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FEDERAL TRUST RESPONSIBILITY AND CONFLICTS OF INTEREST: ENVIRONMENTAL PROTECTION OR NATURAL RESOURCE DEVELOPMENT?*

MR. RICE:[1] On a serious note today, if you would. As the introduction said, I'm an Okie. For those of you who may not be familiar with what is going on down there, the Federal Building was bombed yesterday. The HUD Indian desk was in there, as well as a lot of federal employees who dealt with Indians extensively in the state of Oklahoma. And I'd like to reserve just a moment of silence; I'd like each of you in your own way, if you would, to ask our Creator to make a way for those people and their loved ones today. Thank you very much.

Trust responsibility is a wonderful thing. I have wondered for nigh unto 15 years what it means, how you enforce it, what it is to be enforced, and those types of things. Perhaps the best way I can express my frustrations with it is to tell a war story. I represented a tribe who entered into oil and gas leases. One of those leases was relatively old but had a clause that said that if that lessee were to assign, sublet, or otherwise convey any interest in the lease whatsoever absent the express consent of the Secretary of the Interior, that act was a material and substantial breach of the terms and conditions of the lease and cause for cancellation. The tribe looked around one day and realized that it had a lease with this oil company and hadn't seen it in four or five years. In fact, about 14 or 15 other oil companies were out there on the leases, wandering around drilling wells, working wells, hauling off oil. And the tribe scratched its head and asked the BIA, "Well, who is our lessee?" And the BIA in its ultimate wisdom went through its records and said, "XYZ Oil Company is your lessee of record." And the tribe said, "We haven't seen XYZ in four or five years. Who are all these other oil companies?" And the BIA said, "It doesn't matter. We don't know. They must be XYZ operators." And the tribe went to XYZ and said, "Who are all these other oil companies?" "Oh, those are just our drillers and pumpers." And then we got a notice that a bank was thinking about foreclosing on the tribe's trust property because the mortgage entered into by one of these drillers on the tribal trust property was in default. The tribe came to me and said, "Brother, what's going

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1. Currently Director of the Northern Plains Tribal Judicial Training Institute at the University of North Dakota School of Law. Mr. Rice is also a member of the North Dakota Supreme Court's Committee on Tribal and State affairs.

on?" And I did what I think any self-respecting Indian lawyer would do. I ran over to the BIA and looked through all of their lease records, and everything goes to XYZ, the lessee of record. So I went down to the county courthouse, and in about 20 minutes came up with (I would say 37) assignments and conveyances and subleasings of the tribal mineral estate. That convinced me very quickly that we had a problem and that it was going to take more than what I could do in a stand up title opinion over there.

So we ordered formal title opinions from the real estate companies in the area and came back with a stack of them about so thick (indicating) and found out that, in fact, there had been horizontal assignments, there had been subleases, there had been mortgages, there had been all kinds of other activity, buying, selling, transferring the tribe's mineral estate. When we had the documents in hand and the written record in hand to prove it, I said to the tribe, "We've got two options. We could run over and file in tribal, federal, or possibly state court, or we can go over and see your trustee, the BIA. I hate to beat myself out of a fee, but they're supposed to take care of this stuff for you." So we decided we'd go see what the BIA had to say about it. We went to visit the area director and walked into his office, (he had his realtor guy, his solicitor, and all of his other guys there) laid down a stack of title abstracts about so high on top of his desk with nice yellow stickies in there at every one of them we wanted him to see, and said, "See this here lease and see this here clause that says this is time for cancellation of the lease? See these 37 different places where they breached the lease and lied to you? We want you to cancel the lease." And the long and short of it was the BIA area director said, "Oh, we can't cancel this lease. It might make the oil company mad, and they'll sue us." And we said, "How about the trust responsibility?" And they said, "Oh, they'll get mad, and the oil company might sue us."

The long and short is the tribe had to bear the brunt of the lawsuit. We did cancel the leases and got some decent damages out of it in the tribal court system. And the trust responsibility of the United States is still hanging out there somewhere. So that's what our panel is going to talk about. And I would like to introduce them very shortly. I'm not going to tell a whole bunch of lies about them because most of their vitas are in your packet. We have Richard Monette down on the end, law professor from the University of Wisconsin; Bruce Duthu, law professor at Vermont; one of my recognized elders in the field of Indian law, Brother Sam Deloria from the American Indian Law Center at the University of New Mexico, Albuquerque; Robert Clinton from Iowa; and the last of my colleagues here, Judith Royster from Tulsa. She will be

presenting her paper, *Equivocal Obligations: The Federal-Tribal Relationship and Conflict Development of Tribal Resources.*

PRESENTATION BY JUDITH ROYSTER

Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources.

MR. RICE: Professor Royster, by the way, is the Director of the certificate program in Native American law that is active at the University of Tulsa School of Law. Next on my list we have Brother Clinton, who is currently the Wiley B. Rutledge Professor of Law at the University of Iowa College of Law. He took his B.A. from Michigan and his J.D. from the University of Chicago. He is also an Associate Justice of the Cheyenne River Sioux Tribal Appellate Court and walks around with a book called AMERICAN INDIAN LAW—CASES AND MATERIALS under his arm so that everybody can see his name on it in bright, bold letters.

MR. CLINTON: Thank you very much. With your permission I'm going to sit here. Can you hear me in the back? In commenting on Professor Royster's paper, I'm not going to comment directly on its many interesting points. Rather, I want to use most of my time to set the trust responsibility in some framework. In light of that framework, I will try to at the end of my remarks to tackle some of the questions that Professor Royster has raised since these are important questions. I would submit to you that probably no doctrine of federal Indian law is as conflicted in Indian country and among Indian tribes as the trust responsibility. There's a love/hate relationship among this doctrine among tribes and in Indian country. When the mineral lease is negotiated, for example, and the BIA insists on approval saying to the tribal officials "You've got to do this and you've got to do that," the tribal officials quite naturally respond to the BIA, "What are we? Children? Why are you looking over our shoulder? We're sovereign nations. Go away." But, of course, existing federal statutes indicate that the mineral lease must be approved. Federal approval is part of the modern essence of the federal trust responsibility. The 1938 Indian Mineral leasing Act[2] and the Mineral Development Act of 1982[3] both expressly impose the fiduciary requirement of federal approval of the

2. Act of May 11, 1938, c. 198, 52 Stat. 347, codified at 25 U.S.C. §§ 396a-396g. The requirement for federal approval of Indian mineral leases is set forth at 25 U.S.C. § 396a.

3. Pub. L. 97-387, 96 Stat. 1938, codified at 25 U.S.C. §§ 2101-08. The federal approval requirement for Indian mineral development agreements is set forth in 23 U.S.C. § 2102(a).

lease or other mineral agreement. This statutory requirement of approval is the basic problem that Professor Royster's paper addresses. While tribes object to this requirement of federal approval as a paternalistic relic of colonialism, when the federally approved mineral development deal goes sour, if it does, and the tribe often looks around, as in the case Bill Rice poses, for a trustee to pick up the pieces. In such cases, the Bureau of Indian Affairs and the affected tribe switch gears. The tribal officials say to the federal authorities, "Wait a minute. There's a trust responsibility. We want to sue you. You let us sign an improvident deal" or "You let us get into a situation where we have all of these lessees and assignees and people waiting to foreclose on interests that they can't foreclose on running around our reservation and it's your fault, not ours." And the tribe wants to be able to sue. On the other hand, the BIA, which was so eager to get involved in the mineral project at the front end, now claims that it is not an insurer of the deal and wants to have as little to do with the project as possible.

