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President Nixon's Indian Law Legacy: A Counterstory

Carole Goldberg

ABSTRACT

Scholars of Federal Indian law have often celebrated President Richard Nixon for advancing tribal interests through legislation and policy initiatives. Far less attention has been paid to his impact on Federal Indian law through the appointments he made to the U.S. Supreme Court. During the time his four appointees served together, the Supreme Court rendered three decisions that are among the most harmful to tribal interests of the modern era. Whether any President should be held responsible for the decisions of his appointees is no simple question. It is worth noting, however, that President Nixon had every reason to know the issues in those three cases would likely reach the Supreme Court. Yet he did not investigate or take into account his appointees' views on Native issues before making the appointments. Further, for at least one of the appointees—the one most consistently hostile to tribal interests—there was ample evidence of those views had President Nixon cared to check.

AUTHOR

Jonathan D. Varat Distinguished Professor of Law, UCLA School of Law. I am immensely grateful to Professors Angela Riley and Laura Gomez, as well as to *UCLA Law Review*, for organizing this Symposium. The two things most gratifying to a law professor—students contributing to the field of endeavor, and scholars creating new knowledge—were prominently on display at this Symposium. To my special delight, many of these scholars were former students as well.

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INTRODUCTION

My five years as Vice Chancellor afforded me limited opportunity to carry out sustained scholarly work. My interest was piqued, however, in August 2014, when I received an invitation to present a paper at a conference organized by the Richard M. Nixon Library: "Self-Determination and Tribal Sovereignty: The Lasting Impact of the Nixon Administration." Teaming up with several local universities, the Library touted this April 2015 gathering as "the first event of this type to examine the Indian policies of the nation's 37th president in the 45 years since Nixon presented his landmark statement to Congress in July 1970."[1] As I explain in Part I, President Nixon's 1970 statement is widely viewed as a watershed moment in federal Indian policy that turned the government away from policies designed to quash tribal sovereignty. Many members of President Nixon's administration would be present at the Library conference, presumably able to shed light on behind-the-scenes discussions that shaped his historic statement as well as subsequent federal actions more favorable to tribal self-determination.

Nonetheless, the invitation presented me with a dilemma. Like many of my generation who came of age in the 1970s, I associate President Nixon's administration first with FBI spying and disruption, Watergate, dirty tricks, and impeachment. As an Indian law scholar, however, I have been taught that President Nixon invoked executive powers and proposed legislation in support of tribal interests. A typical observation is this from political scientist David Wilkins, who linked Nixon with President Franklin Roosevelt:

> Other presidents, like Franklin D. Roosevelt and Richard Nixon, acted to protect and even enhance the rights of tribes by restoring lands, ending disastrous policies like allotment and termination, supporting policies like the Indian Reorganization Act of 1934, and, in Nixon's case, establishing the Indian self-determination policy in 1970.[2]

Similarly, historian Clifford Trafzer has recounted:

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1. *Nixon's Relationship With Indian Country to Be Examined at Conference at Nixon Presidential Library & Museum*, NATIVE NEWS ONLINE (Apr. 9, 2015), http://nativenewsonline.net/currents/nixons-relationship-with-indian-country-to-be-examined-at-conference-at-nixon-presidential-library-museum [https://perma.cc/H9CB-VTUW] [hereinafter NATIVE NEWS ONLINE]. President Nixon's 1970 statement can be found at Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564, 564–76 (July 8, 1970).
2. DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 88 (2d ed. 2007).

> When I was a college student, many events unfolded in Indian Country, and I remember tribal leaders telling me then that Nixon offered one of the best Indian policies of any president during the 20th century.[3]

My dilemma flowed from the evident thrust of the conference, which seemed to be an emphasis on the former President's record of positive accomplishments. At the Nixon Library, site of greatest homage to President Nixon, would I be just another voice in a chorus of praise for his under-recognized, overshadowed accomplishments?

The answer to this question came to me when I shifted focus from President Nixon's executive and legislative accomplishments to his four appointments to the U.S. Supreme Court. Given the long tenure of justices and the ongoing force of the Court's precedent-setting decisions, a president's judicial appointments produce some of his most enduring impacts. Yet scholarly assessments of President Nixon and Indian affairs had never featured his influence on the judicial branch. This shift of frame revealed countercurrents to the dominant story of President Nixon as a great benefactor of Indian country. The remainder of this Article explores the extent to which President Nixon's judicial appointments conflicted with his legislative and policy initiatives in support of tribal interests. Part I presents the dominant narrative of President Nixon's positive impact on tribal interests, through legislation he supported and policy initiatives he proposed and implemented. Part II shifts focus to the judicial branch, specifically President Nixon's four appointees to the Supreme Court, showing that during the years they served together, the Court developed new common law doctrines that have severely hindered tribal self-determination. Part III examines whether President Nixon, or any president for that matter, can be held accountable for decisions made by his appointees to the Supreme Court. This Part shows that at the very least, President Nixon was on notice that issues of profound importance to tribes were likely to reach the Court in the near future. Nonetheless, there is no indication that he inquired into his prospective appointees' views on tribal matters, let alone took them into account in making his appointments. Finally, Part IV suggests what President Nixon would have learned had he made such an inquiry. With respect to at least one appointee, he would have received warning signs of judicial opinions detrimental to tribal interests and to his own policies supporting those interests.

3. NATIVE NEWS ONLINE, *supra* note 1.

I. THE DOMINANT ACCOUNT: NIXON'S BENEFICIAL EXECUTIVE AND LEGISLATIVE INITIATIVES

Entering office in 1968, President Nixon encountered a tide in federal Indian policy that was already shifting in favor of tribal interests. He would substantially amplify that change in the course of his presidency. What follows is a highly abbreviated version of that achievement.[4]

Dwight Eisenhower, the very president whom Nixon served as Vice President from 1952 to 1960, presided over a harsh attack on tribal sovereignty and cultures.[5] During that era, now known as "Termination," Congress passed legislation that unilaterally ended the government-to-government relationships between the United States and more than one hundred tribes.[6] These termination acts often abrogated express treaty rights, and invariably ended federal trust protection for tribal land bases and federal benefit programs for tribal members.[7] A separate federal act[8] passed in 1953 extended state civil and criminal jurisdiction—and ended much federal criminal jurisdiction—on reservations in five (later six)[9] states, ostensibly to prepare the tribes in those states for future termination. Simultaneously, the Eisenhower administration advanced a relocation policy that moved tribal members from reservations to urban centers, typically without sufficient assistance for employment or housing.[10] The driving ideology for these termination policies was pro-assimilation and anti-special rights for Indians.[11] The ultimate consequence was a huge transfer of tribal assets into non-Indian ownership, and tremendous social, economic, and cultural dislocation for tribal members.

