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RULINGS OF THE U.S. SUPREME COURT AS THEY AFFECT THE POWERS AND AUTHORITIES OF THE INDIAN TRIBAL GOVERNMENTS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

CONCERNS OF RECENT DECISIONS OF THE U.S SUPREME COURT AND THE FUTURE OF INDIAN TRIBAL GOVERNMENTS IN AMERICA

FEBRUARY 27, 2002
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RULINGS OF THE U.S. SUPREME COURT AS THEY AFFECT THE POWERS AND AUTHORITIES OF INDIAN TRIBAL GOVERNMENTS

WEDNESDAY, FEBRUARY 27, 2002

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:02 p.m., Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Campbell, Cantwell, and Thomas.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Well before this country was founded, Indian nations exercised dominion and control over approximately 550 million acres of land. Their governments pre-existed the formation of the U.S. Government, and, indeed, were so sophisticated that the framers of the U.S. Constitution modeled what was to become America's governmental structure after the Government of the Iroquois Confederacy.

The recognition of the Indian tribes as sovereign governments has its origins in the Constitution of the United States, which in Article III, Section 8, Clause 3, provides that, "The Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

From that time forward, this status of Indian tribal governments as separate sovereigns has informed the laws enacted by the Congress and signed into law by the President for over 200 years, and until relatively recently, has served as the foundation for the rulings of the U.S. Supreme Court.

In the early 1830's the U.S. Supreme Court's Chief Justice John Marshall articulated the fundamental principles upon which the body of Federal Indian law would be constructed in a series of cases that are now referred to as the *Cherokee* cases. Yesterday this committee received testimony from Professor Reid Chambers, who observed that at the time of Chief Justice Marshall's rulings, the Cherokee Nation had a written constitution, an elected bicameral legislature, a tribal judicial system, schools, an established military, a written language, and a much higher adult literacy rate than any State of the Union at that time.

Today tribal governments have not only discarded the mantle of "ward" to the United States "guardian" of Chief Justice Marshall's

day, but have assumed a wide range of government responsibilities that were formally the exclusive province of the National Government.

Although Federal policies have vacillated and congressional acts have reflected those changes in policy, beginning in 1934 with the enactment of the Indian Reorganization Act, and reinforced in 1970 with the establishment of the Federal Policy of Native Self-Determination and Tribal Self-Governance, two of the three branches of the U.S. Government have consistently acted in concert to reaffirm the legal status of Indian tribal governments as sovereign governments.

We are here today because there is a third branch of the U.S. Government, the Judicial Branch, that appears to be headed in a decidedly different direction than the other two branches of the National Government. If there were a few aberrations from the Supreme Court precedent and Federal statutory law, one might not have cause for concern, but those that study the law and the rulings of the U.S. Supreme Court instruct us that the Court is on a steady march to divest native governments of their governmental powers and authorities.

Principles long and well-established, such as the fact that tribal governments retain all of their inherent sovereign powers and authorities not relinquished by them in treaties or abrogated by an express act of the Congress, appear to have been cast aside. The fundamental principle that tribal governments have authority to exercise jurisdiction over their territory, just as other governments do, is being steadily eroded by the Court's rulings.

Notwithstanding the provisions of the U.S. Constitution proscribing discrimination on the basis of race, the Court seems to be consistently imposing limitations on the exercise of tribal government jurisdiction based upon the race and ethnicity of those over whom jurisdiction is exercised.

The historical foundations of the relationship between sovereign governments, the Federal, State, and tribal governments, appear to no longer have any legal import in the Court's rulings.

Last, but certainly not least, from the perspective of the branch of the government that the U.S. Constitution charges with conducting relations with foreign governments, the several states, and Indian tribes, the Congress—one is hard-pressed to find reference in the Court's opinions to the context in which the rest of America is operating; namely, Federal laws and the policies they reflect.

So today the committee has called upon a few of the many experts who have, through their writings and scholarly discourse, instructed us that there is cause for alarm, and have urged the Congress to act. With that, I am pleased to call upon the vice chairman for his remarks.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. Thank you, Mr. Chairman, for that very fine statement. I think it is important that statements like yours remind people that Native Americans' ability to govern themselves didn't start with the Movie "Dances with Wolves." Indeed, I live

about maybe 40 miles east of what's commonly called the "cliff dwellings" of Mesa Verde. People lived there about the time that Christ walked the Earth, and they had a form of government. They were there 400 years before Columbus landed on the shores of the Caribbean Islands. They had a form of government then, 400 years before Columbus got here.

And they weren't the only ones. If you look at two other of the really ancient cultures that thrived about that time, Cahokia, which is in Missouri south of St. Louis, and Tenochtitlan, which the city of Mexico City was built on the ruin of Tenochtitlan, they were thriving communities as large as any community in Europe at the time. They had forms of government.

The tenets of all those ancient forms of government with Native Americans were really based on just three or four: The belief in the family, the relationship with their natural surroundings, and their belief in creative force. I guess I am just continually amazed that so much transpires in America that deals with Federal-tribal relationships when all those years and those centuries, eons and eons of time, are just discarded, like they weren't important in the scheme of things when we deal with tribal self-governance. So I thank you for that statement.

At yesterday's hearing on Indian trust management reform, we heard from distinguished legal scholars about the legal and political foundation of the Federal-tribal relationship. We heard about Chief Justice John Marshall, who we credit with firmly establishing the role of the U.S. Supreme Court in the Federal system and the role he played in Indian jurisprudence, as you have mentioned.

The pendulum of Federal Indian policy has been swinging back and forth right from the beginning of our Republic: Treaties, relocation, reservations, allotment, assimilation, termination, and to the current policy of self-determination. But Indian self-determination is more than a slogan to be carelessly thrown around. Chief Justice Marshall's decisions are grounded in it, and President Nixon knew what it meant in 1970, when he issued his famous Special Message to Congress on Indian Affairs.

Local decisionmaking is important. It is an important part of Federal Indian policy, but it's an important fact to many of us here in Congress, too, and that's why we believe in states' rights and local jurisdiction and the ability of people to make their own decisions at the local level. It is really the core of the principles of American freedoms to me and many of us that are here.

It is also a key concept because it works. Local governments know best what works for their citizens, and Indian tribes are no different in this respect than any other local government. As important as the legal tenets of Federal Indian law and policy are, I'm just as concerned with the practical results that the recent decisions of the U.S. Supreme Court will have on that policy and on the future of Indian tribal governments in America.

An Indian tribal government that can't legally defend its territory isn't a sovereign government at all. An Indian tribal government that is unable to levy a tax on a hotel or things of that nature that enjoy the benefits and the amenities of the tribe with the things that the tribe provides certainly cannot survive very long.

In short, I feel, if left unchecked, the philosophy and reasoning of the Supreme Court cases will mean that in fairly short order Indian tribes will be left with very little, if any, powers at all. If this trend continues, the current vigor of Indian tribal governments will be a distant memory, and the tribes themselves will become little more than social clubs or mechanisms for funding Federal dollars to Indian people.

The advances of rehabilitating tribal economies will be reversed if tribes lack fundamental authority over people and events that are located on their lands. Massive refederalization on Indian issues will take place, which is not healthy for the tribes, for tribal members, or local citizens, or the taxpayer. This result is not, in my view, what the U.S. Constitution sets out envisioned, and does not represent the views of, I believe, the majority on this committee or in Congress generally.

With that, Mr. Chairman, I'd ask unanimous consent that my formal statement be included in the record, and I look forward to the hearing with our witnesses today.

The CHAIRMAN. Without objection, so ordered.

Today we are honored to have the greatest legal minds of this land on matters involved in Indian affairs. For the first panel I call upon Professor David Getches, of the University of Colorado at Boulder, School of Law, and Professor Robert Anderson, of the University of Washington School of Law, Seattle.

STATEMENT OF DAVID GETCHES, PROFESSOR, UNIVERSITY OF COLORADO AT BOULDER, SCHOOL OF LAW, BOULDER, CO

Mr. GETCHES. Thank you very much, Mr. Chairman, Senator Campbell. It is a pleasure to be here, and I am pleased to have an opportunity to talk about an issue of extreme importance to those of us who have been involved in Indian law for many years, and certainly to all people of Indian country.

The current U.S. Supreme Court has made an astounding shift in its Indian law jurisprudence. It has disregarded 170 years of Supreme Court precedent. It has undermined the congressional policy of political and economic self-determination for Indians, and these decisions affect the lives of every reservation Indian, making reservation life less secure and reservation futures less promising.

Now the travesty of mismanaged Indian trust funds is well-known, but the Supreme Court's assault on the foundations of Indian law and on congressionally-mandated Indian policy is virtually unknown outside Indian country, but the effects of the Supreme Court's actions promise to be deeper and longer lasting.

Now I've been a student and a teacher and a practitioner of Indian law for over 30 years now. In the nineties we have witnessed a sea change in Indian law. We have found that Indian law in the Supreme Court is heading in a radical new direction.

I began researching why this was several years ago. I did this reading painstakingly all the opinions of the Court and then spending a summer here at the Library of Congress going through the files that had been made available by the late Justice Brennan and Justice Thurgood Marshall. The first revelation I had in looking at these records was that the internal memos showed that for some Justices on the Supreme Court Indian law was seen as a field with

no anchors, with no guiding principles, or moorings. The memos, internal, private memos, showed an unabashed concern with setting things right in Indian country, with taking to task the decisions of the past, and applying the present values of these Justices, as if the opinions of the past had been grounded in no principles at all.

As your statement, Mr. Chairman, and the statements of Senator Campbell indicated, those earlier opinions were, indeed, grounded in long tradition of Supreme Court precedent, going back to the early 1800s and the decisions in three major cases by Chief Justice John Marshall.

Now it became clear to me as I proceeded in this research that majorities of the Court were deciding cases in order to reach outcomes that satisfied them without basing their decisions on the precedents and principles that had guided their predecessors for 170 years. But other than the fact that the whole exercise was subjective, as I indicated in a 1996 article, I couldn't find any new philosophy or set of principles that gave coherence to the Court's decisions.

Eventually, I turned my attention to the work of constitutional scholars and looked beyond my own expertise in Indian law and found in the full array of cases, the cases going well beyond Indian law, that there were three themes or trends that explained nearly every decision of the Court since the mid-1980's, not just in Indian law. They describe a set of values that the majorities favor, and these values are not specific to Indian law. The three value-based trends are, first, a commitment to the rights of states; second, a belief that the law must be colorblind, and, third, a desire to support mainstream values.

Now each of these trends sweeps with them nearly every Indian case. As I am sure is obvious to the members of the committee, States are adverse to Indians in nearly every Indian case in the Supreme Court. Colorblind justice may stand for principles that are important to members of the Court in affirmative action settings, but Indian laws are not about affirmative action. That's about a government-to-government relationship.

Mainstream values, Indians may have lifestyles and religions that are different, but it's not the same as the perception of being "out of step" that the Court might see in other contexts. These trends are robust, accounting for the Court's outcomes in virtually every case. I would like to offer today this article that does the analysis. I expect that, in the interest of time, we ought not to go over all 80 pages of this very interesting article, but I will offer it for the committee and your record.

The CHAIRMAN. It will be part of the record.

Mr. GETCHES. Now when you look at the work of the Court since the mid-1980's, the most striking reality is that Indians lose. On the chart that I have put up here, you can see the blue lines stand for cases, or rather percentages of cases, in each term of the Court since 1958 to the term 2000–2001. The red lines stand for percentages of losses. As you can see, the red lines are much more prevalent at the more recent end of the chart. The black is a trend line showing the trend of decisions, a trend against Indians.

Now if, for purposes of comparison, it is helpful to look at other courts, what I have done is compared the Rehnquist Court, which really began in 1986, with its predecessor, the Burger Court. This pie charts show that in the Burger Court, Indians were winning 58 percent of the cases. In the Rehnquist Court, almost equal number of terms of Court, Indian tribes are winning on 23 percent of the cases that come before the Court.

Now the differences here are striking. In trying to understand what is going on here, I ask myself, is this extraordinary or are there other groups of litigants, other types of interests, or other subject matters of cases, where litigants have done as badly as Indians. I looked at possibilities ranging from immigration to criminal cases, and the worst record I found for any litigants other than Indians was convicted criminals seeking reversals of their convictions. I found that convicted criminals won 34 percent of the time while Indian tribes have won only 23 percent of the time. Nobody does worse in this Supreme Court than Indian tribes.

These decisions are not only bad on a win/loss ratio. These decisions are major departures from Indian law as it was developed and articulated by the Court from the very foundings of this Nation until the 1980's. The basic rules were straightforward. You mentioned the foundational principles and cases in your statement, Mr. Chairman. The foundation principles are summarized here. Tribes are sovereigns. Tribes became subject to the legislative power of the United States and lost their external sovereignty by being incorporated into the United States, but retained tribal powers can only be qualified by congressional legislation or treaties. This is laid out in the Marshall trilogy, those three leading cases from the early 1800's.

Now not all of these principles have always pleased Indian tribes. The Indian law scholars, Indian tribal leaders and their attorneys have not liked the idea that, just by virtue of planting an American flag on the shore of North America, the right to squelch and diminish tribal powers was gained by the Europeans. But, be that as it may, this doctrine of plenary congressional power has been reiterated by the courts, and tribes have learned to live with it.

They have learned that it can be a barrier against the intrusion of State governments into their territories. Tribes have also suffered under this plenary power doctrine. Congress has not always been generous with Indian tribes.

For instance, tribes suffered enormous losses when Congress embraced the allotment policy in the 1800's, the late 1800's, and the purpose there was to break up reservation lands, tribal lands, and distribute small parcels to every individual Indian, so that the remaining land could be distributed to homesteaders. This policy proved to be an abject disaster. Congress recognized that, but not for almost 50 years. Eventually, Congress reversed the policy with the Indian Reorganization Act policies that you mentioned, Mr. Chairman.

Now the ensuing period was more benign, but then again in the 1950's Congress went astray, if I may say, and abruptly changed the course of Indian policy. Termination became the policy of that era. The idea was to end the Federal relationship with the tribes

of the United States and divide up the property of the tribes, again assimilation.

Now this took an enormous toll on 100 Indian tribes, but the courts didn't alter it. The courts didn't alter the allotment policy. The courts deferred to Congress. It was Congress that reversed again the termination policy after 15 years of failure. It took 20 years to make things right and restore tribes to their original status; that Congress did, but without any encouragement from the courts.

Now since then tribal governments have rebuilt. Some are strong, healthy governments. Others are struggling to overcome a myriad of disadvantages. Congress has decided to support tribes in their successes and allow them their occasional missteps. Tribes have begun to find their footing, and their cultures, bruised by ill-considered policies of the past, are gaining new strength.

During the last 30 years of its self-determination polity, Congress has passed dozens of bills to support the ideal of self-determination, and those bills are enumerated, or many of them, in the footnotes to my written testimony that I submitted earlier. Bills, great pieces of legislation, like the Indian Self-Determination Act, the Indian Child Welfare Act, the Native American Graves Protection and Repatriation Act, the list is very long, and it's a tribute to the work of this committee and to the unflagging policy of Congress during this period.

Meanwhile, the Rehnquist Court has decided case after case against the very principles and policies that the Congress has sought to advance. Instead of recognizing the will of Congress, the Court has strained to give effect today to the policies of yesterday. The allotment policy, for instance, has been a dominant force in the decisions of the current Court.

The Court has prevented tribes from trying non-Indians who commit crimes on the reservation. It's prevented tribes from regulating non-members hunting and fishing on the reservation. It's prevented tribes from zoning non-members' lands in parts of some reservations. It's prevented tribes from taxing guests in hotels on the reservation, and it's prevented tribal courts from hearing personal injury lawsuits by non-Indians who want to use the tribal courts, and from hearing suits by Indians who have tried to sue non–Indians in tribal court for torts committed against them in their homes on reservation lands owned by the tribe.

Now just compare how the Rehnquist Court looks at these issues of tribal sovereignty and powers. I have put up here some quotes from the earlier Burger Court and the Rehnquist Court. On tribal powers, the modern era Burger Court said:

> Until Congress acts, the tribe retains existing powers of sovereignty. That's the law as it has always been.

