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Federal Gatekeeping and Hollow Sovereignty: A Historical Statutory Analysis of Tribal Access to Legal Representation

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I. Introduction

Have you ever tried to hire an attorney but first needed the government's approval of your choice?[1] This was the reality for Indian tribes for over a century. For approximately 130 years, the federal government required the Secretary of the Interior (Secretary), or the Secretary's designee, to approve tribal attorney contracts. In other words, until the federal government approved the attorney's contract, a tribe could not hire an attorney for any purpose, including suing the federal government for significant matters, such as land claims. Congress tightly controlled tribal attorney contracts: Legislating not once or twice, but at least **eleven times** in **five different sections** of U.S. Code Title 25.

This article examines the federal statutes addressing tribal access to key individuals whom some may see as analogous to sovereignty itself: the tribal attorney. For any government, securing legal representation is essential. For tribes, attorneys help protect their rights, guide effective governance, and pursue opportunities for their community. Tribal governments may utilize attorneys in multiple ways, such as through litigation support, criminal prosecution, in-house support for day-to-day advice on general matters of governance, or outside counsel for specialized areas, such as tax. Some tribes may utilize attorneys for all these purposes, and more, or tribes may only use attorneys as a need arises, if at all.

25 years ago, in the year 2000, Congress removed the Secretarial approval requirements of tribal attorney contracts. Prior to this time, however, some exceptions existed to these requirements, and, to the present day, some tribes may still need the Secretary's approval to hire an attorney. Notably, although Congress removed an important barrier to obtaining legal representation, many tribes may continue to lack consistent, adequate legal representation. The concept of *hollow sovereignty* means a sovereign is not supported in the exercise of self-determination, resulting in the exercise of sovereignty in name only. Exploring the historical perspectives of access to legal representation may help tribes,

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scholars, and policy makers understand how consistent legal representation supports the exercise of tribal sovereignty; where potential gaps in legal representation may persist for some tribes; and how tribes can access representation for their legal needs, such as essential legal guidance to govern effectively.

This article first outlines a historical overview of the federal statutes enacted by Congress to regulate tribal access to obtaining legal representation. This article then offers policy and other considerations for tribes, lawmakers, and organizations offering legal representation.

II. Historical Overview

This section explores the history of U.S. Code Title 25–Indians and the five chapters within Title 25 where Congress legislated on access to legal representation for tribes.[2] This review covers approximately a 130-year period, beginning in the year 1871 when Congress first addressed tribal attorney contracts in 25 U.S.C. section 81, Contracts with Indians, and ending in the year 2000 when Congress legislated to unwind the federal government's oversight in approving attorney contracts through the Indian Self-Determination and Education Assistance Act[3]

A. Contracts with Indians, 25 U.S.C. Section 81 [Chapter 3 of Title 25]

On **March 3, 1871**, Congress first regulated tribal attorney contracts by requiring Secretarial approval when it approved into law 25 U.S.C. section 81, Contracts with Indians. Section 81's reach extended much further than attorney contracts by regulating all contracts with Indian tribes. In its original form, Section 81 read, in relevant part, as follows:

> "That hereafter no contract or agreement of any kind shall be made by any person, with any tribe of Indians . . . for the payment of any money . . . in consideration of services for said Indians relative to their lands, or to any claims growing out of or in reference to annuities from or treaties with the United States, unless such contract or agreement

[2] Title 25 is the section of the U.S. Code dedicated to a variety of matters involving Native Americans.
[3] Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423).

> be in writing and approved by the Commissioner of Indian Affairs and the Secretary of the Interior..."

During this timeframe, Congress became aware of unscrupulous individuals seeking land or federal funding, including federal agents with the Bureau of Indian Affairs, who were pocketing resources, such as treaty requirements, instead of allowing these resources to reach the intended beneficiaries: tribes and tribal people.[4] Further, Congress's actions in 1871 took place during the Reservation policy era when federal government's policies were concerned with the competency of Indians to manage their lands and natural resources and strove to assimilate tribal people into mainstream American culture.[5] This paternalistic approach to regulating contracts may have been a result of Congress's concern that third parties would lay claim to land the federal government sought to reabsorb from the displacement of tribes.[6]

i. Section 81 Amendments

The next year, **on May 21, 1872**, Congress amended the law to require agreements (all agreements, including attorney contracts) to be executed before a judge prior to approval by the Secretary.[7] This amendment aimed to further address fraudulent agreements with tribes, such as covering private contracts and preserving copies.[8] Earlier that year, on January 8, 1872, the House authorized an investigation into "Indian frauds." In response to the investigation, the next year on March 3, 1873, the House issued a report that specifically addressed attorneys who were fraudulently

