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

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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

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I. INTRODUCTION

While present at a Dartmouth College symposium on federal Indian law, Governor James Sappier of the Penobscot Nation posed the following question to Ralph Tarr, then Solicitor of the Department of the Interior:¹

Governor Sappier: I know you’re the government’s lawyer. Are you my lawyer?²

Solicitor Tarr: When our interests are congruent, when I can look at what we’re doing, we being the federal government, as being in line with what we think is in the best interest of the tribes, then I’m your lawyer too. When we disagree, when there is an incongruence between what we’ve identified as what the feds want to do and what we think the tribes want to do, then you’d better get your own lawyer.³

Hence, when Federal and Native American interests collide, the result is an apparent irreconcilable breakdown of the 150 year-old Federal-Native American trust relationship.

² Id. at 378.
³ Id. at 378-79.
The above being said, this article will explore why the Federal-Native American trust relationship is so easily dissipated in conflict of interest situations. In doing so, Part II of this article will investigate the nature of the Federal-Native American trust relationship from its historical underpinnings in *Cherokee Nation v. Georgia*\(^4\) to its enigmatic state leading up to *Nevada v. United States*.\(^5\) Next, Part III will discuss *Nevada*, and the problems attributable to the Supreme Court's holding in that case. Part IV will then consider past proposals aimed at rectifying the federal conflict of interest problem, and why this author believes such solutions are unworkable. Finally, Part V will articulate what this author believes to be the most appropriate answer to the federal conflict of interest dilemma—a modification of the traditional Federal-Native American trust relationship in favor of a litigation policy aimed at self-sufficiency and autonomy.

II. **THE NATURE OF THE FEDERAL-NATIVE AMERICAN TRUST RELATIONSHIP**

Since its holding in *Cherokee Nation*,\(^6\) the United States Supreme Court has forged much of the federal law applicable to the Native American tribes.\(^7\) While "the Court has not always been especially active in Indian cases, its pronouncements have served as the cornerstones for American law and policy towards the Indian nations."\(^8\) Therefore, it is only appropriate that this article begin its survey of the Federal-Native American trust relationship with a consideration of *Cherokee Nation*, a case that many believe laid the groundwork for all future cases concerning the Federal-Native American trust relationship.

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\(^4\) 30 U.S. (5 Pet.) 1 (1831).
\(^6\) 30 U.S. (5 Pet.) 1 (1831).
\(^8\) *Id.*
A. Cherokee Nation v. Georgia

Cherokee Nation "arose out of a suit filed by the Cherokee tribe . . . in which the tribe sought to enjoin enforcement of state statutes that gave Georgia jurisdiction over persons residing on [Cherokee] land." In evaluating the Cherokee claims, the Supreme Court was asked to decide whether the Cherokee nation constituted "a foreign state in the sense of the [United States] Constitution," thereby entitling it to original Supreme Court jurisdiction under Article 3, Section 2 of the United States Constitution. The Supreme Court, in an opinion by Chief Justice John Marshall, held that it did not. However, more importantly, the Supreme noted that while the Cherokee nation did not constitute a foreign state in the constitutional sense, it did constitute "a domestic dependent nation." Thus, according to Chief Justice Marshall, the Cherokee nation’s relationship with the federal government "resemble[d] that of a ward to his guardian."

Cherokee Nation must be thought of as the foundational statement with respect to the Federal-Native American trust relationship. However, as with any foundation, the principles enunciated in Cherokee Nation are only as strong as the cases that follow it. Accordingly, the remainder of this section will provide a brief historical overview of the growth of the trust doctrine following Cherokee Nation and leading up to Nevada v. United States.

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11 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).
12 See U.S. CONST. art. III, § 2.
13 See Cherokee Nation, 30 U.S. at 20.
14 Id. at 17.
15 Id.
B. From Cherokee Nation to Nevada

1. Worcester v. Georgia.¹⁷

In Worcester, the Supreme Court examined the "protectorate" style relationship that the United States developed with the Cherokee people during the early half of the Nineteenth Century. In doing so, the Court concluded that while the Cherokee remained "a distinct community occupying [their] own territory," they did so as a nation "claiming and receiving the protection of one more powerful,"²⁰ the United States. Therefore, with the promulgation of Worcester, the "domestic dependent," "protectorate" rationale espoused in Cherokee Nation²² was solidified as the Federal-Native American trust relationship took shape.

