argued that although it was not a federally recognized tribe, the United States had an obligation under the Trade and Intercourse Act of 1790 to prevent confiscation of Indian lands without the government's authority: "No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state unless the same shall be made and duly executed at some public treaty held under the authority of the United States." The court decided in the tribe's favor, ruling that the 1790 Act had indeed established a trust relationship between the federal government and all tribes as property owners.

CONFLICT AND INCONSISTENCIES

Despite the transformation of the guardianship into the trust relationship and the revitalization of the government-government relationship, these two separately recognized relationships are difficult to reconcile. The government-government relationship based on the inherent sovereignty of each party is totally inconsistent with the guardianship doctrine predicated on the federal government's plenary authority to care for Indians. To accept tribes as sovereign bodies and yet argue that the federal government possesses total authority over tribal lands and existence is illogical. This results in such anomalous situations as: the fed-

eral government affirming the inherent right of tribes to structure and administer their own governments, yet claiming final approval powers over tribal constitutions and by-laws;[57] recognizing tribal authority to define its own membership, yet maintaining final approval over blood quantum and enrollment questions;[58] and acknowledging that tribes have a right to use and develop their resources, yet retaining final power over the dispensation of tribal lands and resources.

Tribes possess almost no defense against this plenary authority. They have no protection against the extinguishment of their title and the appropriation of their resources; Congress need only compensate tribes for their loss. In the *Morton* v. *Mancari* (1974) decision, the Court stated that Congressional actions must be "tied rationally" to the fulfillment of Congress' relationship with the tribes.[59] However, given that the government retains plenary authority to determine the relationship's parameters and objectives, it is questionable that the "tied rationally" test offers tribes any substantive protection. To date, the courts have yet to find any legislation concerning Indians to be unconstitutional. Even in a period of self-determination, the federal government may terminate at will the government-government relationship and thereby extinguish all Indian property and treaty rights.

Secondly, the federal government argues that it maintains a government-government relationship with tribes on the basis of their political status. At times, however, because of the plenary guardianship relationship, the government-government relationship is administered on the basis of race. In 1974, in *Morton* v. *Mancari*, the Supreme Court, in considering if the preferential hiring of Indians in the Bureau of Indian Affairs violated the equal protection clause of the Fourteenth Amendment, examined the nature of the government's relationship with Indians. The Court found Indian preferential hiring to be constitutional and based its opinions on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."[60] The Court pointed out that as hiring was limited to members of federally recognized tribes, preference was based on political rather than racial criteria and therefore did not violate the equal protection clause.[61]

Despite the *Mancari* holding, the government under its guardianship authority does, at times, legislate on the basis of race rather than political status. There are a number of laws which apply to Indians as a racial category as opposed to applying to members of federally recognized tribes. The Major Crimes Act, for example, applies to Indians from non-recognized as well as federally recognized tribes.[62] The Snyder Act, passed by Congress in 1921, authorizes the Bureau of Indian Affairs to "expend money as Congress from time to time may deem appropriate, for the benefit, care and assistance of the Indian throughout the United States."[63] Under the authority of this legislation, Congress has established a variety of programs to meet the educational, health, and material needs of tribes and individual Indians, including those from non-federally recognized tribes.

By administering a number of these programs on the basis of racial heritage, not on the basis of membership in a politically recognized tribe, the Bureau has violated tribal sovereignty. The *Mancari* decision ruling intimates that special services are availabel to Indians by virtue of the federal-tribal relationship. The *Martinez* decision affirmed the right of tribes to define their own membership. To define one's membership is to determine who shall participate in tribal rights. For more than a decade, however, the Bureau has provided Indian higher education grants to only those individuals of at least one quarter Indian blood.[64] Since several tribes base tribal membership on other criteria, many enrolled members are denied access to benefits granted fellow members.[65]

In 1986, the Ninth Circuit Court of Appeals recognized this deficiency and ruled that the Bureau's one-quarter eligibility requirement for higher education grants was unjustified and discriminatory on the basis of race.[66] Despite this ruling, the Indian Health Service has recently proposed to limit health care to tribal members of less than one-quarter blood—a move which could deny 75,000 Indians nationwide effective health care.

