

THE THREE PHASES OF THE TRIBAL
SELF-DETERMINATION ERA AND THE PHASE OUT OF
FEDERAL PATERNALISM*Elizabeth Hidalgo Reese**

We commonly call the last fifty years of federal Indian law and policy the “tribal self-determination era.” This Piece argues that this era is actually three conceptually distinct though temporally overlapping phases of federal Indian law and policy development. Each of these three distinct phases is a step further dismantling the structures of federal paternalism and replacing them with laws and policies that support tribal nations’ strength, capacity, and autonomy. Paternalism has become, therefore, somewhat of an anti–North Star for the transformative federal Indian policies of the last fifty years and can continue to serve as that anti-guiding light for further federal Indian law and policy development. What makes this era challenging and noteworthy is that it is characterized by an instance of something unusual and difficult for a government: a commitment to giving up power.

Now this commitment is at a crossroads. The Biden Administration championed a third phase of policies with traditionally conservative, small government–minded commitments to start shrinking federal government bloat and promoting deference to or cooperation with local tribal decisionmaking. The Trump Administration must decide between conservative impulses to continue this work of shrinking unnecessary federal bureaucracy or more authoritarian impulses to increase the control that funding gives the executive branch over entities like tribal nations that rely on that funding.

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[Indians'] foremost plight is our transparency. People can tell just by looking at us what we want, what should be done to help us, how we feel, and what a 'real' Indian is really like . . .

In so many ways, Indian people are re-examining themselves in an effort to redefine a new social structure for their people. Tribes are reordering their priorities to account for the obvious discrepancies between their goals and the goals whites have defined for them.

— Vine Deloria Jr.¹

INTRODUCTION

The title “Great White Father”² has always seemed odd to me. Native Americans are well aware of the brutal reality of our experience with American colonialism. It’s hard to forget. And there wasn’t all that much that was “great” about it. It was actually quite crap. Covetous White Father? Dishonest White Father? Cruel White Father? All would be more accurate. “Great” is laughable. “White” is undeniable. “Father”—as it turns out—is the most nefarious and sticky part of this famous epithet.

This use of “Father” is certainly not meant to suggest that America is the source or the creator of Indians. It is utilized, instead, to convey a particular kind of power dynamic.³ The American government assumed a position of authority over the Indians and promised them care and protection. Part of the price for this care and protection was land—to be sure—but it was also subordination. Hence the use of a paternal term: Father knows best. He knows what is best for the Indians, even better than they do. Indians were mere children in a “state of pupillage.”⁴ They were, as Chief Justice John Marshall described, “ward[s]” who must ask their “guardian” for “protection,” rely on their “kindness,” and beg for “relief [of] their wants.”⁵ That is why, Justice Marshall explained, “[Indians]

1. Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* 1–2 (Univ. of Okla. Press 1988) (1969).

2. This term has been used both seriously and ironically across American history to refer to the President as the representative of the federal government and federal power over Indians. See, e.g., 42 Cong. Rec. 1920 (Feb. 12, 1908) (statement of Rep. Byrd) (“To this unreasonable request the Choctaws seriously protested, claiming their rights to remain under the treaty. And here let me insert the eloquent and pathetic speech of their great chief protesting against the infidelity of their great White Father in making this unjust demand . . .”); Proclamation of the Indians of All Tribes Who Occupied Alcatraz Island (Nov. 1969) (“To the Great White Father and All His People . . .”).

3. See, e.g., Woodrow Wilson, President of the United States, Phonograph Address to the American Indians (1913), <https://speakola.com/political/woodrow-wilson-address-to-the-american-indians-1913> [<https://perma.cc/SVK8-XNHD>] (“The great white father now calls you his brothers, not his children. . . . [Y]ou have shown in your education and in your settled ways of life staunch, manly, worthy qualities of sound character. . . .”).

4. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

5. *Id.*

address the President as their great father.”⁶ In this case, “Father” is much more than just an assertion of power—it is a justification for it.

What this Piece is—and Justice Marshall was—describing is a view that has permeated much of American colonialism: paternalism. Paternalism has been a powerful force informing the development and execution of America’s policies toward its Indigenous peoples since the very beginning.⁷ Paternalism is also a clear throughline in what might otherwise seem to be significant swings in federal Indian policy throughout most of American history.⁸ The United States could be benevolent or destructive—but it was always paternalistic.

This Piece points out that the core wisdom of what we now call the “tribal self-determination era”⁹ of federal policy over the last fifty years was not only that the United States should support rather than undermine or eradicate tribes but that paternalism was—in every form it has taken—a colossal failure. Moreover, the successes of the self-determination era can and should be defined and understood as a series of steps further and further away from the paternalism of our past and toward a future in which the federal government views its new role as supporting tribal nations as they grow in strength, capacity, and autonomy.

It cannot be understated how hard this has been for the federal government to realize, and how much harder, even, it has been for the federal government to implement this insight. This difficulty persists because supporting tribal self-determination has required something that is exceptionally hard for anyone—whether the government or a person—to do: recognizing failures, acknowledging limits, and, ultimately, giving up power or control.

In the self-determination era, we have been watching the United States government admit the failures of its past policies, recognize the limits of its own competency, acknowledge the shortcomings of its expertise, and, more challengingly, demonstrate its willingness to relinquish some of its power.¹⁰ In other words, the Great White Father has had to admit that he isn’t the government best positioned to care for the Indians and that he does not, in fact, know best.

This Piece makes this descriptive contribution to our understanding of the self-determination era. We can understand the progression of tribal

6. *Id.*

7. See Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 Conn. L. Rev. 1251, 1253 (1995) (“By their first principles, programs borne of paternalism assumed that American Indians were incapable of managing and governing their own affairs.”).

8. Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 Harv. L. Rev. Forum 200, 200 (2017), <https://harvardlawreview.org/forum/vol-130/what-the-future-holds-the-changing-landscape-of-federal-indian-policy/> [<https://perma.cc/2G3W-9UVU>] [hereinafter Washburn, *What the Future Holds*].

9. *Id.* at 201.

10. See *infra* Part III.

self-determination policies over the last fifty years as increasing departures from paternalism.¹¹ The tribal self-determination “era,” this Piece argues, is best understood as three distinct though overlapping phases of federal Indian policy development—so far. And each one is best understood as taking an additional significant and distinct step away from paternalistic federal policies. Paternalism has become, this Piece argues, somewhat of an anti-North Star for the transformative federal Indian policies of the last fifty years and can continue to serve as that anti-guiding light for further federal Indian law and policy development.

The first phase of tribal self-determination is epitomized by the Indian Self Determination and Education Assistance Act of 1975 (Indian Self-Determination Act).¹² In this phase of federal policies, the federal government first began to step away from administering vital social service programs for Indians—for the first time allowing tribes to administer these programs themselves.¹³ Tribes were recognized as competent sovereigns that were capable of running federal programs.

What this Piece calls the second phase of tribal self-determination is best characterized by President Bill Clinton’s seminal Executive Order 13,175: Consultation and Coordination with Tribal Governments.¹⁴ In this order, the federal government articulated policies that not only continued supporting tribes as they took on more and more of the work of providing social services for their citizens but also looked to tribes for input on the federal policies that affected them.¹⁵ Tribes were seen as more than competent; they had a unique perspective and valuable information about how these programs worked that ought to then shape the laws and policies that affected them.

Finally, we ought to notice the unique and powerful innovations that have defined the third phase of federal self-determination that was

11. In his 2017 article on federal Indian policy in the *Harvard Law Review Forum*, former Assistant Secretary of Indian Affairs Kevin Washburn similarly described the importance of self-determination as a departure from paternalism. See Washburn, *What the Future Holds*, supra note 8 at 214. Washburn explored the norms that displaced paternalism, such as increasing reliance on and broadening of the idea of the trust responsibility. *Id.* at 209–10. He also considered how vestiges of paternalism—in the form of federal bureaucracy and scrutiny of tribal rights—would continue to shape federal policy. See *id.* at 202, 214, 220. This Piece has no disagreement with anything Washburn described or argued, particularly his excellent point about the increased role that the trust responsibility has taken on over this period. This Piece adds to his account by attempting to synthesize how the arc of these self-determination policies has changed over time and might further change if policies continue to follow this current trajectory.

12. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423 (2018)).

13. The importance of this shift is pointed out in Johnson & Hamilton, supra note 7, at 1253 (describing a “trustee/beneficiary” relationship between Native American tribes and the federal government).

14. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

15. See *id.* at 67,249–50.

championed by the Biden Administration.¹⁶ These federal policies have taken things a step further and recognized that tribal nations possess more than just valuable information. The federal government—most notably the executive branch—has gone out of its way to recognize the unique expertise of tribal nations and the superior decisionmaking of tribal leaders on tribal issues and to bolster tribal autonomy or share decisionmaking power with tribes whenever possible. This era's innovations are epitomized by Executive Order 14,112: Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination,¹⁷ and the rise of comanagement and costewardship of federal lands and waters.¹⁸

It is a mistake to overlook these distinct iterations of federal law and policy over the last fifty years by lumping them all together as one broad era of tribal self-determination. As this Piece illustrates, a more complex understanding can help us not only understand our recent past but also design better laws and policies for our future. To that end, this Piece ends with three gestures toward the future. First, this Piece calls on the Trump Administration and Congress to maintain or expand the progress made by the Biden Administration in championing a third phase of tribal self-determination. Second, this Piece suggests that the next Democratic President and Congress should embrace the potential seeds of the next phase of the tribal self-determination era that were sown by the Biden Administration, including by supporting policies on federal funding reform. And finally, this Piece notes what the federal courts—comprising a branch of the federal government that has been largely absent from this revolutionary change in thinking—might learn from these policy innovations and how they may change their decisionmaking as a result.

I. DIAGNOSING PATERNALISM

Before discussing the renaissance of tribal nations that the tribal self-determination era has made possible, it is worth pausing on paternalism itself. The prevalence of paternalism in federal policy prior to the 1970s is well documented,¹⁹ and the presence of different flavors at different

16. See *infra* Part III.

17. See Exec. Order No. 14,112, 88 Fed. Reg. 86,021 (Dec. 6, 2023).

18. See, e.g., Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 Pub. Land & Res. L. Rev. 49, 143–46 (2021); *Tribal Co-Management and Co-Stewardship of Federal Lands and Waters*, U.S. Dep't Interior: Indian Affs., <https://www.bia.gov/events/tribal-co-management-and-co-stewardship-federal-lands-and-waters> [https://perma.cc/Y66F-4FSF] (last visited Aug. 24, 2025).

19. See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1801–02 (2019) (discussing how “American colonialism transformed from direct violence to structural violence as the national government established the reservation system, forced Native children into boarding schools, and attempted to break up tribal sovereignty under the auspices of paternalism”); Seth Davis, *American Colonialism*

moments throughout the history of federal Indian policy—assimilation, destruction, termination, and so on—is not important to the core claims of this Piece. What is relevant to this Piece, however, is to think about the ideological foundations of paternalism and how they take form within federal policy.

Colonialism can involve many forms of violence: displacement, destruction (actual death or cultural/political death through assimilation), and subordination (structural or political).²⁰ Paternalism can be a motivating ideology that justifies these violent colonial practices as well as something that shapes how these policies are executed. Paternalism is a combination of power, control, and infantilization.²¹ It is arrogance personified as policy.

Federal paternalism toward tribal nations involved an exertion of both decisionmaking and administrative power over Native peoples and tribal nations, particularly after Congress officially ended treaty-making with Indian tribes in 1871.²² Tribes were no longer even the weaker party in bilateral agreements; they were the subjects of federal policymaking by a government and electorate that did not include them.²³ Tribal nations were viewed as inferior, primitive, and dependent peoples who needed assistance from the United States.²⁴ The belief in American superiority that was required to justify this kind of paternalism was wide-ranging and deep-seated. American policymakers needed to believe that they possessed superior intellects, superior access to information, superior decisionmaking power, superior administrative capacity, and so on. The United States' policies themselves could be benevolent²⁵ or

and Constitutional Redemption, 105 Calif. L. Rev. 1751, 1790 (2017) (describing how fiduciary relationships, such as the private trust, “entail paternalism because the law directs the fiduciary to decide what’s in the beneficiary’s best interests”).

20. See Maggie Blackhawk, *The Supreme Court, 2022 Term—Foreword: The Constitution of American Colonialism*, 137 Harv. L. Rev. 1, 2–18 (2023).

21. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 624–29 (1982) (defining paternalism as the overruling of an affected group’s preferences).

22. Indian Appropriations Act of 1871, 25 U.S.C. § 71 (2018). (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”).

23. Indians did not gain universal citizenship until 1924. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2018)).

24. R.H. Pratt, *The Advantages of Mingling Indians With Whites*, in *Proceedings of the National Conference of Charities and Correction* 45, 46 (Isabel C. Barrows ed., Boston, Geo. H. Ellis 1892) (arguing that the federal government should “[k]ill the Indian . . . and save the man”).

25. See, e.g., Indian Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174) (claiming to promote jobs and end poverty); General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (repealed at numerous points from 1934 to 2000) (claiming

destructive,²⁶ but they were always arrogant. And they were also disastrous.²⁷

II. THE EVOLUTION OF FEDERAL INDIAN POLICY IN THE SELF-DETERMINATION ERA

The pivot away from paternalism to self-determination policies in the 1970s has been nothing short of transformative for tribal nations.²⁸ Tribal government institutions were decimated by American colonialism.²⁹ But the United States' response was not to help tribal governments recover and rebuild but to paternalistically step in itself. Instead of social services and support coming from tribal governments, by and large the United States federal government developed a variety of basic social service supports that were administered directly to reservation residents.³⁰ Native people were used to—quite literally—having to go to the Great White Father when they were sick,³¹ when they

to promote farming and civilization); Pratt, *supra* note 24, at 47 (arguing for peaceful assimilation as an alternative to removal).

26. See, e.g., Indian Removal Act § 1 (allowing the federal government to remove tribal nations from their homelands); Dawes Act § 5 (allowing for tribal land to be divided among individual Indian families and for the federal government to sell off the excess).

27. See Ned Blackhawk, *The Rediscovery of America: Native Peoples and the Unmaking of U.S. History* 429 (2023) [hereinafter Blackhawk, *The Rediscovery of America*] (“[In the postwar period,] Indian newborns . . . were six times more likely to die during their first year than non-Natives, while over 10 percent of Indian babies died at birth, compared to 2 percent for non-Natives.”); Alan L. Sorkin, *The Economic and Social Status of the American Indian, 1940–1970*, *Neb. J. Econ. & Bus.*, Spring 1974, at 33, 34 tbl. 1 (reporting that, in 1969, Native men on reservations earned 43% less than Black men and 77% less than white men in the United States); Ronald L. Trosper, *American Indian Poverty on Reservations, 1969–1989*, in *Changing Numbers, Changing Needs: American Indian Demography and Public Health* 172, 174, 177 (Gary D. Sandefur, Ronald R. Rindfuss & Barney Cohen eds., 1996) (explaining that 33.3% of Native families and 57.3% of families on reservations lived below the poverty line in 1969, compared to 10% of American families overall).

28. Joseph P. Kalt, *Harvard Project on Am. Indian Econ. Dev., American Indian Self-Determination Through Self-Governance: The Only Policy that Has Ever Worked* 1–8 (2022), https://ash.harvard.edu/wp-content/uploads/2024/02/native_childrens_commission_hearing_12-15-22_kalt_statement_vfin2.pdf [<https://perma.cc/G9R5-4WGS>].

29. See Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 *Wis. L. Rev.* 263, 277 [hereinafter Washburn, *Facilitating Tribal Co-Management*] (explaining that “[a]s late as the 1960s, some tribal governments had only a single employee”).

30. See Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 *Harv. BlackLetter L.J.* 211, 216 (2002) [hereinafter Davis, *A Discovery of Sorts*] (“The desire to assimilate Indian people into white society . . . resulted in the formal establishment of the reservation system . . . Indian agents oversaw the distribution of rations, managed tribal property and funds, and enforced the various policies of the Bureau of Indian Affairs . . .”).

31. Johnson & Hamilton, *supra* note 7, at 1258.

were hungry,³² and when they needed housing.³³ This was the general state of things until the 1970s.

This Piece is less concerned with the causes of the change in federal policy in the 1970s from paternalism to self-determination. There has been a large amount written about it already, with some crediting Red Power activism, President Lyndon B. Johnson's Great Society programs, tribal leaders' and tribal organizations' advocacy, combinations of these efforts, or other events entirely.³⁴ What is important to this Piece is not *why* these policies came to be, but *what* these policies were—their ideological bases and how they worked as legal and administrative changes.

The self-determination era can be separated into three rough phases of federal policy, each one taking a distinct new step away from paternalism. The first phase of tribal self-determination was chiefly about transferring administrative control to tribal governments.³⁵ The second phase of tribal self-determination was about listening to tribal governments when developing federal policy that affected them.³⁶ And, finally, the third phase of tribal self-determination was characterized by the federal government deferring to tribal decisionmaking, utilizing tribal expertise, and collaborating with tribal nations—putting tribal leaders more directly in the driver's seat of federal policy.³⁷

32. Davis, *A Discovery of Sorts*, *supra* note 30, at 216.

33. *Id.* at 219–23 (describing the United States government's inconsistent action on its promise to fulfill its housing obligations, often building insufficient and uninhabitable homes).

34. See, e.g., Blackhawk, *The Rediscovery of America*, *supra* note 27, at 432–37 (describing self-determination as “[t]he result of a generation of collective activism”); N. Bruce Duthu, *American Indians and the Law* 13 (2008) (“The dramatic shift in federal Indian policy was . . . influenced by the rise of political activism in the 1960s among Indian groups around the country . . . and tribal demands for greater respect and accountability in federal-tribal relations.”); Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 195 (2005) (explaining that “tribal experience with the [Office of Economic Opportunity] and a newly receptive Congress helped lay the foundation for self-determination”); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 Conn. L. Rev. 777, 787–92 (2006) (“[T]ribal self-determination developed accidentally and in spite of official federal Indian policy, not because of it. . . . Despite the fact that [the War on Poverty] was not an Indian program, the inclusion of tribes . . . had dramatic ramifications for American Indian policy.”).

35. See, e.g., Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, § 3(b), 88 Stat. 2203, 2204 (1975) (codified as amended at 25 U.S.C. § 5302(b) (2018)) (laying the groundwork for “an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services”).

36. See, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000) (ordering federal agencies to have “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications”).

37. See, e.g., *Advancing Tribal Self-Determination: Examining the Opportunities and Challenges of the 477 Program: Oversight Hearing Before the Subcomm. on Indian & Insular Affs. of the H. Comm. on Nat. Res.*, 118th Cong. 1 (2024) [hereinafter *Indian & Insular Affs. Hearing on Advancing Tribal Self-Determination*] (statement of Rep.

These phases overlap somewhat and necessarily include some generalizations that help us categorize overall conceptual developments and policy changes over time. This Piece makes no claims to a precise or definitive historical categorization. Separating these phases out, however, provides clarity to historians and policymakers who are trying to better understand or expand on the distinctive developments in tribal self-determination policies over the last fifty years.

A. *The First Phase of Tribal Self-Determination Policies: Transferring Administration*

The first phase of tribal self-determination began in the 1970s. One of the key documents for understanding the ideological foundation of these early policies was President Richard Nixon's Special Message to the Congress on Indian Affairs, which he delivered on July 8, 1970.³⁸ Nixon rejected the "suffocating pattern of paternalism" in American policies, stating that "[e]ven the Federal programs which are intended to meet [Indians'] needs have frequently proven to be ineffective and demeaning" and noting that these policies "denied [Indians] the opportunity to control their own destiny."³⁹

He stated that it was "past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people" and that "the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."⁴⁰ Federal policies had created, among reservations, "excessive dependence" on "outsiders who are responsible and responsive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving."⁴¹ Summarizing the theory behind his new proposed policies, he stated:

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.⁴²

Hageman) ("This [session] continues the Subcommittee's focus on tribal autonomy and the ways Congress can support tribal self-determination. . . .").

38. Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564 (July 8, 1970).

39. Id. at 564–65, 567.

40. Id. at 565.

41. Id. at 566.

42. Id. at 566–67.

Nixon's vision was, undoubtedly, a bold version of self-determination—one that reflected a commitment to tribal autonomy and independent decisionmaking. But the vision was mostly focused on ending Indian dependency on federal agencies and the coercion created by federal control over programs. Nixon viewed the core failing of federal policy as *federal control*, without much talk of the *arrogance* of designing federal programs for tribes.⁴³ Tribes running these programs themselves—just like other federally funded programs that were administered by local authorities⁴⁴—was the goal, not retooling the core function of the programs themselves. Non-Native federal employees would be replaced by Native ones, but little else would drastically change. Tribal control was sold as a form of “local control,” which was primarily important for creating jobs for tribal citizens and thus ensuring that federal dollars were more effectively making it into tribal economies.⁴⁵ Moreover, this proposal was heard in the context of the passage of the Indian Civil Rights Act of 1968, which ensured that tribal governments were not violating many of the protections contained in the federal Constitution's Bill of Rights.⁴⁶

The most important law to come out of this first phase of tribal self-determination was the Indian Self-Determination Act,⁴⁷ which Nixon introduced in his remarks. Nixon described legislation that would allow tribes to choose whether they wanted to take over federal programs,⁴⁸ and federal administrators would not be able to manipulate the terms of a

43. See *id.* at 566 (“This is the second of the two harsh approaches which have long plagued our Indian policies. Of the Department of the Interior's programs directly serving Indians, for example, only 1.5 percent are presently under Indian control.”).

44. See *id.* at 567 (“Federal support programs for non-Indian communities—hospitals and schools are two ready examples—are ordinarily administered by local authorities. There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government.”). President Nixon did suggest that federal control made programs less effective, but this seemed to be a comment both about local control being more effective and about big government being ineffective. See *id.* at 566 (“The result is a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale.”).

45. See *id.* at 568–69 (“Legislation which guarantees the right of Indians to contract for the control or operation of Federal programs would directly channel more money into Indian communities, since Indians themselves would be administering programs and drawing salaries which now often go to non-Indian administrators.”).

46. See 25 U.S.C. § 1302(a) (2018) (“No Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances . . .”).

47. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423 (2018)).

48. See Special Message to the Congress on Indian Affairs, *supra* note 38, at 567 (“I am proposing legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs . . .”).

tribe's takeover by threatening to reject a tribe's request.⁴⁹ Nixon also emphasized the importance of the federal government adequately supporting this transition to tribal control by funding tribally controlled programs and providing additional technical assistance to tribes as they take over the federal programs.⁵⁰ Finally, Nixon wanted to enable tribes to similarly negotiate takeover agreements with states and to preserve federal employee benefits so that federal employees who left their jobs to work for tribes would not be disadvantaged.⁵¹

Not all of these core tenets or policies Nixon envisioned made it into the Indian Self-Determination Act. The Act's findings and policy statements did not talk about giving Indian people control over these programs but rather emphasized giving Indian people a "voice" and ensuring their "meaningful participation" in the "planning, conduct, and administration" of these federal programs.⁵² Moreover, the federal government retained the ability to reject requests for tribal contracts based on federal findings of tribal inadequacy⁵³ and to hold onto grant or contract funding when it was not satisfied that tribes could satisfy federal administrators' standards for a quality education.⁵⁴

Broadly speaking, in this first phase of policies, the federal government began to step away from administering vital social service programs for Indians—allowing tribes to administer these programs themselves for the first time.⁵⁵ Tribes were recognized as sovereigns that were capable of taking over federal programs. And thus, the first phase of tribal self-determination policy was focused primarily on rebuilding the basic infrastructure necessary for tribal governance. This initiative has been—by all accounts—wildly successful.⁵⁶

There has been, moreover, an undeniable renaissance in tribal institutions and tribal lawmaking. An indicative statistic is the number of tribal courts, which has more than doubled. In 1976, a federal task force

49. See *id.* at 568 ("Under this legislation, it would not be necessary for the Federal agency administering the program to approve the transfer of responsibility.").

50. *Id.*

51. See *id.* ("If they chose to hire Federal employees who had formerly administered these projects, those employees would still enjoy the privileges of Federal employee benefit programs—under special legislation which will also be submitted to the Congress.").

52. 25 U.S.C. §§ 5301–5302.

53. Specifically, the Secretary of Interior could reject the tribe's application if they determined the "service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory." *Id.* § 5321(a)(2)(A).

54. See *id.*

55. See Washburn, *Facilitating Tribal Co-Management*, *supra* note 29, at 276 ("In other words, tribes could contract for several programs but then redesign each program and shift funds between various programs within the funding agreement if needs and priorities changed during the fiscal year.").

