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Convoluted Essence: Indian Rights and the Federal Trust Doctrine

David E. Wilkins
University of Richmond, dwilkins@richmond.edu

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DAVID WILKINS

Vine Deloria Jr., recently wrote an article analyzing the *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), decision which held that neither the federal government's trust doctrine nor the First Amendment's religious freedom clause were sufficient to preclude the destruction of the sacred sites of three small northern California tribes.[1]

As Deloria noted, the *Lyng* decision raised the question: "What is the nature of the trust responsibility of the federal government toward American Indians and what primacy does it have in the pyramid of federal values and decision making?"[2]

While the United States' "trust" doctrine has been defined in complex and myriad ways, Deloria complains that there is no agreed upon definition of what the federal "trust relationship" is. Hence, tribes cannot rest assured that their rights will be protected in a consistent way by the very government that alleges to be acting in the tribes' best interest as their "trustee."

Deloria's question and complaint are of fundamental importance. How and why we use the term, "trust responsibility," merits close attention for pragmatic, intergovernmental and public policy reasons.

CONTESTED ORIGINS

A minority of commentators[3] assert that the United States' "trust responsibility" is a relatively recent phenomenon and may not even be a legal principle, except in the narrow sense outlined by explicit treaty provisions. It is, they argue, merely a moral judgment on the part of the federal government in how it normally chooses to relate to tribes.

The vast majority of political and legal scholars, jurists, and federal policy-makers assert, on the other hand, that the federal trust doctrine is an ancient and entrenched, if ambiguous, presence overarching the tribal-federal relationship. The trust doctrine, in this viewpoint, is delineated in several distinctive ways: 1) in ratified treaties and agreements with tribes, 2) in the international law doctrine of trusteeship (first broached in papal bulls and related documents during the time of European nations' first encounters with non-Western societies when the European states assumed a protective and insulating role over these peoples and their territories), 3) in general Congressional policies and specific acts (e.g., the 1819 Civilization Act and the 1921 Snyder Act) applicable to all Indian tribes,[4] 4) in presidential policy pronouncements expressed, for instance, in executive orders, and finally

Facing page: "Equal Justice Under Law" is inscribed on the pediment above the Corinthian columns on the Supreme Court facade.


EQUAL JUSTICE

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5) in judicial opinions when the federal courts describe the federal government's fiduciary responsibility to tribal peoples.

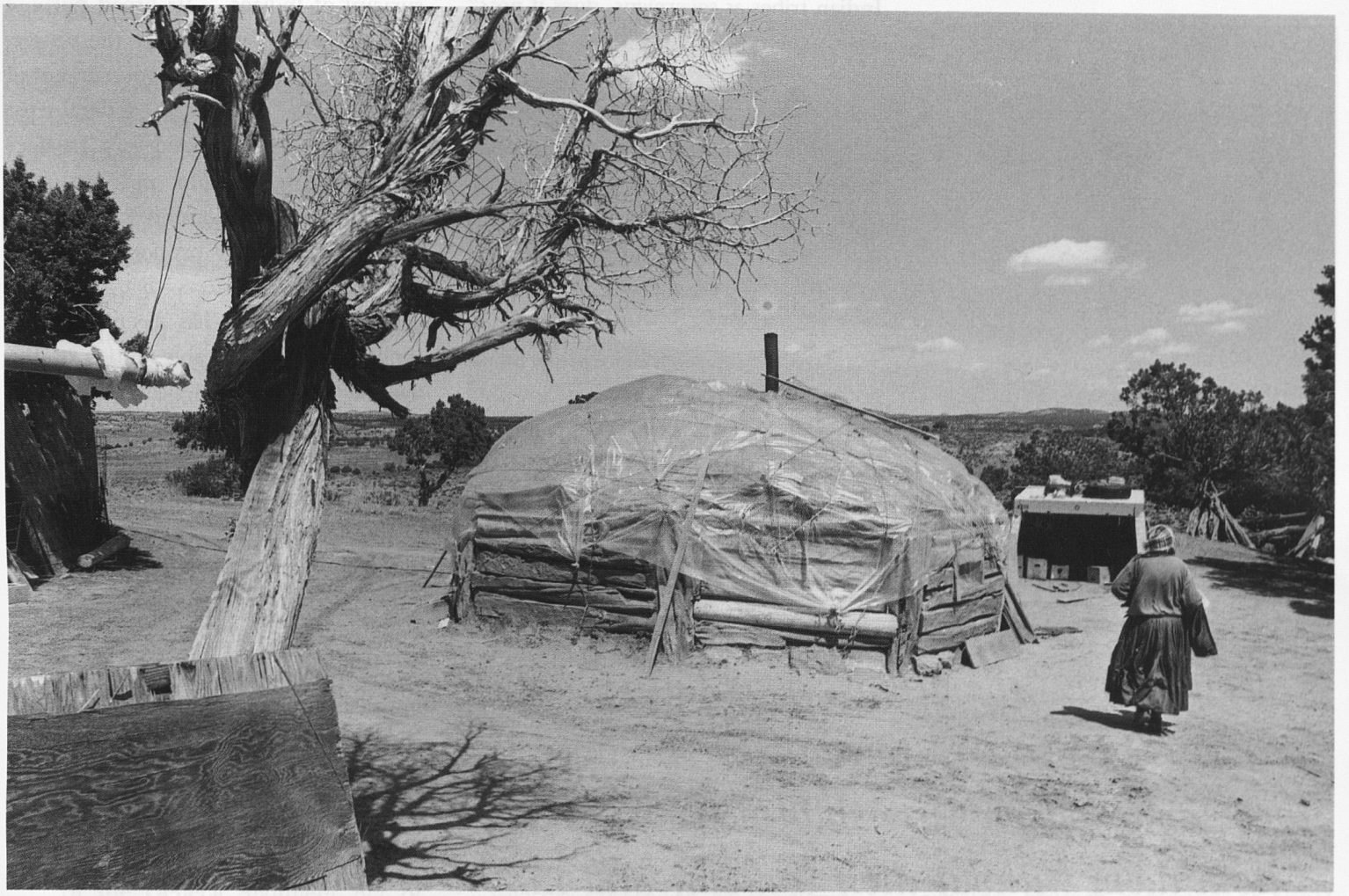
An example of the third embodiment of trust can be found in the American Indian Trust Fund Management Reform Act, enacted by Congress on October 25, 1994. It stated that the "Secretary's proper discharge of the trust responsibility of the United States shall include (but not be limited to) the following: 1) Providing adequate systems for accounting for and reporting trust fund balances ... [and] appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands."[5]