Presidents John F. Kennedy (in office 1960–1963) and Lyndon Johnson (1963–1968) displayed little enthusiasm for termination, but never outright repudiated it as federal policy. Instead, they incorporated Indian communities into their overall legislative programs to benefit the poor, which offered resources

4. *See* GRAY, *infra* note 12, at 161–91; Champagne, *infra* note 12, at 175–83.
5. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 84–93 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK]; Champagne, *infra* note 12, at 164–65.
6. *See Termination of Federal Supervision Over Certain Tribes of Indians: Hearings Before the United States S. Comm. on Interior & Insular Affairs*, 83rd Cong., 2d Sess. (1954).
7. *Id.* at 90–91.
8. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012), 25 U.S.C. §§ 1321–26 (2012), 28 U.S.C. § 1360 (2012)).
9. The sixth state, Alaska, was added in 1958, when it became a state. Pub. L. No. 85-615, § 1, 72 Stat. 545 (1958).
10. *See* COHEN'S HANDBOOK, *supra* note 5, at 88.
11. *See* Kenneth R. Philp, *Dillon S. Myer and the Advent of Termination: 1950–1953*, 19 W. HIST. Q. 37, 58 (1988).

and services to individuals, but did not restore the trust relationship, treaty rights, or tribal self-government.[12] Meanwhile, Indian groups responded to the dangers of termination by organizing to enhance their political influence and block further measures.[13] Their message was clear: Indians will be best served by a policy of self-determination, enabling them to govern their own communities and solve their own problems.

With the arrival of President Nixon and his 1970 statement, provided through a special message to Congress, the challenge to termination policy became explicit and firm at the highest level of government. He not only rejected termination, but also repudiated the paternalism inherent in many Indian programs of the past.[14] His statement conveyed that the federal role was to support, not to dominate, tribal communities. Affirming the moral and legal obligations of the federal government to tribes, President Nixon recommended restoration of tribal land bases, empowerment of tribal communities to take over federal Indian programs and Indian schools, and measures to promote tribal economic development. Many of these recommendations ultimately became law.[15] Others, such as his proposal for creation of a Trust Counsel Authority to "assure independent legal representation for the Indians' natural resource rights,"[16] have been treated as right minded and visionary.[17]

12. *See* CHRISTINE K. GRAY, THE TRIBAL MOMENT IN AMERICAN POLITICS: THE STRUGGLE FOR NATIVE AMERICAN SOVEREIGNTY 147–60 (2013); Duane Champagne, *From Full Citizenship to Self-Determination, 1930–75*, *in* AMERICAN INDIANS/AMERICAN PRESIDENTS: A HISTORY 145, 169–75 (Clifford E. Trafzer ed., 2009). The Community Action Program, which was one component of President Johnson's War on Poverty, indirectly stimulated tribal organization, by creating opportunities for leadership development and funneling resources to tribal entities for administration of federal programs. *See generally* Daniel M. Cobb, *Philosophy of an Indian War: Indian Community Action in the Johnson Administration's War on Indian Poverty, 1964-1968*, 22 AM. INDIAN CULTURE & RES. J. 71 (1998).

13. THOMAS W. COWGER, THE NATIONAL CONGRESS OF AMERICAN INDIANS: THE FOUNDING YEARS 76–149 (1999); GRAY, *supra* note 12, at 137–39.

14. *See* COHEN'S HANDBOOK, *supra* note 5, at 96.

15. For example, Blue Lake was returned to Taos Pueblo. Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970). The previously terminated Menominee Tribe was restored to federal recognition. 25 U.S.C. §§ 903–903f (2012).

16. Special Message to the Congress on Indian Affairs, *supra* note 1 (statement by President Nixon).

17. *See* DEP'T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 25–28 (2013), https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf [https://perma.cc/YZ7M-EMP9]; Ann Carey Juliano, *A Step Backward in the Government's Representation of Tribes: The Story of* Nevada v. United States, *in* INDIAN LAW STORIES 300, 304–06 (Carole Goldberg et al. eds., 2011).

President Nixon's reasons for taking such a strong stance on Indian policy have attracted popular[18] and scholarly interest,[19] both because his Republican supporters included non-Indians contending for tribal resources, and because he seemed far less solicitous of other disadvantaged groups. President Nixon's Quaker upbringing[20] and the influence of his college football coach, a tribal member from the La Jolla Reservation,[21] have all been noted as possible reasons for his strong stance on Indian policy. Drawing on a more systemic (and cynical) political analysis, Christine Gray claims, "Tribal self-determination served Nixon well, both by being entirely consistent with his New Federalism and with his emphasis on diminishing federal bureaucratic power and by appealing to liberals, whose support he needed, at least to a degree, in order to govern at all."[22] Whatever the cause, President Nixon's executive and legislative initiatives unquestionably benefited tribal interests. As explained below, his Supreme Court appointments are quite another story.