56. *Id.* at 277 (describing the programs as "transformative," enhancing "self-determination," and improving service quality for tribes).

estimated that there were 117 tribal courts.⁵⁷ Today, there are 234 tribal courts serving the 345 federally recognized tribes in the lower forty-eight states.⁵⁸ On the economic front, numerous scholars have documented that economic metrics such as income and poverty levels have improved noticeably for reservation residents since 1975 and have credited the self-determination era's policies of promoting tribal government institutions and economic development with this success.⁵⁹

B. *The Second Phase of Tribal Self-Determination Policy: Seeking Tribal Input in Federal Program Design*

The second phase of tribal self-determination is epitomized by President Clinton's Executive Order 13,175: Consultation and Coordination with Tribal Governments.⁶⁰ Though this order was signed in 2000, it built on a commitment to tribal consultation that began in 1994 under the Clinton Administration.⁶¹

57. Task Force Four, Am. Indian Pol'y Rev. Comm'n, 94th Cong., Report on Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission 124 (Comm. Print 1976) (on file with the *Columbia Law Review*).

58. Steven W. Perry, Michael B. Field & Amy D. Lauger, DOJ, Tribal Courts in the United States, 2014–Statistical Tables 1, 11 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st_0.pdf [<https://perma.cc/LGL8-23PS>] (noting the number of tribal courts and explaining the omission of Alaska tribes); Alaska Region, U.S. Dep't Interior: Indian Affs., <https://www.bia.gov/regional-office/alaska-region> [<https://perma.cc/54YA-8WYL>] (last visited Aug. 24, 2025) (noting there are 229 federally recognized tribes in Alaska).

59. The Harvard Project on Am. Indian Econ. Dev., *The State of the Native Nations: Conditions Under U.S. Policies of Self-Determination* 7–9 (2008) (describing wavering economic growth for tribes until “rapid economic growth took hold in the 1990s”); Kalt, *supra* note 28, at 1–8 (“For the last several decades, federal Indian policy in the U.S. has supported tribal self-determination through tribal self-government. While there are exceptions, the results have been (1) remarkable economic growth across most of Indian Country, and (2) concomitant expansions of the responsibilities and capacities of tribal governments.”); Adam Crepelle, *Tribal Law's Indian Law Problem: How Supreme Court Jurisprudence Undermines the Development of Tribal Law and Tribal Economies*, 29 Va. J. Soc. Pol'y & L. 93, 117–19 (2022) (“Thanks to the federal tribal self-determination policy, tribal economies have grown tremendously.”); Sarah Dewees & Raymond Foxworth, *From Dependency to Self-Determination: Native Americans and Economic Development in the 21st Century*, in 1 *The Economics of Inequality, Poverty, and Discrimination in the 21st Century* 194, 200–01, 209–10 (Robert S. Rycroft ed., 2013) (“[W]hile the income of many American Indians has grown over the last 30 years, these rates of growth have not allowed American Indians to catch up to the average income of larger society.” (citation omitted)); Jeff R. Keohane, *The Rise of Tribal Self-Determination and Economic Development*, Hum. Rts., Spring 2006, at 9, 9 (“The past three decades have seen American Indians and Alaskan Natives—collectively referred to as Native Americans here—make the first widespread economic gains since their territories were incorporated within the United States.”).

60. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

61. See Memorandum for the Heads of Executive Departments and Agencies on Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,951 (Apr. 29, 1994) (laying out guidance for executive branch activities to ensure “the rights of sovereign tribal governments are fully respected”); see also Exec.

Notably, the order's preamble discussed the "government-to-government" relationship between tribes and the federal government.⁶² This statement reflects the growing policy justification that tribes were more than just sovereigns *capable* of running federal programs for themselves—they were worthy of respect and the ear of the federal government in policy development. This phase of policies emphasized strengthening and formalizing the relationships between tribes and the federal government to include regular discourse. While not yet a rejection of the belief that the federal government ultimately knew better than tribes, it was a recognition that the federal government ought to listen to tribal leaders when making policy that would affect them. This insight was particularly necessary since tribal governments, despite being no less a part of America than state governments, lack the ability to send representatives to Congress.⁶³ As such, without mechanisms like consultation, tribal voices had no structural place in the federal policymaking process. The Clinton executive order directed each federal agency to create "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications" and to compile a "tribal summary impact statement" for policies with tribal implications, documenting the consultation, summarizing tribal concerns, and explaining whether and how the agency addressed those concerns.⁶⁴

The provisions on tribal consultation contained in sections 5 and 7 of the executive order included clear instructions for creating processes, designating responsible officials, and, most importantly, requiring agencies to certify their compliance with their consultation obligations in their regulatory or legislative submissions to OMB.⁶⁵ It seems trivial, but federal agencies are truly forced to remember their obligation to consult by this paperwork obligation to certify their compliance. When it's missing, it's a problem that can hold up regulations entirely,⁶⁶ so agencies take

Order No. 13,084, 63 Fed. Reg. 27,655, 27,655 (May 14, 1998) (describing its purpose as establishing better collaboration with tribes, reducing "unfunded mandates," and streamlining certain processes). Precursors to modern consultation policies date back much earlier, particularly in legislation impacting land or sacred objects. See Mariel J. Murray, Nicole T. Carter, Eva Lipiec & Mainon A. Schwartz, Cong. Rsch. Serv., R48093, *Federal–Tribal Consultation: Background and Issues for Congress* 6–8 (2024) (noting laws related to tribal self-determination from the 1960s onward).

62. Exec. Order No. 13,175, 65 Fed. Reg. at 67,249.

63. Elizabeth Hidalgo Reese, *Tribal Representation and Assimilative Colonialism*, 76 Stan. L. Rev. 771, 775 (2024) [hereinafter Reese, *Tribal Representation*].

64. Exec. Order No. 13,175, 65 Fed. Reg. at 67,250.

65. *Id.*

66. See Lawrence Susskind, Jungwoo Chun, Alexander Gant, Chelsea Hodgkins, Jessica Cohen & Sarah Lohmar, *Sources of Opposition to Renewable Energy Projects in the United States*, Energy Pol'y, June 2022, at 1, 10 (providing examples of failed or inadequate tribal consultations that resulted in successful tribal litigation challenging the government action).

seriously their obligation to at least say something about their attempt to consult.

Tribal consultation is often faulted for not being a stronger accountability mechanism.⁶⁷ But it was a significant step forward in federal policy development—particularly in the context of such a long history of paternalism in the federal decisionmaking process. Indeed, this was the same federal government that once infantilized and dismissed tribal governments altogether.⁶⁸ Throughout American history, tribal leaders have always come to Washington to voice their concerns.⁶⁹ Tribal consultation, however, ensured that Washington would seek out tribal leaders for their input.

Tribal consultation was not just important for giving a voice to tribal leaders in the federal policy development process, it also helped create a more structured relationship between the federal government and tribal sovereigns. Consultation created records of federal government officials' meetings with tribal leaders, documented the concerns discussed, required some form of federal response, and, overall, provided the scaffolding for a new relationship between tribal governments and the federal government.⁷⁰

Consultation was not without its unexpected consequences. The breadth of the consultation mandate included in Executive Order 13,175 meant that the federal government was obliged to seek tribal input about all policies that might affect tribes.⁷¹ This meant tribes were providing input and insisting on tribal consultation not just for the federal actions and policies that were the core parts of self-determination but also for federal actions and policies for which tribes were just one of many affected

67. See, e.g., Derek C. Haskew, *Federal Consultation With Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 *Am. Indian L. Rev.* 21, 28 (1999) (“[T]his remains the ever-present criticism of [tribal] consultation: even in instances where there is a statutory duty to consult, there is no duty to be bound by the suggestions of the consultees”); Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer With American Indian Governments*, 91 *N.D. L. Rev.* 37, 67 (2015) (detailing the failure of tribal consultations that lack a tribal consent requirement to ensure the concerns of tribes are properly heard and addressed); Letter from Jefferson Keel, President, Nat’l Cong. of Am. Indians, to Tom Vilsack, U.S. Sec’y of Agric. (Dec. 14, 2009) (on file with the *Columbia Law Review*) (describing how tribes fear that the mandated consultations are “viewed by federal agencies as merely a procedural requirement”).

68. See *supra* Part I.

69. See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *Yale L.J.* 1538, 1559 (2018) (explaining how “Congress received, before the end of the Civil War, a steady influx of petitions submitted by the unenfranchised,” including tribal members).

70. Exec. Order No. 13,175, 65 *Fed. Reg.* at 67,250–51.

71. See *id.* at 67,249 (defining “policies that have tribal implications” as including “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship . . . or on the distribution of power and responsibilities between the Federal Government and Indian tribes”).

government and nongovernmental constituencies.⁷² Honoring tribal sovereignty is also about listening to and incorporating tribal opinions, so casting such a wide net over policies eligible for tribal consultation set the federal government up to disappoint tribes. In these broader areas (including, in many cases, the general process for notice and comment rulemaking), tribal input can become one of many—rather than the most relevant and insightful—opinions from an outside stakeholder.⁷³

Moreover, this kind of consultation is a mismatch with the core goal of the self-determination era: to end federal paternalism and rebuild tribal control over *tribal affairs*. The purpose of self-determination is to end federal control of tribal affairs and empower tribal control, not to give tribes more of a voice broadly across federal policy development. This is not to say that tribes shouldn't have more power in the federal government,⁷⁴ but if tribal power within federal policy development generally is the goal, there are better and more robust ways⁷⁵ to get there than through a glorified notice and comment process.⁷⁶ Broad consultation, perhaps inadvertently, diluted the strength of the tribal-sovereignty and self-determination justifications for consultation in the first place and made tribes stretch their resources by giving them the opportunity to weigh in on—or insisting that they weigh in on—any policy that affected them.⁷⁷

Tribal consultation was not the only second-phase policy that helped build the tribal–federal relationship and provide structured engagement between sovereigns. The second policy worth noting is the development of the Tribal Nations Conference under the Obama Administration. In

72. See, e.g., Murray et al., *supra* note 61, at 11 (“The 2022 DOI policy requires the department to consult with Tribes for any departmental action with ‘tribal implications,’ . . .”).

73. See, e.g., 23 CFR § 450.210 (2025) (listing tribes as one of many groups that comments must be solicited from for transportation projects); 43 CFR § 46.435 (detailing the obligation under the National Environmental Policy Act of 1969 to solicit comments from not only tribal governments but also state and local governments and any other “persons or organizations who may be interested or affected”).

74. See Reese, *Tribal Representation*, *supra* note 63, at 777 (“It is time for us all to ask the hard questions about where tribal nations *should* fit within our democratic system and interrogate solutions that better serve the United States’s fundamental commitment to representative democracy for all.”).

75. See, e.g., *id.* at 832–39 (discussing a series of possible ways to include tribal governments in America’s democratic structure, such as seating a Cherokee delegate or looking beyond a statehood model).

76. See *id.* at 830 (“[I]t is adequate to say what consultation is not: Consultation does not give tribal governments a veto or any actual control over the policies that impact them.”); Susskind et al., *supra* note 66, at 9 (“Our study finds that an impact of this relationship (and similar dynamics involving energy companies) is that even when consultation guarantees are upheld to their full extent, there can still be conflict because consultation does not equal consent, and that’s what the Tribes are seeking.”).

77. See Murray et al., *supra* note 61, at 30–32 (discussing the increased burden on tribes and “consultation fatigue” (internal quotation marks omitted)).

1994, President Clinton became the first President to formally invite all tribal leaders to Washington.⁷⁸ A former Clinton Administration staff member, however, described that meeting as being more about “symbolism” than substance.⁷⁹ President Barack Obama made a campaign promise to hold what was initially called a “Tribal G8” gathering to bring tribal leaders together to meet with the President to discuss and shape the federal government’s policy agenda for tribal nations.⁸⁰

In his first year in office, Obama kept that promise and held the first White House Tribal Nations Conference on November 5, 2009.⁸¹ The conference became an annual occurrence during the Obama Administration.⁸²

The federal government not only continued supporting tribes as they took on more and more of the work of providing social services for their citizens but also looked to tribes for input on the federal policies that affected them. In this phase of policy, tribes were more than competent: They had a unique perspective and valuable information about how these programs worked, which ought to shape the laws and policies that affected tribal governments.⁸³ This phase of policy was fundamentally about building respect and communication between tribes and the federal government.