More recently, Senator Daniel Inouye, D-Hawaii, vice-chairman of the Senate Committee on Indian Affairs, in a February 22, 1995 speech to the United South and Eastern Indian Tribes, expressed concern as to whether the Republicans' "Contract with America" intended to create a "change in the relationship between the U.S. and Indian nations."[6] Echoing the sentiment of many tribal people, Inouye said: "Long before the 1994 election, there was a contract with America. It was a contract with the first citizens of America. The terms of that contract were spelled out in treaties, and later in presidential executive orders and laws enacted by the Congress."[7] He went on to observe that although "the responsibilities and obligations of the so-called 'Great White Father' were clearly delineated, few if any of these commitments have been fulfilled."[8]

A month later, Senator Inouye called an oversight hearing on the projected impact to indigenous peoples of congressional proposals to consolidate or block grant federal funds to the states and to hear testimony on the proposed budgetary rescissions under study by the congress and the president. Inouye articulated the trust doctrine thus: "Because the United States has assumed the trust responsibility for Indian lands and resources that arise out of the cession of millions of acres of Indian land to the United States, this trust responsibility is a shared responsibility. It extends not only to all agencies of the executive branch of our Government, but also to the Congress. And so we must each do our part to assure that the United States' trust relationship with Indian nations and Native Americans is honored."[9]

Despite the seeming clarity of these statements there is no agreed upon definition of precisely what the trust doctrine means. First, there is no concurrence on when or why the doctrine originated. Second, it is also uncertain whether or not it is, in fact, a legally enforceable doctrine that may constrain what the federal government or its agencies may or may not do in regard to tribal funds, property or political and civil rights. Additionally, the question is sometimes posed whether the trust doctrine is merely a vague moral compass the federal government is supposed—though is not legally mandated—to be guided by.

Vine Deloria Jr.



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Navajo Indian Reservation, Big Mountain, Arizona. Through coercion and necessity Indian people have had to place trust in the U.S. government. They now question whether that trust has been misplaced.

