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### The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs

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# The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs

Matthew L.M. Fletcher \*

*I think Indian people really understand the outside culture much better than the outside culture understands us, because we have been in the minority of strength.*

—Oren Lyons, Onondaga Turtle Clan traditional chief<sup>1</sup>

## I. A BRIEF HISTORY OF FEDERAL GOVERNMENT INTERVENTION INTO TRIBAL AFFAIRS

Chief Justice John Marshall wrote in 1832 that the English, the predecessors of the Americans, “never intruded into the interior of [Indian tribal] affairs, nor interfered with their self-government.”<sup>2</sup> Conversely, almost from the beginning of the reservation system, Americans have alternated between extreme imposition on Indian

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1. Oren Lyons, *When You Talk About Client Relationships, You Are Talking About the Future of Nations*, in *RETHINKING INDIAN LAW* iv (Nat’l Lawyers Guild, Comm. on Native American Struggles ed., 1982).

2. *Worcester v. Georgia*, 31 U.S. 515, 517 (1832).

tribal affairs and tortious neglect.<sup>3</sup> By the end of the 19th century, the United States Indian agent

ha[d] developed into an officer with power to direct the affairs of the Indians and to transact their business in all details and in all relations. This is a very curious chapter in our history. There is a striking contrast between “ministers plenipotentiary,” appointed by the United States to treat with powerful Indian nations, and an army officer, with troops at his command, installed over a tribe of Indians to maintain an absolute military despotism. Yet our policy of dealing with them has swung from one of these extremes to the other in a strangely vacillating way.<sup>4</sup>

Felix Cohen, former Assistant Solicitor for Indian Affairs in the Department of Interior<sup>5</sup> and author of the *Handbook of Federal Indian Law*,<sup>6</sup> wrote a classic article in 1953 about the rise of the imperialistic Bureau of Indian Affairs.<sup>7</sup> He noted how the Bureau he worked for in the 1930s and 1940s had fallen from grace between 1948 and 1953.<sup>8</sup> Cohen wrote that, for example, “administrations

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3. For example, the Department of Interior “administratively terminated” several Michigan Indian tribes by simply refusing to acknowledge them as tribes. *See Pokagon Band of Potawatomi Indians Act and the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act: Hearing on S. 1066 and S. 1357 Before the S. Comm. on Indian Affairs*, 103d Cong. 44 (1994) (statement of William J. Brooks, Michigan Indian Legal Services, Inc.). An 1855 treaty created “the Ottawa and Chippewa Indians of Michigan,” but then dissolved this legal fiction a few years later by the terms of the treaty. *See Treaty of Detroit*, 11 Stat. 621, 624 (1855) (“The tribal organization of said Ottawa and Chippewa Indians is hereby dissolved.”). The Secretary incorrectly interpreted that language as terminating the tribes, including the Grand Traverse Band of Ottawa and Chippewa Indians, in 1872. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Att’y*, 369 F.3d 960, 961 (6th Cir. 2004).

4. Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study In Bureaucracy*, 62 YALE L.J. 348, 352–53 (1953) (quoting REP. COMM’R OF INDIAN AFFAIRS 24 (1892)). One example of the harsh federal policy is the nineteenth century practice of summarily executing Indians who violated the orders of Indian agents. *See id.* at 360–61 n.50 (quoting REP. COMM’R OF INDIAN AFFAIRS 101 (1866)); *cf.* Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 13–14 (1990) (describing the summary execution of Dakota Indians by the United States military with the tacit approval of President Abraham Lincoln).

5. *See* Cohen, *supra* note 4, at 348 n.†.

6. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (2nd prtg. 1971).

7. *See generally* Cohen, *supra* note 4.

8. *Id.*

which sought to restrict Indian freedom have generally made sure that Indian tribes were not permitted to employ attorneys who might be inclined to challenge [the Bureau].”<sup>9</sup> In another egregious example involving the Blackfeet Tribe in 1950, the Bureau “mimeographed materials attacking certain candidates for local tribal office, charging them with various ‘criminal’ and ‘illegal’ acts (none of which were ever prosecuted and most of which were later shown never to have occurred).”<sup>10</sup> The Bureau did the same thing at future Blackfeet elections and expanded their politicking interventions to Choctaw elections as well.<sup>11</sup> Worse, the Bureau directly interfered with more elections at San Ildefonso Pueblo, where they seized tribal property in retaliation against the Pueblo for choosing a Governor without an election.<sup>12</sup> When the Oglala Sioux Tribe criticized the Bureau in Congress for its wasteful expenditures, “the Indians were advised [by the Bureau] that \$140,000 of credit funds allocated to the tribe several months earlier would be ‘frozen’ until the tribe withdrew its criticisms.”<sup>13</sup>

Cohen detailed how the Bureau testified against bills repealing the paternalistic statutes regulating Indian cattle ranching or involving the sale of liquor, ammunition, agricultural implements, clothing, and cooking utensils to Indians.<sup>14</sup> The Bureau closed down Indian hospitals on rural reservations because the Indian Affairs Commission believed “that Indians should not be encouraged to remain on reservations.”<sup>15</sup> The Bureau’s non-Indian officials insisted on being present during private Pueblo ceremonies on the Rio Grande that strictly prohibited non-Indians from attending.<sup>16</sup> The Bureau ordered Blackfeet Indians to stop playing stick games after 6 p.m. and to go to bed.<sup>17</sup> Cohen noted that the Bureau’s intervention into the personal lives of Pueblo Indians was particularly acute:

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9. *Id.* at 352; *see also id.* at 355–56.

10. *Id.* at 353.

11. *See id.* at 354.

12. *See id.* at 354–55.

13. *Id.* at 356.

14. *See id.* at 356–57.

15. *Id.* at 358.

16. *See id.* at 359.

17. *See id.* at 360 (quoting *Interior Department Appropriations for 1953: Hearing Before the S. Comm. on Appropriations*, 82d Cong. 840 (1952)).

[T]he Bureau issue[d] an official report telling the Rio Grande Pueblos that their custom of annual elections [was] causing “much trouble” in the handling of farm machinery; that their communal use of grazing lands [was] lowering their grazing income; that their individual partitioning of farming lands [was] lowering their agricultural income; and that their religious customs . . . caus[ed] them to put “too much labor” on their corn fields.<sup>18</sup>

The Bureau ignored the Indian preference provisions for Bureau employment, arguing that “Indians are ‘not yet ready’ to run their own public services.”<sup>19</sup> Cohen asserted that despite the Bureau’s imposition of “hundreds of special restrictions [on Indian lands] which do not apply to their white neighbors, Indians have survived on land where white men would starve to death and under regulations which could drive men of any race to insanity.”<sup>20</sup> The list goes on. This was the Bureau of the termination era and, in the words of Ada Deer, a Menominee Indian, “represented a . . . revolutionary forced change in the traditional Menominee way of life. . . . Congress expected immediate Menominee assimilation of non-Indian culture, values, and life styles.”<sup>21</sup>

In 1970, President Richard Nixon ended (or took credit for ending) the termination policy and urged Congress to support the trust relationship between Indian tribes and individual Indians and the federal government.<sup>22</sup> Congress enacted the Indian Civil Rights Act of 1968,<sup>23</sup> which, among other things, provided for the retrocession of state criminal and civil jurisdiction over Indian Country imposed on several states during the termination era.<sup>24</sup> After Nixon’s statement of policy, Congress enacted the Indian Financing Act of 1974<sup>25</sup> and the

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18. *Id.* at 361 (footnotes omitted).

19. *Id.* at 362.

20. *Id.* at 363.

21. CHARLES F. WILKINSON & THE AMERICAN INDIAN RES. INST., *INDIAN TRIBES AS SOVEREIGN GOVERNMENTS: A SOURCEBOOK ON FEDERAL-TRIBAL HISTORY, LAW, AND POLICY* 12 (2d ed. 2004) (quoting *Hearing on H.R. 7421 Before the Subcomm. on Indian Affairs*, 93d Cong. 32–36 (1973)).

22. See 116 CONG. REC. 23258 (1970).

23. 25 U.S.C. §§ 1301–41 (2000).

24. *Id.* § 1323.

25. *Id.* §§ 1451–1544.

Indian Self-Determination and Education Assistance Act of 1975,<sup>26</sup> repudiating the termination era and cementing the beginning of the self-determination era.

However, overt colonialism in defiance of self-determination or as a remnant of termination takes many forms even today. For example, the Navajo Nation recently brought a claim against Peabody Coal,<sup>27</sup> a company that lobbied the Secretary of the Interior to execute a document that would keep its royalty payments to the Navajo Nation for the extraction of coal at significantly less than market value.<sup>28</sup> The Supreme Court found that the United States could not be sued for money damages arising from this action,<sup>29</sup> damages that would have amounted to over \$600 million.<sup>30</sup>

Similarly, the Skokomish Tribe sued the City of Tacoma over a decision of the Federal Energy Regulatory Commission that allowed the City to build dams that completely destroyed the Tribe's river fisheries.<sup>31</sup> The Tuscarora Indian Nation lost before the Supreme Court in its efforts to prevent the condemnation of lands owned by the tribe in accordance with a treaty; the lands were condemned to allow for the construction of a dam.<sup>32</sup> The Three Affiliated Tribes of the Fort Berthold Reservation lost almost their entire reservation when the federal government forced its leaders to agree to the construction of yet another dam.<sup>33</sup> The Department of Interior often denies tribes payments of indirect costs necessary to operate self-determination contracts.<sup>34</sup> The topics omitted from this list are many.

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26. *Id.* § 450.

27. *See* Navajo Nation v. Peabody Holding Co., 209 F. Supp. 2d 269, 272 (D.D.C. 2002), *aff'd*, 64 F. App'x 783 (D.C. Cir. 2003).

28. *See* Brief of Navajo Nation at 7–13, *United States v. Navajo Nation*, 537 U.S. 488 (2003) (No. 01-1375).

29. *See* *Navajo Nation*, 537 U.S. 488.

30. *See* Transcript of Oral Argument of Paul E. Frye on Behalf of the Respondent at 30, *Navajo Nation*, 537 U.S. 488 (No. 01-1375).

31. *See* *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc), *petition for cert. filed*, 74 U.S.L.W. 3233 (U.S. Oct. 3, 2005).

32. *See* *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

33. *See* Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 484–89 (1998).

34. *See* *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1080–81 (Fed. Cir. 2003), *cert. granted*, 541 U.S. 934 (2004); *Cherokee Nation v. Thompson*, 311 F.3d 1054, 1056 (10th Cir. 2003), *cert. granted*, 541 U.S. 934 (2004).

This Article focuses on the actions of federal agencies that often do not appear on the radar screen, either because no existing cause of action allows the tribes to bring suit in federal court to enjoin the government's actions, or because federal law limits tribal sovereignty.

