COALITION for TRIBAL SOVEREIGNTY

Legal Foundations of Tribal Nations' Inherent Sovereignty, United States' Trust and Treaty Obligations, And Unique Political Status

This briefing paper provides an overview of the legal foundations of Tribal Nations' inherent sovereignty, the legal obligations of the United States in its relationship with Tribal Nations, and our unique political status under equal protection principles. These legal foundations show why Tribal programs are different from other federal programs. ***Tribal Nations' exercise of our sovereignty and the United States' delivery on its trust and treaty obligations must not become collateral damage in the Administration's implementation of its unrelated policy priorities.***

Delivery on Trust and Treaty Obligations to Tribal Nations, Tribal Citizens, and Tribal Communities Is Not Race-Based. In 1974, the U.S. Supreme Court in *Morton v. Mancari* unanimously affirmed the principle that the United States may lawfully deliver on its trust and treaty obligations to Tribal Nations, Tribal citizens, and Tribal communities without running afoul of the U.S. Constitution's equal protection requirements.[1] While *Mancari* is the leading case in this arena, courts have continuously upheld this principle.[2] As discussed in more detail below, this unique status is based on the political relationships between inherently sovereign Tribal Nations and their people and the political relationships between the United States and Tribal Nations and Native people—recognized within the U.S. Constitution itself.

Tribal Nations' Inherent Sovereignty. Tribal Nations are and always have been inherently sovereign governments, a status that predates the establishment of the United States and has long been recognized by the United States.[3] Tribal Nations' inherent sovereignty and right to self-determination is further supported by international law principles in existence at the time of first contact and in the present day.[4]

Tribal Nations' Political Relationships with Tribal Citizens and Communities. As an inherently sovereign governmental entity, each Tribal Nation determines the individuals with whom it establishes a political relationship, including its Tribal citizens and community members.[5] Like U.S.

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[1] *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974).

[2] *See, e.g.*, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Antelope*, 430 U.S. 641 (1977); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977); *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023); *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011); *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005).

[3] *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55−56 (1978); *Haaland v. Brackeen*, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring) (explaining that, before colonization, Tribal Nations "existed as 'self-governing sovereign political communities'" and that "such entities do not 'cease to be sovereign and independent'" (quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978), and *Worcester v. Georgia*, 31 U.S. 515, 561 (1832))).

[4] *Worcester*, 31 U.S. at 520 (stating Tribal sovereignty is "settled doctrine of the law of nations"); *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring) (referring to Tribal Nations' enduring sovereignty as a "long-held tenet of international law"); G.A. Res. 61/295, arts. 3–5, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).

[5] *See Antelope*, 430 U.S. at 645 (recognizing that Tribal Nations have sovereignty over our people, including the power to regulate internal and social relations); Citizenship Code of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, ch. CTZ.1 pmbl. ("This ordinance is enacted pursuant to the inherent sovereign authority of the Lac Courte

citizenship, Tribal citizenship may come with rights and duties, such as to participate in Tribal government through voting or otherwise.[6]

Tribal Nations' Government-to-Government Relationships with the United States. From the beginning, the United States and its predecessor governments demonstrated their recognition of Tribal Nations as sovereigns by interacting with us as such.[7] Today, federal recognition of a Tribal Nation remains a "formal political act" that solidifies the "government-to-government relationship" between a particular Tribal Nation and the United States.[8]

United States' Trust and Treaty Obligations. The United States has assumed ongoing trust and treaty obligations to Tribal Nations and Tribal citizens and communities that are political in nature and for which we prepaid with our lands and resources.[9] Many of the statutes authorizing or appropriating funds for Tribal programs acknowledge that they carry out trust and treaty obligations, and those statutes serve as independent mandates.[10] Thus, funding for Tribal programs is legally mandated, even as the Administration implements its other policy priorities.[11] This legal mandate includes the federal funding and federal employees necessary for the provision of critical services the federal government and Tribal Nations and organizations deliver to Tribal communities.