These examples highlight the lack of any coherence to the perceptions of the trust responsibility in Indian Country. Now I think the trust responsibility has not historically been a monolithic, stable doctrine. It has been misunderstood. It has evolved and changed dramatically over time. I think one cannot understand the questions that Professor Royster's paper addresses unless one understands that historic evolution. Furthermore, it is important to understand that some of the demands that tribes make on the United States as trustee and which Professor Royster's paper addresses come out of a certain way of looking at the relationship between the United States and the tribes. Frankly, I think much of that set of perceptions needs to be seriously rethought.

Professor Royster's paper, like many conventional discussions of the trust responsibility, begins by looking at the case of *Cherokee Nation v. Georgia*.[4] *Cherokee Nation* is usually seen as the origin of the trust responsibility. Specifically, many credit Marshall's reference in *Cherokee Nation* to tribes as domestic dependent nations, as originating the trust responsibility. The dependency aspect of that phrase is often thought to be the beginning of the doctrine of the Indian trust responsibility. Now that's not to say that the doctrine did not have antecedents. There literally were colonial trustees occasionally appointed to Indian tribes like the Mohicans, for example. But putting those colonial aspects to the side for a second, we usually trace the doctrinal roots of the trust responsibility to Chief Justice Marshall's

4. 30 U.S. (5 Pet.) 1 (1831).

reference in *Cherokee Nation* to Indian tribes as domestic *dependent* nations, like wards in a state of pupilage.

In general, Marshall did not have federal management of Indian land in mind at all when he wrote about dependency in *Cherokee Nation*. The reference to dependency in *Cherokee Nation* played the same role in that opinion that the beginning of this famous opinion in *Marbury v. Madison*[5] played. Chief Justice Marshall's reference to dependence was a way by which he could decide the case without deciding the case. In both cases he held that the Court did not have any jurisdiction to decide the case. What was all this other stuff about dependence then?

MR. DELORIA: What were all them other sentences?

MR. CLINTON: Yes. As my friend P.S. Deloria at the end of the table says, "What were all them other sentences about?" What they were about involved deciding the merits of the case, saying something about the merits in a context where the chief justice knew he couldn't get his opinion enforced. And what was all this stuff about the dependence about? Well, the Cherokee had already been to Congress. They'd already been to the president to enforce their treaties. They had been consistently told that the United States would not enforce the duties of protections established in the Treaty of Hopewell[6] and the Treaty of Holsten.[7] Thus, the United States government had first solemnly promised the Cherokee Nation protection from intrusion and invasion in these treaties and within a quarter-century, the political branches of the federal government then turned around and indicated to the Cherokees that those promises would not be fulfilled precisely when such protection was required. This duty of protection was a bargained-for arrangement.

The discussion in *Cherokee Nation* about dependence, therefore, was not, as some scholars have argued, about racial inferiority or subjugation. Neither was it about land or resource management, or dependence in that sense. It was about the duties and obligations of protection that the United States owed to the Cherokee Nation. Marshall's references to dependence and wardship therefore represented a criticism of the political branches of government for defaulting on those obligations. Notice that federal obligations of political and military protection have nothing whatsoever to do with land management, with reviewing tribal decisions about resources, or anything else.

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5. 5 U.S. (1 Cranch) 137 (1803).
6. Treaty with the Cheroke Nation, Nov. 28, 1785, 7 Stat. 18.
7. Treaty with the Cherokee Nation, July 2, 1791, 7 Stat. 39.

Well, then how did we get to a position in which the federal government assumed primary management responsibility for most Indian land and resources? The answer lies in the fact that the trusteeship notion was utilized in the late nineteenth century as a source of federal power, of federal oversight, rather than, as Marshall had intended it, as a source of federal protective obligation toward the tribes. This late nineteenth century use of the trusteeship was part and parcel of late nineteenth century American colonial expansion and imperialism. During this period, the federal trusteeship over Indian affairs was used to justify a newly emerged plenary power doctrine in Indian affairs. The notion of plenary power over Indian affairs did not exist at the time of the framing of the Constitution but, rather, emerged instead in the *Kagama*[8] case, the *Lone Wolf*[9] case, and in the *Sandoval*[10] case. The notion of plenary federal power therefore historically emerged through the Court's warping of the *Cherokee Nation* opinion reference to dependence. During the late nineteenth and early twentieth century, colonialist 'white man's burden' argument, which assumed the inferiority of the Indians and the need for federal supervision of their resources, based on their alleged incapacity. Out of that myth emerged the various leasing and economic development statutes that require federal supervision, including the surface leasing statutes,[11] mineral leasing statutes,[12] and timber development statutes.[13] That these statutes which, for the first time, call for federal oversight of tribal land management decisions first emerged during the late nineteenth and early twentieth centuries is not surprising because this period represented the height of American imperialism. In some of my scholarship, I have identified the colonialism in federal Indian law as emerging during this period, the late 19th, early 20th century.[14] It was part of American imperialism and expansionism during this period.

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8. United States v. Kagama, 118 U.S. 375 (1886) (sustaining on trusteeship grounds the power of Congress to enact criminal statutes for intra-tribal crimes theretofore exclusively handled by the tribes).

9. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (sustaining the power of Congress to unilaterally abrogate or ignore the provisions of prior Indian treaties on the basis of the federal government's plenary power over Indian affairs derived from the trusteeship).

10. United States v. Sandoval, 231 U.S. 28 (1913) (sustaining on trusteeship grounds the plenary power of Congress to apply the Indian liquor control laws to the New Mexico Pueblos despite the fact that their lands were held in fee simple and their members were citizens).

11. *E.g.*, 25 U.S.C. § 415.

12. *E.g.*, Act of Mar. 3, 1909, c. 263, 35 Stat. 783, codified at 25 U.S.C. § 396; Act of May 29, 1924, c. 210, 43 Stat. 244, codified at 25 U.S.C. § 398; Act of Mar. 3, 1927, c. 299, 44 Stat. 1347, codified at 25 U.S.C. §§ 398a-398e; Act of May 11, 1938, c. 198, 52 Stat. 347, codified at 25 U.S.C. §§ 396a-396g.

13. *E.g.*, 25 U.S.C. §§ 406, 407.

14. *E.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993).

Thus, the trusteeship to which Professor Royster's article is addressed is precisely part of that same period. The necessity of having federal approval for land use, for having federal approval for leases, for federal oversight of all kinds of tribal decision making as if the tribe were incapable of managing its economic affairs itself doesn't come from Marshall and it doesn't come from *Cherokee Nation* but it comes from this late nineteenth century colonial expansion.

The trusteeship evolved again beginning in the 1930s and greatly accelerating after World War II with the emergence of the Indian Claims Commission. At this point in time, i.e., during the post-holocaust era, the United States sought to try to do something about prior harms, and other wrongs to Indians, and the process created many more, through the Claims Commission. During this period the legal doctrine of the federal trusteeship over Indian affairs evolved into a source of right. All of a sudden the trusteeship, instead of being either a source of federal obligation or an authorization for federal power, became a theory under which Indian tribes could sue the United States for something that the United States had done wrong to them in the past. Notwithstanding the fact that the opinion in *Cherokee Nation*, the alleged source of the trusteeship, indicated that Indian tribes could unilaterally sue in federal courts, the trusteeship metamorphosed into a source of legally enforceable rights in the last half of the twentieth century. Often such cases involved federal mismanagement of Indian resources.[15] And until the *Nevada*[16] case, to which Professor Royster's paper in part is addressed, this source of right generally applied classic private trust law principles. To some extent, the discussion in Professor Royster's paper approaches the problem through classic trust law principles.