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[4] *See generally* Comm'r of Indian Affs., Annual Report of the Commissioner of Indian Affairs for the Year 1869, in H.R. Exec. Doc. No. 1, 41st Cong., 2d Sess. (1869), https://archive.org/details/usindianaffairs69usdorich; George H. Phillips, *The Indian Ring in Dakota Territory*, 1870-1890, 2 S.D. Hist. 346 (1972), https://www.sdhspress.com/journal/south-dakota-history-2-4/the-indian-ring-in-dakota-territory-1870-1890/vol-02-no-4-the-indian-ring-in-dakota-territory-1870-1890.pdf.

[5] Ann-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of a New Era in Federal Indian Policy*, 33 Conn. L. Rev. 667 (2001), 668-670, https://heinonline.org/HOL/P?h=hein.journals/conlr33&i=677; U.S. Bureau of Indian Affs., *Federal Law and Indian Policy Overview*, https://www.bia.gov/bia/history/IndianLawPolicy (last visited Mar. 18, 2025)(providing a brief overview of the federal Indian policy eras).

[6] Gaupp, *supra* note 5.

[7] May 21, 1872, ch. 177, §§1, 2, 17 Stat. 136.

[8] H. Rept. No. 98, 42d Cong., 3d sess., 1873, at 4.

providing legal representation to tribes.[9] The investigation found that attorneys were charging tribes significant costs for nominal services or were otherwise of little to no value to tribes.[10]

Eighty-six years later, on **August 27, 1958**, Congress removed the requirement for court approval, citing this to be a clerical requirement of the court and overly burdensome to tribes, some of whom had to travel long distances to have their contracts approved.[11] Despite being in the Termination era of federal Indian policy—where the federal government sought to promote government efficiency by terminating its trust relationship with several tribes—Congress expressly determined to maintain strict federal oversight of attorney contracts by continuing the requirement for the Secretary's approval.[12]

Other than adding and later removing this court requirement, section 81 substantively remained unchanged for 129 years until **March 14, 2000**. On this date, Congress authorized the Indian Tribal Economic Development and Contract Encouragement Act of 2000 to encourage tribal economic development. [13] Among its provisions, Congress clarified which contracts required approval by the Secretary.[14] In addition, Congress amended both section 81 and the Indian Reorganization Act of 1934 (discussed in Section II.B.) to remove the requirement that the Secretary approve attorney contracts. Section 81 now reads, "Nothing in this section

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[9] *Id*. at 2.
[10] *Id*. at 5-6. Twenty years later, in 1893, the Senate received information from the Department of the Interior detailing attorney contracts with Indian tribes, which included some allegations of fraud and misrepresentation by attorneys to their tribal clients. *See* S. Exec. Doc. No. 52-18 (2d Sess. 1893).
[11] Pub. L. 85–770, Aug. 27, 1958, 72 Stat. 927.
[12] Senate Report 1501, April 29, 1958 (testimony of the director of Bureau of Budget, now the Office of Management and Budget, testifying that the "Indians' interests" would be adequately protected by such requirements like Secretarial approval); Mariel J. Murray, *Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress*, Cong. Res. Serv., R46647, at 7-8 (updated July 21, 2021) (originally written by Tana Fitzpatrick), https://www.congress.gov/crs-product/R46647 (providing an overview of federal Indian policy eras).
[13] Indian Tribal Economic Development and Contracts Encouragement Act of 2000 (ITEDCEA), Pub. L. No. 106-179, 114 Stat. 46 (2000), https://www.congress.gov/106/plaws/publ179/PLAW-106publ179.htm.
[14] *Id*.

