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Feds 200, Indians): the Burden of Proof in the Federal / Indian Fiduciary Relationship

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I. INTRODUCTION

"Great nations, like great men, should keep their word."[1] Justice Black, in his dissent in *Federal Power Commission v. Tuscarora Indian Nation*, encapsulated the failures of two centuries of the United States' relationship with its native Indians.[2] Since establishing the first tentative treaties of the Revolutionary era, the United States has made many broad promises to the Indians.[3] These promises, detailed first in treaties and later in statutes, drew the government and the Indians into a fiduciary relationship. Although this relationship would have consequences for federal/Indian interactions, raising the level of care with which the government would treat its native beneficiaries, its full potential has remained unrealized.[4] In 1960, Justice Black's simple principle fell on deaf ears. Today, courts have the opportunity to listen.

The scope of the federal/Indian fiduciary relationship has escaped precise definition in part because of the elusive nature of all fiduciary interactions. A fiduciary relationship, like that between the federal government and the Indians, usually overlays statutorily regulated ties between parties in trust-based relationships.[5] The fiduciary relationship regulates the *manner* in which the fiduciary fulfills legal duties to the dependant party,[6] providing a "veil" through which courts view the fiduciary's execution of other, more specific obligations.[7] Because of its lack of independent shape, this notion of heightened responsibility may appear a "concept in search

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1. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissent).

2. The use of the term "Indian" as opposed to Native or Ahoriginal American reflects the language of prevailing legal definitions. *See infra* note 29.

3. *See* Cobell v. Babbitt, 91 F. Supp. 2d 1, 53-54 (D.D.C. 1999) (noting the government's recognition of its failure to keep promises to the Indians, including the declaration of Secretary of Interior Bruce Babbitt that the problems between the government and the Indians existed long before any current officer's lifetime).

4. *See* Peter D. Maddaugh, *Definition of Fiduciary Duty, in* SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA, FIDUCIARY DUTIES 15, 16 (1990) [hereinafter SPECIAL LECTURES] ("The term 'fiduciary' is not one used by ordinary people. It is only used by lawyers. This in itself should arouse our suspicions.").

5. *See* P. D. FINN, FIDUCIARY OBLIGATIONS 2 (1977) [hereinafter FINN, OBLIGATIONS]. These relationships include a range of close interactions from doctor to patient, guardian to ward, trustee to beneficiary, and even parent te child. *See infra* Part V.B.

6. *See* FINN, OBLIGATIONS, *supra* note 5, at 2 (explaining that fiduciary responsibility arises because of, not independent of other statutory responsibilities).

7. *See id.* at 1.

of a principle."[8] In fact, fiduciary responsibilities *require* substantive principles, existing only in symbiotic relationship with the firm guidelines of trust, agency, tort and contract law.[9]

This notion, adopted from equity's breach of confidence concerns,[10] boasts broad utilization in modern law.[11] The two basic fiduciary duties, the duty of care and the duty of loyalty,[12] evolved from courts' progressive generalizations of the requirements controlling the interactions between certain parties.[13] As courts grew to expect high standards of care and loyalty in specific types of interactions, like those between a doctor and patient or a trustee and beneficiary,[14] they imposed a higher level of responsibility in instances in which the parties, based on the type of relationship entered, would expect such a standard to apply (the archetypal model).[15] Courts soon expanded this notion, attaching fiduciary responsibilities to non-archetypal arrangements in which the *purpose* of the relationship suggested elements of reliance and high expectations for loyalty and care (the purpose model).[16] Even if a relationship did not fit the archetypal or purpose models, courts often found facts or circumstances that could impose fiduciary responsibilities (the circumstantial model).[17] When a relationship included elements of dominance, influence, vulnerability, trust, or dependency,

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8. P.D. Finn, *The Fiduciary Principle, in* EQUITY, FIDUCIARIES, AND TRUSTS 55 (T.G. Youdan, ed., 1989) [hereinafter Finn, *Principle*].

9. *See id.* This list is not intended to be exclusive but rather demonstrative. Where substantive law binds parties te a particular set of actions, fiduciary law will guide *the manner* in which those actions must be performed. The lack of principle notion misconstrues the symbiotic attachment of fiduciary duties, insisting that because the duties cannot exist independent of other substantive regulations, they lack substance. The role of the fiduciary obligation, however, is not to create an independent relationship, but to ensure that existing relationships are carried out with the highest degree of integrity. Their "piggy-backed" structure, rather than weakening their substantive impact, increases their effectiveness, extending their protections to many diverse areas of law.

10. *See id.* at 69.

11. *See id.* at 72. The first noted use of the "fiduciary" label occurred in 1717. *See* L.S. Sealy, *Fiduciary Relationship*, 1962 Cambridge L.J. 69, 72 n.11 (citing Bishop of Winchester v. Knight, I.P. Wms. 406, 407 (1717)).

12. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880.

13. *See* Finn, *Principle*, *supra* note 8, at 42.

14. *See* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 795 (1983) [hereinafter Frankel, *Fiduciary Law*].

15. *See* Finn, *Principle*, *supra* note 8, at 46.

16. If, for instance, a relationship is entered with the intent of benefiting only one party, the court will presume a fiduciary duty has been undertaken by the non-benefiting party. *See id.* at 3-4 (commenting on the "self-less" nature of the fiduciary's agreement).

17. *See id.* at 41; *see also* Ronald G. Slaught, *Proving a Breach of Fiduciary Duty, in* SPECIAL LECTURES, *supra* note 4, at 39 (noting the existence of a fiduciary relationship is a question of law, but one that remains higbly dependent on fact and circumstance).

courts frequently applied fiduciary obligations to the substantive statutory guidelines.[18] The expansions of fiduciary responsibility, however, were not unlimited: a relationship found fiduciary in one respect may not be so characterized in other aspects. In the words of L.S. Sealy, one "cannot assume that what is fiduciary for one purpose is fiduciary for all purposes."[19]

The government's relationship with the Indians touches all three forms of fiduciary obligations. Historically, courts have recognized the relationship between the government and the Indians as deserving some form of special attention;[20] thus, it may arguably fit the archetypal model. Additionally, the government has persistently characterized the arrangement as serving the best interests of the Indians,[21] implicating application of the purpose model. Finally, the appearance of elements of reliance, trust, vulnerability, dominance, and influence[22] suggests the third, circumstantial, fiduciary relationship.[23]

After years of changing attitudes, shifting policies, and varying standards, the government, more often than not, has failed to keep its pledges to its Indian beneficiaries. Despite the strong evidence of a fiduciary tie, courts, relying on a distinction between the typical common law fiduciary relationship and the "unique" relationship between the government and the Indians, historically have refused to hold the government to the full fiduciary standards imposed on other, private fiduciaries.[24]

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18. *See* Finn, *Principle*, *supra* note 8, at 46. Some courts require additional evidence that reliance or dependence has resulted, *see* Peter D. Maddaugh, *Definition of Fiduciary Duty*, *in* SPECIAL LECTURES, *supra* note 4, at 22, while others seek confirming evidence of party expectations, *see* Finn, *Principle*, *supra* note 8, at 46.

19. *See* Sealy, *supra* note 11, at 81; *see also* FINN, OBLIGATIONS, *supra* note 5, at 4 (the "distinctive feature of the modern law is that each duty itself defines the type of relationship to which it applies"). Although courts have enumerated certain "specific" fiduciary duties, such as the duty not to take an opportunity for one's own interests instead of for the interest of the beneficiary. Fiduciary law remains an overlay to more definite substantive arrangements. These enumerated duties are not a new common law, but rather *examples* of the types of behavior that would conform to the high standards of fiduciary duty. *See* Maddaugh, SPECIAL LECTURES, *supra* note 4 at 27 n.54.

20. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (noting the unique character of the federal/Indian relationship).

21. *See infra* note 62, 72-74, 78 and accompanying text (describing the government's claimed good intentions in instituting Indian land reform).

22. *See Seminole Nation*, 316 U.S. at 297; Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973); Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 (Ct. Cl. 1966).

23. *See* FINN, OBLIGATIONS, *supra* note 5, at 4.

24. *See infra* notes 152-60 and accompanying text (describing the court's interpretation of the relationship as a source of power for Congress over the Indians and announcing a *pre-*

Recognizing this judicial failure, the Supreme Court in 1983 asserted the need for stricter scrutiny of the government's trusteeship of Indian interests,[25] outlining the specific circumstances under which full, common law fiduciary obligations would apply to the government's treatment of Indians.[26] Modern courts, however, rarely find these few specific circumstances satisfied. Despite the two hundred year development of a fiduciary relationship, Indian plaintiffs currently bear the burden of proving that courts should hold the government to the heightened standards of the 1983 decisions.[27] By requiring plaintiff Indians to bear the burden of proving the Court's newly enunciated standards for specificity, comprehensive governmental control, and exclusive relationship,[28] courts place a sizeable hurdle between the Indian beneficiary and the modern law's promised fiduciary protection.

Viewed through the veil of fiduciary law, and in light of the long history of federal/Indian interaction and the recent Court holdings, the current allocation of the burden of proof appears surprisingly unsupportive of Indian interests. Courts have recognized not just a specific statutory relationship between the government and the Indians, but also an underlying, historical fiduciary bond. Although this bond is insufficient to support fiduciary duties independent of more definite statutory or control-based responsibilities, it warrants a presumption in favor of the Indians that the necessary specific obligations exist and that common law-level fiduciary standards should apply to government behavior.

This Note advocates the reallocation of the burden of proof in Indian claims against the federal government, urging the adoption of a presumption of common law fiduciary standards for government actions in Indian affairs. This presumption would require the government, not the Indians, to shoulder the often heavy burden of proving that the precise contours of the federal/Indian relationship do not include a specific interaction when the government deems its control too incomplete or too inclusive to justify imposition of such rigid duties.

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sumption of good faith on the part of Congress rather than a requirement that Congress adhere to strict fiduciary standards of behavior).

25. *See infra* Part II.

26. *See* United States v. Mitchell ("Mitchell II"), 463 U.S. 206 (1983); Nevada v. United States, 463 U.S. 110 (1983). Through the *Mitchell II* and *Nevada* decisions, the Court curtailed government power over the Indians, asserting the duty side of the federal/Indian fiduciary relationship.

27. *See generally Mitchell II*, 463 U.S. at 225; *Nevada*, 463 U.S at 141-42.

28. *See Mitchell II*, 463 U.S. at 225; *Nevada*, 463 U.S. at 141-42.

Section II offers a basic overview of the foundations of Indian law. Though far from complete, this Section explores the development of the federal/Indian fiduciary relationship through three major stages of congressional policies: the treaty period, the era of allotment, and the modern era. Section III reviews the decisions that first identified the federal/Indian relationship, laying the foundations for the Court's most recent interpretation. Section IV examines the Supreme Court's crucial 1983 decisions, *United States v. Mitchell* ("*Mitchell II*") and *Nevada v. United States*, from which the modern fiduciary standards stem. It negotiates the potential theoretical variations of the "new" standards for federal/Indian interaction, finding a workable interpretation in several subsequent lower court decisions. Section V briefly addresses the role of the burden of proof as both a tool for legal change and a means of protecting fiduciary standards, and advocates a shift in the burden of proof for federal/Indian claims in response to the Court's acknowledgment of an existing fiduciary relationship.

II. HISTORICAL DEVELOPMENT OF THE FEDERAL/INDIAN RELATIONSHIP

A. The First Encounters

The Continental Congress first dealt with the Indians[29] in a series of Revolutionary War agreements.[30] These "treaties" sought

29. The concept of an "Indian" traverses, as most of federal Indian law, a maze of regulations, definitions and policies. The complexity of the Indian identity illustrates the variables and inconsistencies that color most federal/Indian interactions. The Department of the Interior (DOI) constructs the Indian identity from a variety of factors, including tribal membership and race. *See* UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 4-5 (1986) [hereinafter FEDERAL INDIAN LAW]. These characteristics, however, are neither precise nor definitive. Members of tribes lacking formal governmental recognition must prove *tribal* existence according to race, leadership and location before establishing their individual claims. Such tribes may be recognized by the Secretary of the Interior or formally incorporated under the Indian Reorganization Act of 1934. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 31-33 (Julie Wrend & Clay Smith chief eds., 1993) [hereinafter DESKBOOK]. Even a member of an accepted tribe who has rejected the tribal lifestyle may not, according to Congress, be an Indian. *See* FEDERAL INDIAN LAW, *supra* at 5. Congress construes rejection of reservation living as rejection of tribal, and Indian, identity. *See id.* Although biology generally identifies an Indian, *see id.* at 6 (discussing the use of race in establishing Indian identity), Congress will only *assume* a person is an Indian if that person can demonstrate ancestral ties to a pre-discovery American and her community's acceptance of her as an Indian. *See id.*

This multi-faceted definition leads even its creaters to inconsistent applications. For example, while the General Allotment Act ("GAA") excluded biological Indians who had al-

affirmations of friendship, or at least neutrality, from individual tribes.[31] Despite their age and specificity, these early treaties remain good law,[32] providing a backdrop that supports and reconciles more recent legislation.[33]

Following the British model,[34] early agreements opened channels of communication, secured goodwill through the exchange

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ready left the reservation, it included white reservation residents who had adopted the ways of the tribe. *See* 25 US.C. § 331, *et seq.* (1887); FEDERAL INDIAN LAW, *supra* at 7. This distinction becomes particularly ironic in light of the original goal of Indian identification: separating the Indians entitled to special governmental benefits from the white population that lacked the same tradition of abuse. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (1986). Nevertheless, should the non-reservation individual inherit previously allotted Indian land, government trust regulations would apply to the individual's possession of that land. *See id.* at 7 n.11.

The concept of Indian identity may vary even from this definition. Modern parlance functionally defines the legal Indian, rejecting the cultural/ethnic angle of earlier definitions. *See* COHEN at 2 (explaining that the term "Indian" may carry *either* an ethnological or a legal connotation). The Conference of Western Attorneys General, for instance, rejects all biological and lifestyle criteria, declaring an Indian a person with whom the government has a special, trust-based relationship. *See* DESKBOOK, *supra* at 28 (referring to Morton v. Mancari, 417 U.S. 535, 551-53 (1974); Board of County Comm'rs v. Seber, 318 U.S. 705, 718 (1943)). Similarly, the modern definition of tribe, as expressed in 25 CFR § 83.7(a)(1991), includes repeated identification by federal authorities and a long-standing relationship with stato and local governmental units based on Indian status among the determinate factors of tribal identification. *See id.* at 33. These definitions present a stark contrast to Congress's early laws, designed, without specific definition, for those the public considered Indians. *See* FEDERAL INDIAN LAW, *supra* at 4, 10. The word "Indian" has become a construct and creation of the federal government, reflecting the profound extent to which the lives of those who bear the label have come under governmental control. The tondency to use this unruly historically legislated identifier, "Indian," in part addresses concerns that any bloodline identifications risk equal protection challenges for racial favoritism. While Indian lineage and tribal recognition remain important, by emphasizing the existing federal/Indian relationship as a basis for new laws, Congress can avoid a modern legislative pothole. *See id.* at 29-30. To understand the extont of the government-Indian relationship, the defining characteristic of modern Indian life, it is essential to first understand the framework from which that relationship has grown. *See id.* at 28.