2. Post-Worcester: The Nineteenth Century

"Over the course of the nineteenth Century . . . the [Federal-Native American trust relationship] theory evolved from the Marshallian ideal of protection to a justification for the exercise of federal power."²⁴ For instance, in United States v. Kagama,²⁵ and Lone Wolf v. Hitchcock,²⁶ the full power of the federal government came to bear on Native Americans who were said to

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²⁰ Id. at 555.
²¹ Cherokee Nation, 30 U.S. at 17.
²² Royster, supra note 18, at 330.
²³ See Cherokee Nation, 30 U.S. at 16-17.
²⁴ Royster, supra note 18, at 330 (citing Milner S. Ball, Constitution, Court, Indian Tribes, 1987 AM. B. FOUND. RES. J. 1, 63 (1987)).
²⁵ 118 U.S. 375 (1886).
²⁶ 187 U.S. 553 (1903).
need the "care and protection" of the federal government with respect to tribal government authority and lands.  

During this period, the Supreme Court refused to intercede at times when the federal government chose to: a) "subject Indians to federal criminal laws;" or b) "take tribal lands for homesteaders in violation of express treaty provisions." Rather, the "domestic dependent" status of Native Americans, based on a theory of manifest destiny, provided an absolute justification for the quashing of Native American rights. Accordingly, post-

Worcester cases during the nineteenth century could be characterized as examples of the unrestricted power wielded by the federal government over Native Americans in the name of dependency.

3. Post-Worcester: The Twentieth Century

"Over the course of the twentieth century, the symbiotic relationship between the guardianship principles and federal plenary power underwent a second significant change." Whereas in the nineteenth century federal power over Native Americans was nearly absolute; in the twentieth century the Supreme Court began to enforce the federal trust responsibility toward Native Americans as it applied to the executive branch of the federal government. "As one indicator of this change, the Court repudiated many of the most destructive aspects of the plenary power doctrine." For instance, in Lane v. Pueblo of Santa Rosa, the Court held that the

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27 Royster, supra note 18, at 330 (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903) and United States v. Kagama, 118 U.S. 375, 384 (1886)).
28 Id. at 330 (citing Kagama, 118 U.S. at 383).
29 Id. at 330 (citing Lone Wolf, 187 U.S. at 554-60).
30 Cherokee Nation, 30 U.S. at 17.
31 Royster, supra note 18, at 331.
33 Royster, supra note 18, at 331.
34 249 U.S. 110 (1919).
Secretary of the Interior could not dispose of lands claimed by a Native American tribe in the same manner in which it disposed of general public lands.\(^{35}\) And, in *Cramer v. United States*,\(^ {36}\) the Supreme Court affirmatively sought to protect Indian-occupied lands from third-party confiscation by way of federal land patent.\(^ {37}\) Consequently, as the Supreme Court began to curb the executive branch's plenary power over Native Americans during the twentieth century, this period could be regarded as a time in which the "[g]overnment was [thought to be] more than 'a mere contracting party [with Native Americans];' [but rather] was to 'be judged by the most exacting fiduciary standards.'"\(^ {38}\)

4. Post-*Worcester*: Questions Remain

Notwithstanding the above, it is not surprising that questions arose concerning exactly what the Supreme Court meant when it stated that the Government should be judged by "the most exacting fiduciary standards."\(^ {39}\) "Although the Cherokee cases appear to have recognized the existence of certain fiduciary obligations, th[ose] cases offered no explanation or elaboration of [such standards]."\(^ {40}\) Furthermore, while a plethora of cases concerning the government's fiduciary responsibility towards Native Americans came to be heard during the twentieth century,\(^ {41}\) none of them answered the basic question: Should the law of private trusts be applied to the Government in its capacity as

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\(^{35}\) *See* Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919).

\(^{36}\) 261 U.S. 219 (1923).

\(^{37}\) *See* Cramer v. United States, 261 U.S. 219, 229 (1923).

\(^{38}\) Canby, Jr., *supra* note 32, at 39 (quoting Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)). *See also* United States v. Mitchell, 463 U.S. 206, 225 (1983) (holding that "[a]ll of the necessary elements of a common-law trust are present" as it pertains to the relationship between the Secretary of the Interior and federally managed Indian forest lands).

\(^{39}\) Seminole Nation, 316 U.S. at 296-97.

\(^{40}\) Note, *supra* note 10, at 429.