I want to turn to the question of whether classic trust law principles can be applied to this unique relationship between Indian tribes and the federal government. I want to do that by calling your attention to a *Navajo* tribe case, not the one mentioned in Professor Royster's paper, although it's factually very similar, but a slightly different, later case. The reason I'm carrying around this book to which Bill referred is because it has the citation and a description of the case. The case in question is *Navajo Tribe vs. United States*.[17] There were a number of tribal claims involved in this case surrounding uranium mining, most of it originating from the controversial Manhattan project, i.e., the development of the atomic bomb. The case centered on secret uranium

15. *E.g.*, Seminole Nation v. United States, 316 U.S. 286 (1942); Menominee Tribe v. United States, 101 Ct. Cl. 10 (1994); Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975).

16. 463 U.S. 110 (1983).

17. 9 Cl. Ct. 227 (1985).

mining that occurred on the Navajo reservation during World War II. One of the claims, the one I want to talk about for a second, is a claim for breach of the trust duty of undivided loyalty because the United States went out and explored for uranium secretly on the Navajo reservation, of course, found it. Having discovered the badly needed uranium, the federal government eventually decided that it was going to enter into leases for the uranium mining with the tribe, but it never sought or secured permission to explore for the mineral on Indian land in the first place. It did it secretly and quietly during the height of World War II, attempting to get the highly secret Manhattan project off the ground. Now, this case, decided after *Nevada*, was decided very differently than a similar *Navajo Tribe*[18] case involving helium development, which is cited in Professor's Royster's paper, which is decided before *Nevada*. I want you to imagine attempting to apply classic trust principles in the Manhattan Project case. What would a private trustee be obligated to do if the trustee had the same conflicting burdens of national defense during World War II and burden imposed by federal statute of representing the land management interests of the Navajo tribe? Well, the duty of undivided loyalty would require that the private trustee's conflict of interest be resolved and generally, one would hope, the resolution would come by the trustee stepping down in favor of a trustee who was not so conflicted. Can the United States, the trustee for Indian resources, step out of its conflicted interests in the Manhattan Project? In this case was it supposed to just stop developing the atomic bomb because it also was trustee for the Navajo tribe? Or, alternatively, was it supposed to develop the atomic bomb and stop being the trustee for the Navajo tribe? Notice that, unlike a private trustee, the United States simply cannot resolve its problems by resorting to the behavior we would expect in like circumstances of the private trustee. Whatever else is true, there will always be competing national interests that the United States feels on occasion it must pursue.

I read *Nevada*, the case that Professor Royster discusses extensively, a little bit differently than her paper presents it. I read it as reflecting the Supreme Court's realization that in the context of conflicts of interest, private trust law analogies will work for enforcing the Indian trust responsibility. What I see the Court as having decided in *Nevada* was that it opted for procedural, rather than substantive trust protections. What do I mean by that? Instead of applying the substantive law generally applicable to the obligations of trustees in the private sphere, the Court will look to the question of whether procedurally the United

18. 364 F.2d 320 (Ct. Cl. 1966).

States has tried to separate out its various interests and to zealously and separately represent the Indian interest within a decision-making process, often taking place possibly wholly within the Department of Interior. If the United States has separately presented and argued for the Indian interest, then federal government has met its trusteeship obligations, notwithstanding its conflict of interest. If, on the other hand, the federal government ignored the procedural requirements of separately representing the Indian interests, then it has not satisfied its trust obligations. Notice that on this reading of the *Nevada* case, the outcome is irrelevant. The only important question is the antecedent procedure under which the decision was made.

To some extent, the Court's approach is like the solution to the problem of conflict of interest posed by President Nixon's proposal for an Indian Trust Council Authority. The idea that formed the core of that proposal was that because the United States always has a conflict of interest, procedurally there has to be an entity or agency that will only have the Indian trust obligation at heart. Now, if I am correct about my interpreatation of the *Nevada* case, the Court has clearly moved away from the idea of full substantive trust responsibility as a legally enforceable obligation against the United States. Instead, it has imposed a legally enforceable procedural obligation to make sure there is full representation of Indian interests. But if there was full representation, then you cannot sue the federal government for breach of trust based solely on actual outcome. Incidentally, this approach is precisely what I understand the Indian Mineral Development Act to provide.[19] The outcome is not the sole determinant. The United States is not an insurer of the success of the bargain.

In Iowa we have a slogan you hear around, you can't make a silk purse out of a sow's ear. If I'm right that the United States is always conflicted as a trustee, then it seems to me that in Indian country the better way to begin to think about the process of mineral and other land development vis-a-vis the trustee is to abandon efforts to enforce substantive limitations of undivided loyalty on the trustee. You're not going to get undivided loyalty however much you try to enforce an obligation. Rather, instead of trying to make a silk purse out of a sow's ear, federal Indian law should move back to Chief Justice Marshall's conception of the trust responsibility as a doctrine that simply involves federal legal obligations of protection of Indian tribes against intrusions from third parties on their lands, resources, and sovereignty. Federal Indian law should move away from the models of federally supervised

19. 21 U.S.C. § 2103 (e).

Indian resource development set forth in the 1938 Mineral Leasing Act and the 1982 Indian Mineral Development Act. Rather, the tribes, with technical assistance from the United States, should assume the ultimate responsibility for their deals. No federal approval should be required. The tribal governments should be required to assume the political accountability if and when those deals go sour.

MR. RICE: Thank you very much. Perhaps one of the things Professor Clinton was addressing was the dilemma that Dean Davis, from the University of North Dakota Law School, mentioned over lunchtime at a little conference up here on the bench. Maybe one of the problems is when we Indians go over to the State and federal courts, we find that there is a lack of consistency and predictability about what law is going to be applied, and what the outcome might be given the circumstances of the case. And perhaps that's kind of where we're coming out.

The next fellow who's going to come up and talk, (unlike me who went from university to university), got invited back to Yale after his B.A. to get his J.D. He's been a deputy assistant secretary for Indian Affairs in the Department of the Interior. He's an enrolled member of the Standing Rock Sioux Tribe and currently is the Director of the American Indian Law Center in Albuquerque, my friend Philip Sam Deloria.

MR. DELORIA: Thank you, Bill. I enjoyed Professor Royster's paper very much. I learned a lot from it and she looked up a lot of stuff that I've wondered about for many years. I was sick the day they did the library tour and I don't know how to use the computer. I have to wait for people to get interested in the same things I am and then read their paper. Bob Clinton's one of my best friends, and the reason for that is he says so elegantly and passionately and forcefully the wrong things. It gets me really oriented. I get all confused. I thought I knew something about this and when Professor Royster got done I thought, Oh, God, I don't know anything about it. And then Clinton just said what he said, and, yeah, I do understand it.