A 1997 case, *Strate* v. *A–1 Contractors,* our case law establishes that, absent express authorization by Federal statute or treaty, tribal jurisdiction exists only in limited circumstances, an exact shift in position.

Tribal sovereignty, what did the Court say up until the mid-eighties? Indian sovereignty is not conditioned on the assent of non-members. Non-members' presence and conduct on Indian lands is conditioned by the limitations tribes choose to impose. That was

the law until the mid-eighties. The 2001 case of Atkinson Trading Company said that Indian tribes can no longer be described as sovereigns in this sense.

Look at the shift with respect to tribal courts. In 1987, Iowa Mutual, civil jurisdiction over non-member activities presumptively lies in tribal courts. 2001, Justice Souter concurring in the *Hicks* case says:

> A presumption against tribal court civil jurisdiction squares with one of the principal policy considerations underlying Oliphant:

The earlier criminal jurisdiction case.

What does the present Court say about congressional intent compared to its predecessors? How do they look on the policies of this Congress? In the modern era, the period up until the mid-1980's, the Court said things like this in *Bryan* v. *Itasca County:*

> Courts are not obligated in ambiguous circumstances to strain to implement an assimilationist policy Congress has now rejected.

Look at what the Court now says. In the *Brendale* case, it said that:

> When an avowed purpose of the allotment policy was the ultimate destruction of tribal government, we can find no tribal jurisdiction.

You see, the Court in the 1970's not ready to look back at repudiated policies of Congress, and you see the Court in 1989 looking farther backward to the allotment policy as its touchstone for its decisions.

Now let's look at a couple of these recent cases and what their impacts are. The *Brendale* case, which I just quoted, involved two non-Indian landowners on the reservations. Both of them wanted to build multi-unit housing developments on the Yakima Reservation. Now the tribe, the Yakima Nation, has for many years had its own zoning laws. Later on the county adopted its zoning laws. The county, under its zoning laws, would make possible these multi-unit developments on the Yakima Reservation. The Yakima zoning regulations would not.

Now the U.S. Supreme Court decided that the applicable zoning for one of the two parcels was tribal because in this case the land of the non-Indian was located in a pristine wilderness-type area that the Court said "retained its Indian character." In the case of the other parcel, the U.S. Supreme Court said that the county could zone the non-Indians' land because in this area there had been several non-Indians move into a small town on the reservation, and that area had lost its Indian character, having businesses in it and a small airport.

In another case, the 1997 *Strate* case, which we quoted earlier, a non-Indian contractor was doing work on the Ft. Berthold Indian Reservation. The non-Indian contractor was driving down the road, and Jazella Fredericks came out of her driveway at her home. The truck hit her at a high rate of speed and did serious harm to her. She was in the hospital for many weeks, having been gravely injured.

She and her several children, all members of the tribe, sued. Now Mrs. Fredericks was not a member of the tribe. She had lived on the reservation most of her life, having been a war bride of her husband, Mr. Fredericks, a tribal member. They met in Germany,

and she came directly from her native Germany to the reservation, lived there, raised her children.

When she found that she needed the help of the justice system, she went to the Ft. Berthold justice system, and she was turned back by the U.S. Supreme Court. The Court held that the tribe had no jurisdiction because the accident had taken place on non-Indian land. What was the non-Indian land? It was a road on tribal property over which a right-of-way had been granted to the State to construct the road, non-Indian land.

Now the result would have been different, the Court said, if it was a Federal road or a tribal road, or if Mrs. Fredericks had been a tribal member. Now consider for 1 minute the plight of being a police officer or a zoning official or some other officer of the government for either the tribe or the county or the State in either of these situations. How do you apply the law handed down by this U.S. Supreme Court? It is absolutely impractical and unworkable, depending as it does on tribal membership, race of the parties, and the ownership of land.

Now consider also how all of this must look to a person thinking of putting a business on an Indian reservation or investing in a tribal business. The one thing that a business person wants in my experience is certainty. There is no certainty here, where the law depends on a complex mix of factors that the Court is continuing to articulate, such as race, tribal membership, landownership, and some unarticulated balancing of those factors.

As tribal governments look forward to trying to enhance their economies and fulfill the congressional policy of Indian self-determination and economic growth, these cases are going to be, are today, a major barrier. They are going to drive away businesses. Congress' policy of self-determination for tribes and bolstering tribal governments is being seriously eroded by this course of decision-making.

In the modern era, this period since 1958 until 1986, about when the Rehnquist Court began, the Supreme Court gave modern meaning to those old precedents from the Marshall trilogy, and it sustained tribal powers over tribal territory. During this same period, tribes enacted codes and laws. They strengthened tribal governments and built up agencies and entities to administer their laws over everything from water and the environment to business regulation.

With the help of congressional policy and congressional funding, they strengthened their tribal courts and governments. With new business activity coming in, and it wasn't just bingo parlors and casinos that are known best to the public, the cycle of poverty started to lose its grip on many reservations.

Tribally-controlled schools got new quality and accessibility to education. Now progress, admittedly, has been slow, but it has been steady, and it's been progress, to be sure, thanks to wise and determined tribal leaders, and thanks to the congressional policy of self-determination that's remained unchanged for 30 years. But all of this is now threatened by the devastating impact of these U.S. Supreme Court decisions that deny and reverse congressional policy.

The decisions are filling every gap that Congress has left. If Congress has not addressed an issue, has not spoken, the Court will enter and curb tribal powers. The activism of the Court is resulting in a new and more confused Indian policy with no agenda and no vision beyond its distaste for difference and what it considers to be race-based institutions and a commitment to protecting the powers, prerogatives, and immunities of states. The Court is ruling against tribes in case after case.

The trend in Indian law, indicated by our first chart, is explained by these broader trends that I have identified in the article, but the Court, whether purposefully or not, is advancing a kind of termination. But termination, even wrapped in a black robe, is still termination.

What surely remains of Indian law is Congress' power to legislate in Indian affairs. Just as Congress has stepped in to correct the error in *Duro* v. *Reina,* the case denying tribal criminal jurisdiction over non-members, Congress can reaffirm and clarify tribal jurisdiction and set Indian law and Indian policy back on track.

Indian rights and Indian sovereignty are essentials in a government-to-government relationship that goes all the way back to the founding of the Nation. If the Court understood this and appreciated this grounding in original intent, Indian law could be put back on track by the Court itself, but this seems unlikely. The Court's primary mission has little to do with Indian law. It will be up to Congress to reverse the trend. Thank you.

[Prepared statement of Mr. Getches appears in appendix.]

The CHAIRMAN. Thank you very much, Professor.

May I now call upon Professor Anderson.

STATEMENT OF ROBERT ANDERSON, UNIVERSITY OF WASHINGTON, SCHOOL OF LAW, SEATTLE, WA

Mr. ANDERSON. Thank you, Mr. Chairman and members of the committee. It is an honor to be here today.

I want to state for the record that I agree with everything that Professor Getches has so eloquently laid out. He's done such a good job that he doesn't leave much for his colleagues to discuss here.

But I have spent about 1 dozen years working for the American Native Rights Fund, 5 years with Secretary Babbitt at the Interior Department, and I'm now at the University of Washington, where I teach Indian law and run the Native American Law Center, which does a lot of day-to-day work with Indian tribes in the Northwest, Alaska, and around the country. I am also a member of the Bois Forte Band of the Minnesota Chippewa Tribe.

I want to talk to you a little bit about some of the particular instances where the Supreme Court's jurisprudence of late has caused real harm to Indian tribes on the ground and also created the significant potential for mischief within the executive branch.

First and foremost is the fact that for years the executive branch, States, and tribes have understood that they operate in a legal world in which Congress has the final say. The foundational principles of Indian law, that tribes have all powers except those expressly taken away, provided a baseline against which tribal leaders, their lawyers, States, and non-Indians could operate. If adjustments needed to be made or experiments were to be undertaken in

the Indian law arena, that sort of an experiment or approach could be authorized by Congress, hopefully after dialog with the affected tribal leaders and others.

The Indian Reorganization Act is a great example. Adopted in 1934 to reverse the trends of the allotment assimilation era, the terrible loss of land, the IRA stands as a bulwark against termination of tribes. Even though a termination era was undertaken in the 1950's, the IRA stood as a backstop. Many tribes are organized under the IRA.

But, more importantly than the particular provisions of the IRA, I think, is the philosophy that it sets out, and that philosophy is that in the United States there are three sovereigns, the United States, the States, and Indian tribes, and that Congress firmly supports the continued recognition of Indian tribes and the broad exercise of tribal powers through tribal courts and tribal institutions as tribes see fit.

Now when Public Law 280 was based by the termination era Congress in the 1950's, it provided states with jurisdiction over Indian reservations. Congress, mistakenly in my view, did not require tribal consent to such state jurisdiction. Congress was dealing with what was perceived as a state of some lawlessness within Indian reservations and acted in Public Law 280 to give States authority.

It was only 14 years later, in 1968, when the Indian Civil Rights Act was passed, in which Congress amended Public Law 280 to require that States who would assert jurisdiction over Indian reservations receive the consent of the tribe, receive the consent of the body with governmental authority over a particular reservation. Since 1968, no State has assumed jurisdiction over an Indian reservation.

In fact, in the State where I live, Washington State, the Tulalip Tribes recently worked with the State legislator, with the Governor of Washington State, to have the State of Washington surrender its jurisdiction over the Tulalip Reservation in favor of tribal jurisdiction. The tribe worked with Secretary Babbitt, with the county police officials, with Congress, in order to obtain funding to ensure that the tribal government could administer police protection and provide a forum for judicial dispute resolution on the reservation.

The Tulalip Tribes have a tribal court with a couple of judges, a public defender's office, a prosecutor's office, a jurisdictional arrangement with the counties and with the State that works well for all parties.

Now the Supreme Court decisions in the *Hicks* case and the *Atkinson* case severely undermine the certainty that we have, or had, that the tribe could provide justice to all parties on the reservation, at least in the civil context. The Court has indicated that tribal courts may not have authority to hear cases that involve only non-Indian parties, of which there are a significant number on the Tulalip Reservation, who may wish to use the tribal court for dispute resolution.

Now also part of the Indian Civil Rights Act were provisions of the U.S. Constitution which were placed on Indian tribes. As Professor Getches pointed out, the tribes are recognized in the Constitution as one of three sovereigns. The provisions of the Bill of

Rights are applicable to the Federal Government and to the States through the 14th Amendment. The Congress, in 1968, chose, over the objection of many tribes, I might add, to make many of the provisions of the Bill of Rights applicable to Indian tribes. That was Congress' prerogative to do so.

The Supreme Court, in 1978, when it heard a case involving the application of the Indian Civil Rights Act, a Federal law, correctly, in my view, determined that Congress had not intended to allow Federal courts to intrude on the operation of Indian tribes. Instead, the Court said, well, Congress has put in place the provisions of the Bill of Rights to some extent and made them applicable to tribes. However, Congress did not clearly authorize Federal court to hear these cases, and therefore, we're going to make these rights enforceable only in tribal court.

If Congress wishes to allow Federal courts to hear these actions, it can state so explicitly. That is as it should be. Unless Congress speaks clearly to an issue, the Court should rule that the tribal autonomy is not interfered with. We've seen a dramatic departure in just the opposite presumption taking place with the current Court, as Professor Getches has pointed out.

Third, Congress has acted in several areas to delegate Federal authority to Indian tribes. Most notably, in the Clean Air Act, Congress explicitly provides tribes with the ability to obtain treatment as a state and to set air quality standards within reservations, after going through a bureaucratic exercise with the EPA. Similarly, the Indian liquor laws are administered in tandem by the Department of Justice, the Secretary of the Interior, and Indian tribes with tribes acting to exercise delegated Federal authority under the Indian liquor laws.

The Clean Water Act provides an interesting example. It seems to me to provide for the exercise of delegated Federal authority. It has also been interpreted by the EPA to allow tribes to exercise their inherent authority over reservation lands, and EPA has taken its cue from Congress and interpreted the Clean Water Act quite liberally. It has provided tribes with treatment as a state in a number of cases, recognizing tribal inherent authority over their reservations.

The *Hicks* and the *Atkinson* cases make it appear that the EPA may have to cabin its authority and recognition of tribal inherent authority. I think that would be a tragedy if it were to do so, but many state that that may be the case.

Again, uncertainty caused by the radical shift in the Supreme Court's approach to these cases is causing many to reconsider what the baseline is anymore. I submit that this body is the appropriate one to act to correct that baseline, to reconfirm tribal authority over all land within the reservations and all people present within reservation boundaries. do, that this body has adopted a great deal of laws in the 1980's and 1990's that support and enhance tribal governmental jurisdiction: the Indian Child Welfare Act, the Indian Child Protection and Family Violence Act, the Indian Tribal Justice Act. The Department of Justice COPS Program is a tremendous success. The funding that's been provided by Congress has put police officers, tribal police officers, on the beat on reservations. It is

another example of tribes receiving that which is their due treatment under the U.S. Constitution.

The executive branch has taken notice. Now the executive branch, as I can well attest, sometimes drags its feet at implementing Federal policy. President Clinton issued executive orders on consultation with tribes as governments. President Nixon announced the self-determination policy in 1970. Memoranda on government-to-government relations and other secretarial orders that confirm and recognize the status of tribes as government sometimes seem to me as sort of a paper chase. These are exercises that are not really worthwhile.

But having been in the administration, I can tell you that the fact that the President of the United States cites the Self-Determination Act and other acts of Congress and directs career employees to consult with Indian tribes because they are governments has an important effect on the way the Government does business.

Now the Supreme Court in these cases has undermined that policy by limiting the authority of tribes over their reservations. I fear that it is possible that the executive branch will get cold feet unless this Congress steps in and reaffirms the authority of tribes in a strong baseline against which tribes, states, and Federal bureaucrats may operate.

I can't say enough about Congress' work with the Indian Self-Determination Act and the Self-Governance Act. I was looking at some statistics the other day. In Alaska, 97 percent of BIA programs are carried out by tribes; 75 percent of Indian Health Services programs are carried out by tribes. That's the case in many regions of the country.

Notwithstanding the terrible loss that Alaska Natives suffered in the *Vinatie* case, they remain governments with members and important jurisdiction. The Alaska Supreme Court, never known for its friendly disposition to Indian tribes, recently recognized the authority of tribes in Alaska to adjudicate domestic relations matters among members and non-members who consent to tribal jurisdiction, this notwithstanding the loss in the U.S. Supreme Court in the *Vinatie* case.

I tell you, it is a strange day when we look to State Supreme Courts for protection, and they look better than the U.S. Supreme Court. Yet, that is the case that we find ourselves in as a result of the Rehnquist Court's recent decisionmaking.

Similarly, when the Rehnquist Court handed down the *Seminole Indian Gaming* Case, which, in essence, made part, important parts, of the Indian Gaming Regulatory Act unenforceable, the Secretary of the Interior was able to step in with gap-filling regulations. The cases in litigation, the administration was able to respond to the Court's ruling in the best way that it could, but, again, I fear with these recent blows that have been dealt with *Hicks* and *Atkinson,* it is only Congress that can make the situation right. I urge Congress to do so. Thank you very much.

[Prepared statement of Mr. Anderson appears in appendix.]

The CHAIRMAN. Thank you very much, Professor.

If I may proceed now with questions, Professor Getches, you have suggested the Rehnquist Court is not pursuing its own Indian policy, but advancing its agenda of states' rights, colorblind justice,

and mainstream values. Now if this is accurate, how can you explain why the Court applies considerations of race and ethnicity in determining the scope of tribal jurisdiction?

Mr. GETCHES. Yes; there certainly is a paradox there, Mr. Chairman, in announcing a policy of colorblind justice and then bringing race into consideration as a major factor in its Indian decision-making, but I would see this as part of an overall effort to limit the scope of what the Court views as special rights for one minority for Indian tribes and to make sure that that realm of special rights, as they see it, doesn't include or affect any non-Indians, non-members of that tribe.

As they do that, it runs the risk of becoming, as Senator Campbell warned in his statement, tantamount to the treatment of a social club. The Elks Club or a college fraternity has the same level of "sovereignty" over its place and its members as an Indian tribe would under that kind of formulation. So, in a sense, they're making it colorblind by factoring out any residual governance that a tribe might have over people or territory that is not owned by it and members who are not participants in that tribal government.