\(^{41}\) *See* Canby, Jr., *supra* note 32, at 41 (discussing how "[s]everal lower courts have invoked the trust responsibility to compel the government to undertake litigation to protect tribal lands or resources.").
Federal-Native American trustee? Accordingly, when the Supreme Court heard arguments in 1983 in Nevada v. United States, the stage was set for it to determine exactly what was meant when it previously stated that the government should be judged by "the most exacting fiduciary standards" in terms of its relationship with the Native American tribes.

III. Nevada v. United States

A. Background

In Nevada, the federal government sought to litigate a longstanding dispute concerning the ownership of water rights associated with the Truckee River. Water claims were originally brought in 1913 on behalf of the Pyramid Lake Indian Reservation and the Newlands Reclamation Project, and in 1944, all of the original claims were thought to be settled. Nevertheless, in 1973, the federal government brought suit once again in favor of the Pyramid Lake Indian Reservation, asserting additional water rights on its behalf.

While the government's opponents raised the time-honored doctrine of res judicata as a defense, the government responded that:

[B]ecause it had represented both the [Pyramid Lake Indian Reservation] and the [Newlands Reclamation Project] in the [original] litigation, there was no adversity of

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42 At most, Heckman v. United States, 224 U.S. 413, 444-45 (1912), established in dicta that the trust relationship in general is not "circumscribed by rules which govern private relations." However, the force of such language is subject to broad interpretation. See Part II of this Article, infra.
44 Seminole Nation, 316 U.S. at 296-97.
46 See id.
47 See id. at 113.
48 See id. at 118.
49 See id. at 113.
interest between the claimants, and [as such], the [1944 settlement] could not be binding as between the [Pyramid Lake Indian Reservation] and the [Newlands Reclamation Project].

Therefore, what began as a simple water rights dispute now blossomed into a precedent-setting case in which the Supreme Court was asked to decide whether "the federal conflict of interest [described above] obviated the necessary adversity [required for the defense of res judicata]."

B. Holding

The Supreme Court, in an opinion written by then-Associate Justice William Rehnquist, held that it did not. According to the Court, "[n]ot only had the federal government pleaded the claimant's interests separately, but the reclamation interests had also been represented after 1926 by the local irrigation district." Furthermore, the Court noted that:

[While t]he United States undoubtedly owe[d] a strong fiduciary duty to its Indian wards . . . [,] where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless

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50 Royster, supra note 18, at 351 (citing Nevada, 463 U.S. at 137-39). See also Nevada, 463 U.S. at 135 n.15 (discussing the argument that because "the Government's primary interest in Orr Ditch was to obtain water rights for the Newlands Reclamation Project . . . by definition any rights given to the [Pyramid Lake Indian Reservation] would conflict with that interest.").
51 Royster, supra note 18, at 351.
52 See Nevada, 463 U.S. at 135 n.15.
53 Royster, supra note 18, at 351 (citing Nevada, 463 U.S. at 140).
private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.\textsuperscript{54}

Consequently, in \textit{Nevada}, the Supreme Court established that simply because the government is charged with more than one responsibility (\textit{i.e.}, \textit{a conflict of interest}\textsuperscript{55}), does not mean that such conduct constitutes a breach of the Federal-Native American trust relationship on the part of the government. Rather, "[t]he Court found it 'simply unrealistic' that the government could not, as required by Congress, represent both interests adequately."\textsuperscript{56}

C. Problems With \textit{Nevada}

While it is generally true that the federal executive is held to a strict standard of compliance with respect to fiduciary duties,\textsuperscript{57} the \textit{Nevada} Court specifically noted that such a premise is true only if the executive is not otherwise directed by Congress.\textsuperscript{58} As