A parallel instance is the aboriginal border crossing rights of American Indians. The courts have ruled that the Jay Treaty provisions relating to the rights of American Indian tribes to cross the border freely is an aboriginal right.[67] Aboriginal rights belong to the tribe as a political entity. Individual aboriginal rights of specific Indians derive from membership in the polity, or tribe. An Indian has the right to travel within the boundaries of his or

her homeland by virtue of his or her tribal identity, not because of racial identity as an Indian. Denial of border entry to tribal members of less than 50% Indian blood is both Congressional interference in the exercise of inherent tribal authority and a denial of individual aboriginal rights to tribal members of less than one half Indian blood.[68]

Barring access to federal programs to tribally recognized members of federally recognized tribes violates the logic of the *Mancari* and *Martinez* rulings. In the above instances, race and not political status becomes the determining factor. Tribes as political entities should be free to establish eligibility requirements for these programs. Non-recognition of such freedom violates the government-government relationship by treating Indians as a disadvantaged minority, not as members of a political entity who have a right to these services in fulfillment of their special relationship to the United States.

THE GUARDIANSHIP-TRUST RELATIONSHIP REDEFINED

The difficulty is not the existence of the guardianship or trust relationship, but rather its interpretation and administration by the government. The trust relationship is most correctly viewed as a subset of the government-government relationship, not as a separate and parallel relationship. The history of treaty-making and the *Worcester* decision indicate that the government did promise in treaties to protect tribes. In return for land, military alliances and friendship the government pledged to secure remaining tribal lands and tribal existence from encroachment by states and settlers.

The Court correctly argued in *Kagama* that the government had promised in treaties to protect tribes. The Court's attempt to use this promise to legitimate government legislation over tribes is convoluted since treaties functioned as protection against *all* government incursions not agreed to by the tribes. Marshall clarified this point in *Worcester* v. *Georgia*. "Protection," according to Marshall meant the "supply of their essential wants" and "protection from lawless and injurious intrusions into their country. . . . Protection did not imply the destruction of the protected."[69] As mentioned, Marshall emphasized that the Cherokee—federal relation was that "of a nation claiming and

receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[70] Marshall supported his interpretation by citing international law:

> . . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[71]

Hence, protection in no manner involved the control of tribal lands or the management of tribal affairs. Treaties were explicit evidence as well as implicit recognition of the Indian nations' sovereignty. Periodically, tribes did agree to allow federal jurisdiction within their lands, especially in regard to criminal jurisdiction over non-Indians. These agreed upon restrictions did not constitute a denial of sovereignty. To request protection or to limit one's actions by treaty is to exercise one's right as a sovereign.

That Congress originally possessed no authority over the tribes except what the tribes had ceded in treaties, is supported by the previously mentioned 1834 congressional report.[72] As discussed, this report reviewed the United States-Indian Nations relationship and found illegal extension of federal authority beyond what the tribes had agreed to in their treaties. In examining previous legislation, the congressional committee found only three treaties authorizing the appointment of three Indian agents. Under an 1802 act and other acts, however, Congress had appointed eighteen agents and twenty-seven sub-agents. As the Report pointed out, "it was not competent for an act of Congress to alter the stipulations of the treaty or to change the character of the agents appointed under it."[73] The committee also found that the federal government had exceeded its power in the distribution of annuities: "The payments are required, by the terms of the treaties, to be paid to the tribes as a political body capable of acting as a nation. . . ."[74] The government, by distributing the money to individual tribal members, had done "much injustice to the tribes. . . ."[75]