30. *See* FRANCIS PAUL PRUOHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 23 (1994).

31. *See id.* The use of the term "treaty" has caused a great deal of debate over the sovereign status of the Indian tribes at the time of the agreements. If, it is reasoned, the tribes were originally recognized as independent nations (the typical parties to treaties) the government cannot justify later treatment as dependent, conquered peoples. Importantly, at the time of the American Revolution, the term "treaty" referred to a negotiation, not to a particular type of intergovernmental agreement. Thus, when Congress made an agreement with the Indians on trade, allegiance, or later land, it appropriated funds and assigned delegates "to treat" with particular tribes. While the resulting document would later be referred to as a "treaty," the term denoted the product of the negotiation, not an international resolution. *See id.* at 23-25.

32. *See* COHEN, *supra* note 29, at 33.

33. *See id.*

34. *See id.* During British control of the American colonies, the British government had instituted a similar treaty system based on the exchange of gifts. *See id.*

of gifts, and attempted to awe the Indians with the strength of the American nation.[35] Although the new government believed European discovery and American conquest validated its title to the Indians' land,[36] the young nation could not yet defend its acquisitions.[37] It needed peaceful deals with the Indians to protect its interests.[38]

Those interests continued to expand, as did the government's involvement in Indian affairs. By August of 1786, Congress claimed full power over Indian relations.[39] It set up a system of districts within which authorized superintendents would make necessary deals with local tribes.[40] Through these deals, Congress hoped to address the concerns of two major groups pressing the boundaries of Indian territory,[41] the traders and the settlers. Congress constrained traders by requiring licenses for all commercial transactions with the Indians.[42] The settlers, however, presented a greater problem. They wanted the Indian's land. While Congress asserted that, through discovery and conquest, it alone held title to these lands,[43] it recognized the dangerous validity of the Indians' competing occupancy claims.[44] This dilemma became the key issue shaping governmental Indian policies, from the post-Revolution period to the present day.[45]

In the early years, Congress's need for geographical expansion governed its approach to the land question. Although it recog-

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35. *See* PRUCHA, *supra* note 30, at 25-26.

36. *See* DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 143, 145 (1979) (describing the early Supreme Court's attempts te characterize the United States/Indian relationship). According to the theory, the Treaty of Paris transferred full title to the territory of the modern continental United States to America. The Supreme Court later echoed this notion in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823).

37. *See* PRUCHA, *supra* note 30, at 53 (observing that the United States' early treaties with the Indians did not ensure peace between the settlers and the Indians).

38. *See id.*

39. *See id.* This claim of power followed the delegation of duties originally established in the Articles of Confederation. *See* FEDERAL INDIAN LAW, *supra* note 29, at 1.

40. *See* PRUCHA, *supra* note 30, at 53-54.

41. Indian territory is generally defined as that land belonging to the Indians by right of occupancy, or that area in which Indians live and trade. *See* DESKBOOK, *supra* note 29, at 12, 13 n.2.

42. *See* COHEN, *supra* note 29, at xxv.

43. *See supra* note 36 (discussing the conquest theory of land ownership).

44. *See* DESKBOOK, *supra* note 29, at 40-41.

45. *See id.* at 39 (observing that "[l]and occupancy or ownership issues have been a central concern of Indian law since the Nation's founding"); *see, e.g.*, Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999) (resolving the most recent controversy between the Indians and the government over the trust fund accounts in which the government holds proceeds from land allotted to individual Indians over 200 years ago).

nized the validity of Indian occupancy,[46] government representatives, "treating"[47] with the Indians for land, frequently reminded the Indians of their defeat alongside the British, suggesting that only because of its great benevolence would the new nation agree to bargain with them.[48] The Treaty of Hopewell, signed January 3, 1786, illustrates the typical terms of these first treaties. In it, the government provided a boundary line behind which land would be "reserved" for the Indians.[49] Notably, this line involved a sizeable cession of then-current Indian territory.[50] In exchange for the ceded land, the government promised trinkets and protection.[51] The government's pledge of protection, however, was already in doubt. Congress knew, even as it ratified these early agreements, that white settlers would corrupt any negotiated boundary.[52] Thus, while it gained territory with each treaty, Congress could rely on even greater gains from unlawful settlement extensions. Between 1778 and 1868, [53] Congress executed over 400 such treaties, greatly increasing its control of Indian territory.[54] On the remaining Indian lands, Congress placed alienation restrictions, ensuring its continuing supervision even where it lacked physical control.[55] The growing nation pushed further and further into Indian country, legislating separation of the Indians from the ever-expanding white settlements as it advanced.[56]

Congress's expansionist policies, however, fell quickly to disfavor. While 1887 marked the end of the treaty period,[57] statutory language from as early as 1867 condemned treating with the Indi-

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46. *See* DESKBOOK, *supra* note 29, at 41.

47. *See supra* note 31 (explaining the origin and historical meaning of the term "treaty").

48. *See* PRUCHA, *supra* note 30, at 60-61.

49. *See id.* at 61.

50. *See id.* at 62 (observing that "[t]he land provisions of the treaty were in general accord with the existing situation").

51. *See id.* at 61 (noting that the government provided $1,200 worth of presents for the 918 Indians who had participated in the treaty negotiations).

52. *See id; see also* Cobell v. Babbitt, 91 F. Supp. 1, 7 (D.D.C. 1999) (noting that during the treaty period, "treaties and agreements were frequently violated or amended to reduce Indian holdings and to open more land to non-Indian settlers").

53. *See* DESKBOOK, *supra* note 29, at 13.

54. *See id.* at 12. During the same period, Congress authorized the removal of all Indians east of the Mississippi River to western lands. *See id* at 13.

55. *See* DESKBOOK, *supra* note 29, at 39; *infra* note 94 (describing the types of restrictions Congress placed on Indian land transfers).

56. *See* DESKBOOK, *supra* note 29, at 13 (explaining that congressional policy was based on "a desire te segregato tribes from interaction with non-Indian society except under tightly regulated circumstances").

57. *See id.* at 9 (noting that 1887 marks the end of the "Trade and Intercourse Acts period").

ans and anticipated a new era of allotment and assimilation.[58] Although Congress ultimately abandoned the formal practice of treating with the Indians, it did so only while asserting that its power over the Indians remained undiminished.[59]

B. The Era of Allotment

Early Indian policies addressed tribes individually, pursuing a national policy of separation one tribe or region at a time.[60] After the passage of the Dawes Act in 1887, however, the government handled Indians primarily as a single group.[61] Though continuing to push for expansion, the government began to assimilate, rather than separate, the nation's Indian occupants.[62]

In 1823, *Johnson v. M'Intosh*[63] had asserted the government's sovereign right to extinguish Indian title, retaining, for the Indians, only a right of occupancy.[64] While the government lauded this occupancy right as the "sacred" equivalent of fee simple title,[65] designed to protect the native residents from unprincipled white settlers,[66] the right slowly diminished as the young nation grew.[67]

The General Allotment Act ("GAA"), or Dawes Act,[68] passed in February 1887, defined federal/Indian relations for this period. The first general application statute to authorize individual allotments,

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58. *See* COHEN, *supra* note 29, at 66.

59. *See* FEDERAL INDIAN LAW, *supra* note 29, at 25-26.

60. *See supra* Part II.A (describing the treaty process between the government and various tribes).

61. The precise demarcation of the government's shift in policy towards Indian agreements is elusive because even during the treaty period, Congress claimed power to legislate Indian affairs. *See* FEDERAL INDIAN LAW, *supra* note 29, at 26. Although the actual shift from treaty making te legislation was perhaps a gradual one, by the time the Dawes Act passed in 1887, it had gathered the necessary momentum to reject fully the old policies. *See id.* at 112, 114-15.

62. *See id.* at 115 (noting the government's belief that "civilizing" the Indians would not only better serve the Indians' general welfare, but would also open more land to white settlers).

63. Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1923).

64. *See* FEDERAL INDIAN LAW, *supra* noto 29, at 18.

65. *See id.* at 19 (citing Mitchel v. United States, (9 Pet.) 711, 746 (1835)).

66. *See id.* at 18.

67. *See infra* notes 73-78, 91-92 (describing the increasingly detrimental effects of congressional policies on Indian land rights).

68. General Allotment Act, 24 Stat. 388-91 (1887) *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, at 171 (Francis Paul Prucha ed., 2d ed. 1990) [hereinafter DOCUMENTS].

[69] the GAA authorized the President to survey and divide previously reserved Indian lands for distribution as individual parcels.[70] Initially, each reservation Indian could select a parcel to be held in government trust for twenty-five years.[71] Less than twenty years after the GAA's passage, however, Congress extended this trust period indefinitely, granting discretion over the trust period to the President. [72] Altering the provision, Congress expressed its concern that the initial twenty-five year term would prove too brief a period for Indians to adjust to the essential concept of individual property ownership.[73] Congress decided, therefore, to alter the provision to allow the government to remain trustee over the Indian land allotments until each individual Indian became "competent" to manage his own property.[74]

Once each member of the reservation tribe had an opportunity to select a land parcel, the GAA allowed the U.S. to purchase the remaining "surplus" lands.[75] Money from the purchase would remain with the Department of Treasury, held in trust for the selling tribe.[76] By 1904, the government no longer sought Indian permission before declaring surplus lands open to white homesteaders.[77] The GAA, intended to facilitate private Indian ownership, had instead shifted control of sixty percent of tribal lands to government ownership.[78]

The government's plan also failed to teach the Indians private land homesteading skills.[79] Although Congress intended the Indians to maintain their allotments as individual properties, an 1891 amendment allowed the government to rent the property on the Indian's behalf should the Indian beneficiary prove unable to

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69. *See* DESKBOOK, *supra* note 29, at 16. Although some individual allotments had been made under early treaties, the GAA provided the first comprehensive allotment system and is thus credited with marking the shift in U.S. policy towards the Indians from one of separation to one of assimilation. *See* COHEN, *supra* note 29, at 206 (discussing the 1798 treaty with the Oneida Nation).

70. General Allotment Act, 24 Stat, 388 §1 (1887).

71. *See id.* § 5.

72. *See* FEDERAL INDIAN LAW, *supra* note 29, at 73.

73. *See* Note, *Rethinking the Trust Doctrine in Federal Indian Law,* 98 HARV. L. REV. 422, 429 n.38 (1984).

74. *See* FEDERAL INDIAN LAW, *supra* note 29, at 74.

75. *See infra* notes 89-90, 105 and accompanying text (explaining the government's use of the restricted Indian ownership to maintain possession of title to Indian lands).

76. *See* General Allotment Act, 24 Stat. 388 §5 (1887).

77. *See* DESKBOOK, *supra* note 29, at 19.

78. *See id.* The government purchased nearly all of the land in the present continental United States during this period. *See* GETCHES, *supra* note 36, at 150.

79. *See* DESKBOOK, *supra* note 29, at 16 n.82.

use the land.[80] Many Indians used the new provision to transform their land from a source of communal life to a source of individual income.[81] Despite government restrictions on the duration and purposes of leases,[82] these Indians surrendered their lands to government rentals in exchange for quick cash.[83] Without the support of their traditional, communal livelihoods, Indian dependence on the federal government increased.[84] The twenty-five year (or longer) trust provisions aggravated this dependence by preventing state taxation on the Indian property during the period of trusteeship.[85] Without a related source of tax income, states refused to supply services to the Indians.[86] Soon, Indians had only the meager, federal-issue tools, seeds, and funds to facilitate the difficult transition from tribal to individual economy.[87] Combined with the withdrawal of tribal lands through the surplus provision, this practice soon withered Indian self-sufficiency.[88] The Department of Interior would later comment that the control of tribal lands initiated during this period provided the most fundamental expression of congressional power over the Indians.[89]

In 1934, Congress passed the Wheeler-Howard Indian Reorganization Act ("IRA"), ending the allotment program and authorizing the Secretary of the Interior to return unclaimed surplus lands to their original tribal occupants.[90] The IRA appeared to re-

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80. *See id.* at 17.

81. *See id.*

82. Provisions of the GAA and related legislation restricted leases according to purpose (farming, grazing, or irrigation only), duration (5 to 10 years), and maker (often the allottee), and required approval from the Secretary of the Interior, effectively returning control of any Indian-made leases to the government. *See* FEDERAL INDIAN LAW, *supra* note 29, at 805-07.

83. *See* DESKBOOK, *supra* note 29, at 17.

84. *See* GETCHES, *supra* note 36, at 76 ("Some critics of the Allotment Act see it as an orgy of exploitation, with Indian lands being singled out for sacrifice to the westward expansion."). COHEN, *supra* note 29, at 216 (quoting commissioner Collier's Feb. 19, 1934 memorandum to the House Committee on Indian affairs to emphasize that the Allotment Act not only stripped the Indians of their property, but also weakened their social organization and diminished Indian wealth).

85. *See* COHEN, *supra* note 29, at 212.

86. *See id.*

87. *See id.*

88. *See id.* at 216; *see also* Cobell v. Babbitt, 91 F. Supp. 2d 1, 7 (D.D.C. 1999) (noting that during this era the BIA became the crucial provider of food and goods to the tribes).

89. *See* FEDERAL INDIAN LAW, *supra* note 29, at 33-34. This control has, in the modern era, created huge complications for the federal government. *See Cobell*, 91 F. Supp.2d at 17 n.14 (explaining that in the hundred years since most allotments were made, nearly seven generations have divided and inherited portions of the trust land and noting that today's average parcel has over forty owners).

90. *See* Wheeler-Howard Indian Reorganization Act, 48 Stat. 948 §§1,3 (1934) *reprinted in* DOCUMENTS, *supra* note 68, at 222.

verse the GAA's assimilationist goals in favor of a return to Indian control.[91] In reality, however, the IRA perpetuated governmental restrictions on Indian property alienation and prolonged the GAA's trust periods, this time at Congress's discretion.[92] The IRA reinforced these measures by declaring that even if unclaimed surplus lands returned to tribal occupancy, title should remain with the federal government.[93] Although tribes could enhance their property rights by incorporating under the IRA, governmental alienation restrictions remained on even incorporated tribal lands. [94] Despite an "opt out" provision, allowing individual tribes to reject the standards of the new legislation, over sixty percent of the nation's Indian population agreed to the IRA's terms.[95] The IRA espoused the government's desire to restore tribal self-government and to end direct supervision of Indian activities by Congress;[96] in the area of land management and Indian property rights, however, the IRA merely reaffirmed the GAA's restrictive goals.[97]

C. Indian Land Management

By the end of the 1930s, the combined GAA and IRA provisions severely constrained the scope and terms of tribal land ownership.[98] Although tribes could acquire land in a variety of ways,[99]

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91. *See* COHEN, *supra* note 29, at 84-85 (discussing the reversal of GAA policies as the major goal of the IRA).

