TESTIMONY OF EDWARD P. LAZARUS[1]
SENATE COMMITTEE ON INDIAN AFFAIRS
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Mr. Chairman and Vice-Chairman, I very much appreciate the opportunity to testify before this Committee. As someone who started studying Indian Law in junior high school and who has spent his professional life first as a law clerk at the United States Supreme Court and then as an analyst of and practitioner before that Court, it is honor to have been asked to share my views on *Carcieri v. Salazar* and its legal implications.

As you know, on February 24, 2009, the Supreme Court issued its decision in *Carcieri*, 129 S. Ct. 1058, which held that the Secretary of the Interior's authority to take land into trust for an Indian tribe under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, is limited to tribes and their members who were "under federal jurisdiction" when the IRA was enacted in 1934. The harm occasioned by that decision cannot be overstated. The Supreme Court, in an extraordinarily cramped reading of statutory text, has drastically curtailed the primary mechanism by which the federal government has for decades promoted the sovereignty, self-determination, economic stability, and political development of Indian tribes, many of whom were not recognized by the federal government until after the IRA's enactment. Congress passed the IRA to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The Supreme Court, however, has now held that the IRA perpetuated the consequences of the federal government's prior assimilationist and tribal-termination policies by limiting IRA's most fundamental protection and assistance to those tribes which were under federal jurisdiction (commonly, through recognition) in 1934.

The ability to have land taken into trust is critical to the preservation and advancement of tribal sovereignty, Nation building, and economic and cultural development. That is because land held in trust by the United States for tribes is generally exempt from (i) state and local taxation, *see* 25 U.S.C. § 465; (ii) local zoning and regulatory requirements, *see* 25 C.F.R. § 1.4(a); and (iii) state criminal and civil jurisdiction absent tribal consent, *see* 25 U.S.C. §§ 1321(a), 1322(a). *See Connecticut v. United States Dep't of the Interior*, 228 F.3d 82, 85-56 (2d Cir. 2000). For tribal governments, placing land into trust also confirms that the land may not be condemned or otherwise alienated without either tribal consent or express congressional authorization. *See* 25 U.S.C. § 177. That is, in essence, what makes the land a true homeland for tribes. And this protected status lays the groundwork for tribes to exercise genuine sovereignty and control over their land and, like all responsible governments, to make the decisions about land and resource use that are needed to protect and promote the community's growth and well-

[1] Although I am a partner at the law firm Akin Gump Strauss Hauer & Feld, I am appearing before this Committee in my personal capacity as a recognized authority on the Supreme Court with a background of scholarship, commentary, and teaching in the fields of Constitutional Law and Federal Indian Law. In *Carcieri*, Akin Gump submitted an amicus brief on behalf of the Narragansett Indian Tribe, but I did not work on that brief and am not representing the Tribe.

being. Securing the ability of tribes to control their own land, in other words, is indispensable to fulfilling the United States government's unique responsibility for preserving and respecting the status of tribes as distinct sovereigns within our Nation.

Accordingly, there is an urgent need for the federal government to respond to the *Carcieri* decision and address the challenges it has created for the federal government's fulfillment of its special obligations to Indian tribes and, in particular, to those tribes whose recognition and protection by the United States was delayed until after 1934. What follows are the potential options for the government to pursue, ranging from the clearest and most effective to the plausible but admittedly tenuous.

First, Congress should amend the IRA to correct the statutory construction issue that led to the *Carcieri* decision. As you know, in that case, the Court addressed the meaning of the term "now" in 25 U.S.C. § 479, which provides that the government can take land into trust for an "Indian," who is defined (as relevant here) to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." The Supreme Court held that the term "now" froze in time those tribes that were under Federal jurisdiction when the statute was enacted in 1934, rejecting the Interior Department's argument that "now" referred to the time the trust decision was made.[2]

In so ruling, the Supreme Court defied 70 years of practice and undermined a generally settled understanding that a main purpose of the IRA was to provide authority and flexibility for rebuilding a tribal land base that had been reduced by more than 100 million acres during the period when the United States pursued an aggressive policy of breaking up and "allotting" Indian lands, as well as trying to assimilate individual Indians into American society. Congress, however, has the unquestioned power to reject the Court's belated assessment of congressional intent and restore the status quo ante. If Congress were to amend the law by deleting the term "now" or otherwise clarifying that, consistent with IRA's animating purpose, the term "now" refers to the time the decision to take land into trust is made, the problem would be eliminated and all federally recognized tribes would be able to exercise the sovereignty rights ordinarily associated with that status.