Finally, the report considered the extension of federal criminal jurisdiction within tribal boundaries. To preserve peace on the frontier and to protect its own citizens, the federal government had negotiated with various tribes for the right to assume criminal jurisdiciton within tribal boundaries. Legislation implementing these treaty provisions, however, was extended to tribes which had not ceded the authority. The committee pointed out that this practice was inconsistent both with many treaty provisions and with exclusive tribal jurisdiction over crimes committed by or against Indians in their territory. "It is not perceived that we can, with any justice or propriety, extend our laws to offenses committed by Indian against Indians, *at any place* within their limits."[76] The committees also stressed that tribes had allowed federal jurisdiction over crimes committed by or against non-Indians as "a courtesy not a right."[77]

Rather than viewing Indian treaties as a bar against all governmental incursions, except those which had been agreed to by the tribes in treaties, the *Kagma* and *Lone Wolf* rulings interpreted the treaties as providing protection against state incursions and as a license for federal control. In so doing, the Court transformed the plenary authority the government possessed vis a vis the states to relate to Indian tribes to plenary authority to regulate the tribes. By so doing the courts created two separate and often conflicting relationships between the federal government and tribes.[78]

SUMMARY

The correct view of the guardianship relationship should be that it is an important subset of the original treaty or government-government relationship, rather than an independent relationship. In return for land cessions and peace, the federal government promised to protect tribal existence and remaining tribal lands. As Marshall emphasized, this protectorate relationship, well known in international law, did not imply a loss of sovereignty on the part of the protected and did not allow for the destruction of the national character of the protected.

The federal government has ignored both of these very critical points. It has reinterpreted the guardianship doctrine into a source of authority which allowed for the extinguishment of tribal

sovereignty and the destruction of tribal identity through such legislation as the Major Crimes Act, the Dawes Act, PL 280, House Resolution 108, and the Indian Civil Rights Act, among others. The creation of this separate authority has allowed the United States to recognize Indian sovereignty, at the same time claiming total control over the Indian population. This interpretation has permitted the federal government to assume (despite the existence of Indian sovereignty) final authority over Indian lands and resources and final power over tribal governments and membership. It has allowed the United States to claim maintenance of a political relationship with tribes, yet to administer the relationship along racial lines in violation of the equal protection clause of the Fourteenth Amendment.

To view the guardianship doctrine as an important subsidiary of the government-government relationship would reconcile the above anomalies. If treated as a subsidiary, the guardianship doctrine would be founded on the same basis as the government-government relationship, i.e., a consensual relationship based on the inherent sovereignty of each party.

This reinterpretation of the two relationships, however, would necessitate certain changes in the government's understanding and administration of its rights. The plenary doctrine would have to be restored to its original meaning—that the federal government possesses plenary authority vis a vis the states to relate to tribes, not plenary authority over tribes. A consensual relationship also requires the involvement of tribes in a determination of what constitutes effective protection of tribal lands and resources. Given that Indian services and programs represent the fulfillment of the government's obligation to protect tribal existence, the termination of such programs and responsibilities as occurred in the 1950s and 1960s must be recognized as illegal without tribal consent.

Finally, the government has a responsibility to the more than 200 non-recognized and terminated tribes.[79] The trust relationship arises basically from the land exchange process; in return for land and peace the federal government entered into a protectorate relationship with various tribes through the treaty process. Since the federal government has obtained lands from all tribes, it possesses a moral obligation to provide all tribes with protection.