[81] shall be construed to—(1) require the Secretary to approve a contract for legal services by an attorney . . .”[15]

B. Indian Reorganization Act of 1934 [Chapter 45 of Title 25]

On **June 18, 1934**, Congress enacted the Indian Reorganization Act of 1934 to give tribal governments more control over their own affairs.[16] Congress acted in response to a 1928 report, often referred to as the *Merriam Report*, that detailed the dire social and economic conditions on Indian reservations across the country.[17] These conditions were a direct result of the Allotment and Assimilation policy era where the federal government sought to break up tribal lands and to assimilate tribal people into mainstream American culture, primarily through boarding schools.

The IRA ended the allotment of reservation lands, provided provisions regarding lands and natural resources, and stated that tribes have the right to organize as governments. Section 16 of the IRA provided tribes authority to adopt a constitution and bylaws, which required a vote by tribal members at a special election and approved by the Secretary.[18] Section 16 provided for additional powers that tribes could utilize, and specifically provided for attorney contracts “[t]o employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior . . .”[19]
On **June 26, 1936**, Congress passed a joint resolution addressing attorney contracts approved by either the Secretary or by Congress prior to 1936.[20] When Congress enacted the IRA in 1934 requiring the approval of attorney contracts, it unintendedly resulted in

[15] 25 U.S.C. § 81(f). Although Congress removed this requirement from the U.S. Code, the accompanying regulations to section 81 continue to state that the choice of counsel and the fixing of fees are subject to Secretarial approval. 25 C.F.R. § 88.1(b). For historical information on the Department of the Interior’s regulation of attorney contracts under section 81, see 22 Fed. Reg. 248, 10538-39 (Dec. 24, 1957).
[16] Indian Reorganization Act, ch. 576, 48 Stat. 984, 987 (1934) (codified as amended at 25 U.S.C. § 5123).
[17] Lewis Meriam et al., *The Problem of Indian Administration: Report of a Survey Made at the Request of Honorable Hubert Work, Secretary of the Interior, and Submitted to Him*, February 21, 1928, Institute for Government Research (1928), https://narf.org/nill/documents/merriam/b_meriam_letter.pdf.
[18] IRA at § 16.
[19] *Id*.
[20] Joint Resolution of June 26, 1936, ch. 831, 49 Stat. 1984 (codified as amended at 25 U.S.C. §§ 81a–81b).

confusion about whether contracts approved pursuant to section 81 were still in full force and effect. The 1936 joint resolution addresses attorney contracts for the prosecution of claims against the United States and deems them in "sufficient compliance with section 81 . . ."[21] The joint resolution remains unchanged and is currently codified at 25 U.S.C. sections 81a and 81b.[22]

i. IRA Section 16 Amendments

For 66 years after its enactment in 1934, IRA section 16 remained unchanged by Congress, despite Congress amending this same section twice (1988 and 1994).[23] As previously mentioned, on **March 14, 2000**, Congress enacted the Indian Tribal Economic Development and Contract Encouragement Act of 2000.[24] This act struck the following language from IRA section 16, "the choice of counsel and fixing of fees to be subject to the approval of the Secretary."[25]

C. Indian Claims Commission Act of 1946 [Chapter 2a of Title 25]

On **August 13, 1946**, Congress passed the Indian Claims Commission Act (ICCA) to settle claims against the United States by Indian tribes to settle land claims.[26] Even prior to the passage of the IRA in 1934, Congress considered the creation of a special commission to address Indian land claims.[27] In initial drafts, Congress did not include requirements for attorney contracts, but upon final passage in 1946, Congress provided strict parameters

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[21] *Id*.
[22] 25 U.S.C. § 81a expressly retains the Secretary's power to cancel such contracts. Section 81b acknowledges that contracts approved by an act of Congress remain in full force.
[23] Pub. L. 100-581, title I, § 101, 102 Stat. 2938 (Nov. 1, 1988) (establishing procedures for review of tribal constitutions); Pub. L. 103-263, § 5(b), 108 Stat. 709 (May 31, 1994) (adding new subsection addressing privileges and immunities of Indian tribes).
[24] ITEDCEA, Pub. L. No. 106-179, 114 Stat. 46.
[25] *Id*. Although Congress removed this requirement from the law, the accompanying regulations continue to state that the choice of counsel and the fixing of fees are subject to Secretarial approval. 25 C.F.R. § 88.1(a). For historical information on the Department of the Interior's regulation of attorney contracts under IRA section 16, see 22 Fed. Reg. 248, 10538-39 (Dec. 24, 1957).
[26] Indian Claims Commission Act (ICCA), Pub. L. No. 79-726, 60 Stat. 1049 (1946).
[27] U.S. Indian Claims Commission, *Final Report*, 95th Cong., 2d Sess., at 3, (Sept. 30, 1978), https://commons.und.edu/indigenous-gov-docs/167/.

