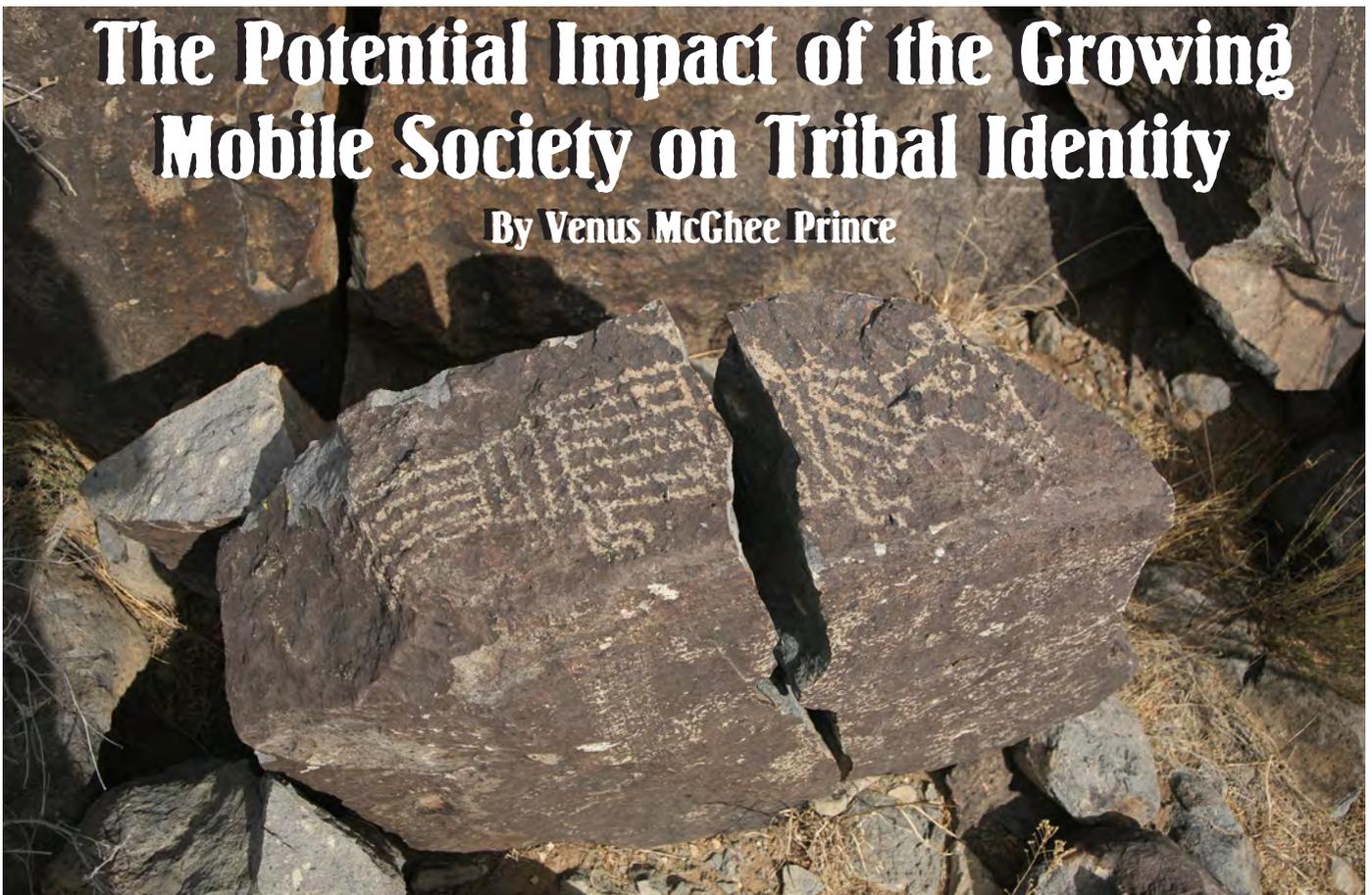


The Potential Impact of the Growing Mobile Society on Tribal Identity

By Venus McGhee Prince



When most Americans think of tribes in this country, they don't think of modern Indians who may live next door and may look and act much like them, at least from a first glance. Yet the growing technological and physical mobility of modern society may be producing these fundamental changes in tribal identity. How will tribes define themselves going forward? How will outside society view and respond to the continued "special status" that tribes currently enjoy under the law? This article explores the challenges that face tribes as their identities are reshaped in the modern world.