NOTES

1. House Report No. 474.
2. *Ibid.*, 7.
3. *Ibid.*, "What was in fact mere usage, seems to have been taken as having been established by law;" *Ibid.*, 3.
4. *U.S.* v. *Kagama*, 118 U.S. 375 (1886).
5. *Ibid.*, 383–384.
6. There are more than 600 tribes in the United States. Of these, the United States maintains a political relationship with approximately 485, known as federally recognized tribes. The remainder are classified either as state recognized, terminated, or unrecognized tribes. None of these tribes possess a legal relationship with the federal government and none receive any of the special services and protections afforded to federally recognized tribes. David Getches, Daniel Rosenfelt, Charles Wilkinson, *Federal Indian Law* (West Publishing Co., 1979), 5.
7. The relationship is between the United States and the tribes, not between the United States and tribal members. *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977); *Morton* v. *Mancari*, 417 U.S. 535 (1974); *In re. Heff*, 197 U.S. 488 (1905).
8. The most important legislation has been the Wheeler-Howard Act (Indian Reorganization Act), June 18, 1934, U.S. Status at Large, 48: 984–88, and the Federal Acknowledgement Program, see *Federal Register*, Vol. 44, No. 1, January 2, 1979.
9. See for example, *Morton* v. *Mancari*, 417 U.S. 535 (1974).
10. See for example: *Talton* v. *Mayes*, 163 U.S. 376 (1895); *U.S.* v. *Mazurie*, 419 U.S. 544 (1975); *U.S.* v. *Wheeler* 435 U.S. 313 (1978).
11. *Santa Clara Pueblo et al.* v. *Martinez*, 436 U.S. 49 (1978).
12. *U.S.* v. *Kagama*, 118 U.S. 375 (1886), *Morton* v. *Mancari, supra* N. 9.
13. *Oliphant* v. *Suquamish Indian Tribe*, U.S. 191 (1978).
14. *U.S.* v. *Kagama, supra* N.4.
15. *Elk* v. *Wilkins*, 112 U.S. 94 (1884).
16. *U.S.* v. *Kagma, supra* N.4. See also *Delaware Tribal Business Comm.* v. *Weeks*, supra N.7.
17. See for example: *U.S.* v. *Creek Nation*, 295 U.S. 103 (1935); *Seminole Nation* v. *U.S.*, 316 U.S. 286 (1942); *Manchester Band of Pomo Indians* v. *U.S.*, 363 7. Supp. 1248 (1973); *Pyramid Lake Paiute Tribe* v. *Morton*, 354 7. Supp. 252 (1973).
18. Senator Ervin: "And so we have gotten to a position now where we do not know exactly what our fundamental theory in this field is. Is that not true?" Mr. Carver (Assistant Secretary of the Interior): "I think that is a very accurate analysis, Mr. Chairman." Hearings on the Indian Civil Rights Act before the Subcomm. on Constitution Rights, Senate Comm. on the Judiciary, 87th Congress, 1st session, pt. 1 at 18–19 (1961). To add to the confusion, Indian tribes have been variously described as international sovereigns, semi-sovereigns, political entities possessing a status higher than that of states, and wards of the federal government.
19. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