\begin{footnotesize}
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\item \textsuperscript{54} Nevada, 463 U.S. at 142 (emphasis added).
\item \textsuperscript{55} Such a conflict of interest arose as a result of the federal government's required concurrent representation of both the Newlands Reclamation Project and the Pyramid Lake Indian Reservation despite the fact that each party had obviously competing interests. See Nevada, 463 U.S. at 113. See also the Reclamation Act of 1902, ch. 1093, 32 stat. 388 (1902) (current version at 43 U.S.C. §§ 372-73, 383, 391-92, 411, 416, 419, 421, 431-32, 434, 439, 461, 491, 498), and Part II of this Article, \textit{infra}. However, such conflicts of interest are not unique to \textit{Nevada}, as Part II(C)(1) of this Article, \textit{infra}, explains.
\item \textsuperscript{56} Royster, supra note 18, at 351 (citing Nevada, 463 U.S. at 128). See also Arizona v. California, 460 U.S. 605, 627 (1983).
\item \textsuperscript{57} See Mary Christina Wood, \textit{Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources}, 1995 UTAH L. REV. 109, 114-15 (1995) (noting that "[w]hen faced with Indian trust law issues, courts instinctively gravitate toward private trust law, a body of jurisprudence which has engendered a generous set of standards by which to assess private fiduciary conduct.").
\item \textsuperscript{58} See Nevada, 463 U.S. at 128 (stating that "it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this [...]").
\end{itemize}
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such, the *Nevada* decision—which allows the government to represent both Native Americans and third party/government interests simultaneously—appears to fly in the face of both common sense and established principles concerning conflicts of interest.

1. Inherent Conflicts of Interest Within the Federal Bureaucracy

"If the United States maintains a trust relationship with Indian Nations, then when the United States pursues its own interests to the detriment of Indian Nations, does this violate the trust relationship?"\(^{59}\) According to *Nevada*, the answer is no. This is the case despite the fact that it is readily apparent that "[b]ureaus within the federal government have conflicting responsibilities in relation to [the] trust function, with [different branches] look[ing] out for Indian interests [and] others look[ing] out for the interests of the United States population as a whole."\(^{60}\) For instance, consider the following example:

In 1970 the Bureau of Land Management (B.L.M.) agreed to lease a tract of public lands for 99 years to the state of Arizona for airport and public park facilities. This tract bordered an Indian reservation and the tribe on that reservation claimed that it owned and used part of the tract which B.L.M. was going to lease as public lands. The tribe complained that the land was not recognized as theirs only because of a surveying error made 50 years ago. The tribe objected to the lease and demanded that the land be returned to them. B.L.M. refused so the dispute went to the Secretary of the Interior for a settlement. The


\(^{60}\) *Id.* at 783.
Secretary decided to allow B.L.M. to lease the land despite the objection of the Indian tribe.

In making his decision the Secretary was arbitrating a dispute between two of his "clients"—the B.L.M., for whose actions he was responsible under the law, and the Indian tribe, to which he owed a trust duty under the law to protect its lands and rights. The duty to Indians obligated the Secretary of the Interior to diligently pursue all reasonable claims on their behalf.

In this example the Indian tribe and B.L.M. had competing interests in the same tract of land and in these circumstances the Secretary of the Interior could not fulfill his trust obligation to the tribe. Legally, he could not even consider the position of the B.L.M. and still comply with the required standards of utmost loyalty to Indians and good faith to their interests. Thus he had a conflict of interest in a situation where he was deciding the use and ownership of Indian lands.\(^6\)

While a "private attorney could not ethically undertake the representation of such clearly competing clients, [ ] government attorneys regularly do."\(^6\)\(^2\) And, while "[t]heoretically, the existence of such competitive interests means that all sides of an issue are heard[,] and [that] the final policy decision reflects a measured policy judgment in the public interest[,]"\(^6\)\(^3\) it is still important to


\(^6\)\(^2\) Canby, Jr., supra note 32, at 50.

\(^6\)\(^3\) Hall, supra note 61, at 31. See also Nevada, 463 U.S. at 135 n.15 (focusing on the district court's finding that conflict of interest issues are resolved within the executive branch of government by top-level executive officers who are charged with the responsibility of making ultimate political and policy decisions.).
remember that "substantial political pressure [and outside economic pressure] can frequently be applied [to] executive [branch] officials [in an effort] to compromise or ignore Indian rights." Accordingly, this author would submit that the Supreme Court's position in *Nevada*, which focuses on a perceived orderly and hierarchical decision making process within the executive branch, free of *any* outside interference or influences, is fanciful at best.

2. Compromising Established Ethical Principles

Additionally, it is important to note that the *Nevada* decision appears to make compromises with respect to established ethical principles concerning conflicts of interest and the duty of loyalty. For instance, while A.B.A. Model Rule 1.7, Ethical

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65 *See* Nevada, 463 U.S. at 135 n.15. *See also* Rice et al., *supra* note 1, at 373 (interpreting *Nevada* as holding that "the Court will look to the question of whether procedurally the United States has tried to separate out its various interests and zealously and separately represent the Indian interest within a decision-making process, often taking place possibly wholly within the Department of the Interior.").