78. Press Release, White House, President Clinton to Hold Historic Meeting With Native Americans (Mar. 23, 1994), <https://clintonwhitehouse6.archives.gov/1994/03/1994-03-23-president-announces-meeting-with-native-americans.html> [<https://perma.cc/FY7T-BMY9>].

79. Jourdan Bennett-Begaye, Joe Biden’s Tribal Summit Raises Expectations, *Indian Country Today* (Dec. 9, 2023), <https://ictnews.org/news/joe-bidens-tribal-summit-raises-expectations/> [<https://perma.cc/9RNJ-F49A>] (internal quotation marks omitted) (quoting Holly Cook Macarro, former Staff Assistant, White House Off. of Intergovernmental Affs.).

80. See Nick Baumann, Obama’s Play for Indian Country, *Mother Jones* (Oct. 27, 2008), <https://www.motherjones.com/politics/2008/10/obamas-play-indian-country/> [<https://perma.cc/95A7-8KZ2>].

81. Jesse Lee, The White House Tribal Nations Conference, White House: Blog (Nov. 5, 2009), <https://obamawhitehouse.archives.gov/blog/2009/11/05/white-house-tribal-nations-conference> [<https://perma.cc/S9KW-FX2K>].

82. Press Release, White House, Fact Sheet: The 8th Annual White House Tribal Nations Conference, White House (Sep. 26, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/26/fact-sheet-8th-annual-white-house-tribal-nations-conference> [<https://perma.cc/APK7-Z3SZ>].

83. See, e.g., White House, Working With Tribal Nations to Build a Brighter Future: Synopsis of the 2010 White House Tribal Nations Conference 7–19 (2011), https://obamawhitehouse.archives.gov/sites/default/files/Tribal_Nations_Conference_Final_0.pdf [<https://perma.cc/F5KH-TDJ5>] (summarizing various comments and recommendations made by tribal leaders during the 2010 White House Tribal National Conference).

III. THE THIRD PHASE: LETTING GO OF CONTROL OVER FEDERAL FUNDING AND RECOGNIZING SELECTIVE AREAS OF SUPERIOR TRIBAL DECISIONMAKING

We just witnessed a third phase of federal Indian self-determination policy take shape in the Biden Administration. In many ways, these innovations were the next step forward. While the first phase of self-determination was about transferring *administration* of federal programs, this third phase is about transferring more *decisionmaking authority* and *control* to tribal governments. And while second-phase consultation policies recognized that the federal government needed to listen to tribal leaders *when it was making decisions*, third-phase policies recognize that tribal leaders are *better decisionmakers* than the federal government about the needs of tribal lands and communities. The federal government understands that the best policies involve exercising federal humility and deference, taking a hands-off approach, or seeking out ways to make tribal governments decisionmaking partners.

Viewed through the antipaternalism lens of this Piece, this third phase of policies recognizes that (1) even well-intentioned or run-of-the-mill requirements or limitations on federal dollars are felt as vestiges of paternalistic control of tribal governance⁸⁴ and (2) tribal governments—not the federal government—are the experts in what is best for their citizens, so good federal Indian policymaking requires federal humility and trusting tribal priorities.⁸⁵

A. *Promoting Tribal Control and Trusting in Tribal Priorities: The Tribal 477 Program and Executive Order 14,112*

An important seed of the ideology that has come to dominate third-phase tribal self-determination policies was sown in the 1988 amendments to the Indian Self-Determination Act.⁸⁶ In these amendments, Congress allowed tribes to bundle together multiple federal program contracts to lessen administrative burdens.⁸⁷ It also authorized the Tribal Self-Governance Demonstration Project, a pilot program for twenty tribes.⁸⁸ Moreover, tribes could—for the first time—exercise more autonomy and

84. See *infra* text accompanying notes 104–105.

85. Others have recognized that different parts of the Biden Administration’s agenda shared the heart of the policies discussed in this Piece. See, e.g., Grace Gosz, *The Uncertain Future of Tribal Co-Stewardship of Public Lands*, ABA (May 1, 2025), https://www.americanbar.org/groups/environment_energy_resources/resources/newsletters/indigenous/the-uncertain-future-of-tribal-co-stewardship-of-public-lands/ (on file with the *Columbia Law Review*) (explaining that Executive Order 14,112 called for agencies to collaborate with tribes in managing public lands).

86. See Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, sec. 102, § 3, 102 Stat. 2285, 2285–86 (1988) (codified at 25 U.S.C. § 5302 (2018)).

87. See *id.* sec. 202, § 104 (“The Secretary is authorized, upon the request of an Indian tribe, to make a grant to any tribal organization for . . . the planning, designing, monitoring, and evaluating of Federal programs serving the tribe . . .”).

88. *Id.* § 209.

flexibility over this funding in view of their leeway to “redesign programs, activities, functions, or services.”⁸⁹ Four years later, Congress made tribal self-determination policies permanent.⁹⁰ Under the Indian Self-Determination Act’s contracting and compacting policies, tribal governments have flourished.⁹¹ But self-determination was never a blank check written to tribal nations—it merely allows tribes to negotiate compacts and even more rigid contracts that detail how the tribe will run the formerly federal program.⁹² The terms of these agreements limit tribes’ ability to use the funding in the ways they need.⁹³ And the paperwork burden associated with applications and compliance is astronomical.⁹⁴

This is particularly concerning because the stakes for the accessibility and flexibility of tribal access to federal funding are exceptionally high. Tribes rely extensively on federal funding⁹⁵—not because they want to, but

89. *Id.* § 303.

90. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 203, 108 Stat. 4250, 4271.

91. See Washburn, *Facilitating Tribal Co-Management*, *supra* note 29, at 277 (“Public Law 93-638 and its amendments are credited with spawning a renaissance in tribal governments in the past half century. . . . Today, most tribal governments have dozens or even hundreds of tribal governmental employees due to 638 contracts and related programs”); see also Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 *Am. Indian L. Rev.* 1, 48–49 (2014) (“In 1991, only seven tribes entered self-governance with the BIA, for a total . . . slightly over \$27 million. By Fiscal Year . . . 2013, 254 [tribal entities] entered into 106 funding agreements, operating \$432 million in programs In FY 2015, . . . agreements will transfer . . . over one-third of the IHS total appropriation[] to tribes” (footnote omitted) (citing S. Rep. No. 108-412, at 4 (2004); Bureau of Indian Affs., U.S. Dep’t of the Interior, *Budget Justifications and Performance Information, Fiscal Year 2024: Indian Affairs*, at IA-TG-4 (2014), <https://www.bia.gov/sites/default/files/dup/assets/as-ia/ocfo/ocfo/pdf/idc1-021730.pdf> [<https://perma.cc/TD5M-5WUB>]; HHS, *Fiscal Year 2015 Justification of Estimates for Appropriations Committees: Indian Health Service 138* (2014), <https://www.ihs.gov/sites/ofa/themes/responsive2017/documents/FY2015CongressionalJustification.pdf> [<https://perma.cc/S2TJ-JJX5>])).

92. See, e.g., Indian Self-Determination Act Amendments of 1994 § 101 (indicating that the “tribal organization may negotiate with the Secretary” on the contract or the grant about the conduct of a program).

93. OMB & U.S. Digit. Serv., *Discovery Project: Accessing Grants for Tribal Nations* 24 (2022), https://assets.performance.gov/cx/files/life-experiences/2022/OMB_Tribal-Access-Grants_Public_v4.4.pdf [<https://perma.cc/2JXP-QQD3>] (explaining that “[s]ome Federal grants limit the amount of funding spent on administrative or indirect expenses,” which disproportionately affects “low-capacity Tribes” that lack the ability “to spread those costs over multiple projects or departments”).

94. See HHS, Exec. Off. of the President, U.S. Dep’t of the Treasury & U.S. Dep’t of the Interior, *Tribal Customer Experience Pilot for Post-Award Reporting* 13, 17 (2024), <https://www.hhs.gov/sites/default/files/grants-qsmo-tribal-cx-report.pdf> [<https://perma.cc/5NTV-DGCK>] (documenting tribes’ needs for more skilled staff and simplified reporting).

95. See OMB, *FY 2024 Native American Funding Crosscut 5* (2023), <https://www.doi.gov/media/document/fy2024-native-american-funding-crosscut> [<https://perma.cc/>]

because they have no other choice. Tribes cannot effectively raise revenue through the normal means—taxes—for four main reasons.⁹⁶ First, American colonialism decimated tribal government institutions and economies—leaving most tribal governments without an economically prosperous tax base from which to raise revenue.⁹⁷ Second, the federal government—not private individuals—holds the title to reservation lands, which means that tribal governments cannot rely on property taxes as states do, only sales or income tax.⁹⁸ Third, the Supreme Court has significantly limited tribes’ ability to tax non-Indians on their reservations, meaning that even if tribes have successful businesses on their reservations, they are often unable to profit from the economic draws they have created.⁹⁹ And, finally, the Supreme Court has allowed states to tax non-Indian activities on tribal land, which effectively cuts tribes out of many creative attempts to tax since these taxes would be “double taxes.”¹⁰⁰ That leaves tribes with two primary sources of funding: (1) tribally run businesses—most notably casinos—and (2) federal dollars.¹⁰¹ Since casinos are not significant sources of income for the vast majority of tribes, federal dollars are a vital source of funding for tribal self-governance.¹⁰² Tribes rely not only on federal dollars through self-governance contracts and compacts but also on federal grant funding, which often requires tribes to compete against one another.¹⁰³

Enter the Biden Administration, which took lessons from the success of tribal compacting and the struggles over the rest of federal funding accessibility, equity, and flexibility. The Biden Administration demonstrated a keen awareness that *red tape* and administrative burdens attached to federal funding are a serious impediment to tribal self-determination since they impose real costs on tribal governments that can prohibit access

3C68-GZL2] [hereinafter OMB, Native American Funding Crosscut] (showing that Native American tribes receive tens of billions of dollars a year in federal funding).

96. See Matthew L.M. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. Rev. 759, 771–74 (2004).

97. Taxation, Nat’l Cong. Am. Indians, <https://archive.ncai.org/policy-issues/tribal-governance/taxation> [<https://perma.cc/28QT-LS4L>] (last visited Aug. 23, 2025).

98. *Id.*

99. See Cohen’s Handbook of Federal Indian Law § 10.04 (2024) (explaining the federal limitations on tribal authority to tax).

100. *Id.* § 10.05 (describing the problems associated with concurrent taxing authority).

101. See Washburn, What the Future Holds, *supra* note 8, at 204–05.

102. The National Indian Gaming Commission reports that 244 tribes across twenty-nine states run a total of 519 gaming operations. Nat’l Indian Gaming Comm’n, FY 2022 Gross Gaming Revenue Report 4 (2023), https://www.nigc.gov/wp-content/uploads/2025/02/GGRFY22_071923_Final.pdf [<https://perma.cc/2TJB-CXGZ>]. Of those 519, 51% of the annual total of \$40.9 billion in gross gaming revenue is generated by the most profitable 8% of operations. *Id.* at 8. By contrast, 55% of tribal gaming operations collectively generate less than 5% of gross gaming revenue. *Id.* Put another way, approximately 285 gaming operations collectively gross—not profit—just \$2 billion dollars. *Id.*

103. See OMB, Native American Funding Crosscut, *supra* note 95, at 2, 8.

or limit the effectiveness of programs.¹⁰⁴ What's more, the Administration recognized that the strings attached to federal funding also limit the effectiveness of federal programs because tribes—which, as the on-the-ground providers and community experts, know best what their communities need—are unable to flexibly utilize funding to meet the needs of their citizens.¹⁰⁵ These funding limitations or bureaucratic hurdles are not necessarily rooted in skepticism of tribal government competence; they are often rooted in the very well-intentioned desire to ensure that federal dollars are spent in the way Congress intended.¹⁰⁶

The Biden Administration took several actions that reflect the insight that less control and more deference to tribal priorities in federal policymaking is more efficient and effective: most notably, reinvigorating the Tribal 477 Program and issuing Executive Order 14,112.