Most Americans recognize that Indian tribes in the United States enjoy a "special status." They might not understand whether this special status is based on history, race, politics, or the law, but they assume that tribes have their "own" lands and have different language, customs, and traditions. Tribes also take great pride in this special status, and most members of tribes do not hesitate to identify themselves as such. This special status has entitled tribes to pursue many federal programs and benefits as well as unique economic ventures, such as gaming. But what continues to make tribes different from other racial, ethnic, or political groups in modern society? The answer to this question requires a closer look at what constitutes tribal identity¹ in the 21st century.

This complex, multidisciplinary concept of tribal identity first fascinated me when I chose the topic for my college

thesis in 1995 and focused on the construction and evolution of identity among members of my tribe, the Poarch Band of Creek Indians. I then further explored the impact of federal law and policies on tribal identity in my law school comment in 1998. At the time, Poarch Creek identity was based on two critical aspects—extended kinship ties and the existence of the reservation and tribal administrative services.²

The world around us has changed dramatically since the 1990s. The world has become increasingly mobile—both technologically and physically. More than five billion cell phones are in use worldwide;³ the number of mobile phones in use in the United States exceeds the total U.S. population.⁴ More and more people are relocating in order to pursue job opportunities,⁵ and workers are commuting significant distances to their jobs. (That includes me. I travel two hours to and from work daily crossing from the state of Florida to the state of Alabama.) We no longer live in an isolated world.

We also cannot ignore the increase in the urban Indian population⁶ and its potential impact on how tribes may reconstruct their identity. According to the U.S. Census, in 1970, only 38 percent of people identified as American Indian and Alaska Native did not reside on reservations.⁷ By 2000, that percentage had risen to 61 percent. In the most recent 2010 census, that percentage increased again to 78 percent. These statistics suggest a dramatic change in where and how most tribal members live in this modern society.

Will this growing mobile society have an impact on tribal identity? And if it does, what will that impact be?

Does the Physical Tie to the Tribe's Lands Matter Anymore?

Throughout history, tribes have identified closely with their homelands. These homelands may have been “stolen” or legally confiscated by various means, but the federal government ultimately placed most tribes on reservations, lands that are held in trust by the United States for the benefit of the tribes. These tribes then made these lands their own by developing customs and traditions specific to these areas over time, and the reservation became a fundamental basis of their respective tribal identities. The ties to the reservation also became embedded in the development of federal and tribal jurisprudence. The federal government may have intended the reservation to serve as a place of isolation or geographic imprisonment for tribes, but tribes have co-opted the physical place and legal concept and consider these essential to their identity. As described by one author, “Indian trust land provides for tribes’ spiritual, physical, economic, and political well-being, while promoting a sense of individual and collective identity, of community.”⁸ The growing numbers of tribal members relocating away from their reservations, however, could undermine this perception of the meaning and significance of the reservation to tribal identity and call into question the reliance on the reservation in federal and tribal law.

Many federal laws that have shaped and continue to shape, at least in part, the identity of tribes perpetuate the assumption that most Indians reside on the reservation or on other Indian lands. For example, the Indian Reorganization Act of 1934 intended to rebuild the Indian land base and to encourage self-sufficiency. The definition of “Indian,” as given in the act, includes one class of persons who must have been “residing within the present boundaries of any reservation.” The term “tribe,” as used in the act, referred to “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.”⁹ The Indian Gaming Regulatory Act of 1988 has fueled massive economic development and self-sufficiency in Indian country, but again, the placement of a gaming facility on “Indian lands” is a fundamental requirement for a tribe to engage in gaming activity.¹⁰ This requirement conversely tears at the core of sovereignty and impedes prosperity by preventing tribes from erecting gaming facilities on tribally owned lands that do not fall within the scope of “Indian lands.” These laws presume that the reservation remains the fundamental building block of tribal identity.

Similarly, the goal of the Indian Child Welfare Act of 1978 is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” Yet a tribe has exclusive jurisdiction only over a “child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe.”¹¹ This narrow grant of exclusive jurisdiction to tribes gives a tribe no flexibility in exercising exclusive jurisdiction over an Indian child who may live near the reservation, much less in an urban area.