66 A.B.A. Model Rule 1.7 states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
Considerations 5-14 and 5-15 of the A.B.A. Model Code, and the A.B.A.'s Restatement of the Law Governing Lawyers take strong positions against potential conflicts of interest, the arrangement promulgated in Nevada seems to ignore such important

(2) the client consents after consultation. When representation of multiple clients in a single matter in undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (As Amended February 1999).

A.B.A. Model Code—Ethical Consideration 5-14 states:
Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (As Amended 1983).
A.B.A. Model Code—Ethical Consideration 5-15 states in pertinent part that:

A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (As Amended 1983) (emphasis added).

See generally RESTATEMENT OF LAW GOVERNING LAWYERS §§ 201-16 (Draft April 1998).
judgments. Accordingly, this author would ask whether the "less-than-satisfactory advocacy" system approved of in Nevada should trump established and universally accepted ethical standards simply because the primary interests involved are Native American.

3. Inadequate Compensation for Breach

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69 In fact, even if a tribe sought to intervene in litigation due to an actual or potential governmental conflict of interest, such a procedure must still be approved by the two most likely conflicted parties to begin with, the Secretary of the Interior and the Commissioner of Indian Affairs. See Tracy N. Zlock, The Native American Tribe as a Client, GEO. J. LEGAL ETHICS 159, 178 (1996) (citing 25 U.S.C.A §§ 81-82).

70 Canby, Jr., supra note 32, at 38.

71 According to Professors Richard C. Wydick and Rex R. Perschbacher:

In 1969, the American Bar Association promulgated the ABA Model Code of Professional Responsibility (the "ABA Code") as a model for the various states to follow in adopting their own sets of legal ethics rules. It was widely accepted, and within a few years almost all of the states had adopted ethics rules patterned closely on the ABA Code.

In 1977, the ABA began work on the ABA Model Rules of Professional Conduct (the "Model Rules"). The ABA Rules were designed to replace the Model Code—that is, to become a new model for the states to follow. After extensive debate and a long process of compromise and amendment, a final version of the ABA Model Rules was adopted by the ABA House of delegates in 1983.

The ABA Model Rules did not receive the quick, warm reception that the states had given the ABA Code fourteen years earlier[.]. However, as of 1996, thirty-six states and the District of Columbia have adopted new legal ethics rules patterned on the ABA Model Rules . . . , and a few other states have recently revised their legal ethics rules, drawing partly on the ABA Model Rules for guidance. [Finally, t]he remaining states have thus far elected to retain their own rules patterned on the ABA Code.

Richard C. Wydick and Rex R. Perschbacher, CALIFORNIA LEGAL ETHICS at 43-44 (West, 2d Ed. 1997).
Finally, yet no less importantly, problems exist with the Nevada Court’s oversimplified insistence that should the Government fail in its obligations towards a tribe, then that tribe has a remedy for breach of duty against the government. While it only seems fair to “offer tribes the promise of a breach of trust action [should] the . . . Government fail to properly represent tribal interests[,] . . . damages in breach are not water rights,” nor are they mineral rights, nor could they ever hope to compensate for lands passed on for hundreds, if not thousands of years, from one generation to the next. Therefore, this author would submit that while monetary remedies for breach of fiduciary duties are appropriate in other circumstances, they are simply unsatisfactory in the Federal-Native American trust situation.

IV. PREVIOUSLY PROPOSED ALTERNATIVES AIMED AT RECTIFYING THE CONFLICT OF INTEREST PROBLEM

When considering the historical developments above, it is important to note that during the 1970's two alternative proposals were offered as potential remedies to the conflict of interest dilemma. While neither was enacted, both proposals served as a call to action with respect to the conflict of interest problem. Consequently, a brief description of each, and a review of their feasibility, follows.