Part II of this Article discusses four case studies: the Grand Traverse Band of Ottawa and Chippewa Indians' struggle to retain its right to determine its own membership requirements; the Saginaw Chippewa Indian Tribe of Michigan's response through its tribal court of appeals to federal intervention in a tribal election dispute; the erosion of tribal rights to restore lost land and expand economic development opportunities; and the continuing impact of the Bureau's sale of Indian land without Indian consent.

Part III places these case studies in the broader context of how federal bureaucratic actions have rendered meaningless critical aspects of self-determination. This portion of the Article argues that meaningful self-determination requires bureaucratic acknowledgement of Indian tribes' exclusive right to determine membership; that Indian tribes must be allowed to decide internal disputes without any interference from the federal government; that Indian tribes must be allowed to restore the land base to a critical mass for each tribe in order to allow for adequate economic development activities; that Indian tribes retain a right to a remedy for the past violations of law of which they are a victim; and that, finally, Indian tribes have a right to a competent trustee.

The Article concludes in Part IV with a bleak vision, describing areas of critical tribal interest in which the federal bureaucracy is likely to maintain its paternalistic attitudes. Nevertheless, much of what ground has been lost can be regained with a simple change toward recognition of principles of self-determination on the part of the federal bureaucracy.

## II. CASE STUDIES OF INSIDIOUS COLONIALISM

With the establishment of the self-determination era, Indian tribes began to assert their inherent sovereignty over both internal and external affairs. On the surface, the federal government, working mostly through the Bureau of Indian Affairs, grants tribes the space

to develop as tribes. But this space often amounts to paying mere lip service to the notion of tribal sovereignty. As Derrick Bell's "interest convergence dilemma" theory suggests,<sup>35</sup> the leeway granted to tribes in the self-determination era has limitations—the major limitation being that where non-Indian interests are affected, tribal self-government must give way.<sup>36</sup> The following four case studies are illustrative, but not isolated, examples of how the federal bureaucracy and agency-level policy makers subvert the concept of tribal self-determination.

#### *A. The Secretary and the Grand Traverse Band*

The insidious colonialism of the conqueror takes one form in an area fundamental to Indian tribes: the establishment and codification of tribal law through the adoption of its initial constitution and membership requirements.<sup>37</sup> Under federal law, if an Indian tribe reorganizes in accordance with the Indian Reorganization Act, the Secretary of Interior must first approve the tribe's proposed constitution.<sup>38</sup> For tribes recently recognized or reorganized, this requirement allows the federal government to decide elemental questions of tribal law that should be decided by the tribe alone. Tribes should have exclusive authority over internal tribal matters such as membership requirements.<sup>39</sup> Depending on an administration's political leanings, this approval requirement can do enormous damage to Indian tribes by creating artificial and arbitrary tribal membership requirements.

In 1981, President Ronald Reagan appointed James Watt as Secretary of the Interior.<sup>40</sup> He presided over the Department of the

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35. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20 (Kimberlé Crenshaw et al. eds., 1995).

36. *Cf. id.* at 22 ("The interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

37. See generally Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 *GONZ. L. REV.* 81 (1993–94).

38. 25 U.S.C. § 476(a)(2), (d) (2000).

39. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978).

40. See *Watt Loses Another Job—As Attorney for Crow Indian Tribe*, *CHI. TRIB.*, Mar. 19, 1987, at 30.



Interior's shift in focus from preservation of public lands to development of public lands.<sup>41</sup> Watt, like the Reagan Administration in general,<sup>42</sup> was no friend to Indian tribes, and he presided over the "fire-sale" of coal rights on Indian lands to the detriment of tribes.<sup>43</sup> Watt's apparent policy regarding Indian tribes was to eliminate all federal involvement, including the Bureau of Indian Affairs. This policy is suggested by his comment that Indian tribes are "an example of the failures of socialism."<sup>44</sup> Watt's reign as Secretary of Interior was a low-water mark in modern tribal-federal relations during the self-determination era.

The Grand Traverse Band of Ottawa and Chippewa Indians, the first Indian tribe to be administratively recognized by the Branch of Acknowledgement and Research,<sup>45</sup> was an early victim of Watt's government-shrinking, anti-Indian policies. After recognition in

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41. See George Cameron Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 490-91, 518-20 (1990).

42. See generally Robert A. Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribe Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 337-39 (1985).

The Reagan administration's policy is premised principally upon the simplistic yet chimerical belief that the 'avenue of development for many tribes' lies in the supposedly abundant natural resources underlying land that the nineteenth century American government regarded as useless. Unfortunately, such a policy ignores the fact that fewer than one in eight Indian Nations has energy and mineral reserves that can be developed. In the minds of many Indian leaders and their people, federal policies premised upon such a belief implicitly condone a neocolonial status for those tribes fortuitously sitting atop strategic mineral and energy stockpiles.

*Id.* (footnotes omitted).

43. See James Coates, *Ruling Rakes Watt Land Leases over Coals*, CHI. TRIB., June 9, 1985, at 4.

44. *Reagan Outlines Policy on Tribes*, N.Y. TIMES, Jan. 25, 1983, at A16 ("If you want an example of the failures of socialism, don't go to Russia. Come to America, and see the American Indian reservations."). Watt later apologized, but added that "his comments had focused attention on problems that have been around for decades. 'I have given you an opportunity, don't miff it,' Mr. Watt said." Associated Press, *Watt Apologizes to Indians for any 'Hurt' from Socialism Remarks*, N.Y. TIMES, Jan. 26, 1983, at A13. In fact, it appeared that Watt's "apology" was nothing of the sort: "Mr. Watt conceded that he might have used 'unartful language' in making the comments, but added, grinning, 'boy, I got attention.'" *Id.*

45. See *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Att'y*, 369 F.3d 960, 962 (6th Cir. 2004); *Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe*, 45 Fed. Reg. 19,321 (Mar. 25, 1980).

1980, the Bureau of Indian Affairs informed the Grand Traverse Band that it “will not be eligible to organize and adopt a constitution under the Indian Reorganization Act until a reservation has been set aside for it.”<sup>46</sup> In a classic pincer maneuver that placed the Band’s feet to the fire, the Bureau strongly implied that it would not declare a reservation until the Band agreed to amend its proposed constitution to exclude more than eighty percent of its proposed membership.<sup>47</sup>

The Bureau admit[ted] it is well established that Indian tribes have authority to determine their own members, there is an equally fundamental principle that membership in an Indian tribe is a bilateral, political relationship which derives its legal significance from, and is dependent upon, an interaction between the individual and the tribal community. The existence of such a relationship was one of the criteria considered in the acknowledgement process. During that process it was determined that the group of 297 individuals met this criterion and their acknowledgement as a tribe was based upon that determination.<sup>48</sup>

The Bureau told the Band that its federal acknowledgement depended completely on the Bureau’s interpretation of the relationship between individual Michigan Ottawas and the Band.<sup>49</sup> As the Band sought to expand its definition of membership, the Bureau responded with threats: it would refuse to distribute Indian Claims Commission judgment funds;<sup>50</sup> refuse to declare a reservation;<sup>51</sup> cut off federal program funds;<sup>52</sup> refuse to take additional land into trust;<sup>53</sup>

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46. Letter from Deputy Assistant Sec’y, Indian Affairs (Operations), to Joseph C. Raphael, Chairman Grand Traverse Band of Ottawa and Chippewa Indians (Nov. 4, 1983) (on file with author) [hereinafter 1983 Letter].

47. *See id.*

48. *Id.*

49. *Id.*

50. *See id.*

51. *See id.* The Bureau eventually did declare an initial reservation in 1984. *See Grand Traverse Band*, 369 F.3d at 962 (citing *Grand Traverse Band of Chippewa and Ottawa Indians Establishment of Reservation*, 49 Fed. Reg. 2025 (Jan. 17, 1984)).

52. *See* Letter from Acting Deputy Assistant Sec’y, Indian Affairs, to Joseph Raphael, Chairman Grand Traverse Band of Ottawa and Chippewa Indians (Mar. 18, 1985) (on file with author).

53. *See id.*

refuse to issue treaty fishing cards;<sup>54</sup> and, most incredibly, reconsider federal recognition of the Band (which it had no authority whatsoever to do on its own).<sup>55</sup> The Bureau's choice of language in their communication to the Band is remarkable. It reads more as a threat from an organized crime boss extorting shop owners<sup>56</sup> than as useful advice from the Band's trustee. The Bureau used its authority under the Indian Reorganization Act not to assist the Band, but to force the Band to shrink—fewer Band members means that there are fewer persons eligible for services from the federal government.<sup>57</sup> This, then, was the on-the-ground result of the James Watt-era Bureau policy.

Once the Bureau realized that it could extort the newly-recognized Grand Traverse Band in this manner, it extended its extortion to other newly-recognized Indian tribes. The Bureau, in reviewing the Jamestown Klallam tribe's proposed constitution, "made some rather significant changes to the membership provisions."<sup>58</sup> The Bureau

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54. *See id.*

55. *See id.* ("The character of the current membership is such that it raises the question of whether the acknowledgement decision validly applies to the Band as now constituted."); Letter from Scott Keep, Assistant Solicitor, Tribal Gov't & Alaska Branch, to William Rastetter (July 2, 1985) (on file with author).

56. *See* 1983 Letter, *supra* note 46.

It was our thought that in this interim period while a decision on the reservation proclamation is pending, the tribe might want to consider our concerns about the membership provisions contained in the tribal draft. If the band wishes to submit another alternative which would address our concerns, it of course may do so. We thought we should let you know, prior to a decision on the proposed proclamation of a reservation, of our concern . . . .

*Id.*

57. Ironically, now that the Little River Band of Ottawa Indians and Little Traverse Bay Bands of Ottawa Indians are federally recognized, *see* 25 U.S.C. § 1300k-2 (2000), and the Muskegon River, Grand River, and Burt Lake Bands are petitioning for federal recognition, *see* Proposed Finding Against Federal Acknowledgement of the Burt Lake Band of Ottawa and Chippewa Indians, Inc., 69 Fed. Reg. 20,027 (Apr. 15, 2004); Receipt of Petitions for Federal Acknowledgment of Existence as an Indian Tribe, 68 Fed. Reg. 13,724, 13,725 (Mar. 20, 2003) (Muskegon River Band); Grand River Band Ottawa Council; Receipt of Petition for Federal Acknowledgment of Existence as an Indian Tribe, 60 Fed. Reg. 8136 (Feb. 10, 1995); *cf.* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 404 (3d ed. 2002) (listing the Burt Lake Band of Ottawa and Chippewa Indians and the Grand River Band of Ottawa Indians as state-recognized tribes), the federal dollars spent on splitting up those Michigan Ottawa groups is exponentially higher.