II. UNLEASHING A COUNTERCURRENT IN THE SUPREME COURT

President Nixon made four appointments to the U.S. Supreme Court: Warren Earl Burger,[23] Harry Blackmun,[24] William Rehnquist,[25] and Lewis Powell.[26] These four Justices served together for fourteen years—from 1972 to 1986—under the leadership of Chief Justice Burger. During that fourteen-year period, the Court decided three cases[27] that have had the most lasting harmful effects on tribal sovereignty of any rendered during the modern era.[28] Also significant, these opinions display considerable judicial activism, understood

18. *See, e.g.*, Rob Schmidt, *Why Nixon Did It*, NEWSPAPER ROCK (July 14, 2008, 10:36 PM), newspaperrock.bluecorncomics.com/2008/07/why-nixon-did-it.html [https://perma.cc/K3KJ-UX9Q].
19. *See, e.g.*, Champagne, *supra* note 12, at 175–78. The fullest account of social and political forces leading to President Nixon's Indian policy can be found in GRAY, *supra* note 12, at 161–91.
20. *See* Champagne, *supra* note 12, at 177–78.
21. In his memoirs, President Nixon wrote of his coach, Wallace "Chief" Newman: "I think that I admired him more and learned more from him than from any man I have ever known aside from my father." RICHARD NIXON, THE MEMOIRS OF RICHARD NIXON 19 (1978).
22. GRAY, *supra* note 12, at 165.
23. Chief Justice Burger served from 1969–1986, always as Chief Justice.
24. Justice Blackmun served from 1970–1994.
25. Justice Rehnquist served from 1972–2005, as Chief Justice from 1986.
26. Justice Powell served from 1972–1987.
27. *See infra* notes 30–32.
28. The modern era in federal Indian law is usually dated from 1959, when the Supreme Court decided *Williams v. Lee*, 358 U.S. 217 (1959), upholding exclusive tribal jurisdiction over a civil claim brought by a non-Indian against a tribal member arising within Indian country. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1–3 (1987).

as judicial fashioning of law without deference to legislative and executive branches. In other words, the Court went out of its way to deny tribal claims. Opposition to such activism by the Warren Court was one of President Nixon's major campaign themes in 1968.[29] Thus, it is particularly noteworthy that President Nixon's appointees participated in an activist effort to thwart tribal self-determination.

The three cases I single out are:

(1) *Moe v. Confederated Salish & Kootenai Tribes* (1976),[30] which upheld state taxation of on-reservation tribal cigarette sales to non-Indians, depriving tribes of important revenue sources;

(2) *Oliphant v. Suquamish Indian Tribe* (1978),[31] which barred tribal criminal jurisdiction over non-Indians who commit crimes within Indian country; and

(3) *Montana v. United States* (1981),[32] which limited tribal civil jurisdiction over non-Indian activities on non-Indian-owned lands within Indian country.

An extensive literature exists on all three of these cases,[33] demonstrating both the baleful effects on tribal self-determination and the degree of judicial activism. The impact on tribes has come both from the direct outcomes of the decisions and from the language the Court used to reach those outcomes, which has been deployed in subsequent cases to further restrict tribal self-determination. *Moe* severely hampered tribal economic development by denying tribes revenue from taxation of sales to non-Indians.[34] Although *Moe* itself did not involve a tribe that was attempting to impose its own tax, the case was later applied to allow a state tax even when the tribe was levying its own.[35] Loading

29. *See* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 558–59 (2010).
30. 425 U.S. 463 (1976).
31. 435 U.S. 191 (1978).
32. 450 U.S. 544 (1981).
33. *See, e.g.*, Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1202–18 (1995) (*Moe*); Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 261 (Carole Goldberg et al. eds., 2011) (*Oliphant*); William P. Zuger, *"Members Only": A Critique of* Montana v. United States, 87 N.D. L. REV. 1 (2011) (*Montana*).
34. For an account of how prospects of double taxation have affected the Navajo Nation, see Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1172–74 (2004).
35. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 158–59 (1980).

tribal taxes on top of state taxes makes reservation sales uncompetitive with off-reservation sales.

Oliphant prevented tribes from maintaining order in their communities and protecting their citizens.[36] Although states or the federal government may have criminal jurisdiction over non-Indian offenders, neither of those systems is accountable or responsive to tribal community needs.[37] *Oliphant* also set the Court on a path of ever-greater restrictions on tribal sovereignty, including a ban on tribal criminal jurisdiction over nonmember Indians (which Congress eventually overturned).[38]

And *Montana* has become a "pathmarking"[39] decision on the subject of tribal civil jurisdiction over non-Indians, thwarting tribal efforts to control everything from safe driving on reservation highways to taxation of non-Indian businesses. *Montana* has been interpreted in subsequent Supreme Court decisions to create a presumption against tribal civil jurisdiction over non-Indians on non-Indian lands.[40] Some lower courts have even interpreted *Montana* to create a presumption against tribal civil jurisdiction over non-Indians throughout Indian country, including on tribal trust lands.[41]

In each one of these three cases, the Court reached beyond constitutional and legislative directives to fashion legal doctrine, striking out on new courses not found in existing precedents. As Judge William Canby, Jr. points out in his treatise, "[a]t the same time that Congress and the Executive have been acting to strengthen the tribes, the Supreme Court has been narrowing tribal power over nonmembers within tribal reservations."[42] The late Dean David Getches, among others, powerfully advanced this point, arguing that the Court has departed from foundational principles of Indian law in pursuit of the Justices' own subjective notions of what the Indian jurisdictional situation ought to be.[43] In addition, Lawrence Baca asserts that "the most dangerous language in federal Indian law is

36. *See* Krakoff, *supra* note 33, at 283–93.
37. This critique is elaborated in INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 1–17 (2013).
38. *See* Duro v. Reina, 495 U.S. 676 (1990), *overturned*, 25 U.S.C. § 1301(2); Krakoff, *supra* note 33, at 293–95.
39. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).
40. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001).
41. Stifel v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 807 F.3d 184 (7th Cir. 2015); MacArthur v. San Juan County, 497 F.3d 1057, 1069 (10th Cir. 2007); *Atkinson Trading Co.*, 532 U.S. at 659.
42. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 34 (6th ed. 2015).
43. *See generally* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996).

the statement in *Oliphant* . . . that 'Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status"' as domestic dependent nations."[44]

Except for Chief Justice Burger, who dissented in *Oliphant*, the Nixon appointees joined each one of these three decisions.[45] *Moe*, as a unanimous decision, is the least attributable to President Nixon's choices. Nonetheless, Justice Rehnquist wrote opinions for the Court in both *Oliphant* and *Moe*, using broad language that opened the door to future antitribal decisions.[46] So even if the Nixon appointees did not always determine the outcomes by their numbers, they influenced the impact of these decisions through the justifications they provided for those outcomes.

