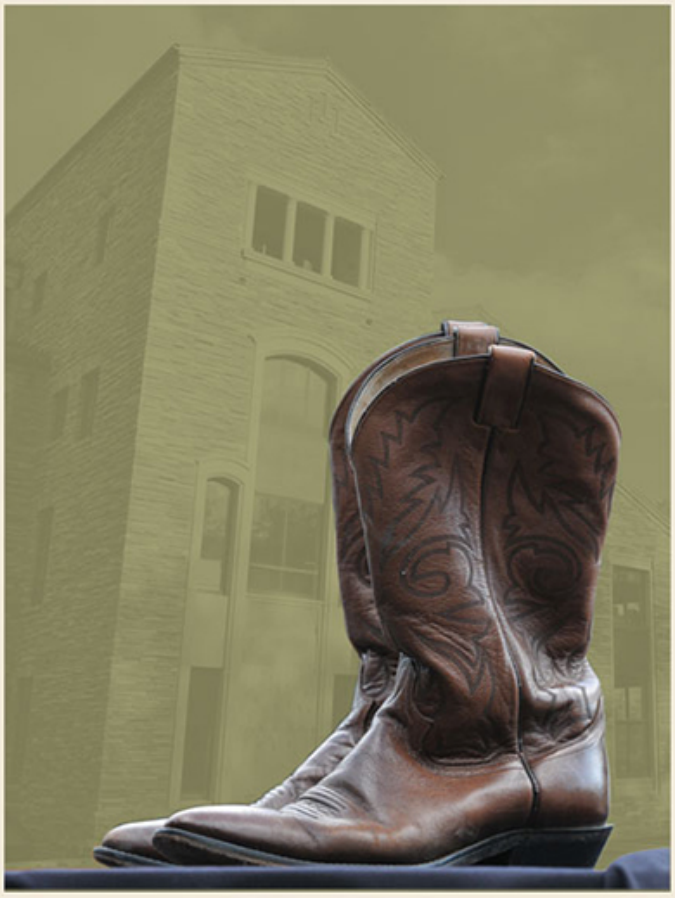
2013

Remarks of David H. Getches: Federal Bar Association Indian Law Conference (April 7, 2011)

David H. Getches
University of Colorado Law School



David H. Getches, *Remarks of David H. Getches: Federal Bar Association Indian Law Conference (April 7, 2011)*, 84 U. COLO. L. REV. 201 (2013).

REMARKS OF DAVID H. GETCHES: FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE (APRIL 7, 2011)

DAVID H. GETCHES*

At no other occasion is there so much expertise in Indian law gathered in one place, at one time. It is a tribute to the [Federal Bar Association ("FBA")] that it does this year after year, renewing our exploration of a subject so vital and exciting to all who come together and so critical to the survival of tribal nations. Thanks to my Colorado Law colleague, Professor Kristin Carpenter, and to her cochairs, and to Professor Elizabeth Kronk, chair of the FBA Indian law section.

It is my honor to be here once again. This conference is where I have rolled out research on United States Supreme Court decisions in Indian law that later became articles, and this is where I have often updated the troubling path of recent Supreme Court decisions in Indian law.

My message this morning is that meeting and defining the continuing challenges posed by Indian law and defining best practices calls for a renewed pursuit of some venerable principles. The future of Indian law, like its past, is critical to ensuring the ability of tribes to survive and thrive in a world that is obsessed with issues that seem to many people more important.

The common cause of tribes and the United States is the continued existence of plural cultures, a kind of federal (small

* Dean of the University of Colorado Law School from July 2003 until his untimely passing in July 2011. Before that, Dean Getches was a long-time and beloved faculty member and the Rafael Moses Chair in Water law. In his more than two decades at Colorado Law, Dean Getches became a national authority on natural resources and Indian law issues. His academic interests were prompted by his experience; prior to joining the faculty of Colorado Law School in 1979, he was the founding Executive Director of the Boulder-based Native American Rights Fund and spent several years in private practice. Dean Getches had a prolific academic career. He wrote casebooks, as well as books intended for a more general audience, and published numerous articles and book chapters, including some written in Spanish and French. He took two leaves from the University of Colorado, first to serve as the Executive Director of the Colorado Department of Natural Resources from 1983 to 1987, and then to serve as a special consultant to the Secretary of the Interior in 1996.

F) ideal of one from many. It is no threat to the United States, nor any shame to tribal people, to have groups of separate, self-governing peoples with thriving economies—tribal groups who decide how to manage their territories. In fact, it is the obligation of the national government, under our rule of law, not only to allow, but to foster that independence, that growth of tribal governing and economic power.