In addition, the Congress should pass legislation that ratifies the numerous pre-*Carcieri* decisions by Interior taking significant tracts of land into trust for tribes recognized after 1934. Tribes have undertaken substantial development and investment in reliance on those trust decisions. Leaving all of those decisions in legal limbo, undoubtedly spawning substantial

[2] For all the Supreme Court's focus on plain language, the supposedly crystalline meaning of the phrase "now under federal jurisdiction" was lost on one of the leading experts at the time. Felix S. Cohen served in the office of the Solicitor of the Department of the Interior from 1933 to 1947 and edited the first Handbook for Federal Indian Law in 1941. Cohen was also a principal advocate of, and heavily involved in the drafting of the IRA, then known as the Wheeler-Howard Act. In a memorandum written just prior to the IRA's enactment, Cohen expressed bafflement at the phrase's significance – backhanding it with the observation "whatever that may mean" – and argued that the phrase should be deleted because it would "likely [] provoke interminable questions of interpretation." Analysis of Differences Between House Bill and Senate Bill. Box 11, Records Concerning the Wheeler-Howard Act, 1933-37, folder 4894-1934-066, Part II-C, Section 4 (4 of 4); Differences Between House Bill and Senate Bill, Box 10, Wheeler-Howard Act 1933-37, Folder 4894-1934-066, Part II-C, Section 2, Memo of Felix Cohen.

litigation, would entail enormous resource and reliability costs for the Tribes, the United States government, and the courts. The impact of the decision on the substantial investments and developments already made and being made on trust land would also generate significant economic uncertainty for Tribes and their surrounding cities, counties, and States, which would be profoundly unfortunate in these challenging economic times.

Draft language for both bills is appended to this testimony for the Committee's reference.

Second, in the absence of remedial legislation, the Department of the Interior has an affirmative obligation after *Carcieri* to consider, if presented with a fee to trust application, whether tribes that were federally recognized after 1934 were nevertheless "under Federal jurisdiction" in 1934, and thus that those tribes qualify for trust eligibility under Section 479. The Supreme Court held in *Carcieri* only that the term "now" temporally modified the phrase "under Federal jurisdiction." The Court did not hold – nor could it grammatically – that the term "now" modifies the time within which a tribe had to be recognized. That would defy the sentence structure and careful placement by Congress of the term "now" in the statute. *See Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring) ("The statute, after all, imposes no time limit upon recognition.").

Importantly, the *Carcieri* decision leaves open the option for Interior to determine that a tribe that was recognized by the federal government sometime after 1934 was nonetheless "under Federal jurisdiction" in 1934, thus qualifying for the IRA's protections of tribal sovereignty. The Supreme Court's opinion explicitly states that the question of whether that hybrid status could be established was not before it in the *Carcieri* case, noting that "[n]one of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934." 129 S. Ct. at 1068. Underscoring that it was not deciding this issue, the Court then explained that, under the Supreme Court's unique rules of discretionary certiorari review, the absence of any contest over that issue in the parties' certiorari briefs required the Court simply "to accept this as fact for purposes of our decision in this case." *Ibid*. The Supreme Court, in other words, made clear in *Carcieri* that both substantively and procedurally the question of whether tribes could establish the dual status of being recognized post-1934 yet under federal jurisdiction pre-1934 remains an open one.

This open question was the principal subject of Justice Breyer's concurring opinion. There, Justice Breyer explained at some length (and without contradiction in the majority opinion) that the opportunity to determine that dual status was unaffected by the Court's decision and Interior remained free to address it. 129 S. Ct. at 1069-1070. Indeed, Justice Breyer noted that, in the past, Interior had determined that some tribes that were recognized after 1934 were nevertheless "under Federal jurisdiction" in 1934. *Id*. at 1070. Justices Souter and Ginsburg echoed Justice Breyer's observation about Interior's retained authority, explaining that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Id*. at 1071.