92. *See id.* at 84 ("Section 2 extends, until otherwise directed by Congress, existing periods of trust and restrictions on alienation placed on Indian lands.")

93. *See* Wheeler-Howard Indian Reorganization Act, 48 Stat. 948, §§ 2,5 (1934) *reprinted in* DOCUMENTS, supra note 68, at 222; *see also* FEDERAL INDIAN LAW, *supra* note 29, at 59.

94. These alienation provisions included restrictions on sale or mortgaging of the property and on leases for periods of more than 10 years. *See* DESKBOOK, *supra* note 29, at 21-22.

95.*See id.* at 22.

96. *See id.* at 21-22. The Act did, in many ways, contribute to tribal self-government by allowing for tribal elections and the creation of tribal charters.

97. *See* GETCHES, *supra* note 36, at 81-82. Despite the IRA's reforms of tribal administration, the land restrictions continued, exacerbating what has today become the most crucial issue in federal/Indian relations. *See supra* note 45 (discussing the importance of the land management issue).

98. The restrictions on alienation, enhanced by provisions in later tribal charters, control land administration to this day. *See* FEDERAL INDIAN LAW, *supra* note 29, at 789 (discussing the origin of modern restrictions in the provisions of early land allotments).

99. First, Congress could withdraw land from the public domain (all area not under private deed within the United States and its territories, including both land and water), *see* FEDERAL INDIAN LAW, *supra* note 29, at 20, and reserve it for Indian use. Second, Congress could purchase private lands available through voluntary sales or condemnations. While these sales agreements did not denote the lands as "reservations," the use of the specific term was unnecessary for effective reservation creation. In addition te these two major methods of land acquisition, trihes could occupy new properties in four additional ways. The government

the GAA and IRA assured ultimate title would remain with the government.[100] Modern reservations, products of this system, only faintly echo their original treaty form. Most include or enclose land parcels held by non-members due to post-trust[101] or surplus sales under the GAA.[102] As the Department of the Interior observed, this control is "perhaps the most fundamental expression" of Congressional power over Indian affairs.[103]

The same "fundamental" control extends to individual land parcels. [104] Individually allotted lands also require secretarial approval for alienation or encumbrance of title.[105] These lands, often referred to as "restricted" Indian lands, ultimately remain within the government's grasp.[106] Congress can extend, modify, or remove existing restrictions, or re-impose previously lifted restrictions.[107]

Congress created the modern land management system to assimilate the Indians while protecting them from "improvident" sales of their newly assigned lands.[108] It later hoped the system would

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could exchange private lands for public lands, consolidating those areas held for the Indians, but preserving title in the government, or it could sell old reservation land and reinvest the sale proceeds on behalf of the tribe for later purchase of new property. Finally, the government could either restere previously removed tribal lands or, subject te congressional approval, transfer lands voluntarily relinquished by another tribe, the state or individuals. *See* COHEN, *supra* note 29, at 296-98.

100. *See* Cobell v. Babbitt, 91 F. Supp. 2d 1, 7-9 (D.D.C. 1999) (noting that after the passage of the two acts, the government held approximately 11 million acres of former Indian land in individual trusts).

101. *See supra* note 29, at 46. The GAA provided a twenty-five year period during which the government retained title in fee te the land. Although later amendments and the passage of the IRA extended the trust period indefinitely, some Indians did gain full title te their allotments after the expiration of the unamended restriction period. Many of these Indians sold their part of the land te non-Indians, creating pockets of white settlement within the federal reservation.

102. *See id.* at 46-47.

103. FEDERAL INDIAN LAW, *supra* note 29, at 33-34.

104. *See id.* at 58-59.

105. *See id.* at 72 (citing Arenas v. Preston, 181 F.2d 62 (9th Cir. 1950)).

106. *See id.* at 58-59 (identifying typical lease restrictions and authorization requirements).

107. *See id.* at 40. This ownership structure does not arise simply because the landowner is an ethnological Indian. A person of Indian descent has the ability te own land freely in any state. Only when that Indian has remained a part of a tribal-reservation group or receives benefits from the government in relation to his/her Indian status will the listed restrictions apply. *See supra* note 82 (listing typical restrictions). Thus only legally-defined Indian owners possessing lands originally acquired during GAA allotment face these types of restrictions. *See* FEDERAL INDIAN LAW, *supra* note 29, at 40. It is te this more restricted land ownership that this Note will refer.

108. *See id.* at 84 ("This authority was given . . . for the protection of the Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation.") (quoting Anicker v. Gunsburg, 246 U.S. 110, 119-20 (1918)).

divest the government of the responsibility developed during the assimilation era.[109] The government's responsibility under the system, however, never decreased. Today, the remnants of the GAA and the IRA weave a comprehensive pattern of continuing government control around Indian land ownership.[110]

This broad government control demands comprehensive administration. The almost "all-inclusive" powers of the federal government over modern Indian life reside with the Secretary of the Interior.[111] That delegation, however, has developed over a period of many years.[112]

The Continental Congress first appointed regional commissioners to handle Indian interactions.[113] By 1789, Congress reassigned control of Indian affairs to the War Department, reflecting the contemporary view that the Indians were subjects of conquest—potential security problems for the new nation.[114] Relations through the War Department, however, were limited; the budget of 1791 appropriated only $39,424.71 for Indian affairs.[115] By 1832, Congress designated a Commissioner for Indian Affairs within the War Department.[116] Two years later, it transferred that position to the Department of Interior,[117] establishing the modern Bureau of Indian Affairs ("BIA").[118]

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109. *See id.* at 129 ("The bill now under consideration definitely puts an end te the allotment system through the operation of which the Indians have parted with 90,000,000 acres of their land in the last 50 years.") (quoting H.R. REP. NO. 73-1804, at 6 (1934)).

110. This control is generally held to extend to tribal and individual funds as well as to real property on the theory that most tribal revenue comes from rentals and royalties on the allotted land. *See id.* at 39. Tribal funds raised from direct member donations are not subject to this type of regulation, but funds held in the tribal treasury at the time of incorporation under the 1934 IRA are included in the modern government trust. *See id.* at 62-63. Government management of tribal funds raises little dispute so long as the funds are clearly expended for the benefit of the tribe. *See id.* at 39. The government has no direct control of a tribe member's interest in tribal property, but, because Congress determines the statutory definition of tribal membership for benefit and distribution purposes, it indirectly guides an individual Indian's power to make any tribal claim. *See id.* at 43. Furthermore, Congress can remove a party's claim to tribal property by negating their membership in the relevant tribe. *See id.* at 44.

111. *See id.* at 49.

112. *See id.* at 215-21 (detailing the development of the BIA); *see also infra* text accompanying notes 126-31.

113. *See* FEDERAL INDIAN LAW, *supra* note 29, at 215. Benjamin Franklin, Patrick Henry, and James Wilson were among those first selected as commissioners. *See id.*

114. *See id.* at 216.

115. *See id.* at 217.

116. *See id.* at 218.

117. *See id.*

118. *See id.* at 219, 221. The modern era has seen a few legislative attompts to return to tribal self government, most notably House Concurrent Resolution 108, passed on August 1, 1953, which listed tribes to be removed from federal supervision as soon as possible. *See* H.R.

Today, the BIA lists three major goals: to create conditions facilitating continuing Indian social, economic, and political adjustment to non-tribal life; to encourage tribal and individual self-sufficiency; and to terminate federal supervision where possible.[119] In executing these goals, the BIA acts as trustee for individual and tribal land and money, provides public services (health, education, etc.) to the tribes, offers guidance to Indians leaving the reservations, and facilitates the return of property management and service provision to the tribes.[120] While other agencies assist in these areas,[121] primary responsibility for modern Indian affairs lies with the BIA.[122]

This brief historical and administrative overview describes the foundation from which the courts struggled to build a working understanding of federal/Indian interaction. Within this framework of changing policies and ever-expanding control, the courts found a strong fiduciary relationship binding tribe to government and government to tribe. That relationship, permeating all aspects of federal/Indian intercourse, structured judicial resolution of Indian claims.

III. THE RESULTING RELATIONSHIP

A. The Marshall Era: The Guardian/Ward Model

The Supreme Court first addressed the developing federal/Indian relationship during the early 1800s. In 1823, *Johnson v. M'Intosh*[123] affirmed U.S. sovereignty over former Indian lands, setting the stage for closer examination of the federal/Indian relationship,[124] a relationship Chief Justice Marshall, in a pair of cases

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Con. Res. 108, 83rd Cong. (1953), *reprinted in* DOCUMENTS, supra note 68, at 233. Despite these brief variances, the government maintains pervasive control of Indian affairs today.

119. *See* Mission Statement, Bureau of Indian Affairs, United States Department of the Interior (visited Sept. 17, 2000) <http://www.doi.gov/bia/mission.html>.

120. *See* FEDERAL INDIAN LAW, *supra* note 29, at 263.

121. The Department of Treasury, for instance, handles accounts from royalties and rents, while the Bureau of Land Management sells lands that tribes have ceded to the US. *See id.* at 267; *see also* Cobell v. Babbitt, 91 F. Supp. 2d 1, 9-10 (D.D.C. 1999) (describing the roles of other agencies, including the Office of Special Trustee, the Office of Trust Fund Management, the Minerals Management Service, and the Office of Hearings and Appeals, in government management of individual Indian trust accounts).

122. *See* FEDERAL INDIAN LAW, *supra* note 29, at 263.

123. Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823).

124. *See id.* (basing title on the discovery and conquest of the American continent).

during the 1830s, would describe as similar to that between ward and guardian.[125]

The first of these cases, *Cherokee Nation v. Georgia*,[126] challenged a Georgia statute abolishing the Cherokee claim to state land. The Cherokees, originally residing throughout the southeast, had retreated to Georgia during the early 1800s in face of the ever-expanding United States.[127] Between 1827 and 1830, Georgia abolished Cherokee government and legislated the distribution of Indian territory to white settlers.[128] In defense of their occupancy rights, the Indians sued the state.[129] When the case reached the Supreme Court in 1831, Chief Justice John Marshall held that the Court had no jurisdiction over the question raised.[130] In dicta, however, he espoused a model of the federal/Indian relationship that would shape legal rhetoric for decades.[131] Marshall explained that the relationship between the Indians and the government was unique, "[resembling] that of a ward to his guardian."[132] He expanded on his analogy, noting that the Indians "[looked] to [the] government for protection; [relied] upon its kindness and its power; [appealed] to it for relief to their wants; and [addressed] the president as their great father."[133] While his comments were intended to distinguish Indian tribes from foreign nations,[134]they soon outgrew the confines of their immediate context. An unwitting Marshall had definitively characterized federal/ Indian relations.[135]

The following year, Georgia's attempts to regulate Indian country again drew legal challenge. This time, a white missionary protested his arrest for residing on an Indian reservation without a state license.[136] In *Worcester v. Georgia*,[137] the Court reaffirmed its description of the federal/Indian relationship as that of a stronger guardian state to a weaker, but independent, Indian government.[138] The court emphasized the responsibility of the dominant power to

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125. *See* Cherokee Nation v. Georgia, 30 U.S. (5. Pet.) 1, 17 (1831).
126. *Id.*
127. *See* GETCHES, *supra* note 36, at 158.
128. *See id.*
129. *See Cherokee Nation*, 30 U.S. at 1.
130. *See id.* at 20.
131. *See id.* at 17-18.
132. *Id.* at 17.
133. *Id.*
134. *See id.* at 18 (explaining tbat the tribes were independent, but within the reaches of U.S. sovereignty).
135. *See id.*
136. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 529 (1832).
137. *Id.* at 515.
138. *See id.* 560-61.

protect its weaker subsidiary.[139] Striking down the state license requirement, the court asserted the federal government's sole authority over Indian affairs.[140]

In both *Cherokee Nation* and *Worcester*, Marshall took a "middle of the road"[141] approach to Indian status, neither acknowledging complete tribal independence nor denying the existence of self-contained Indian nations. [142] The Indians, in Marshall's view, were America's weaker allies. They were not government dependents, but rather recipients of government protection.[143] The fiduciary relationship Marshall conceived in these first cases ascribed to the government both a political duty and a moral commitment to the Indians.[144] This moral commitment, however, would not withstand the constant pressures of the land-hungry new nation. Where the Marshall Court contemplated a federal/Indian relationship centered on the protection of the Indians, the Justices of the next era would view the relationship not as a source of responsibility, but as an opportunity and justification for Congress' self-serving Indian policies.

B. The Fiduciary Relationship as a Source of Plenary Power

As the Allotment Era dawned, the Court magnified the scope of the guardian-ward relationship,[145] turning the protective fiduciary "shield" of the *Cherokee Cases* into a formidable congressional "sword."[146] Indeed, the government's power over the Indians dominated the Court's rhetoric.[147] The first case of this new period,

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139. *See id.*

140. *See id.* (As a result of the Court's decision, missionaries would subsequently be subject only to any *federal* permission requirements before entering Indian territory).

141. *See* GETCHES, *supra* note 36, at 148

142. *See id.*

143. *See* Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at its Development and at How its Analysis Under Social Contract Theory Might Expand its Scope*, 18 N. ILL. U. L. REV. 115, 124 (1997).

144. *See* Kimberly T. Ellwanger, *Money Damages for Breach of the Federal-Indian Trust Relationship After* Mitchell II—United States v. Mitchell, *103 S.Ct. 2961 (1983)*, 59 WASH. L. REV. 675, 675 (1984); Note, *supra* note 73, at 425-26 (observing that "Marshall framed the doctrine in broad moral terms").

145. *See* Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 714 (1989).

146. *See generally* Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437 (1998) (developing the "shield" and "sword" model of federal-Indian relational analysis).

147. *See id.* at 450 (discussing the difficulties of defining the Indian relationship because of these variances).

United States v. Kagama,[148] considered the validity of a federal statute allowing certain crimes between Indians to fall under federal, as well as tribal, jurisdiction.[149] Upholding the law, the Supreme Court reinvigorated Marshall's fiduciary description, declaring, "Indian tribes are the wards of the nation."[150] The Court supported this characterization, as had Marshall, by detailing Indian reliance on the government: "[The Indians] are communities *dependent* on the United States—dependent largely for their daily food; dependent for their political rights . . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them . . . there arises the duty of protection, and with it power."[151] With this final phrase, the Court articulated a shift in the nation's conception of the federal/Indian relationship. No longer would Indian dependency only inhere duty; after *Kagama*, it also conferred the privileges of control and power.[152] Congress's plenary power over the Indians was born.