The CHAIRMAN. Sovereignty, as related to Indian country, has been defined in many different ways. How does the Supreme Court, the Rehnquist Court, define sovereignty?

Mr. GETCHES. It seems to define it as what a tribe has, the powers that a tribe has specifically over its members. It has taken away the territorial version of that sovereignty. In quotes that we looked at earlier, the earlier courts have recognized the territorial reach of tribal powers. In fact, Justice Rehnquist himself said in the *Mazzare* case years ago, before he became Chief Justice in this earlier period I've characterized as the modern era, a term I borrowed from my colleague Charles Wilkinson, he said that a tribe has power over its members and territory, and that is language that incorporates the notions going back all the way to Chief Justice Marshall's time.

But there's been a turn of events since then. The current Court has said that kind of sovereignty, territorial sovereignty, no longer exists. That's the shift. It's just sovereignty over members and owned land, again the social club model.

The CHAIRMAN. Both of you have suggested that the Congress should do something about the present trend of the Rehnquist Court. What type of statute are you talking about, case-by-case or a statute of general application?

Mr. GETCHES. Mr. Chairman, I think that the legislation will have to address cases, or at least the outcomes in cases, that now have become generalized to all tribes. Of course, a case comes up on one reservation concerning a couple of people, and then the law becomes generalized. Congress has a great advantage in being able to step back and look at the big picture and decide what the impact on Indian country as a whole and society as a whole will be, to have hearings and participation.

I think that looking case-by-case at what's been done and seeing whether Congress is happy with those results at a generalized level is the first step. Then legislation to undue the effects of unacceptable results is necessary. This means, would man under the approach that I would recommend taking, a restoration of tribal pow-

ers in many of these instances where they have stripped away by the Court decisions.

Second, a clarification of the jurisdictional situation on reservations. Third, a reaffirmation in a more general way of the foundational principles that were the formulation of the Supreme Court itself in the past. Give them back their own rules of decision and let them know that gap-filling will be done by the Congress and not by the Court.

The CHAIRMAN. And you believe that will suffice?

Mr. GETCHES. I beg your pardon?

The CHAIRMAN. That will suffice? That would overcome these decisions?

Mr. GETCHES. Well, I think you need to start by being very specific about the principles in those decisions that need to be reversed. If, for instance, civil jurisdiction over non-members in tribal courts is to be restored, that will have to be explicit.

The CHAIRMAN. So then the law should specifically address, say, the *Hicks* case or the *Atkinson* case?

Mr. GETCHES. Well, I think the approach of Congress should address those cases. The statement of the principle should be more than a reversal of the case by citation, which in a few rare cases Congress has done. I think this is like the approach to *Duro* v. *Reina,* where the case wasn't specifically overruled, but the principle was embodied in legislation after Congress determined that it was unacceptable. So, yes, it is case-by-case, but probably without citation to or limitation to a court decision.

I know Congress did that once in the case of *United States* v. *Midwest Oil* in the public lands area, just said the case is overruled. I think more amplified and thorough treatment is needed for these cases.

The CHAIRMAN. If I may now ask Professor Anderson, do you have any personal theory as to why the Supreme Court in recent rulings seemed to ignore the stated Federal policy of self-determination and tribal self-governance?

Mr. ANDERSON. I think that there are a few reasons, a couple of which were stated by Professor Getches here. No. 1, I think that this whole notion that tribes have jurisdiction over non-members is something—and non-members who can't vote in tribal elections or run for tribal office in some cases, although a tribe can do what it wishes in terms of determining its officers might be, I think there's a fundamental problem.

Justice Souter, in his concurring opinion to the *Hicks* case, outlined that reason as one of the particular problems that he personally sees in analyzing whether or not to affirm tribal jurisdiction over non-members.

Second, my personal thought is that we don't have anybody on the Court who takes a great personal interest in these cases anymore. When Justice Brennan and Justice Marshall and Justice Blackmun were on the Court, they took it upon themselves to become scholars in this area. They cared about Indian law. They cared about Indian people and understood what was happening on the ground. I just don't think that we have anybody on the Court right now that takes that sort of an interest.

When I look at the opinions, I see them as quite superficial in their analysis. I see them letting themselves off the hook by saying, well, if we make any mistakes, Congress can just remedy them. It used to be, under the Burger Court and prior Courts, that the law would run in favor of tribes. Ambiguities, as we all know, would be interpreted in favor of Indian tribal governments, and if a Court erred in terms of recognizing too much tribal governmental powers, the Court said, well, Congress can remedy that, as it did with the Indian Civil Rights Act. So we've seen a complete reversal in the modern era.

I think it really comes down to a lack of interest and this notion that, oh, we're not going to recognize any special rights for groups, and because of the lack of interest, the Court fails to understand the governmental status, the political status of Indian tribes and treats them as a racial minority instead of as governments that they are that pre-existed the establishment of the United States.

The CHAIRMAN. Both of you have suggested that we should act on this trend. Can we impose upon both of you and call upon you for assistance in drafting appropriate legislation? We are not in the practice of overturning the Supreme Court. We have done that in some cases, like the *Duro* v. *Reina* case, but it is not common practice here. May we call upon both of you?

Mr. GETCHES. Well, in my case, certainly. I would be eager and honored, and I wouldn't consider it reversing the Supreme Court, but merely providing guidance. [Laughter.]

The CHAIRMAN. I do not think as a Member of Congress I should say that. [Laughter.]

Mr. Vice Chairman.

Senator CAMPBELL. Thank you, Mr. Chairman.

Dave, it is nice to see you again. I remember two decades ago when we worked on issues of mutual interest in Colorado, and I had great admiration for you then and still do. You have really a good heart when it comes to dealing with Indian people and Indian issues. I am glad to see you've done so well. I guess the jury's still out whether I've done well because it seems like all I do when I show up at these hearings is get mad. [Laughter.]

But, I'll tell you, when I hear comments like yours and Mr. Anderson's, I do get mad, not at you, but at the process, the way we have treated Indians in the history of this country.

It seems to me that they should have two sets of rights: that of being Native Americans as given in the treaties and that they inherit being an American, like any other American. Yet, we see a constant erosion of their rights on both sides of that equation.

Some of those, it seems to me, ought to be protected in the Constitution like anybody else. And, yet, if they were protected in the Constitution, they probably would have had the right to vote at least as early as women did in this Nation. If they were protected, truly protected, by the Constitution, I mean the basic human rights that they ought to have like anybody else, we wouldn't have the remains of 16,000 Indians warehoused in the basement of the Smithsonian, although many of them are not there now because of the work of Senator Inouye and me. As you know, under the Museum of the American Indian Act 12 years, we required the Museum to

start giving those remains back to the tribes and the families of the people they had collected.

But I point that out because I think it's clearly different than any other, if I can use the word, minority is treated in this country. Indians have made some small gains sometimes in the state courts, as Mr. Anderson suggested, and years ago a few of them in the Supreme Court. They've made a few gains here, but it seems like every time they make a gain, they lose one.

You spoke at length about termination. Both of you did. I'll tell you, of all the misguided, dumb things that Congress could have done, I guess that was the classic worst. I often think that the Termination Act, the equivalent would have been for the Federal Government to tell African Americans that we passed a law saying you're no longer black. I mean, how stupid can you get? That was a stupid act.

But we rectified that. We changed that, as you know. It's a good thing we did. It should have been done sooner. It did a lot of damage to Indian people.

But now we seem to have, for lack of a better phrase, termination by Court decree, rather than what we have done here. Maybe we're getting a little more enlightened, but we have a long way to go. I know you're aware of that, too.

But let me ask you just a couple of questions. That's our role, Congress' role. Maybe either one can answer, but let me just address it to maybe you, Dave, first of all.

How much is our fault? How much are we to blame for allowing the Court to encroach in the field of Indian affairs, a field where the Constitution, and you pointed out a number of former decisions made by the Court that I think supported the fact that the Constitution delegates affairs with Indians to Congress. Have we made big mistakes by not taking this on sooner?

Senator Inouye mentioned that we don't often get involved in this, and I agree we don't. Maybe we should have a long time ago.

Mr. GETCHES. Well, Senator Campbell, I would say, no, it hasn't been something that you look back at with regret or guilt for not wading in sooner, because who could have seen this coming? The jurisprudence of the Supreme Court has always been that, unless Congress speaks, we're going to read tribal powers as undiminished.

Now implicit in that is there might be situations where it is intolerable for tribal powers or tribal rights to exist, and that Congress will take care of that.

Senator CAMPBELL. Now it seems that if we don't speak, they do diminish them.

Mr. GETCHES. It's just the opposite now. I think that while you can't say that Congress has dropped the ball in the past, it would be a serious mistake not to wade in at this point. We're all on notice. This thing has gone on for at least 15 years, and it doesn't appear to be getting any better. In fact, every decision that comes down, as those trends indicate, show that things are getting much, much worse, and it's time for Congress to act.

Senator CAMPBELL. Well, we're doing things little by little. I'm just not sure that the courts are getting the message. During the 106th I sponsored a bill that repealed parts of the Dawes Act. That

message was really to thoroughly repudiate the allotment policy. Will things like that have an effect on future decisions, do you think?

Mr. GETCHES. Yes; they certainly should, but then one would think that the legislation that is the legacy of this committee over the past many years, and of its members and their work, and of Congress itself, one would think that that would send a clear enough message to the Court. I think that you need to stay the course on dealing with these vital issues, but be much more directive in terms of the rules of decision. There isn't another area in constitutional law that I think of where Congress' power is more clear-cut and more sweeping than in Indian affairs, and it's time to act on that.

Senator CAMPBELL. In 2000 also enacted a bill I introduced called, "The Indian Tribal Legal Systems Enhancement Act," which would help, strengthen the tribal courts. Yesterday Justice Breyer spoke at the National Congress of American Indians and noted the need for solid Indian courts. Do you think that if we continue the strengthening of tribal courts, that the Supreme Court would recognize the tribes have the ability to deal with their own problems?

Mr. GETCHES. I think it's absolutely essential that those efforts move forward. Without them, there is going to be backsliding, maybe even in a more understanding Court, one which, as Professor Anderson indicated, has a member or two who really is engaged on Indian law. Even in those Courts, if you don't have a strong tribal court system itself, the support from the Federal judiciary is not likely to be sustainable. However, it is still not enough. It is not going to be enough when you have members of this present Court talking about tribal courts as strange institutions, as institutions that have come a long way, but are still alien to many people and have their own customs and their own rules of decision that are not all written down.

Senator CAMPBELL. Has that been language that's been included in the Supreme Court's decisions?

Mr. GETCHES. Yes; it is. I could read you worse language. I've collected it all, and it's frightening. It borders on racism.

Senator CAMPBELL. When we speak of sovereignty, do you believe the Federal Government has the trust obligation to protect tribal sovereignty?

Mr. GETCHES. Does the Court have it?

Senator CAMPBELL. Do we have it?

Mr. GETCHES. Oh, definitely, the Congress is the lead trustee, if you will. I like to look at this like a bank. Congress is the bank——

Senator CAMPBELL. I believe so, too, but I think the problem we face now is the tribes in some cases feel they have no place to go. Is there anything the tribes can do if we fail in our obligation to uphold that obligation?

Mr. GETCHES. The buck stops here.

Senator CAMPBELL. It seems like I've heard that somewhere before. [Laughter.]

Professor Anderson, how can Congress—this is kind of rhetorical; you might not even answer that—but how do we get the Supreme Court to return to their former approach, assuming that tribal authority exists until it is clearly extinguished by an act of Congress?

Mr. ANDERSON. Well, I just think that you've got to act. You know, we can wait around 30 or 40 years and hope for a better Court and try to get them to discard this approach as wrong-headed. That's always possible. But unless this body acts, I just think that we're going to continue this downward spiral. I mean, it reached a crescendo last year with Hicks and Atkinson. It's been getting worse every year for the last 15, and it's time to stem the tide here.

Senator CAMPBELL. Thank you. I appreciate the appearance of both of you.

Thank you, Mr. Chairman.

The CHAIRMAN. I just have one more, but I would like to submit several other questions, if I may.

It appears, as you have pointed out, both of you, that more and more the Court seems to be applying a principle that tribal exercise of criminal, civil, judicial, or regulatory jurisdiction over non-members would be inconsistent with the domestic status of tribal governments. Statutorily, do you believe we can prevent the Court from applying this principle?

Mr. GETCHES. The powers of Congress to legislate in this area may be limited if there is a constitutionally-based decision of the Supreme Court. One such decision apparently was the Court's decision in Smith, which the Congress tried to rectify—that's the *Peyote* case—with an act that re-established the strict scrutiny test for establishment of religion cases. That was struck down by the Court itself. You tried to remedy the situation. The Court said, no, this is a constitutional matter.

But I think strictly within the realm of Indian affairs, the power is much greater. That dealt with the First Amendment and defining the constitutional powers under the Bill of Rights. But commerce clause powers belong to Congress. Even if the Court finds that constitutionally tribes never had a power, you can do it. You can restore those powers. Certainly even if a power didn't exist before, you could delegate it to an Indian tribe.

The CHAIRMAN. May I thank both of you on behalf of the committee, and we will be calling upon you for assistance, if we may.

Mr. GETCHES. Thank you, Mr. Chairman.

Mr. ANDERSON. Thank you.

The CHAIRMAN. Thank you very much.

And now we are most privileged to have as a witness the Senior Judge of the United States Court of Appeals for the Ninth Circuit, William C. Canby, Jr.

Judge it is a great pleasure and honor to have you here, sir.

STATEMENT OF WILLIAM C. CANBY, JR., SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PHOENIX, AZ

Mr. CANBY. Mr. Chairman, members of the committee, I used to teach Indian law, and in the last 20-some years I have been on the Court occasionally deciding cases of Indian law, but I have to begin my remarks by saying that I speak as a former teacher and a present student of Indian law, and I hope a scholar of Indian law, but I can't speak for my Court or the Federal Judiciary in general.

I have been asked to elaborate on some trends in the Court, and I'll try not to go over ground that has already been covered so well

by Professors Getches and Anderson. But there are two or three doctrines that the Supreme Court has evolved, and even within those doctrines, has changed over time. The present trend in use of all of those doctrines is to the detriment of tribal power.

We've already seen in the analysis of Professor Getches that there's been a reversal of the original presumption. I date it from what was a friendly decision of McClanahan back in the 1970's, where since the days of John Marshall, it had always been assumed that the States had no power in Indian country unless it had been affirmatively granted by Congress or by a treaty or something like that.

The presumption has been switched, as some of the language shown by Professor Getches indicates. So now they say, well, the state power extends into Indian country unless there's some positive law excluding it. That is a function of the last 20 or so years. Once you switch the presumption, then when you get to any particular case, the tribe tends to suffer.

I would like to emphasize most, though, the business of the Supreme Court in deciding that various powers are inconsistent with the status of the tribes as domestic dependent nations. The Court is going against the historical background that I think has already been set out for you. When John Marshall decided that the tribes were separate nations governing their own territories, territories in which the laws of Georgia could have no force, Chief Justice Marshall was acting perfectly in accord with the dominating congressional legislation of the time, the Trade and Intercourse Acts. The first one was passed by the very first Congress.

Those acts, for instance, provided that tribes could not alienate their land to others without the consent of the United States. They could only alienate to the United States. So the Judiciary and Congress were pretty much in synchronization at that time.

Then we went through the period of assimilation, and that was ended in 1934. The time of allotment ended in 1934. The time of termination came in the fifties, and that was ended, and we've already had reference to that. So by 1968, with the effective repeal of Public Law 280 by the Indian Civil Rights Act, and in 1970 by the Executive pronouncement of President Nixon, we had Congress and the Executive once again back on a historical track of protecting Indian self-determination. It's been buttressed by things like the Indian Self-Determination and Education Assistance Act.

At that time the Supreme Court was on board, too. The dominating case of that time in 1959 was *Williams* v. *Lee,* which held that, if a non-Indian wanted to sue an Indian over a transaction that occurred on the reservation, that non-Indian would have to go to tribal court. The reason that non-Indian would have to go to tribal court was that to sue an individual Indian in State court would interfere with the self-government of the tribe.