58. Memorandum from Chief, Branch of Tribal Enrollment Servs., to Chief, Branch of Tribal Relations (Apr. 19, 1983) (on file with author) [hereinafter 1983 Memorandum].

based its apparent authority to force these changes based on the “precedent” it created by forcing the Grand Traverse Band to amend its membership criteria.<sup>59</sup> The Bureau took the stance that the Jamestown Klallam’s members must “have a ‘significant community relationship’ with the Jamestown Klallam Tribe.”<sup>60</sup> This “significant community relationship” requirement has no basis in statutory or case law.

In short, the Bureau used its authority to approve tribal constitutions under the Indian Reorganization Act to force newly-recognized tribes to succumb to its political decisions on tribal membership. Because of the constantly shifting federal and state definitions of “Indian”<sup>61</sup> and because of a tribe’s right to determine its own membership, such meddling for pure political purposes is patent colonialism.

### *B. The Assistant Secretary and the Saginaw Chippewa Tribe*

The Bureau sometimes intruded upon the purely internal tribal issues arising out of tribal elections by using its power to selectively recognize an Indian tribe’s leadership. In one admittedly difficult instance, Kevin Gover, former Assistant Secretary for Indian Affairs, appeared to overstep his bounds by using this power to force a tribal election in accordance with the Bureau’s official wishes.<sup>62</sup> The power to determine which tribal “faction” or “leader” to deal with is no license to actively intervene in purely tribal affairs.

The issue arose when the tribal council of the Saginaw Chippewa Indian Tribe of Michigan nullified four of five general and primary

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59. *See id.* (“We have made some rather significant changes to the membership provisions consistent with some decisions that have been made in conjunction with Departmental review of the Grand Traverse Band’s proposed constitution.”). The Bureau has a long history of coercing Indian tribes to accept narrow membership criteria. *See, e.g.,* Snowden v. Saginaw Chippewa Indian Tribe, 32 Indian L. Rep. (Am. Indian Law Training Program, Inc.) 6047, 6048–49 (App. Ct. of the Saginaw Chippewa Indian Tribe Jan. 5, 2005) (on file with author) (detailing how the Bureau coerced the Saginaw Chippewa Tribe into adopting a constitution that excluded tribe members living off the reservation from membership).

60. 1983 Memorandum, *supra* note 58.

61. *See generally* COHEN, *supra* note 6, at 2–3.

62. *See* Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 87–88 (2002) (describing the Assistant Secretary’s exercise of authority in this case as “virtually unlimited authority”).

elections from 1997 to 1999.<sup>63</sup> Membership in the Saginaw Chippewa tribe is often a contentious issue, especially given the large gaming revenues the tribe distributes to its members.<sup>64</sup> The major issue in the 1997 through 1999 elections was the parallel political drive to change the tribe's constitution to reduce membership.<sup>65</sup> The tribal council, led by Kevin Chamberlain, became known as the "holdover council" when it did not step down after its term of office ended.<sup>66</sup> It originally ran on a platform of membership and constitutional reforms in 1995.<sup>67</sup> By 1997, when the time came for new elections, the Chamberlain council had done little to effectuate the membership and constitutional reforms promised, but it had presided over the establishment of a hugely successful gaming enterprise.<sup>68</sup>

The council members succeeded in the tribe's primary election, but only four survived the general election.<sup>69</sup> In accordance with tribal law, the council was authorized to review election results and declare them invalid, which it did.<sup>70</sup> They held a curative election in January of 1998 that produced similar results, and the council nullified this election as well.<sup>71</sup> At that point, its term expired.<sup>72</sup> Shortly thereafter, the holdover Chamberlain council suspended 140 tribal members from exercising their membership rights (e.g., voting), a decision the tribal court of appeals suggested was unconstitutional.<sup>73</sup>

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63. See *Saginaw Chippewa Indian Tribe v. Gover*, No. 99-10327, 1999 WL 33266029, at \*1 (E.D. Mich. Aug. 19, 1999); *Chamberlain v. Peters*, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) 6085, 6086-88 (App. Ct. of the Saginaw Chippewa Indian Tribe Jan. 5, 2000).

64. Cf. *Lincoln v. Saginaw Chippewa Indian Tribe*, 967 F. Supp. 966 (E.D. Mich. 1997) (dismissing claim requesting court to force tribe to admit plaintiff as a member and allow her to enjoy the tribe's per capita gaming revenue distributions), *aff'd*, 156 F.3d 1230 (6th Cir. 1998).

65. See generally *King v. Norton*, 160 F. Supp. 2d 755 (E.D. Mich. 2001); *Hinmon v. Tribal Council*, No. AC-03-1015 (App. Ct. of the Saginaw Chippewa Indian Tribe Sept. 29, 2003); *Chamberlain*, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) at 6086.

66. *Chamberlain*, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) at 6087.

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.* at 6086-87, 6087 n.4.

The Chamberlain council then held another primary election, but only one of its members qualified for the general election.<sup>74</sup> It nullified this second primary, but enacted a law allowing the tribal court to review its election certification decisions.<sup>75</sup> The tribal court then reviewed and dismissed a claim that the Chamberlain council should be held in contempt for failure to hold a curative election.<sup>76</sup> The Chamberlain council, entering its second year as holdovers, held a third primary election on January 19, 1999.<sup>77</sup> This election gave rise to the Peters council.<sup>78</sup> However, one month later, the Chamberlain council entered a ruling that invalidated the January 19 election.<sup>79</sup>

Dissatisfied with the Chamberlain council's actions, a group of tribal members convened to hold their own, parallel elections.<sup>80</sup> The Chamberlain council enacted a sedition law to prohibit this activity, but the elections went ahead with the support of the Peters council.<sup>81</sup>

Both councils initiated a drive to persuade Gover to recognize their council.<sup>82</sup> The Chamberlain council also mounted a media campaign that strongly criticized the administration of Gover's Bureau of Indian Affairs.<sup>83</sup> The Assistant Secretary eventually responded to the dueling councils by writing a letter suggesting that the Chamberlain council hold another election within forty-five days, and implying that the most recent election held by the Chamberlain council, in which the Peters council was more or less victorious, was valid in the Bureau's opinion.<sup>84</sup> The Assistant Secretary wrote that without a new election, the Bureau would deal only with the persons allegedly elected on January 19, 1999.<sup>85</sup> When the Chamberlain

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74. *See id.* at 6087.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 6086–87.

82. *See id.* at 6087.

83. *See id.*; William Claibourne, *Tribe PR Drive Targeted BIA Head*, WASH. POST, Aug. 16, 1999, at A13. The purpose of this media campaign was unclear, but most certainly could not have helped the Chamberlain council.

84. *See Chamberlain*, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) at 6087.

85. *See id.*

council did not hold an election within forty-five days, the Assistant Secretary wrote another letter to Chamberlain, informing him that the local Bureau officials would deal only with the eleven persons who received the most votes in the January 19 primary.<sup>86</sup>

Immediately, the Chamberlain council brought an action in the federal district court challenging the Bureau's decision and asking for a temporary restraining order.<sup>87</sup> The district court denied the request, relying principally on the Eighth Circuit's decision in *Goodface v. Grassrope*.<sup>88</sup> *Goodface* presented facts superficially similar to the Saginaw Chippewa case. In *Goodface*, a tribal council elected in 1980 competed with a council allegedly elected in 1982 for recognition from the Bureau.<sup>89</sup> The court properly held that it lacked jurisdiction to decide which council should ultimately win, but recognized that the Bureau had the authority to recognize one or the other in the interim.<sup>90</sup> The purpose of this authority was to avoid "jeopardiz[ing] the continuation of necessary day-to-day services on the reservation."<sup>91</sup> Determining the valid leadership of an Indian tribe is, according to another federal court, required in order to fulfill the Bureau's "responsibility to administer its trust duties to the Indian people."<sup>92</sup> Since federal courts have no jurisdiction to decide the merits of a tribal election dispute,<sup>93</sup> only the Saginaw Chippewa tribal judicial system could resolve the case.

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86. See *id.*; see also *id.* at 6097–98 (reproducing the letter); William Claibourne, *U.S. Ousts Tribe's Leaders*, WASH. POST, Aug. 12, 1999, at A13 ("Gover replaced the 10-member tribal council headed by Chief Kevin Chamberlain with 12 candidates who Gover said had received the largest number of votes in the most recent election."). Significantly, since two candidates tied for tenth place, Mr. Gover instructed local Bureau officials to recognize *eleven* instead of *ten* persons as included in the full Tribal Council. See *Saginaw Chippewa Indian Tribe v. Gover*, No. 99-10327, 1999 WL 33266029, at \*1 (E.D. Mich. Aug. 19, 1999); *Chamberlain*, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) at 6087.

87. See *Saginaw Chippewa Indian Tribe*, 1999 WL 33266029, at \*1.

88. See *id.* at \*2–3 (citing *Goodface v. Grassrope*, 708 F.2d 335, 337, 339 (8th Cir. 1983)).

89. See *Goodface*, 708 F.2d at 336–37.

90. See *id.* at 339.

91. *Id.*

92. *Milam v. U.S. Dep't. of the Interior*, 10 Indian L. Rep. (Am. Indian Law Training Program, Inc.) 3013, 3015 (D.D.C. 1983).

93. *E.g.*, *In re Sac & Fox Tribe*, 340 F.3d 749, 763–64 (8th Cir. 2003); *Saginaw Chippewa Indian Tribe v. Gover*, No. 99-10327, 1999 WL 33266029, at \*2 (E.D. Mich. Aug. 19, 1999) (citing *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985)); *Wis. Winnebago*

When the matter finally reached the Saginaw Chippewa Tribe's appellate court,<sup>94</sup> it held first that the actions of the Chamberlain council were invalid once its term of office expired.<sup>95</sup> Turning to the validity of the Bureau's decision to recognize the so-called Peters council, the appellate court excoriated the Bureau. The court reviewed the Assistant Secretary's letter and found three serious flaws. First, the Bureau provided no legal authority for issuing a decision at all, which is significant because neither council had formally initiated an administrative action. Second, the Bureau's decision violated the tribal constitution by recognizing eleven instead of ten persons. Third, the Bureau's decision again violated the tribal constitution by recognizing the victors of a tribal *primary* election, not of a general election.<sup>96</sup>

The appellate court held that the Bureau did not possess the authority to recognize the victors of a tribal election, even in the interim.<sup>97</sup> The court noted first that no statute exists that expressly authorizes the Bureau to take this interim step of recognizing one party over another in a protracted tribal election dispute.<sup>98</sup> Second, the court, acknowledging the Bureau's duty to administer federal programs,<sup>99</sup> refused to accept the argument that the Bureau consequently had authority to "recognize" one side over the other.<sup>100</sup>

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Bus. Comm. v. Koberstein, 636 F. Supp. 814 (W.D. Wis. 1986); Kickapoo Tribe v. Thomas, 10 Indian L. Rep. (Am. Indian Law Training Program, Inc.) 3093, 3094 (D. Kan. 1983) (citing Potts v. Bruce, 533 F.2d 527 (10th Cir. 1976); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); and Mota v. United States, 402 F.2d 1 (10th Cir. 1968)).

