CONGRESSIONAL TRUST RESPONSIBILITY AND TRIBAL HEALTH CARE

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I. INTRODUCTION

"As a member of the Cherokee Nation, I firmly believe the federal government must honor its trust and treaty responsibilities to Indian Nations."

U.S. Senator Markwayne Mullin[1]

Federal Indian trust responsibility is the legal idea that the federal government owes a special duty to federally recognized tribes to act in the best interest of their land, people, and economic well-being.[2] While Indian trust responsibility plays a significant role in the executive and judicial branches,[3] its reach in Congress has been less specific. As the nation's legislative body, Congress has no obligation to pass legislation. Thus, the application of legislative trust responsibility is challenging to measure. Still, over the years, Congress has referenced and even set guidelines on how the legislative process should encompass the trust doctrine.[4] But despite setting lofty goals, Congress routinely fails to provide adequate resources for tribal communities—especially during the appropriations

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1. Sophie Will & Sean Michael Newhouse, *House Should 'Keep its Word' and Seat Delegate from Cherokee Nation, Panel Hears*, ROLL CALL (Nov. 16, 2022, 4:28PM), https://rollcall.com/2022/11/16/house-delegate-cherokee-nation-hearing/ [https://perma.cc/9X26-4VKQ].

2. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04 (Nell Jessup Newton ed., 2012); Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 400-25 (2017).

3. *See, e.g.*, DEP'T INTERIOR, ORDER NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES (2014); Arizona v. Navajo Nation, 599 U.S. 555, 563 (2023) ("The Federal Government owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities.'").

4. *See* 95TH CONG., AMERICAN INDIAN POLICY REVIEW COMMISSION FINAL REPORT (Comm. Print 1977).

process.[5] This issue is particularly pronounced in Congress's failure to sufficiently fund health care coverage for federally recognized tribes.[6] And unlike states and domestic localities, federally recognized tribes—overall—are uniquely reliant on federal resources for the daily functions of their communities.[7] This Essay argues that federal Indian trust responsibility strongly signals a moral obligation for Congress to provide health care coverage for federally recognized tribes under an entitlement program.

This Essay is organized into two sections. First, this Essay provides a background on the federal Indian trust doctrine and Congress's application and understanding of legislative trust responsibility. Second, this Essay argues that health care entitlement funding for federally recognized tribes meets Congress's legislative trust responsibility better than discretionary funding. This Essay concludes that Congress does have some affirmative trust responsibilities that should be exercised to improve health outcomes for tribal Americans.

II. LEGISLATIVE FEDERAL INDIAN TRUST RESPONSIBILITY

A. Trust Responsibility Origins

Federal Indian trust responsibility is built on the complicated legal and constitutional footing of tribes in the U.S. governmental system. Famously, in a series of foundational cases involving Native American tribes (the Marshall Trilogy), Chief Justice Marshall set the tone for how U.S. law would treat indigenous tribes, writing that tribes were subservient dependent entities of the federal government.[8] For instance, in *Johnson v. M'Intosh*, Justice Marshall explained that tribes did not own title to their lands.[9] Instead, under the doctrine of discovery, European colonist's (and later the United States') title was superior because "the discoverers possessed the exclusive right of acquiring."[10] In *Cherokee Nation v. Georgia*, Marshall further explained the subservient relationship, noting that tribes are dependent peoples to the federal government, holding that they are not a "foreign nation" to the U.S., nor are they a "territory" or "property" but instead are "domestic dependent nations."[11]

Stemming from Marshall's characterization of American indigenous tribes, federal-tribal relations have been described as "akin to a ward's relationship to

5. *See, e.g.*, Lucia Winton, *How Federally Funded Health Care is Failing Native Americans*, BROWN POL. REV. (Oct. 12, 2018), https://brownpoliticalreview.org/2018/10/federally-funded-health-care-failing-native-americans/ [https://perma.cc/AY44-G4XV].

6. *See, e.g.*, *id.*

7. *See* Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 27–30 (2020) (describing tribal reliance and congressional dysfunction in providing payments to tribes for essential services under the Indian Self Determination and Education Act).

8. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543 (1823).

9. *Id.*; *see also* Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021, 1042–47 (2022) (contextualizing *M'Intosh* and describing the decision as "morally indefensible").

10. *Johnson*, 21 U.S. at 592.

11. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 10–11 (1831).

its guardian."[12] The connotation is that the federal government holds the ultimate responsibility over the welfare of tribal nations. This idea fits within the broader legal framework Chief Justice Marshall put into place, that tribes are "dependent"[13] on the federal government and—historically—can only become sovereign entities against states or localities for limited purposes when, for example, a state seeks to enforce binding rules in a tribe's "distinct community."[14] Thus, as tribes have continuously ceded land to the U.S. through treaties[15] and under federal legislation,[16] courts have held that the federal government assumed a "federal Indian trust responsibility."[17] The Supreme Court has ruled that this trust responsibility requires the federal government to uphold "moral obligations of the highest responsibility and trust" to protect tribal rights.[18] This responsibility weighs heavily in administrative actions[19] and can be judicially enforceable as a fiduciary duty.[20]

But how does trust responsibility apply to the legislative branch? Congress is a coequal branch of government exclusively charged with legislative functions.[21] As a general principle, all legislative functions are discretionary because Congress is not required to pass legislation. And when Congress does act, unlike executive quasi-legislative powers,[22] legislative powers do not require Congress to explain its actions because individual legislatures are accountable to the people via election. Nevertheless, over the years, Congress has taken steps to consider Indian trust responsibility through the lawmaking process. For example, in 1977, Congress's American Indian Policy Review Commission laid out three foundational principles to guide congressional understanding of the obligation in the legislative process:

12. CONG. RSCH. SERV., R47391, LEGAL AND PROCEDURAL MATTERS RELATED TO SEATING A CHEROKEE NATION DELEGATE IN THE HOUSE OF REPRESENTATIVES 2 (2023).

13. *Cherokee Nation*, 30 U.S. at 11.

14. *See* Worcester v. Georgia., 31 U.S. 515, 561 (1832) (explaining that "the laws of Georgia can have no force" on Cherokee Nation land).

15. *See, e.g.*, Treaty with the Cherokees, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478, 478–88 [hereinafter Treaty of New Echota].

16. *See, e.g.*, Indian Removal Act, Pub. L. No-21-148, 4 Stat. 411.

17. *See What is the Federal Indian Trust Responsibility?*, DEP'T INTERIOR (Nov. 8, 2017), https://www.bia.gov/faqs/what-federal-indian-trust-responsibility [https://perma.cc/V2SA-3QMD] (summarizing federal Indian trust responsibility).

18. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

19. *See, e.g.*, DEP'T INTERIOR, *supra* note 3; Revised Final Tribal Consultation Policy, 88 Fed. Reg. 89467 (Dec. 27, 2023).

20. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians."); *see also* Nell J. Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U. L. REV. 635 (1982).

21. *See* U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress.").

22. By quasi-legislative functions, this Essay is referring to notice and comment rulemaking under Section 553 of the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553.

1. The trust responsibility to American Indians extends from the protection and enhancement of Indian trust resources and tribal self-government to the provision of economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.
2. The trust responsibility extends through the tribe to the Indian member whether on or off the reservation.
3. The trust responsibility applies to all United States agencies and instrumentalities, not just those charged specifically with administration of Indian affairs.[23]

Congress has passed legislation according to these trust principles since the 1970s.[24] And in 2009, Congress codified the federal Indian trust responsibility into law.[25] The resolution, tucked within a defense appropriations bill, acknowledged the "special legal and political relationship Indian tribes have with the United States and the solemn covenant with the land we share" and "apologize[d] on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States."[26] However, like most congressional acknowledgments of trust responsibility, Congress's apology amounted to only mere words because the statute does not provide any enforceable rights.[27]

B. Legislative Trust Responsibility and Entitlement Health Care Benefits

Despite Congress's invocation and acknowledgment of trust responsibility, Congress routinely fails to abide by the principles of legislative trust responsibility during the annual appropriations process. The size of tribal economies and the welfare of tribal people is broadly related to federal appropriations.[28] As tribal law scholars have pointed out, federal courts have long recognized that the federal government has a special duty under the Indian trust doctrine to provide

23. 95TH CONG., AMERICAN INDIAN POLICY REVIEW COMMISSION FINAL REPORT (Comm. Print 1977).