Now we have to think of what kind of an interference that is when we look at what the Court is doing today. Justice Black in *Williams* v. *Lee* said, if you take an individual Indian and sue over a private transaction, and sue that Indian in State court, that's an interference with self-government of the tribes, and it can't be done. The State court has no jurisdiction.

So the Court and the Executive and Congress were really quite in agreement as of, say, 1970, and then it began to deteriorate with Oliphant in 1978, when it was held that tribes had no criminal jurisdiction. Why? Well, Oliphant went through some Federal statutes and made an argument that was perhaps at least arguable that they seem to assume that the tribes wouldn't be exercising jurisdiction over non-Indians.

But the Court didn't really base its decision on those statutes at all. It says, well, exercise of criminal jurisdiction over non-Indians would be inconsistent with the status of the tribes as domestic dependent nations.

Now Chief Justice Marshall had announced two disabilities of dependent status. The tribes could not alienate their lands to others than the Federal Government or with the consent of the Federal Government, and this was in line with the congressional policy of protecting the Indian land base from erosion by aggressive States and State citizens.

And the other, which seemed to be almost necessary once the tribes were engulfed within the United States, was that the tribe lost control of external relations. And what did they mean by that? They meant the tribe, an Indian tribe, could not make a treaty with Germany or France. They lost their power over external relations in the international foreign relations sense.

Justice Marshall said, well, if a foreign power tried to make a treaty with an Indian tribe, we might well consider that an act of war as a nation. Well, we still hear the phrase from the Supreme Court today that the tribes lost power over external relations, but what they now mean is that the tribe can only deal with its own members on its own land. It means that they can't deal with a non–Indian who's in Indian territory doing things there and is brought into tribal court. That is not an external relation within John Marshall's view of domestic dependent status.

Well, once this line was broken and Oliphant invented a new limitation on tribal status because of domestic dependent status, it's an unbounded category. Any time the Court is suspicious of a tribal power and decides to strike it down, it can simply say it's inconsistent with domestic dependent status.

The list is long. *Rice* v. *Rehner,* the tribes lack status to adopt a preemptive liquor licensing law, of all things. Strate, they lost the power to adjudicate accidents that occur on a public right-of-way within the reservation that's on tribal land when non-Indians were the parties.

Then we have Atkinson, the taxation of non-Indians on fee land, and *Hicks* v. *Nevada* just last term, where State officers enforcing a search warrant were held not to be subject to regulation by the tribe, even when they're executing a warrant against an Indian on Indian land, on Indian-owned land.

Well, the key case that the Supreme Court is using when they invoke these doctrines now is Montana against United States, which was decided in 1981. The Court now considers that the fountainhead of its jurisprudence.

When Montana came down, most of us didn't get too excited. It seemed to create a small exception to what we all assumed was the power of the tribe to exercise regulatory jurisdiction over its whole

reservation, fee and non-fee, Indian and non-indian. The exception? Well, when a rancher owned his own ranch, he could go out and hunt birds or deer on that ranch, and the tribe wouldn't be able to regulate it.

Well, that seemed like a small exception, and even that exception had exceptions. If it affected the welfare of the tribe, they talked about the internal relations, the self-government, but also the health or welfare of the tribe. If the non-Indian conduct, even on fee land, affected the welfare of the tribe, then the tribe would be able to regulate. That's the way Montana was read by most of us.

It also had language, however, which talked about the tribal power really is over Indians and isn't really aimed at non-Indians. But the holding was rather narrow. But as has happened in almost every case since Montana, the most pernicious language in the opinion becomes the deciding point in the next case. Montana was an exception. We all saw it as an exception.

Well, what happens is Montana becomes not the exception, but the rule. The rule is that tribes are presumed not to have regulatory power over non-Indians.

Well, that wasn't the holding, but it has become the rule that people talk about. So when we get to Strate, we have Justice Ginsburg saying, well, we've got to interpret very narrowly the exceptions to Montana because, if you interpret the effect on welfare broadly, it would swallow the rule. Well, this ignores the fact that Montana was supposed to be an exception to a rule.

What happened now, by interpreting the Montana exceptions, the exceptions to Montana narrowly, Montana has become the exception that is swallowing the rule, the rule being that tribes have power over their own territories and the people within it.

Well, Strate, for instance, admitted that those who drive carelessly on a public highway running through the reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule, and so on. Well, of course, there is an effect on the tribe when people race down the highway right through the reservation on tribal land.

The last two cases, *Atkinson* and *Nevada,* make me wonder, as I do in my written testimony, whether the Court fully understands the impact of its decisions in Indian country. In Atkinson the Navajo tribe, which provides services to the trading post on fee land that is surrounded by an within the reservation can't impose a hotel tax. Well, there are small tribes, for instance, whose primary income, or a very substantial part of it, comes from taxing railroad property that goes through a right-of-way over Indian land. Has it lost its primary tax base? Remember, Strate now says right-of-way is just like fee land, and Atkinson says, well, you can't tax non-Indian things on fee land.

Well, this is a very, very disruptive decision. It is a judicial construct. It comes from nothing Congress has said. It isn't consonant with Congress' view that tribes are self-governing bodies with control over their territories.

The same with Nevada against Hicks, I wondered if the Supreme Court, when it decided Nevada against Hicks, wondered why when State officers went to a State court in Nevada and asked for a

search warrant to be executed against an Indian on Indian land within a reservation, the State judge said, well, I can give you a search warrant, but it's no good there; you will have to go to tribal court. That State judge did what, to my knowledge, every State judge that I know in the West would have done, was to say, sure, I can give you a writ if you want, but it doesn't run on the reservation against an Indian.

So the State officers did what is not at all unknown. They went to the tribal court and they got a search warrant, which isn't hard to do and it wasn't hard to do in Hicks. They then went to execute it. Unfortunately, they allegedly exceeded the scope of it and caused some damage to property, and so on.

But all of this, if you take the rationale of the Supreme Court in deciding Hicks, that State judge was just engaged in a nicety. There was no necessity for that. The tribal officers could have walked right onto tribal land. They didn't have to notify anybody. They could exercise their search warrant just banging on the door, as they would off reservation, without saying "boo" to anybody. That's the rationale of Hicks. That's the law of Hicks.

Well, they even drop a footnote dealing with, in either Atkinson or Hicks, I believe it was actually Atkinson, where they drop a footnote saying that, well, we wouldn't want the reservation to become a haven for criminals, and they refer to an old 1970's case from the Ninth Circuit which deal with extradition from the Navajo Reservation, and it didn't permit extradition because the Navajos did not have an extradition treaty with Oklahoma, as they did with Arizona, an extradition agreement.

Well, several of the tribes, many of the tribes have extradition agreements, either informal or formal, in my part of the country. Those were worked out over a long period of time. Under Hicks, it's so much waste paper and waste effort. If the State of Arizona wants an Indian who has committed a crime off reservation, under Hicks it can just go in and arrest him, get an arrest warrant from a State court. They don't have to ask a tribal court. They don't have to ask a tribal government. They don't have to ask anybody. They can just go in and make the arrest, if you follow Hicks.

Well, this has upset settled expectations in Indian country in a way that I suspect even the members of the Supreme Court may not fully understand; I don't know. But if you look at Hicks and Atkinson, Atkinson particularly, which says that certainly the Cameron Trading Post has an impact on the tribe—I mean, it costs some fire and police protection, and so on—but it doesn't threaten the very viability of the tribe. So it doesn't interfere with tribal self-governance.

In Hicks, Justice Scalia has said, well, this doesn't fall within the second Montana exception because, with the exception that says that if it affects the health and welfare of the tribe, then the tribe can regulate it, it doesn't fall within that exception because the state's interest in enforcing the law is very strong. Well, they're supposed to discuss the tribal interests when you decide whether something affects the health and welfare of the tribe, not just the state interest, but the Supreme Court did not do that.

Indeed, if you look back at *Williams* v. *Lee,* suing an individual Indian on a private contract in State court was considered an im-

permissible interference with self-government. Now we've moved to where you can have an impact on the fire services, the police services, you can endanger the tribal members on the highways, and none of that has an effect on the tribe because it doesn't threaten the very existence of the tribal government. That's just much too strong a test, and it's an evolution of a test that the Supreme Court has used. It is certainly not in—it does not come from anything Congress or the Executive has ever done.

I know that we are getting pressed for time, and I will only refer briefly to the rest of my testimony. That had to do with when this committee and Congress corrected the result of *Duro* v. *Reina* and referred to the inherent authority of tribes to exercise criminal jurisdiction over non-member Indians.

The effect of that came to an en banc decision of my court to consider just how that worked out. All 11 members of the court said that, well, this was really an adjustment of the Supreme Court's view of history or it was not necessary to adjust it. Either way, the tribe was exercising its sovereign power after this act, and so there was no double jeopardy problem.

The important point for the purposes of today, however, is that all 11 judges—there was no dispute—all 11 judges had no difficulty with the idea that this body has the ultimate power to decide what jurisdiction the tribes have, and the fact that there's been a Supreme Court decision which was overruled by this body is simply business as usual, because in non-constitutional matters the Supreme Court is simply operating until Congress speaks, and Congress had spoken. There's no question now that the tribal courts have that power, and the Supreme Court denied review of that 11-judge decision.

So I believe that my view is much in accord with that of the first two witnesses. The trend of Indian decisions in the last 15, possibly to 20, years has been seriously out of synchronization with that of the Congress and the executive branch.

I thank the committee for permitting me to address them.

[Prepared statement of Judge Canby appears in appendix.]

The CHAIRMAN. I thank you very much for your learned and scholarly explanation.

If I may, I would like to ask the same question I asked of Professor Getches. You spoke of the principle that the Court, the Rehnquist Court, has been applying, that tribal governments have lost governmental powers because the exercise of these powers would be "inconsistent with their status as domestic dependent sovereigns."

Can Congress statutorily prevent the Court from applying this principle in future cases?

Mr. CANBY. Yes; I think it could. It is hard, I suppose, to have legislation which simply says that there's some sort of a principle that cannot be applied, but you can have legislation that's clearly inconsistent with the principle and the Court would be forced to follow it.

For instance, there could be legislation stating specifically in some of the same areas that the Court has been making decisions in, that the inherent power of the tribes include, and then name things that the Court has said were inconsistent. Congress can an-

nounce that they are, indeed, consistent. That is much in the manner of what Congress did after *Duro v. Reina.*

I don't see this, incidentally, as a battle between Congress and the Court at all. The Court has never purported in any of these decisions except the Smith religious decision to be announcing constitutional policy. There are several points in these decisions where they say, in the absence of acts of Congress, and what they mean is a specific act of Congress on this very point. In the absence of an act of Congress, then we decide this. In the absence of an act of Congress, the tribes cannot exercise jurisdiction, criminal jurisdiction over non-member Indians. Well, then there was an act of Congress, and the Court has yielded to it.

I think that if this body chooses to overrule decisions of the Court, it's not something that the Court would view as an interference with its business because it recognizes the plenary power of Congress in this area.

The CHAIRMAN. Does the Constitution of the United States explicitly grant or vest the Supreme Court with authority to change the legal status of Indian tribes?

Mr. CANBY. Well, no, it certainly doesn't explicitly vest that authority in the Supreme Court. There has been a long tradition, however, from Marshall of the Court's deciding what the status of the tribe is when a decision requires it. In other words, when there is a dispute before the Court that turns on the capacity of the tribe, then the Court might have to decide its view of the status or the capacity of the tribe, but it would certainly be subject to any directions Congress gave.

The CHAIRMAN. Judge, I thank you very much.

Mr. Vice Chairman.

Senator CAMPBELL. Thank you, Mr. Chairman. Thank you.

Judge Canby, do you think your colleagues on the Federal Bench would be opposed to legislation that expanded tribal court jurisdiction over non–Indians if it allowed some form or review or appeal in the Federal courts?

Mr. CANBY. No; I don't think they would be opposed. They might well go take the position that it's really up to Congress to decide and we will exercise jurisdiction and we will recognize tribal jurisdiction whenever the Congress pleases.

Senator CAMPBELL. Second, it is my understanding that Federal law requires Federal courts to implement arbitration decisions even if the Federal courts disagree with the result reached by the arbiters and even if they think the arbiter applied the law incorrectly. Could Congress require the Federal courts to implement tribal court rulings in a similar manner?

Mr. CANBY. I don't see why they couldn't. I haven't thought about that, but we certainly would have, I would think in reviewing a tribal court decision, as we now do in habeas corpus under the Indian Civil Rights Act, we give the same kind of deference, I believe, to a tribal court decision that we would have to give to a State court decision, if we were exercising habeas jurisdiction, which is a very deferential standard of review. Findings of fact by that Court, for instance, normally don't get re-examined.

Senator CAMPBELL. Thank you, Mr. Chairman. No further questions.

The CHAIRMAN. Thank you very much, Your Honor.

Mr. CANBY. Thank you, Mr. Chairman. Thank you, members of the committee.

The CHAIRMAN. Now may I call the chief justice of the Navajo Nation Supreme Court, Robert Yazzie; the chief justice of the Supreme Court of the Wind River Reservation of Wyoming, John St. Clair, and the chairman of the Jamestown S'Klallam Tribe of Washington, W. Ron Allen.

Now it's my great honor to call upon the chief justice of the Navajo Nation Supreme Court.

STATEMENT OF ROBERT YAZZIE, CHIEF JUSTICE, NAVAJO NATION SUPREME COURT, WINDOW ROCK, AZ

Mr. Yazzie. Chairman Inouye and Vice Chairman Campbell, and the working staff of this committee, I appreciate the opportunity to speak to this committee on the effect of recent U.S. Supreme Court rulings on the Navajo Nation and its legal system. A copy of my entire comments has already been submitted for the record. So I will quickly give a summary of the Navajo Nation's concern.

The rulings have caused many problems. Neither Indians or non-Indians have a clear understanding of what happens when someone commits an act or causes harm in Indian country, and victims of crime are helpless because of the failure of Federal prosecutors to prosecute. One of the problems from the rulings is that the docket of the Navajo Nation Supreme Court is crowded with jurisdictional challenges.

Another, businesses with right-of-ways or leases of Navajo Nation land, such as utilities and pipeline, are now claiming that the Navajo Nation has no authority to regulate or sue them. Navajos are being denied the right to access to our courts when they are involved in motor vehicle accidents or incidents on highway rights-of-way across Navajo Nation land.

Even though Congress dealt with the issue of criminal jurisdiction over non-member Indians, Russell Means continues to challenge this congressional action and our authority to deal with family violence by non-Navajos.

A non-Navajo sued the State of New Mexico and the Navajo Nation over a civil traffic ticket for speeding and resisting arrest by a Navajo Nation police officer cross-deputized as a State law enforcement officer. Now even the BIA's putting forward cross-Commission agreements with state law enforcement agencies without our input.

Last November a member of the Hopi Nation was arrested for possession of unlawful weapons and the possession and distribution of liquor, but we have no jurisdiction because the arrest was done on a highway right-of-way within the Navajo Nation. The defendant is currently challenging Navajo jurisdiction.

State police officers are entering the Navajo Nation and engaging in misconduct or violations of the Treaty of 1868. One situation involved a high-speed chase that resulted in a death. County deputies are entering the Navajo Nation to siege license plates without a hearing, and they are attempting to arrest Navajos for crimes committed outside the Navajo Nation without following Navajo extradition laws.

Navajo trial courts are being sidetracked from the nuts-and-bolts of deciding cases because of the large number of jurisdictional challenges. Creditors are now saying, "We do not need to follow Navajo Nation consumer protection laws."

In sum, recent U.S. Supreme Court decisions have made it impossible to maintain a functioning civil government in the Navajo Nation to safeguard the public.

We are all concerned of the way things have changed after September 11, 2001, but you may not be aware of the consequence for Indian country. The U.S. Department of Justice has released reports on the fact that crimes in Indian country are far higher than other parts of the United States, and domestic violence in Indian country is out of control.

Given decisions of the Federal Bureau of Investigations and the U.S. Department of Justice to make the war on terrorism and homeland defense priorities, I am concerned about our power to punish and our power to prevent crime. The ability of Indian nations to effectively exercise jurisdiction and to address crime and social problems must be maintained.