Lone Wolf v. Hitchcock[153] followed close on *Kagama's* heels. In *Lone Wolf*, tribal leaders challenged the Secretary of the Interior's violations of a treaty provision requiring approval from a tribal majority before government disposal of Indian property.[154] Affirming the government's action as an exercise of Congress's plenary power over the Indians,[155] the Court announced a presumption of good faith towards Congress's dealing with the Indians.[156] In the view of some commentators, this holding eradicated any hope of a "judicial limit" on Congress's power over the Indians.[157] The government could break its treaty promises to the tribes if it showed a good faith reason for the abrogation.[158] Shielded by a strong presumption of good faith, the government could now seize tribal lands at will for distribution to land-hungry white settlers.[159] Where the

148. United States v. Kagama, 118 U.S. 375 (1886).

149. In the case, two Indians charged with the murder of another Indian on a California reservation challenged the statute's assignment of their case to federal law. *See id.*

150. *Id.* at 383 (emphasis added).

151. *Id.* at 383-84.

152. *See* Ezra, *supra* note 145, at 714-15 (explaining that the *Kagama* decision not only emphasized federal dominance in Indian affairs, but also recharacterized the Indians as not "wards," but conquered peoples).

153. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

154. *Id.* at 555-56.

155. *See id.* at 555.

156. *See id.* at 568.

157. *See* JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 161 (1995).

158. *See Lone Wolf*, 187 U.S. at 566.

159. *See* ELY, *supra* note 157, at 161.

Cherokee Cases had recognized the independence of Indian nations despite their reliance on the government, *Kagama* and *Lone Wolf* derived total congressional power from the newly asserted "pure" Indian dependency.[160]

A short series of cases followed *Lone Wolf*, affirming congressional dominance over the government's Indian wards.[161] These cases confirmed the continuation of Indian wardship,[162] determined that even full land ownership would not alter the special relationship between the Indians and the government,[163] and asserted that the United States was both a guardian and a trustee with control of all tribal lands.[164] In the words of the Court, Congress had a duty to legislate, but with that duty came a positive grant of power.[165]

C. The Fiduciary Relationship as a Constraint on Government Power

The *Kagama* and *Lone Wolf* decisions opened a new period of congressional dominance. As the 1900s continued, however, the Court reconsidered the federal/Indian relationship, finding governmental power as much of a constraint on legislative action as a license for dominance.[166] In the 1940s, the Court began to attribute the responsibilities of a common law fiduciary[167] to the federal government's Indian actions, curtailing the power *Lone Wolf* and *Kagama* had conferred, and returing, once again, to a protective, Marshall-esque view of the federal/Indian bond.[168]

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160. *See* Aitken, *supra* note 143, at 118 (noting that Justice Marshall's language of Indian dependence in *Cherokee Nation* "developed into the plenary power doctrine . . . in *Lone Wolf v. Hitchcock*").

161. *See* United States v. Kagama, 118 U.S. 375, 383 (1886); *sce, e.g.*, Morrison v. Work, 266 U.S. 481 (1925); United States v. Nice, 241 U.S. 591 (1916).

162. *See Nice*, 241 U.S. at 598 (noting that "national guardianship" would end only when Indians were "prepared to exercise the privileges and bear the burdens of one *sui juris*").

163. *See id.* at 601 (noting that Indian wardship does not depend on allotments or trust patents).

164. *See Morrison*, 266 U.S. at 485.

165. *See Kagama*, 118 U.S. at 383-84; GETCHES, *supra* note 36, at 183-84.

166. *See* Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, *reprinted in* GETCHES, *supra* note 36, at 240, 246-47.

167. Common law fiduciary duties are generally divided inte the duty of care (the manner in which trust responsibilities are executed) and the duty of loyalty (the obligation te act for the best interest of the beneficiary). *See supra* Part I (introducing the fiduciary relationship as an additional safeguard on the *manner* in which dominant parties execute their statutery duties); *see also infra* Part V.B (detailing the effects of fiduciary responsibility on legal analysis, particularly the allocation of the burden of proof).

168. *See* Chambers, *supra* note 166, reprinted in GETCHES, *supra* note 36, at 240, 246-47.

In *Seminole Nation v. United States*,[169] the Court held the government to the high standards of a common law trustee in its management of Seminole tribal funds.[170] Under its agreement with the Indians, the government had promised annual payments to each member of the tribe.[171] At the request of tribal elders, however, it instead made the payments to the tribal council—a council the government knew was corrupt.[172] The Court applied the common law rule that the knowing utilization of a corrupt intermediate fiduciary violates the duties of the primary fiduciary and found the government in breach of its duty to the Indians.[173] The government's actions had failed to meet the common law's "most exacting fiduciary standards."[174] Effectively, the Court created a new governing principle for the federal/Indian relationship: the government should not act against Indian interests.[175]

This pattern of judicial constraint continued over the next forty years. In 1966, the Court of Claims adopted *Seminole Nation's* high fiduciary standards in *Navajo Tribe of Indians v. United States*.[176] Holding the government to "exacting" common law rules, the Claims Court found that the government's failure to inform the Navajo tribe of a governmental sublease of its reservation oil and gas mines violated governmental duties of care and loyalty to the tribe.[177] Even when the government acted in the best interests of the nation, it could not contravene the Indians' best interests.[178] The Court determined that the government, like a common law fi-

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

170. *See id.* at 297.

171. *See id.* at 295.

172. *See id.* at 295-96.

173. *See id.* at 297.

174. *Id.*

175. Two earlier cases had paved the way for the *Seminole Nation* holding. In *Cramer v. United States*, 261 U.S. 219 (1923), the Court held Congress responsible for acting against Indian interests in conveying Indian land for the development of a railroad. Similarly, in *United States v. Creek Nation*, 295 U.S. 769 (1935), the Court resolved a reservation boundary dispute in favor of the Indians, holding the U.S., as trustee, responsible for a demarcation error. Notably, the *Creek* decision, while apparently holding the U.S. te a high fiduciary standard, also suggested that Congress had the power to constrain its own fiduciary duties with specific legislation. *See* Chambers, *supra* note 166, at 242 (discussing Congress's power to shape the scope of its trust responsibility). In *Mitchell II* and *Nevada*, the Court indirectly clarified this notion, increasing the specificity required initially to impose fiduciary responsibilities on the government, while continuing to require the government, within those responsibilities, to observe the high standards of care and loyalty required of a private or common law fiduciary. *See infra* Part IV.A-B.

176. Navajo Tribe of Indians v. United States, 364 F.2d 320 (Ct. Cl. 1966).

177. *See id* at 322-24.

178. *See id.* at 323-24.

duciary, had a primary duty to its beneficiaries.[179] The government should have notified the tribe of the original lessee's desire to sublease before seizing the opportunity for itself.[180]

The Northern District of California likewise applied the high fiduciary standards imposed on common law trustees to the government in *Manchester Band of Pomo Indians v. United States.*[181] The court held the government in violation of its fiduciary duties for failure to invest Indian trust funds at advantageous market rates, finding that the government's fiduciary obligations required it to at least investigate more profitable, non-governmental investment options.[182]

That same year, the D.C. District Court demanded higher standards of care in a less obviously fiduciary setting.[183] In *Pyramid Lake Pauite Tribe of Indians v. Morton*, the court held that the government could not serve two masters without violating its trust-based fiduciary duties.[184] Representing both the Indian tribe and the opposing irrigation district in a water rights dispute, the government violated its duty to protect Indian interests with a high degree of loyalty.[185] The government, acting as an umpire, not an advocate, failed to meet the common law's exacting fiduciary standards.[186] Thus, the court found the government had failed in its duties to the Indians.[187] The constraining responsibilities of a common law fiduciary seemed, at least before the Supreme Court's 1982 term, firmly in place.[188]

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179. *See id.* at 324.

180. *See id.*

181. Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973).

182. *See id.* at 1247.

183. *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973). *Pyramid Lake* provides a "less obvious" fiduciary setting in that no direct trust or agency agreement detailed the government's duties to the Indians. The government, in this case, merely litigated on the tribe's behalf. To apply fiduciary responsibility to the government's attorney/client activities, the court considered the relevant elements of dependence, reliance, dominance, influence, and expectations before concluding that fiduciary responsibilities should apply. *See supra* notes 14-18 and accompanying text (explaining the three scenarios under which a court may chose to attach fiduciary responsibilities to statutory obligations). This case eventually led to *Nevada v. United States*, 463 U.S. 110 (1983), described in the next section. It is included here, however, as a reflection of the general understanding of the federal/Indian relationship before the Supreme Court's 1982 term.

184. *Pyramid Lake*, 354 F. Supp. at 256-57.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980) (removing the presumption of good faith on the part of Congress expressed in *Lone Wolf* and finding greater duties in

D. The Resulting Relationship: A Common Law Fiduciary?

By the beginning of the 1980s, a rough outline of federal/Indian law had taken a discernible, if shadowy, shape.[189] First elucidated as a protective power by Marshall's *Cherokee Cases*,[190] the federal government's plenary control over Indian affairs had developed into a positive assertion of federal dominance.[191] This control, however, was not unlimited. The complementary duties of care and loyalty restrained the government fiduciary.[192]

Although the courts frequently held the government to common law fiduciary standards, the imprecision of the common law analogy strained such applications. Marshall, comparing the government to a guardian, failed to note a statutory or regulatory source from which this duty might arise.[193] Common law, however, required a specific manifestation to precede imposition of fiduciary responsibility.[194] Furthermore, even within the common law, the roles of guardians and wards were unclear. Felix Cohen, writing on Indian law in the 1920s, explored at least ten possible common law definitions for "ward" that could apply to the federal/Indian context.[195] "Ward" could refer to a domestic dependent nation.[196] "Ward" could also refer to obedience to congressional power.[197] For

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cases where Congress is a specifically designated trustee); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975) (recognizing that the unique relationship between tribe and government applies to all Indians, even those not formally recognized by the government, unless Congress specifically provides otherwise); *see also* GETCHES, *supra* note 36, at 135.

189. *But see* Chambers, *supra* note 166, at 246 (suggesting that any coherence must be "forced" onte Indian trust law).

190. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

191. *See* United States v. Kagama, 118 U.S. 375, 383-84 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553, 555, 568 (1903).

192. *See supra* Part III.C (describing Seminole Nation v. United States, 316 U.S. 286, 297 (1942), *Pyramid Lake*, 354 F. Supp. at 256, and Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 (Ct. Cl. 1966)).

193. *See* GETCHES, *supra* note 36, at 424

194. *See* Note, *supra* note 73, at 423 (observing that "the development of a coherent trust doctrine must begin with an analysis of the relevant precepts of morality that permeate American law.").

195. *See* COHEN, *supra* note 29, at 169-73. The Department of Interior later adopted these definitions in its discussion of Federal Indian Law. *See* FEDERAL INDIAN LAW, *supra* note 29, at 557-66. Because Cohen first articulated these standards, this Note will primarily reference his works.

196. *See* COHEN, *supra* note 29, at 170. This definition supports Marshall's use of the term in the *Cherokee Cases* to distinguish the Indians from foreign states. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

197. *See* COHEN, *supra* note 29, at 170-71.

the Indians, Congress's plenary powers extended even beyond the scope of its normal legislative authority.[198] "Ward" could also reflect Congress's power over an individual.[199] In the case of individual Indians, such power derived from tribal legislation.[200] At common law, a "ward" could be a person subject to the jurisdiction of federal courts[201] or to administrative power.[202] A "ward" could also be a simple trust beneficiary.[203] "Ward" could refer to a noncitizen,[204] or the recipient of the "federal bounty."[205] A "ward" could be any person holding land subject to restraints on alienation[206] or a person with unequal bargaining power.[207] While no single definition fully encapsulated the federal/Indian relationship, the range of possibilities demonstrated the ambiguities within Marshall's original characterization.

To further complicate matters, the government also eluded the neat definition of a common law guardian. At common law, a guardian has physical custody of the ward, and normally decides where the ward will live.[208] The guardian uses the ward's own funds to secure the beneficiary's education and personal maintenance.[209] The guardian manages the ward's property for the ward's benefit, refrains from profiting at the ward's expense, and provides an ac-

198. *See* FEDERAL INDIAN LAW, *supra* note 29, at 561. In this context, "ward" served a very different purpose from the common law term. Rather than being used by dependents to demand care, under *Kagama*'s plenary power model, the term justified extension of the fiduciary government's dominance. *See id.*

199. *See* COHEN, *supra* note 29, at 171.

200. *See id.*

201. *See id.* This definition provides little guidance for fiduciary applications.

202. *See id.* at 171-72. Applying this definition to the Indians would not place them in a fiduciary relationship with the administrating agency, i.e. the BIA. While the agency manages Indian affairs for the government, it does not directly manage the affairs of the tribe. *See* FEDERAL INDIAN LAW, *supra* note 29, at 563 n.1. Thus, the "administrative power" to which the Indian ward acquiesces is the federal government.

203. *See* COHEN, *supra* note 29, at 172. This definition cannot fully describe the federal/Indian relationship because Congress and the courts have determined that an Indian remains a ward of the federal government even when the government does not hold property or funds in trust for the Indian. *See* FEDERAL INDIAN LAW, *supra* note 29, at 564.

204. *See* COHEN, *supra* noto 29, at 564. The 1924 Indian Citizenship Act recognized Indians as citizens. *See* Indian Citizenship Act, 43 Stat. 253 (1924), *reprinted in* DOCUMENTS, *supra* note 68, at 218. The "noncitizen" definition, therefore, does not apply to modern Indians.

205. *See* COHEN, *supra* noto 29, at 173.

206. *See id.* at 172. This is problematic in reference to Indians because the Indian relationship with the government does not end if existing restraints are lifted. *See supra* note 163 and accompanying text.

207. *See* COHEN, *supra* note 29, at 172-73.

208. *See* FEDERAL INDIAN LAW, *supra* note 29, at 557.

209. *See id.*

counting of the estate when the guardianship ends.[210] Although the government arguably had some physical control over Indians[211] and maintained extensive control over individual and tribal property and funds, its responsibility to refrain from self-interested profit and to provide a thorough accounting of resources remained, in light of historical governmental behavior, in question.[212] After over a hundred years of Indian litigation and legislation, the precise nature of the government/Indian fiduciary relationship remained in flux.