My message is that the rule of law commands federal support for the shared objectives of all tribes. Now, I know that lumping all tribes together is hazardous. But, I know and have worked with many tribal leaders over the past forty-plus years, and have never met one that did not want to be able to govern the people and resources of a demarked tribal territory. Additionally, I have never met one who did not aspire to a degree of economic self-sufficiency within his or her territory.

The rule of law, under United States statutory law and judicial precedent, says that these tribal aspirations shall be allowed and that the federal government should protect all lawful tribal efforts and actions to further those aspirations. The rule of law includes some hoary principles coming from cases that surprise many a law student first exposed to Indian law—ideas of self-governance free of state interference and respect for tribal territory and fulfillment of ancient promises by the government itself. Yes, I know there are some curious doctrines wrapped around those principles—doctrines of plenary power and trusteeship. These are surprising to our students and to the new practitioner entering the field. How can the government, to paraphrase Chief Justice John Marshall, arrogate to itself these powers over peoples whom it simply surrounded with a kind of constructive conquest? But, I urge that we—I urge that my students—see this as a deal. If this is the law that rules under a system of rule of law, accept the guarantees and insist that the federal powers be used to enforce them. This is the context of *Worcester* [*v. Georgia*].[1]

So, if there is to be tribal self-government, the intrusions of the states must be limited. Such intrusions have been limited in hundreds of potent Indian law decisions that exclude states from governing tribes and tribal territory. The federal government must use its plenary legislative role to advance, support, and protect tribal government from intrusions. If there is to be protection for tribal property rights, the federal

1. 31 U.S. 515 (1832).

trusteeship must be realized in proactive efforts to control individuals and state and local governments who threaten the integrity of tribal rights to land, water, and resources.

For some of my friends, it is anathema to speak of the legitimacy of such heretical concepts as plenary power in terms of its utility, let alone see it as fundamental to the future of Indian law. For many people—including in the federal government itself, and even some tribal leaders—the idea of federal trusteeship seems outmoded. The federal agencies, even the [Bureau of Indian Affairs], the one that should know best, do not really understand their responsibilities. And, tribal leaders, fed up with federal officials who historically use trusteeship to control what the tribes should be controlling, have given up on asserting a trust relationship.

Scholars, some of my dearest friends, are offended by the impurity of all this—[a] plenary power grab that is hard to justify in any way but by an assertion of raw power, and a trust relationship that came out of cases talking of Indians as wards and weak and defenseless people. I share a cynicism about the origins of these doctrines, too.

But, I believe that finding the strengths in two centuries of jurisprudence and embracing the pillars as we insist on the government following the rule of law will be a fruitful path and is consistent with our own morality. I believe in not only holding our own system and officials accountable for the transgressions of the past, but also for supporting the nation-building that tribes seek for their own future. We need to seek the shelter and the force of the rule of law. It is our starting place, and it is the engine for arguments and efforts of tribes.

That means, too, that Congress must understand that its role is to exercise plenary power positively to support tribal building with funding and to correct misguided Court decisions. The new Indian Law and Order Commission—first meeting in April[2]—will make recommendations on jurisdiction and on the federal role: legislation [and] administration.

Our challenge is one of educating those charged with wielding plenary power and fulfilling the trust relationship. As I have complained at these conferences, almost nobody on the United States Supreme Court, for fifteen years under William Rehnquist and for the past few years under John Roberts, seems to get it. It is surely the worst era for Indian law ever in

2. April 6, 2011.

the Supreme Court. It can change. Justice Sonia Sotomayor has expressed to friends her desire to understand the field. That is hopeful. She is but one, but if she can convince her colleagues that there is really something distinct known as Indian law, it is possible that the Court will stop using those cases for other agendas.

I am not one who thinks the Court has been on a mission to do in tribes or Indian people. I have written, and I think the decisions before and after my writing show, that the Court is really just using those cases to advance one of three larger ideological agendas. The three agendas are promoting so-called "colorblind justice," protecting states' rights, and adhering to mainstream values in our society. Tribes tend to lose if these things are what the Court thinks a case is about.

We should not give up on educating the Court. And, we should argue the vitality of plenary power, as in [*United States v.*] *Lara*.[3] It is the true means for restoring and expanding tribal power and Indian rights. And, if arguments in cases where tribal power confronts states' rights are to result in the triumph of tribal sovereignty, the exclusive right of Congress to extinguish tribal powers and rights—exercised in the particular case—is a strong argument. Especially strong is the exercised plenary power, upholding tribal governments or even extending it as in the Indian Child Welfare Act.

Pressing the trust responsibility is a thorny matter. It is thorny because neither the Court, nor flat-footed federal agencies, seem to understand its meaning in a modern context. Tribes are functioning governments with competent agencies. Consider the vast and well-trained machinery of, say, the water resources department at Navajo. The fisheries management capacity of the Northwest Indian Fish Commission is at least as good as the state fisheries agency. In minerals management, many tribes have overcome the incompetence of federal managers in years past with their own experts.