for attorney involvement and regulated the practice of attorneys by its own adopted procedures. The act especially emphasizes the amount of attorney fees that, unless expressly agreed upon in the approved contract, could not exceed 10 percent of the amount recovered in any case. Specifically, the ICCA stated:

> "The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U. S. C., sec. 476), shall be selected pursuant to the constitution and bylaws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 2103 to 2106, inclusive, of the Revised Statutes (25 U. S. C. secs. 81, 82-84)."[28]

On June 12, 1951, the U.S. Senate Committee on Interior and Insular Affairs convened a subcommittee charged with investigating attorney and other contracts with Indians. On January 16, 1953, the subcommittee issued its report, which noted the long history of unscrupulous attorneys taking advantage of tribes, and particularly in response to litigation pursuant to the Indian Claims Commission Act that resulted in large monetary judgements. The subcommittee concluded that Secretarial approval of attorney contracts remain in effect to continue to protect tribes from such attorneys.[29]

D. Indian Civil Rights Act of 1968 [Chapter 15 of Title 25]

On **April 11, 1968**, Congress passed the Indian Civil Rights Act (ICRA), which extended many of the constitutional civil rights afforded to individuals to tribal governments.[30] ICRA currently maintains the following provision:

> "Notwithstanding any other provision of law, if any application made by an Indian, Indian tribe, Indian council, or any band or group of Indians *under any law requiring the approval of the Secretary of the Interior* or the Commissioner of Indian Affairs of contracts or agreements

[28] ICCA at § 16. Congress amended the ICC several times before its eventual termination in 1978.
[29] S. Rep. No. 83-8 (1953), https://commons.und.edu/indigenous-gov-docs/151/.
[30] Indian Civil Rights Act (ICRA), PL 90-284, title VI, § 601 (§ 1331), Apr. 11, 1968, 82 Stat. 80.

> relating to the employment of legal counsel (including the choice of counsel and the fixing of fees) by any such Indians, tribe, council, band, or group is neither granted nor denied within ninety days following the making of such application, such approval shall be deemed to have been granted."[31]

The provision essentially states that if the federal government does not act, the tribe's attorney contract is automatically approved. *Section 1331 remains the law.* Congress has amended Title 15, Chapter 25 several times, such as legislating on the Tribal Law and Order Act but has not amended section 1331.[32]

E. Indian Self-Determination and Education Assistance Act of 1975 [Chapter 46 in Title 25]

On January 4, 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA).[33] The act ushered in a new era of tribal participation in governance whereby tribes could utilize federal funding to manage certain federal programs, such as education and health, provided by the federal government for their benefit (commonly referred to as a 638 contract). Under such agreements, tribes have some flexibility in managing the program, but the federal government maintains oversight and must approve significant changes to the contract.[34]

On **October 25, 1994**, Congress amended ISDEAA to enact the Tribal Self-Governance Act, which permanently authorized tribes to enter into agreements to manage several, eligible programs within the Department of the Interior with less federal oversight (commonly referred to as 638 compacting).[35] In its 1994

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[31] ICRA at §1331 (emphasis added).
[32] *See, e.g.*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, title II, 124 Stat. 2258 (2010).
[33] Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423). For more information on the background of federal tribal self-determination authorities, including ISDEAA and its amendments, see Cassandria Dortch, et. al., *Tribal Self-Determination Authorities: Overview and Issues for Congress*, Cong. Rsch. Serv., R48256 (updated January 10, 2025) at https://www.congress.gov/crs-product/R48256. Congress has amended ISDEAA several times.
[34] ISDEAA, 25 U.S.C. §§ 5321(a), 5329.
[35] Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, title II, 108 Stat. 4270 (Oct. 25, 1994) (codified as amended at 25 U.S.C. §§ 5361–5368).