While Interior thus retains the authority to determine that a tribe was under Federal jurisdiction in 1934 even though it was not recognized, the legal standard for establishing such jurisdiction is less clear cut. As Justice Souter and Ginsburg explained in their concurring opinion in *Carcieri*, there is "no body of precedent or history of practice giving content to the

condition sufficient for gauging the Tribe's chances of satisfying it." 129 S. Ct. at 1071. This is hardly surprising. After all, prior to *Carcieri*, there was little reason to focus on the question. Nonetheless, the concurring opinion of Justice Breyer identifies some relevant indicia of federal jurisdiction, such as continuing obligations by the United States to the tribe, an ongoing government-to-government relationship despite the federal government's mistaken belief that the tribe was terminated, or subjection of the tribe to a congressional appropriation or enrollment with the Bureau of Indian Affairs (for example, at a BIA school or judgment distribution rolls). *See id*. at 1070 (discussing examples). Other factors include the existence of a written record documenting the tribe's existence as a separate tribe, the tribal members' receipt of federal aid, or the fact that the tribe lived as and was considered by others to be a separate tribe. Indeed, Justice Breyer specifically noted the case of the Stillaguamish who were not officially recognized until 1976, but were determined to be entitled to recognition because the Tribe had maintained treaty rights since 1855. The same is true for the Samish Tribe, which was not recognized by the government until 1996, even though the Tribe possessed the same federally protected treaty fishing rights dating from 1855.

Furthermore, a tribe could well have been under federal jurisdiction even though the federal government did not know so at the time. 129 S. Ct. at 1070 (Breyer, J., concurring). In February 1937, for example, Interior's Solicitor recommended that land be placed in trust for the Mole Lake Band members as a tribe, rather than as individuals of one-half or more Indian blood. Mem. Sol. Int., Feb. 8, 1937, (hereinafter "Interior Opinions"). The Interior Opinion cited a number of factors establishing that the group of 141 persons "mostly fully bloods" should be recognized as a tribe, such as the fact that tribal members received annuities from a Treaty of 1854, other federal aid, and schooling from the federal government. The Interior Opinion also emphasized that the tribal members were not part of another tribe, other tribes in the area recognized the Mole Lake Band as a separate tribe, the tribal members continued to maintain their customary form of government, and the tribal members persistently refused to leave the Mole Lake area.

As the Mole Lake situation reflects, whether a tribe is under federal jurisdiction can be most easily determined if the Department of the Interior has a sufficient written record of the tribe's existence. For the Mole Lake Band, the 1937 Interior Opinion demonstrated that the Interior Department had a substantial written record dating from 1919 until 1937, which substantiated that the tribe was "under federal jurisdiction" at the time of IRA's enactment. Accordingly, for tribes whose circumstances support the conclusion, the Department of Interior retains the authority to conclude that "later recognition reflects earlier 'Federal jurisdiction,'" 129 S. Ct. at 1070 (Breyer, J., concurring), or to otherwise determine that the tribe was under Federal jurisdiction in 1934.

It is important to note, however, that the absence of information within the Department is NOT evidence that a given tribe was not under federal jurisdiction in 1934. Suffice it to say that record keeping has not always been the Interior Department's strong suit. And, as particularly relevant here, part of the unfortunate history of federal Indian relations is the uneven way in which Indian tribes came to be recognized or, in some cases, noticed by the government. As Justice Breyer observed, the Department created a list of 258 tribes covered by the Act and "we also know it wrongly left certain tribes off the list." 129 S. Ct. at 1068. As these omissions continued to create problems for the Department (such as determining which tribes were entitled

to the protection of treaty guaranteed fishing rights), the Department realized it needed to formalize the way in which it determined which Indian tribes were eligible for government services.

It was not until 1978, however, that the Department established a formal process for the acknowledgment or "recognition" of Indian tribes. While this process has been a separate focus of the Congress and this Committee, the salient point here is that these acknowledgment regulations already effectively embody the concept that to be formally acknowledged, the purported Indian tribe must have been under federal jurisdiction at the time the IRA was enacted. For example, the first mandatory criterion that a petitioning group must satisfy is that it has "been identified as an American Indian entity on a substantially continuous basis since 1900," 25 C.F.R. 83.7(a), which may be documented through identification by the federal authorities or other sources, such as state government, historians or newspapers and books.