94. The Saginaw Chippewa appellate court was composed of Carey Vicenti, Cheryl Fairbanks, and Frank Pommersheim—an extremely distinguished group. Professor Vicenti is Apache and has written articles on Federal Indian law, e.g., *The Social Structures of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL'Y 513 (2001). Professor Pommersheim has written very important works on tribal courts and Indian law in general, e.g., FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1995). Ms. Fairbanks is an Alaska native, long time practitioner of Indian law, and co-chair of the 2006 Federal Bar Association's Indian Law Conference.

95. See *Chamberlain v. Peters*, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) 6085, 6088–90 (App. Ct. of the Saginaw Chippewa Indian Tribe Jan. 5, 2000).

96. See *id.* at 6091.

97. See *id.* at 6091–95.

98. See *id.* at 6091–92.

99. See *id.* at 6092.

100. See *id.* ("You either meet the requirements to qualify for federal funding or you don't. Yet it is much more difficult to extend this obvious federal governmental responsibility to the right and duty to legally decide who is the 'recognized' governing body of the Tribe.").



The court characterized the Bureau's actions as "assum[ing] the worst and proceed[ing] accordingly. This is the trustee not as helpful partner, but as arrogant superior."<sup>101</sup>

Third, the court found no case law to support the Bureau's actions. The court distinguished the *Goodface* case on the simple but fundamental ground that the party recognized by the Bureau in that case had allegedly won a *general* election.<sup>102</sup> Moreover, the *Goodface* decision explicitly stated that the Bureau's recognition in that instance was valid until the tribal court made a final determination. In the Saginaw Chippewa case, however, the Bureau and the competing councils all proceeded without filing an appeal to the tribal appellate court.<sup>103</sup> In short, the court found both parties at fault for going directly to the Bureau for relief when tribal court remedies were still available, and found the Bureau at fault for proceeding on the merits without directing the parties to the tribal court.

The import of this case study is that the Bureau can influence, or even decide, the outcome of a tribal election by recognizing a winner before the tribal election dispute process concludes. Moreover, the Bureau will attempt to force a tribe to conduct elections at a particular time and in a particular manner—sometimes to the detriment of tribal courts, as in this case study. Because there are two sides to every dispute, the Bureau will be tempted to choose a side with the best argument, particularly if there appears to be an inequity.

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101. *Id.* at 6093.

102. *See id.* at 6094.

103. *See id.* at 6093–94. The appellate court further criticized the Secretary of Interior when he refused to file a friend of the court brief in the appellate court action. *See id.* at 6094–95 n.40. Scott Keep, the Assistant Interior Solicitor, declined to file a brief on the grounds that the *Saginaw Chippewa Indian Tribe v. Gover*, No. 99-10327, 1999 WL 33266029 (E.D. Mich. Aug. 19, 1999), case was extant in the federal courts. *See Chamberlain*, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) at 6094–95 n.40. The court concluded that the Department as a whole had utterly "disrespect[ed]" the court first by not directing the parties to the tribal court for relief and then by refusing to participate as an *amicus*. *See id.* at 6094–95.

### *C. Indian Gaming and Off-Reservation Trust Acquisitions*

The Secretary of Interior, the Bureau of Indian Affairs, and the National Indian Gaming Commission have begun to systematically erode the reach of both the Indian Gaming Regulation Act (IGRA),<sup>104</sup> and the discretionary authority of the Secretary to acquire trust land for tribes.<sup>105</sup> This is done by creating artificial territorial barriers to Indian gaming through the arbitrary exercise of the Secretary's authority to take land into trust for the benefit of Indian tribes. Though IGRA and the trust land acquisition statute say nothing about territorial or geographic limitations on Indian gaming, all three federal political entities have begun to impose geographic limitations as to where Indian gaming may take place. These limitations arise as political decisions and serve to subvert Indian tribes by using statutes otherwise designed to assist tribes.

The legislative history regarding the territorial and geographic reach of Indian gaming is sparse, apparently because Congress, the agencies, and the tribes assumed that Indian tribes would never think about gaming outside of their immediate traditional territory or, conversely, that silence in the statute allowed for expansion. Congress's purpose in enacting IGRA was to codify and clarify Indian gaming, especially considering the uncertainty of the application of several federal and state laws to tribal gaming customers, such as the Organized Crime Control Act<sup>106</sup> and the Johnson Act,<sup>107</sup> and the possibility that states would arrest non-Indians leaving Indian gaming establishments.<sup>108</sup>

Congress enacted IGRA after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*,<sup>109</sup> in which the Court held that federal law did not authorize the state of California to enforce its gaming laws against the tribe.<sup>110</sup> IGRA allows Indian

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104. See 25 U.S.C. §§ 2701–21 (2000).

105. See *id.* § 465; 25 C.F.R. § 151 (2004).

106. 18 U.S.C. § 1955 (2000) (prohibiting illegal gambling businesses).

107. 15 U.S.C. §§ 1171–78 (2000) (regulating transportation of gambling devices).

108. See *State ex rel. Poll v. Mont. Ninth Judicial Dist. Ct.*, 851 P.2d 405 (Mont. 1993).

109. 480 U.S. 202 (1987).

110. See *id.* at 211.

tribes to conduct casino-style gaming “on Indian lands.”<sup>111</sup> Moreover, the tribe must “exercise[] governmental power” over those lands in order for them to qualify as gaming lands.<sup>112</sup> Land held in trust by the Secretary for the benefit of the tribe is sufficient to meet the “exercise[ing] governmental power” requirement.<sup>113</sup> IGRA also prohibits gaming on Indian lands after October 17, 1988 (IGRA’s enactment date) unless the tribe undergoes a Secretarial determination process wherein the Governor of the affected state maintains a veto,<sup>114</sup> or the lands are “restored” to a “restored” Indian tribe.<sup>115</sup> Nowhere does IGRA limit the geographic reach of these “Indian lands” or “restored lands.”<sup>116</sup>

One of the inherent limitations of gaming as a revenue source for many tribes is their location away from the gaming markets. Relatively few tribes are fortunate enough to be located near non-Indian population centers. Once the statutory authority for Indian gaming was in place, tribes located far from viable gaming markets began to apply to take off-reservation land into trust. Because IGRA

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[T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Accordingly, we conclude that Pub. L. 280 does not authorize California to enforce Cal. Penal Code § 362.5 within the Cabazon and Morongo Reservations.

*Id.*

111. See 25 U.S.C. § 2710(a), (d) (2000).

112. See *id.* § 2703(4)(B).

113. *Id.* Indian tribes have jurisdiction over trust lands. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (holding that Indian tribes are “invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy”) (citation omitted).

114. See 25 U.S.C. § 2719(b)(1)(A) (2000).

115. See *id.* § 2719(b)(1)(B)(iii).

116. Senator Daniel K. Inouye, former Chairman of the Senate Committee on Indian Affairs and one of the principal drafters of IGRA, has expressly denied that IGRA included a geographic limitation. See *Bay Mills Indian Community Land Claims Settlement Act: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 30 (Oct. 10, 2002) (statement of Sen. Daniel K. Inouye).

In the testimony that was presented here, you suggested that Congress did not anticipate land approximately 250 miles from a reservation area being acquired in a settlement for purposes of gaming. Where do you find that intent, because I happen to have been the author of IGRA and I believe I participated in just about every debate on this matter.

*Id.*

created the National Indian Gaming Commission (NIGC) as the federal agency to oversee some aspects of Indian gaming,<sup>117</sup> that agency had first crack at defining the meaning of “Indian lands” and “restored lands” when confronted with a tribe’s request to take off-reservation lands into trust for gaming purposes.

The NIGC’s initial (implied) opinion as to the existence of a geographic limitation to “Indian lands” or “restored lands” came in 1997 when it reviewed the Pokagon Band of Potawatomi Indians Restoration Act.<sup>118</sup> The question was whether lands taken into trust in accordance with that Act could be considered “restored lands.”<sup>119</sup> The Interior Solicitor focused on language that the land acquisition at issue was within a ten county area that formed the Band’s service area,<sup>120</sup> and he opined that the land was therefore “restored land.”<sup>121</sup> The seeds of a geographic limitation were thereby planted.

In subsequent opinions, the Solicitor’s office focused on geographic limitations that appeared in other tribe-specific land acquisition statutes or in statutes implementing land claim settlements in this manner, extrapolating a geographic limitation onto “restored lands” that did not exist in IGRA.<sup>122</sup> Eventually, in a case concerning the Grand Traverse Band’s Turtle Creek Casino, a federal district

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117. See 25 U.S.C. §§ 2704–08 (2000). Sections 2704 through 2708 created the NIGC to regulate and oversee only Class II gaming, which is bingo-type gaming (not casino-type gaming, which is Class III). See *id.* § 2706(b). Frank Ducheneaux and Pete Taylor wrote a very enlightening piece about the origins of IGRA, particularly as it relates to the NIGC’s authority. See Franklin Ducheneaux & Peter S. Taylor, *Tribal Sovereignty and the Powers of the National Indian Gaming Commission* (undated) (unpublished manuscript, on file with author). In short, the authors persuasively argued that IGRA never intended the NIGC to have authority over casino-style gaming. See *id.* at 49–54. Distinguished commentators have harshly criticized IGRA and the expansion of the NIGC’s powers. See generally Robert B. Porter, *Indian Gaming Regulation: A Case Study in Neo-Colonialism*, 5 GAMING L. REV. 299 (2001).

118. 25 U.S.C. § 1300j (2000).

119. See Memorandum from the Office of the Solicitor, Dep’t of the Interior, to Sec’y of the Interior (Sept. 19, 1997) (on file with author) [hereinafter 1997 Memorandum].

120. See 25 U.S.C. § 1300j-6 (2000).

121. See 1997 Memorandum, *supra* note 119.

122. *E.g.*, Memorandum from Derril B. Jordan, Assoc. Solicitor, Div. of Indian Affairs, to Hilda A. Manuel, Deputy Comm’r for Indian Affairs (Nov. 12, 1997) (on file with author) (focusing on the geographic limitation on mandatory trust acquisitions in the Little Traverse Bay Bands of Odawa Indians Act, 25 U.S.C. § 1300k-4(a) (2000)); Memorandum from Derril B. Jordan, Assoc. Solicitor, Div. of Indian Affairs, to Acting Dir., Indian Gaming Mgmt. Staff (Mar. 16, 1998) (on file with author) (focusing on the geographic limitation on mandatory trust acquisitions in the Little River Band of Ottawa Indians Act, 25 U.S.C. § 1300k-4(b)).

court reviewed the Pokagon, Little Traverse, and Little River opinions of the Interior Solicitor, and mused in dicta that “the location of the acquisition” of after-acquired lands might be taken into consideration in determining whether the lands are “restored lands.”<sup>123</sup> The Department became bolder after this opinion was issued, asserting in an opinion concerning the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians that “‘restored lands’ . . . include only those lands that are available to a restored tribe as part of its restoration to federal recognition.”<sup>124</sup> This very restrictive definition was struck down by the district court for the District of Columbia in 2000.<sup>125</sup> However, the court quoted language from the Grand Traverse Band case suggesting that a geographic limitation of “restored lands” might still be plausible.<sup>126</sup> Again, there was no statute, regulation, or snippet of legislative history to support this limitation.