The only federal law that appears to accommodate the physical mobility of today’s Native American population and to acknowledge the existence of the urban Indian population is the Indian Healthcare Improvement Act, which was enacted in 1976 and reauthorized five times, most recently in 2011. This act has had a significant impact on the

lives of American Indians and Alaska Natives by providing the basis for funding health care services to both “Indians and urban Indians,” the distinction being made between reservation Indians and off-reservation Indians.¹² Over the years, there has been a growing need to fund urban centers for Indians as more and more individuals have left reservations and moved to urban areas.¹³

With the migration of three-quarters of the 5.2 million American Indians and Alaska Natives away from the reservation, there appears to be a growing disconnect between the fundamental assumption in federal and tribal laws that most Indians live on the reservation and the daily lives of modern Indians. But will this tension in federal law diminish tribes’ reliance on the reservation as part of their tribal identity? It is possible (and somewhat likely) that, over time, an urban Indian may rely less and less on the reservation as a basis for his or her spiritual and physical well-being.

However, the connection to a “tribal homeplace”¹⁴ might remain as a foundation to even the urban Indian’s legal and political identity as a result of mobile technology. Most tribes have appropriated modern technology as a means of improving communications with members of their tribes. Tribes have developed sophisticated websites and newsletters, thereby providing modern means for tribal members to stay informed about the tribe’s activities. Some tribes may also allow their members to participate in political activities, even if the tribal member does not reside on or near the reservation. For example, the Poarch Band of Creek Indians allowed a tribal member to serve on the Ethics Board while living in Germany by using e-mail correspondence and conference calls. This is a documented example of how mobile technology may arguably strengthen a tribal member’s ties to the reservation.

Any statistical figures with respect to the migration of tribal members from reservations to urban areas may also be a bit deceptive. The U.S. Census figures are not universally accepted as a reliable way to quantify the Native American population.¹⁵ In fact, the statistics for the Poarch Creeks suggest that the U.S. Census statistics do not portray the situation accurately. The Poarch Creeks certainly are experiencing increased physical mobility, but they are not locating far from the reservation.

Only 155 of the 3,095 members of the Poarch Band of Creek Indians live on the reservation or on other Indian lands. Yet the majority of the tribe’s members remains close to the reservation. Of the 3,095 tribal members, 1,940 (63 percent) still live within the tribe’s six-county service area. In this respect, when it comes to any increase in physical mobility, census data may not be as accurate or telling as one would expect.

In short, the emphasis on the reservation is so firmly embedded in federal and tribal law that the reservation has become a part of the self-identification of many tribes. Even though the increased physical mobility and moving away from the reservation could prompt revisions to the legal definitions of “Indian” and “tribe,” the technological mobility of modern society may counter some of these impacts by sustaining the political, legal, and perhaps cultural elements of tribal identity.

Will Definitions of Tribal Membership Need to Evolve?

For many organized tribes, the cornerstone of tribal identity is membership in a tribe—whether that is determined by the federal government or the tribe itself. As I discovered in drafting my law school comment and as discussed by many theorists and scholars, federal law and policy have had an indelible influence on how tribes identify themselves. The federal government has required either some level of blood quantum or membership in a federally recognized tribe for access to federally funded services.¹⁶ In turn, 70 percent of tribes now require that an individual have a certain amount of blood quantum, often at least one-quarter, to be eligible for tribal membership.

As noted by one author, however, tribes have not fully adopted or perpetuated the federal Indian blood quantum approach in their requirements for tribal membership. Many tribes have demonstrated an innovative spirit by refashioning the federal Indian blood concept into a tribal blood concept, which is a genealogical measure that “does not rest on an Indian/non-Indian dichotomy, but rather serves as a device for counting a tribe’s ancestors.” These tribal communities are “acting to extricate themselves from the pan-Indian category used by the federal government and to reassert themselves as self-contained, self-governing polities.”¹⁷ But will this type of innovation backfire against a tribe in this growing mobile society, in which technological and physical mobility may lessen the opportunity for and frequency of intermarriage with members of the same tribe?