1. *The Tribal 477 Program Reinvigoration and Implementation.* — The Biden Administration was particularly creative in breathing new life into old laws to meet the third-phase policy goals of supporting tribal autonomy and increasing reliance on tribal decisionmaking. In one such example, the Administration reinvigorated what is known as the Tribal 477 Program (477).¹⁰⁷ 477 is so-called because of its statutory authority, Public Law 102-477: The Indian Employment, Training and Related Services Demonstration Act of 1992.¹⁰⁸ Originally passed in 1992, 477 allows tribes to consolidate various federal grant programs related to employment, training, and other services into a single, cohesive plan, budget, and reporting system managed by the Bureau of Indian Affairs (BIA).¹⁰⁹ Integrating this funding significantly reduces the administrative burden on tribes and allows them to take the funds they get from different federal agencies and treat them like one pot of funds utilized to support a single tribal initiative.¹¹⁰ This increased capacity and flexibility allows tribes to more efficiently and effectively provide services. But 477 was met with early

104. See *infra* section III.A.1.

105. See *infra* section III.A.1.

106. See *infra* section III.A.1.

107. Fact Sheet: Biden–Harris Administration Delivers New Memorandum of Agreement to Streamline Employment and Job Training Funding for Tribal Nations, White House (Oct. 7, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-biden-harris-administration-delivers-new-memorandum-of-agreement-to-streamline-employment-and-job-training-funding-for-tribal-nations/> [<https://perma.cc/9GWZ-TY4U>] [hereinafter Biden–Harris Memorandum of Agreement Fact Sheet].

108. Indian Employment, Training and Related Services Demonstration Act of 1992, Pub. L. No. 102-477, 106 Stat. 2302 (codified as amended at 25 U.S.C. §§ 3401–3417 (2018)); Biden–Harris Memorandum of Agreement Fact Sheet, *supra* note 107.

109. Indian Employment, Training and Related Services Demonstration Act §§ 2, 4, 11.

110. See Biden–Harris Memorandum of Agreement Fact Sheet, *supra* note 107 (explaining that the 477 program allows tribal governments to integrate their various sources of federal funding into a central plan for tribal economic development).

skepticism.¹¹¹ Federal agencies are required to transfer their funds to the BIA to participate in 477 and to trust the BIA to develop an appropriate oversight process for their dollars.¹¹²

Unsurprisingly, the many different federal agencies that administer programs that support tribes¹¹³ are protective of their funds and their oversight responsibilities. As such, 477 was plagued by decades of interagency disagreements and attempts to resolve these disagreements across different presidential administrations.¹¹⁴ Both the Bush and Trump Administrations proposed additional administrative burdens for 477, which were vehemently opposed by tribes.¹¹⁵ After the expansion of 477 with Public Law 115-93 in 2017, federal agencies had one year to design and ratify an agreement to implement the program, but then, in 2018, the Trump Administration signed a memorandum of agreement without consulting tribes—a decision that had a chilling effect on tribal nations’ use of 477.¹¹⁶ While up to 250 tribes had opted into 477 by 2015,¹¹⁷ by 2017, only sixty-five tribes had 477 agreements.¹¹⁸ By 2019, that number had only grown to sixty-seven.¹¹⁹

111. See Memorandum from Indian & Insular Affs. Subcomm. Staff to House Comm. on Nat. Res. Republican Members 3–4 (Mar. 20, 2024), https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_sub_on_iaa_ov_hrg_on_477_program_03.20.24.pdf [<https://perma.cc/QLG5-UHXJ>] [hereinafter Comm. on Nat. Res. Memo] (explaining that the federal government’s unilateral changes to 477 undermined the program’s purpose and prompted tribal criticism).

112. See How Public Law 102-477 Can Create Economic Opportunities, U.S. Dep’t Interior: Indian Affs., <https://www.bia.gov/service/starting-business/477-economic-opportunities> [<https://perma.cc/638M-XQSC>] (last visited Aug. 24, 2025) (“Once [the tribe’s proposed plan is] approved, the agencies whose programs are included in the plan will transfer funds for the tribe to BIA.”).

113. For an exhaustive list of such agencies and the funds they are authorized to spend on “programs . . . that in whole or in part benefit or relate to American Indians,” see OMB, Native American Funding Crosscut, *supra* note 95, at 2, 8–9.

114. See Comm. on Nat. Res. Memo, *supra* note 111, at 3–5 (explaining a series of changes to 477 from 2008 to 2022 by federal agencies, Congress, and tribal agreements).

115. See *id.* (explaining tribal resistance to Bush- and Trump-era changes to 477).

116. Ian Record, Opinion, Biden Administration Righted a Tribal Workforce Development Wrong, *Indian Country Today* (Nov. 17, 2022), <https://ictnews.org/opinion/biden-administration-righted-a-tribal-workforce-development-wrong/> [<https://perma.cc/B6WZ-Q8SN>].

117. Tribal Self-Governance, 477 Program (2015), <https://www.tribalselfgov.org/wp-content/uploads/2015/04/L7-477-Program-Jan-2015-Final.pdf> [<https://perma.cc/LNT3-U6B3>].

118. Citizen Potawatomi Nation, 477 Legislative Update (2017), <https://www.tribalselfgov.org/wp-content/uploads/2017/05/2017-Annual-SG-100C-477-CPN-MZ-full.pdf> [<https://perma.cc/BT5L-NT4Z>].

119. Examining the 477 Programs: Reducing Red Tape While Promoting Employment and Training Opportunities in Indian Country: Hearing Before the S. Comm. on Indian Affs., 116th Cong. 6 (2019) (statement of Spike Bighorn, Acting Deputy Bureau Dir., Off. of Indian Servs., Bureau of Indian Affs., U.S. Dep’t of the Interior).

Once the Biden Administration took office, it prioritized resolving the issues with 477. Less than one year into the Administration, it announced that twelve federal agencies had agreed to a new memorandum of agreement on how to implement 477.¹²⁰ By fall 2022, 292 tribes had 477 agreements,¹²¹ and tribes that utilized 477 largely praise the program as allowing for vital flexibility and improving efficiency.¹²²

2. *Executive Order 14,112*. — In 2023, President Biden issued Executive Order 14,112: Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination.¹²³ This executive order was, as its title suggests, about promoting the “next era” or, in the language of this Piece, the “next phase” of tribal self-determination policies.¹²⁴ Its policy foundations were exceptionally clear:

Now is the time to build upon this foundation by ushering in the next era of self-determination policies and our unique Nation-to-Nation relationships, during which we will better acknowledge and engage with Tribal Nations as respected and vital self-governing sovereigns. As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they are able to make their own decisions about where and how to meet the needs of their communities. No less than for any other sovereign, Tribal self-governance is about the fundamental right of a people to determine their own destiny and to prosper and flourish on their own terms.¹²⁵

Executive Order 14,112 was about demonstrating respect for tribal sovereignty by giving tribes greater autonomy over how they invest federal funding. The order directed all federal agencies to support tribal self-determination by reforming federal funding programs’ design and administration to take a more hands-off approach that cut down administrative burdens and funding limitations—reflecting a trust in tribal priorities and deference to tribal decisionmaking.¹²⁶

The Biden Administration was not the first administration to acknowledge this problem with federal funding accessibility, equity, and

120. Biden–Harris Memorandum of Agreement Fact Sheet, *supra* note 107.

121. *Id.*

122. See Indian & Insular Affs. Hearing on Advancing Tribal Self-Determination, *supra* note 37, at 12 (statement of Lee Spoonhunter, Co-Chair, Northern Arapaho Bus. Council) (describing 477 as “an important step towards tribal self-governance” and explaining that it “has allowed for . . . increased budget flexibility, reduced program inefficiencies, and allows [the Northern Arapaho Tribe] to prioritize programs that help our people build sustainable lives for themselves and their families”).

123. Exec. Order No. 14,112, 88 Fed. Reg. 86,021, 86,021–22 (Dec. 6, 2023).

124. See *id.* at 86,021.

125. *Id.*

126. *Id.* at 86,022.

flexibility.¹²⁷ Though this aspect of Clinton's executive order on tribal consultation is rarely discussed, section 3 set forth that:

[T]he Federal Government shall grant Indian tribal governments [administering federal statutes and regulations] the maximum administrative discretion possible.

. . . When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.¹²⁸

Moreover, there was a directive in section 4 that "[a]gencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3"¹²⁹ and a directive in section 6 that agencies streamline the process by which tribes "apply for waivers of statutory and regulatory requirements" and aim to be as flexible as possible in granting those waivers.¹³⁰

These are undoubtedly bold and important directives previewing third-phase thinking. What differentiates this lesser-known provision of the executive order from its better-known provisions on tribal consultation is the complete absence of the enforcement or accountability mechanism discussed above. Moreover, the directives are phrased at a very high level of generality, which leaves agencies without a clear idea of what complying with that directive actually means or, even worse, broad wiggle room to say that some bare minimum consideration complies with the directive.¹³¹

What set Executive Order 14,112 apart from these prior directives was its specificity. Not only were there generalized policy directives about the importance of minimizing burdens, but there was also a very specific list of nine agency actions that comply with the order contained in section 5.¹³² Agencies were directed to:

(i) promote compacting, contracting, co-management, co-stewardship, and other agreements with Tribal Nations that allow

127. *Id.*

128. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000).

129. *Id.*; see also Special Message to the Congress on Indian Affairs, *supra* note 38, at 564–65 ("Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.").

130. Exec. Order No. 13,175, 65 Fed. Reg. at 67,251.

131. See *id.* (imposing on agencies a mere duty to grant waivers "with a general view toward increasing opportunities for utilizing flexible policy approaches").

132. Exec. Order No. 14,112, 88 Fed. Reg. at 86,023–25.

them to partner with the Federal Government to administer Federal programs and services;

(ii) identify funding programs that may allow for Tribal set-asides or other similar resource or benefits prioritization measures and, where appropriate, establish Tribal set-asides or prioritization measures that meet the needs of Tribal Nations;

(iii) design application and reporting criteria and processes in ways that reduce administrative burdens, including by consolidating and streamlining such criteria and processes within individual agencies;

(iv) take into account the unique needs, limited capacity, or significant barriers faced by Tribal Nations by providing reasonable and appropriate exceptions or accommodations where necessary;

(v) increase the flexibility of Federal funding for Tribal Nations by removing, where feasible, unnecessary limitations on Tribal spending, including by maximizing the portion of Federal funding that can be used for training, administrative costs, and additional personnel;

(vi) improve accessibility by identifying matching or cost-sharing requirements that may unduly reduce the ability of Tribal Nations to access resources and removing those burdens where appropriate;

(vii) respect Tribal data sovereignty and recognize the importance of Indigenous Knowledge by, when appropriate and permitted by statute, allowing Tribal Nations to use self-certified data and avoiding the establishment of processes that require Tribal Nations to apply to, or obtain permission from, State or local governments to access Federal funding or to be part of a Federal program;

(viii) provide Tribal Nations with the flexibility to apply for Federal funding and support programs through inter-Tribal consortia or other entities while requiring non-Tribal entities that apply for Federal funding on behalf of, or to directly benefit, Tribal Nations to include proof of Tribal consent; and

(ix) provide ongoing outreach and technical assistance to Tribal Nations throughout the application and implementation process while continually improving agencies' understanding of Tribal Nations' unique needs through Tribal consultation and meaningful partnerships.¹³³

This list may seem like bureaucratic drivel, but it created a much clearer picture of *what kind of* agency action was expected under the order, as well as a clear floor of what actions agencies had to take—or not take—as part of complying with the order. General policy directives are easy to

133. *Id.* at 86,024.

interpret and can be even easier to dodge.¹³⁴ But specific directives, when they apply to an agency's action, are harder to deny or avoid. One might have expected that this list of nine things could easily become a compliance checklist for every federal agency administrator that is tasked with designing, reviewing, or administering federal funding. In addition, Executive Order 14,112 directed federal agencies to form specific bodies to track their progress, share best practices, and report back to the President on both the implementation of Executive Order 14,112 and additional recommendations for legislative or regulatory changes.¹³⁵ Like in the executive order on tribal consultation, in Executive Order 14,112, clear new process mechanisms along with a directive to report and track progress served a key implementation function. Indeed, just a year after it issued Executive Order 14,112, the Biden Administration released an addendum to the order—an implementation tracker—that notes over three hundred actions taken by federal agencies to comply with the order's directives.¹³⁶

B. *Recognizing Tribal Wisdom: Indigenous Knowledge Guidance and Reinventing Tribal Co-management*

On November 15, 2021, former Secretary of the Interior Deb Haaland and former Secretary of Agriculture Tom Vilsack issued the Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters,¹³⁷ and in 2022, the Department of Commerce signed on to the order.¹³⁸ This order directs

134. See, e.g., Davis, A Discovery of Sorts, *supra* note 30, at 212 (describing how the federal government's previous policy directives were ineffective at promoting real improvements for Indian housing).