24. *See, e.g.*, Indian Education and Self Determination and Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat.; Indian Child Welfare Act of 1978, Pub. L. No. 95-608., 92 Stat. 3069.

25. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-18, 123 Stat. 3409, Sec. 8113 ("Apology to the Native Peoples of the United States[.]").

26. *See id.*

27. Congress's apology stated that it did not authorize or support "any claim against the United States." *Id.*

28. This Essay acknowledges that this general rule does not hold true for every federally recognized tribe, especially those with large gaming revenues. *Compare, e.g.*, Timothy Williams, *$1 Million Each Year for All, as Long as Tribe's Luck Holds*, N.Y. TIMES (Aug. 9, 2012), nytimes.com/2012/08/09/us/more-casinos-and-internet-gambling-threaten-shakopee-tribe.html [https://perma.cc/3EJW-8V6R] ("Each adult . . . receives a monthly payment of around $84,000, or $1.08 million a year."), *with* Rae Yost, *Poverty, Poor Health for SD's Native Americans*, KELO, https://www.keloland.com/keloland-com-original/poverty-poor-health-for-sds-native-americans/ (Oct. 11, 2022, 9:01 AM) [https://perma.cc/U2ZG-GSB5] ("The native population is more likely to have lower household incomes, be in poverty and be without health insurance compared to other South Dakota residents.").

"health care to members of federally recognized tribes."[29] However, early federal efforts in the 1900s to provide health care programs on reservations did nothing to counter "deplorable health and sanitary conditions."[30] Congress eventually took action in 1921 through the passage of the Snyder Act, which provided the "first formal authority for federal provision of health care services to members of all federally recognized tribes."[31]

In modern times, health care programs are an expensive endeavor, and the ability of the federal government to successfully provide health care to tribal members turns on how Congress appropriates funds for the Indian Health Service (IHS). Agency appropriations determine the capacity at which agencies can act pursuant to their statutory mission.[32] Thus, as Professor Josh Chafetz has explained, "it is a mistake to think about the congressional power of the purse solely in terms of Congress's power to determine spending levels."[33] Instead, Congress's spending power is substantive and "represent[s] the views of Congress and the President and their consent to agency power."[34] In the context of the IHS, how and to what extent Congress chooses to fund the agency and its programs directly correlates to the power of the IHS to successfully administer health care services to federally recognized tribes.

But, as scholars have recognized for over thirty years, Congress's funding choices for tribal health care have been contrary to its legislative trust obligation.[35] Broadly speaking, Congress can create two types of spending programs: mandatory/entitlement spending or discretionary spending.[36] Mandatory/entitlement spending is controlled by an authorizing statute that sets multi-year funding via a formula or specific amount and regulates who is 'entitled' to benefits or funding under the program.[37] For example, Social Security is appropriated in perpetuity (funded through a tax) that pays out benefits to people over a certain age threshold.[38] On the other hand, discretionary spending is subject to Congress's annual appropriations process, meaning Congress must annually approve

29. William Boyum, *Health Care: An Overview of the Indian Health Service*, 14 AM. INDIAN L. REV. 241, 259 (1989).

30. BRETT LEE SHELTON, LEGAL AND HISTORICAL ROOTS OF HEALTH CARE FOR AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 7 (2004).

31. *Id.*

32. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 66 (2017).

33. *Id.*

34. Matthew Calabrese, *The Filibuster, Appropriations, and Administrative Capacity*, 16 GOV'T L. REV. 90, 105 (2023).

35. *See* AMBER TORRES, VICTOR JOSEPH & GREG ABRAHAMSON, RECLAIMING TRIBAL HEALTH: A NATIONAL BUDGET PLAN TO RISE ABOVE FAILED POLICIES AND FULFILL TRUST OBLIGATIONS TO TRIBAL NATIONS 11 (2020).