The Poarch Creeks now use tribal blood quantum, rather than Indian blood quantum, as the basis for tribal membership, but this change is a recent development. The original tribal constitution allowed persons of “at least one fourth (1/4) degree Indian blood” to become members, “provided they are not enrolled as members of any other tribe, group or band of Indians.” However, in 2010, the tribal membership approved an amendment that tightened the eligibility requirements in two significant ways: (1) a person must be “one fourth (1/4) *Poarch Creek* Indian blood”; and (2) a person cannot be enrolled as a member of “any other *federally recognized* tribe, group or band of Indians.”¹⁸ With this amendment, the Poarch Creeks have shown a clear preference to identify themselves as members of their own tribe, as distinct from any other federally recognized tribe.

Although this isolation was and continues to be a critical aspect of the identity of the Poarch Creeks, the combination of a lineal descent requirement plus a minimum blood quantum could create an identity crisis in upcoming generations. In my 1995 thesis entitled “The Construction and Evolution of Identity Among the Poarch Band of Creek Indians,” I noted that not only was a majority of the tribal members already intermarried, but most of the younger members of the core study group were not concerned about “marrying Indian” or other Poarch Creeks. Given that only 289 of our 3,095 tribal members are under the age of 18 and that all of them are growing up in an extremely mobile society, marriage to other Poarch Creeks is extremely unlikely. Moreover, half of the 289 tribal members who are minors have only one-fourth blood quantum, so even if one of them married a descendant of a tribal member, the

probability that their child would have the one-fourth blood quantum necessary for tribal membership is also unlikely. Thus, the Poarch Creeks’ seemingly innovative approach to defining tribal identity could be quite short-lived.

To solve this potential identity crisis, the Poarch Creeks could further refine this approach over time by focusing on the genealogical aspect through pure lineal descendancy and eliminating the minimum blood quantum requirement. Still, this approach to determining tribal identity focuses only on the racial aspect. The lack of any nonracial elements in both the Indian and tribal blood quantum approaches is striking and potentially problematic in this modern society. The rise in physical and technological mobility will naturally lead to a rise in intermarriage, which will naturally lead to a lesser blood quantum (Indian or tribal), which could lead to a crisis with this largely race-based definition of tribal membership under both federal and tribal law.

As noted in a recent article published in the *New York Times* in late 2011, “How Do You Prove You’re an Indian?” by Duane Treuer, tribes must turn away from the “fixation on blood” and look “beyond genetics alone” in identifying themselves as “Indian.” Tribes could base tribal membership on several factors, such as the possession of fluency in their native language, the passage of a basic civics test, residency or some period of naturalization inside the treaty or service area, or a year of community service.¹⁹ Even though urban Indians may not live on the reservation or on other Indian lands, they may have lived on the reservation in the past or could do so in the future. Similarly, lineal descendants with less than one-fourth blood quantum who grew up or lived in a tribal community would have an opportunity for tribal membership as well. Moreover, all of these individuals can use modern technology to potentially satisfy some of the other membership factors. This approach may avoid the biological and geographical barriers caused by the current Indian and tribal blood quantum approaches to tribal membership and exacerbated by the new mobile age.

The urban Indian population has been moving in this direction with respect to its tribal identity. The 78 percent of Indians who do not reside on the reservation or on other Indian lands already use other criteria to define their identity, such as ancestry, appearance, cultural knowledge, and participation in the Indian community.²⁰ Thus, even though these urban Indians may not be directly participating in cultural affairs on the reservation, they certainly consider cultural knowledge as a badge of tribal identity and they may very well be interacting with fellow tribal members or other Indians in different types of cultural experiences. Still, the growing mobile society could produce a decline in tribe-specific identity in favor of the pan-Indian identity that has been encouraged by the federal government’s Indian blood quantum approach—an approach that has its own set of challenges.

Even though the move away from the blood quantum requirement may make sense conceptually, tribes may encounter practical obstacles in doing so, such as the following:

- Will tribal members who have known no other eligibility requirement but blood quantum be willing to

pass an amendment to a tribal constitution that adopts these other factors in determining tribal membership? Many tribes have experienced massive assimilation and have lost fluency in their native languages and cultural ties. As a result, many tribal members may not understand or appreciate the significance of the nonracial ties to the tribe. It should also be taken into account that it is difficult for anyone to adopt an identity construct that may call into question his or her own identity.