amendments, Congress expressly stated that tribes who enter into self-governance compacts with the federal government are not subject to the provisions of section 81 or IRA section 16 for attorney contracts.[36]

On **August 18, 2000**, Congress amended ISDEAA to establish self-governance within the Department of Health and Human Services. [37] In doing so, Congress created a parallel provision that states that tribes who enter into self-governance compacts for health are not subject to the provisions of section 81 or IRA's section 16 for attorney contracts.[38]

III. Policy Implications and Options for Consideration

This section explores how Indian tribes, the federal government, and other entities could consider several options to increase resources or attention to this important topic. Such efforts could include increasing funding to tribes, removing dormant laws or other requirements, and continuing to gather research on present day impacts to tribes with no or limited access to tribal attorney representation.

A. Reversing Hollow Sovereignty by Increasing Current Federal Appropriations

In short, sovereignty can be described as the right of a sovereign to rule and govern themselves.[39] Most often used in international contexts, the concept of *hollow sovereignty* may be described as a situation or circumstance where a sovereign is not provided the resources to support self-determination in practice, so that the exercise of sovereignty is in name only.[40] In a domestic context, in 1967, the Senate Judiciary Committee, in discussing removing

[36] *Id*. at § 204.
[37] Tribal Self-Governance Amendments of 2000 (TSGA 2000), Pub. L. No. 106-260, 114 Stat. 711 (Aug. 18, 2000) (codified as amended at 25 U.S.C. §§ 5381–5399).
[38] TSGA 2000 at § 4.
[39] Native Am. Rts. Fund, *Frequently Asked Questions*, https://narf.org/frequently-asked-questions/ (last visited Mar. 24, 2025).
[40] *See, e.g.*, Trudy Jacobsen & Charles Sampford eds., *Re-Envisioning Sovereignty: The End of Westphalia?* (1st ed. Taylor & Francis 2008).

arbitrary limitations on attorneys' fees before federal administrative proceedings, heard testimony from American Bar Association representatives who described: "The right or privilege of being represented by counsel in a Federal administrative proceeding becomes hollow * *if the private party is prohibited from paying his attorney other than a subnormal fee. Retaining one's own counsel is a private right which deserves safeguarding in fact as well as in theory."[41] Here, the Senate Judiciary Committee considered the right of a claimant to obtain counsel of their choosing, and whether it was a hollow right that existed in name but not in practice. While not expressly addressing the sovereignty of a tribal government, in essence the ABA's testimony demonstrates how sovereignty may not be fully exercised without structural support, particularly with regard to exercising one's own right to choose legal counsel.[42]

Over the course of approximately 130 years, Congress did not hesitate to legislate at least eleven times, possibly more, to restrict and control tribes' ability to access legal representation. Some could argue these restrictions were necessary to protects tribes from fraudulent attorneys. However, even into the 1990s, in at least one instance, a tribe waited on the BIA for one year to approve their attorney contract.[43] Thus, the removal of the Secretary's approval requirement remains significant. But, once removing these requirements, Congress has not considered replacing these requirements with resources to allow tribes to achieve true self-determination around legal representation.

Many governments across the country employ legal counsel to assist with a variety matters, including in house services. It would be unfathomable for the federal government to not have attorneys providing it legal advice and representing its interests for multiple legal purposes. Every branch of the federal government employs attorneys: Executive (the U.S. Department of Justice, plus federal

[41] S. Rep. No. 90-795, at 3 (1967) (describing limitations on attorney fees that undermine meaningful legal representation).
[42] The author acknowledges that providing funding to pay for legal counsel is not squarely the same as exercising the right to choose counsel.
[43] Ken Bellmard, *Endeavoring to Persevere: Becoming and Being a Tribal Attorney*, 9 Kan. J.L. & Pub. Pol'y 752, 756 (1999–2000), https://heinonline.org/HOL/P?h=hein.journals/kjpp9&i=766.

agencies), U.S. Congress (e.g., both chambers have Offices of Legislative Counsels), and the Supreme Court (Legal Office).[44]

While Congress removed unduly burdensome and paternalistic requirements in obtaining legal counsel, it did not replace it with laws or funding seeking to sufficiently support tribes in this critical area. Without adequate access to legal representation, tribes risk threatening the integrity of their internal governance, forgoing economic development opportunities, overlooking federal laws and policies applicable to tribes, among other issue areas. These risks could hinder effective governance and introduce inefficiencies that stagnate operations.