My aim here is not to critique these decisions further, but to raise questions about President Nixon's role in producing them. Given the typical difficulty of predicting the future positions of Supreme Court Justices, it may be fair to ask whether a president should ever be held responsible for his appointees' decisions.[47] What if these critical Indian law issues were not well understood at the time President Nixon made his appointments? What if there were no indications of how his appointees might view Indian law issues, based on their past experiences and records?

III. WHAT DID PRESIDENT NIXON KNOW AND WHEN DID HE KNOW IT?

Let's assume that Indian interests really mattered to President Nixon, and he wanted to see his tribal self-determination policy succeed. If this were the

44. Lawrence R. Baca, *40 Years of U.S. Supreme Court Indian Law Cases: The Justices and How They Voted*, 62-Apr FED. LAW. 18, 19 (2015) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978)).

45. Justice Blackmun dissented in part in *Montana*, but not on the issue of tribal jurisdiction. After the period of the four Nixon-appointed justices, Justice Blackmun changed his views, dissenting regularly from opinions adverse to tribal interests. See, for example, Justice Blackmun's plurality opinion in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 448–68 (1989) and his dissenting opinions in *South Dakota v. Bourland*, 508 U.S. 679, 698–704 (1993) and *Hagen v. Utah*, 510 U.S. 399, 422–42 (1994).

46. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 150–60 (1980). Writing in 2015, Lawrence R. Baca observed that over the past forty years, the Justice who has written the most opinions in cases opposing Indian interests is Justice Rehnquist, who wrote eight. Baca, *supra* note 44, at 19.

47. President Eisenhower's appointment of Chief Justice Earl Warren is the archetypal illustration of this point, as Warren's legal and political career did not point to the far more liberal direction of his decisions as Chief Justice.

case, it should have been of interest to him whether Court battles were looming that might thwart his initiatives, and if so, how his nominees were likely to resolve those conflicts.

In fact, there were clear indications that the very tribal self-determination policies President Nixon was promoting through the executive and legislative branches were generating conflicts between tribes and states, and between tribes and non-Indians, that would soon reach the highest court. On January 26, 1970, the National Council on Indian Opportunity (the Council), made up of six tribal leaders and six cabinet-level officers, met in Washington, D.C., with Nixon's Vice President, Spiro Agnew, and presented a report to the President. One portion of its recommendations was devoted to "Legal matters and Jurisdiction." This text perfectly foreshadowed the disputes that came before the Supreme Court and its Nixon appointees:

> The question whether the states can levy taxes on individuals and businesses on reservations is raging in the courts at the present time. It appears that the question is being resolved in favor of the states. This flies in the face of history and legal precedent and may result in "termination" by judicial decision, rather than federal legislation as Indian tribes have long feared.
>
> Indian tribes nearly unanimously wish to retain exclusive jurisdiction, vis a vis the states, over their own affairs. They believe this is necessary at present so that they may develop their communities to the point where they can participate on a parity with the other communities of the nation.
>
> One aspect of jurisdiction which seems most unjust to the Indian tribes is the absence of tribal jurisdiction over non-Indians who commit offenses within reservation boundaries. . . .
>
> Because of the same jurisdiction problem, which conceivably could be solved by a change in Interior Department regulations, the anomaly exists that a non-Indian can sue an Indian in a tribal court and obtain an enforceable judgment, but the Indian cannot sue a non-Indian in a tribal

> court because tribal courts do not have jurisdiction over non-Indian defendants.[48]

With remarkable foresight, the Council predicted the likelihood that the issues presented in *Moe*, *Oliphant*, and *Montana* would reach the Supreme Court, and the potential harm to tribes if those issues were decided as they eventually were by the Nixon Court. Clearly the Nixon administration was on notice that its efforts to reverse termination policy could be undone by an unfriendly Supreme Court.

Nevertheless, there is no evidence, either from legislative or other historical records, that President Nixon considered whether the justices he nominated had backgrounds or records that might suggest their positions on Indian law issues. When I asked, none of his former aides who spoke at the Nixon Library conference could recall any such inquiries.[49] I also checked to see whether the most active Native American organization at that time, the National Congress of American Indians (NCAI), had testified at any of the confirmation hearings or advocated for or against potential nominees based on their views about Indian issues.[50] A search of NCAI records by its general counsel revealed nothing.[51]

If President Nixon had made the effort to scour backgrounds and records of his Supreme Court nominees for evidence of their likely views on Indian law issues, would he have found anything? At least as to some of the nominees, relevant information was available, if only his administration had taken the time to inquire. And as to one, William Rehnquist, there were clear signs of animosity toward the very policy of tribal self-determination that the Nixon Library conference hailed as the President's positive legacy.

48. Senator Barry Goldwater provided a detailed account of the Council and January 1970 meeting, including a record of its recommendations, in the Congressional Record on March 11, 1970. 116 Cong. Rec. 6895, 6898 (1970).

49. One of the attendees, Wally Johnson, had specifically advised the president on Justice Department-related matters, including judicial appointments. *A Conversation With Wally Johnson, Rehnquist's Lawyer*, RICHARD NIXON FOUND., http://nixonfoundation.org/news-details.php?id=78 [https://perma.cc/J7NM-33M4].

50. In contrast, the NAACP did weigh in strongly against William Rehnquist when he was nominated, given a memo he had written about the case of *Brown v. Board of Education* while a law clerk for Justice Robert Jackson. *See* JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 35–43, 131–32 (2012).

51. Email From John Dossett, General Counsel, National Congress of American Indians, to Carole Goldberg, Professor of Law, UCLA School of Law (Apr. 20, 2015, 8:35 AM) (on file with author).