- If an amendment is passed to the tribe's constitution, how would the tribe's leadership determine whether an individual satisfies the nonracial elements of tribal identity? The blood quantum requirement has the advantage of being objective and simple to administer. Perhaps this is why most tribes that consider amendments to membership requirements focus only on lowering the blood quantum requirement or pursuing lineal descendancy, rather than embracing other nonracial factors.

To effect any real changes in tribal membership, however, a tribe's governing body would need to launch a well-coordinated and creative campaign to educate its tribal membership on the need for action.

What Does the Future Hold?

There is no doubt that our rapidly growing mobile society has had an impact on an Indian's tribal identity and will continue to have an impact. The dramatic increase in the number of Indians living off the reservation in the past 30 years is a testament to this effect. The fact that there are more mobile phones in use than there are people in the United States is a telling sign that indicates how Americans—including American Indians and Alaska Natives—have been swept up in this information age. Despite this new mobility, the reliance on the physical boundaries of a reservation as the cornerstone of tribal identity should remain. However, the more indirect effects of this mobility on other aspects of tribal membership—particularly tribal membership—are yet to be seen.

The reservation concept is well entrenched in federal and tribal law and serves as the basis for the legal and political aspects of this tribal identity. The physical mobility of the modern age and the move to urban areas may affect or change the cultural aspects of an individual's tribal identity, but the technological mobility increases the tribal members' communications with a tribe in a way that could reinforce the legal, political, and cultural aspects of their overall tribal identity.

The more problematic impact of the mobile society may be the pressure that it places on the prevailing approaches to tribal membership—the ultimate expression of a tribe's identity. Many of us already anticipated that the blood quantum approach, whether using Indian blood or tribal blood, could cause an identity crisis on its own because of the mere passage of time. The rapid increase in mobility might precipitate this crisis by increasing the rate of intermarriage with non-Indians and decreasing any requisite

blood quantum required by tribal membership. A move to a pure genealogical approach would eliminate the minimum blood quantum requirement but does not address the tension that may be caused by outside perceptions if tribes have not retained any distinct characteristics.

How long will society at large recognize a separate identity for tribes or support their special status under the law? As tribal members become more mobile—technologically and physically—they are arguably being assimilated culturally and otherwise into the larger surrounding society. If tribes require no connection to the tribe other than lineal descent, the authenticity of a tribe and the need for acknowledgment of separate sovereignty will certainly be challenged. Although tribes experienced a unique history with the federal government that resulted in their special status under the law, tribes may appear no different from closely held corporations or other state or local polities.

If they are to survive, tribes must continue to reshape their tribal identity in a way that will accommodate the impact of a growing mobile society on their tribal membership requirements. The incorporation of political and/or cultural ties to the tribal community into tribal membership requirements could potentially slow or lessen the issues created by the race-based approaches to tribal identity. Tribal members could then potentially take advantage of the “mobility” of the modern era to maintain their political and cultural ties to their reservations, even if they do not reside there.

I remain concerned about the future of tribal identity in light of this growing mobile society, but my conclusion for all tribes is the same today as it was for my tribe many years ago: As long as the emotional tie and the feelings of *closeness* and *pride* in who they are remain, the Poarch Creek community will survive. This community has proved its resilience in the past and will continue to do so in the future. **TFL**

Venus McGhee Prince is attorney general for the Poarch Band of Creek Indians, a federally recognized Indian tribe located in Alabama. Prince received her Bachelor of Arts, cum laude, in sociology from Harvard University and her Juris Doctor from the University of California at Berkeley. Prior to her employment with the Poarch Band of Creek Indians, she served as a law clerk to Justice Dana Fabe of the Alaska Supreme Court. She also practiced at Sonosky, Chambers, Sachse, Enderson & Perry LLP in Washington, D.C., concentrating on Indian law; Novack and Macey LLP in Chicago, concentrating on commercial litigation; and Sachnoff & Weaver Ltd. in Chicago, concentrating on insurance coverage for policyholders. Prince is a member of the Alabama State Bar, the District of Columbia Bar, and the Illinois State Bar and is also a member of the Federal Bar Association and its Indian Law Section and the Association of Corporate Counsel. © 2012 Venus McGhee Prince. All rights reserved.