36. *See* JESSICA TOLLESTRUP, CONG. RSCH. SERV., R44582, OVERVIEW OF FUNDING MECHANISMS IN THE FEDERAL BUDGET PROCESS, AND SELECTED EXAMPLES 3–19 (2021). However, Congress can create more complicated mixed programs, like funding for federally qualified health centers (FQHCs). Congress provides funding to FQHCs under the Affordable Care Act's Community Health Center Fund (a multi-year mandatory spending program) and through other discretionary appropriations accounts. *See id.* at 17.

37. *Id.* a 10–12.

38. *See* CONG. RSCH. SERV., IF10426, SOCIAL SECURITY OVERVIEW (2022).

the budgetary level of the program each year.[39] The advantage of an entitlement program, in the context of health care benefits, is that an entitlement vests a statutory right to a benefit with the individual while the overall program can be managed on a multi-year basis.[40] Discretionary health care benefits programs are problematic because eligible recipients have no right to benefits and may be denied or receive delayed care due solely to budgetary constraints.[41] Delayed health care is troublesome because waiting on treatment can cause other adverse health outcomes or create a culture where community members do not seek professional treatment.[42]

As William Boyum observed in 1989, "the Indian Health Service (IHS) seems to be an ideal entitlement program promoting the health of all American Indians . . . under an obligation it has assumed for more than a century[.]"[43] To this day, Congress wrongly attempts to fulfill its legislative trust obligation of providing health care to federally recognized tribes through a discretionary spending program.[44] For decades, the discretionary budget of the IHS has failed to track medical care inflation and routinely leads to benefit coverage gaps—particularly at the end of the fiscal year.[45] As public health researchers have observed, as a discretionary program, IHS funding is "susceptible to unrelated political agendas . . . contributing to [American Indian/Alaska Native] health disparities . . . ."[46]

In FY2023, Congress made the first step at addressing the benefit gap by providing the IHS with a multi-year appropriation.[47] Multi-year appropriations are met to limit uncertainty in the operation of health care programs by allowing the IHS (or an IHS-funded facility) to plan for ongoing operations. As tribal leaders have noted, the main advantage of multi-year appropriations for the IHS is that a government shutdown or continuing resolution will not slow or halt operations.[48]

39. *See* TOLLESTRUP, *supra* note 36, at 4–10.

40. *See* Mark Walker, *Pandemic Highlights Deep-Rooted Problems in Indian Health Service*, N.Y. TIMES, nytimes.com/2020/09/29/us/politics/coronavirus-indian-health-service.html (Oct. 8, 2020) [https://perma.cc/R34J-R6GF].

41. *Id.*

42. *Id.*

43. Boyum, *supra* note 29, at 241.

44. *See generally, Broken Promises: Evaluating the Native American Health Care System*, U.S COMM'N OF CIV. RTS (last visited Jan. 20, 2024), https://www.usccr.gov/files/pubs/docs/nabroken.pdf [https://perma.cc/MP97-E9MW].

45. TORRES, *supra* note 35, at 11.

46. Donald Warne & Linda Bane Frizzell, *American Indian Health Policy: Historical Trends and Contemporary Issues*, 104 AM. J. PUB. HEALTH S263, S266 (2014).

47. For FY2023, Congress provided the IHS with $4.890 billion in its health care services account and $5.129 billion for FY2024 across all IHS accounts for "advanced appropriations." 168 CONG. REC. S8661 (daily ed. Dec. 20, 2022) (citing to the joint explanatory statement entered into the Congressional Record for the FY2023 omnibus spending package).

48. *See, e.g.*, *Northwest Tribes Celebrate Historic Congressional Funding Provision for Indian Health Service*, NW. PORTLAND AREA INDIAN HEALTH BD. (Dec. 23, 2022, 8:31 PM), https://www.prnewswire.com/news-releases/northwest-tribes-celebrate-historic-congressional-funding-provision-for-indian-health-service-301709835.html [https://perma.cc/8LYD-9MV6] (collecting quotes from tribal and federal health care leaders).