Political Status Embedded Within Constitution. The U.S. Constitution singles out Tribal Nations in recognition and furtherance of Tribal Nations' sovereign governmental status, the political relationships Tribal Nations carry on with our own people and the United States, and the United States' trust and treaty obligations. This includes through direct reference in the Indian Commerce Clause,[12] implementation of the Treaty Clause,[13] and "the Constitution's adoption of preconstitutional

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Oreilles Band of Lake Superior Chippewa Indians to determine its Tribal citizenship which predates its Treaties of 1825, 1826, 1837, 1842, 1847, and 1854 with the United States Government.").

[6] *See, e.g.*, Const. and By-Laws of the Pueblo of Laguna, art. III, § 8.

[7] *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations . . . capable of making treaties. This was only following the practice of Great Britain before the Revolution."); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 180 (2008).

[8] H.R. Rep. No. 103–781 (1994); *see also* 25 C.F.R. § 83.2(a); 140 Cong. Rec. S6145 (May 19, 1994) (Sen. McCain) ("The recognition of an Indian tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations.").

[9] *See Mancari*, 417 U.S. at 551–52; *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government is . . . more than a mere contracting party. . . . [I]t has charged itself with moral obligations of the highest responsibility and trust.").

[10] *See, e.g.,* 25 U.S.C. § 1602(1) ("[I]t is the policy of this nation, in fulfillment of its special trust responsibilities and legal obligations to Indians . . . to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy."); 25 U.S.C. § 5301; *see also Antelope*, 430 U.S. at 647 n.8 (1977) ("[L]egislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution.").

[11] Some individual federal agencies have recognized that Tribal programs should not be harmed during implementation of the Administration's unrelated policy priorities. *See, e.g.,* Ending DEI Programs and Gender Ideology Extremism, Sec. Order 3416, § 6(d) (Jan. 30, 2025) ("Nothing in this Order shall be construed to eliminate, rescind, hinder, impair, or otherwise affect activities that implement legal requirements . . . , including but not limited to . . . the statutory authorities, treaty, and/or trust obligations of the Department and its Bureaus/Offices to Tribal nations and the Native Hawaiian Community.").

[12] U.S. Const. art. I, § 8, cl. 3.

[13] *Id.* art. II, § 2, cl. 2; *see also id.* art. IV, § 3, cl. 2 (Territory Clause).

powers."[14] The Constitution also directly refers to Native individuals in the Indian non-taxation portion of the Apportionment Clause.[15] Congress, in celebrating the 200th anniversary of the signing of the Constitution, reaffirmed that the government-to-government relationships between the United States and Tribal Nations are recognized in the Constitution.[16]

United States' Tribal Consultation Requirements. In furtherance of the government-to-government relationships between the United States and Tribal Nations and to implement its trust and treaty obligations, the United States has embedded a Tribal consultation requirement into specific and enforceable statutes.[17] The Executive Branch has also recognized via Executive Order a duty to consult with Tribal Nations on federal actions that may have Tribal implications.[18] Further, free, prior, and informed consent is an international standard for Native peoples worldwide.[19] The Administration must consult with us before taking actions that may affect us, including implementing Executive Orders and other Administration priorities.

[14] *United States v. Lara*, 541 U.S. 193, 201 (2004); *see also McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n.7 (1973); *United States v. Holliday*, 70 U.S. 407, 418 (1865); *Brackeen*, 599 U.S. at 307, 310 (Gorsuch, J., concurring) (referring to the "Indian-law bargain struck in our Constitution," the terms of which include that "Indian Tribes remain independent sovereigns").
[15] U.S. Const. art. I, § 2, cl. 3.
[16] H.R. Con. Res. 331, 100th Cong. (1988).
[17] *See, e.g.*, 54 U.S.C. § 300108 (implemented through 36 C.F.R. pt. 800).
[18] *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).
[19] *See, e.g.*, G.A. Res. 61/295, arts. 10–11, 19, 28–29.