There are also fears expressed by the U.S. Supreme Court about whether tribal courts can and will protect individual civil rights. Mr. Chairman, Mr. Vice Chairman, I give you my assurance that the courts of the Navajo Nation can and do provide individuals these protections.

One controversial issue is that tribal courts do not appoint counsel for indigents. This is not true. We have a law for appointing counsel that fully complies with the Federal constitutional standard that an indigent must have counsel if there is a likelihood of a jail sentence.

Non-Indians challenge the fairness of Indian customary law. Non-Indians assume that traditional Indian law is some kind of mystery, something to be feared. In our legal system decisions are written in English, in plain words, the commonsense nature of Navajo commonlaw. The Navajo Nation Bar Association has 400 members. They are required to learn Navajo common law. Many nonIndian lawyers appear before the Navajo Nation courts and administrative hearing officers, making arguments in Navajo, using Navajo commonlaw.

The lack of jurisdiction to regulate activities and to hear a case because one or both of the parties are non-Navajo or the activity or event took place on lands that may or may not be Indian country is a nightmare. The Navajo Nation legal system is open, visible, and easy to understand. Under the Navajo Nation Bill of Rights that predates the Indian Civil Rights Act, all protections of the U.S. Constitution are available.

Recent rulings of the Supreme Court are not grounded in the Constitution. In fact, the U.S. Supreme Court has openly invited Congress to clarify these jurisdiction complexities. It is time for Congress to act.

The Navajo Nation asks this committee today to commit itself and the Congress to work with Indian nations to resolve these jurisdictional problems by legislatively recognizing and affirming the inherent authority of Indian nations to regulate the activities of all

individuals within their territorial jurisdiction. The Navajo Nation is committed to do just that. Thank you.

[Prepared statement of Justice Yazzie appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Chief Justice. I can assure you that the chairman and the vice chairman of this committee will do everything possible to address the problems that you have cited. However, I cannot speak for the Congress of the United States, but we will do our best to convince them.

Now it is my privilege to call upon the chief justice of the Supreme Court of the Wind River Reservation, Chief Justice John St. Clair.

STATEMENT OF JOHN ST. CLAIR, CHIEF JUSTICE, SUPREME COURT OF THE WIND RIVER RESERVATION, FORT WASHAKIE, WY

Mr. ST. CLAIR. Good afternoon, Chairman Inouye, Vice Chairman Campbell, and distinguished members of the Senate Committee on Indian Affairs.

Thank you for the invitation to come before you today to talk about a topic that has a major impact upon Indian tribal governments. My name is John St. Clair. I'm the chief judge and chief justice of the Shoshone and Arapahoe Tribal Court located in west central Wyoming. I'm an enrolled member of the Eastern Shoshone Tribe. I'm also a licensed attorney. I have been in that position since 1983. I'm also on the board of directors for the National American Indian Court Judges Association.

The Wind River Indian Reservation is approximately 3,500 square miles in area, and it's inhabited by approximately 12,000 members of both tribes, plus other Indians living within the exterior boundaries. In addition, there are about 25,000 non-Indians.

The Shoshone and Arapahoe Tribal Court, through a comprehensive law and order code, extends jurisdiction over all persons who have significant contacts with the reservation and over all Indians who commit offenses that are prohibited in the law and order code. It consists of a chief Judge who must be a professional attorney and three Associate Judges. There is an appeals court that consists of remaining judges who did not sit as trial judge.

Jurisdiction is limited by applicable Federal law. Total caseload for 2001 was approximately 3,500 cases.

The recent U.S. Supreme Court decisions have become a major concern for the tribes due to their intensified passion to limit the sovereignty of tribal governments. As stated before by the other witnesses, tribes have lost, between 1990 and 2000, 23 out of 28 cases argued by the U.S. Supreme Court.

Beginning with *Oliphant* v. *Suquamish Tribe* in 1978, the tribes held by implication for the first time, the Court held that tribes are without inherent jurisdiction to try non-Indians for crimes. From this case, a new doctrine has emerged that tribes lack certain powers that are inconsistent with their dependent status, even when Congress has not acted to terminate those powers.

This new doctrine has been extended to the civil area, the regulatory area in *Montana* v. *United States* and the adjudicatory area in *Strate* v. *A–1 Contractors;* recently, in *Atkinson Trading Post* v. *Shirley* to a hotel occupancy tax imposed by the Navajo Nation.

The most recent extension was mentioned before, *United States* v. *Hicks,* where was held that tribes lacked jurisdiction over civil suits against State officials for violating the rights of Indians on Indian land within a reservation.

The impact of Oliphant and its progeny on the powers and authorities of Indian tribal governments is that it severely restricts the ability to exercise basic regulatory and adjudicatory functions when dealing with everyday activities on reservations. When both Indians and non-Indians are involved in domestic violence, alcohol and/or drug-related disturbances, or other criminal activity, the tribes can only adjudicate the Indians while non-Indians, even when detained and turned over to State officials, go unpunished. This double standard of justice creates resentment and projects the image that non-Indians are above the law in the area where they choose to live or choose to enter into.

The effect on tribes of not being able to regulate taxing, hunting and fishing, the environment, zoning, and even traffic places limitations on economic development and self-sufficiency. Without the ability to generate revenues to fund basic governmental functions, tribes become more and more dependent upon Federal grants, contracts, and compacts as a sole source of funding. This results in increased economic burden that ultimately falls on the Federal Government.

Now tribal courts constitute one of the front-line institutions that are involved in issues involving sovereignty. While charged with providing reliable and equitable adjudication of increased numbers of criminal cases by both Indians and non-Indians and complex civil litigation, tribes are increasingly underfunded.

Tribes and their courts also agonize over the same issues that Federal and State courts do, such as violence against women, sexual abuse of children, alcohol and substance abuse, gang violence, child neglect, pollution of the air, the water, and the earth. These are just some of the common, yet complicated, problems that arise on Indian reservations.

These vast panorama of cases handled by the 500-plus courts, Indian courts, would significantly increase the caseloads of Federal district courts and also state courts, if they chose to exercise this jurisdiction. This would not only increase the caseloads, but increase the cost to Federal and state courts and result in major budget shortfalls.

This recent trend of the U.S. Supreme Court toward judicial termination poses the greatest threat to tribes since the allotment era of the 19th century and congressional termination of the mid-20th century, and it runs counter to the proclaimed Federal policy of self-determination that has repudiated the allotment and the termination policies.

The third sovereign, America's third sovereign, the Indian tribes occupying Indian country, have come before you today to ask that you utilize the plenary power of Congress found in the Indian commerce clause, Article I, Section 8, Clause 3, of the U.S. Constitution and request that you restore and reaffirm the inherent and regulatory adjudicatory authority of tribes over all persons and all land within Indian country as defined in 18 U.S.C. section 1151. This approach would place the exercise of jurisdiction in the hands of

the tribes and the extent of it within their organic and case law, making it a question of tribal law.

I want to also add that recent Supreme Court Justices have invited Congress to rectify these decisions that diminish tribal sovereignty through legislation. Just the other day, Justice Breyer in a speech invited Congress to act.

A recent Supreme Court case that was requested to go to the Supreme Court was denied certiorari, *United States* v. *Enas*. This case affirmed the Duro fix legislation and let stand that legislation. So today we ask that Congress go forward with this legislation and take the same or similar approach that was done in the Duro, the so-called Duro fix.

Again, I want to thank you for this opportunity that you provided to my tribes and to all Indian tribes today together. Thank you.

[Prepared statement of Mr. St. Clair appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Chief Justice.

May I now call upon Chairman Allen. It is always good to have you here, sir.

STATEMENT OF W. RON ALLEN, CHAIRMAN, JAMESTOWN S'KLALLAM TRIBE, SEQUIM, WA

Mr. ALLEN. Thank you, Mr. Chairman. It's always an honor to be before this committee. It's disappointing that we have to be here with regard to a matter that makes our hearts heavy.

For the record, I am Ron Allen, chairman for the Jamestown S'Klallam Tribe, a signatory to the No-Point Treaty in Washington State. I'm here as a former president and first vice president of the National Congress of American Indians. In that capacity, I am cochairing, along with the president of the Navajo Nation, a National Tribal Task Force to propose some options and approaches to deal with what we believe are clear attacks of the Federal court and Supreme Court system on tribal sovereignty and tribal jurisdiction.

Because of the *Hicks* and *Atkinson* case, the tribes definitely came together to start deliberating on what is it we can do. As a former NCA officer, I joined in this effort to crisscross Indian country, because of the profound concerns of the tribal leaders, our lawyers, our counsels, and our people regarding the future of our governments, our reservations, and the welfare of our communities.

The speakers before me have provided you a great deal of details and examples of Indian law, the background of the tendencies of the Supreme Court and Federal court system with regard to Indian law. Suffice it to say that I and my colleagues clearly believe that, as a basic principle, the treaties, the Constitution, Federal Indian law has made it quite clear: Indian governments are supposed to be provided the authority, based on our sovereignty, to govern ourselves, to provide for the needs of our people, and to protect our cultures, our unique ways of life that are very unique to our society.

There's over 560 American Indian and Alaska Native nations across the United States, and our ways of life are very unique. We believe that the fundamental rule of Indian law is that we retain our inherent sovereignty and that we have that authority.

So as we're moving forward and engaging in discussions with this committee and the Congress, the question becomes: Where are we going and what are the problems that we have to face? As a tribal politician, I'm not a lawyer nor am I a justice. That's not our duty. Our duty is to provide leadership for our community. Our duty is to establish the laws for our communities, so that we can have order over how our communities are going to advance. Our duties are to be able to advance the goals of our communities and to utilize the opportunities that the Congress is making to help the tribes become more self-sufficient and self-reliant, based on our own laws and our own rules and our own value systems.

There are a lot of laws that have been passed over the last number of years, and many of them have been constructive, but many of them have been counterproductive with regard to advancing those goals. When Public Law 280 was passed, many people would argue that it had pluses and minuses with respect to the various Indian communities.

But there's been a basic concept with regard to these laws and the principles of the Congress, and that is that they respected tribal sovereignty, that they respected the responsibilities of the tribal governments, and that the tribes have jurisdiction over our lands, unless Congress is attempting to revise that authjority or modify that in any way.

The string of court cases that has emerged from the Supreme Court, from back in the *Oliphant* case to the *Montana* case, *Atkinson* case, and so on, certainly is providing us some great concerns. The *Atkinson* case with regard to, can we tax? And it's saying absolutely not, you cannot tax non-Indian businesses on Indian lands. Where historically you looked at what Congress has established through treaties with Indian nations, provided a preservation of certain lands that the tribes have reserved, and then the Congress created some complications, the Dawes Act. Subsequently, the Dawes Act created all kinds of new problems with the checkerboard reservations, and so forth, and the slow erosion of those reservations, but we believe that it didn't change our authority over the activities within those reservations or the right that we preserved in our treaties.

But these cases now are redefining that matter, and it is also redefining the current objective of the Congress to preserve the self-determination and self-sufficiency goals of the tribes. If the Congress says, you need to become self-sufficient but we can't tax, where does Congress think that we're going to start getting revenues? If the Congress doesn't believe that—or if the Court starts saying that we can't provide order within our reservation borders, how are we going to invite investors to come into our reservations and invest, if they feel that they have no due recourse or they have no confidence over the order that is supposed to be maintained within the reservation borders?

Based on the way the Supreme Court decisions are heading, we are supposed to govern our reservations, but we can't prevent non-Indians from committing crimes; we can't regulate matters that affect our communities, including zones. We can't tax Indian businesses, and yet we're still providing road maintenance and water services, law enforcement, that provide some sort of order and

other fundamental domestic services that are made available to all members, Indian and non–Indian alike. Yet we have no revenues for those fundamental services that we are providing.

Now some attorneys might say that, well, these cases aren't as bad as you think, that we still are preserving our governmental authority. We believe that these cases are creating a great deal of uncertainty. We believe that it is clearly eroding the tribe's authority, and that it is absolutely contrary to the treaty commitments and the current modern laws and commitments of Indian nations to empower our tribes to take care of our communities and move our agenda forward.

We believe it is not taking into consideration the problems that we have that this Congress and past administrations have recognized that we have many problems. So if we have domestic problems, as provided by the Supreme Justices, we have a domestic violence problem with a non-Indian beating up an Indian woman, which we know is a common problem that we have throughout our communities, but we can't do anything about it. So what are we to do? The courts come to us, our courts come to us as politicians and say, "What are we going to do about this?" So we have some serious problems.

Are the county governments or State governments going to help out? No, they're not. They have other priorities. They have no interest in spending their resources to deal with the problems on Indian reservations, and the attitude has not been very encouraging over the years, even though in some areas you will see some constructive success that is going on.

The Hicks case makes it even worse. You know, obviously, that creates even a greater concern to us over what the *Hicks* case does. In our opinion, it creates a lot of chaos and a lot of disorder in our communities.

We can give you example after example of where there are State and county enforcement officers who would just love to come on and just not even respect the tribal courts and enforcement systems with regard to matters that they believe that they have to enforce their laws on tribal lands.

So our concern is, what are we going to do? How are we going to fix this? Now, you know, based on our simple little knowledge of civics, understanding how this Government works, our understanding is that Congress makes the laws, the administration enforces, carries out the laws, and the courts interpret whether or not anybody is complying with those laws and those commitments, including the treaties, which we understand is the supreme law of the land in this country with regard to Indian affairs.

So if the Court is now interpreting these laws and they're now interpreting in a way that is eroding the fundamental historical, legal, and moral commitment to Indian nations, then where do we go? We believe that it is the responsibility and duty of the Congress as the ultimate trustee to assist the tribes in reaffirming our sovereign authority. The lands that we preserved is for our people and our cultures, and the laws that we have been establishing, the ordinances for order in our communities are for the purposes of the welfare of our future children. We need to have order. We need to have respect for those laws.

So we're asking this Congress to move forward. Our tribal leaders are gathering to organize methodically and deliberately, crisscrossing the Indian country, for a solution that we would like to offer to this committee and to this Congress to help correct this problem. We look forward to your help. We have appreciated your support, and we hope that we can come back to propose a piece of legislation that will correct the errors and misunderstandings of the Supreme Court. Thank you, Mr. Chairman.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Chairman.

Chief Justice Yazzie, you have testified that, as a result of the Supreme Court's decision in the *Strate* case, utility companies are now challenging the Navajo Nation's jurisdiction over the rights-of-way. Am I correct to assume that these rights-of-way were granted to these utility companies by the Navajo Nation?

Mr. YAZZIE. Yes.

The CHAIRMAN. That you could have turned them down?

Mr. YAZZIE. Well, at the time the Navajo Nation did not foresee any problem as a result of granting these rights-of-ways as they do today.

The CHAIRMAN. But if an application is made today by a utility company, you can deny that application, can't you?

Mr. *Yazzie.* If that's the position the Navajo Nation wishes to take, that is correct. There's a big concern about jurisdictional challenges granting States rights-of-way, affects the economic stability of the Navajo Nation. The challenge jeopardizes the Nation's ability to tax, and taxing is very crucial to providing essential governmental services.

The CHAIRMAN. Now you have indicated that the Navajo Nation provides services to these utility companies, such as fire protection, police protection, et cetera?

Mr. *Yazzie.* Yes; the Navajo Nation does provide emergency services in case of accidents, services such as medical, fire protection, and police services to both Indians and non-Indians.

The CHAIRMAN. And they are refusing to pay for those services through taxation?

Mr. *Yazzie.* To our knowledge, that's the case today.

The CHAIRMAN. Now you have also stated that county police officers are now entering the Navajo Nation and confiscating State license plates from vehicles owned by Navajos. Do county police officers provide Navajo Nation with any notice before they enter Navajo Nation or do they just drive in?

Mr. YAZZIE. To my knowledge, if there is a notice to confiscate a license plate, the notice would go to the individual. As far as I know, if the license plate is taken away, Navjos may not have the ability to challenge or even appear in attempting to get their license plates back. Today we have unemployment rate of 60 percent. Most Navajos have no steady income. It takes money to hire an advocate to handle these kinds of matters. An individual would have to go before the State, and it takes money to do that. Most people do not have the job and most people cannot afford legal services to do just that.

The CHAIRMAN. So no notice is provided to you?