IV. INTIMATIONS OF INDIAN LAW LEANINGS AMONG THE NIXON APPOINTEES

A. Justice Lewis Powell

Of the four Nixon appointees, one, Justice Powell, had no documented life or legal experiences directly linked to tribal issues. That should come as no surprise, considering that Justice Powell's early life, undergraduate and law school years, and legal career all took place in the state of Virginia.[52] Although English settlers in Jamestown and other early colonists encountered a large indigenous population, and the Commonwealth has recognized several tribes with treaties predating the United States,[53] there were no federally recognized tribes in Virginia during Justice Powell's lifetime.[54] The historical record reveals no evidence that Justice Powell dealt with the non-federally recognized Virginia tribes during his career in practice or as a member of the Richmond School Board. Furthermore, his high-level corporate law practice would not have brought him into contact with Indian law issues. Although Justice Powell's very lack of experience with tribes may have shaped his negative response to tribal claims, his future positions on such matters were likely unformed, and hence unknowable, to President Nixon at the time the President considered him for appointment to the Court. Apart from the three anti-tribal decisions in which he joined, Justice Powell participated in fifty-nine other Indian law cases, in half of which he sided against tribal interests.[55] He authored opinions in only five—two majority opinions and three dissents. Of the two majority opinions, one was a relatively straightforward statutory construction case, in which the tribe prevailed.[56] The other was a complex tribal land claims case, which seemed to be decided in the tribe's favor, but actually sowed the seeds for a later decision dashing

52. *See generally* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 13–221 (1994) (providing a detailed account of Justice Powell's early life and pre-Supreme Court career).

53. The National Park Service provides a guide to Virginia's state-recognized tribes. Sarah J. Stebbins, *Meet the State-Recognized Virginia Indian Tribes*, NAT'L PARK SERV., https://www.nps.gov/jame/learn/historyculture/virginia-indian-tribes.htm [https://perma.cc/863H-RHGA].

54. In 2015, the Department of the Interior recognized the Pamunkey Tribe. Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe, 80 Fed. Reg. 39,144 (July 8, 2015).

55. For a list of all the Supreme Court Indian law cases decided while Justice Powell sat on the Court, including how each Justice voted, see generally Baca, *supra* note 44.

56. Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (state not authorized by federal statute to tax Indian mineral royalty interests).

hopes for recovery.[57] The three dissents, one in a fishing rights case,[58] the second in a state taxation case,[59] and the third in a trust violation case,[60] were all in cases that tribes won.

B. Chief Justice Warren Earl Burger

Unlike Justice Powell, Chief Justice Burger spent his formative years in Minnesota, a state with twelve federally recognized tribes. Nonetheless, although Chief Justice Burger resided in Minneapolis and St. Paul for most of his first fifty years, he does not seem to have met up with Indian law issues during that time. His big-city corporate and real estate practice would not have lent itself to such encounters, and his law teaching specialties at William Mitchell were contracts and trusts.[61] His first documented experience with Indian law came on the D.C. Circuit, which he joined in 1958 as President Eisenhower's appointee. During his ten years on that court, he wrote one opinion in an Indian law case, and dissented in another. The first, *Udall v. Littell*,[62] raised questions about federal power to cancel a private lawyer's contract with the Navajo Tribe, when there was evidence the lawyer had breached contractual terms and violated his fiduciary duties.[63] Judge Burger's[64] lengthy opinion for the three-judge panel sided with the federal government; but it offered no clues to his views on state versus tribal jurisdiction, and only hinted at any concerns for tribal sovereignty.

The primary issues in *Udall v. Littell* were in the realm of federal administrative law. Did federal statutes authorize the Secretary of the Interior to cancel an attorney contract, and was the Secretary's decision to cancel arbitrary and capricious? In responding yes to the first question and no to the second, Judge Burger's opinion stressed federal obligations to look out for Indian

57. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (finding that no statute of limitations precludes tribal land claims suit, but leaving open the possibility of a laches defense). Laches was upheld as a defense in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005).

58. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 (1979) (Powell, J., dissenting in part).

59. Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 170 (1980) (Powell, J., dissenting).

60. United States v. Mitchell, 463 U.S. 206, 228 (1983) (Powell, J., dissenting).

61. *See* Leon Friedman, *Warren E. Burger*, *in* IV THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1465, 1467–68 (Leon Friedman & Fred L. Israel eds., 1995); *Burger, Warren Earl*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=319&cid=0&ctype=sc&instate=na [https://perma.cc/U68R-VZWK].

62. Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966).

63. In a fascinating coincidence, one of the private lawyer's own attorneys in closely related matters was none other than William Rehnquist. *See infra* notes 85–91 and accompanying text.

64. For clarity, justices are referred to as "Judge" when discussing their work on the circuit courts.

"wards"[65] and protect their interests. Such a paternalistic view of tribes is hardly consistent with a robust understanding of tribal sovereignty, and suggests Judge Burger would be unsympathetic to affirmative exercise of tribal powers in contests with states. And while he also went out of his way to cite evidence from the record that the Navajo Tribal Chairman, many members of the Tribal Council, and a Tribal Advisory Committee had all registered harsh judgments of their attorney's conduct, this discussion does not seem to reflect great respect for tribal self-determination. Rather, Judge Burger used this evidence to show that the attorney-client relationship had degenerated into "an unseemly squabble,"[66] triggering the need for federal intervention "to see that such controversies do not develop, or if they do, to terminate them by administrative action."[67]

If *Udall v. Littell* offers only slight indication of Justice Burger's likely position on tribal-state conflicts, his dissent in *Hayes v. Seaton*,[68] written seven years earlier, is somewhat more revealing. Like *Udall v. Littell*, *Hayes v. Seaton* raised questions of federal administrative law: Could the federal courts review a decision by the Secretary of Interior that ascertained the legal heirs of an Indian allotment?[69] Dissenting from the majority, Judge Burger argued such review was permissible under the relevant federal statutes. Once his dissent opened the door to federal review, Judge Burger had to address the question of applicable law. Would federal or state law govern determination of the rightful heir? Judge Burger articulated a strong preference for state over federal law, ignoring the long history of conflicts between state and tribal interests. A choice of state law in a dispute affecting Indian country could very well portend lack of regard for tribal policies regarding descent and distribution. Had President Nixon desired appointees who would be sympathetic to tribal interests, these decisions by Judge Burger should have raised concerns. At the very least, President Nixon showed indifference to tribal interests by failing to pursue such relevant indicators of future decisions. A large majority of recent appointees to the Supreme Court are former lower federal court judges, precisely because their earlier judicial opinions

65. *Udall*, 366 F.2d at 675–76 & 675 n.24. Judge Burger wrote, "That greater independence for Indians is the laudable ultimate objective does not undermine or impair the Secretary's duty to help protect the Indians from their own improvident acts or from overreaching by outsiders. Indian wards, like individual wards, may often require the intervention of the guardian to prevent unwise action or dissipation of assets." *Id.* at 675 n.24.