So what do tribes need of the trust responsibility today?

(1) fair dealing in all things—even where the government has conflicting responsibilities;
(2) consultancy—building agencies, tech assistance;
(3) financial aid—funds to implement federal laws and

3. 541 U.S. 193 (2004).

supplement old federal functions; and
(4) advocacy—in courts.

There is a great opportunity with the Secretarial Commission on Trust Responsibility that will be set up as part of the historic Cobell Settlement.[4] As momentous as that settlement is in achieving redress for a century of incompetent federal management of trust funds, it can be even more. At a minimum, Indians must demand that trust funds management be done right in the future. The Commission should ensure that. But, should not it also look at the trust responsibility in the larger context—legal representation, oversight of contracting and leasing, land protection, [and] mineral, and other resource management? Never again should we see the travesty of the Navajo coal leasing case, in which the Supreme Court allowed connivance between the Secretary of the Interior and a coal company to suppress competitive pricing of the tribe's coal in a lease where the Secretary was supposed to act as a trustee.

Why not use the Secretarial Commission to develop and propose administrative and even legislative articulation of best practices and principles for the trust responsibility? Surely the Department of the Interior needs better guidance in its fulfillment of the trust responsibility, and that could come out of a process that begins with the Trust Commission holding national hearings on the legitimate expectations of American Indians for exercise [sic] of a fiduciary relationship. How has the government failed to fulfill its responsibilities? How should it [fulfill its responsibilities] in the future? Surely, the kind of services and responsibilities expected of the trustee varies with the times and with the sophistication and capacity of the beneficiary. Educated tribal leaders do not need the federal government to substitute its judgment for theirs. [However], they should be able to expect fair dealings always, the benefit of the doubt in close cases, and advice and counsel when they need it.

While my advice to tribes and their lawyers has been, for some years now, to avoid pressing cases to the Supreme Court, sometimes there is no choice but court. So, when cases are

4. This is the proposed settlement agreement resulting from the class action case *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012), which continues to be litigated as individuals have filed petitions with the Supreme Court for a writ of certiorari.

heading through the courts, it would be foolhardy to ignore the basic principles of Indian law. Never mind that some scholar may have made a dire prediction about how an issue [would] come out if the Supreme Court [got] a hold of it. Sure, the Court has strayed, but most of its digressions from Indian law, as we learned it, and as we should continue to teach it, can be isolated as exceptions, and, yes, as mistakes. These are our *Plessys* and *Dred Scotts*.[5] They are wrong. They can be overturned by a later court. They can be remedied with congressional action.

The principles that can lead to their overruling someday and that will undergird legislation must be repeatedly asserted. We can debate in the classroom whether the Supreme Court, under Justice Marshall, grabbed too much power over Indian affairs for Congress and [used disdainful] rhetoric in early cases that sounds racist today, 170 years later, but there are powerful principles that can be argued and used to vindicate rights and to demand respect for tribal power over people and territory. And, of course, as *Lara*[6] tells us, the road to congressional restoration of tribal sovereignty, where it has been eroded by misguided Supreme Court decisions, is paved with plenary power.

Tribes today are smart and well equipped to deal with plenary power. They have—if they act collectively, with the wealthier doing more than their share—the political savvy and access to turn back negative legislation. They have [achieved] legislation that enables and funds the implementation of tribal authority and Indian rights. And, they have the ability to propose and get a fair shot at legislation that will bolster and restore powers and rights.

So, as we look up close at dealings with the continuous legal challenges that fill the conference agenda and search for best practices, let us consider what the federal responsibility in each area is and how it should be fulfilled in an era of developing tribal nations. And, consider how the impediments of tribal governance on their territories can be removed through legislation. It is tempting to write off the principles that worked to protect tribal rights and lands in the past

5. Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sandford, 60 U.S. 393 (1856). *Plessy* was overruled by the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Dred Scott* was superseded by Constitutional amendment. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

6. *See Lara*, 541 U.S. at 193.

because they have been corrupted in some applications, because they are imperfect, and because they have questionable pedigrees.

But, I urge that these principles be held up as the law of the land and made the benchmark for meeting new and continuing challenges and setting the best practices of the future. Look at what past generations of Indian people—overpowered by the larger society—did:

(1) they revised the Allotment Act;
(2) confronted by a national policy of termination to end the federal tribal relationship and trust lands, they fought; they won reversal of this misguided policy; and
(3) treaties, the engines for taking away Indian land in the country, are cherished for what they preserve, specifically or by not specifically taking away.

Just as the earlier generations did not forget the fundamental principles and fought to return to them, so should future generations.