135. Exec. Order No. 14,112, 88 Fed. Reg. at 86,022–23.

136. Bureau of Indian Affs., Dep't of the Interior, Executive Order 14112 Section 5 Implementation Tracker (2024), https://www.bia.gov/sites/default/files/media_document/eo_14112_implementation_tracker.public.pdf [<https://perma.cc/C9XC-NE6T>]; Elizabeth Molle-Carr, How OMB Has Strengthened the Relationship Between Tribal Nations and the United States, OMB: Blog (Dec. 9, 2024), <https://bidenwhitehouse.archives.gov/omb/briefing-room/2024/12/09/how-omb-has-strengthened-the-relationship-between-tribal-nations-and-the-united-states/> [<https://perma.cc/3N5W-W3UB>] (“Furthermore, over the past four years, OMB has worked with agencies to reform Federal funding programs and make programs more accessible, flexible, and in-line with Tribal self-determination through over 300 individual agency actions, highlighted in the Executive Order 14112 addendum.”).

137. U.S. Dep't of the Interior & USDA, Order No. 3403: Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters 1, 5 (Nov. 15, 2021), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf> [<https://perma.cc/BK4W-QWZG>].

138. U.S. Dep't of the Interior, USDA & U.S. Dep't of Com., Order No. 3403, Amend. No. 1: Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters 5 (Nov. 21, 2022), <https://www.doi.gov/>

agencies to increase opportunities for tribes to participate in costewarding federal lands and waters that are important to them, since tribes have thousands of years of ecological knowledge and sustainability practices that should be integrated into the federal management and operation of such lands.¹³⁹ This order also directs agencies to reach agreements with tribes to collaborate with them on the operation of federal lands and parks.¹⁴⁰

The Biden Administration's costewardship work aimed to be a "respectful and mutually-beneficial partnership that is indicative of [its] hopes for a new era of Nation-to-Nation relationships between Tribal Nations and the Federal Government."¹⁴¹ The Biden Administration ran at this opportunity head-on, reaching twenty such agreements by 2022 and over 210 by 2023.¹⁴²

The source of executive authority for comanagement flows from a series of different laws and treaties.¹⁴³ That does not mean that the legal authority for these actions is thin—several scholars have pointed out how it isn't¹⁴⁴—but it means that the Biden Administration had to be creative and seek out this possibility when other administrations had not. In other words, the Biden Administration went out of its way to figure out how to use its administrative discretion to partner with tribes and start sharing decisionmaking authority with them.¹⁴⁵

document-library/secretary-order/so-3403-a1-joint-secretarial-order-fulfilling-trust-responsibility (on file with the *Columbia Law Review*).

139. *Id.*

140. *Id.* at 2.

141. Domestic Pol'y Council, White House, 2023 Progress Report for Tribal Nations 17 (2023), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/12/2023.12.04-TNS-Progress-Report.pdf> [<https://perma.cc/8HY3-JYZU>].

142. *Id.* at 17–18; Tribal Co-Management and Co-Stewardship of Federal Lands and Waters, *supra* note 18.

143. Mariel J. Murray, Cong. Rsch. Serv., R47563, Tribal Co-Management of Federal Lands: Overview and Selected Issues for Congress 8–10 (2023), <https://www.congress.gov/crs-product/R47563> (on file with the *Columbia Law Review*); see also Off. of the Solic., U.S. Dep't of the Interior, Current Land, Water, and Wildlife Authorities that Can Support Tribal Stewardship and Co-Stewardship: Final Report 11–51 (2022), <https://www.doi.gov/sites/doi.gov/files/-final-legal-rvw-v-final-pdf-508.pdf> [<https://perma.cc/BQ79-8HHX>] (explaining the different sources of federal, departmental, and bureau-specific authority).

144. See, e.g., Washburn, Facilitating Tribal Co-Management, *supra* note 29, at 278–82; see also Mills & Nie, *supra* note 18, at 143–46.

145. Other scholars have recognized the importance of tribal costewardship and comanagement as a form of federal policy promoting self-determination and documented its effectiveness. See, e.g., Clarita Lefthand-Begay et al., From Paternalism to Self-Determination: Examining Evolving Tribal-Federal Relationships and Co-Management Arrangements Through Three Case Studies, *Humans. & Soc. Scis. Commc'ns*, Dec. 2025, at 1, 2–11 (examining three cases illustrating challenges facing tribal access to ancestral land and cultural practices).

Moreover, the Biden Administration took the insight of respectfully recognizing and, when appropriate, utilizing tribal expertise even further by creating guidance on the use of Indigenous knowledge in federal decisionmaking.¹⁴⁶ This guidance, released in 2022, “help[s] Federal agencies integrate Indigenous Knowledge in their work—from research, to environmental rulemaking, to co-management of lands and waters.”¹⁴⁷ The Chair of the White House Council on Environmental Quality described, “As the original stewards of the natural environment, Tribes and Indigenous communities have expertise critical to finding solutions to the climate crisis and protecting our nation’s ecosystems”¹⁴⁸ This is emblematic of third-phase thinking because it—in contrast to the arrogance of the past—recognizes that not only are tribes able to make decisions, but that tribes might bring insights or decisionmaking frameworks to the table that are better than what the federal government would have done without them.

IV. CONTINUING THE THIRD PHASE

While the change from Democratic to Republican control of Congress and the White House might usually be a death knell for the prior administration’s policy priorities, it need not be here. Although the third phase was initiated and championed by a Democratic Administration, it shares more policy foundations with the Republican platform. Put into the Republican Party’s policy framework, this third phase of policies is about cutting the size and power of federal bureaucracy, maximizing the efficiency of federal spending, and transferring more power to local government institutions.¹⁴⁹ This *should be* something Republican legislators and executive branch officials agree with if partisan political distractions don’t get in the way.

146. Press Release, White House, White House Releases First-of-a-Kind Indigenous Knowledge Guidance for Federal Agencies (Dec. 1, 2022), <https://bidenwhitehouse.archives.gov/ostp/news-updates/2022/12/01/white-house-releases-first-of-a-kind-indigenous-knowledge-guidance-for-federal-agencies/> (on file with the *Columbia Law Review*).

147. Id. (internal quotation marks omitted) (quoting Arati Prabhakar, President’s Sci. & Tech. Advisor & Dir., Off. of Sci. & Tech. Pol’y).

148. Id. (internal quotation marks omitted) (quoting Brenda Mallory, Chair, Council on Env’t Quality).

149. See Press Release, White House, Fact Sheet: President Biden Signs Historic Executive Order to Usher in the Next Era of Tribal Self-Determination (Dec. 6, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/12/06/fact-sheet-president-biden-signs-historic-executive-order-to-usher-in-the-next-era-of-tribal-self-determination/> [<https://perma.cc/U24U-VT7P>] (“As a result of this Executive Order, Tribes will spend less of their resources cutting through bureaucratic red-tape to apply or comply with federal administrative requirements and use federal dollars more effectively.”).

A. Lessons for Congress

Congress has, at this point, fully embraced phase one and two policies, not only in the Indian Self-Determination Act but also in other laws that promote or strengthen tribal sovereignty and self-determination. For example, the Tribal Law and Order Act of 2010 (TLOA) and the tribal provisions of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) both restored tribal governments' abilities to prosecute certain cases that occur on their reservations and to sentence criminals more appropriately.¹⁵⁰ Like the Indian Self-Determination Act, however, these laws contain vestiges of paternalism that show up in the form of conditions on expanded federal power.¹⁵¹ To exercise this expanded criminal jurisdiction or sentence convicted individuals for more than a year, VAWA 2013 and TLOA require tribal governments to provide a list of protections to defendants and to comply with a handful of judicial standards.¹⁵² Some, but not all, of these requirements fit with the cultural and societal goals or structures of tribal court systems.¹⁵³

Congress should further limit unnecessary requirements on tribal spending, choosing instead to trust tribal governments. Congress should write fewer conditions on federal funding, include more exceptions for tribal governments to blanket funding requirements, and include clear directives that agencies implement their federal funding directives in a manner that maximizes flexibility and minimizes burdens. It should also expand the Indian Self-Determination Act and 477 to all federal funding. It should more often utilize effective funding models, like the reimbursement option built into the Violence Against Women Act Reauthorization Act of 2022.¹⁵⁴ That model allows tribes to submit receipts for a specific type of incurred costs rather than having to apply for a competitive grant program and then—for the lucky few tribes that get the grant—navigate the compliance system to make sure they are spending

150. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 234, § 202, 124 Stat. 2258, 2279–80 (codified at 25 U.S.C. § 1302 (2018)); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 904–905, 127 Stat. 54, 120–24 (codified as amended at 18 U.S.C. § 2265, 25 U.S.C. § 1304).

151. See, e.g., 25 U.S.C. § 1304 (requiring that tribes provide defendants with “rights whose protection is necessary . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant”).

152. *Id.* §§ 1301–1304.

153. See Nat'l Cong. of Am. Indians, VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report 61–72 (2018), https://archive.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [<https://perma.cc/6UMQ-2XDQ>] (discussing how participating tribes have chosen to comply with the statutory requirements of VAWA 2013 in ways that best fit their communities).

154. Cf. Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, 122, 901–04 (listing the budgetary allocations provided for grants, contracts, cooperative agreements, and other assistance for the prevention and prosecution of violence against women, including the reimbursement program for tribes).

every dollar appropriately.¹⁵⁵ Trust and flexibility, not micromanaging: That's what third-phase federal funding is all about.

Similarly, Congress has embraced tribal consultation, now regularly directing that tribal consultation occur in statutory directives to the executive branch about how to implement laws and policies.¹⁵⁶ Congress could take the lesson further and think of other, more structured ways for it to engage with tribal nations the way that the executive branch has. Members of Congress are eager to attend the executive Tribal Nations Summit (formerly the White House Tribal Nations Conference¹⁵⁷)¹⁵⁸ and often invite tribal leaders to testify at congressional hearings.¹⁵⁹ But that is not the same as the structured conversations that the executive branch has with tribal nations at the Tribal Nations Summit, which, in its current form, ensures that tribal

155. *Id.* at 902–04.

156. See, e.g., 25 U.S.C. § 1631 (requiring that the HHS Secretary “consult with any Indian tribe that would be significantly affected by such expenditure for the purpose of determining and, whenever practicable, honoring tribal preferences” before making changes to Indian Health Service facilities); *id.* § 2011(b)(1) (requiring that decisions related to Indian education be made “with active consultation with tribes”); 54 U.S.C. § 302706(b) (2018) (requiring that the federal government “consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to” a historically significant property in administering historic preservation programs).

157. See White House 2024 Tribal Nations Summit, U.S. Dep’t Interior: Indian Affs., <https://www.bia.gov/tns/2024> [<https://perma.cc/5MQG-T2FU>] (last visited Nov. 10, 2025) (“The Tribal Nations Summit, established by Executive Order 13647, is the flagship annual convening of the Federal government and Indian Country . . .”).

158. See, e.g., Dean Rhodes, Cherry Represents Grand Ronde Tribe at Tribal Nations Summit, *Smoke Signals* (Dec. 11, 2023), <https://www.smokesignals.org/articles/2023/12/11/cherry-represents-grand-ronde-tribe-at-tribal-nations-summit/> [<https://perma.cc/5DAB-5R3K>] (noting Representative Sharice Davids’s attendance); Dusty Johnson (@RepDustyJohnson), X (Dec. 7, 2023), <https://x.com/RepDustyJohnson/status/1732832274498929075> [<https://perma.cc/R22U-AJHC>]; Teresa Leger Fernández (@RepTeresaLF), X (Dec. 6, 2023), <https://x.com/RepTeresaLF/status/1732508460032335961> [<https://perma.cc/LY6V-5GTG>]; Image posted by Melanie Stansbury (@repstansbury), Instagram (Dec. 6, 2023), https://www.instagram.com/p/C0iQ9cldOhJa/?utm_source=ig_web_copy_link&img_index=1 (on file with the *Columbia Law Review*).