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Endnotes

¹For purposes of this article, “tribal identity” refers to the identity of tribes that are organized with a governing structure and recognized by the federal government or by a state.

²Venus Sharee McGhee, “The Construction and Evolution of Identity Among the Poarch Band of Creek Indians” (March 24, 1995) (unpublished B.A. thesis, Harvard University, Department of Sociology) (on file with author).

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⁵Lisa Bernard-Kuhn, *Rising Cost of Relocation Hampers Job Market*, USA TODAY (July 30, 2011).

⁶National Urban Indian Family Coalition, *Report to the Annie E. Casey Foundation, Urban Indian America: The Status of American Indian and Alaska Native Children and Families Today*, 6–7 (2008).

⁷The U.S. Census actually used the term “American Indian Areas,” which included federal American Indian reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state American Indian reservations, and state-designated tribal statistical areas. Although there are legal distinctions between these areas, I use the term “reservation” to refer broadly to all these areas for purposes of this discussion.

⁸Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifi-*

cations for Placing Land Into Trust Through 25 C.F.R. Part 151, 27, AM. INDIAN L. REV. 421, 422 (2002/2003).

⁹825 U.S.C. § 479.

¹⁰925 U.S.C. § 2703(4), 2710.

¹¹1025 U.S.C. § 1902, § 1911.

¹²1125 U.S.C. § 1602, amended by H.R. 536 (2011–12).

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¹⁴McCoy, *supra* note 8, at 444–45.

¹⁵National Urban Indian Family Coalition, *supra* note 6, at 7 n.12.

¹⁶Robert Clinton, Carole Goldberg, and Rebecca Tsosie, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 171–182 (2005).

¹⁷Kristy Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 251–52, 298–99 (2008/2009).

¹⁸Poarch Band of Creek Indians, Tribal Constitution, Article I, Sec. 1 (adopted June 1, 1985, amended June 5, 2010) (emphasis added).

¹⁹David Treuer, *How Do You Prove You’re an Indian?* N.Y. TIMES (Dec. 20, 2011), available at www.nytimes.com/2011/12/21/opinion/for-indian-tribes-blood-shouldnt-be-everything.html.

²⁰National Urban Indian Family Coalition, *supra* note 6, at 6.

the era of allotments and assimilation, the period of Indian reorganization, the termination era, and the era of self-determination⁶—that form the basis of literally all casebooks and treatises that followed.⁷ David’s work (along with that of Daniel Rosenfelt and Charles Wilkinson) in organizing the historical eras of Indian law and policy effectively framed how practitioners, courts, and scholars now discuss federal Indian law.

TFL

Matthew L.M. Fletcher is a professor of law at Michigan State University College of Law. Some of the material in this paper appeared first in the Fall 2011 edition of Federal Indian Law Newsletter published by the Federal Bar Association’s Indian Law Section. Kristen A. Carpenter is the associate dean for faculty development and an associate professor of law at the University of Colorado School of Law. Memorial contributions may be sent to the David H. Getches Scholarship Fund. Additional information is available at www.cufund.org/GetchesScholarship. © 2012 Matthew L.M. Fletcher and Kristen A. Carpenter. All rights reserved.

Endnotes

¹University of Colorado Law School, Press Release (July 5, 2011).

²National Congress of American Indian, Press Release (July 7, 2011).

³Mark Udall, *In Memory of David Getches*, 157 CONG. REC. S4478 (July 11, 2011).

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⁷See Felix S. Cohen, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 47–206 (1982 ed.); Monroe E. Price and Robert N. Clinton, LAW AND AMERICAN INDIAN 68–92 (2d ed., 1983); William C. Canby Jr., AMERICAN INDIAN LAW IN A NUTSHELL 9–31 (1983); Conference of Western Attorneys General, AMERICAN INDIAN LAW DESKBOOK 9–27 (1993); Felix S. Cohen, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.02–1.07, at 10–113 (2005 ed.); Robert T. Anderson, Bethany Berger, Philip P. Frickey, and Sarah Krakoff, AMERICAN INDIAN LAW: CASES AND COMMENTARY 15–162 (2008). See also Stephen L. Pevar, THE RIGHTS OF INDIANS AND TRIBES 1–15 (4th ed., 2012).