66. *Id.* at 676.

67. *Id.*

68. Hayes v. Seaton, 270 F.2d 319 (D.C. Cir. 1959).

69. Indian allotments are tracts of collectively held reservation land that the federal government allocated to individual tribal members in trust, with the trust to expire in a period of years. For a comprehensive discussion of allotments, see generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

are thought to provide the surest predictors of their positions when issues reach the high Court.

C. Justice Harry Blackmun

Although Justice Burger's D.C. Circuit opinions provide some evidence of Indian law proclivities hostile to tribal interests, that evidence is not conclusive. In contrast, Justice Blackmun's early experiences and legal career may point to some positive orientation toward tribal concerns. On balance, however, this evidence is not strongly positive, and could also be consistent with more antagonistic views.

Biographies of the Justice note that his high school principal, Dietrich Lange, was an influential figure in his life and became a close friend.[70] A German immigrant and ardent conservationist, Lange wrote naturalist young adult fiction about Boy Scouts' encounters with Native peoples.[71] Biographer Tinsley Yarbrough has written: "[Lange] may . . . have had some hand in nurturing Blackmun's life-long interest in the outdoors and concern for the plight of the American Indian, as well as the justice's childhood curiosity about historic battles between the Sioux and Chippewa."[72] An influence of this sort, however, could easily give rise to paternalistic and romanticized views of Native Americans, rather than a realistic appreciation of their contemporary status, aspirations, and struggles.

After his law studies at Harvard, Justice Blackmun joined the Minneapolis law firm of Dorsey, Coleman, Barker, Scott & Barber,[73] now one of Minnesota's largest full-service practices. Today known as Dorsey & Whitney, it is one of the leaders in the area of Indian law; but that specialty probably postdates Justice Blackmun's years there.

Later, as a judge on the Eighth Circuit, Justice Blackmun wrote one opinion on an Indian law issue that later became a subject of considerable Supreme Court litigation: reservation diminishment. Since the 1960s, as tribes have asserted greater control over their territories, opposing interests have challenged the reach of reservation boundaries. These opponents have found ammunition

70. *See, e.g.*, TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 10 (2008).
71. Naturalist fiction about Native Americans had been widely popularized in Germany by the author Karl May.
72. YARBROUGH, *supra* note 70, at 10.
73. Dennis J. Hutchinson, *Harry A. Blackmun*, *in* IV THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1607, 1609 (Leon Friedman & Fred L. Israel eds., 1995).

for their challenges in federal allotment statutes dating back to the late nineteenth and early twentieth centuries.[74] These statutes typically divvied up large reservations into 160-acre tracts for individual tribal members, and opened up any remaining lands to purchase and settlement by outsiders. Over time, some of the Indian allotments that were placed in federal trust for only twenty-five years wound up in non-Indian ownership. Some of the opened tracts were never purchased, and were still designated as part of the reservation on many maps and in the minds of the tribe. Judge Blackmun's case, *Beardslee v. United States*,[75] involved an Indian trust allotment. A tribal member committed a crime on a non-Indian-owned former allotment within a part of the Rosebud Sioux Reservation that had never been opened to outside settlement by any federal statute. Federal jurisdiction to prosecute the offense could be upheld only if the crime occurred within Indian country, which in this instance meant within the reservation boundaries. The defense argued that once an Indian trust allotment was transferred as fee simple property to a non-Indian, that land was no longer part of the reservation. It was a difficult argument to sustain, because the federal statute defining "Indian country" included all land "within the limits of any Indian reservation . . . notwithstanding the issuance of any patent."[76] Not surprisingly, Judge Blackmun, writing for a unanimous panel, ended his discussion of this issue as follows:

> We therefore conclude, and without particular difficulty, that federal jurisdiction over the offenses charged here has been established . . . . In summary: The site is within the original boundaries of the Rosebud Reservation. The Todd County portion remains closed. Neither the platting nor the extinguishment of the Indian allotment title of 1912 take the site outside Indian country.[77]

The very ease with which the Eighth Circuit dispatched this straightforward interpretation of the Indian country statute makes it difficult to infer that the opinion's author, Judge Blackmun, entertained concern for tribal interests. Nonetheless, if President Nixon had inquired into Judge Blackmun's prior record on such matters, he would have found weak evidence of pro-tribal leanings. Thus, it is difficult to hold President Nixon accountable for Justice Blackmun's participation in the three decisions, discussed in Part II, that have proved so harmful to Indian country.

74. For an explanation of allotments, see *supra* note 69.
75. Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967).
76. 18 U.S.C. § 1151(a) (2012).
77. *Beardslee*, 387 F.2d at 288.

In fact, once he was on the Court, Justice Blackmun displayed far more antagonism toward tribal interests during the era of the four Nixon appointees than afterwards. Justice Blackmun's early decisions have a patently anti-tribal cast. Ten years after *Beardslee*, as a Justice of the Supreme Court, Blackmun joined the other three Nixon appointees in the majority in a 6-3 decision that returned to questions about the Rosebud Sioux Tribe's boundaries.[78] This time, the opinion was decidedly contrary to tribal interests, subtracting three quarters of the reservation's 3.2 million acres as defined in an 1889 federal statute, and leaving 2,000 tribal members outside of tribal jurisdiction. The issue was whether federal statutes that had opened the reservation had intended to eliminate the reservation status of the opened lands. Although governing Supreme Court doctrine required the Court to construe any ambiguities in these statutes in favor of the Tribe, the majority studiously refused to acknowledge any ambiguities, finding that the reservation status of the affected territory had been "disestablished."[79] A dozen years later, with Justices Powell and Burger no longer on the Court, Justice Blackmun's Indian law opinions made another 180-degree turn, roundly defending sovereignty interests.[80] While he was part of the Nixon four, however, Justice Blackmun largely toed the anti-tribal line. It is difficult to imagine that anything President Nixon might have learned about Justice Blackmun, prior to his nomination, could have predicted this twisting course.