NEGATIVES OF THE TRUST DOCTRINE

In recent years there has been growing resentment from what one might term, for lack of a better phrase, the "anti-trust" segment. These commentators have offered a host of arguments to support their position: the trust doctrine has been and is still used primarily to "give moral color to depredations of tribes;"[10] it is "an assertion of unrestrained political power over Indians, power that may be exercised without Indian consent and without substantial legal restraint;"[11] and it is really a "metaphor for federal control of Indian affairs without signifying any enforceable rights of the tribal 'beneficiaries.'"[12] Yet others suggest that the trust doctrine is an "illusion unsupported by legal authority" and that through it Congress has become "the source of largely unrestrained federal power to regulate all aspects of tribal existence—from the management and disposal of Indian land and resources, to the imposition of federal criminal jurisdiction over tribal members, even the dissolution of tribal government."[13] In sum, these scholars dramatically show that "the trust doctrine has proved to be a pliable instrument of nearly unlimited federal control and neglect."[14]

An example of this virtually unconstrained theory of trust is found in *United States v. Sioux Nation*, 448 U.S. 371 (1980). The federal government's attorney made the startling oral argument that the trustee relationship "carries both obligations but also unusual powers, the power to dispose [of Indian land] against the will and without exercising the power of eminent domain."[15] In response, a justice acerbically asked, "The Constitution itself recognizes

Indian tribes as sovereigns, does it not?" The government's legal counsel responded by remarkably asserting: "Yes, but the Constitution perhaps also recognizes the dependent status of Indian tribes, their inability to alienate their land which accordingly, if it must be done in their interest, may occasionally have to be done against their will by their guardian."[16]

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POSITIVES OF TRUST

In contrast to the "anti-trust" commentators, there are those who could be labeled the "pro-trust" segment. They forcefully argue that the trust responsibility "creates legally enforceable duties for federal officials in their dealings with Indians."[17] They also assert that the doctrine "has great significance in that it provides a check (albeit sometimes minimal) on federal and state actions which may endanger Indian rights."[18]

The trust doctrine, they note, "emanates from the unique relationship between the United States and Indians in which the Federal Government undertook the obligation to insure the survival of Indians ... Its broad purpose ... is to protect and enhance the people, the property, and the self-government of Indian tribes."[19] Hence, the federal trust duty is best characterized as a trustee-beneficiary relationship and not as a guardian-ward relationship.[20] Charles F. Wilkinson, a major proponent of this variety of trust, asserts that "although comparatively little has been done to explicate the enforceable duties of the trustee, the trust relationship has played a pervasive role in serving as the philosophical basis for a number of important doctrinal advances ... Thus, in addition to the accountability of federal officials for trust violations, the trust has a diverse and continuing influence in the development of Indian law."[21]

This trust perspective, while not denying that the federal government may wield extraordinarily broad power over tribal lands, resources and rights, nevertheless adheres to the political and moral image of the United States exemplified by the 1787 Northwest Ordinance. There the federal government pledged that "the utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."[22]

THREE KINDS OF TRUST RESPONSIBILITY

Other writers have crafted broader and more textured analyses of the doctrine's historical and legal evolution.[23] They have suggested that "in modern-day Indian law, the trust relationship, although not constitutionally based and thus not enforceable against Congress, is a source of enforceable rights against the

executive branch and has become a major weapon in the arsenal of Indian rights."[24] The issue of enforceability, however, depends on which of the "three kinds of trust" the federal courts may be considering: the general trust, a limited or bare trust, or a full-blown "fiduciary relationship."[25]

A general trust is simply an acknowledgment of the historic relationship between indigenous groups and the federal government, according to Newton. This is usually dated back to John Marshall's opinions in the *Cherokee Nation* cases of the early 1830s (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). The general trust is also in evidence in *Seminole v. United States*, 316 U.S. 286 (1942), discussed immediately below.

The bare or limited variety, on the other hand, deals with a trust established for a narrow and limited purpose. An example of this would be the key provision of the General Allotment Act of 1887 which spelled out the actual allotting process. These subdivided lands, which were to be held in trust for 25 years, created a limited trust. The trust in this definition, is "limited to the original purpose for the statute, which is protecting Indian land from taxation and involuntary alienation because of failure to pay taxes or debts."[26] Finally, there is the so-called fiduciary relationship. This is the most comprehensive type of trust, even though there is usually nothing in a statute, policy document, or judicial opinion authorizing its establishment.

Overarching the situation and adding to its complexity, is the fact that each of the federal government's three branches have coined various and sundry definitions of the trust relationship that has pertained between tribes and the United States.[27] The classic federal judicial expression of trust is found in *Seminole v. United States*. In this decision, Justice Murphy said:

> ...This Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people ... In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress, and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[28]

More recently, on April 29, 1994, President Clinton, in a memorandum to the heads of executive departments and agencies, acknowledged that "the United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions" and when the departments undertake activities affecting tribal rights or trust resources they should do so "in a knowledgeable, sensitive manner respectful of tribal sovereignty."[29]

On the contrary, in the 1988 *Lyng* case mentioned earlier, the Supreme Court essentially held that notwithstanding the federal government's given trust responsibilities to protect the rights and property of Indians, it was permissible for the United States Forest Service to construct a 6-mile road segment which would admittedly "destroy the ... Indians' ability to practice their religion" in the sacred areas of three small northern California tribes because the Indians' religious rights, according to Justice O'Connor, could not be allowed to "divest the Government of its right to use what is, after all, its land."[30]

A great deal has been written, legislated, proclaimed, and litigated about the trust doctrine, all giving rise to assorted and often conflicting definitions of "trust." This is somewhat understandable because there is not even

Indian people continue to work towards building better relations with the U.S. government, as shown here during a presentation of an Allan Houser statue to President Bill Clinton.