The problem with the Trust Council Authority is precisely the problem that we've been talking about. I've been saying for a long time the conflict of interest cannot be resolved as a private trustee. It can only be managed, unless you get rid of one of these obligations. And you know which one they have to get rid of if they get rid of one—that's us and not the public interest. The problem with the Trust Council Authority is precisely that it moves in the wrong direction.

The process that has to be looked at is the process of decision-making. The Trust Council Authority essentially takes the Indian interest out of decision-making and moves them to an office

building over in Virginia someplace, which means that when the Interior Department people sit down to decide what we're going to do, I can read you preemptively the transcript of the conversation. If anybody says at the meeting, "What about the Indians," and it's unlikely that they will, the answer will be "We don't need to worry about them. They have their lawyers over in Virginia and they can sue us." Now, in the day-to-day decision-making process you can see the result of that. Everybody in the government is freed from thinking about the impact on Indians.

In law school professor terms you can see another very important consideration, and, that is, it is one thing to be in the room when a bunch of GS-13s decide that eight timber companies embody the public interest and you're in the room and you can say, "Here's all the reasons why you should look at the Indian interest this way," and you may persuade them and you may not persuade them, but it depends on your ability to go to that meeting. If you say, "We're going to handle this by hiring any number of lawyers," although the amount of resources devoted to the Trust Council Authority, which was supposed to be a separate litigating unit, the amount of resources that would be devoted to that is an important consideration because they may be going up against the entire Justice Department at any point.

But what's even more important than that is where do they look? Where are these issues addressed? They're addressed in court. And when they're addressed in court, you're asking a federal judge to substitute his or her judgment for that of an administrative agency, and then you get into the very problems that Professor Royster has pointed out. It is one thing to persuade a bunch of GS-13s that your version of what the federal government owes to the Indians is correct. It's quite another thing, after all these decisions have been made and deference is going to be given to the executive agency, to persuade a court to just throw all that out and go back. So that's why the Trust Council Authority, I think, is the wrong thing and that's why I think we have to look not at a process of separating out the Indian interest but, in fact, the process of bringing out the grain in the total federal responsibility. And what I was trying to talk about this morning a little bit is to look at the places where decisions are made and look at what stage in the process does anybody, particularly the federal decision makers, address the Indian interest and define what that is? And as Professor Royster was talking—we're talking about balances, that's fine. But, again, at what point in the process are you balancing and what is it you're balancing?

Here's what I think the problem is: Stage one of my chart of the decision-making process, stage one is you decide what your legal

obligation is. To whom do you have a legal obligation? What is your responsibility in a particular situation? And stage two then is to, if necessary, balance that responsibility under this constitutional provision or this statutory provision or this Indian trust doctrine or whatever. You balance that. The ones that compete balance against each other. What happens in my opinion, what the federal government is allowed to do is to treat stage one non-Indian situations as if they were stage two, which to me begs the question.

Here's what I mean: The Reclamation Act gave the Secretary of Interior authority to assist in the chartering of irrigation districts all over the country and to make water available to them, make money available to them for the development of water resources in the West. The passage of the Irrigation Act didn't give to any individual human being or entity any rights whatsoever other than to apply for benefits under the Act. Now, if I'm wrong about this, somebody tell me. This is my understanding. The day after the Reclamation Act was passed you had a bunch of Indian tribes and individuals in the West with a claim on the Secretary's loyalty that day and you had everybody in the United States with no claim on the Secretary's loyalty until they could get from stage one to stage two and qualify as beneficiaries under the Act. And so if there's one cup of water left in the West and that cup of water is claimed by Indians as a trust matter and a bunch of people show up at the Secretary's office and say, "Give us some of those forums under the Reclamation Act," the Secretary's supposed to say, "I'm sorry. There's no water left." And he doesn't owe them anything because they haven't qualified to claim his loyalty, his divided loyalty.

I think a lot of the problems we have in sorting these out is we are elevating what is not clearly a formed and vested non-Indian interest and allowing that to compete with an Indian interest prematurely because-and I think a lot of it is largely a function of the structure of the federal government—nobody said to all those reclamation guys in 1980 "Don't go organizing irrigation districts where you're going to take Indian water," because the assumption was the Bureau would take care of the Indians. We'll create the irrigation district.

So, I think we need to look at the stage in the process and whether we are comparing—if we're going to allow the federal government to claim it has a conflict of interest as it did in Maine as I was saying this morning—we have to look at what stage in the process they're claiming they have a problem because I think they tend to, instead of shielding and making room for the Indians, they kind of shield the Indians and wait until the non-Indians qualify under some legislation. And then they can say, "Thank God they qualified. Now we have a conflict of interest

and we can't do what we're supposed to do for the Indians." I look to use the private analogy which I think can be useful. All of these are metaphorical. I mean, we always have to realize that we're not using these terms literally.

In looking at it in a paper I did some time ago, it seems to me that there are three kinds of situations where the federal government has a conflict which may or may not be a conflict of interest. When the federal government is claiming the same property, a piece of land or some water for itself that the Indians also want, there couldn't be a more classic conflict of interest than that. That is a conflict of interest. "It's mine." "No, it's mine." "Wait a minute, you're my trustee." By the way, the assistant attorney general for lands, I understand, denies that even that's a conflict of interest. So remind me not to hire her for my bank when she gets out of the government.

The second one is in the application of taxes to an Indian situation. And there have been a lot of cases about the IRS claiming that certain things were taxable and the government hassling about that. It seems to me that a private fiduciary has an obligation to seek, on behalf of the trust, to avoid as many taxes as legally possible.

The third—and I'm not discussing the second because I want to get to the third one. The third one is where there is a conflicting statutory obligation, regulatory in particular, which applies to the management of Indian trust property. Seems to me, by the same token, if you look at what the obligation of a private trustee would be, a private trustee would be obligated to do whatever's in the best interests of the trust. In some instances, that would be to argue that the trust property is included in some regulatory statute where there's some question of whether it is or not, to protect the trust, and in other cases the obligation would be to argue that they're not included. And the trustee would have to decide what that is.

Now, the reason I mention these three things is because it seems to me that we're facing the same problem of getting the comparisons in sync. The federal government first has to decide the scope of the Indian claim to either be included in a tax or regulatory statute or to be excluded before it can decide how it's going to balance the interest. Very often, when you see what they're balancing, they're balancing an assumption that a statute applies in a way that the Indians don't want it to apply with the claim of the Indians to get out from under it. And I think that is comparing two different stages.

It seems to me that you could argue, plausibly at least, that it is the obligation—the moral—the procedural obligation of the government, before it decides whether income from trust allotments are taxable or

whether its position is going to be that they're taxable, to decide whether it as trustee should give the Indian claim for exemption the widest possible plausible scope and then decide what the scope of the tax law is. They don't do that and I think that's part of the procedural problem.

That's why I argued this morning that because it's so hard to frame these in the abstract, the best thing to do is for the Indians to be able to attend these meetings where these things are decided so we can say at the right point in the process "Here's how you should read this law because we don't figure that Congress passed the Reclamation Act intending to give away water that it had obligated to us." And if we have to read all these statutes together, then you have to interpret the Reclamation Act as being limited by the preexisting commitments to the Indians. The same way with tax statutes. The same way with regulatory statutes.

MR. RICE: Our next speaker is a member of the Houma Tribe of Louisiana. He took a B.A. from Dartmouth College and his J.D. from Loyola University in New Orleans, Louisiana. He was the Director of the Dartmouth Native American Program between '86 and '89 and is now an Associate Professor of Law at Vermont Law School, Mr. N. Bruce Duthu.