A. The Indian Trust Counsel Authority

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72 See Nevada, 463 U.S. at 144 n.16 (majority opinion), and see also Nevada, 463 U.S. at 145 (Brennan, J., concurring).
73 Royster, supra note 18, at 353.
74 See President Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970) (proposing an Indian Trust Counsel Authority), and AMERICAN INDIAN POLICY REVIEW COMMISSION, 94TH CONG., 2D SESS., REPORT (1976) (proposing a cabinet level Department of Indian Affairs with its own Office of Trust Rights Protection).
75 See Canby, Jr., supra note 32, at 52.
In 1970, President Richard M. Nixon "proposed the establishment of an independent Indian Trust Counsel Authority that would undertake legal representation of Indian trust interests."\(^7\) "The Trust Counsel Authority proposal would have created an independent legal authority which would [have brought] lawsuits on behalf of the United States government as trustee."\(^7\) Additionally, the Trust Counsel Authority would have been governed by a three-person board of directors (appointed by the President with the advice and consent of the Senate),\(^7\) with at least two of those directors required to be Native American.\(^7\) Finally, and perhaps most importantly, under the Trust Counsel Authority, the United States would have been required to waive its sovereign immunity from suit in connection with Authority led litigation.\(^8\) Thus, the proposal would have created a governmental entity free to litigate Native American claims, unfettered by conflict of interest issues. Nevertheless, despite the need for such a proposal, the Trust Counsel Authority idea was never implemented because it was seen by government bureaucrats as "relieving the Justice Department of its [widespread] responsibility."\(^8\)

B. The American Indian Policy Review Commission

Following on the heals of President Nixon's proposed Trust Counsel Authority, "Senator James Abourezk introduced *Senate Joint Resolution No. 133* [in 1973] to establish a Federal

\(^7\) *Id.* at 51 (citing 116 Cong. Rec. 23258, 23261 (1970)).


\(^8\) *See President Richard M. Nixon, Special Message to the Congress on Indian Affairs* (July 8, 1970).

\(^8\) *See id.*

\(^8\) *See id.*

commission to review all aspects of policy, law, and administration relating to affairs of the United States with American Indian tribes and people." 82 Thereafter, on January 2, 1975, the Resolution83 was signed into law by the President,84 and the American Indian Policy Review Commission was established.85

The Commission, which delivered its report to the Senate Select Committee on Indian Affairs in 1977,86 "boasted [that] it was the first such panel 'to listen attentively to the voice of the Indian rather than the Indian expert.'"87 Furthermore, while numerous suggestions were proposed by the Commission, perhaps the most important, for the purposes of this Article, came in the form of the Commission’s recommendation that "a cabinet level Department of Indian Affairs with its own Office of Trust Rights Protection [be established] to litigate trust cases."88 Such an entity, much like Nixon’s Trust Counsel Authority,89 would have "operated independently of the Bureau of Indian Affairs,"90 and would not have been "burdened by that agency’s tangled history with [the] tribes."91 Nevertheless, despite these important and necessary features, the Interior Department refused to relinquish its authority over the tribes,92 the proposed cabinet level plan was soon abandoned, and any hopes of rectifying the Federal-Native American trust conflict of interest problem were effectively shelved.

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82 United States Senate Committee on Indian Affairs—History Web-Page (visited April 1, 2000) <http://www.senate.gov/~scia/cominfo.htm>.
84 See id. (enacted).
85 See United States Senate Committee on Indian Affairs—History Web-Page (visited April 1, 2000) <http://www.senate.gov/~scia/cominfo.htm>.
86 See id.
88 Canby, Jr., supra note 32, at 51-52.
89 See Part IV(A) of this Article, supra.
90 Lightman and Jones, supra note 87, at A1.
91 Id.
92 See id.
C. Feasibility of the Two Previously Proposed Alternatives

While many believe that the problems associated with Nevada93 might never have become an issue had either of the two previously discussed proposals been enacted, others note a sincere lack of confidence in the ability of either proposal to affect Nevada-like cases.94 The former belief, prompted by the notion that a Trust Counsel Authority or cabinet level Department of Indian Affairs would be the end-all-and-be-all with respect to Nevada-like issues, is, in this author's mind, clearly idealistic. By contrast, the latter belief, supported by a realization that sheer resources95 may readily determine one's ability to litigate successfully,96 appears to hit the mark.

While it is true that the proposed Trust Counsel Authority or cabinet level Department of Indian Affairs would have been independent, it still would have been required to compete in court with powerful adversaries such as the Department of Justice and the Department of the Interior.97 Furthermore, given the present era of pervasive governmental budgetary restraints, it is not difficult to surmise that each proposed entity's budget would have paled in comparison to the resources devoted to the more established, and far-reaching Departments of Justice and the Interior. Accordingly, this author would submit that the potential for a proposed Trust Counsel Authority or cabinet level Department of Indian Affairs to succeed as an independent governmental agency seems debatable.