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Navajo mother with her daughter a short distance from her home, Black Mesa in background, Kayenta, Arizona.

agreement on the base word. In fact, a number of word combinations are often used to describe the intergovernmental relationship between tribes and the United States government: trust, trust duty, trust relationship, trust responsibility, trust obligation, trustee-beneficiary, and trust analogy.

SEARCHING FOR DEFINITION

The multitude of trust doctrine definitions is evidence that the policy-maker and academic debate on the actual meaning of this crucial political/legal concept is nowhere near closure.

How the various terms and phrases are related is one question. For example, is the trust relationship equal to the expression—the trust responsibility?[31] Is the trust doctrine primarily a moral presence, strictly a legal force, or is it a flexible, non-static melange of the two? Does this depend on the issue involved (i.e., questions of jurisdiction, congressional appropriations), the tribe involved (federally-recognized, state-recognized, non-recognized, or terminated), or the origin of the trust (i.e., whether it is specifically or only implicitly spelled out in an Indian treaty, an agreement, a congressional statute, an executive order, a judicial decree)? Or does it depend on the agency administering the trust? Is the Bureau of Indian Affairs solely responsible for enforcing the federal trust, or is every federal agency and each branch also required to uphold the federal government's pledges to tribes?

In light of the *Lyng* precedent, is the trust doctrine enforceable in the federal courts anymore? Or does *Lyng* also color the way the trust is perceived and then administered by Congress and the executive branch?

Finally, did the trust concept (as responsibility) originate in the "Discovery Era" of Europe's commercial and religious excursions to the Americas, or is it an outgrowth of the Marshall Court's critically important Indian law cases? These decisions held, among other things, that 1) the federal government, based on the "discovery" principle had secured "absolute" title to Indian land;[32] 2) had effectively reduced tribes to the status of "domestic-dependent nations;"[33] 3) but conversely had also recognized a significant measure of sovereignty in tribes which effectively precluded state governments from interfering in internal tribal matters;[34] and 4) recognized the tribes' ownership of their territory and the concomitant right to sell their lands and affirmed their international standing.[35]

Is the trustee-beneficiary relationship equal, contrary, or an outgrowth of the guardian-ward relationship? Or is the trust doctrine, as Francis P. Prucha has asserted, merely a figment of the fertile imagination of the 1975-1977 American Indian Policy Review Commission?[36]

If one accepts the essence of the federal trust doctrine when defined as "responsibility," does this imply that one

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grants the premise that the United States has plenary (read: virtually absolute) power over tribes, their resources, and their rights?[37]

A most useful definition of federal trust that seems to meld well with the historical record has been offered by Vine Deloria Jr.. He recently stated that as long as the federal government asserts claims to Indian lands via the problematic doctrine of discovery then it has willingly assumed a protectorate stance on behalf of Indian nations. As the tribes' protector from all enemies, domestic and foreign, the federal government "must defend the Indian tribes against intrusions by other Christian nations, and it must adjust its domestic law and the behavior of its citizens to ensure that its institutions and its citizens do not intrude upon the activities and the political rights of the Indian nations."[38] This notion of trust, while in evidence at various times in American history, has yet to be implemented on a consistent and comprehensive scale. Nevertheless, it is a definition which deserves close scrutiny.

NOTES

1 Vine Deloria, "Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the United States," *The State of Native America: Genocide, Colonization, and Resistance*, (Boston:South End Press, 1992) pp. 267–290

2 Deloria, 1992, p. 287

3 L.C. Green, "North America's Indians and the Trusteeship Concept," *Anglo-American Law Review,* Vol. 4, pp. 137–162; F.P. Prucha, *American Indian Treaties: The History of a Political Anomaly*, (Berkeley:University of Berkeley Press, 1994) p. 428

4 Vine Deloria, *A Brief History of the Federal Responsibility to the American Indian*, Department of Health, Education, and Welfare, Office of Education, OE Publication No. 79-02404 (Washington DC:Government Printing Office, 1979) pp. 19–20