MR. DUTHU: The problem with going third or fourth or fifth is that you run out of people that you can say you agree or disagree with. But I do agree and disagree with a lot of what has already been said. I want to start with my own little war story that bears on this issue of the trust responsibility and take one particular person back in time, and that's P. S. Deloria who was just up here. During my second year of running the Native American Program at Dartmouth, we hosted a symposium on federal Indian law and among the participants were Sam Deloria; Charles Wilkinson; Rennard Strickland; the then governor of the Penobscot Nation, James Sappier; and the Solicitor of Interior, Ralph Tarr, who was a keynote speaker and also was a Dartmouth alum. He was very much looking forward to coming back to his alma mater. During the question-and-answer portion of the keynote address, Governor Sappier, then governor of Penobscot Nation, asked a question. His question was: "I know you're the government's lawyer. Are you my lawyer?" And Solicitor Tarr could not answer the question. He thought long and hard. And he said, "Let me think about that." Fortunately it was a two-day conference because the next day the roles were reversed and Sappier and others were on the dais, and Tarr was out in the audience. When it was our turn for the question-and-answer session, Tarr was the first hand eager to get up and say, "I have an answer." And we said, "To what?" "To Governor Sappier's question." And his response went something along these lines: "When

our interests are congruent, when I can look at what we're doing, we being the federal government, as being in line with what we think is in the best interest of the tribes, then I'm your lawyer, too. When we disagree, when there is an incongruence between what we've identified as what the feds want to do and what we think the tribes want to do, then you'd better get your own lawyer." Governor Sappier kind of looked at the rest of us and I don't know that he was happy with that answer but that's the answer he got.

My point in bringing that in and to echo many of the things that have already been said here is to express agreement with part of what Professor Clinton has said. I also find this area to be one of the most vexing issues and I think that my students find as one of the most troubling artifacts of federal Indian law. And I think the reason that we find it to be an artifact of federal Indian law is for a lot of the reasons that Sam Deloria talked about and that Professor Clinton has talked about: we haven't really reconciled a lot of things that the trust relationship conjures up.

For me, what the trust relationship conjures up is our inability as a community, as a body politic, to confront a very conflicted history, the role of history, the treatment of Indian tribes, and the treatment of Indian people. That is to say, when you look at that history, and Professor Clinton has very eloquently, as usual, outlined and contextualized for us the trust relationship and has noted and described for you quite clearly the evolving nature of the trust responsibility. I would submit that one of the main things that caused or precipitated that evolution of the trust responsibility is one very simple thing: tribes were not playing with the program. You see, tribes weren't expected to last as body politics for very long. You look at the historical record. Very early on, some of the founding fathers, President Jackson, and others, expressly stated their sentiments that the government should stop this entire foolishness of treatying with tribes. Tribes should get with the program, and join this larger body politic being formed, the United States of America. This whole aspect of maintaining some sort of a separateness, "measured separatism" to use Professor Charles Wilkinson's term, was really a romanticized harkening back to the way things used to be, the good old days, that tribes would never retrieve. I would submit that that sentiment is one that the federal government has had to come to grips with, the fact that tribes were even able to survive such oppressive policies as we witnessed in the nineteenth century, the allotment policy being just one of many. Wounded Knee comes to mind, as do BIA regulations that outlawed religious expression, language, appearance, dress codes, boarding schools, indeed, the entire panoply of efforts to de-Indianize

Indian people. So the reason why we had to keep changing the trust responsibility or to keep redefining it was because Indians were not going along with the way that history had been preordained for them or at least, the colonizers' view of historical development.

Well, I am going to talk about Professor Royster's paper but I wanted to put that out first to give you some context for where I'm coming from in the way that I've approached the trust responsibility or the trust relationship. I want to say two things in particular about the remarks that have been made and leading right into Professor Royster's wonderful paper, which I found to be a very, very easy read. For me, reading is difficult and I have no hesitation in admitting that, knowing that there are law students out here. I'm a terribly slow reader. I don't understand things the third time I've read them. And this was a pleasure to just go through. As usual, Professor Royster's writing is so clear that, one time around, I think I got everything that was there. For me, that's an accomplishment.

Two questions that I pose after reading the paper, one that has already been touched on, and that is, are we moving in the right direction? When we talk about having a trust responsibility that in the contemporary era, provides tribes with an enforcement mechanism, that is, a means to extract something from the federal government, that's a good thing. I mean, tribes would and I think do appreciate any of the ammunition that the law will afford, and if the trust responsibility or relationship can be utilized to demand that the federal government take into account the Indian voice, then all to the good. But the larger question looming behind that is, do we continue to set a negative precedent by framing arguments that continue to utilize the trust relationship as a linchpin for continued protection? That is, does it force tribes to take on an infantilized view of their very political selves that they would rather not do and instead, move towards what both Professors Clinton and Deloria talked about, which is the business of being sovereigns in their own right, negotiating, as I think Justice Marshall conceded, government to government? I don't know. I think the trust relationship is here for a while because I just have this sense that the states, private entities, and the federal government are not at the point where they can conceive of tribes playing the kind of substantively significant roles that many tribes are already playing and many more want to play; that is, being at the table, negotiating, talking, being in control of their destiny, destinies of their people, et cetera. And I think the federal role is going to be, at least for the foreseeable future, a necessary evil; to prevent a retrogression of the gains that have been made in the modern era such that whether the assault on tribal

sovereignty is coming from state aggression or private party litigation or even from the United States Supreme Court, which we'll talk about later on this afternoon, there needs to be, I think, that protective mechanism there.

The second question or issue that sparked some thoughts from Professor Royster's paper is a very specific point that she makes with regard to the environmental impact considerations already being put on the table. The Secretary, in developing the EIS, environmental impact statements mandated by NEPA, is already taking into account the environmental impact and, consequently, there should be no additional weighing of these larger environmental impacts in the context of mineral development in Indian Country. Professor Royster notes that tribes derive some benefits from the EIS process; the process does serve to provide a wealth of information for the tribes to make informed decisions about what the proposed development will mean to them. That's a positive. A negative, according to Professor Royster, and I quote,[20] "To the extent that the EIS, environmental impact statement, must consider the adverse environmental consequences of tribal development on lands and resources *outside* Indian country, it introduces non-Indian considerations into the secretary's approval process. Moreover, neighboring non-Indian interest may at least delay projects on lands by challenging the adequacy of the EIS in federal court."[21]

Now, perhaps I am reading those provisions much, much too myopically. My first reaction was, why are the considerations of adverse environmental consequences, even those outside the Indian country, necessarily viewed as "non-Indian" considerations? Why wouldn't tribal members be concerned that whatever occurs within their reservations not negatively impact their neighbors? The point that Judge P. Diane Avery made in her wonderful address at lunchtime struck a chord with me and that was her use of the term "respect." That's something that growing up in the bayous in Louisiana in my community was very much a part of the way that I was raised, respect not just for my ways, for my culture, but for everyone and everything around me. Unless I am a steward of everything that is around me, bringing the proper respect, I won't have much of a future. I'm wondering whether a suggestion that the Secretary not do any further assessment of the impacts outside of Indian country will possibly lead to enhanced

20. Throughout this commentary, Professor Duthu's references are to an earlier draft of Professor Royster's paper.

21. Emphasis was added by Professor Duthu.

hostilities between Indian tribes and their neighbors. Will that work towards the larger good or the larger goal of tribal self-determination? Or is it going to take us down a road where we are continually finding ourselves pitted against states, private developers, others outside of Indian country because we're so busy trying to get the federal government to maintain its obligations that we may not take into full account the impact that we're having on others outside of Indian country? Thank you.