E. Canons of Construction

Despite these ambiguities, courts intuited that the federal/Indian relationship was special.[213] Several canons of construction crucial to court assessments of Indian claims developed to reflect the relationship's fiduciary bond.[214] The basic rules arose from treaty interpretation: treaties should be construed to favor the Indians, any ambiguities must be resolved in favor of the Indians or as the Indians would have understood them, and Congress must show clear intent to break a treaty.[215] These provisions, both in treaties and later in non-treaty agreements and statutes, [216] protected the weaker-positioned Indian bargainer.[217] In non-treaty

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210. *See id.*

211. The government, for instance, confined Indians to reservations with aggressive treaty provisions. *See supra* Part II.A.

212. *See* Cobell v. Babbitt, 37 F. Supp. 2d 6, 9 (D.D.C. 1999) (holding the government in contompt for failure to provide requested documentation of Indian trust accounts); *see also supra* Part II.A (chronicling the changing policies and contrary attitudes with which the government has addressed Indian interests over the past two centuries).

213. *See* Seminole Nation v. United States, 316 U.S. 286, 296 (1942). The "special" nature of the federal/Indian relationship has proved, for the Indians, both a blessing and a curse. Where in *Seminole Nation*, it increased the government's protection of Indian interests, in *Kagama* and *Lone Wolf*, it enlarged Congress's power to modify those same interests. *See supra* Part III. B-C (discussing the shift in policy from *Kagama's* plenary power interpretation to *Seminole Nation's* restraint on congressional action). The canons of construction emphasize the more protective side of the "special" relationship, ensuring protections above the basic statutory responsibilities, indirectly requiring a nearly fiduciary duty of care.

214. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Green Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 617 (1975) ("The unequal bargaining position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality.").

215. *See* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 1 (1995).

216. *See id.*

217. *See* Thomas H. Pacheco, *Indian Bedlands Claims: A Need to Clear the Waters*, 15 HARV. ENVTL. L. REV. 1, 5-6 (1991).

agreements, the canons required liberal construction in the determination of an Indian right, strict construction of statutes abridging those rights, and express congressional intent to constrain Indian privileges through passage of a general law.[218]

These rules, structured around the courts' understanding of the federal/Indian relationship, reflected the centrality of that relationship in Indian law.[219] Their potentially decisive effect reemphasized the importance of the federal/Indian fiduciary bond.[220] While the precise confines of the fiduciary relationship eluded easy definition,[221] the strength of the government's duty to the Indians shone clear. The underlying federal/Indian relationship, as expressed in the canons of construction, affected the *manner* in which the government performed all its Indian-related duties, from managing money,[222] to land management,[223] to keeping, or breaking, its word.[224] Just as the Supreme Court identified power in the federal/Indian relationship,[225] the evolved canons of construction reflected an equally "awesome" moral and political duty, existing outside any particular interaction, to protect Indian interests.[226]

IV. THE MODERN INTERPRETATION: LIMITED FIDUCIARY DUTY UNDER *MITCHELL II* AND *NEVADA*

By the start of the 1980s, the federal/Indian relationship had taken reasonably definite shape. Although the specific contours of governmental responsibility remained elusive, the special nature of the federal/Indian relationship continued to mold Indian law.[227] Acknowledging the importance of this fiduciary bond, courts applied

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218. *See* GETCHES, *supra* note 36, at 201, 203-04.

219. *See id.* at 204.

220. *See* Pacheo, *supra* note 218, at 6; *see also supra* note 214 (highlighting the emphasis the canons of construction placed on the protective aspect of the federal/Indian relationship and their foreshadowing of later impositions of common law fiduciary standards on government actions towards the Indians).

221. *See supra* Part I (attempting a preliminary definition of the functions of fiduciary law).

222. *See* Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238, 1242 (N.D. Cal. 1973).

223. *See* Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 (1966).

224. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 555-56 (1903).

225. *See* United States v. Kagama, 118 U.S. 375, 383-84 (1886).

226. *See* GETCHES, *supra* note 36, at 248.

227. *See* United States v. Mitchell ("*Mitchell II*"), 463 U.S. 206, 225 (1983) (noting the "undisputed existence of a general trust relationship" between the government and the Indians); *see also supra* Part II.A-C (explaining the evolution of the courts' characterization of the government's fiduciary role).

strict common law duties[228] to cases of government mismanagement, particularly in the handling of formal trusts.[229] During its 1982 term, however, the Supreme Court decided two cases that reshaped federal/Indian law, requiring identification of specific criteria *before* application of common law fiduciary obligations[230] and deemphasizing the duty of loyalty when the government's duty to the Indians conflicted with the multitude of other governmental responsibilities.[231]

A. Mitchell II*: The Control Principle*

In *United States v. Mitchell* ("*Mitchell II*"), the Quinault and Quileute tribes of Washington state claimed monetary damages for the government's mismanagement of forest resources.[232] The tribes first ceded land to the government in the late 1800s, exchanging their territory for the creation of a reservation and a promise of protection from expanding settlements.[233] A few years later, the GAA divided the reservation lands for individual distribution.[234] By 1935, although the government had allotted all of the 2,340 identified parcels, it retained nearly two-thirds of those plots in trust.[235] Additionally, as part of its trust duties, the government undertook management of the reservation's vast forest resources.[236]

In their claim, first filed in 1971, the reservation Indians alleged mismanagement of the trust lands, including failure to pay interest during some quarters, failure to pay interest at a reasonable rate during others, failure to compute annual maintenance expenses, failure to perform adequate maintenance including the failure to build necessary logging roads, and sale of tribal lands at less

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228. *See supra* Part I (discussing the premises of private or "common law" fiduciary duties as attached to specific statutory responsibilities).

229. *See supra* noto 183 and accompanying text (explaining the difference between "obvious" fiduciary settings, in whicb statutos impose a recognized fiduciary relationship, and "less obvious" fiduciary settings in which the Indians must show, by purpose or circumstance, the existence of a fiduciary bond).

230. *See Mitchell II,* 463 U.S. at 219, 220 (outlining specific statutory provisions that defined the parameters of the government's obligations to tbe Indians regarding timber sales from reservation lands); *see also infra* notes 258-60 and accompanying text.

231. *See* Nevada v. Unitod States, 463 U.S. 110, 135 n.15; *see also infra* notes 302-05 and accompanying text.

232. *See Mitchell II,* 463 U.S. at 210.

233. *See id.* at 208.

234. *See id.* at 209.

235. *See id.*

236. *See id.*

than fair market value.[237] The Court of Claims[238] accepted jurisdiction, asserting that the GAA created a fiduciary relationship between the government and the Indians, which empowered the Indians to challenge governmental breaches of fiduciary duties.[239] The Supreme Court, however, first hearing the case in 1980,[240] rejected the Claims Court's decision, finding that the GAA created only a *general* trust relationship from which the Court could impose no positive duties for monetary damage purposes.[241] The Court remanded, requesting identification of more particularized standards that could support specific fiduciary duties.[242] The Claims Court reevaluated the case, this time identifying a series of specific statutes on timber sales and forest management as potential sources for a more concrete fiduciary responsibility.[243] On *Mitchell*'s second appeal to the Supreme Court, the Court approved the proposed statutes as sufficiently specific to beget fiduciary duties supporting

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237. *See id.* at 210.

238. Congress had, before 1946, passed legislation to waive sovereignty for individual Indians to sue the government. Although the Court of Claims had, since 1855, heard other claims against the government, Indians were specifically excluded from use of its courtroom. The Indian Claims Commission Act of 1946, 25 U.S.C.A. §§ 70-70v, established a special commission to hear existing Indian claims and provided for the litigation of subsequent cases in the Court of Claims. While most cases centered on land disputos, the Claims Court had jurisdiction in law and equity over constitutional, treaty or tort based claims. The Claims Court, however, could provide only monetary damage remedies. *See* Sandra C. Danforth, *The Indian Claims Commission*, 49 N.D. L. REV. 359, *reprinted in* GETCHES, *supra* note 36, at 152-55.

239. *See Mitchell II*, 463 U.S. at 210.

240. *See* United States v. Mitchell ("Mitchell I"), 445 U.S. 535 (1980).

241. *See id.* at 544-46. Importantly, the *Mitchell I* and *Mitchell II* decisions both focused on the ability of the Indians to claim monetary damages in response to the alleged breach of trust. Under the Indian Tucker Act, 28 U.S.C. §§1491, 1505, Indians may bring suit against the government in the Court of Claims only with government consent. *See Mitchell II*, 463 U.S. at 212. To waive the consent requirements of the Tucker Act, the court must find statutory authority providing a specific requirement of fiduciary duty. The purpose of the act, to assure Indians a "fair day in court," and thereby to ensure agency accountability, is, in Congress's view, preserved by the consent or specificity requirement, assuring Indians will pursue only *valid* claims against the government. *See id.* at 214, 216-17. In *Mitchell I* and *Mitchell II*, the Indians sought monetary damages claiming that equitable remedies, retrievable outside the Tucker Act restrictions, were inappropriate. *See id.* at 227. Because of the difficulties of monitoring the government, because a trusteeship generally does not require beneficiary monitoring, and because the risk of damage before discovery of mismanagement was great in the forest management situation, the Indians sought monetary compensation rather than equitable remedies for the alleged government omissions. *See id.* In cases based on a statutory claim in which Indian plaintiffs do not seek monetary damages, courts may waive sovereignty under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, which forbids courts to dismiss non-monetary claims alleging harm from the official action or inaction of a government agent. *See, e.g.*, Cobell v. Babbitt, 91 F. Supp. 2d 1, 24-25 (D.D.C. 1999).

242. *See Mitchell II*, 463 U.S. at 211.

243. *See id.* at 220.

monetary damages.[244] The Court noted, however, that the fiduciary relationship appeared not only in the specific statutory provisions from which the plaintiffs now tried to define the government's trust responsibilities, but also in the more general relationship that the government's comprehensive control of the forest lands had created.[245] In the words of the Court, "a fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over forests and property belonging to Indians."[246] Continuing, the Court explained that "[all] of the necessary elements of a common-law trust [were] present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."[247] The sources of the government's obligations were not, however, limited to the terms of statutes or the extent of its immediate control.[248] Underlying the government's statutory and control-based responsibilities, the Court recognized the "undisputed existence of a general trust relationship between the United States and the Indian people,"[249] which comprised a "distinctive obligation of trust incumbent upon the Government" in Indian affairs.[250]

Justice Powell, with Justices Rehnquist and O'Connor joining, dissented from the majority's decision, asserting that by evaluating the sufficiency of the offered statutes, the Court usurped Congress's duty to establish a basis for claims against the government.[251] The dissent also objected to the majority's references to the rules of common law trusts.[252] It argued that the relevant agreements must include the term "trustee" before the Court could attach such strict fiduciary standards to the government's responsibilities.[253] Because of the government's inherent differences from a common law benefactor, common law standards would not apply

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244. *Id.* at 224-26.

245. *See id.* at 225.

246. *Id.*

247. *Mitchell II*, 463 U.S. at 210.

248. *See supra* Part I.

249. *Mitchell II*, 463 U.S. at 210 (noting the importance of comprehensive *control* in raising the level of governmental responsibility, and suggesting a new standard, based on that control, for Indian claim analysis).

250. *Id.* (citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942)). The Court also suggested the potential extension of its reasoning to government management of Indian funds. *See id.*

251. *See id.* at 229-30 (Powell, J., dissenting). The dissent continued its critique, suggesting that by allowing the Court to establish bases for claims in Indian suits only, the Court provided the Indians a benefit denied to other litigants. Furthermore, the dissent denied the right of the Court to impose trust duties against the government unless unambiguously asserted in the language of the governing statutes. *See id.* at 233 (Powell, J., dissenting).

252. *See id.* at 233-34 (Powell, J., dissenting).

253. *See id.* at 234 (Powell, J., dissenting).

generally.[254] The dissent believed the majority had turned the federal/Indian relationship from a protective shield to an Indian sword.[255]

Mitchell II offered a variety of new interpretations of the federal/Indian relationship. First, it announced a new, control-based theory of government responsibility.[256] As the dissent protested,[257] no longer would only the magic term "trustee" invite application of common law fiduciary standards.[258] Instead, a contextual analysis of the parties' situations would either confirm or, in a few cases, negate the underlying recognition of a general federal/Indian fiduciary relationship.[259] This new control analysis reinforced previous statutory assignments of responsibility[260] and embodied the ideas of inequality and government supremacy imbedded in the long-accepted canons of Indian construction.[261] Confusion arose, however, as to how the new control standard should and would find application.[262]

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254. *See id.* at 234 n.8 (explaining the various differences between the government trustee and a common law trustee, including the lack of a manifestation of intent to take on the trusteeship, and the ambiguity of prior Court analyses of the relationship that characterized the government as both guardian and trustee) (Powell, J., dissenting); *see also supra* Part III.D.

255. *See id.* at 234-35 (Powell, J., dissenting). Interestingly, the dissent uses the shield/sword imagery here in opposition to its original post—*Kagama* use. Where previously the image denoted an aggressive use of the fiduciary relationship by *Congress* to justify increasing encroachment into Indian territory, the *Mitchell II* dissent uses the "sword" image to explain what it characterizes as an unduly broad assertion of Indian protective rights.

256. *See* Russell Lawrence Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863, 885 (1984).

257. *See Mitchell II*, 463 U.S. at 234.

258. *See* Barsh, *supra* note 256, at 885.

259. *See generally* Aitken, *supra* note 143, at 116.

260. *See Mitchell II*, 463 U.S. at 219-22, 224 (detailing the statutes listing specific duties te which fiduciary responsibility might attach, including the IRA and the timber management statutes, 25 U.S.C. §§ 406-07, 466, and noting that these provisions, "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of tbe Indians"). By reemphasizing federal duty where the Court found pervasive control, the court broadened the effect of these responsibilities, potentially creating an additional ring of responsibility to which fiduciary duties, already recognized as attaching to statutorily defined obligations might *de facto* apply. *See supra* Part I.A (describing the various circumstances under which fiduciary duties may attach te statutory, de facto, or circumstantial responsibilities).

261. *See* Ellwanger, *supra* note 144, at 684. The canons demonstrated that because of the government's bargaining supremacy and expansive control potontial, the courts would generously interpret statutes for Indian benefit when confusion or ambiguity arose. *See supra* Part III.E (describing the Indian canons of construction). The new control standard similarly recognized this potential for the government, even within statutory guidelines, to accumulate enough power over the Indians to facilitato abuse. Thus, the control test brought an additional area of government dominance to the court's scrutiny, acting, like the canons, to ensure the Indians the full benefit of legislation designed on their behalf. *See supra* notes 248-49 and accompanying toxt (describing the control test).

262. *See* Barsh, *supra* note 256, at 886.