Mr. YAZZIE. To my knowledge, I have not seen any cases, but if there's ever to be one, that challenge will probably go to the courts. More then likely, State courts.

The CHAIRMAN. Navajo Nation law enforcement officers, police officers, are they subject to civil suits if they detain a non-Indian or non-member in a domestic violence case or alcohol or drug-related disturbance?

Mr. YAZZIE. In the Navajo Nation, if officers cause an injury, while acting under Navajo law, they would be subject to the Navajo Nation jurisdiction; therefore, subject to suit. But if the Navajo Nation police officer were acting under State law, then the State would have to determine whether the Navajo police officers acted under the color of State law.

There was such a case in 1998. A non-Indian was arrested for civil traffic violation, and the non-Indian told the Navajo police officer, "You don't have jurisdiction over me," and he resisted arrest. He was arrested and taken to State facilities. The non-Indian challenged the jurisdiction of the Navajo Nation, and the New Mexico court of appeals dismissed the action, saying that there was no State action pursued by the Navajo police officer, and also the Navajo Nation is also immune from suit.

The CHAIRMAN. Thank you very much. If I may ask Chief Justice St. Clair, we speak of tribal sovereignty at every hearing, every meeting. Does the tribal judiciary or the system of courts play an important role in sovereignty?

Mr. ST. CLAIR. I believe it's one of the most important roles of tribal government because it deals with the day-to-day activities that occur within the reservation. The tribal court interprets the tribal law and the tribal custom of the tribes. The judiciary provides a forum for establishment of membership. Paternities are brought into our court system, so that the process of enrollment is enhanced or carried forward.

Should the court not exist, I believe it would be a case where there would not be equal protection of the laws because, if an incident occurred between an Indian and a non-Indian, an accident or whatever, the Indian would have to sue in state court. The State courts in Wyoming today, just the past month or so, they're still trying to get more Indians for their juries, and there's an issue of whether they have enough Indians on the juries even for the cases that occur off the reservation. So they're struggling with trying to provide equal protection in their courts, and it would be even worse if they had to hear the cases from the reservation or if they had to go into the Federal courts.

But I believe the tribal courts are a front-line institution that deals with these conflicts that occur between individuals and between individuals and society, that arise on a day-to-day basis, especially domestic violence, drug- and alcohol-related incidents, which are on the rise. The recent statistics indicate that Indian reservations are the one area where crime has arisen within the past few years as compared to the state and Federal areas.

The CHAIRMAN. In other words, you are stating that if your governmental powers were taken away from you, self-determination and self-governance would be just a sham and worthless and meaningless?

Mr. ST. CLAIR. Correct. Government without a judiciary really wouldn't be a government at all. If you can't adjudicate matters that occur within the area you live, you can't regulate those, commercial dealings would be—there wouldn't be any place for contracts that are made by the tribe and with businesses that come on the reservation to be heard. They would have to be taken into State court. Many times the tribes in the State courts, they're reluctant to take their cases in there. For the court to interpret these, I believe that the tribe and the business, if the court was fully funded and a stable institution, it would provide a forum and a stable forum for those business contracts or incidents that occur as a result of business activity to be heard right there on the reservation.

The CHAIRMAN. You have indicated in your testimony that non-Indians on your reservation consider themselves to be above the law. Are you suggesting that, as a result of these Supreme Court decisions, the level of criminal activities among non-Indians has gone up?

Mr. ST. CLAIR. Yes; I think just crime in general, whether it's Indians or non-Indians, has arisen on reservations. When an incident does occur, even if there is an extradition procedure or agreement or a law enforcement assistance agreement between the tribes and the county or the State government, that just deals with how to handle the incident on the scene. It doesn't deal with adjudication. Most of the time, once that is completed, the non-Indian is not prosecuted. So the result is that only the Indian people are prosecuted.

In the civil area, without having jurisdiction over or being limited to the Montana test, to exert jurisdiction as it now is, the non-Indian is at an advantage because he could take the Indian into either the tribal court or the State court, whereas the Indian can only take the non-Indian into the State court, but not into the tribal court. So there's two choices for him or her.

The CHAIRMAN. Thank you very much, Chief Justice.

Chairman Allen, you have been long involved in the matter of Indian affairs. You have served as president of the National Congress of American Indians and have been involved in not just governing your Nation, but in representing this Nation's tribes, 566 of them. Would you suggest or consider that the Supreme Court decisions are at times violating treaties or amending treaties that were entered into by Indian nations and our Nation?

Mr. ALLEN. Yes, Mr. Chairman; I believe they are. I believe that the Supreme Court is taking great liberty in their discretion on the judicial review, and in that process, through these decisions, are reinterpreting the commitment that this Nation made to the Indian nations through those treaty agreements.

The CHAIRMAN. All three of you have testified that, as a result of the *Nevada* v. *Hicks* case, more and more State and local police departments are coming into reservations. Are you documenting these instances, so we can use it as evidence in our reports?

Yes, Chief Justice?

Mr. YAZZIE. Mr. Chairman, it would be nice to document, give you numbers, but we do not have the ability to do that. We just don't have the resources to maintain, to get statistics. It takes

money to buy computers and to develop the data necessary to tell us something.

The CHAIRMAN. But would you say that these incidents are commonplace?

Mr. YAZZIE. Yes.

The CHAIRMAN. I have been on this committee now for over 25 years. Somehow I get the feeling, and this is a very ugly feeling, that, right or wrong, these decisions of the Supreme Court have been rendered because Indians are considered inferior people. Is that a fair statement, that this is racism?

Mr. YAZZIE. We had two U.S. Supreme Court Justices visit the Navajo Nation in July 2001. The visit was very beneficial. This is the first time that the U.S. Supreme Court was exposed to how tribal courts work. They were very clear as to the attitude of non-Indians, toward tribal justice that no matter how well we're educated in the law, how experienced we are in the law, how well we run the system, it's still not good enough. There's constant challenges about our ability to exercise jurisdiction over non-Indians. We are forever telling the American public, our court system is very competent—I can show you the flowchart there.

Justice Breyer looked at it and said, "This is a very complex and sophisticated system," and Justice O'Connor said, "This is a demonstration to show that the Navajo Nation has a competent system." You can tell that to the non-Indian they still will not believe it.

Non-Indians do not understand how our legal systems work. Today we are making the effort to let the world know. The Navajo Nation courts, we go to law schools; we hold our oral argument, to let the American public know, the lawyers, the legal community, to say this is how we work; this is our law, and it's a fair system.

I think there is an effort now to develop polls among the American public. I think if the American public were educated to know something about tribal courts, they would know that the Indian courts are very human, that they care about getting to the bottom of the problem, and that's exactly what we do as a Navajo legal system.

We don't believe in win/lose-type adjudication. It doesn't work. It takes a lot of money to win a lawsuit. Better yet, get the people who are involved in the lawsuit, get them to solve the problem, and that's exactly what we're doing with peacemaking. We let the people, the people who are related, solve their own problem, and it means more to them when they do that. They are more satisfied with the outcome than they are with the outcome of court orders.

We have to prove to the American public that our court system is just as good as State and Federal courts, and we have shown that, and we have gone beyond that. We have shown that the Navajo Nation has traditional justice methods that work, and we have been traveling to other countries, Norway, Australia, Canada, they know about our system. We go over there; they come to us.

Now the State courts are looking at us and ask: How do you Navajos work your justice system? We tell them this is how we work it. Our system is very simple. Rather than treating somebody impersonal, you treat the parties with respect. You treat the parties

like human beings. I'll tell you, we have done a lot in solving disputes using the Navajo mind as to how disputes are solved.

The CHAIRMAN. Chairman Allen, what do you think?

Mr. ALLEN. Mr. Chairman, my answer is yes. I think that one of the root problems that we have with this society and its political and judicial system is it still cannot cope with the sophistication and the ability to administer quality justice in tribal systems. I think Chief Justice Yazzie is talking about the educational campaign that we have to engage in. There's no question that we have to do that here in Congress as well as in the general public, but, yes, that is clearly a huge hurdle that we have to overcome.

The CHAIRMAN. After two centuries, Americans are not convinced you're equal?

Mr. ALLEN. That's correct.

The CHAIRMAN. Justice St. Clair?

Mr. ST. CLAIR. Chairman Inouye, I do believe there's a feeling that Indians are inferior within these Supreme Court decisions. Like Justice Yazzie says, they've shown time and time again that their system is probably the most sophisticated of all the Indian tribes; yet, it still doesn't seem to be sufficient.

I believe there is a fear of Indian people in general in the Supreme Court, so that they want to do away with Indian tribes. This judicial termination that's coming about is just another attempt to get rid of Indian people, which has been attempted in various ways and various methods, beginning with extermination originally and change in vacillating between extermination, self-determination, and allotment, assimilation, and the policies have gone back and forth, and we're just in an era here that happens to be within the Supreme Court another era of termination.

However, I believe that the American public itself, and especially when I see non-Indians come into our court system to use the system, are very satisfied with the speed of the cases that are processed, the fairness exhibited by the judges, the efficiency of the clerks, and all this being done on a very, very limited budget.

One of the questions I think that was posed to me was, what would be the average cost of one of the cases, of our cases that we have? It looks like the cost is somewhere around $1,200 a year. That's ideally, if we were funded fully. We're doing that on about a third of what we asked for in our budget. So we have to cut costs here and there. We don't have a prosecutor, although we apply for—I mean a defender, sorry. We apply for a defender every year. The only defense counsel that we have available is Legal Services, which the party must be indigent to qualify. So that leaves a vast area of people who are not represented in tribal court. It's sort of an imbalance.

So we have some deficiencies, but I believe that overall this sense of feeling that tribal governments and tribal people are inferior is still there within the Supreme Court of the United States, but the American public itself I don't believe feels that way. I think if there was more education and more contact and tribal courts were funded better, we could demonstrate that we have a fair system; we have judges that care; we have people in our system who are willing to put forth extra effort, work long hours, to deal with our increased caseloads, even though our taxing ability and regulatory

ability is being diminished. We have less ways to obtain resources. Funding is tight, and we're still trying to face these increased caseloads that we have.

The CHAIRMAN. On behalf of the committee, I would like to thank all of the witnesses for sharing their wisdom and their expertise with the committee.

I must apologize to all of you that the attendance has been poor, but hope you will understand that at this moment there are about 12 committees meeting, and this is just one of them. So in every committee you will have situations such as this. But I can assure you that the staff people who are sitting here represent the members of this committee, and they will advise their Senators as to what transpired. I will also recommend that they read the transcript.

This has been a good day, and I can assure you that this committee will act on this matter.

With that, the hearing is adjourned.

[Whereupon, at 4:40 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Thank you, Mr. Chairman, for the opportunity to learn from the testimony of legal scholars regarding recent Supreme Court rulings that have worked to curtail tribal sovereignty. I would also like to thank Professor Robert Anderson and the Honorable Ron Allen for making the trip from Washington State to be with us today.

The testimony from these experts, and others here today, is critical to our ability to help clarify the authority of tribal governments.

United States policy toward Native Americans has certainly been marked with inconsistencies, dramatic shifts, and reversals. In the 19th century, Native Americans were pushed onto reservations, and then saw the reservations broken up to force assimilation. The 20th century saw a repeat of this cycle, with the Government recreating reservations and then later trying to terminate the Federal relationship with tribes.

But in 1970, President Nixon announced a commitment to a new Federal policy of tribal self-governance and self-determination. Since then, Presidential administrations and Congress have affirmed self-governance and self-determination in their policymaking.

At the same time, Supreme Court decisions have been moving in the opposite direction, finding that tribal sovereignty, particularly over non-Indians in tribal communities, is inconsistent with tribes' "dependent status." These recent rulings are inconsistent not only with the legislative and executive trends toward self-governance, but also with Supreme Court precedent itself Indeed, the fundamental principle of Indian law, which was set by *Worcester* v. *Georgia* in 1832, is that Indian tribes maintain their sovereign rights except when explicitly limited by treaty or Federal law.

I am concerned that these Court rulings undermining tribal sovereignty are making for, once again, an inconsistent Federal relationship with tribes.

Tribal governments are responsible for providing the same services to their communities as local, county, and State governments. It is imperative that tribal governments be empowered with the authority and resources to serve the people in their jurisdiction. Tribal governments need the power to tax and to enforce laws, and Supreme Court rulings have negatively affected their power to do both.

Reservation boundaries often include a mix of tribal and non-tribal members and a mix of trust and fee simple land. If the courts rule that tribal jurisdiction depends on qualities like status of the land within the reservation boundary, tribal membership, or race, then we must seriously consider the implications of these limits on jurisdictional authority. This is obviously a very complex issue, but we must ensure that tribal governments can provide critical services to the people in their jurisdictions, such as law enforcement.

Again, I am pleased that the committee is hearing from the scholars and experts appearing today, and thank you all for sharing your insights with us.

PREPARED STATEMENT OF ROBERT T. ANDERSON, ASSISTANT PROFESSOR OF LAW, DIRECTOR, NATIVE AMERICAN LAW CENTER, UNIVERSITY OF WASHINGTON SCHOOL OF LAW, SEATTLE, WA

Good afternoon Mr. Chairman and members of the committee. Thank you for the opportunity to present my views on the U.S. Supreme Court's recent Indian law decisions. I teach Indian law at the University of Washington School of Law in Seattle and I also am the director of the Law School's Native American Law Center. Prior to joining the faculty, I was counselor to Secretary of the Interior, Bruce Babbitt and held the position of Associate Solicitor for Indian Affairs within the Interior Department. I also worked as a senior staff attorney for 12 years with the Native American Rights Fund.

I was asked to address the effect of the Supreme Court's recent decisions on the exercise of tribal authority over their territory. Professor Getches' testimony illustrated the dramatic break the Supreme Court has made from tradition in recent cases such as *Nevada* v. *Hicks,* 533 U.S. 353 (2001) and *Atkinson Trading Company* v. *Shirley,* 121 S.Ct. 1825 (2001). In contrast to prevailing rules, *Hicks* and *Atkinson* permit State authority and limit tribal authority in an unprecedented fashion.

It is difficult to overstate the change in the law that has occurred regarding tribal jurisdiction over non-Indians during the past 25 years. The Court's ruling in *Oliphant* v. *Suquamish Tribe,* 435 U.S. 191 (1978) stripped tribes of criminal jurisdiction over non-Indians and signaled the rise of the Court as the lawmaking body with regard to tribal authority over non-Indians. The Court's recent presumption against tribal authority over non-Indians on fee lands stands in stark opposition to foundational principles of Indian law, and the actions of Congress and the executive branch in the modern era. I begin with some general observations on the development of Indian law and then contrast recent trends in the Supreme Court with the actions of Congress and the executive branch.

I. The Court's Traditional Respect for Tribal Self-Government and the Role of Congress.

Many have questioned the moral basis for the very notion that "discovering" European nations were entitled to usurp the rights of Indian tribes to deal with their own property or engage in foreign relations.[1] The law recognized by the Marshall Court, *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831); and *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), nevertheless provided a sound basis for legal insulation of Indian tribes from the authority of the States. The Court soundly rejected Georgia's attempt to assert jurisdiction over Indian country and recognized tribes as domestic dependent Nations. In tandem with the Indian Commerce Clause of the U.S. Constitution, the basic principle set out in these cases is that Indian tribes are free to govern themselves and others who enter their territory to the exclusion of State power.

The independence of tribes was even recognized to some degree in relation to the Federal Government. In *Ex Parte Crow Dog,* 109 U.S. 556 (1883) the Court followed the basic principles of the Marshall Court and ruled that the murder of one Indian by another within Indian country was not a criminal offense punishable by the United States. This was not because the United States lacked power over Indian country, but because Congress had not expressly legislated in the area. In short, Indian tribes and their territory were free of regulations by other sovereigns absent explicit direction from Congress.

Cases that followed, such as *United States* v. *Kagama,* 118 U.S. 375 (1886) (upholding the power of Congress to adopt the Major Crimes Act) and the infamous case of *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), cemented the central role of Congress in Indian affairs as provided in the Indian Commerce Clause. In *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73 (1977) and *United States* v. *Sioux Nation,* 448 U.S. 371 (1980) the Court made clear that there were some limits to Congress' plenary power over Indian affairs. Congressional action had to be tied rationally to fulfillment of Congress' unique obligation toward the Indians[2] and congressional acts allegedly taking Indian property would be thoroughly reviewed for consistency with the United States' role as trustee.