MR. RICE: Our final formal speaker is a guy who could hometown a lot of lawyers around here, I guess. Richard Monette grew up in Turtle Mountain, and is an enrolled member of the tribe. He's been with the Department of Interior, Bureau of Indian Affairs as director of their office of congressional and legislative affairs and has also served as a staff attorney on the U.S. Senate Committee on Indian Affairs. He is currently an Assistant Professor of Law at the University of Wisconsin. Professor Monette.

MR. MONETTE: I'll just sit here if that's okay, too. First I'd like to thank the North Dakota Law Review for inviting me home. Nice to be home. I went to graduate school here ten—starting a long time ago, twelve or thirteen years ago. I also have the distinction of at least most recently sitting on the other side of the fence, so to speak, in this trust responsibility, trust relationship debate. I spent the last year working with the Department of Interior with the Bureau of Indian Affairs. And, you know, there haven't been enough stories told today. So I'm going to tell a story real quick-like. A lot of you probably don't know how I got that job and it's somewhat of an interesting story. When Clinton was elected president, you know, he appointed Ada Deer, a Menomonie tribal member and also on the faculty of the University of Wisconsin, to be the Assistant Secretary. And, you know, Democrats hadn't been in office for a while so they were somewhat unsure of how things worked. And Ada, in particular, wasn't sure, and she said, "Bill, how am I going to choose who's going to work with me? How do you decide these things?" And he said, in his folksy way, "Very simple, Ada. What I did is I just presented a little riddle to them. I presented a little riddle and if they could answer it, they could work with me; and if they couldn't, they couldn't work with me. That's how I chose Al and the whole bunch." She said, "Oh, that sounds great. Sounds great. What's the riddle? Give me the riddle." He said, "Well, one of the best ones is ask them 'what's the name of your father's son who is not your brother.'" Ada thought about it for a while. "Okay. Okay. I can do that." So she was getting ready to make her calls and she was a little bit uncertain, and she called her good old friend Sam Deloria, and said, "Sam, you know, I got this question, this riddle, and the President told me this is how I could

choose who's going to work with me. But I'm not quite sure if I know the answer, and I didn't want to tell him that." She said, "It's 'what is the name of your father's son who is not your brother?'" And Sam said, "Well, that's simple. It's me. Sam Deloria is the answer." She said, "Oh, yeah. Yeah. That's what I thought. That's what I thought. Good. Good." So she gives me a call, asks me the riddle "What is the name of your father's son who's not your brother?" I said, "Geez, Ada, that's kind of tough. Give me a couple days to think about it." And I hung up and immediately called Sam. "Sam, what do you think about this? Ada's asking me this riddle here to work with her. I'm not quite certain what the answer is." He said, "Well, what is it?" And I said, "Well, it's what is the name of your father's son who's not your brother." And he said, "Yeah. Yeah. That's the simple riddle. It's me, Sam Deloria. "Oh, okay. Okay. Good enough." So she calls back in a couple days and asks me, "What is the name of your father's son who is not your brother?" You guessed it. I said, "Well, I know that one." I had a big smile on my face. I said, "It's me, Sam Deloria." Ada scratched her head in her way and kind of frowned a little bit, and she said, "How did you know?" I got the job.

I took the job, on a somewhat more serious note, to work just on two or three topics of special interest to me. I was very hesitant to go out there. But a couple of the things that I wanted to do have a very strong tie into the topic today, this trust responsibility, trust relationship thing. And two of them in particular were the Self-Determination Act that was being amended. And there was also the Self-Governance demonstration project. I don't know if you know about these acts, but very simply, the self-determination law allowed for tribes to contract for federal programs and to operate them themselves. The self-governance project, very simply, used the same idea but that the tribes didn't have to contract program by program; rather, they could do a sort of a block grant for several programs and then actually redesign them. But the idea of both laws is for tribes to work federal programs themselves.

In this context that became immediately important because some of the tribes put on the table first and foremost to contract for the Bureau of Land Management and the BIA management of leases, mineral and timber leases. And, I mean, I agree with what Professor Royster is saying at least to the extent where she's talking about where the Secretary weighs the interest using the trust responsibility of the tribe against the Nation or the various States. But I also agree with Professor Clinton that there is a totally different dimension that we, I think, are ignoring in this debate. Again, I don't know if I quite follow his logic to his conclusion. In fact, I might agree with Sam that maybe I wouldn't follow that down

the path that Professor Clinton is following. I didn't hear what Bruce agreed with or disagreed with, so I couldn't tell you if I disagree with him or not.

First and foremost, I think it is time to simply ask one question with some meaning, not just rhetorically. We've asked the question before, others have often asked it: why is there even a trust responsibility? Why is there a Leasing Act? Why is the Bureau of Indian Affairs managing these leases or why is it at least reviewing these leases for approval or disapproval? Why are they involved at all? And where is the tribe? Why isn't the tribe dealing with all of this? Why isn't the tribe creating and maintaining, sustaining its own property system from top to bottom, leases, titles, deeds, having its own register of deeds, regulating conveyances, everything? Why not? Why isn't this happening? And if we, in fact, are going to start contracting out BLM and BIA leasing programs, the BIA also runs the realty program which is a little thing that most Americans don't know.

All of the states have a property system. Most of you don't know that the federal government also runs a property system and they run it for Indian tribes, a property system that scatters across 3000 miles in varying directions, all kinds of land. Millions and millions, fifty, sixty some million acres of land, and most Americans really don't know that. And from that point most of us really don't know that when they do it, they do it very badly. Now, some of it I believe—just to look at some of the dimension that Professor Clinton was talking about is to back all the way up. I believe there are a few myths that need to be debunked, a few cases that I think have been characterized wrongly and must be re-read, and some close reading that needs to be done.

Let me begin with three quotes. To touch on where Professor Clinton was coming from, much of this development came out of the General Allotment Act as you've heard, much of the source of these problems of leasing coming out of the General Allotment Act when the United States came in and divided up into severalty tribes' territories. And the first place that I found, you know, we got this magic called "Westlaw" and "Lexis" these days, the first place that I found the word "allotment" used was, in fact, by Chief Justice John Marshall. Yet, I haven't found this quote cited anywhere by any of our Indian law scholars unless I missed something. Here's what he said: "To contend that the word 'allotted'"—(he also used the word "allotment" but this quote I think is better—allotted in reference to the land guaranteed to the Indians in certain treaties)—"to contend that the word 'allotted' indicates a favor conferred rather than a right acknowledged, it would seem to me do injustice to the understanding of the parties." In other

words, it doesn't matter that we're recognizing territory and property and/or allotments. A critical question is, whose was it to begin with? The answer to that question might have a little bit to do with whose is it now. And he's saying the United States didn't confer this right. It came from tribes, as does much of the idea of sovereignty in a Democratic system comes from the people in the local areas, not from the federal government, not from the big government. That point is clear in this context.