159. See, e.g., Joint Oversight Hearing on Severe Food Distribution Shortages in Tribal and Elderly Communities Before the Subcomm. on Agric., Rural Dev., FDA & Related Agencies of the H. Comm. on Appropriations & the Subcomm. on Nutrition, Foreign Agric. & Horticulture of the H. Comm. on Agric., 118th Cong. 10 (2024); Hearing on S. 4370 & S. 4505 Before the S. Comm. on Indian Affs., 118th Cong. 3 (2024); Indian & Insular Affs. Hearing on Advancing Tribal Self-Determination, *supra* note 37, at 4; Hearing on S. 3126, S. 3264, S. 3937, S. 4079 & S. 4556 Before the S. Comm. on Indian Affs., 116th Cong. 8 (2020); *Chez Oxendine, Tribal Witnesses Express Frustration With Murky Energy Regulations at Congressional Hearing*, *Tribal Bus. News* (Sep. 29, 2023), <https://tribalbusinessnews.com/sections/energy/14486-tribal-witnesses-express-frustration-with-murky-energy-regulations-at-congressional-hearing> [<https://perma.cc/DZ9N-Q54J>] (discussing tribal witnesses’ testimony before the House Natural Resources Committee’s Indian and Insular Affairs Subcommittee).

leaders have the opportunity for closed-door, “nation-to-nation” talks with members of the President’s cabinet.¹⁶⁰

Congress could internalize this second-phase insight more effectively by creating a reliable and structured way to receive input from tribal leaders. Tribes may not have the ability to send representatives to Congress, but there are other options. Maybe tribes could send tribal delegates to regular congressional convenings, provide input on legislative policy priorities, or select regional representatives with staff and the ability to speak on the floor (if not vote), who could regularly raise and discuss tribal interests with members of Congress as fellow government representatives, instead of “outside” lobbyists.¹⁶¹

B. *Lessons and Hopes for the New Trump Administration*

One of President Donald Trump’s major policy priorities in the first year of his second term has been shrinking federal bureaucracy and making government more efficient¹⁶²—consistent with phase-three thinking on tribal policy.

But rather than taking up the work of implementing 477 and Executive Order 14,112 and ironing out their challenges, the Trump Administration has taken significant steps backwards. There was hope that this would not be the case in the initial days of the new Administration. President Trump’s day-one executive order rescinded seventy-eight of President Biden’s executive orders and presidential memoranda, but it did *not* rescind Executive Order 14,112.¹⁶³ President Trump’s pick for Secretary of the Interior, Doug Burgum, was met with bipartisan support, including from tribal nations.¹⁶⁴ Trump’s pick for Assistant Secretary of Indian Affairs, Navajo Nation citizen Billy Kirkland, participated in an inauguration event in which several tribal leaders emphasized their hope

160. White House, Tribal Nations Summit 2023, at 2 (Dec. 6, 2023), https://www.bia.gov/sites/default/files/media_document/white_house_tribal_nations_summit_agenda_12_5_2023.pdf [<https://perma.cc/6KJJ-6JLD>] [hereinafter White House, Tribal Nations Summit 2023].

161. See Reese, Tribal Representation, *supra* note 63, at 780.

162. See Exec. Order No. 14,210, 90 Fed. Reg. 9669, 9669 (Feb. 11, 2025) (requiring the OMB Director to “submit a plan to reduce the size of the Federal Government’s workforce through efficiency improvements and attrition”); Emily Davies, As Trump Wages War Against the Federal Bureaucracy, Some Workers Fight Back, *Wash. Post* (Feb. 7, 2025), <https://www.washingtonpost.com/politics/2025/02/07/trump-resistance-federal-workers/> (on file with the *Columbia Law Review*); Erica L. Green & Michael D. Shear, Musk Wields Scythe on Federal Work Force, With Trump’s Full Blessing, *N.Y. Times* (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/politics/trump-musk-doge-pentagon.html> (on file with the *Columbia Law Review*) (last updated Feb. 10, 2025).

163. Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 20, 2025).

164. Acee Agoyo, ‘A Lot of Big Plans’: Tribal Leaders Ready to Get to Work With New Presidential Administration, *Indianz.com* (Jan. 20, 2025), <https://indianz.com/News/2025/01/20/a-lot-of-big-plans-tribal-leaders-ready-to-get-to-work-with-new-presidential-administration/> [<https://perma.cc/M75W-EPWH>].

that Republicans would continue to resist federal control over tribes and tribal dollars.¹⁶⁵

By March, however, any initial hopes had dissipated. On March 14, 2025, President Trump rescinded Executive Order 14,112.¹⁶⁶ The decision was met with criticism from Indian country's leaders, advocacy organizations, and a bipartisan group of congressmembers.¹⁶⁷ Amid the Trump Administration's supposed efforts to increase government efficiency, repealing the executive order seemed to directly contravene those priorities. The Coalition for Tribal Sovereignty, an organization made up of nearly every major Native or tribal policy organization,¹⁶⁸ expressed concern over the repeal of 14,112 amid the Trump Administration's government reform efforts and called on the Administration to replace it with "something even better,"¹⁶⁹ a hope that has not come to pass. The Coalition and related groups have been exceptionally busy trying to prevent the Trump Administration from harming Indian country—petitioning the Administration to maintain essential funding, clarify the scope of government reforms, and better consult with tribal nations.¹⁷⁰

165. See *id.*; see also Acee Agoyo, *Citizen of Navajo Nation Tapped for Indian Affairs Post*, *Indianz.com* (Feb. 4, 2025), <https://indianz.com/News/2025/02/04/citizen-of-navajo-nation-tapped-for-indian-affairs-post/> [<https://perma.cc/L7XG-Z738>].

166. Exec. Order No. 14,236, 90 Fed. Reg. 13,037, 13,037–38 (Mar. 14, 2025).

167. See, e.g., Hamilton Kahn, *Biden Order on Strengthening Tribal Sovereignty Rescinded*, *KOAT Action News*, <https://www.koat.com/article/biden-order-on-strengthening-tribal-sovereignty-rescinded/64199668> [<https://perma.cc/VMT2-MTS2>] (last updated Mar. 17, 2025) (highlighting that one Native leader characterized the rescission as "a destabilizing action" (internal quotation marks omitted) (quoting Mark Macarro, President, Nat'l Cong. of the Am. Indian)); Levi Rickert, *Trump Administration Rolls Back Executive Order on Tribal Sovereignty and Self-Governance*, *Native News Online* (Mar. 15, 2025), <https://nativenewsonline.net/sovereignty/trump-administration-rolls-back-executive-order-on-tribal-sovereignty-and-self-governance> [<https://perma.cc/D2T6-FECY>] ("Rolling back this Executive Order increases federal interference with local actions." (internal quotation marks omitted) (quoting Bryan Newland (Bay Mills Indian Community), Former Assistant Sec'y for Indian Affs.)); Letter from Am. Indian Higher Educ. Consortium et al. to President Donald Trump (Apr. 9, 2025), <https://coalitionfortribalsoverignty.org/wp-content/uploads/2025/04/2025.04.09-Tribal-Org-Ltr-re-New-EO-and-EO-14112-FINAL.pdf> [<https://perma.cc/2NFB-LW45>] (highlighting the coalition's efforts urging the Administration to "remove unnecessary bureaucratic hurdles and red tape so that Tribal Nations may exercise local control to take care of our own communities, and to ensure that we are treated as true sovereigns"); Letter from Rep. Teresa Leger Fernández et al. to President Donald Trump 1 (Mar. 26, 2025), https://www.heinrich.senate.gov/imo/media/doc/letter_to_potus_re_self_determination.pdf [<https://perma.cc/H5TK-KEB8>] (urging President Trump to restore Executive Order 14,112 because its rescission will "creat[e] uncertainty and instability that directly undermines tribal self-determination").

168. See About, *Coal. for Tribal Sovereignty*, <https://coalitionfortribalsoverignty.org/coalition-action-center/about/> [<https://perma.cc/3T8P-3SDC>] (last visited Aug. 24, 2025).

169. Letter from Am. Indian Higher Educ. Consortium et al. to President Donald Trump, *supra* note 167.

170. See Letters & Comments, *Coal. for Tribal Sovereignty*, <https://coalitionfortribalsoverignty.org/non-coalition-advocacy/letters/> [<https://perma.cc/4DKQ-QRNM>] (last visited Nov. 8, 2025) (listing and providing links to letters sent by non-Coalition members to the Trump Administration); see also Letters Sent by the Coalition, *Coal. for*

On the lands front, the Trump Administration has thus far undertaken a sharp reversal in policy. Some people hoped that conservative, small-government ideology could push the Trump Administration even further than the Biden Administration by removing lands from federal ledgers and returning them outright to tribes instead of engaging in comanagement.¹⁷¹ Such hopes proved naive. Instead, the Trump Administration has championed land policies—such as selling lands, repealing land protections, and greenlighting mining efforts—that cut out tribal voices, ignore tribal priorities, and disregard the potential harm to tribal sacred sites.¹⁷²

The Biden Administration did a very Republican thing by letting go of some of its power over tribal governments and ancestral homelands now under federal control. It chose to shrink the role of the federal government and instead empower the local governments: tribal nations. The challenge for the new Trump Administration appointees will be whether to continue on that path or try to claw back some of that power. President Trump and his appointees, simply put, have a responsibility not to regress toward paternalism by reinserting itself in places where the Biden Administration took a strategic step back.

This may prove to be a challenge for the Trump Administration, which has already demonstrated a desire to use federal funding to exert

Tribal Sovereignty, <https://coalitionfortribalsovereignty.org/coalition-action-center/letters-sent-by-the-coalition/> [<https://perma.cc/WRD7-PXGB>] (last visited Aug. 24, 2025).

171. See, e.g., Victor A. Lopez-Carmen, Trump's Push to Shrink Government Could Return National Parks to Tribes, *Forbes* (Nov. 16, 2024), <https://www.forbes.com/sites/victorlopez-carmen/2024/11/16/trumps-push-to-shrink-government-could-return-national-parks-to-tribes/> (on file with the *Columbia Law Review*) (“While co-stewardship represents progress, it also highlights the untapped potential of fully transitioning these lands to Tribal sovereignty.”).

172. See, e.g., Matthew Brown, US Justice Department Says Trump Can Cancel National Monuments that Protect Landscapes, *KSBW*, <https://www.ksbw.com/article/trump-administration-abolish-national-monuments/65028859> [<https://perma.cc/C9TZ-FNE6>] (last updated June 11, 2025) (describing a Justice Department legal opinion upholding the Trump Administration's authority to abolish national monuments originally established to protect important environmental sites and Indigenous lands); Austin Fisher, ‘Back to the Days of Land Grabs’: New Mexico State Lawmakers on Alert Against Sale of Public Lands, *Indian Country Today* (June 10, 2025), <https://ictnews.org/news/back-to-the-days-of-land-grabs/> [<https://perma.cc/CKJ5-BL6A>] (“As the interim legislative Indian Affairs Committee on Monday planned its work for the rest of 2025 . . . two members said the U.S. government's plan to sell public lands could threaten tribal sovereignty and economic development in New Mexico, which is home to 23 Indigenous nations.”); Gosz, *supra* note 85 (describing the Trump Administration's rescission of Executive Order 14,112, a Biden Administration action meant to promote tribal sovereignty and costewardship of tribal lands with the federal government); Anya Kamenetz, The US Government Stole the Black Hills. Now It's Clear-Cutting Them, *Indian Country Today* (May 27, 2025), <https://ictnews.org/news/the-us-government-stole-the-black-hills-now-its-clear-cutting-them/> [<https://perma.cc/V2JT-P9HB>] (describing several efforts by the Trump Administration to expand logging operations in the Black Hills National Forest).

more—not less—control over all who receive it.¹⁷³ This has, unfortunately, included vital Indian country funding.¹⁷⁴ Some of the vital dollars that flow to Indian country to support tribal self-governance have been threatened by President Trump’s attempt to prohibit or freeze federal funding that supports diversity, equity, and inclusion (or “DEI”) initiatives—which tribal self-determination surely is not. As in many other areas, self-determination policy is caught in the Trump Administration’s existential crisis between desires to champion conservative small-government policies and policies that enhance the President’s own power and control.¹⁷⁵

In the realm of Indian country policymaking, this is particularly concerning because federal control is the heart of paternalism and the antithesis of tribal self-determination. Federal control centered around the President himself is particularly concerning. Put more bluntly, unless there is a reversal of course, President Trump seems far more interested in being the Great White Father than any American President in a generation.

Whether the Administration will demonstrate that tribes, rather than President Trump, should make decisions about their futures remains uncertain.