These uncertainties spawned several competing analyses of the *Mitchell II* decision. One theory envisioned the control requirement as a rejection of the full application of common law trust doctrine.[263] Giving courts a flexible standard under which to assess the applicability of common law standards, the Court, according to this line of reasoning, indirectly reasserted its control of the federal/Indian relationship.[264] This theory, however, failed to integrate the idea behind the dissent's objections, that the Court had shifted power from the government to the Indians.[265] A second group of theories debated which of the *Mitchell II* factors necessitated the imposition of common law responsibilities: control, pervasive control, the presence of common law trust elements, statutory language, or a combination of all of these.[266] Further questions arose as to whether the federal/Indian relationship now justified a presumption of common law fiduciary obligation anytime the government acted in Indian affairs.[267] While "logic and fairness"[268] urged increasing governmental responsibility, the words of the Court left the requirement of such an increase less certain.[269] The small differences between the unacceptable provisions of the GAA offered in *Mitchell I* and the responsibility-assigning passages examined in *Mitchell II*, if construed narrowly, supported a very strict standard for assessing comprehensive control.[270] Applied more broadly, however, in conjunction with the Court's recognition of a pre-existing federal/Indian relationship, the decision facilitated the application

263. *See id.*

264. *See id.*

265. *See Mitchell II*, 463 U.S. at 234-35.

266. *See* Aitken, *supra* note 143, at 136-37. Additional criticism, following the dissent's objections, highlighted the inconsistencies between the federal/Indian relationship and the common law fiduciary model, arguing that common law duties should *never* apply to the government. *See* Ellwanger, *supra* note 144, at 689.

267. *See* Michael Roy, Note, *Indians May Sue for Breach of Federal Trust Relationship:* United States v. Mitchell, 26 B.C. L. REV. 809, 840 (1985).

268. Ellwanger, *supra* note 144, at 686. Ellwanger argues that an examination of the opposite conclusion justified an assumption of intent to increase government responsibility. If the government was not held to a high standard when it controlled Indian activity, she explains, it would gain unlimited authority with only limited potential accountability. In the face of a history of abuse and oppression, such allowances seemed unlikely to reflect congressional intent. *See id.* at 686-87.

269. *See id.* at 686 (observing that absent a specific statutory scheme, a court might be unwilling to hold the government liable for money damages based on a breach of trust).

270. *See* Aitken, *supra* note 143, at 136-37. Because, in *Mitchell II*, the government had nearly complete control of the Indian lands and funds in question, later courts could construe the holding as requiring the same type of nation-wide, historically based dominance to justify attaching the *Mitchell II* specificity and control principles.

of higher standards on almost all Indian claims.[271] While the first approach risked excluding relevant claims against the government, the second potentially neglected case-specific incidents of Indian control.[272] Fortunately, a second case, *Nevada v. United States*,[273] decided three days before *Mitchell II*, clarified the Court's intended analysis.

B. Nevada v. United States*: Accepting Divided Loyalties*

Nevada v. United States represented the culmination of the 1970s Pyramid Lake dispute.[274] In 1859, the government created a half million acre reservation for the Paiute Indians along the banks of Pyramid Lake, a vast desert lake, originally over fifty miles long and twelve miles wide.[275] Forty years later, the government reclaimed much of the reserved land for irrigation projects, giving nearly 200,000 acres to the Newlands Irrigation District.[276] The government's action gave water rights on the Truckee River, the sole source of water for Pyramid Lake, to three classes of people: private owners of riverside property, the reservation Indians (represented by the government), and the Irrigation District (also represented by the government).[277] Concerns about water allocation, raised in 1913, settled initially in 1944.[278] The government returned the controversy to the courts in 1973, however, seeking additional water rights for the Indians.[279] Since the establishment of the reservation, Pyramid Lake had receded by 20,000 acres.[280] The government, on behalf of the Indians, claimed the 1944 settlement's allocation addressed only the Indians' irrigation needs, neglecting the importance of lake levels to their fishing-based economy.[281] The Court decided the earlier settlement precluded the current claim.[282]

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271. *See id.* Alternatively, because the government realistically exercises at least *some* control in almost every aspect of tribal Indian life, from housing, health care and education, to land and resource management, subsequent decisions could use *Mitchell II* as an opening for suit on almost any aspect of this widespread federal control.

272. *See id.*

273. Nevada v. United States, 463 U.S. 110 (1983).

274. *See supra* Part III.C.

275. *See Nevada*, 463 U.S. at 115.

276. *See id.*

277. *See id.* at 116-17.

278. *See id.* at 113.

279. *See id.*

280. *See id.* at 115.

281. *See id.* at 118-19.

282. *See id.* at 143.

The majority's discussion of the government's dual representation of the Indians and the opposing Irrigation District, however, refined the modern understanding of governmental fiduciary responsibilities.[283]

The Court cited *Seminole Nation*'s declarations of the government's unique duties to the Indians.[284] It noted, however, the key difference between governmental and private duties of loyalty:[285] where a common law trustee must act only for the interests of a single beneficiary, the government may wear "two hats" when Congress so requires.[286] The Court could not, recognizing this structural difference between government and private trustees, impose private fiduciary law unquestioningly on the federal/Indian relationship.[287] The breadth of governmental responsibility, however, could not excuse the neglect of federal obligations to the Indians.[288] While government inherently involved divided responsibility, the court should not allow the division to jeopardize the Indians' fiduciary interest.[289]

In significant dicta, the Court commented that the "United States undoubtedly owes a strong fiduciary duty to its Indian wards."[290] Continuing, the Court suggested that when Congress has not imposed additional, conflicting responsibilities upon it, the government should uphold the same standards as a common law fiduciary.[291] Emphasizing this reasoning, the Brennan concurrence ac-

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283. *See id.* at 127.
284. *See id.*
285. *See id.* at 128.
286. *See id.* at 135-38 n.15.
287. *See id.* at 141.
288. *See id.* at 142.
289. *See id.*
290. *Id.*
291. *See id.* While the Court did not explicitly discuss the appropriate standard for interactions in which Congress did give the government a conflicting responsibility, histery and precedent support two possible interpretations. First, under *Nevada,* the Court recognized that the government may divide its attentions. *See id.* at 135-38 n.13. At common law, fiduciary obligations require the interests of the beneficiary to be the fiduciary's sole priority. *See* Finn, *Principle, supra* note 8, at 4. If more than one beneficiary exists for a single interaction, the fiduciary must treat both parties with equally high observations of care and loyalty. *See* FINN, OBLIGATIONS, *supra* noto 5, at 45-46. Thus, the Court's exception could simply provide an opening for the government to take on additional responsibilities, while still requiring that it treat the Indians, and the additional beneficiaries, within a single, common law type fiduciary obligation. *See infra* notes 292-95 and accompanying text (discussing the Brennan concurrence's admonition tbat the government could only divide responsibility if Indian interests would not be jeopardized). In *Nevada,* however, the Court acted te create an *exception* from a general rule of fiduciary responsibility. *See infra* notes 300-03 and accompanying text. A more tenable analysis, therefore, assumes that the government, when faced with conflicting responsibilities, must observe not the private standard applied to a fiduciary with multiple

cepted the government's ability to act for two masters, but asserted the government's continued duty to act for the Indians.[292] Should the government's divided attentions cause harm to the Indians, Brennan observed, the courts should hold the government responsible.[293] Only so long as the government adequately served the Indians could Congress justifiably divide governmental loyalty.[294]

The *Nevada* decision sparked two lines of interpretation. It appeared "pro-Indian" in its emphasis of common law fiduciary duties in the federal/Indian context. The Court allowed a limited exception from those duties only when Congress specifically required representation of an opposing interest, highlighting the general applicability of common fiduciary law.[295] Courts would presumably set a high standard for the justification of such divided interests.[296] Alternatively, the decision appeared "pro-government," providing broad leeway for acting *against* Indian interests under the loose "nature of government" rationale.[297] Under either view, however, two clear principles emerged. First, in recognizing the same "general" fiduciary duty mentioned in *Mitchell II,* the Court reinforced the notion of a pre-existing duty.[298] Second, while finding that in the case at bar Congress required the government to represent the conflicting interests of the Indians and the Irrigation District, the Court recognized this scenario as an *exception* from the general applicability of common law fiduciary standards.[299] *Nevada* thus af-

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benefactors, but a modified, lower standard of loyalty and care. The government would treat the beneficiaries of all of its mandated attentions not as multiple parties to the same obligation, but as parties to individual relationships, each owed a different level of responsibility. Under this, more likely, analysis, Indian interests appear less secure. Since the *Cherokee Cases*, the "unique" relationship between the government and the Indians has imposed greatly varied levels of care on the government. *See supra* Part III.A-C (describing the progression of Court interpretations of the federal/Indian relationship). Where *Seminole Nation* saw the relationship as reasserting governmental duty, *see supra* Part III.C, *Kagama* and *Lone Wolf* used it to empower Congress to more broadly control its Indian beneficiaries, *see supra* Part III.B. Hence, in *Nevada's* second category of federal/Indian interaction, that in which Congress has divided the government's attentions, the Court thrusts the Indians back to their indeterminate, pre-*Mitchell II* state. While *Mitchell II's* requirements of specific statutory duties remain, *see supra* Part IV.A, the care with which those duties must be executed appears, within this category, likely to fall short of the common law's "exacting" fiduciary standards of loyalty and care.

292. *See Nevada,* 463 U.S. at 145 (Brennan, J., concurring).

293. *See id.*

294. *See id.*

295. *See* Aitken, *supra* note 143, at 140.

296. *See id.* at 141.

297. Barsh, *supra* note 256, at 889.

298. *See Nevada,* 463 U.S. at 142.

299. *See id.*

firmed *Mitchell II*'s assertion that common law fiduciary standards, based not only on the specific statutory and control situation before the court, but also on the underlying fiduciary relationship between the government and the Indians, should apply to Indian claims *unless* the *Nevada* exception applied.[300]

Together, *Mitchell II* and *Nevada* heralded a new era of case-specific Indian law.[301] The appropriateness of common law fiduciary standards required case-by-case analysis, but the recognition of a pervasive, underlying fiduciary bond would color that consideration.[302] Although the Court confirmed the restraining quality of the fiduciary relationship,[303] the "exclusive loyalty" of the government would depend on the applicability of *Nevada's* exceptional circumstances.[304] To hold the government to the high standards of a common law fiduciary in its exercise of statutory or control-based duties to the Indians, Indian plaintiffs now had to prove two elements: 1) that the right affected fell within statutory or control-based governmental responsibilities,[305] and 2) that no conflicting congressional mandates divided loyalties, precluding the application of common law standards.[306] Although both *Mitchell II* and *Nevada* recognized the importance of acknowledging an underlying fiduciary bond beyond the specific provisions of any single interaction, courts did not effectuate this recognition in allocating the procedural burden of establishing that the government owed the Indians common law fiduciary duties in a particular instance.

*C. The Post-*Mitchell II/ Nevada *cases*

Interpretations of the *Mitchell II* and *Nevada* decisions appeared not only in theoretical analyses, but also in the language of subsequent decisions. Exploring the use of the *Mitchell II* and *Nevada* precedents in a series of later cases reveals that while control and dual responsibility helped shape the extent of the government's fiduciary responsibilities, the acceptance of a pervasive, underlying federal/Indian fiduciary bond remained strong.

In a 1986 rehearing *en banc*, the Tenth Circuit adopted its original dissent to affirm *Mitchell II*'s control principles. The case,

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300. *See* Barsh, *supra* note 256, at 886.
301. *See id.* at 864.
302. *See id.* at 887.
303. *See* Aitken, *supra* note 143, at 142.
304. *See id.* at 141.
305. *See* United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 219-22 (1983).
306. *See* Nevada v. United States, 463 U.S. 110, 142 (1983).

Jicarilla Apache Tribe v. Supron Energy Corporation,[307] involved an Indian tribe's claim for federal mismanagement of gas leases on reservation lands.[308] In assessing governmental responsibility, the court cited *Mitchell II* to support the existence of an "all pervasive 'general trust relationship' " as well as the "context-specific trust relationship"[309] it found in statutory language and congressional intent.[310] Viewing these two types of relationships in light of the pervasive role of the Department of the Interior in Indian mineral and resource management, the court found the government had exhibited a "firm desire" to act as trustee for the Indian mines.[311] Such trusteeship placed significant fiduciary constraints on the Secretary's management discretion.[312] *Mitchell II*, according to the Tenth Circuit, had raised the standards of care and loyalty for federal administration of Indian affairs. *Mitchell II* obligated the government, under the same fiduciary duties as a common law trustee, to pursue the action in the Indians' best interest.[313] Additionally, the court reasserted the viability of the canons of Indian construction, stating a need to construe any statutory ambiguity in favor of greater governmental responsibility.[314]

As in *Mitchell II* itself, the *Jicarilla* dissent further clarified the position of the majority. The overturned judge protested the court's en banc interpretation of *Mitchell II*, claiming that *Mitchell II* in fact revoked the idea of an underlying fiduciary duty, requiring instead a purely statutory construction of the federal/Indian fiduciary relationship.[315] The dissent viewed *Nevada* as a final rejection of common law fiduciary standards for governmental trustees.[316]

Despite the dissent's objections, the *Jicarilla* majority's interpretation quickly prevailed. In 1987, the Federal Circuit, in *Pawnee v. United States*,[317] reviewed an Indian class action alleging

307. Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 855 (10th Cir. 1986) (adopting, *en banc*, Judge Seymour's dissent in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563-73 (10th Cir. 1984)). Citations will appear in original Seymour dissent.

308. *See id.* at 1557-58.

309. *Id.* at 1563.

310. *See id.* at 1564 (noting the relative unimportance of specific language in revealing Congress's intent to take on fiduciary obligations).

311. *See id.* at 1564-65.

312. *See id.* at 1567.

313. *See id.*

314. *See id.*

315. *See Jicarilla*, 782 F.2d at 858.

316. *See id.* at 859-60.

317. Pawnee v. United States, 830 F.2d 187 (Fed. Cir. 1987).

violation of the government's fiduciary duties in the management of oil and gas leases.[318] The court identified a general fiduciary relationship between the Indians and the federal government, represented before the Court by the Department of the Interior.[319] Within this general relationship, the court found that it could presume a more particular fiduciary relationship for certain types of interactions under the *Mitchell II* guidelines.[320] According to the Federal Circuit, while *Mitchell II* relied on particular statutory provisions to impose common law fiduciary standards on the government, *Jicarilla Apache* had already demonstrated the viability of a breach of fiduciary duty claim in the area of gas and oil leasing; thus, in claims within this realm of interaction, the court could presume sufficient statutory precision to justify a claim.[321] While statutory language continued to confine the extent of the government's duties, the Court could assume the existence of such duties in a previously examined area of federal/Indian affairs.[322]

The Court of Claims considering an Indian claim for breach of trust over a loss of water rights litigation in which the United States had represented the Indians, interpreted *Mitchell II* in 1991.[323] Resolving the case, *Fort Mojave Indian Tribe v. United States*,[324] the Claims Court followed *Mitchell II* , requiring specific statutory guidelines in the establishment of substantive trust responsibilities.[325] Finding a sufficient statutory framework, the court then looked to private trust law to define the government's fiduciary responsibilities.[326] The court explained that *Mitchell II* had raised the standards for government fiduciaries. When the government acted on behalf of its Indian beneficiaries, it would have to act

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318. *See id.* at 188.