One of the cases that is sorely mischaracterized is *Johnson v. M'Intosh*,[22] one of the only cases that ever makes it into a property text. And there it stands for the proposition that all the property stems from the sovereign. However, the issue as framed in the case is, can the tribe issue a title that is sustainable in the courts of this country? And in his holding, Justice Marshall repeats the issue almost the same way. The tribe cannot issue title that is sustainable in the courts of this country. Unfortunately, many of our scholars have taken that and shortened it quite simply with some rather terse and heated language, coming inevitably to one conclusion: that tribes can't issue title, period. And that's not what the case says. It says: can they issue title that is sustainable *in the courts of this country*? Two vastly different things. But this idea that supposedly tribes can't issue title finds its way into the discussion today when we're talking about whether the tribes can issue a mineral lease. Unfortunately, we often hear that tribes can't do that sort of thing. They can't run their own property systems.

Well, I pulled a little quote out of *Johnson v. M'Intosh* that, again, I can't find quoted anywhere in the scholarship. Here's what Justice Marshall says: "The person who purchases lands from the Indians within their territory"—(and he uses the word "territory")—"incorporates himself with them so far as respects the property purchased, holds their title under their protection and subject to their laws." To me, that says a tribe *can* issue title. That says a tribe can create and maintain its own property systems. That's what Justice Marshall believed 150 years ago. That says that the misreading and mischaracterization of the case has hurt us greatly. Justice Marshall went on to say, "We know of no principle which can distinguish this case from a grant to a native Indian authorizing him to hold a particular tract of land in severalty." So, you know, if the tribe wants to sell to Johnson and then take the territory encompassing that and sell it to the United States who then grants a title to M'Intosh, Johnson surely has lost his property. But his beef is not with the United States. His beef is with the tribe who issued the title and

22. 21 U.S. (8 Wheat) 543 (1823).

then took it back and sold it. Unfortunately, the law, including the scholarship and case law and everything else, has not followed that line of thinking.

Now, one of the myths that goes along with this, and incidentally one of our Indian scholars who most often mischaracterizes that case also is the one who most often invokes this myth, and that is that tribes don't have a concept of private property. And so then the argument goes that the United States shouldn't be imposing their Anglo-American concepts of private property on us. Well, I don't agree with that. I know that my grandfathers had teepees and if you went in them, you were in trouble; and my grandmothers had berry-picking patches and if you picked berries in them, you were in trouble. Now if that's not private property, I don't know what is. In fact, the case that I'm taking this quote from has the attorney for the state using that argument against the tribe. He said, "A doubt has been suggested whether this power in Georgia extends to lands to which the Indian title has not been extinguished." And then the attorney goes on to say, "What is this Indian title? It's not like our tenures. They have no idea of a title to the soil itself." In other words, from the beginning that very idea has been most strongly used against us rather than for us.

So first, I say let's read *Johnson v. M'Intosh* right. It didn't say tribes can't issue title. It said tribes couldn't issue title sustainable in the courts of this country. And even that might have changed, which is yet another theme, because when the tribe in that case issued that title, it didn't have a treaty with the United States. Johnson was a lone Anglo-American out there in the wilderness getting a chunk of land from the Piankeshaw Tribe. But once the tribe entered into a treaty with the United States, whether that title is recognizable in U.S. courts is a totally different question because then the tribe is recognized. So first we have to read that case right. Then we have to debunk a few of these myths. Then we can come up to face some of these questions that are difficult to deal with today and that are necessarily on the table if, in fact, the self-governance and self-determination policies are going to mean anything.

For example, in our case, this case that we're dealing with here today, *Boyd & McWilliams*, suppose this little variation had been in play: Suppose the U.S. owned the subsurface estate, managed by BLM, but suppose rather than the tribe owning the surface it had been a Navajo citizen, perhaps one who opposed the lease. Then suppose that the Navajo Tribe said, "Fine. The lease is okay with us." Here it would have been the tribe against its own citizen in what they wanted done with that surface estate. And there it would have been the BIA in a position

saying, "We owe a trust to the tribe. We owe a trust to this individual Navajo citizen." Now, who do we side with? And to me, those are the most common and the most difficult questions in this trust area.

Now, one of the ways I like to think about it is a way that we were somewhat able to work into the Self-Governance Act, which was to think of the trust owed to the tribe as a relationship, as a political idea. It is a political relationship despite the term guardian-ward. Remember that when Marshall used those words, there was no General Allotment Act yet. The United States wasn't yet dealing with property of the tribes or their members. It was purely a political matter. After the General Allotment Act, we started hearing more and more this idea of responsibility in the sense of fiduciary responsibilities as a property concept. The political concept of trust and the property concept of trust are, to me, two entirely different things.

Now, I would conclude, and the way that I think to a great extent, although, unfortunately, not entirely, we were able to work it with the Self-Governance Act, is that when the tribe's interests are at odds with the individual tribal members, the political trust relationship prevails. I hold that opinion for this particular reason, and it's a reason that ran through some of the discussion this morning: the tribal individual is a member and can participate in that tribe. They're citizens. They can decide to change their government. They can decide to change their government to rework whatever it is that they're unhappy within their tribe's dealing with the BIA. They can amend their tribe's Constitution. They can effect their tribal laws by electing and unelecting leaders. We had an old term for that. It used to be called "democracy." It apparently doesn't work anymore in Indian law. We don't think of it in the Indian realm. Instead, we want to protect tribal members in federal court. We want to defer to federal courts. We talk about federal court abstention. We talk about deference to tribal courts. What about deference to the entire sovereign so that the whole government can work, so that the tribes' law-making bodies, law-executing bodies, and its courts all function entirely from the bottom up? Then I think we get to the idea that tribes can do this. Tribes can create their own property systems. They have the mechanisms to work them. They will make mistakes. Not everybody will be happy. But that is the seed of democracy. Thank you very much.

MR. RICE: There's a couple of thoughts that I think the panel put in my head, and maybe I'll share one or two of them with you now. If we, in fact, go back and look at *Johnson v. M'Intosh*,[23] and *Cherokee*

23. 21 U.S. (8 Wheat) 543 (1823).

Nation v. Georgia,[24] and some of the early foundational cases and find that by and large at least some attorneys, and some judges, have not read them for what they say; if we look at the original understanding of the Commerce Clause as reflected in the writings of the founding fathers; if we look at the interpretation given to the constitutional provisions that relate to Indians as reflected in the writings of the early justices; if we acknowledge the warping that perhaps has occurred of some of those ideas, some of those thoughts, as we went through the removal, the reservation system, and allotment system, and compare that with the United Nations conventions on things like genocide and self-determination; perhaps we come to the conclusion, as did the courts in Australia, that continuing to build an Indian law system on the warping of these precepts is unjust. We started off the federal-tribal relationship where dependent domestic nations meant, at least in my view, dependent enclaves at international law. A dependent enclave is simply one sovereign who happens to be surrounded by the territory of another sovereign and has asked for the protection from the world of a more powerful government without giving up any of its own rights of self-government. The examples are Monoco, the Vatican City, Luxembourg, other principalities and small entities around the world who have seats in the United Nations and diplomatic missions in Washington. If we acknowledge the warping of the theories of early Indian law as the federal government attempted to destroy tribal government, we must also acknowledge that 150 years of attempts to take the Indian out of Indians hasn't worked. We're still here, the survivors are here. Surviving tribal governments are here, and will never give up their desire to govern their own people and their own territory, that which has been reserved to us by our forefathers. By the way, I call them patriots. I've seen them referred to as Indian braves here and there and warriors and whatever, but they were our patriots. And they kept for us and reserved to us tracts of land now called "reservations" and governments which we have organized and reorganized. Do we return to that dependent enclave status of *Worcester v. Georgia*?[25]

24. 30 U.S. (5 Pet.) 1 (1831).
25. 31 U.S. (6 Pet.) 515 (1832).