The Department went back to work, creating from its own opinions the legal authority for the concept of a geographic limitation to the “restored lands” exception in IGRA. The Department again opined that a trust acquisition within the area of a restoration act was “restored land,” solidifying its previous position with citations to its own prior opinions.<sup>127</sup>

Finally, the NIGC provided a lengthy opinion on the Grand Traverse Band’s Turtle Creek Casino on remand from the federal district court.<sup>128</sup> The NIGC, consistent with previous opinions on geographic limitations, opined that “the phrase ‘restoration of lands’ is a difficult hurdle and may not necessarily be extended, for

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123. See *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att’y*, 46 F. Supp. 2d 689, 700 (W.D. Mich. 1999).

124. Memorandum from Interior Solicitor to Assistant Sec’y, Indian Affairs (Oct. 19, 1999) (on file with author).

125. See *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161–64 (D.D.C. 2000).

126. See *id.* at 164 (quoting *Grand Traverse Band*, 46 F. Supp. 2d at 700).

127. See Memorandum from Derril B. Jordan, Assoc. Solicitor, Div. of Indian Affairs, to Deputy Comm’r of Indian Affairs (Apr. 18, 2000) (on file with author) (focusing on the land acquisitions area of the Paskenta Band Restoration Act, 25 U.S.C. § 1300m-3(a) (2000) and citing the Little Traverse and Pokagon opinions).

128. See Letter from Kevin K. Washburn, Gen. Counsel, Nat’l Indian Gaming Comm’n, to Hon. Douglas W. Hillman, Senior U.S. Dist. Judge (Aug. 31, 2001), available at National Indian Gaming Commission, [www.nigc.gov/nigc/documents/land/hillman.jsp](http://www.nigc.gov/nigc/documents/land/hillman.jsp).

example, to any lands that the tribe conceivably once occupied throughout its history.”<sup>129</sup> The district court affirmed the NIGC’s stance.<sup>130</sup>

Bootstrapping onto the “restored lands” decisions, the Secretary of Interior, Gale Norton (a protégé of former Secretary Watt)<sup>131</sup> entered the debate and applied this reasoning to fee-to-trust acquisitions under 25 U.S.C. § 465. In approving by inaction the Class III gaming compact between the Seneca Nation of Indians and the State of New York, the Secretary asserted her own views as a political appointee: “I believe that IGRA does not envision that off-reservation gaming would become pervasive.”<sup>132</sup> The Secretary threatened to bar virtually all off-reservation trust acquisitions if the land is intended for gaming operations:

I am nevertheless concerned that elements of this Compact may be used by future parties to proliferate off-reservation gaming development on lands not identified as part of a Congressional settlement but instead on lands selected solely based on economic potential, wholly devoid of any other legitimate connection. Thus, to the extent that other states and tribes model future compacts after this one, and seek to have the United States take land into trust for these gaming ventures, they should understand that my views regarding land acquired through a Congressional settlement are somewhat different from my views when a tribe is seeking a discretionary off-reservation trust acquisition. . . . While I do not intend to signal an absolute bar on off-reservation gaming, I am extremely concerned that the principles underlying the enactment of IGRA are being stretched in ways Congress never imagined when enacting IGRA.<sup>133</sup>

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129. *Id.*

130. *See* Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Att’y, 198 F. Supp. 2d 920, 935–36 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004).

131. *See* Nancy Benac, *Bush Nominees May Have a Hard Road*, ASSOCIATED PRESS ONLINE, Jan. 3, 2001, available at 2001 WL 3648685.

132. Letter from Gale A. Norton, Sec’y of the Interior, to Hon. Cyrus Schindler, Nation President, Seneca Nation of Indians (Nov. 12, 2002) (on file with author).

133. *Id.*

Again, there is no statute or legislative history supporting this limitation.

The most recent decisions out of the NIGC on “restored lands” treat the geographic limitations—more or less created from whole cloth—as hornbook law.<sup>134</sup> Thus, the train rolls along.

The import of these agencies’ interpretations of the law is that newly-recognized tribes with little or no trust land are strictly limited in restoring their reservations for gaming purposes. For tribes like the Grand Traverse Band, which has not had any land taken into trust without comment from the Bureau or the Department since 1996, the promise of the Indian Reorganization Act, enacted to help tribes restore their stolen land base,<sup>135</sup> is a slowly emptying vessel.

#### *D. The Secretary and the Indian Land Claims Limitation Act*

In the 1950s, during the peak of the termination era,<sup>136</sup> the Secretary of Interior and the Bureau of Indian Affairs engaged in a massive sell-off of trust lands held on behalf of individual Indians and Indian tribes.<sup>137</sup> This sell-off, without the consent of Indians or tribes, often moved forward under the auspices of 25 U.S.C. § 372, which authorized the Secretary to sell Indian allotments whenever he “decide[s] one or more of the heirs [to an allotment] to be incompetent.”<sup>138</sup> Section 372, enacted in 1910,<sup>139</sup> was severely restricted by the Indian Reorganization Act in 1934,<sup>140</sup> which, *inter alia*, limited the authority of the Secretary to sell Indian lands without

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134. See, e.g., Memorandum from Maria Getoff, Staff Att’y, NIGC, to Philip N. Hogan, Chairman, NIGC (Mar. 24, 2004) (on file with author) (rejecting the Wyandotte Nation of Oklahoma’s attempt to begin gaming in Kansas City, Kansas).

135. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 24–25 (4th ed. 2004).

136. In 1953, Congress explicitly entered the termination era by expressing its intent to force tribes and Indians to be “subject to the same laws as are applicable to other citizens of the United States.” *Id.* at 26 (quotation omitted). The starkest action taken by Congress during this era was to dissolve Indian tribes by statute and convert tribal lands into public lands. See *id.*

137. See Cohen, *supra* note 4, at 364–65.

138. 25 U.S.C. § 372 (2000). The federal regulation following from this statute extends (without statutory support) the authorization to sell trust lands as well. See 25 C.F.R. § 152.20 (2004) (“[I]f the Secretary decides that one or more of the heirs who have inherited trust land are incapable of managing their own affairs, he may sell any or all interests in that land.”).

139. See Act of June 25, 1910, ch. 431, § 1, 36 Stat. 855 (1910).

140. See 25 U.S.C. §§ 461–94 (2000).

the consent of the affected tribe.<sup>141</sup> However, by 1953, the Bureau took a narrow view of this provision and began its sell-off. Generally, tribes with trust or allotment land that were not federally recognized at the time, tribes that did not reorganize under the Indian Reorganization Act, and Minnesota tribes subject to the Nelson Act<sup>142</sup> suffered these land divestitures.

The mechanics of these sales typically began with a request from a non-Indian business interested in acquiring natural resources on land occupied by Indians.<sup>143</sup> Also, state departments of natural resources or conservation often sought to acquire trust allotments for study, to expand state land holdings, or to open up the area for public use.<sup>144</sup> With the Eisenhower Administration fully in favor of terminating the trust responsibility,<sup>145</sup> the sale of Great Lakes Indian lands began with the study of Indian heirship determinations in accordance with section 372.<sup>146</sup> Once the Bureau completed locating as many heirs as they could, they sent them letters asking for their consent to sale. Rarely did the Indian heirs consent,<sup>147</sup> so the Department simply declared an heir to be incompetent and proceeded with the sale anyway. Under section 372, *they only needed to unilaterally declare one heir incompetent.*<sup>148</sup> One Grand Traverse Band Ottawa member, John Bailey, recalled the story of his mother refusing to consent to the sale when she received her letter:

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141. *See id.* § 483a.

142. The Nelson Act implemented the General Allotment Act in Minnesota. *See* 25 Stat. 642 (1908); *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998).

143. *See* Dr. James McLurken, *South Fox Island: Its Historical Importance to the Grand Traverse Band of Ottawa and Chippewa Indians* 64–65 (Aug. 28, 2001) (unpublished manuscript, on file with author) [hereinafter *South Fox Island Report*] (“Field Agent Barns also received numerous and sustained requests to buy four timber-rich allotments on Beaver Island. Superintendent Cavill sent the Barns recommendation for investigation of heirship and other criteria required to instigate the sale of trust land on the islands to the Commissioner of Indian Affairs for instructions.”).

144. *See id.* at 68. For allotments ranging in size from twenty to 160 acres on South Fox Island, Michigan, the State offered to purchase them for between \$220 and \$600. *See id.*

145. *See id.* at 66–67.

146. *See* 25 U.S.C. § 372 (2000).

147. Usually, the Indians contacted did not respond, so the Bureau assumed that they had consented to the sale, *see* *South Fox Island Report*, *supra* note 143, at 71, a highly dubious legal position to take.

148. 25 U.S.C. § 372 (2000).



[T]hey had a fear of the government coming back and taking something, or more. She said whatever the amount of money that they were talking about—her and my dad—was not enough to even bother about it.

I know they didn't send it in. She didn't sign it and they put it away. Fact is, I do recall the letter was around the house for probably a couple of years before it might have finally got thrown out or just disappeared or whatever. I know they kept it for awhile, but they never sent it in.<sup>149</sup>

Another Grand Traverse Band Ottawa member, Eva Petoskey, actually owns the letter that her mother received from the Bureau of Indian Affairs regarding an heirship claim on the Sam Bird, South Fox Island, homestead. The letter gave heirs thirty days to “show cause why the rejection of the application of Sam Bird should not be made final and the case closed.”<sup>150</sup> Ms. Petoskey's family received approximately five dollars in compensation for the loss of their allotment.<sup>151</sup>

Other Ottawas signed the document from the Bureau without understanding its import. Darrell Wright's mother signed the sales consent form thinking that it was merely an authorization for the Nickerson lumber company to take some timber off the land.<sup>152</sup> When she received \$1500 for the allotment, Mr. Wright recalled: “When I saw the price she got, I thought, ‘Well, that's alright for the timber, you know.’ When I heard she might have signed something to give away her land, I didn't think that's great.”<sup>153</sup>

On South Fox Island, Michigan, for example, the federal government originally provided fifteen allotments to Michigan Ottawa families and then, years later, sold eleven of those allotments to the Nickerson family's lumber concern,<sup>154</sup> without the consent of

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149. South Fox Island Report, *supra* note 143, at 73–74 (quoting John Bailey, member of the Grand Traverse Band of Ottawa and Chippewa Indians).