319. *See id.* at 189-90.

320. *See id.* at 190 (discussing the presumption of a specific trust relationship in the management of Indian oil and gas leases).

321. *See id.* at 189-90. This type of assumption, over time, created the automatic imposition of fiduciary duties in many common law fiduciary relationships. *See supra* notes 12-17 and accompanying text.

322. *See Jicarilla*, 728 F.2d at 191-92. In asserting its "assumption" principle, the court added a warning that although it would presume duty in a specific area of Indian affairs, each Indian claimant would have to prove a valid violation of that duty at trial. *See id.*

323. *See* Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417 (Cl. Ct. 1991). The case also involved a Fifth Amendment takings claim beyond the scope of this Note.

324. *Id.*

325. *See id.* at 424. The court asserted, for instance, that the GAA lacked the specificity required to create an enforceable fiduciary relationship, restricting its function to the prevention of state taxation on Indian lands. *See id.* (quoting United Statos v. Mitchell ("Mitchell I"), 445 U.S. 535, 544 (1980)).

326. *See id.* at 426.

like a common law fiduciary, as the "reasonably prudent man" protecting his own property.[327]

The District Court for the District of Columbia undertook the most recent examination of *Mitchell II* and *Nevada* in *Cobell v. Babbitt*.[328] In 1996, the court certified a class of over 300,000 Native Americans claiming mismanagement of trust funds against the Departments of the Interior and Treasury.[329] While the plaintiffs in the case, unlike the Indians in *Mitchell II*, sought only equitable relief,[330] the dispute drew national attention to the still unbalanced relationship between Indians and the federal government.[331]

The plaintiff Indians raised claims for breach of both common law and statutory trust duties.[332] The court, on an issue of first impression,[333] rejected the Indians' common law claim, asserting that common law alone provided an insufficient basis for the alleged breach of the Individual Indian Monetary Account ("IIM") trust duties.[334] Although the court confidently determined that history demonstrated the existence of a federal/Indian relationship built on dependency and trust, it believed the Indians could not seek legal re-

327. *See id.* (quoting G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 582 (2d ed. rev. 1980)). The Court also looked for the elements of the common law trust (trustee, beneficiary, trust corpus), suggesting that, in its view, these elements may be necessary for the imposition of common law responsibilities.

328. *See* Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999).

329. *See* Cobell v. Babbit, 37 F. Supp. 2d 6, 11 (D.D.C. 1999). The funds at issue, Individual Indian Money ("IIM") accounts, developed from the allotment era's tribal land disbursements. As the government managed individual parcels under the extended trust period, revenues, rentals, and resource profits accumulated in the trust funds. Since their allotment, most parcels have passed through nearly seven generations of owners, leaving an average of forty beneficiaries for each trust parcel today. *See Cobell*, 91 F. Supp. 2d at 17 n.14.

330. The *Cobell* plaintiffs presented a two-fold request; a "prospective" court order requiring government to bring its management of IIM accounts in line with common law trust standards, and a "retrospective" accounting of the money contained in the funds. *See Cobell*, 37 F. Supp. 2d. at 11.

331. *See, e.g.*, John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40.

332. *See Cobell*, 91 F. Supp. 2d at 28. The distinction between these two types of claims is critical. The common law claim suggested that, absent statutes, the government steod as trustee for Indian interests. The statutory claim, by contrast, asserted that such responsibilities arose from the legislation first placing the Indian allotments in trust and from subsequent statutes governing the management of those trust funds. A common law fiduciary obligation could attach to either of these substantive arrangements if the expectations of parties and circumstances supported such an assignment. *See supra* Part I.

333. *See Cobell*, 91 F. Supp. 2d at 28-29.

334. *See id.* (no federal common law), *see id.* at 30 (asserting that plaintiffs "must point to rights guaranteed by statute . . . " and reemphasizing the lack of a "persuasive basis" for claims grounded only in the common law).

dress when only the historical relationship defined governmental responsibility.[335]

Drawing a subtle but important distinction, the court did, however, acknowledge the appropriateness of attaching common law fiduciary responsibilities to the government's statutory trust duties.[336] The court found that under *Mitchell II*, where statutes enumerated specific governmental trust duties, common law fiduciary standards would attach.[337] Finding both a comprehensive statutory scheme[338] and pervasive government control within the statutory guidelines,[339] the court used common law fiduciary standards to interpret the meaning of the statute's trust responsibilities.[340]

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335. *See id.* at 28-30. Note that the court did not reject the *existence* of an historical fiduciary relationship, nor negate *Mitchell II* and *Nevada's* assertions that that relationship should play a role in analyzing the appropriate level of responsibility imposed on more specific substantive responsibilities. While an historical fiduciary relationship may not independently support a claim, it may structure the analysis of a more confined claim between the parties. *See supra* Part I.

336. *See id.* at 30.

337. *See id.* The court also contemplated *Mitchell II* and *Nevada* to detormine the appropriate level of governmental responsibility in several preliminary motions. The D.C. court found that under *Mitchell II*, in absence of clear congressional intent to the contrary, the government could be held to the standards of a private fiduciary with regard to its statutorily identified duties. *See* Cobell v. Bahbitt, 30 F. Supp. 2d 24, 33 (D.D.C. 1998). Applying this reasoning, the court referred to hornbook rules for private trustees in condemning the government's behavior during the course of the litigation in its February 1999 decision holding the Secretary of Interior and Secretary of Treasury in contempt of court for failure to comply with a document production request. *See* Cobell v. Babbitt, 37 F. Supp. 2d 6, 23 (D.D.C. 1999) The court discussed the differences between governmental and private trustees, noting that while at common law the beneficiary normally creates the trust, the government, through the exercise of its plenary control, had long ago created the federal/Indian trust relationship. *See* Cobell v. Babbit, 52 F. Supp. 2d 11, 15 (D.D.C. 1999). Nevertheless, the court asserted that, in the nature of the elements involved (trustee, beneficiary, trust corpus), the federal/Indian relationship mirrored its private counterparts. *See id.* While the court found the government's specific duties in the statute, it emphasized that these were not the only sources of government responsibility; a significant historical relationship underlay the modern statutory bonds. *See id.* at 15-16, n.3. Interpreting *Mitchell II*, the court determined that common law fiduciary standards should apply when the government acted under specific statutory guidelines and asserted pervasive control of the questioned Indian activity. *See id.* at 22-23. It found that *Mitchell II* provided a workable example of how much control it should deem pervasive. *See id.* at 23. Furthermore, the court found that *Mitchell II* required application of the rules of common law trust responsibility to the unique federal/Indian relationship unless *Nevada* exempted the government from the duty of exclusive loyalty because of a conflicting, congressionally-mandated interest. *See id.* at 26-27. In disputes involving only the government and the Indians, the D.C. court interpreted *Mitchell II* to require adherence to the common law's high-level standards. *See id.* at 27.

338. *See Cobell*, 91 F. Supp. 2d at 12-13 (identifying the 1994 Trust Fund Management Reform Act, Pub. L. No. 103-412 (1994), as the pertinent statute).

339. *See id.* at 29-30 (noting that the court could also have found jurisdiction under the APA's provisions for limited non-statutory review).

340. *See id.* at 30-33 ("These statutorily based duties must be interpreted in light of the common law of trusts and the United States's 'Indian Policy.' "). The use of the histerical

Although the government dulled some of the holding's impact by stipulating before the trial that the "[f]iduciary obligation of the United States government is not being fulfilled,"[341] the court recognized its duty to find that in creating a statute, "Congress intended to impose on trustees traditional fiduciary duties unless [it] . . . unequivocally expressed an interest to the contrary."[342] Thus, the court held that the government had breached its statutorily defined trust duties to the Indians as well as the fiduciary obligations attached to them.[343] The court did not, as the Indians urged, place the government's trust management under the supervision of a court-appointed master.[344] It did, however, retain jurisdiction over the case, subject to extension, for five years.[345] The decision, a "victory"[346] for the Indian beneficiaries, confined the scope of governmental duties to *Mitchell II*'s statutory guidelines,[347] but effectively embraced *Nevada*'s suggestion that in an activity involving only the government and the Indians, common law fiduciary standards should ensure high standards of governmental care and loyalty.[348]

D. The Resulting Doctrine

Read in the shadow of more than 200 years of federal/Indian history and in the light of recent case law and the canons of Indian construction, *Mitchell II* and *Nevada* reassert the protective force of the federal/Indian fiduciary bond. While acknowledging that the

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fiduciary relationship at this stage reflects *Mitchell II* and *Nevada's* assertions of its important role in shaping federal/Indian interactions. This Note does not question the Supreme Court's requirement of specific standards followed here; it merely suggests that in light of a recognized historical fiduciary relationship, the burden of proof regarding the specificity of the statutory or control-based standards should fall on the defendant government, not the plaintiff Indian. *See infra* Part V.C.

341. *Cobell, 91 F. Supp. 2d* at 33.

342. *Id.* at 42 (quoting N.L.R.B. v. Amax Coal Co., 453 U.S. 322, 330 (1981)).

343. *See id.* at 54-55. In so holding, the court recognized the presence of several factors exaggerating the injuries from the government's breach including the "helpless reliance" of the Indians on the government and case law's admonition that in its relationship with the Indians, the government should be judged with the "most exacting fiduciary standards." *See id.* at 46 (quoting Seminole Nation v. United Statos, 316 U.S. 286, 297 (1942)).

344. *See id.* at 54-55.

345. *See id.* at 54-56.

346. *See id.* at 176 (reminding plaintiffs that they bad won as much of a victory as the law could provide).

347. *See id.* at 31 (quoting *Mitchell II*'s requirement that specific statutes or regulations support claims for breach of fiduciary duties).

348. *See id.* at 32-33 (requiring interpretation of those statutory duties in light of common law trust duties); *see id.* at 126 (assuming that "traditional" fiduciary duties will apply).

historical ties between the two parties may not alone bind the government to high-level common law fiduciary duties, these cases provide for the application of stringent common law standards in the face of specific statutory guidelines and comprehensive federal control.[349] The Supreme Court's 1983 decisions suggest that private fiduciary duties may act as a default standard for government behavior in Indian affairs.[350] While *Nevada* provides for a specific exception—relaxation of the duty of exclusive loyalty when Congress mandates action for a conflicting interest—the common law provides a base fiduciary standard for federal/Indian interaction. While simply including the term "trust" in an agreement will not automatically attach common law fiduciary duties, neither will the absence of the term preclude their application.[351] The modern analysis of the federal/Indian relationship takes a contextual approach to fiduciary determination, generally applying high standards of loyalty and care in recognition of the government's extensive control over Indian life, and acknowledging the importance of an historical fiduciary tie between the government and the Indians in imposing these high standards on Indian claims.[352]

The courts' recognition of an on-going, historical fiduciary relationship, however, is not currently reflected in the administration of Indian claims. Although *Mitchell II* and *Nevada* entitle Indians to common law protection commensurate with the extent of government dominance, Indians challenging the government's exercise of its regulatory powers must leap several evidentiary hurdles before the court will apply common law fiduciary standards to their claim. Even when seeking purely equitable relief,[353] Indians must present sufficient evidence of statutory regulation and pervasive control before asserting the need for common law fiduciary analysis of the alleged breaches of duty. This initial burden potentially shapes the litigation.[354] Required to produce evidence, frequently in government hands, in order to prove that the government's statutory or control-based obligations invoke a high standard of care and

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349. In heavily regulated areas of Indian affairs (land, timber, oil and gas, water rights) courts may, under *Mitchell II* and *Pawnee*, even chose to presume that statutery regulations are sufficiently specific to require adherence to the common law. *See* Pawnee v. United States, 830 F.2d 187, 189-90 (Fed. Cir. 1987) (discussing the implications of *Mitchell II*).

350. *See* Nevada v. United States, 463 U.S. 110, 142 (1983).

351. *See* Unitod Statos v. Mitchell ("Mitchell II"), 463 U.S. 206, 225 (1983).

352. *See* Barsh, *supra* note 256, at 885-86.

353. A purely equitable claim will avoid the constraints imposed by the Indian Tucker Act. *See supra* note 243.

354. *See* Tamar Frankel, *Presumptions and Burdens of Proof as Tools for Legal Stability and Change*, 17 HARV. J.L. & PUB. POL'Y 759, 759 (1994) [hereinafter Frankel, *Presumptions*].

loyalty in handling Indian affairs,[355] the Indians struggle to invoke the shelter of common law fiduciary protections. The importance of the burden of proof and its increased significance in cases of fiduciary relationship only accentuates the inequity of such burden allocation.

V. PRACTICAL IMPLICATIONS OF THE FIDUCIARY RELATION: ASSIGNING THE BURDEN OF PROOF

A. The Significant Role of the Burden of Proof

Among the procedural issues most affected by the fiduciary relationship is the burden of proof. The singular "burden of proof" actually denotes two burdens, the initial burden of producing evidence and the subsequent burden of persuading the court.[356] The burden of production is a "critical mechanism" in establishing a claim, as failure to produce the required evidence can thwart a party's case before substantive consideration.[357] Even if a party satisfies this production burden, however, the party still faces the secondary burden of persuasion.[358] The court's assignment of these dual burdens often determines the success or failure of the parties in a litigation.[359] If a party cannot meet the standards of production or fails in its attempts at persuasion, its claim may falter before reaching trial.[360] The burden of proof, therefore, shapes the litigation from its outset. Because it wields such great influence, the burden of proof often acts not only as a procedural "burden," but also as a powerful tool for legal change.[361] Burden allocation affects the parties' own estimates of their chance of success, as well as increasing or decreasing the cost of presenting their cases.[362] When balanced against the importance of the issue under debate, these factors may encourage parties to pursue or reject claims, to enter

355. *See supra* Part I.

356. *See* KENNETH S. BROUN ET AL, MCCORMICK ON EVIDENCE § 336 (4th ed. 1992).

357. *See id.*

358. *See id.*

359. *See* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1052 (1991) (explaining that if the principal party has the burden of demonstrating an agent's disloyalty or misconduct, the inability to document this behavior will preclude a successful claim).

360. *See id.*

361. *See* Frankel, *Presumptions*, *supra* note 357, at 759.

362. *See* Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 677-78 (1997).

settlements, or to engage their causes more vigorously.[363] Thus, burden placement may change the behavior of parties, discouraging some claims even before the court evaluates the adequacy of production or persuasion.