In other words, in light of the acknowledgment regulations, it generally should be the case that tribes recognized by the United States after 1934 actually meet the criteria – such as continuous existence – for being "under federal jurisdiction" as of 1934. And it makes no sense whatsoever to deny the benefits of the IRA, including the trust land provision, to tribes that, through no fault of their own, were left off the original IRA list or otherwise continuously existed (and thus, were under federal jurisdiction) as an Indian tribe from historic times to the present. Justice Breyer recognized exactly this possibility, noting that simply because a group's Indian character has been overlooked or denied "from time to time . . . [should] not be considered to be conclusive evidence that this criterion has not been met." *Ibid*.

I realize that this suggested approach is in tension with the Bush Administration's statement at the Supreme Court oral argument that Interior's "more recent interpretation" was that recognition and under federal jurisdiction were coextensive determinations. Oral Arg. Tr. 42. But that last-minute litigation position is contrary to what those published regulations reflect, as well as longstanding agency practice. That position also renders the phrase "recognized Indian tribe" redundant, contrary to *Carcieri*'s command that "we are obliged to give effect, if possible, to every word Congress used." 129 S. Ct. at 1066. By contrast, the prior agency position that the two determinations are distinct inquiries better comports with the statutory text because it gives meaning to Congress's decision to employ both phrases as qualifying yardsticks in Section 479. Accordingly, Interior retains the authority to reinstate its prior view as the better reading of statutory text and the view that better comports with congressional purpose.

As a matter of administrative law, the Solicitor General's oral-argument pronouncement does not even merit deference normally accorded agency determinations. "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *see Kentucky Retirement Sys. v. EEOC*, 128 S. Ct. 2361, 2371 (2008) (denying deference to informal agency interpretation that the agency "makes little effort to justify"). Thus, there should be no administrative hindrance to Interior's return to its considered and longstanding position, embodied in formal agency regulations, that a tribe could be under federal jurisdiction even if not formally recognized. In any event, the Supreme Court just reiterated this month that agencies may reasonably change their interpretation of ambiguous statutory language. *See FCC v. Fox Television Stations, Inc.*, No. 07-582, slip op. at 10, 11 (Apr. 28, 2009) ("We find no basis in the

Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review." "[The agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.").

All told, given that the erratic pattern of federal recognition at the time of the IRA's enactment was due, in large part, to administrative and record-keeping problems on the part of the Department of Interior, and given that the Supreme Court has now invested those administrative oversights and mistakes with legal significance, the Department now has a special and affirmative obligation to exercise its administrative authority – in consultation with interested Tribes -- to ensure that proper IRA protection is extended to all Tribes that were under federal jurisdiction in 1934. It must be said, however, that this approach will surely trigger protracted and expensive case-by-case litigation and, as a result, is only a second-best alternative to remedial legislation.

Third, Section 479 provides a separate definitional mechanism – entirely distinct from the "federal jurisdiction" test – by which the Secretary may acquire land in trust. Section 479 includes within the definition of "Indian[s]" eligible to have land taken into trust "all other persons of one-half or more Indian blood." 25 U.S.C. § 479. The Secretary of the Interior even has the authority to assist such Indians in organizing as a separate Indian tribe by virtue of such blood quantum. *See* 25 U.S.C. §§ 476 and 479.

On its face, the IRA authorizes Interior's acquisition of land into trust for Indians possessing one half or more Indian blood regardless of any temporal relationship to the enactment of the IRA. In fact, a number of federally recognized Indian tribes first organized as half-blood communities under the IRA – the St. Croix Band of Chippewa, the Mississippi Choctaw Tribe, and, more recently, the Jamul Indian Village in California. In each case, the Department assisted those half-blood Indians by first acquiring land in trust for their benefit until the half-blood community could formally organize according to the IRA.