150. *Id.* at 74 (quoting Eva Petoskey, member and former Vice Chair of the Grand Traverse Band of Ottawa and Chippewa Indians).

151. *See id.*

152. *See id.* at 75.

153. *Id.* (quoting Darrell Wright, member of the Grand Traverse Band of Ottawa and Chippewa Indians).

154. *See id.* at 69.

most of the Indian heirs. As Han Walker, Jr., former Associate Solicitor for Indian Affairs, wrote in 1979: “[B]etween the years 1948 and 1958 Bureau personnel authorized conveyances of trust allotments without the consent of *all* the beneficial heirs under circumstances where one of the heirs was determined to be incompetent.”<sup>155</sup>

By 1978, Bureau field solicitors became convinced that the sales of the Great Lakes Indians’ allotments during the 1950s were likely void *ab initio*, creating a cloud on the title to hundreds of thousands—and possibly millions—of acres. In 1978, a field solicitor from the Minneapolis office wrote a memorandum describing the sale of approximately 2000 parcels that took place in Minnesota.<sup>156</sup> The field solicitor estimated “that it is likely that the figure is even greater on the reservations under the jurisdiction of the Great Lakes Agency and the Michigan Agency.”<sup>157</sup> The next year, the Associate Solicitor for the Bureau of Indian Affairs concluded that sales made during the 1950s in compliance with section 372 were void *ab initio*.<sup>158</sup>

Though federal law requires the United States attorney to represent Indians in all suits at law and equity,<sup>159</sup> in 1978, the United States Attorney General, Griffen Bell, explicitly stated that he would not bring any land claim suits on behalf of Indian tribes or individual Indians because of the harm to the current landowners, who he claimed to be “innocent.”<sup>160</sup> Arlinda Locklear, who litigates Indian

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155. Memorandum from Hans Walker, Jr., Acting Assoc. Solicitor, Indian Affairs, to Assistant Sec’y, Indian Affairs (Feb. 16, 1979) (on file with author).

156. See Memorandum from Field Solicitor, Twin Cities, Minn., to Solicitor, Dep’t. of Interior (Mar. 7, 1978) (on file with author).

157. *Id.*

158. See Memorandum from Thomas W. Fredericks, Assoc. Solicitor, Indian Affairs, to Solicitor, Dep’t. of the Interior, & Assistant Sec’y, Indian Affairs (May 31, 1979) (on file with author).

As a result, it appears that numerous transactions were entered into without the requisite authority and are therefore void. . . . Current holders of those 160-acre allotments include non-Indians, municipalities, Indian tribes, and federal agencies such as the U.S. Forest Service. Their titles now suffer from a severe cloud which is a direct result of unauthorized administrative action.

*Id.* (citing *Ewert v. Bluejacket*, 259 U.S. 129 (1922)).

159. 25 U.S.C. § 175 (2000).

160. Letter from Griffen B. Bell, Att’y Gen., to Cecil B. Andrus, Sec’y of the Interior, reprinted in S. REP. NO. 96-569, at 12 (1980).

land claims in New York state and elsewhere, argued that these “innocent” landowners

are not innocent in any sense of the word. They are trespassers. They have been sued because they have been sitting on, taking advantage of, and enjoying the benefit of land that belongs to the [Indian] people. . . . [E]ven if they had not been aware of that fact 100 years ago, if I had to venture a guess, I would say that a good 75% of them had personal knowledge of that fact when they acquired the land.<sup>161</sup>

Despite the fact that the landowners likely knew full well that they had been living on Indian land, and despite the fact that the federal government knew about its illegal transactions that divested Indians of their land, the Attorney General will not file land claims on behalf of Indian tribes.

In 1982, Congress enacted the Indian Claims Limitation Act of 1982.<sup>162</sup> This statute:

[P]rovides that there is no limitations period for suits for possession or title brought by the United States. Title 28 U.S.C. § 2415(b) provides that Indian claims that are on a list published by the Secretary of the Interior pursuant to section 4(c) of the Indian Claims Limitations Act of 1982 are not barred until (1) one year after the Secretary publishes, in the Federal Register, a rejection of the claim, or (2) three years after the Secretary submits legislation to Congress to revoke the claim.<sup>163</sup>

So, in 1983, the Secretary published the list of Indians with potential land claims for their lost allotments,<sup>164</sup> including the South Fox and Beaver Island claims.<sup>165</sup> To date, the Secretary has initiated

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161. Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L. REV. 593, 598 (2003).

162. 28 U.S.C. § 2415 (2000).

163. *Seneca Nation v. State*, 26 F. Supp. 2d 555, 573 (W.D.N.Y. 1998) (citations omitted), *aff'd*, 178 F.3d 95 (2nd Cir. 1999), *cert. denied*, *New York v. Seneca Nation*, 528 U.S. 1073 (2000).

164. *See* 48 Fed. Reg. 13,698 (Mar. 31, 1983).

165. *See id.* at 13,876.

litigation to recover this land only rarely, preferring to not investigate the claim at all. In sum, since the Secretary was told by the Attorney General that the United States will never initiate land claim litigation again,<sup>166</sup> these claims are tabled forever.

The four case studies in this section have attempted to describe how the ideal of self-determination articulated by Congress and the President can be undermined by bureaucratic implementation of federal law. Each of these studies symptomatize a broader problem in the federal executive, detailed in Part III.

### III. COLONIALISM CRIPPLES MEANINGFUL SELF-DETERMINATION

There is a difference between self-determination for Indian tribes as an ideal and as a meaningful, objective concept. Meaningful self-determination for American Indian tribes requires the United States government to recognize certain rights that an indigenous nation must possess to survive. These rights include the right of an Indian tribe to determine its membership without any interference; the right to conduct its own internal political activities without any interference; the right to restore its land base; the right to a legal remedy; and the right to a competent trustee. These rights must be recognized and applied by federal bureaucrats tasked with administering the trust responsibility between Indian tribes and the United States, just as they have been recognized by Congress and by the judiciary (with notable exceptions). Without a rigorous and disciplined hands-off approach by federal bureaucrats in areas of tribal membership, tribal law and constitution-making, and tribal elections, the ideal self-determination recognized by Congress and the judiciary is meaningless. The placement of procedural and political barriers to effective redress of tribal land claims and land base restoration by an incompetent trustee renders meaningful self-determination unattainable.

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166. See *supra* note 160.

### A. *The Right to Determine Tribal Membership*

The question, “Who is an Indian?,” intrigues (and sometimes baffles) legal and political experts.<sup>167</sup> The Supreme Court’s attempts to answer the question yielded contradictory results;<sup>168</sup> Congress subsequently enacted statutory definitions.<sup>169</sup> The short answer for legal purposes is “it depends.” It depends completely on the circumstances. As Stephen Pevar wrote, “[e]ach government—tribal, state, and federal—determines who is an Indian for purposes of that government’s laws and programs.”<sup>170</sup> If the Bureau grants a preference in employment to an Indian,<sup>171</sup> then it must follow the definition in the Indian preference authorizing statute.<sup>172</sup> If the Indian Health Service provides services to an Indian,<sup>173</sup> then it also must follow the definition in its authorizing statute.<sup>174</sup> The same rule applies for federal criminal jurisdiction.<sup>175</sup>

But for purposes of an Indian tribe’s recognition of its own membership, no federal or state law should apply. The Supreme Court recognized long ago that Indian tribes have exclusive authority to determine their own internal affairs.<sup>176</sup> The question is whether the Bureau will stay out of internal tribal matters and let the tribes decide the question of membership—the most critical question any tribe

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167. See COHEN, *supra* note 6, at 2–3; PEVAR, *supra* note 57, at 18–19. For a recent review of the historical tension between federal and tribal law as to the definition of “Indian,” see Bethany R. Berger, “Power over This Unfortunate Race”: *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957 (2004).

168. For an excellent description of the Supreme Court’s hypocrisy, racism, and contradiction relating to the definition of “Indian,” see Lawrence R. Baca, *Diversity and the Federal Bar Association*, FED. LAW., Feb. 2003, at 23, 27–28 (comparing *United States v. Joseph*, 94 U.S. 614 (1876), with *United States v. Sandoval*, 231 U.S. 28 (1913), where the Court came to opposite conclusions as to whether the Pueblo Indians were “Indian” as defined under federal law).

169. See, e.g., 25 U.S.C. § 1151 (2000).

170. PEVAR, *supra* note 57, at 18.

171. See *Morton v. Mancari*, 417 U.S. 535 (1974).

172. See 25 U.S.C. § 472 (2000).

173. See Indian Health Care Improvement Act, 25 U.S.C. §§ 1601–83 (2000).

174. See 25 U.S.C. § 1603(c) (2000).

175. E.g., *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995), *cert. denied*, 516 U.S. 1178 (1996).

176. See *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *cf. Ex parte Crow Dog*, 109 U.S. 556 (1883) (holding that federal courts had jurisdiction to entertain prosecution of Indian for crime committed in Indian Country).

must decide. As noted, federal law allows the Bureau to force tribes to adopt the Bureau's definition of membership by granting the Bureau an effective veto over a tribe's initial constitution, and often the amendment of that constitution.<sup>177</sup>

In short, if an Indian tribe wants to adopt non-Indians, Canadian, Central, or South American Indians, or Indians of other tribes into their own as full or partial members, then federal law and federal bureaucrats should not have a say in the matter. If the feds have a problem providing services or funds to a tribe where the authorizing statute defines "Indian" in a too-limited fashion, then the feds are free to withhold those services, just as the *Chamberlain* court indicated.<sup>178</sup> Whether a particular member of an Indian tribe is eligible for certain federal programs must not determine who may be a member of a tribe for tribal law purposes. There may be circumstances where a person is an Indian for tribal purposes, but not for federal purposes, and vice versa.<sup>179</sup> That right to decide should always remain with the tribe.

The Bureau expanded its authority to approve tribal constitutions and equated it with the power to set eligibility requirements for federal programs, thereby imposing its own views of tribal membership. On occasion, the Bureau justifies its intervention with the assertion that it does not want to create classes of tribal members, or that the provision of federal programs will become unduly complicated. The Bureau can advise the tribe to make decisions on these bases and the tribe may even follow its advice, but the Bureau must not force its bureaucratic conveniences down the throats of Indian tribes. Indian tribes must not allow the Bureau to assert authority it does not have to define tribal membership.

The first question—and it is a continuing question—for every Indian tribe is, "Who is in this tribe?" By definition, only the tribe can answer the question. If the tribe must then face consequences

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177. See *supra* Part II.A.

178. See *Chamberlain v. Peters*, 27 Indian L. Rep. (Am. Indian Training Program, Inc.) 6085, 6092 (App. Ct. of the Saginaw Chippewa Indian Tribe Jan. 5, 2000).