In most cases, the burden of proof follows the burden of pleading; thus, the plaintiff will have to produce evidence to substantiate each of her claims.[364] A plaintiff alleging breach of trust, for example, must demonstrate the existence of both a trust and a breach thereof. In certain circumstances, however, the court may choose to reallocate the burden of proof.[365] If a plaintiff's claim is most likely valid, if the plaintiff faces unusual expense in presenting evidence or has a great deal at stake, or, if a "wrong" outcome presents the possibility of great social harm,[366] the court may choose to shift the burden of proof to the defendant. If the court repeatedly allocates the burden of proof to the defendant for a certain type of case, the placement will become standard, reflecting the court's understanding of the "status quo" between the parties.[367] A party adhering to the court's status predictions benefits from a presumption of correctness, while a party challenging the established "norm" must both produce evidence and adequately persuade the court before altering the status quo. If these burdens prove unduly great, their allotment may deter further challenges to the norm.[368] Through repeated allocation, the burden of proof develops a favorable protection for the court's interpretation of the existing situation.[369]

B. The Effect of the Fiduciary Relationship

The historical fiduciary relationship between the government and the Indians assigns federal/Indian interactions to the often "elusive" realm of fiduciary law.[370] Fiduciary relationships may range from the formal agreements between trustees and beneficiaries, agents and principals, or guardians and wards, to the more personal encounters between doctors and patients, administrators

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363. *See id.* at 678.

364. *See* BROUN, *supra* note 356, at §336.

365. *See* Hay, *supra* note 362, at 675.

366. *See id.*

367. *See* Frankel, *Presumptions*, *supra* note 354, at 763.

368. *See id.* This may either deter valid claims or, when appropriately utilized, provide necessary protection for an existing social relationship.

369. *See id.*

370. *See* DeMott, *supra* note 12, at 879.

and employees, and even parents and children.[371] While seemingly diverse, in each of these interactions, a "fiduciary" holds the power and responsibility to act on behalf and in the interests of the "entrustor."[372] Courts may attach fiduciary responsibility to a particular relationship because it is of a recognized, previously established fiduciary nature (the archetype model),[373] because the purpose of the relationship is to serve the interests of only one party (the purpose model),[374] or because the elements of dependence, vulnerability, influence, trust and dominance signal the presence of a fiduciary relationship (the circumstantial model).[375] These structural similarities unite and connect the unique relationships before the law, reflecting the expectations of the parties, and the courts, that a heightened standard of care and loyalty should guide behavior within these interactions.[376]

Traditionally, abused entrustors turned to courts of equity for breach of confidence remedies.[377] Today, laws binding fiduciaries to duties of care and loyalty protect the interests of entrustors from the inherent risks of delegating power and privilege to others.[378] Within the obligations of relationship, the extent of powers delegated and the availability of other protections, like supervision,[379] may cause the court to view a fiduciary's responsibilities to his entrustor more or less strictly.[380] If, for example, a beneficiary empowers a trustee only to manage a specific piece of land, the court will impose duties far less strict than the standards of care and loyalty imposed on a trustee with complete control of an estate's affairs.[381] Even within a single relationship, fiduciary duties may apply to only some areas of interaction.[382]

Unlike a contractual relationship in which the terms and intent of the parties' agreement define their interactions, more gen-

371. *See* Frankel, *Fiduciary Law*, *supra* note 14, at 795-96.
372. *See id.* at 800.
373. *See supra* note 15 and accompanying text.
374. *See supra* note 16 and accompanying text.
375. *See supra* note 18 and accompanying text.
376. *See* Frankel, *Fiduciary Law*, *supra* note 14, at 799.
377. *See* DeMott, *supra* note 12, at 880; *see also supra* Part I.
378. *See* Frankel, *Fiduciary Law*, *supra* note 14, at 808.
379. *See* Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209,1212 (1995) [hereinafter Frankel, *Default Rules*] (describing the difficulties of maintaining adequate safeguards in the fiduciary relationship).
380. *See* Frankel, *Fiduciary Law*, *supra* note 14, at 810.
381. *See id.*
382. *See supra* note 19 and accompanying text (explaining that what is fiduciary for one purpose may not be fiduciary for all purposes).

eral moral and ethical ties bind the parties in a fiduciary relationship.[383] As "[e]ven entrustors who are in a strong bargaining position before they enter the relationship become vulnerable immediately after they entrust power or property to their fiduciaries,"[384] courts will generally subsume the specific terms of an agreement to the need for institutionalized protections of the entrusting party.[385] Recognizing that most entrustors lack the resources and ability to monitor the work of their fiduciaries to ensure it meets the common law's high standards of duty and care, especially when those fiduciaries are large public entities, courts develop and impose substantive and procedural guidelines to ensure the benefits and security of the entrustor.[386] While not wanting to discourage parties from entering relationships in the dominant fiduciary role, courts have demonstrated a belief that the fiduciary alone should bear the cost of protecting the entrustor within the relationship.[387]

This desire to protect fiduciary relationships leads to deliberate allocation of the burden of proof in claims for breach of fiduciary duties. At common law, when a court recognizes a fiduciary relationship as well established, it will allot the burden of proving the relationship's existence to the defendant fiduciary rather than to the plaintiff entrustor.[388] Because the appearance of an on-going relationship increases the likelihood that the plaintiff's characterization is accurate, and because, for an entrustor, the costs of producing evidence to demonstrate the existence of a fiduciary relationship may be prohibitively high,[389] the court shapes the litigation around an initial presumption favoring the plaintiff's assertion of fiduciary duties. The court's burden allocation acknowledges and supports the status quo, requiring the established fiduciary to *disprove* the relationship, rather than demanding that the entrustor

383. *See* Frankel, *Fiduciary Law*, *supra* note 14, at 830; DeMott, *supra* note 12, at 887.

384. *See* Frankel, *Default Rules*, *supra* note 379, at 1216.

385. *See* DeMott, *supra* note 12, at 887 (observing that a "fiduciary obligation sometimes operates precisely in opposition to intention as manifest in express agreements.").

386. *See* Frankel, *Default Rules*, *supra* note 379, at 1212, 1275. Additionally, because the government has so much more power than an individual or corporate actor, an act by a fiduciary will pose a greater risk of harm when that fiduciary is a governmental rather than a corporate public entity. *See generally* PETER H. SCHUCK, SUING GOVERNMENT 64 (1983) (observing that, by virtue of the government's authority, a government actor has a greater capacity than a private fiduciary to do harm).

387. *See* Frankel, *Fiduciary Law*, *supra* note 14, at 834.

388. *See* Hay, *supra* note 362, at 674.

389. *See* Cooter & Freedman, *supra* note 359, at 1052 (explaining that the difficulty of proving a relationship is fiduciary is particularly great for the entrustor because evidence of action or inaction usually lies with the fiduciary who has been charged to act on the entrustor's behalf).

substantiate its existence.[390] Similar provisions, allowing the court to shift the burden of proof to the defendant fiduciary in cases of apparent mismanagement or self-dealing, reemphasize this idea.[391] Through these recognitions of existing relationships, the court uses burden allocation to protect the beneficiary's "trust" in his fiduciary.[392]

C. The Burden of Proof in Federal/Indian Trust Claims Under Mitchell II *and* Nevada

At common law, when the court deems a fiduciary relationship firmly established, the burden of proof for demonstrating basic responsibility shifts from the claimant beneficiary to the defending fiduciary.[393] Not so for the Indian plaintiff. Despite the firm historical foundation for a binding fiduciary relationship between the government and the Indians, the beneficiary Indian, under *Mitchell II*, must prove sufficient regulation and control to justify application of private fiduciary standards.[394] Furthermore, under *Nevada*, the beneficiary Indian, not the defending government, must show that Congress has not mandated conflicting responsibilities to the government, which would excuse adherence to the strict common law standards of loyalty.[395] While *Mitchell II* and *Nevada* expanded the applicability of common law protections to the federal/Indian relationship, without procedural revisions, their principles bring little real change.

Such change, however, is possible. *Mitchell II* and *Nevada* reaffirmed the Court's earlier declarations of governmental responsibility.[396] In both cases, the Court cited *Seminole*'s assertions that the federal/Indian relationship was a unique, protective bond.[397] Using the *Seminole* analysis to support modern requirements of specificity, control, and exclusive interaction for the imposition of

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390. *See id.* at 1075.

391. *See* Frankel, *Fiduciary Law*, *supra* note 14, at 824-25.

392. *See* Frankel, *Presumptions*, *supra* note 354, at 776. Notably, as Professor Randall Thomas of Vanderbilt University Law School suggested, the court in corporate cases generally requires the plaintiff to prove facts suggesting some violation of this fiduciary bond before allowing plaintiffs to proceed with their claim.

393. *See* Hay, *supra* note 362, at 674.

394. United States v. Mitchell ("Mitchell I"), 463 U.S. 206, 222, 225 (1983).

395. Nevada v. United States, 463 U.S. 110, 141-42 (1983). While it may be possible for Indians to document these preliminary issues through normal discovery, that discovery will often prove difficult when the necessary evidence lays in government control.

396. *Mitchell II*, 463 U.S. at 225; *Nevada*, 463 U.S. at 127.

397. *See Mitchell II*, 463 U.S. at 225; *Nevada*, 463 U.S. at 127.

fiduciary responsibilities, the Court suggested that this long recognized fiduciary relationship, in the particular circumstances, deserved the full protections of the common law.

The *law* relating to federal/Indian relations is established. *Mitchell II* and *Nevada* codified and confirmed 200 years of policy and interpretation. As early as 1791, President George Washington, in his annual address to Congress, asserted the importance of acting with philanthropy towards "an unenlightened race of men, whose happiness materially depends on the conduct of the United States."[398] Chief Justice Marshall referenced the same dependant relationship in resolving the *Cherokee Cases*, describing the government's responsibility toward the Indians as like that of a guardian to his ward.[399] The Court drew power from the recognized federal/Indian relationship during the expansionist 1880s to justify increasing governmental encroachment on Indian territory.[400] Today, the existence of that trust relationship supports the very definition of Indian identity.[401] The fiduciary relationship espoused in *Mitchell II* and *Nevada* is not a new creation of the Court. It reflects the product of the 200 year evolution of Indian law.

The *application* of that law, however, remains subject to change. Recognizing the principles behind *Mitchell II* and *Nevada*—the presence of a general fiduciary relationship and the protection of the Indian canons of construction—courts should shift the burden of establishing *Mitchell II* and *Nevada*'s statutory and control-based dominance necessary to justify the imposition of common law fiduciary obligations from the plaintiff Indian to the defendant government in breach of duty claims. The Court has recognized that in the federal/Indian relationship, the substantive supports for fiduciary duties arise not only from the particular regulations and government actions in individual cases,[402] but also from a more pervasive, historical fiduciary bond between the government and the Indians.[403] A court, with the support of a 200 year record, may reasonably presume that the elements of trust, vulnerability, dominance, influence and dependence underlie every interaction be-

398. *See* President Washington's Third Annual Message (October 25, 1791), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY (Francis Paul Prucha, ed., 2d ed. 1975) (emphasis added).

399. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

400. *See* United States v. Kagama, 118 U.S. 375, 382-385 (1886).

401. *See* DESKBOOK, *supra* note 29, at 28.

402. *See Mitchell II*, 463 U.S. at 219-20.

403. *See id.* at 225; *Nevada*, 463 U.S. at 127.

tween the government and the Indians.[404] Furthermore, the court may also, on the basis of a thorough historical demonstration, presume that the expectations of the parties and even the purpose of the agreement, suggest a fiduciary relationship. Acting on these well-founded assumptions, the court may fairly place on the government the burden of *disproving* a 200 year status quo, of showing that the *Mitchell II* standards of statutory specificity and broad control and the *Nevada* requirement of exclusive interaction are not met.[405]

Even faced with such a burden, the government needs little to rebut a court's assumptions in cases in which such standards should not apply. To rebut the presumption of the applicability of common law fiduciary duties, the government need only show that 1) it has a congressional mandate requiring a division of loyalties, thus permitting, under *Nevada's* exception, a lower standard of loyalty and care for execution of government responsibilities;[406] 2) that it lacks specific statutory guidelines in this area of administration and thus cannot be held for violation of any particular duty;[407] or 3) that control of this area of Indian affairs has returned to the Indians to an extent sufficient to divest the government of the required "pervasive" control.[408] Establishing any of these three elements could return the burden to the Indian plaintiff to justify application of the common law rules.

The burden, for the government, is not a difficult one to bear. Arguably, if the government may so easily satisfy these requirements, there is no reason to shift the burden at all. The important question, however, is not the practical size of the burden on the government, but the inherent unfairness, in light of history and the rules of fiduciary law, of leaving that burden with the Indian plaintiffs on whom it currently falls. The government may have to do little to address the shifted burden, but even that little represents an important step towards fair resolution of Indian claims. *Mitchell II* and *Nevada* crystallized Indian law's acknowledgement of the imbalanced, but on-going, federal/Indian relationship. Reallocation of the burden of proof in Indian claims against the government can

404. *See supra* note 17 and accompanying text (explaining the circumstantial model of fiduciary relationships).

405. *See supra* note 392-94 (discussing the burden of proof in cases of established fiduciary relationship at common law).

406. *See supra* note 295 (exploring the possible standards of care under the *Nevada* exception).

407. *See Mitchell II*, 463 U.S. at 224.

408. *See id.* at 222.

apply that acknowledgment to the resolution of disputes throughout Indian law.

VI. CONCLUSION

"Great nations, like great men, should keep their word."[409] The Supreme Court has taken the government's duty towards the Indians very seriously. In its *Mitchell II* and *Nevada* decisions, the Court raised the bar for government behavior, affirming the trend towards exclusive emphasis of the protective nature of the federal/Indian relationship that Marshall first contemplated in 1831.[410] In administering subsequent cases, lower courts should not ignore the Supreme Court's mandate. Without a reallocation of the burden of proof, the Supreme Court's standards offer little real change. Great nations, like great men, keep their word. The United States, despite repeated promises to the Indians, has not fulfilled its fiduciary obligations.[411] If the burden of proof is reallocated for Indian breach of fiduciary duty claims, however, this nation may, after two hundred years, begin to keep its promise to protect the Indians. While courts "cannot simply take over the role of [an] agency,"[412] controlling and mandating the government's role in Indian affairs, they can, by enforcing their recognition of the government's fiduciary obligations and thus shifting the burden of proof in pure federal/Indian claims, begin to make a change.

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409. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

410. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

411. *See* Cobell v. Babbitt, 91 F. Supp. 2d 1, 53 (D.D.C. 1999) (including trial testimony of Secretary of the Interior Bruce Babbit affirming the long history of government fiduciary obligation to the Indians and the government's longstanding awareness of its failure to live up to that obligation).

412. *Id.* at 53-54 (explaining why plaintiffs remedies are limited by the scope of legal remedies).

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