The development of the Court's general doctrine up to the *Oliphant* decision in 1978 reveals considerable deference to congressional action and continuation of rules that insulated Indian tribes from state authority. In the case *Williams* v. *Lee,* 358 U.S. 217 (1959) the Court ruled that disputes over debts incurred on an Indian res-

[1]For criticism of the foundations of Indian law in the United States, see Williams, The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 Wisc. L. Rev. 219.

[2]*Morton* v. *Mancari,* 417 U.S. 535 (1974).

ervation must be heard in tribal court because allowing State court jurisdiction infringed on the right of tribal self-government. Similarly, in *Fisher* v. *District Court,* 424 U.S. 382 (1976) state court jurisdiction was denied over an adoption proceeding involving tribal members. The Court reasoned that denying State court access furthered the congressional policy of tribal self-government. Important to the Supreme Court in all of these cases was the bedrock presumption that Indian country is beyond the reach of State courts and state jurisdiction, unless and until Congress provides otherwise.

The Court's approach, however, took note of the fact that Congress regularly legislated in the area of Indian affairs and made adjustments to the doctrine rooted in the decisions of the Marshall Court. For example, in response to the ruling in *Ex Parte Crow Dog,* Congress adopted the Major Crimes Act, 18 U.S.C. §1153, and thus provided for Federal jurisdiction over certain criminal acts. Likewise, in Public Law 280, Congress provided for State court jurisdiction to hear civil causes of action and enforce State criminal law within Indian country. See *Bryan* v. *Itasca County,* 426 U.S. 373 (1976). The Court thus adhered to the general rule that State regulatory or judicial jurisdiction within tribal authority is prohibited unless Congress sees fit to alter the status quo.

The same rule applied to Federal court incursions on tribal authority and thus buttressed the notion of tribal independence. In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978) the Court refused to allow Federal courts to hear alleged violations of the Indian Civil Rights Act (ICRA). The Court rested on the bedrock principles that tribes are autonomous, absent governing acts of Congress. The Court also took notice of the fact that Congress had expressly provided for Federal court review in habeas corpus actions. It was accordingly appropriate for the Court to leave it to, Congress to determine whether to further intrude on tribal self-government by providing for Federal court review of alleged violations of ICRA.

While the Court's decision in *Santa Clara Pueblo* remains controversial, Congress has not chosen to alter the law. There have, however, been several oversight hearings dealing with the issue of enforcement of the Indian Civil Rights Act over the past several years. As an Administration witness in two of those hearings, I can attest to the value of direct dialog between Congress, Indian leaders and the executive branch on the important policy issues. Through such a process adjustments that are found to be necessary may be made Congress, not the courts and only after a dialog with the tribes.

It is thus evident that the course followed by the Supreme Court from the Marshall Court up to the *Oliphant* decision was marked by judicial restraint with respect to tribal powers. Through the varying policy eras employed by Congress and through the beginning of the self-determination era, on thing remained clear—it was Congress not the Supreme Court that decided policy in the Indian law area. Congress thus legislated against a static judicial backdrop that recognized tribal autonomy unless clearly altered by Congress. The current Supreme Court has turned this principle on its head, thus prompting the need for congressional action. As detailed below, the Court's current approach is completely at odds with modern congressional and executive branch policies.

II. Modern Congressional Acts Support the Role of Tribes as Governments with Comprehensive Authori1y Over Their Territory.

The vacillation in congressional policy with respect to the role of Indian tribes in the United States is well-known. The formative years of Indian policy saw the development of the guardian-ward relationship as evidenced in the Trade and Intercourse Acts beginning in 1790. This protective assertion of a monopoly over land transactions with Indian tribes soon gave way to the removal statutes and the forced relocation of Indian tribes from the East to the Oklahoma Territory and other parts of the West. Soon thereafter, in the treaty era, the President's agents negotiated treaties with western tribes to obtain peace and cessions of vast areas of land. In exchange, the United States promised permanent homelands, obtained peace and often guaranteed certain off-reservation rights. See *Washington* v. *Passenger Fishing Vessel Ass'n.,* 443 U.S. 658 (1979). The treaty era was supplanted by the allotment policy and the attempt to assimilate Indians into mainstream American society in the fashion of yeoman farmers.

The failure of that policy demonstrated the need for major change. The Indian land base had been reduced by nearly two-thirds and it was clear that assimilation of Indian people was not going to occur. All of this prompted passage of the Indian Reorganization Act of 1934 [IRA], which provided substantial support for tribal governments and was geared toward protecting the remaining Indian land base.

Not long after passage of the IRA, Congress again shifted its approach and called for the termination of a number of tribes in the United States. This "termination" of the Federal-tribal relationship for some Indian tribes was accompanied by the

adoption of Public Law 280, which authorized (and in some instances required) States to extend their jurisdictional reach into Indian country. This termination period galvanized Indian tribes to fight for their political existence and prompted the congressional termination experiment to fizzle out by the early 1960's. See Stephen Cornell, The Return of the Native 123–124 (1988).

The Indian Civil Rights Act of 1968 marked another turning point for congressional policy. While the act's application of certain provisions of the Bill of Rights to Indian tribes can be seen as a further diminishment of tribal autonomy, it is equally plain that the act contemplated the continued existence of Indian tribes as vibrant governments exercising governmental power over their territory and the people present therein. President Nixon's message to Congress in 1970 announced the policy of "self-determination without termination." H.R. Doc. No. 91–363, 91st Cong., 2d Sess. (July 8, 1970). That marked the course that Congress and the Executive have followed to this day and stands in stark contrast to decisions such as *Strate, Atkinson* and *Hicks.*

There is likely no statute that surpasses the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450, et seq., in importance and effectiveness. The act allows tribes to operate dozens, if not hundreds, of programs previously carried out by Federal agencies like the Bureau of Indian Affairs and the Indian Health Service. Congress has amended the statute on a number of occasions to spur the executive branch to contract more and more programs out for tribal administration and with increased flexibility for the tribes. See 25 U.S.C. §§ 458aa, et seq. The Self-Determination Act and Self-Governance Act have assisted in building tribal governmental infrastructure, while maintaining the Federal-tribal trust relationship. Other statutes provide directly for the exercise of tribal or delegated Federal authority of tribal territory and all those within it. Examples include the Indian liquor laws, 18 U.S.C. § 1152,[3] and a number of environmental statutes. The Clean Air Act, 42 U.S.C. §§ 7401–7642 directs the Administrator of the EPA to treat Indian tribes as States under the act. Tribes exercise delegated Federal authority over members and non-members within Indian country. Similarly, the Clean Water Act, 33 U.S.C. §§ 1251–1377, provides that tribes may be treated as States and exercise either inherent, or delegated authority over members and non-members within Indian country. See city of *Albuquerque* v. *Browner,* 97 F.3d 4l5 (10th Cir. 1996); and *Montana* v. *EPA,* 137 F.3d 1135 (9th Cir. 1998). See also, Safe Drinking Water Act, 42 U.S.C. § 300j–f; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9657; Surface Mining Reclamation Act, 30 U.S.C. §§ 1201–1328; and Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (all providing for some measure of tribal authority over land for both members and non-members).[4]

Even a cursory review of the United States Code reveals the broad scope and support of Congress for the welfare of tribes and their members, as well as their ability to govern their reservations. See, e.g., 25 U.S.C. § 4301, et seq. (Native American Business Development Act of 2000); 25 U.S.C. § 4101, et seq. (Native American Housing Assistance Act of 1996); 25 U.S.C. § 3601, et seq. (Indian Tribal Justice Act of 1993); 25 U.S.C. § 3201, et seq. (Indian Child Protection and Family Violence Act of 1990); 25 U.S.C. § 2701, et seq. (Indian Gaming Regulatory Act of 1988); and 25 U.S.C. § 1901, et seq., (Indian Child Welfare Act of 1978). The point here is that Congress has unequivocally acted to support Indian tribes and has even delegated Federal authority to tribes in many circumstances.

By way of contrast, since the passage of the Self-Determination Act, the Supreme Court has gone out of its way to implement long-abandoned policies that increase state authority and reduce the power of tribes. For example, in *County of Yakima* v. *Yakima Indian Nation,* 502 U.S. 251 (1992), the Court stretched to implement policies embodied in an obscure proviso the repealed allotment act in order to uphold county real estate taxes on tribal property. The Court appears oblivious to the past 35 years of congressional policy even as it abandons the previous 140 years of Supreme Court doctrine.[5] It bears emphasizing that even as Congress implemented failed policies such as allotment, assimilation and termination, the Supreme Court during that time adhered to the basic policy enunciated by the Marshall Court. Thus, in 1883 which was the heart of the assimilation era, the Court secured tribal Indians from Federal prosecutions in recognition of their status as separate

[3] See *United States* v. *Mazurie,* 419 U.S. 544 (1975).

[4] Compare *Backcountry Against Dumps* v. *Environmental Protection Agency,* 100 F.3d 147 (D.C. Cir. 1996) (setting aside EPA's treatment of tribe as a State under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, et seq. as not authorized by statute).

[5] The Honorable Judge Canby's testimony eloquently reveals the Supreme Court's doctrinal evolution.

sovereigns. Likewise, during the termination era of the 1950's the Court upheld the right of "Indians to make their own laws and be ruled by them." The Court thus adhered to the Marshall Court's rule that Indian tribal powers and immunities continue until Congress acts clearly to diminish those powers, or authorizes state incursions into Indian country.

The Court's recent course has not just been a reversal of the fundamental rules of Indian law, it has also usurped the role of Congress as the policymaking body in the area of Indians affairs. What is truly remarkable is that the Court has taken this course in the midst of an era of unprecedented support for Indian tribes and their authority.

III. Executive Branch Policies Similarly Support Indian Tribe Jurisdiction.

Although Congress has paramount authority in the field of Indian affairs, the actions of the executive branch are also worthy of consideration. Beginning with President Nixon's announcement of the self-determination policy, every Administration has supported the role of tribes as sovereign governments within the United States. Most recently, President Clinton issued an Executive order calling on all Federal agencies to engage in "Consultation and Coordination with Indian Tribal Government." E.O. No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); see also, Memoranda of the President, 59 Fed. Reg. 22951 (April 29, 1994), Government to Government Relations with Native American Tribal Governments. Similarly, the Secretaries of the Interior and Commerce have issued orders calling on their subordinate agencies to consult with Indian tribes in the implementation of the Endangered Species Act. Secretarial Order Nos. 3206 and 3225 (Orders applicable to Indian tribes in the lower 48 States and Alaska respectively).

The executive branch, through the Justice Department, has supported Indian tribes in the recent cases before the Court (*Strate, Atkinson* and *Hicks*) and has actively supported Indian treaty rights in cases such as *United States* v. *Washington* and *United States* v. *Michigan.* The Justice Department also supported the tribes in the Indian gaming case—*Florida* v. *Seminole Tribe of Indians.* When the Supreme Court ruled in favor of the State by upholding Florida's sovereign immunity, the Department of the Interior exercised its authority to fill the gap caused by the ruling and promulgated a rule in support of Indian gaming. Administrative agencies, however, are limited in terms of their authority and only Congress can right the wrongs committed by the Supreme Court.

Conclusion

Congress has always led the way in setting Federal Indian policy as provided in the Constitution. I respectfully suggest that Congress should act to correct the Supreme Court's mistaken notions of what is best for governance in Indian country. This should be done with deliberation and full consultation with Indian tribes. I commend the Chairman and members of the committee for holding this hearing.

Thank you very much. I would be pleased to answer any questions.

PREPARED STATEMENT OF JOHN ST. CLAIR, CHIEF JUDGE, SHOSHONE AND ARAPAHOE TRIBAL COURT, WIND RIVER INDIAN RESERVATION, WYOMING

Good afternoon Chairman Inouye and distinguished members of the Senate Committee on Indian Affairs. Thank you for the invitation to come before you today to testify about a topic that has had a major impact upon the powers and authorities of Indian tribal governments.

My name is John St. Clair. I am an enrolled member of the Eastern Shoshone Tribe of the Wind River Indian Reservation located in west central Wyoming. I am an attorney licensed in Wyoming and have been sitting as chief Judge of the Shoshone and Arapahoe Tribal Court since 1983. I am president of Wyoming Legal Services, president of Montana-Wyoming Tribal Judges Association and a member of the board of directors of the National American Indian Court Judges Association [NAICJA].

The Wind River Indian Reservation is jointly owned by the Eastern Shoshone and Northern Arapahoe Tribes [the tribes]. It is approximately 3,500 square miles in area inhabited by about 12,000 members of both tribes and other tribes, along with about 25,000 non-Indians.

The Shoshone and Arapahoe Tribal Court through a comprehensive Law and Order Code extends jurisdiction over all Indians who commit offenses prohibited in the Code and over all persons who have significant contacts with the reservation. The Court consists of a chief judge who must be a professional attorney and three associate judges. There is a Court of Appeals comprised of the remaining three judges who did not hear the case. Jurisdiction is limited by applicable Federal law. Total case load for 2001 was approximately 3,500.

IMPACT OF RECENT SUPREME COURT DECISIONS

Recent U.S. Supreme Court decisions have become a major concern to the tribes due to their intensified passion to limit the sovereignty of Indian tribes. In particular, within the past 10 years tribes have lost 23 of 28 cases argued before the Court. Since the case of *Oliphant* v. *Suquamish Tribe,* 435 U.S. 191 (1978), where the Court held by implication that tribes are without inherent jurisdiction to try non-Indians for crimes, a new doctrine has emerged that tribes lack certain powers that are inconsistent with their dependent status even, when Congress has not acted to curtail those powers. This new doctrine has been extended to the civil regulatory area by *Montana* v. *United States* 450 U.S. 544 (1981), the adjudicatory area by *States* v. *A–1 Contractors,* 520 U.S. 438 (1997) and in 2001, in *Atkinson Trading Post* v. *Shirley,* 531 U.S. 1009 (2001) to a hotel occupancy tax imposed by the Navajo Nation. The most recent extension of the doctrine is *Nevada* v. *Hicks,* 121 S. Ct. 2304 (2001) where it was held that tribes lack jurisdiction over civil suits against State officials for violating the rights of Indians on Indian land within a reservation.

The impact of *Oliphant* and its progeny on the powers and authorities of Indian tribal governments is that it severely restricts the ability to exercise basic regulatory and adjudicatory functions when dealing with everyday activities on reservations. When both Indians and non-Indians are involved in domestic violence, alcohol and/or drug related disturbances or a other criminal activity, tribes can adjudicate only Indians while non-Indians, even when detained and turned over to State authorities, go unpunished. This double standard of justice creates resentment and projects an image that non-Indians are above the law in the area where they choose to reside or enter into.

The affect on tribes of not being able to regulate taxing, hunting and fishing, the environment, zoning, traffic, et cetera placed limitations on economic development and self-sufficiency. Without the ability to generate revenues to fund basic governmental functions, tribes become more and more dependent on Federal grants, contracts and compacts, as a sole source of funding, This results in an increased economic burden that ultimately falls on the Federal Government.

Tribal courts constitute one of the frontline institutions confronted with the issues involving sovereignty, while charged with providing reliable and equitable adjudication of increased numbers of criminal matters and complex civil litigation. Tribes and their court agonize over the same issues State and Federal courts confront. Child sexual abuse, alcohol and substance abuse, gang Violence, violence against women, child neglect, pollution of the air, water, and earth, are just some of these common yet complicated problems that arise on Indian reservations. The vast panorama of cases handled by the 500 plus tribes in their courts would significantly increase the caseloads of Federal District Courts and also local State courts, if tribal courts no longer existed. The increased cost to Federal and State courts would also result in major budget short falls.

CONCLUSION

The recent trend of the U.S. Supreme Court toward judicial termination poses the greatest threat to tribes since the allotment era of the 19th Century and Congressional termination of the mid–20th Century. This trend runs counter to the proclaimed Federal policy of self-determination that has repudiated the allotment and termination policies.