To illustrate, in 1936, the Solicitor of the Interior reviewed a proposed acquisition of trust land for Choctaw Indians in Mississippi, who had become separated from the Choctaw Tribe in Oklahoma. The Solicitor determined that land could be taken into trust for "such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." Mem. Sol. Int., Aug. 31, 1936, *reprinted in* 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 668. The Jamul Indian Village organized in the same manner. Beginning in the 1970s, representatives of Jamul contacted the Bureau of Indian Affairs about obtaining federal recognition. The Bureau explained that the Village could either seek recognition through a formal petition for federal acknowledgment or organize as a half-blood community pursuant to Sections 16 and 19 of the IRA, 25 U.S.C. §§ 476 and 479. The Jamul pursued the latter option and submitted 23 family tree charts to the Area Director. The Bureau eventually determined that 20 people possessed one-half or more Indian blood and proceeded to acquire, through donation, a parcel of land to establish the Jamul Indian Reservation. The grant deed conveyed the parcel to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." In May of 1981, the half-blood members ratified a

constitution which formally established the Jamul Indian Village. Two months later, the Department approved the constitution. The Secretary of the Interior then included Jamul in the next list of federally recognized Indian tribes published in the federal register. 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982).

Thus, as a matter of plain statutory text and established administrative practice, the federal government retains the authority to take land into trust for communities of Indians who establish that they have half or more Indian blood. As Justice Breyer noted, 129 S. Ct. at 1070, nothing in *Carcieri* affected that distinct basis for trust decisions to be made.

Fourth, in 40 U.S.C. § 523, Congress delegated authority to the General Services Administration to transfer to the Secretary of the Interior any excess real property owned by the United States that falls within an Indian reservation.[3] The statute further provides that "the Secretary shall hold excess real property transferred under this section in trust for the benefit and use of the group, band, or tribe of Indians, within whose reservation the excess real property is located." 40 U.S.C. § 523(b)(1). This statutory authority could be helpful in the occasional circumstance where federal property, such as a military base, falls within the historic and undiminished bounds of an Indian reservation. In those relatively unusual situations, the Secretary has full statutory authority to effectively return the "excess" land to the Tribe in trust status. The statute thus provides authority to put excess federal land in trust for an Indian tribe as long as the land falls "within an Indian reservation" of a federally recognized Indian tribe. *Shawnee Tribe v. U.S.*, 405 F.3d 1121, 1126 (10th Cir. 2005).

Neither the statute nor the regulations define "within an Indian reservation," but generally "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). While the Court has held that "only Congress can divest a reservation of its land and diminish its boundaries," *ibid*., the Court has also held that a tribe may not reassert jurisdiction over land that has long passed out of Indian control, even if the reacquired land is within the tribe's reservation. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197. 202, 219 (2005).

The allotment policy at the turn of the century complicated question of whether land is within an Indian reservation *Solem*, 465 U.S. at 466-67. The allotment policy forced Indians onto individual allotments, which were carved out of reservations, and opened up unalloted lands for non-Indian settlements. *Ibid.* The legacy of allotment has created jurisdictional quandaries where state and federal officials dispute which sovereign has authority over lands that were opened by Congress and have since passed out of Indian ownership. *Id.* at 467.

Generally, Congress has diminished a reservation boundary by opening up unallotted lands and freeing the land of its reservation status. *South Dakota v. Yankton Sioux Tribe*, 522

[3] More specifically, Section 523 provides that "[t]he Administrator of General Services shall prescribe procedures necessary to transfer to the Secretary of the Interior, without compensation, excess real property located within the reservation of any group, band, or tribe of Indians that is recognized as eligible for services by the Bureau of Indian Affairs."

U.S. 329, 343 (1998). But, if Congress "simply offered non-Indians the opportunity to purchase land within established reservation boundaries then the opened area remained Indian country." *Ibid.* Whether Congress has diminished a reservation's boundaries depends largely on the statutory language used to open Indian lands. *Solem*, 465 U.S. at 470. Other factors, however, weigh into the diminishment question, such as: (1) the events surrounding the passage of a the congressional act, particularly how the transaction was negotiated with the tribe involved; (2) the legislative history of the act; (3) Congress's treatment of the affected area in the years immediately following the opening of the land, including how the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands; and (4) the "Indian character" of the land, that is whether non-Indian settlers flooded into the opened portion of a reservation. *Id.* at 471.

"Excess property" is defined as "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." 40 U.S.C. § 102(3). In contrast, "surplus property" means excess property that GSA determines is not required to meet the needs or responsibilities of any federal agency. *Id.* § 102(10).

Lastly, whether a tribe is federally recognized may be determined by referring to the list of the federally recognized tribes that the Secretary of the Interior is required to publish every year under 25 U.S.C. § 479a-1.