179. See *Halbert v. United States*, 283 U.S. 753 (1931) (holding that children of Indian who were not members of tribe could still receive allotment from federal government); *United States v. Rogers*, 45 U.S. 567 (1846) (holding that non-Indian adopted into tribe remains subject to federal criminal laws); *cf. Nofire v. United States*, 164 U.S. 657 (1897) (holding that tribal member adopted into tribe is subject to tribal criminal laws).

under the express language of federal statutes, then so be it, but the Bureau must back out of these purely internal tribal decisions.

### *B. The Right to Resolve Internal Disputes*

Tribal self-governance is nothing without the exclusive right to decide internal political disputes. As a general matter, it is well established that the Bureau must refrain from interfering in internal tribal issues, such as election disputes.<sup>180</sup> In cases that appear to be situations of extraordinary, arbitrary and capricious actions by Indian tribal governments, it is understandable for federal agencies to seek to intervene.<sup>181</sup> Nevertheless, they must not. Federal agencies have no authority to enter into these disputes.

Colonialism can come in the form of paternalism. A critical element of federal Indian law is the trust relationship: the concept that the federal government is tasked with protecting individual Indians and Indian tribes from states,<sup>182</sup> non-Indians,<sup>183</sup> and themselves.<sup>184</sup> It is premised on the belief that Indians are weak and wholly dependent on the federal government, often due to the

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180. See *Alcantra v. Acting Pac. Reg'l Dir., Bureau of Indian Affairs*, 37 I.B.I.A. 136, 137 (2002) (noting that the Bureau tends to avoid interfering in internal tribal affairs in the interest of tribal self-determination); cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that federal courts have no jurisdiction over internal tribal matters); *Ordinance 59 Ass'n v. U.S. Dep't. of the Interior Sec'y*, 163 F.3d 1150, 1154–58 (10th Cir. 1998) (same); *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997) (same); *Bowen v. Doyle*, 880 F. Supp. 99, 112–13 (W.D.N.Y. 1995) (same).

181. See *United States v. Wadena*, 152 F.3d 831, 857 (8th Cir. 1998) (Beam, C.J., concurring and dissenting) (“Until Congress specifically provides for jurisdiction over this type of internal tribal matter, we must avoid the paternalistic temptation to assert jurisdiction based on the subjective belief that federal intervention is the only way to protect the civil rights of tribal members.”).

182. See *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.

*Id.*

183. See *id.*

184. See *id.*; cf. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (“Meanwhile they [the Indians] are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.”).

militant and often genocidal actions of the federal government. This concept of a trust relationship has allowed Congress to enact statutes that offer great assistance to Indian tribes,<sup>185</sup> but it has also allowed Congress to unilaterally abrogate treaties and take tribal property with little or no compensation.<sup>186</sup> In short, it is a mixed bag. This tension existing between self-determination and the trust relationship is likely to dominate federal Indian law for another century.

With this tension in mind, federal bureaucrats must look to the bigger picture when analyzing the internal workings of internal tribal disputes. Both Congress and the executive have spoken uniformly in favor of continued tribal self-determination.<sup>187</sup> Despite the best of intentions, interfering (or even suggesting the possibility of interfering via silence, ambiguity, or outright threat) in tribal disputes by recognizing one faction over another, for the purpose of continuity in the provision of federal statutes, fundamentally retards the growth of Indian tribes as viable, long-term governing bodies. Indian tribes must go through these growing pains, just as the Union itself went through them; the 1801 electoral tie is one such example.<sup>188</sup>

Tribes such as the Grand Traverse Band of Ottawa and Chippewa Indians underwent a constitutional crisis early in its history when a newly-elected councilor was declared unfit for office by the remainder of the Tribal Council.<sup>189</sup> The Tribal Council voted to

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185. *E.g.*, Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (2000); Indian Reorganization Act, 25 U.S.C. §§ 461–94 (2000).

186. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (allowing Congress to take land held under Indian title without just compensation); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (allowing Congress to allot Indian land without Indian consent).

187. *E.g.*, 25 U.S.C. § 2702(1) (2000) (“The purpose of this chapter is to provide a statutory basis for the operation of gaming as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments . . . .”); *id.* § 450(b)(1) (“[T]rue self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles . . . .”); Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994); *see also* CANBY, *supra* note 135, at 33 (“At present, then, congressional and executive federal Indian policy seems clearly to be based on a model of continuing pluralism; it recognizes that the tribes are here to stay for the indefinite future, and seeks to strengthen them.”).

188. *See generally* Jennifer Van Bergen, *Aaron Burr and the Electoral Tie of 1801: Strict Constitutional Construction*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 91 (2003).

189. *See In re McSauby*, No. 97-02-001-CV-JR, slip op. at 5–6 (Grand Traverse Band Tribal Ct. July 30, 1997) (en banc) (on file with author).



remove the newly-elected councilor due to alleged misconduct relating to a dispute over a land transaction between the councilor and the tribe.<sup>190</sup> The tribal court, only a few years in operation, confidently and competently handled a very difficult political crisis involving the procedures for removal of a Tribal Councilor<sup>191</sup> and the procedures for hearing a critical case en banc (as the full tribal judiciary),<sup>192</sup> and created critical tribal common law on the question of appointed counsel in such matters, if necessary.<sup>193</sup> While this crisis was not as critical as the one at the Saginaw Chippewa Tribe, the tribal court created tribal common law where necessary and built the foundations of its future legitimacy and efficiency. Other Michigan tribal courts have provided necessary guidance in election disputes to the tribal government, even as the Bureau of Indian Affairs intervened in the Saginaw Chippewa Tribe's election dispute.<sup>194</sup>

In addition to impeding the development of tribal courts, the expectation that the Bureau might intervene in tribal election disputes encourages tribal members to bring suits and complaints to federal and state courts, or to the Bureau itself. Even without adequate empirical evidence, it appears that litigation over matters of internal tribal governance has exploded in the last few years.<sup>195</sup> In most instances, the courts dismiss the claims for lack of jurisdiction. But

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190. *See id.*

191. *See id.* at 5–10.

192. *See* GRAND TRAVERSE BAND CONST. art. VIII, § 2(a) (1988), available at <http://www.narf.org/nill/Constitutions/grandtraverseconst/grandtraversetoc.htm>.

193. *See McSauby*, slip op. at 1–5.

194. *See* Crampton v. Sam, 27 Indian L. Rep. (Am. Indian Law Training Program, Inc.) 6239 (Little River Band of Ottawa Indians Tribal Judiciary Feb. 23, 1999).

195. *E.g., In re* Sac & Fox Tribe, 340 F.3d 749 (8th Cir. 2003) (refusing jurisdiction over internal tribal leadership dispute); *Torres v. Wickliff*, 47 F. App'x 537 (10th Cir. 2002) (dismissing claim that Bureau improperly withdrew recognition of individuals as the governing members of the tribe on grounds that they were not members); *Sac & Fox Tribe v. Bureau of Indian Affairs*, 321 F. Supp. 2d 1055 (N.D. Iowa 2004) (rejecting challenge by tribal election board to Bureau's recognition of election held by dissident faction of tribe); *In re* Marriage of Jacobsen, 18 Cal. Rptr. 3d 162 (Cal. Ct. App. 2004) (ordering tribal member to provide alimony through payment of per capita tribal gaming proceeds); *Ackerman v. Edwards*, 17 Cal. Rptr. 3d 517 (Cal. Ct. App. 2004) (refusing jurisdiction over claim that tribe should be ordered to enroll plaintiffs); *Johnson v. Wright*, 682 N.W.2d 671 (Minn. Ct. App. 2004) (taking jurisdiction over case involving tribal member's per capita gaming payments); *Salinas v. Lamere*, No. RIC 406255 (Cal. Super. Ct. July 23, 2004) (on file with author) (taking jurisdiction over enrollment dispute), *rev'd*, 31 Cal. Rptr. 3d 880 (Cal. Ct. App. 2005).

some state courts, particularly in California, are beginning to take jurisdiction over these types of cases.<sup>196</sup> This, too, hampers tribal self-determination by encouraging tribal members to disregard their own chosen dispute resolution process in favor of seeking outside, “impartial” mediators. The Saginaw Chippewa appellate court properly chastised the actions of both councils to seek recognition from the Bureau, but the actions of the Bureau in response to these requests for intervention undermined the legitimacy of tribal courts across the country. It is truly unfortunate—though understandable—that tribal members continue to seek relief for allegedly unfair tribal decisions from non-tribal courts and bureaucrats.

The Bureau’s lead in intervening in difficult tribal election disputes in cases such as the Saginaw Chippewa epitomizes how bad facts make bad law. The Bureau’s intervention contravenes Congressional and Presidential statements about self-determination and tends to de-legitimize tribal court development specifically, and tribal governance generally. Simple discipline on the part of the Bureau to stay out of these disputes would go a long way towards improving tribal governance structures.

### *C. The Right to a Land Base and Government Revenue*

Meaningful self-determination includes the right to a land base and the right to raise revenue for government purposes. Unfortunately, the Secretary’s authority to acquire land for tribes and hold it in trust in perpetuity is discretionary.<sup>197</sup> Moreover, Indian tribes’ ability to generate income from off-reservation sources is also based on bureaucratic discretion. This discretion is virtually absolute and nothing prevents the Secretary from sitting on trust land acquisition applications from tribes for years. The Grand Traverse Band of Ottawa and Chippewa Indians, for example, has not had land taken into trust by the Secretary since 1996, even though the tribe’s numerous applications are complete and include land contiguous to

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196. See *Salinas*, No. RIC 406255.

197. See 25 U.S.C. § 465 (2000).

its current trust land. Many other tribes complain of the same problem.<sup>198</sup>

The Indian Reorganization Act's promise to help restore the Indian tribes massive land base prior to 1887 appears hollow. As the National Congress of American Indians noted, "[a]lthough 8 million acres have returned to tribal control, that represents less than 10% of the lands lost through allotment."<sup>199</sup> Worse, for many tribes, the promise of IGRA to assist tribes in developing strong economies and governments is realized only by those tribes fortunate enough to be located near population centers, or, as in the case of the Seneca Nation, to have political power and resources sufficient to persuade the governor of New York and the Secretary of Interior (who, at the moment, are Republicans) to allow off-reservation gaming. Though nothing in the language of the IRA or IGRA explicitly precludes off-reservation gaming and land acquisitions, federal bureaucrats tend toward limiting the opportunities for Indian tribes with grave economic and governmental needs. In short, tribes have little choice but to barter their sovereignty for economic resources—unfortunately, similar to the manner in which tribes with membership and election disputes momentarily gave up tribal rights in order solve their problems.