V. THIS AUTHOR'S PROPOSAL TO ALLEVIATE THE CONFLICT OF INTEREST PROBLEM

93 See Part III(C) of this Article, supra.
94 See Rice et al., supra note 1, at 375.
95 Both economic and human.
96 See Rice et al., supra note 1, at 375.
97 See id. (Noting that, while it is one thing to say, "[w]e're going to handle this by hiring any number of lawyers," it is quite another thing to feel the same way knowing that one is "going up against the entire Justice Department.").
The above being said, this author would suggest that one solution to the Federal-Native American conflict of interest dilemma lies in allowing Native Americans to litigate on their own behalf, free of federal interference and direction.

For more than 150 years, Chief Justice Marshall’s paternalistic philosophy has placed federal interests in the first priority and Native Americans in the second with respect to Federal-Native American trust litigation tactics and objectives. Thus, when Native American trust issues are involved, the best that Native Americans can hope for is to be given adequate notice and a full and fair opportunity to be heard (i.e., intervention) after their representative, the federal government, has asserted litigation supremacy. Yet, this author would ask, is it truly appropriate to place Native Americans in the position of interventionist, when in most cases litigation brought on their behalf concerns interests unique to them? Clearly, the answer is no, and this being the case, this author would submit that Native Americans are both entitled to, and fully capable of, litigating claims on their own behalf, free of government interference and direction.

Specifically, such a proposal is not a call for greater Native American intervention in litigation already spearheaded by the federal government. Rather, it is a call for an abatement of the Federal-Native American trust relationship to the extent that, when it is necessary to litigate claims associated with Native American interests, Native Americans take the lead.

A. A Call for a Federal-Native American Litigation Trust Fund

98 See Part II of this Article, supra.
99 See Nevada, 463 U.S. at 144 n.16.
100 As a result of sovereignty considerations.
101 See Ralph W. Johnson, 1991 Fragile Gains: Two Centuries of Canadian And United States Policy Toward Indians, 66 WASH. L. REV. 643, 676-78 (1993) (discussing the historical development of legal representation for Native Americans from the 1960's onward, and how such developments have "had a significant impact on the achievement of Indian goals.").
102 After all, even intervention is ultimately controlled by the Secretary of the Interior and the Commissioner of Indian Affairs. See Zlock, supra note 69, at 178 (citing 25 U.S.C.A §§ 81-82).
Along these lines, this author would suggest that serious consideration be given to the establishment of what this author would term a Federal-Native American Litigation Trust Fund. In essence, such a fund would be analogous to the federally funded, and state distributed, block grants that are so commonplace today. The federal government would be responsible for appropriations under the fund based on its Federal-Native American trust responsibility, and Native Americans, perhaps through a common entity such as the Native American Rights Fund or the National Congress of American Indians, would be empowered to litigate claims on their own behalf using trust fund assets.

While progressive, such a plan would leave the Federal-Native American trust relationship altered yet unbroken. Furthermore, it would serve to strengthen Native American sovereignty by allowing Native Americans to control their own destiny. Most importantly, however, such a proposal would help to alleviate the hazard posed by a relaxation in the federal government's Federal-Native American trust responsibility—that is, the inability of Native Americans to litigate claims on their own behalf due to a lack of economic resources. Accordingly, this author would submit that a Federal-Native American Litigation Trust Fund would benefit all parties involved while serving to resolve Nevada-like conflict of interest problems.

B. The Capacity for Native American Self-Representation

With the above noted, there is every indication that Native Americans are ready to take on such a leadership role. Indian

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104 This author notes that such a remedy will most likely be viewed by others as overly-simplistic, and perhaps idealistic. However, such a remedy is in no way meant to be exclusive. Rather, this author's proposed remedy is intended to serve as a catalyst for healthy debate on this important topic.

105 See Johnson, supra note 101, at 676-78.
law can no longer be thought of as an “arcane, odd little field with seminars of five to six people.”\textsuperscript{106} Rather, today it is very much a part of both federal and state law.\textsuperscript{107} For instance, it is readily apparent that “the 1950s and 1960s produced a cadre of young, capable lawyers . . . some of whom became expert in the unique field of Indian law.”\textsuperscript{108} Furthermore, with law schools beginning to teach federal Indian law in the late 1960s and early 1970s,\textsuperscript{109} the ability of Native Americans to litigate claims on their own behalf appears to be self evident.\textsuperscript{110} This being said, it seems obvious that as Federal Indian law has developed, the dependency upon government litigators has diminished. Thus, a modification of the traditional Federal-Native American trust relationship appears to be in order.