To reverse hollow sovereignty, Congress could consider how to support tribes in the same way it has supported their self-determination. Congress has frequently enacted legislation that supports tribal sovereignty and self-governance, most notably the IRA and the ISDEAA. Here, Congress could do the same. For example, Congress provides funding, administered by the Bureau of Indian Affairs, for tribal legal representation for limited purposes.[45] An option could be for Congress to increase its appropriations to this funding line and designate additional funding for express purposes, such as to secure in-house counsel. While the BIA does not authorize funding to tribes for private attorneys in general, it can, however, approve such funding for limited purposes.[46] If Congress appropriated additional funding and increase the type of legal support tribes could access with federal funds, the BIA would also need to update its regulations. Supporting tribes in such a way would be an investment into the future of a tribe, and the future benefits of which could result in

[44] U.S. Dep't of Just., Office of Legal Counsel, https://www.justice.gov/olc; U.S. House of Representatives, Office of the Legislative Counsel, https://legcounsel.house.gov; U.S. Senate, Office of the Legislative Counsel, https://www.slc.senate.gov; J.W. Winkle III & M.B. Swann, *When Justices Need Lawyers: The U.S. Supreme Court's Legal Office*, 76 Judicature 244 (1993), https://www.ojp.gov/ncjrs/virtual-library/abstracts/when-justices-need-lawyers-us-supreme-courts-legal-office.

[45] *See* U.S. Dep't of the Interior, *Bureau of Indian Affairs FY 2025 Congressional Budget Justification* (2024), IA-RES-20, https://www.bia.gov/sites/default/files/media_document/fy2025-508-bia-greenbook.pdf ("The Attorney Fees program provides financial assistance to eligible Tribes to secure legal services to assist them in establishing or defending Tribal rights or protecting Tribal trust resources that are guaranteed through treaty, executive order, statute, court decision, or other legal authority.").

[46] 25 C.F.R. § 89.41 (2024).

less reliance on federal services, potentially resulting in a more efficient federal-tribal relationship. Finally, some could argue that supporting tribes financially to obtain consistent legal representation may be a function of the federal trust responsibility.[47]

B. Consider Removing Unenforceable Laws, Constitutional Revisions

To further support tribal self-determination, Congress may consider the option of removing current laws that could continue to be a hindrance to tribes, specifically ICRA's section 1331. Whether the Department of the Interior has ever approved or disapproved a contract under this provision is unclear. On one hand, section 1331's present use may be unlikely since Congress removed requirements for Secretarial approval under section 81 or IRA section 16 when it enacted P.L. 106-179. In this context, section 1331 could be considered unenforceable law. Unenforceable laws are laws that will not be enforced by a court.[48] Thus, one could argue that a court would not enforce this statute given Congress's actions in the year 2000 that sought to remove requirements of Secretarial approval of attorney contracts.

On the other hand, however, some laws may continue to require Secretarial approval. For instance, section 1331 begins by stating, "notwithstanding any other provision of law . . ." In the context of this statute, "any other provision of law" could be vague and ambiguous (i.e., not clear to the reader). Specifically, it is unclear whether this statement only pertains to federal statutory laws, or if it could include federal regulations; tribal treaties, which are considered the supreme law of the land; or possibly even tribal constitutions, such as those adopted pursuant to the Indian Reorganization Act. If adopted under the IRA, some tribal constitutions may continue to require federal approval of their attorney contracts. Thus, it could be argued that tribal constitutions are a "provision of law" and fall within ICRA section 1331's

[47] For a definition of the federal trust responsibility, see U.S. Dep't of the Interior, Bureau of Indian Affs., *What Is the Federal Indian Trust Responsibility?*, https://www.bia.gov/faqs/what-federal-indian-trust-responsibility (last visited Mar. 24, 2025).
[48] Cornell L. Sch. Legal Info. Inst., *Unenforceable,* https://www.law.cornell.edu/wex/unenforceable (last visited Mar. 24, 2025).

applicability, which would allow the Secretary to disapprove tribal attorney contracts.