20. *Cherokee Nation* v. *Georgia, Ibid.*, 16.
21. *Ibid.*, 18-19.
22. *Worcester* v. *Georgia, Ibid.*, 542.
23. *Ibid.*, 556.
24. *Ibid.*, 558.
25. *Ibid.*, 554.
26. See U.S. Constitution, Article I, sec. 8 and Article II, sec. 2.
27. For example the Creeks in the late 1700s maintained simultaneous treaty relations with the United States and Spain as well as exclusive trading rights with Great Britain.
28. Act of March 3, 1871, N. Stat. 544, 566, R.S. sec. 2079, 25 U.S.C. 71.
29. Early legislation passed by Congress under Article I regulated the right of American citizens and the states to engage in commerce with the tribes. Citizens and states were forbidden to negotiate with the tribes for land (1790 Trade and Intercourse Act), passports were required for travel to Indian country, and strict licensing procedures were established for the conduct of commercial relations.
30. See: *U.S.* v. *Kagama*, supra N. 4, *U.S.* v. *McBratney*, 104 U.S. 621 (1881); *Cherokee Tobacco*, 11 Wall 616 (1870); and *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).
31. Ex Parte Crow Dog, 109 U.S. 566 (1899).
32. *Ibid.*, 568.
33. *U.S. v. Kagama*, supra N. 4, pp. 381-382.
34. *Ibid.*, 383-384.
35. The Major Crimes Act and the *Kagama* decision also confirmed this point. The Major Crimes Act applied to all Indians as indicated by the *Kagama* decision which dealt with a non-treaty tribe.
36. *Elk* v. *Wilkens, supra* N. 15, 99.
37. *U.S.* v. *Sandoval*, 231 U.S. 28 (1913). This case overruled *U.S.* v. *Joseph* 94 U.S. 614 (1876) which had found the Taos Pueblo in 1876 to be "too civilized" for government guidance.
38. *Lone Wolf* v. *Hitchcock, supra* N. 30.
39. *Ibid.*, 565.
40. Quoted in: Edward Ward, "Minority Rights and American Indians," *North Dakota Law Review* 51 (1974): 137-185, 159.
41. General Allotment Act (Dawes Act), February 8, 1887, Statutes at Large, 24:388-91.
42. See *supra* N. 7.
43. House Concurrent Resolution, 108, 67 Stat. B 132.
44. Approximately 12,000 Indians and 1.4 million acres of land were affected. For a historical analysis of this period see Donald L. Fixico, *Termination and Relocation* (Albuquerque: University of New Mexico Press, 1986), 183.
45. Public Law 98-638, January 4, 1975, 25 USC 450.
46. See *supra* N. 10.
47. *Ibid.*
48. See *supra* N. 11.
49. *Supreme Court Bulletin* 47 (1987): B1118-B1144.
50. *Ibid.* at B1123.

51. *Felix Cohen's Handbook of Federal Indian Law,* reprint of original 1942 edition (1986), 122.

52. *U.S.* v. *Creek Nation,* 295 U.S. 103 (1935).

53. See: Reid Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians," *Stanford Law Review* 27 (May 1975): 1213.

54. See for example: *Menominee Tribe* v. *U.S.,* 59 7 Supp. 135 (Ct. Cl. 1944); *Manchester Band of Pomo Indians* v. *U.S.,* 363 7 Supp. 1238 (N.D. Col. 1973); *Pyramid Lake* v. *Morton,* 354 7 Supp. 252 (1973); *Seminole Nation* v. *U.S.,* 316 U.S. 286 (1942); *Navajo Tribe* v. *U.S.,* 364 7. 2d 320 (Ct. Cl. 1966).

55. For example, see: *White* v. *Califano,* 437 F. Supp. 543 (1977); *Edwardsen* v. *Morton,* 369 7 Supp. 1359 (D.D.C. 1973); *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton,* 528 7 2d 370 (1975); *Kimbal* v. *Callahan,* 493 7 2d 564 (9th Cir. 1974), cert. denied 419 U.S. 1019 (1974); and *U.S.* v. *Washington,* 384 7. Supp. 312 (1974), aff'd 520 F. 2d 676 (1975).

56. *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton, Ibid.*

57. The 1964 Senate Committee on the Judiciary could find no statutory authority for the secretarial approval practice and concluded that it "frustrates responsible tribal self-government." Summary Report of Hearings and Investigation, by the Subcommittee on Constitutional Rights." 1-4 Sen. Comm. on the Jud., 88th Cong. 2nd Sess. (1964).

58. That tribes and not the Bureau of Indian Affairs, possess the right to determine tribal enrollment was recently upheld by the federal district court of Utah. The court held that the enrollment provision of the Ute Constitution and not the Ute Partition Act of 1954 passed by Congress and implemented by the Bureau, was the proper authority for determining tribal membership. See *Haskell Levi Chapoose et al.,* v. *William P. Clark, et. al.,* 607 F. Supp. 1027 (1985).

59. See *Delaware Tribal Business Committee* v. *Weeks* supra N. 7 and *Fisher* v. *District Court,* 424 U.S. 382 (1976).

60. *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974).