5 United States Congress, American Indian Trust Fund Management Reform Act (108 St. 4239, 4240) October 25, 1994

6 *News from Indian Country*, March 1995, p. 2

7 Ibid.

8 Ibid.

9 United States Senate, Oversight Hearing on the Projected Impact of Proposed Rescissions for Fiscal Year 1995 and of Porposals to Consolidate or Block Grant Federal Funds to the States upon programs Serving American Indians, Alaska Natives, and Native Hawaiians, Hearing before the Committee on Indian Affairs, 104th Congress, 1st Session, March 20, 1995 (Washington DC: Government Printing Office, 1995) p. 3

10 Milner Ball, "Constitution, Court, Indian Tribes," *American Bar Foundation Research Journal*, Vol. 1, 1987, p. 62

11 Robert T. Coulter and Steven M. Tullberg, "Indian Land Rights," *The Aggressions of Civilization,* (S.L. Cadwalader and V. Deloria Jr, eds.) (Philadelphia:Temple University Press, 1984) p. 203

12 E.P. Krauss, "The Irony of Native American 'Rights,'" *Oklahoma University Law Review*, Vol.8, 1983, p. 447

13 Petra Shattuck and Jill Norgren, *Partial Justice: Federal Indian Law in a Liberal Constitutional System*, (New York: Oxford University Press, 1991) p. 116

14 Ibid., p. 118

15 *The Complete Oral Arguments of the Supreme Court of the United States*, (Frederick MD:University Publications of America, Inc., 1980) p. 46

16 Ibid.

17 Reid P. Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians," *Stanford Law Review*, Vol. 27, 1975, p. 1215

18 Gilbert L. Hall, *Duty of Protection: The Federal Indian Trust Relationship* (2nd ed), (Washington DC: Institute for the Development of Indian Law, 1981) p. iv

19 United States Congress, Special Report, *American Indian Policy Review Commission: Final Report*, (Washington DC:Government Printing Office, 1977) p. 126

20 Ibid., p. 127

21 Charles F. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy*, (New Haven:Yale University Press, 1987) pp. 85-86

22 United States Congress, Northwest Ordinance, St. 50, 52 (1787)

23 Anonymous, "Rethinking the Trust Doctrine in Federal Indian Law," *Harvard Law Review*, Vol. 98, 1984, pp. 422-440; Nell Jessup Newton, "Enforcing the Federal-Indian Trust Relationship after Mitchell," *Catholic University Law Review*, Vol. 31, 1982, pp. 635-683; Newton, "Federal power over Indians: Its Sources, Scope, and Limitations," *University of Pennsylvania Law Review*, Vol 132, 1984, pp. 195-288; Newton, "Rethinking the Trust Doctrine in Federal Indian Law," *American University Law Review*, Vol. 98, 1992, pp. 422-440

24 Newton, 1984, pp. 232-233

25 Newton, 1992, pp. 801-802

26 Ibid., p. 802

27 Newton, 1982; Anonymous, 1984

28 *Seminole v. United States*, 316 U.S. 286, 296–297 (1942)

29 United States, *Weekly Compilation of Presidential Documents*, (Washington DC:Government Printing Office, 1994) pp. 936–937

30 *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 453 (1988)

31 Prucha has argued in an unpublished essay (author has copy) that these are altogether different terms. He suggests that while the U.S. legitimately acts as a "trustee" for Indian land and other assets, and that this responsibility is therefore "similar to those of a bank or similar agency acting as a trustee for a beneficiary's money or other property," this is fundamentally different from the "greatly expanded meaning" attached to the phrase "trust responsibility" that Prucha says originated with the federally established American Indian Policy Review Commission in the late 1970s. According to the Commission "(1) the trust responsibility of American Indians covers protection and enhancement of Indian trust resources and tribal self-government and the provision of economic and social programs needed to raise the standard of living of the Indians to a level comparable to the non-Indian society; (2) it extends through the tribes to the Indian members, whether on or off the reservation; and (3) it applies to all federal agencies, not just those charged specifically with administration of Indian affairs" (p. 13). Prucha's view of the federal "trust" is limited to actual Indian treaty provisions which spell out a clear and legal fiduciary responsibility.

32 *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)

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

34 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)

35 *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835)

36 United States Congress, 1977, Chapter 4

37 Ball, 1987, p. 56

38 United States Senate, Native American Free Exercise of Religion Act, Hearing on S. 1021 before the Committee on Indian Affairs, 103d Congress, 1st Session, September 10, 1993 (Washington DC:Government Printing Office, 1994) pp.75–76

David Wilkins is a research fellow at the Center for Advanced Study in the Behavioral Sciences and an associate professor of political science and American Indian Sudies at the University of Arizona.