It's easy for America to look at Israel: it's easy to look at places in the Middle East and elsewhere, the Kuwaits of the world, and say that people are entitled to their own self-government without interference or impact by other people. It's a lot harder to do that in your own back yard. It's a lot harder to do that when it's right down the road. It's a lot harder to do that when it hits you in your own pocketbook. It's a lot harder to do that when it means the state doesn't get quite so much taxes. The question that I see coming up is, whether America is self-confident enough, sure of itself enough, mature enough to say that we can tolerate true independent tribal self-government in our own backyard, and we can acknowledge the full dependent enclave status that Justice Marshall started with?

And to go along with that is the other concept that I saw come up, which is the self-determination and self-governance idea. I think this really reflects on the trust responsibility, and the problem that this paper addressed when we come down to the question: "What happens when the Secretary is out of the loop?" The Court has gone away from the recognition and reliance on inherent tribal sovereignty as a sale ground for exclusive tribal jurisdiction over particular matters, or joint federal and tribal jurisdiction in particular matters and has of late relied on federal preemption to protect tribes from the invasive application of state or local law. As tribes become full of self-determination and full of self-government (which are, as you know, primarily super program management acts which are pregnant with the assumption that the tribe will really assume jurisdictional and management capabilities later on down the line), what do we do when the tribe is doing it all and the Secretary is out of the loop? How do we rely on preemption when he's not there? And I think those are some of the issues that are going to face us in the future. That's my own take on this issue.

Do we have any questions?

FROM THE AUDIENCE: Professor Clinton asked, in effect, the division that we should return to a trust relationship based on the *Cherokee* decisions. And I think he remembers the *Cherokee* decisions being maybe as the good and then he looks at perhaps the 1880s decisions as being the bad. And I think that Professor Monette reminds us that some scholars looked at *Johnson v. M'Intosh* as being the ugly or of course his comment was that it's not as ugly as it appeared, and I agree with that. However, the question, I guess, is to Professor Clinton, don't you think, in effect, that *Johnson v. M'Intosh* and its holding had a lot to do with the United States having a trust responsibility for the tribes because it did—they do hold a legal title and we Indians only have the beneficial title so that if you go back to a *Worcester* type of decision,

should you perhaps decide to get rid of some of this, of this language in *Johnson*, if you're going to do this? And do you think that perhaps Justice Marshall in *Worcester* eventually got over *Johnson v. M'Intosh* and perhaps did modify it in any case in that later decision?

MR. CLINTON: Actually I think I'm more with Professor Monette on this question. I actually do not read *Johnson v. M'Intosh* in that way. There's a little bit of history that actually is found in one of the books of the unnamed professor who I think we've been referring to previously, which actually sheds an awful lot of light on *Johnson v. M'Intosh*. In the period of colonial rejection of crown authority before the revolution there had been a significant movement to violate colonial restraints on alienation of Indian land by people who simply went out and negotiated on their own, in violation of colonial law, with tribes for direct grants. What *Johnson* holds, as I understand it, isn't anything as broad as the question would suggest. What it holds, I think, is that given the restraints against alienation that gave the crown the exclusive right to purchase Indian land, citizens of the crown or the subsequent sovereigns, like the state of the United States, could not go out in violation of the sovereign's rights and purchase that land themselves and expect that that sovereign's courts would recognize the grant. But the end of the opinion quite clearly says that there is absolutely nothing wrong with the tribe by its own law and in its own forums recognizing the grant. Now, if you read *Johnson* that way, and that is the way I've always read it, that *Johnson* does not stand either for a tribal incapacity to grant legal title, nor does it put the United States in a position of being trustee over Indian land. It only puts the United States in a position as a result of the quite controversial doctrine of discovery of being the potential exclusive buyer particularly vis-a-vis its own citizens of that land. That's not a trust. That's a United States regulation of the way in which it deals with its own citizens and who it is among them that can deal with the Indian tribes for the grant. The trustee merges out of a much later doctrine.

MR. MONETTE: In fact, even so much that I wouldn't use the term that Professor Clinton uses. I wouldn't use the term "restraint on alienation" because that's not what it was. It was a restraint on buying. The Piankeshaw Tribe, Chippewa, Sioux, Winnebago, Sac, and Fox, all went to a big treaty in 1825 where the United States happened to be there because it was trying to facilitate the treaty but it was not a party to it. Those tribes exchanged territory and the United States agreed so that it could, of course, in turn buy some of the territory after it knew who owned it. In other words, the tribes alientated territory to those not subject to U.S. law—other tribes. So there was no restraint on alienation. It was a restraint on purchase, restraining those over whom it could

exercise restraint, those over whom it exercised its governance, its own states and their people.

MR. CLINTON: I totally agree that's a better characterization.

FROM THE AUDIENCE: I have just one question on that: is that consistent with the results in the *Oneida* cases, where it wasn't a question of the non-Indians enforcing their title in federal court, rather it was a question of the Oneida's ability to prosecute a trespass action? That seems to me to be inconsistent with the reading. I think I understand you.

MR. MONETTE: I hope I'm not oversimplifying it, but I think that the Oneida were bringing their case under U.S. laws and saying that no matter where the onus of the case fell the law says that the state of New York and the county of Oneida and their citizens could not buy from the tribe. So the tribe did not alienate in violation of U.S. laws. Rather the state bought in violation of U.S. laws.

MR. CLINTON: I think that's basically accurate as to the *Oneida* decisions which relate to the restraint on buying. It's classically called in the literature the "Non-Intercourse Act Restraint" or occasionally "restraint against alienation," but Richard is absolutely right, it's a restraint on buying and a restraint on buying only over those who they have some control over, their citizens. There is one *Oneida* decision that seems somewhat inconsistent, and that is the I believe it's 1988 decision of the Second Circuit dealing with the Oneida claims relating to state acquisitions prior to the adoption of the Constitution and governed by the Articles of Confederation. There seems to be an implication there, not that private parties kept, but that the states could during the confederation period negotiate. And that raised some serious questions that up to that date had not been resolved about, one, the meaning of the Articles of Confederation and, two, add independence, who had succeeded to the crown's exclusive right of purchase vis-a-vis crown citizens? Was it the state or the United States? It seems in later decisions pretty clear that it probably was the states but subject to federal regulatory control after the Constitution. The problem is I would have read the Articles of Confederation differently than the Second Circuit and suggested that even as of the articles period it was subject to exclusive federal control. So there is a marginal element of inconsistency but not a total inconsistency because private citizens even during the confederation period couldn't go out and negotiate with the tribes. The relevant question is, which of the sovereigns could?

MR. RICE: I think, if memory serves me correctly, in the main *Oneida* case the Oneida people never brought the claim that their government at the time of the original agreement with the state of New

York and the original sale, did not have the power to sell or that they weren't the proper government, or any of those types of claims. What they brought were the claims that those people didn't have the power to buy, which was a totally different claim. And I think that brings it into consistency if my memory serves me correctly.