173. See, e.g., Exec. Order No. 14,151, 90 Fed. Reg. 8339, 8339 (Jan. 20, 2025) (ordering the OMB to terminate all DEI programs, grants, offices, and positions); Fact Sheet: President Donald J. Trump Protects Civil Rights and Merit-Based Opportunity by Ending Illegal DEI, White House (Jan. 22, 2025), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-protects-civil-rights-and-merit-based-opportunity-by-ending-illegal-dei/> [<https://perma.cc/M75S-X5ZW>] (summarizing the Executive Order’s termination of DEI initiatives in federal contracting and spending).

174. See Alex Brown, For Indian Country, Federal Cuts Decimate Core Tribal Programs, Stateline (Mar. 4, 2025), <https://stateline.org/2025/03/04/for-indian-country-federal-cuts-decimate-core-tribal-programs/> (on file with the *Columbia Law Review*) (discussing how funding cuts created “deep uncertainty about [tribal] health clinics, schools, police agencies and wildfire crews”); see also Brian Edwards, Another Federal Court Blocks Trump \$3T Funding Freeze as Tribal Leaders Press for Protection, Tribal Bus. News (Feb. 4, 2025), <https://tribalbusinessnews.com/sections/policy-and-law/15007-another-federal-court-blocks-trump-3t-funding-freeze-as-tribal-leaders-press-for-protection> [<https://perma.cc/NRU8-PEX2>] (reporting on a federal court order enjoining the OMB from enforcing a funding freeze for Native programs); Dianna Hunt, Kevin Abourezk, Jourdan Bennett-Begaye & Stewart Huntington, Tribes Scramble to Respond to Trump Administration Funding Freeze, ICT (Jan. 28, 2025), <https://ictnews.org/news/tribes-scramble-to-respond-to-trump-administration-funding-freeze> [<https://perma.cc/7FP9-7EX5>] (discussing the potential impacts of a memo issued by the Trump Administration’s OMB freezing federal funding to tribal communities).

175. See, e.g., Jon Allsop, How Donald Trump Is Expanding His Authority While Shrinking the Government, New Yorker (May 2, 2025), <https://www.newyorker.com/news/fault-lines/how-donald-trump-is-expanding-his-authority-while-shrinking-the-government> [<https://perma.cc/LQU4-AWAJ>].

CONCLUSION

There is now an opportunity to take a step forward, though this is a step the Trump Administration is less likely to take since it involves assessing, and then likely increasing, federal spending.¹⁷⁶ Tribes need federal dollars to keep rebuilding and to provide better services to their citizens.¹⁷⁷ And they need much more money than they are currently getting.¹⁷⁸ As President Nixon stated in the 1970s, the federal government both created the conditions that led to tribes' need for additional support and manufactured tribal dependence on federal programs.¹⁷⁹ The next step, or fourth phase, therefore, should be for the federal government to start the process of ending this dependence. The road to ending that dependence will require a much more significant investment in rebuilding and strengthening tribal governance, and taking up that challenge is a wide-open opportunity for the next willing President and Congress.

The Biden Administration sowed the seeds for this potential fourth phase of tribal self-determination policies by prioritizing increased funding for tribal governments and the federal programs that support them.¹⁸⁰ It spent significant political capital expanding funding and prioritizing advanced appropriations for the Indian Health Service (IHS) for the first time in American history in fiscal year 2023, with the goal of significantly increasing IHS funding and making it a mandatory, rather than discretionary, part of annual federal spending.¹⁸¹ Advanced funding allows IHS facilities—including tribally run facilities—to provide better

176. Cf. Hunt et al., *supra* note 174 (discussing the Trump Administration's decision to freeze federal funding for tribal communities).

177. Fact Sheet: The President's Budget Delivers on His Commitment to Tribal Nations and Native Communities, White House (Mar. 11, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/03/11/fact-sheet-the-presidents-budget-delivers-on-his-commitment-to-tribal-nations-and-native-communities/> [<https://perma.cc/62WL-GLAZ>] (describing the Biden Administration's allocation of funding to "better support Tribal Nations as they govern and grow on their own terms").

178. See, e.g., Off. of Tribal Just., DOJ, Tribal Public Safety and Criminal Justice Systems Funding Consultation Report 2 (2025), <https://www.justice.gov/tribal/media/1385416/dl?inline> [<https://perma.cc/JZ53-A67T>] ("The Department understands that the current federal funding levels and mechanisms do not adequately meet Tribes' public safety and criminal justice needs.").

179. Special Message to the Congress on Indian Affairs, *supra* note 38, at 566.

180. Fact Sheet: Biden-Harris Administration Announces New Actions to Support Indian Country and Native Communities Ahead of the Administration's Second Tribal Nations Summit, White House (Nov. 30, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/> [<https://perma.cc/UZZ6-8A93>].

181. Press Release, Indian Health Serv., Statement From IHS Acting Director Elizabeth Fowler on the President's Fiscal Year 2023 Budget (Mar. 28, 2022), <https://www.ihs.gov/newsroom/pressreleases/2022-press-releases/statement-from-ihs-acting-director-elizabeth-fowler-on-the-presidents-fiscal-year-2023-budget/> [<https://perma.cc/N759-JSNY>].

care, and mandatory appropriations would allow the budget to grow over time and prevent IHS facilities from being on the chopping block in every fight over the federal budget.¹⁸²

Executive Order 14,112 also directed the White House Council on Native American Affairs, OMB, and the Domestic Policy Council to work across the federal government to measure the chronic funding shortfalls affecting tribes and develop recommendations for what additional funding and programming is necessary.¹⁸³ The order also required that federal agencies report on their progress in implementing those recommendations on an annual basis moving forward.¹⁸⁴ The next President—Democrat or Republican—ought to reinstate the bipartisan bureaucratic efficiency reform efforts of Executive Order 14,112. But the next President who is willing to embrace a plan that requires increased spending—likely a Democrat—should also embrace the blueprint for assessing federal funding needs in Executive Order 14,112 and take the next step of outlining a plan for meeting them.

The third branch of government—the judiciary—has lagged woefully behind the other two branches in recognizing the vital role of tribal nations in self-governance. During the tribal self-determination era, Congress's and the executive's commitment to tribal self-determination contrasted with the Supreme Court's expansion of federal power over tribal sovereignty and erosion of tribal sovereignty.¹⁸⁵ Thus, in a new fourth era of tribal self-determination, the federal courts could finally reach third-, second-, or even first-era thinking. In particular, there are two key pieces of wisdom from different phases of the tribal self-determination era that can be applied to the federal courts.

First, the core wisdom of the first two phases of tribal self-determination policies was that tribes are sovereigns worthy of respect and capable of good self-governance.¹⁸⁶ While the notion of tribal nations'

182. Elayne J. Heisler & Kate P. McClanahan, Cong. Rsch. Serv., R46265, *Advance Appropriations for the Indian Health Service: Issues and Options for Congress 1–2* (2020).

183. Exec. Order No. 14,112, 88 Fed. Reg. 86,021, 86,023 (Dec. 6, 2023).

184. *Id.*

185. See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177, 1205–15 (2001) (describing the early cases of the tribal self-determination era as initially “complement[ing] the Indian policies of Congress and the Executive Branch” only to give way to inconsistency and erosions of tribal sovereignty at the hands of a “[Supreme] Court [that] is rudderless in Indian law”); see also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1, 37, 45 (1999) (demonstrating how the judiciary asserted authority by framing tribal power as contingent, thereby perpetuating the colonial subordination of tribes).

186. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000) (“Agencies shall respect Indian tribal self-government and sovereignty . . .”); see also Johnson & Hamilton, *supra* note 7, at 1253 (discussing the tension of tribes being viewed as both “sovereign and ward”).

sovereign status has crept into the Supreme Court's doctrine recently,¹⁸⁷ in the self-determination era, the Court has eroded tribal sovereignty and control rather than bolstering it.¹⁸⁸ Moreover, several of the decisions that have limited tribal control or allowed other sovereigns—states or the federal government—to exert themselves on reservations have relied on reasoning that dismisses the core competency of tribal government institutions, particularly the ability of tribal governments to exert any form of governance over non-Indians.¹⁸⁹ The Court seems to have misinterpreted the lesson from the self-determination era, understanding it not as “tribes can be trusted to effectively govern” but “tribes can *only* be trusted to govern themselves.” This misperception is rooted in some combination of ignorance, fear, distrust, and assumptions about tribes' capacity to soundly administer the law that ought to belong in the past.¹⁹⁰ To subject tribal governments to more skepticism or scrutiny than we do the other governments in this country is nothing more than a paternalistic impulse rooted in colonially tinged distrust of tribal governments as somehow more suspect or less capable of dispensing equal justice. This practice of assuming tribal government incompetency or untrustworthiness when it comes to governing non-Indians is particularly outdated given the recent turn to tribal governments to offer their unique expertise or provide superior governance.¹⁹¹

187. See, e.g., Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. Ill. L. Rev. 1901, 1904 (emphasizing tribal sovereignty as a core principle of federal Indian law that influences statutory interpretation, judicial doctrine, and constitutional understanding in ways increasingly acknowledged by the Supreme Court).

188. See *Montana v. United States*, 450 U.S. 544, 564 (1981) (holding that tribes generally lack civil authority over non-Indians on non-Indian fee land within a reservation); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (“[We] conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.”); Keegan Medrano & Sharen Kickingwoman, *Supreme Court Ruling Flouts Tribal Sovereignty*, ACLU Mont. (July 12, 2022), <https://www.aclumontana.org/en/news/supreme-court-ruling-flouts-tribal-sovereignty> [<https://perma.cc/2CMH-5AJ3>] (“The *Castro-Huerta* decision is devastatingly corrosive to tribal sovereignty. It further complicates criminal jurisdiction and endangers the lives of Indigenous people in Indian Country.”).

189. See *Oliphant*, 435 U.S. at 209–11 (“By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States . . .”).

190. See Elizabeth A. Reese, *The Other American Law*, 73 Stan. L. Rev. 555, 573–78 (2021) [hereinafter Reese, *The Other American Law*] (explaining how perceptions of Indians as “primitive” underpinned colonialism and legal doctrines).

191. A notable and widely covered example of tribal governments' effectiveness was their ability to administer COVID-19 vaccines more efficiently than neighboring states. Sukee Bennett, *American Indians Have the Highest Covid Vaccination Rate in the US*, Nova (July 6, 2021), <https://www.pbs.org/wgbh/nova/article/native-americans-highest-covid-vaccination-rate-us/> [<https://perma.cc/ABP3-3A9W>]; Kirk Siegler, *Why Native Americans Are Getting COVID-19 Vaccines Faster*, NPR (Feb. 19, 2021), <https://www.npr.org/2021/02/19/969046248/why-native-americans-are-getting-the-covid-19-vaccines-faster> [<https://perma.cc/L4EF-ZVRD>].

Second, internalizing the insight from the second and third phases of tribal self-determination policies that we ought to look to tribes for wisdom, federal courts should more robustly look to tribal courts and tribal law. If tribal governments are indeed sovereigns capable of making law and governing decisions, then tribal courts ought to be treated with deference on questions of tribal law, just as federal courts defer to state courts on matters of state law. There are clear areas where tribal expertise is relevant to understanding the dispute at issue, most notably in the determinations about the scope of tribal civil jurisdiction.¹⁹² Tribal civil jurisdiction is determined by whether specific conduct is a threat to the political integrity, economic security, or health and welfare of a tribe.¹⁹³ It is inconceivable that federal courts have failed to recognize that this question is a mixed question of tribal law that requires looking closely at tribal laws and potentially deferring to tribal courts' analyses.

* * *

The United States has come very far since the days when federal policy could aptly be described as the Great White Father dictating condescendingly from Washington, D.C. And it is just as certain that we have a long way to go. It took hundreds of years to erode tribal institutions and build up a comparatively ineffective federal bureaucracy to attempt to fill in the gaps. But we are at a crossroads. It cannot be underappreciated just how remarkable the recent turn in federal policy has been. It is a rare thing indeed to see a government humble itself by relinquishing power and admitting its incapacity as a decisionmaker, let alone a government like the United States government. The Great White Father has metaphorically—as the title of this Piece alludes—learned to get out of the way.

Things could continue on this path, or they could take a sharp turn backwards. This Piece could end this with the phrase, “time will tell,” but that would be inaccurate and obscure the reality that federal policymakers, tribal leaders, and the American people have a tremendous amount of agency over the future. People will decide. Hopefully they will choose wisdom and humility over laziness and arrogance.

192. Reese, *The Other American Law*, *supra* note 190, at 631–33.

193. *Id.* at 632.