The federal agency opinions about IGRA, coupled with the Secretary's actions in rewriting the rules relating to trust acquisitions, compel tribes to trade sovereign rights. Now tribes are forced to reach agreement with *every* state, local, and municipal government entity even remotely affected by the acquisition of trust land before the Secretary will consider taking the land into trust.<sup>200</sup> Tribes must give away five, ten, even twenty-five percent of net gaming proceeds to the state in order to convince the state to allow Indian gaming.<sup>201</sup>

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198. See Anita Fineday, Remarks at the 17th Annual Indian Law Symposium, University of Washington (Sept. 9, 2004).

199. Brief for Amici Curiae National Congress of American Indians et al. in Support of Defendants-Appellees at 5 n.2, *Carcieri v. Norton*, 398 F.3d 22 (1st Cir. 2005) (No. 03-2647), available at <http://216.69.166.179/sct/carcieri/ncai-tribes-amicus-brief.pdf>.

200. Cf. Heidi McNeil Staudenmaier, *Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles*, 4 NEV. L.J. 301, 310 (2003).

201. See generally Alan Meister, *Tribal-State Gaming Compacts and Revenue Sharing: A California Case Study*, 7 GAMING L. REV. 347 (2003).

Moreover, tribes must donate their limited resources to the political party in power in Washington, D.C., to have them notice that the tribe requires assistance.<sup>202</sup> Thanks to the direction taken by the federal bureaucrats, trust acquisitions and off-reservation gaming soon will become far too expensive even to attempt.

#### *D. The Right to a Remedy and the Right to a Competent Trustee*

The right to a fair and impartial forum to recover tribal property fraudulently taken by individuals, the states and localities, and the federal government is also necessary for meaningful self-determination. The United States' failure to bring suit to recover lands fraudulently sold without the consent of Indians means that Indian tribes remain disposed of lands rightfully theirs, and that non-Indians and local governments are stuck with clouded titles to the land they currently occupy.<sup>203</sup> While there are numerous examples of land claims filed, followed by Congressional land settlement acts to clear title and compensate the Indian victims,<sup>204</sup> these are relatively rare. More common is the circumstance where an Indian tribe goes it alone, without its trustee, and loses in federal or state court on a procedural technicality.<sup>205</sup> The Department of Justice could cure this defect and force these issues to conclusion,<sup>206</sup> but it does not. And the

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202. See *Tribal Lobbying Matters: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 2 (2004) (statement of Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs) (“[S]ix tribes paid Mr. Scanlon more than \$66 million, and . . . Mr. Scanlon, in turn, paid Mr. Abramoff more than \$21 million [for his share of the scheme].”), available at <http://indian.senate.gov/2004hrgs/092904hr/Campbell.pdf>; Thomas Edsall, *Probe to Include GOP Donations*, WASH. POST, May 18, 2004, at A17.

203. See *supra* Part II.D.

204. E.g., Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721–35 (2000); Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–16 (2000); Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741–50(e) (2000); Mashantucket Pequot Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751–60 (2000); Wampanoag Tribal Council of Gray Head, Inc., Claims Settlement Act of 1987, 25 U.S.C. § 1771 (2000); Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. § 1773 (2000); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, 25 U.S.C. §§ 1775–75h (2000).

205. E.g., *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001); *Bay Mills Indian Cmty. v. W. United Life Assurance Co.*, No. 2:96-CV-275, 1998 U.S. Dist. LEXIS 20782 (W.D. Mich. Dec. 11, 1998), *aff’d*, 208 F.3d 212 (6th Cir. 2000).

206. State sovereign immunity, laches, and other procedural defects do not prevent the federal government from bringing Indian lands claims. See *generally* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

largest reason it does not, despite the fact that non-Indians want these cases decided in order to clear title for once and for all,<sup>207</sup> is because the cases are just too hard. There are too many documents, too many transactions, too many parties, and too much money.

This same argument was made by the defendants in the *Cobell v. Norton* litigation. The litigation was initiated by Eloise Cobell and the Native American Right Fund over accounting for Individual Indian Money accounts held in trust by the Department of Interior.<sup>208</sup> Courts in other cases have had no choice but to place a number of federal officials in contempt because it appears it was simply too hard for them to do the work—work that should have been done all along.<sup>209</sup> The federal bureaucrats wait and wait, letting problems accumulate until it is too late and until the federal courts are breathing down their necks.

It is the same argument federal bureaucrats in the Branch of Acknowledgement and Research, charged with administratively recognizing Indian tribes,<sup>210</sup> make when they get behind in processing applications for tribal recognition.<sup>211</sup> There are too many applications, too many documents to review, too much history to cover. The applications build up and there is no one to do the work.

The end result of all this bureaucratic incompetence (admittedly spurred by congressional inaction and failure to adequately fund and staff the bureaucracy) is mounds and mounds of litigation. The Individual Indian Money accounts case<sup>212</sup> is eight years running and the BAR is getting further behind every day. The litigation now consumes an enormous amount of the Bureau of Indian Affairs' time.

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207. See, e.g., *Manypenny v. United States*, 948 F.2d 1057, 1061 (8th Cir. 1991) (discussing how land claim victory by Indian in *State v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977), contributed to landowners seeking legislation from Congress to quiet title in the White Earth Land Settlement Act of 1985, Pub. L. No. 99-264, 100 Stat. 61 (1986), to Minnesota acreage clouded by potential Indian land claims).

208. See generally *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

209. See generally *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004) (denying motion to disqualify lower court judge from hearing contempt proceedings against federal officials).

210. See 25 C.F.R. § 83.4 (2004) (requiring a letter of intent requesting tribal acknowledgement to be filed with the Branch of Acknowledgement and Research).

211. E.g., *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094 (D.C. Cir. 2003); *Ramapough Mountain Indians v. Norton*, 25 F. App'x 2 (D.C. Cir. 2001); *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30 (D.D.C. 2000).

212. *Cobell*, 240 F.3d 1081.

Federal court orders requiring the BAR to drop one activity and vault another to the forefront, such as in the *Muwekma Tribe* case,<sup>213</sup> work to the detriment of those tribes that patiently wait in line. The massive *Cobell* litigation is even worse, taking up so much of the Bureau's time that the Bureau now can legitimately excuse its failure to issue decisions in fee-to-trust applications. Federal bureaucrats, with their years of historical incompetence, effectively institutionalized a do-nothing Bureau. In large part, this is due to Indians and Indian tribes whose only recourse is to sue the trustee.

The land claims put aside by Congress in 1982 will stay there, possibly forever, until some young, ambitious, and brilliant Indian lawyer decides to sue the Secretary for failure to take action, shutting down the system again. Meaningful self-determination requires that the trustee take a proactive approach to its relationship with Indian tribes. Until that happens—and given the state of affairs we see today, it may never happen—the right of Indians and Indian tribes to a remedy for clear and compensable historical and modern wrongs is destroyed by its incompetent trustee.

Colonialism is complete, it appears, when the front end of colonialism—the wars, the disease, and the genocide<sup>214</sup>—gives way to the back end—the incompetent trustee. Historical reconciliation or meaningful self-determination is unlikely to occur to anyone's satisfaction absent a competent legal entity who can facilitate tribal government development. We see it in America with the Indian tribes just as we see it on television with the chaotic Iraqi occupation. It is the paradox of colonialism: the efficiency of the conqueror versus the inefficiency of the occupier.<sup>215</sup>

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213. 133 F. Supp. 2d at 30.

214. See generally DAVID E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* (1992).

215. Compare William Bradford, "With a Very Great Blame on Our Hearts": *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002–03), and Lindsey Glauner, Comment, *The Need for Accountability and Reparation*, 51 DEPAUL L. REV. 911 (2002), with William C. Bradford, "The Duty to Defend Them": *A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365 (2004), and Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

#### IV. FUTURE BUREAUCRATIC ATTACKS ON MEANINGFUL SELF-DETERMINATION

The topics discussed in this Article are by no means complete. Examples of colonialism abound and are replete in case law and statutes, but bureaucratic colonialism mostly escapes the attention of politicians and judges (or is quietly encouraged). Due to this inattention and the insidious nature of bureaucratic colonialism, it will continue to appear in various matters. Anticipate more pressure to preclude Indian tribes from operating off-reservation. Anticipate the Bureau becoming more involved in brokering membership and election disputes, especially among gaming tribes. Anticipate the Department of Justice taking positions contrary to tribal interests in land claims and treaty rights cases. Attorney General Griffen Bell's letter turns Derrick Bell's interest-convergence theory into reality.<sup>216</sup>

As new issues arise, federal bureaucrats may see fit to intervene in other areas of tribal affairs where they are not wanted. Anticipate the Bureau disapproving (without any enabling legal authority) an ordinance allowing tribal court recognition of same-sex marriages.<sup>217</sup> Anticipate the Bureau seeking to limit tribal expenditures in federal and state campaign contributions.<sup>218</sup> Anticipate the Bureau seeking to hinder self-governance contracts,<sup>219</sup> especially as more tribes take over their own federal programs and leave less congressional appropriations for the Bureau.

In sum, the covert colonialism of the federal bureaucracy is not easily discoverable, nor can it easily be prevented by amendment of relevant statutes. The federal government has its tentacles all over every Indian tribal government. Whether it seeks to persuade, coerce, intimidate, or otherwise force a tribe to act in a certain fashion is a question for the bureaucracy to answer. Felix Cohen concluded his

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216. *See supra* notes 138, 160.

217. *See generally* Wenona T. Singel, Remarks at the Federal Bar Association Indian Law Conference, Taboo Topics in Indian Country: Making Our Own Rules: Gay Marriage in Indian Country (Sept. 24, 2004).

218. *See generally* Editorial, *Tribal Trickery*, WASH. POST, Sept. 28, 2004, at A26 (noting that the Senate Committee on Indian Affairs had scheduled a hearing to discuss tribal lobbyists' over-billing and ethics).

219. *See* 25 U.S.C. § 450f (2000).

1953 article about the dreaded federal Indian bureaucracy with a warning that apparently has gone unheeded.<sup>220</sup>

Migwetch.

*It has been said often enough, and with great truth, that expert knowledge of the cultures and histories, not alone of Indian generally, but of the many separate tribes, is needed to understand Indian needs, desires, actions, and responses, as well as to work intelligently and compassionately with Indians to help frame, administer, and service policies and programs for their benefit.*

—Alvin M. Josephy, Jr.<sup>221</sup>

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220. See Cohen, *supra* note 4, at 390 (“What [federal Indian bureaucrats] forget is that in the long run we are all dead, and that while the means we use may be moulded by the ends we seek, it is the means we use that mould the ends we achieve.”).

221. Alvin M. Josephy, Jr., *The American Indian and the Bureau of Indian Affairs*, in RED POWER: THE AMERICAN INDIANS’ FIGHT FOR FREEDOM 78, 81 (Alvin M. Josephy, Jr. et al. eds., 2d ed. 1999).