D. Justice William Rehnquist

If the likely Indian law positions of Justice Powell were unknowable, and those of Justices Burger and Blackmun not entirely clear at the time of their nomination to the Court, the Indian law leanings of the future Justice Rehnquist were unmistakable, had President Nixon only checked. Justice Rehnquist's opposition to civil rights received great attention during his confirmation hearings for the Court and later for the position of its Chief Justice.[81] There is no record, however, of Native organizations or individuals questioning his views on Indian law, either before or at the time of his nomination.

Though born and raised in Wisconsin and educated at Stanford, Justice Rehnquist settled in Phoenix, Arizona to launch his legal career. While in

78. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).
79. *Id.* at 609.
80. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 448 (1989) (Blackmun, J., concurring and dissenting in part, together with Justices Brennan and Marshall).
81. *See* JENKINS, *supra* note 50.

private practice there, he became active in local political affairs, including voicing outspoken opposition to a 1964 public accommodations ordinance.[82] Although civil rights and tribal rights are not the same,[83] and it is possible to favor one and not the other,[84] they both involve claims of marginalized, disadvantaged groups. The future Justice Rehnquist was consistent in opposing both sets of interests. Practicing in Arizona, a state where twenty federally recognized tribes have reservations and one-quarter of the land is tribal territory, he inevitably encountered Indian law controversies. Most notably, he took on representation of Norman Littell, longtime attorney for the Navajo Tribe, in Littell's conflicts with the Tribe over his billing.[85] Littell was simultaneously representing the Navajos in a land claim before the Indian Claims Commission and as their general counsel for everyday legal business. By statute, Littell's work on the Claims Commission case was to be paid entirely on a contingent fee basis. Under the agreement for attorney services, which had to be approved by the federal government, his work as general counsel was to be billed hourly, with associates paid a fixed amount. When the Navajos discovered that Littell's firm was billing them on an hourly basis for work on the Claims Commission case, they enlisted federal officials to cancel the agreement.

As noted above,[86] Justice Burger, then a Judge of the D.C. Circuit, wrote a 1964 opinion upholding the federal government's decision to cancel the contract. Not long thereafter, while still in private practice Justice Rehnquist represented Littell in two cases against Raymond Nakai, Chairman of the Navajo Tribal Council, both of which reached the Ninth Circuit. In the first, *Littell v. Nakai*,[87] Justice Rehnquist tried to invoke federal jurisdiction in a claim against Chairman Nakai for tortious interference with the attorney services contract. Recent Supreme Court legal authority had held that suits against tribal members for claims arising within the reservation were within exclusive tribal jurisdiction. Justice Rehnquist pressed for a distinction, arguing that his case did not involve

82. *Id.* at 69–70.

83. Civil rights are generally personal and individually held. Tribal rights are political and collectively held. For a discussion of the contrast, see Duane Champagne, *UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights*, 28 WICAZO SA REV. 9, 20 (2013).

84. For example, Justice Ruth Bader Ginsburg, a strong supporter of civil rights, has shown considerably less support for tribal claims. *See* Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003 (2009).

85. *See* Albert J. Sitter, *Judge Will Decide Monday on Littell Injunction Plea*, ARIZ. REPUBLIC, Feb. 21, 1964, at 17.

86. *See supra* text accompanying notes 62–67.

87. Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965).

internal tribal affairs because the Chairman had acted outside the scope of his tribal authority. The Ninth Circuit dismissed his argument swiftly as a "*non sequitur*."[88] As the opinion noted, the rationale for exclusive tribal jurisdiction hinged not on whether the Tribe was a direct party, but "on whether the matter was one demanding the exercise of the Tribe's responsibility for self government. Here, we believe that requisite is met. Indeed the very heart of the dispute appears to center on Nakai's authority as Chairman."[89]

When one of Norman Littell's associates sued him in federal court for defamation, based on statements that Littell allegedly made about the associate to the Navajo Tribal Council, Justice Rehnquist had to switch sides on tribal sovereignty. To defend Littell in this diversity action,[90] he had to claim that the Tribe's general counsel partakes of the Tribe's own sovereign immunity. Even then, however, Justice Rehnquist may have made a rather anemic plea. For when the Ninth Circuit ultimately ruled in Littell's favor on the immunity question, it did so rather grudgingly:

> There can be little doubt that, with substantial federal domination of Indian affairs, the status of Indian tribes is an uncertain one today. *See* Oliver, *The Legal Status of American Indian Tribes*, 38 Ore. L. Rev. 193 (1959). The Supreme Court has long recognized the ambiguity of their position as both "domestic dependent nations" and wards of the federal government. *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1, 17–18 (1831); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832).
>
> Nevertheless, the concept of tribal sovereignty has been found a sufficient basis for extending to Indian tribes sovereign immunity from suit.[91]

It would not be surprising if Justice Rehnquist formed a negative opinion of tribal claims based on his experience representing Norman Littell in his disputes with the Navajos. That experience put him at odds with tribal interests.

Further evidence of Justice Rehnquist's views on tribal issues can be found in his lifelong fascination with Judge Isaac Parker.[92] From 1875 to 1896, Judge

88. *Id.* at 490.
89. *Id.*
90. Davis v. Littell, 398 F.2d 83 (9th Cir. 1968). The basis for federal jurisdiction in this suit between non-Indians was diversity of citizenship.
91. *Id.* at 84.
92. JENKINS, *supra* note 50, at 49–58. Justice Rehnquist even contemplated writing a book about Judge Parker, and visited Ft. Smith, Arkansas to carry out archival research on his way to the start of law practice in Phoenix. *Id.* at 50.