Fifth and finally, it might be argued, though admittedly with considerable difficulty, that the President retains some inherent constitutional authority to protect Indian lands as part of his constitutionally assigned duties to enforce domestic law and security, as well as to conduct the federal government's relations with other sovereigns. Between 1855 and 1919, the President used executive orders to set aside 23 million acres of land from the public domain for Indian reservations. Felix S. Cohen, *Handbook of Federal Indian Law* 982 (2005). In 1882, the Attorney General authored an advisory opinion supporting the President's authority to create Indian reservations through executive orders. 17 Op. A.G. 258 (1882). The opinion first noted an early historical practice of presidential reservations of land for public uses, as well as congressional recognition of the President's power to withdraw lands from the public domain. The opinion then reasoned that reserving land for Indians constitutes a proper "public use" for the land because of the government's longstanding policy of settling Indians on reservations. With respect to the question whether the President could "reserve lands within the limits of a state for Indian occupation," the Attorney General responded that "it has been done; it has been the practice for many years," and "I have found no case where the objection has been raised that a reservation could not be made within the boundaries of a State without the consent of the State." *Ibid*.

The Supreme Court agreed. In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Court upheld the President's authority to withdraw public land from free and open acquisition by citizens, even though Congress had designated the land for such acquisition. The Court explained that the President's practice of withdrawing public land that would otherwise be for open acquisition stretched back at least 80 years, and that Congress knew of and acquiesced in the practice. *Id*. at 469. The Court concluded that such congressional acquiescence "operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen." *Id*. at 475.

In 1919, however, Congress withdrew the Executive Branch's authority to create Indian reservations out of the public domain, commanding that "[n]o *public lands* of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress." 43 U.S.C. § 150. In 1927, Congress further retracted Executive Branch authority by directing that only Congress may change the boundaries of an Indian reservation created by the Executive Branch. 25 U.S.C. § 398d; *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188 (1999) (the President lacked constitutional and statutory authority to issue an 1850 Executive Order terminating a tribe's hunting, fishing and gathering rights under a treaty); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution itself.").

The question remains whether there is some constitutional residuum (in addition to the specific statutory authority provided by the IRA) that empowers the Executive Branch (i) to exempt parcels of land from state and local taxation because such lands have been acquired to advance the special public purpose of protecting Indian tribes; (2) to exempt parcels of land from local zoning and regulatory requirements; (3) to exempt land from state criminal and civil jurisdiction; and (4) to prevent the land from being alienated. If there is, then it could be argued that the Secretary retains the authority to give some parcels of Indian land protections that approximate those accomplished by trust status.

However, given Congress's statutory partial prohibition against the Executive Branch's creation of Indian reservations and the Constitution's assignment of primary responsibility for the control of public lands and the taking of private lands for public purposes to the Congress, *see* U.S. Const. art. I, § 8 & art. IV, § 3; *Youngstown*, 343 U.S. at 587-588, the argument that the President has independent authority to create trust lands contrary to Congress's direction in the IRA will be a difficult one to make. *See Youngstown*, 343 U.S. at 588-589. The creation of such lands *contrary to statutory direction* would not fall within any obvious grant of power to the Executive Branch in the Constitution. It is not inherent in the President's power to make treaties with Indian nations, nor does it entail the enforcement or execution of laws duly enacted by Congress. Quite the opposite, such action seems similar to the seizure of private property for a presidentially identified purpose that was struck down in *Youngstown.* An Executive Branch creation of trust land or trust-like land would "not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President." *Id*. at 588.

In short, the argument that the President alone could, in effect, chart an independent course for the creation of trust-like Indian lands, while finding some support in *Midwest*, would be difficult to establish in the face of both contrary statutory and Supreme Court direction. The argument's greatest chance of success would arise in case-by-case scenarios where the President could argue based on the specific facts before him that supplemental protection of the land was necessary to accomplish congressional purpose, to enforce a law or treaty, or to stabilize inter-governmental relations.

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In sum, although the *Carcieri* decision upended decades of consistent agency practice under the IRA, avenues remain open by which the federal government could afford Indian lands the distinct protection that they merit. Those avenues should be vigorously pursued both by Congress and the Executive Branch because they are of vital importance to tribal communities across the Nation.