However, this Essay argues that even multi-year appropriations for the IHS fall short of Congress's legislative trust responsibility because it is reasonably foreseeable that IHS funding will not cover the basic health care needs of federally recognized tribes. As policy scholars have repeatedly noted, "chronic[] . . . underfunding and bureaucratic shortcomings" have plagued health outcomes for Native Americans.[49] Data published by the IHS confirms that Native Americans "die[] five and a half years sooner than the average American."[50] The results of funding Native American health care through discretionary appropriations accounts leads to, as Professor Matthew Lawrence has labeled, a "disappropriation" because congressionally chosen funding levels fail "to honor a government commitment . . . ."[51]

Under Congress's legislative trust responsibility, the baseline should not be whether Congress provides a benefit that supports Native American communities but whether that benefit is realistically certain "to raise the standard of living and social wellbeing of the Indian people to a level comparable to the non-Indian society."[52] This Essay argues that the most sensible choice is to untether health care benefits from the IHS and transition them to a program that vests coverage with the actual tribal member under a new entitlement program. Transitioning health benefits from an agency function to an individual right fits squarely within the legislative trust doctrine because it targets increasing the welfare of "the Indian member whether on or off the reservation."[53]

Entitlement health benefit programs create a legal obligation vested in an individual of a statutory class. [54] For example, Medicaid vests health care benefits within the individual, meaning anyone who "meets [income] eligibility rules has a right to enroll in Medicaid coverage."[55] And because Medicaid is funded under a multi-year entitlement statute, the program is not subject to annual political debate and uncertainty. This means that a Medicaid patient can utilize benefits anytime throughout the year without fear of budgetary constraints that may delay care.[56] This makes Medicaid dissimilar from current IHS health care benefits because Medicaid vests health benefits within an impoverished individual instead of an agency that must weigh when to distribute benefits as resources allow.[57] Moving Native American health care away from an IHS-run

49. *See* JORDAN K. LOFTHOUSE, INCREASING FUNDING FOR THE INDIAN HEALTH SERVICE TO IMPROVE NATIVE AMERICAN HEALTH OUTCOMES 1 (2022).

50. *Id.*

51. Lawrence, *supra* note 7, at 25.

52. 95TH CONG., AMERICAN INDIAN POLICY REVIEW COMMISSION FINAL REPORT (Comm. Print 1977).

53. *Id.*

54. *See, e.g.*, VICTORIA WACHINO, ANDY SCHNEIDER & DAVID ROUSSEAU, FINANCING THE MEDICAID PROGRAM: THE MANY ROLES OF FEDERAL AND STATE MATCHING FUNDS 4–5 (2004) (explaining the basics of entitlement health care programs)).

55. CTR. ON BUDGET & POL'Y PRIORITIES, INTRODUCTION TO MEDICAID 2 (2020).

56. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 8 (2016)

57. *See, e.g.*, U.S. COMM'N ON CIV. RTS., A QUIET CRISIS FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY A QUIET CRISIS FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 34–35 (2003) (explaining the connection between budgetary constraints and health outcomes in Native America communities).

discretionary program would acknowledge the special obligation the federal government owes to federally recognized tribes and individual tribal members. Moreover, an entitlement model for tribal health benefits would recognize tribal members as a shared personhood and could encourage a holistic understanding of tribes as people instead of "domestic dependent nations."[58]

III. CONCLUSION

Legislative trust responsibility is, at best, a fuzzy subset of the federal Indian trust responsibility. However, as a moral obligation, trust responsibility should not be limited to enforceable rights. Instead, a more substantial trust responsibility should apply in areas where Congress has an exclusive domain—like appropriations. In the case of Native American health care, this Essay argues that legislative trust responsibility should encourage Congress to create an entitlement health care program for members of federally recognized tribes. Only then will Congress be acting in a manner reasonably calculated to equalize health outcomes between tribal and non-tribal Americans.

58. Cherokee Nation v. Georgia, 30 U.S. 1, 11 (1831).