Parker was the United States District Judge for the Western District of Arkansas, which included the vast Indian Territory that would ultimately become the state of Oklahoma. Apparently of greatest interest to Justice Rehnquist was Parker's unmatched record as a "hanging judge," meting out swift capital sentences to nearly two hundred defendants. Under then-prevailing jurisdictional rules, many of those judgments were not even subject to appellate review; the potential deterrent effect of such expedited, harsh sentencing intrigued the future Justice.[93] When it came time to decide the *Oliphant* case in 1978,[94] Justice Rehnquist relied on a Judge Parker opinion, *In re Kenyon*,[95] to find against tribal criminal jurisdiction over non-Indians. Rehnquist justified heavy reliance on a lone district court opinion by observing that "as District Court Judge for the Western District of Arkansas [Judge Parker] was constantly exposed to the legal relationships between Indians and non-Indians."[96] In fact, as one commentator has pointed out, *Kenyon*'s statement about tribal jurisdiction was dictum, and relied on a doctrinal approach quite different from (and even antagonistic to) the one Justice Rehnquist employed in *Oliphant*.[97] Justice Rehnquist's reliance on *Kenyon* might be viewed as no more than a sentimental nod to an admired jurist, but for the fact

93. *Id.* at 50–53.

94. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). For further discussion, see *infra* notes 96–97.

95. *Ex parte* Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878).

96. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 200 (1978). Justice Rehnquist's opinion seeks to bolster the authority of Judge Parker's opinion by noting it was reaffirmed by a 1970 opinion of the Solicitor of the Interior. *Id.* at 200–01 (citing Criminal Jurisdiction of Indian Tribes Over Non-Indians, 77 INTERIOR DEC. 113 (1970)). Only in a footnote does the *Oliphant* opinion point out that the 1970 Solicitor's opinion was withdrawn four years later. *Id.* at 201 n.11.

97. *See, e.g.*, Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole Is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 434 (1993). As Maxfield notes, *Oliphant* justified denying tribal jurisdiction on the basis that the federal government had always shown "solicitude" for the liberties of its citizens, and therefore tribes must have implicitly surrendered their criminal authority over non-Indians when they submitted "to the overriding sovereignty of the United States." *Oliphant*, 435 U.S. at 210. Yet *Kenyon* denied tribal jurisdiction on quite a different basis. Maxfield points out:

> [*Kenyon*] actually concluded that the federal constitution limited tribal government. Even though the constitutional aspect of the 1878 decision was later repudiated by the Supreme Court, *Kenyon*'s erroneous conclusion indicates that the founders' "solicitude" used by the *Oliphant* Court to extinguish tribe's [sic] criminal jurisdiction in fact did not exist. The law as perceived in 1878 rendered it unnecessary. In other words, *Kenyon*, which the *Oliphant* Court used to establish the existence of an assumption that tribes do not have criminal jurisdiction over non-Indians, actually supports the concept that there was no such "solicitude" at that time because officials thought that the Constitution limited tribal government.

19 J. CONTEMP. L. at 401 (footnotes omitted).

that it was used to shore up a weakly reasoned decision that reflected both judicial activism and antipathy toward tribal sovereignty.[98]

There is no evidence that President Nixon knew of William Rehnquist's likely views about Indian law at the time he nominated the relatively unknown lawyer with well-established conservative views. What we do know is what Nixon told his Attorney General, John Mitchell, at the time he nominated Rehnquist: "Be sure to emphasize to all the southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is."[99] And we also know that Justice Rehnquist, later Chief Justice Rehnquist, went on to write more anti-tribal Supreme Court opinions than any other jurist of his era.[100] Either President Nixon did not care enough about his Indian country policies to seek out the nominee's views, or he actually hoped for his appointee's anti-tribal positions.

CONCLUSION

If we judge a president's Indian law legacy in part by his Supreme Court appointments, the lasting impact of Nixon's presidency looks decidedly mixed. What he gave through legislative and executive branch initiatives he undermined with four appointees who ignored those policies, engaging in activist judicial lawmaking to advance competing interests. Even if President Nixon did not openly and deliberately seek that outcome, he was clearly on notice that key disputes threatening tribal sovereignty were likely to reach the Court. He made no effort to investigate the likely views of his nominees on Indian law issues, and at least in the case of Justice Rehnquist, had he done so he would have found good reason to be concerned. In preparing to speak at the Nixon Library, I was surprised to find an absence of scholarship about the experiences of his appointees with Indian law before they joined the Court. This Article is my attempt to fill that gap.

Today, the active engagement of the National Congress of American Indians and other tribal organizations would ensure a full vetting of the likely Indian law leanings of any prospective appointee. Intense publicity and analysis of likely positions on all issues surround all Supreme Court appointments, because critically important political controversies reach the Court, making the stakes very

98. *See* 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, 34–39 (1999).

99. JENKINS, *supra* note 50, at 130. For transcripts of Nixon-Mitchell telephone calls, see *Choosing Rehnquist Part 5*, AM. RADIOWORKS, http://americanradioworks.publicradio.org/features/prestapes/f5.html [https://perma.cc/6BK5-EQR9].

100. *See* Baca, *supra* note 44; *see also* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1995).

high. Those conditions make it easier to hold presidents accountable for the ensuing decisions, even though federal judges' lifetime tenure allows for changes of views over time. In President Nixon's case, his apparent emphasis on pro-tribal policies in the legislative and administrative arenas raises questions about his choice of justices. Those choices were powerfully consequential for Indian country, harming tribal interests and countermanding President Nixon's own Indian law policy initiatives. At the very least, he could have evaluated his nominees' experiences and records regarding those policies. Although the indications were practically non-existent in Justice Powell's case, and relatively limited in the cases of Chief Justice Burger and Justice Blackmun, regarding Justice Rehnquist, the evidence pointed squarely to an anti-tribal position. For that choice alone, President Nixon's Indian law legacy should be reassessed.