In this era of tribal self-determination, it may be unlikely that the Secretary requires approval of an attorney contract under section 1331, or takes the time to disapprove a contract, which is why this may be described as an unenforceable law. Still, because it has not been repealed or invalidated, section 1331 is good law, which means that Congress continues to authorize the Secretary of the Interior to approve or disapprove attorney contracts that fall within the terms of section 1331.

As described above, federal laws and regulations, and potentially tribal constitutions, continue to authorize the Secretary of the Interior to approve or disapprove attorney contracts. The continuance of these laws and regulations may continue to be a barrier to some tribes seeking to hire a tribal attorney. An option could be to determine and remove all remaining requirements for federal approval of attorney contracts. For tribes, this could mean reviewing their tribal constitution, particularly IRA constitutions, for attorney approval requirements and working with the federal government to remove such provisions. Further, removing unenforceable laws, such as ICRA section 1331, and removing remaining requirements from federal regulations could remove any unintentional barriers to accessing adequate legal representation, which supports tribal self-determination.

C. Additional Research; Establish a Task Force; Nationwide Survey

Research on the adequate access to legal representation for Indian tribes is virtually non-existent.[49] Research by academic

[49] *But see* Kirsten Matoy Carlson, *Access to Justice in the Shadow of Colonialism*, 59 Harv. C.R.-C.L. L. Rev. 70 (2024), https://ssrn.com/abstract=4909047; Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 Fordham L. Rev. 3085 (2013), https://ir.lawnet.fordham.edu/flr/vol81/iss6/3; Nat'l Native Am. Bar Ass'n, *The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession* (2015), https://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf; Arin Reeves, *Excluded & Alone: Examining the Experiences of Native American Women in the Law and a Path Towards Equity* (Am. Bar Ass'n & Nat'l Native Am. Bar Ass'n 2023),

institutions, think tanks, or other nonprofits in this area could consider focusing on gathering data to illustrate the impacts to tribes who do not have regular access to legal counsel to help them defending their sovereignty or with effective governance. Likewise, such research could learn from tribes that do have regular access to tribal attorneys, such as those with well established Office of Attorney General or General Counsels, who can describe the benefits and any potential cost savings to the tribe for having an in-house tribal attorney. Research may also show the indirect cost savings to the federal government, who would continue to maintain its trust and legal obligations but may see increased benefit to its relationships with Indian tribes.

Another option could be for either the American Bar Association or the National Native American Bar Association to establish a task force to conduct a nationwide survey to determine the number of tribal communities that have little to no daily access to a tribal attorney. One result of such a survey could be to help determine the gaps in legal representation, which may be helpful to law schools that can be responsive in graduating students with the necessary skill sets to represent tribal interests.

IV. Conclusion

In sum, this article intends to shed light on the history of tribal access to legal representation over a 130-year period. Throughout much of this time, the federal government maintained a paternalistic approach to monitoring the legal representation tribes could seek. Although, for well over an 80-year period, Congress regularly discussed in its house and senate reports the fraud committed by attorneys against Indian tribes. Finally, in the year 2000, Congress eliminated the biggest hurdle to obtaining legal representation by not requiring Secretarial approval of their tribal attorney contract. While this assisted with removing a major barrier, in some respects it could be seen as supporting hollow sovereignty in that the federal government has not acted in the 25 years since this shift in policy to support tribal self-determination in accessing adequate legal representation.

An option for Congress may be to act in support of tribal self-determination by expanding funding opportunities for tribes to take

https://www.nativeamericanbar.org/initiatives/native-american-women-attorney-study/ (last visited Mar. 24, 2025).

advantage of being able to afford legal representation. Congress could also review where there may continue to be barriers in the law, such as removing unenforceable laws like ICRA section 1331, or by assisting tribes with removing additional barriers that may exist in tribal constitutions. Finally, academic institutions, think tanks, and the ABA may consider assisting by filling the gap in understanding about this under studied research area of legal support for the exercise of tribal sovereignty and governance. Filling this void would shift away from hollow sovereignty and actively support the right of tribes to self-govern and seek an optimistic future for themselves and their people.