VI. CONCLUSION

While the Federal-Native American trust relationship embodies nearly 200 years of legal precedent, there is simply no reason why such a relationship must be burdened with the ethical dilemmas described above.\textsuperscript{111} Rather, this author would suggest that the Federal-Native American trust relationship is adaptable to change. And, while the solutions promulgated by President Nixon\textsuperscript{112} and the American Indian Policy Review Commission\textsuperscript{113} provided a call to action with respect to such change, until the paternalistic spirit of Marshallian thought\textsuperscript{114} is muted, it appears

\begin{itemize}
\item \textsuperscript{106} Kevin Gover, "There is Hope": A Few Thoughts on Indian Law, 24 AM. INDIAN L. REV. 219, 219 (2000).
\item \textsuperscript{107} See id.
\item \textsuperscript{108} See Johnson, supra note 101, at 677.
\item \textsuperscript{109} See id. See also Gover, supra note 106, at 219.
\item \textsuperscript{110} See, e.g., Johnson, supra note 101, at 678 n.177 (noting how the Native American Rights Fund, established in 1968, employs roughly 20 attorneys and is commonly involved in nearly 70 cases nationwide at any given time); and Gover, supra note 106, at 219 (stating that “[t]hirty years ago, there were less than a dozen Indian people who were attorneys, and look at us now.”).
\item \textsuperscript{111} See Part III(B) of this Article, supra.
\item \textsuperscript{112} See Part IV(A) of this Article, supra.
\item \textsuperscript{113} See Part IV(B) of this Article, supra.
\item \textsuperscript{114} See Royster, supra note 18, at 330.
\end{itemize}
unlikely that a solution to *Nevada*-like conflicts of interest\(^{115}\) will ever come to fruition.

This being said, it is this author's hope that the present article serves as a wake up call to all parties involved that decisions such as *Nevada* should not, and cannot, be tolerated. Sooner or later, the guardian-ward relationship espoused by Chief Justice Marshall\(^{116}\) must be modified in response to modern realities.\(^{117}\) Nevertheless, until that day comes, "every nick, every cut, out of the group of powers that have constituted tribal self-government, tribal self determination, and tribal sovereignty over the years, could very well become a feature that is permanently lost."\(^{118}\)

**APPENDIX "A"\(^{119}\)**

**DEPARTMENT OF THE INTERIOR LANDS UNDER JURISDICTION OF THE BUREAU OF INDIAN AFFAIRS AS OF DECEMBER 31, 1997**

<table>
<thead>
<tr>
<th>State</th>
<th>Acreage Tribal Owned</th>
<th>Individually Owned</th>
<th>Total Trust Owned</th>
<th>Government Owned</th>
<th>Total Owned</th>
</tr>
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<tr>
<td>Alabama</td>
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<td>0.00</td>
<td>1,689.32</td>
<td>0.00</td>
<td>1,689.32</td>
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<td>1,161,599.03</td>
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<td>20,627,658.06</td>
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<td>20,718,124.54</td>
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<td>71,527.40</td>
<td>591,877.36</td>
<td>152.74</td>
<td>592,030.10</td>
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<td>800,331.16</td>
<td>12.24</td>
<td>800,343.40</td>
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<td>7,202.30</td>
<td>0.00</td>
<td>7,202.30</td>
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<td>0.00</td>
<td>356,509.64</td>
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<td>356,842.94</td>
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\(^{115}\) For this author's proposed solution, see Part V(A) of this Article, *supra*.

\(^{116}\) See *Cherokee Nation*, 30 U.S. at 17.

\(^{117}\) See, e.g., *Johnson*, *supra* note 101, at 676-78; and *Gover*, *supra* note 106, at 219. See also Appendix "A" of this Article, *infra* (tabulating tribal lands under the jurisdiction of the United States Bureau of Indian Affairs).

\(^{118}\) *Gover*, *supra* note 106, at 221.

<table>
<thead>
<tr>
<th>State</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
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<td>290,836.81</td>
<td>0.00</td>
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<td>0.00</td>
<td>473.90</td>
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<td>374.37</td>
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