61. "The preference as applied is granted to Indians not as a distinct racial group, but rather as members of quasi-sovereign tribal entities." *Ibid.* See also: *Antelope* v. *U.S.,* 430 U.S. 641 (1977): "The decision of this Court leaves no doubt that federal legislation with respect to Indian tribes . . . is not based upon impermissable racial classification." There is a series of early cases which held that legislation concerning Indians was constitutional provided that it was based on the affiliation of the individual to the tribes. See: *Perrin* v. *U.S.,* and *In re Heff,* see *supra* N. 7. *Fisher* v. *District Court, supra* N. 59, 232 U.S. 478 (1914): "The exclusive jurisdiction of the Tribal Court does not derive from race of plaintiffs but rather from the quasi-sovereign statues of the Northern Cheyenne under federal law." See Ralph Johnson and E. Susan Crystal, "Indians and Equal Protection," *Washington Law Review* 54 (1970): 587-631, and Karl Funke, "Educational Assistance and Employment Preference: Who is an Indian?", *American Indian Law Review* (1976): 1-45.

62. See *Ex parte Pero,* 99 F.2d 28, 30 (7th Cir. 1938), and *United States* v. *Ives,* 504 F.2d 935, 953 (9th Cir. 1974).

63. 25 USC 413. In fact, Title 25 is captioned "Indians" not "Tribes."

64. For example, see 25 C.F.R. sect. 40.1.

65. To be a member of the Oglalla Sioux Tribe, for example, one must have

been born on the reservation. There are three Pueblos who continue to exercise unrestricted powers of naturalization: The Isleta, Const. Art. II (3); Laguna, Const., Art. II (1) (f); Santa Clara, Const. Art II (2). Fay, *Charters, Constitutions and By-laws of Indian Tribes of North America,* (Greeley, Colorado: 1967-71.)

66. *Zarr* v. *Barlow,* 800 F.2d 1484 (9th Cir. 1986).

67. *McCandles* v. *U.S. ex rel. Diabo,* 25 F. 2d 71(1928); *U.S. ex rel. Goodwin* v. *Karnuth,* 74 F. Supp. 660 (W.D.N.Y. 1947); *Aikens* v. *Saxbe,* 380 7. Supp. 1210 (1974). See Sharon O'Brien, "The Medicine Line: A Border Dividing Tribal Sovereignty, Economics and Families," *Fordham Law Review,* Vol. LIII, N. 2, Nov. 1984.

68. Immigration and Nationality Act of 1952, sec. 289, 8 USC 1359. In a similar vein, the Unites States refuses to allow Canadian and Mexican Indians to share in awards which accrue to their tribe as a political entity. For example, descendants of the Sioux who fled into Canada after the Wounded Knee Massacre are ineligible to receive shares of the current $122 million award to the Sioux Nation for the government's illegal taking of the Black Hills. See The Indian claims Commission Act for provisions excluding non-U.S. Indians.

69. *Worcester* v. *Georgia, supra* N. 19, 552.

70. *Ibid.,* 554.

71. *Ibid.,* 560.

72. *Supra.,* N. 1.

73. *Ibid.,* 5.

74. *Ibid.,* 9

75. *Ibid.*

76. *Ibid.,* 13.

77. *Ibid.*

78. In recent years a few court decisions and commentators have argued that the government's plenary authority is derived from the commerce clause. While this argument assigns more legitimacy to the notion of plenary control by basing it in a constitutional grant of authority rather than a judicially created power, it is doubtful that the commerce clause can be stretched sufficiently to grant the federal government the authority to exercise criminal jurisdiction, extinguish property rights, prohibit the practice of religion and terminate all tribal powers.

79. Congress terminated over 100 tribes during the 1950s and 1960s. More than 100 tribes have never been recognized by the federal government. Getches, Rosenfelt and Wilkinson, *supra* N. 6, p. 5. In 1978 the Interior Department instituted the Federal Acknowledgement Program, a mechanism whereby tribes can petition to establish a government-government relationship with the federal government. Approximately seventy tribes have filed petitions for recognition. *Supra* N. 8.