America's Third Sovereign, the Indian tribes, occupying Indian country come before this distinguished body to ask that you utilize the plenary power of Congress in Indian affairs conferred upon you by the Indian Commence Clause, article 1, section 8, clause 3, of the U.S. Constitution. We request that you restore and reaffirm the inherent regulatory and adjudicatory authority of tribes over all persons and all land within Indian country as defined in 18 U.S.C. Sec. 1151. This approach would place the exercise of jurisdiction in the hands of the tribes and the extent of it within their organic documents and case law making it a question of tribal law.

Again I want to thank you for this unique opportunity that you have provided on behalf of my tribes and all the Indian tribes.

PREPARED STATEMENT OF WILLIAM C. CANBY, JR. JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Good morning Mr. Chairman and members, of the committee. I appear here as a former professor of Indian Law who has worked on technical assistance programs with tribal courts over the years. For the past 21 years I have been a judge of the U.S. Court of Appeals for the Ninth Circuit, and am chair of the Ninth Circuit Council Committee on Tribal Courts. I preface all of my remarks with the dis-

claimer that the views I express are my own; I cannot and do not speak for my court or the Federal judiciary in general.

I have been asked to elaborate on recent trends in the Indian Law decisions of the Supreme Court during the past several years particularly with reference to a divergence between the trend of those decisions and the Indian Law policies of Congress and the executive branch.

Others will describe for the committee the general historical overview of Indian Law, in terms of judicial decisions, legislation, and actions of the executive branch. I wish to focus on a few recurring themes in the line of Supreme Court decisions in the past 30 years, to emphasize the development of certain doctrines that have, in my view, led to decisional law that has significantly changed the legal status of Indian tribes in ways that differ from earlier decisional law and from the patterns set by Congress and the executive branch. The doctrines of the Supreme Court that I will discuss involve: (1) preemption analysis when State interests conflict with tribal interests; (2) the discovery of new limitations on tribal power because of the tribes' status as domestic dependent nations; and (3) the diminishing role of territoriality in the concept of tribal power. I will then discuss one example of congressional overruling of a Supreme Court decision and some of the questions that arose in its aftermath.

The basic judicial concepts of Indian Law were, of course, established by Chief Justice John Marshall in the *Cherokee* cases. He recognized tribes as self-governing bodies that he termed "domestic dependent nations" in *Cherokee Nation* v. *Georgia,* 30 U.S. 1 (1831), and then held that the Cherokee Nation governed a distinct territory "in which the laws of Georgia can have no force." *Worcester* v. *Georgia,* 31 U.S. 515 (1832). In holding that the tribes enjoyed a special relationship with the United States, and that the States did not exercise power over the tribes or their territories, Marshall was acting entirely consistently with the series of Trade and Intercourse Acts that had been passed by Congress, beginning with the first Congress in 1790. 1 Stat. 137 (1790).

Over the ensuing years there were major movements in Indian law initiated by Congress or the executive branch, including the removal of tribes to the west and, in the 1880's, a policy of allotment designed to break up the tribal landholdings into small individual farms. Many years later, Congress acknowledged that the allotment policy had been a disaster and enacted the Indian Reorganization Act of 1934, which was based on the proposition that the tribes were here to stay as self-governing bodies with power over their territories. There was an interruption in this view during the 1950's, when congressional acts were passed to terminate the special relationship between specified tribes and the Federal Government. At the same time, Public Law 280 extended the civil and criminal jurisdiction of certain named States into Indian country, and permitted other States to elect to do the same without tribal consent. This period of "termination" came to an end with the passage of the Indian Civil Rights Act of 1968 and the President's statement on Indian affairs in 1970. Since that time, such measures as the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Tribal Government Tax Status Act of 1982, have clearly signaled a congressional policy of encouraging tribal self-government.

Tribal self-government was also supported by the Supreme Court in the 1959 case of *Williams* v. *Lee,* 358 U.S. 217. In holding that a non-Indian was required to go to tribal court to sue an Indian over a debt incurred in a transaction on the reservation, the Supreme Court stated that its ruling was necessary to preserve "the right of reservation Indians to make, their own laws and be ruled by them." Id. at 220. Notably, this right of self-government was protected by requiring a non-Indian to come to tribal court. *Williams* v. *Lee* was an important modern foundation of decisional Indian law, and under its regime all three branches of the Federal Government by 1970 were united in a strong view of tribal self-government over tribal territories.

The 1970's marked the beginning of a shift in the Supreme Court away from a view of the tribes as entities with full governmental power over their territories. The first doctrinal step occurred in a case generally regarded as a victory for the tribes—*McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164 (1973). That case held that Arizona could not tax the income of an Indian earned on a reservation, but the analysis contained the seeds of a diminution of tribal power. McClanahan considered tribal sovereignty to be a mere "backdrop" for the determination of whether States could exercise their power over subjects in Indian country. If Federal laws and treaties, read against the backdrop of sovereignty, preempted State power, then the State was excluded. This analysis reversed a previous presumption: that States had no power in Indian country unless some positive reason (or legislation) existed to extend it there. Under the McClanahan approach, State power extended

into Indian country unless a positive Federal law or policy excluded it. Thus preemption doctrine, as it has been formulated since McClanahan favors the extension of State power into Indian country. An example is *Cotton Petroleum Corp.* v. *New Mexico,* 490 U.S. 163 (1989), which permitted a State to impose a severance tax on non-Indian oil and gas lessees on a reservation, even though the tribe also imposed a tax.

A far greater doctrinal limitation on Indian tribal power was employed in *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 1911 (1978), which held that tribes had no criminal jurisdiction over non-Indians who committed crimes on their reservations. The Court held that exercise of criminal jurisdiction over non-Indians would be inconsistent with the status of the tribes as domestic dependent nations. Chief Justice Marshall, who had characterized tribes as domestic delineated only two limitations dependent nations in *Cherokee Nation* v. *Georgia, delineated only two limitations on full sovereignty that attended the tribes' status as domestic dependent nations: (1) they could not alienate their land other than to, or with the consent of, the Federal Government, and (2) they could not enter treaties or other agreements with foreign nations. For 150 years these limitations we're generally assumed to be the only two that flowed from the tribes' status. Oliphant* came up with a new limitation, and since that time, other Supreme Court decisions have proliferated the limitations that are deemed to arise from the tribes' domestic dependent status. Thus, in *Montana* v. *United States,* 450 U.S. 544 (1981), a tribe's regulation of non-Indian hunting on non-Indian land within the reservation was held to be inconsistent with the tribe's domestic dependent status. One case went so far as to state that a tribe's domestic dependent status prevented it from adopting preemptive regulation of liquor sales on its reservation. *Rice* v. *Rehner,* 463 U.S. 713, 726 (1983). Tribes were held to lack criminal jurisdiction over non-member Indians because of their domestic dependent status. *Duro* v. *Reina,* 495 U.S. 676 (1990). And, under the refinement introduced by *Montana* v. *United States,* which I will discuss in a moment, tribes have been held to lack inherent authority to adjudicate civil disputes between nonmembers arising out of activities on a highway right-of-way within the reservation. *Strate* v. *A–I Contractors,* 520 U.S. 438 (1997). Most recently, tribes have been held to be precluded by their domestic dependent status from collecting a hotel room rental tax from a non-Indian hotel on non-Indian fee land within a reservation. *Atkinson Trading Co.* v. *Shirley,* 532 U.S. 645 (2001), and from regulating the activities of State law enforcement officers executing a search warrant of an Indian dwelling on Indian land within the reservation, when the investigation concerns a crime allegedly committed off-reservation. *Hicks* v. *Nevada* 121 S.Ct. 2304 (2001).

These recently announced additional limitations on the powers of tribes because of the tribes' domestic dependent status create numbers of questions for lower courts. It is easy for historical reasons to understand why tribes could not alienate their land except to, or with the consent of the Federal Government, and it is easy for reasons of international law to understand why tribes are not allowed to enter treaties with foreign nations. Both of these limitations are explainable as inherent in the status of the tribes as internal nations owed a duty of protection by the Federal Government. But the new limitations On tribal sovereignty do not seem to have such compelling necessity behind them. Tribes could exercise criminal and civil jurisdiction over persons within their territory without torturing their status as domestic dependent nations. So it is difficult to predict when a challenged exercise of tribal power is to be upheld on the ground that the power is inconsistent with the tribe's domestic dependent status. One way of drawing a bright line, and that indeed seems the direction in which things are going, is to say that a tribe has no power over non-members at all. Such a rule provides certainty, but leaves the tribe with almost no governmental power at all, greatly reducing tribal authority below the level it enjoyed under *Williams* v. *Lee* and below the level that is contemplated by existing legislation Congress and policies of the executive branch. Short of that drastic formulation, it is difficult under the current trend of Supreme Court decisions to draw a predictable line defining what tribes may do or not do as domestic dependent nations.

Perhaps the watershed case of recent times, although did not appear to foreshadow such immense changes when it was announced, is *Montana* v. *United States,* 450 U.S. 544 (1981). That decision held that a tribe, as a domestic dependent nation, had no power to regulate hunting and fishing by non-Indians on non-Indian fee land within a reservation. At the time this ruling did not appear to be a large exception to the general proposition that tribes could regulate non-Indian activity within their reservation; *Montana* freely acknowledged that tribes could regulate or prohibit hunting or fishing on Indian lands within the reservation. Moreover, there were two acknowledged exceptions that permitted tribes to regulate non-Indian activity even on non-Indian fee land: (1) the tribe could regulate activities of non-

members who entered consensual relationships with the tribe or its members, such as leases or licenses; and (2) the tribe could regulate activities of non-members on fee land that, "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. This latter exception, with its language reflecting the traditional view of a State's police power, suggested that a tribe could regulate non-Indians whenever its reasonable interests supported such regulation.

Montana contained some expansive language, however, describing tribal sovereignty in terms of power over members, implying the absence of power over others. In later years, the Supreme Court has emphasized this aspect of the Montana opinion. The fact that Montana was an exception to the general rule that tribes could regulate non-member activity, within their borders seems to have disappeared from sight. In later cases, the Montana exception has become the Montana "rule" that tribes have no power over nonmembers. In *Strate* v. *A–1 Contractors,* 520 U.S. 438 (1997), for example, the Supreme Court held that a tribe had no regulatory authority over nonmember activities on a State highway right-of-way through the reservation; even though the highway was on tribal land, not fee land, the tribe had given up the right to exclude and therefore the Court treated it as if it were fee land. The Court also concluded that a tribe's adjudicatory jurisdiction (by civil suit in tribal court) could not exceed its regulatory jurisdiction. It is difficult to see where this limitation came from. Most courts, of course, are not so restricted; an Arizona court can entertain a case arising from an automobile accident in New York even though Arizona would have no authority to regulate the conduct of the parties in New York.

Most egregiously, *Strate* held that a highway accident within the reservation did not affect the welfare of the tribe, so as to fall within the second exception prescribed by *Montana. Strate* stated:

"Undoubtedly, those who drive carelessly on a public highway running through the reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule."

520 U.S. at 457–58. But this formulation ignores the fact that the *Montana* rule was itself an exception. If, as a general proposition, it is improper to permit exceptions to swallow rules, then *Montana* itself should be narrowly construed, so that it does not erode the general rule that tribes have regulatory jurisdiction over activities on their reservations. Accordingly, *Montana's* exceptions, being exceptions to an exception, must be construed broadly.

The *Montana* rule continued to be broadened, and its exceptions narrowed, to the detriment of tribal power in two decisions of last term, *Atkinson Trading Co.* v. *Shirley* 532 U.S. 645 (2001), and *Nevada* v. *Hicks,* 121 S.Ct. 2304 (2001).

Atkinson held that the Navajo Nation could not tax room rentals in a trading post hotel on fee land within the reservation, even though the trading post benefited from various tribal services. The Supreme Court applied *Montana* and, again, read the exceptions narrowly. License as a trading post was not closely enough related to operation of a hotel to fall within the "consensual" exception, and the second exception to *Montana* did not apply because "[w]hatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity." 532 U.S. at 659. Perhaps most interesting of all, Justice Souter (joined by Justices Kennedy and Thomas) entered a concurring opinion stating that "[i]f we are to see coherence in the various manifestations of the general law of tribal Jurisdiction over non-Indians, the source of doctrine must be *Montana* v. *United States."* And, he continued, *Montana's* principle that tribal authority does not extend to non-members should apply "whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe." Id. at 659–60. Under this apparently developing view, tribes lose the power to regulate non-members on trust land, a power that was accepted as a given in *Montana.*

Hicks took the last step, in holding that tribes had no power to regulate the activities of State law enforcement officers executing a search warrant against an Indian on tribal land within a reservation. The Supreme Court's opinion states that the *Montana* "rule" that tribes have no inherent power to regulate nonmember activity applies on tribal as well as fee lands! Once that proposition is established, then under *Strate* a tribal court could not entertain civil suit against the officers for exceeding the scope of the warrant because a tribe's adjudicatory jurisdiction cannot exceed its regulatory jurisdiction.

The expansive rationale of *Hicks* represents an astonishing diminution in the control that tribes may exercise over their own reservations. Montana assumed that tribes could control non-Indians, but carved out an exception for non-Indian hunting and fishing on Indian land if it was not consensual with the tribe and did not affect

the welfare of the tribe. In *Hicks, Montana* is invoked as support for the proposition that the tribe cannot regulate non-members even on tribal land, unless the activity falls within two exceptions that are being ever-more-narrowly construed. It is clear that, between the dates of *Montana* and *Hicks,* a major shift has occurred in the Supreme Court's view of tribal authority.

One characteristic of the considerable shift in the Supreme Court's recent Indian Law cases is the movement away from a territorial view of tribal power. To John Marshall in the *Cherokee* cases, tribal power was clearly territorial; the 12 tribes exercised power over their reservations and the laws of Georgia could not, intrude. Later in the 19th century, State law was permitted to govern the activities of non-Indians on reservations, so long as the activity did not involve Indians or have an effect on Indians. There was no reason to doubt, however, that enough of John Marshall's original concept remained so that tribes could govern their territories largely in the way that any other sovereign did. If the tribes' power over non-Indians was rarely exercised, it had not been negated. And as tribal governments were buttressed by the Indian Reorganization Act of 1934, it was natural to assume and expect an increasing exercise of tribal powers over the reservation.

The *Oliphant* decision put a stop to this trend by holding that tribes had no criminal jurisdiction over non-Indians. At about the same time, the Supreme Court decided *United States* v. *Wheeler,* 435 U.S. 313 (1978), which for the first time made the jurisdictional distinction not between Indians and non-Indians, but between tribal members and non-members. Thus began a shift in emphasis from tribal power as governmental power over a territory to tribal power as a function of membership. Without a territorial concept, any analysis of challenged governmental power is likely to be very restrictive. It is very difficult to conceive of a government that wields power other than over a territory; we do not regard governments-in-exile, for example, as real governments—they are potential governments that presume to become governments over a territory. When tribal power is viewed only through a membership lens, then tribal power is automatically restricted to power over members, leaving tribes with no more governmental power than a club or a union or a church may exercise over its members.

Until recently, the courts in deciding jurisdictional questions in Indian law looked to Congress's definition of Indian country for criminal-law purposes, which included all land within the exterior boundaries of a reservation whether owned in fee by non-Indians or not. See 18 U.S.C. § 1151. *Montana,* however, introduced a new distinction between tribally owned land and fee land within a reservation. Later another wholly new, but less frequently used, distinction was introduced between "open" and "closed" portions of a reservation for purposes of tribal zoning. *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989). The tribe was permitted to exercise zoning authority over all lands in the closed portion.

Almost every move away from a purely geographical delineation of tribal power has resulted in a diminution of that power. In 1982, when a more expansive view of tribal power still obtained in some fields, the Supreme Court upheld a tribal tax on non-Indian mineral lessees of tribal property and in doing so the Court was careful to assert that the power to tax did not depend only on the tribe's power to exclude persons from its reservation: "it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130 (1982). By the time of *Atkinson* last year, however, *Montana* controlled and a tribe could not tax non-Indian activity on fee land (with three justices asserting that it made no difference whether fee land or tribal land was involved).

Another facet of a non-geographical approach to tribal power is illustrated by *Strate* v. *A–1 Contractors,* which held that tribes could not regulate non-Indian activity on a highway located on Indian land within a reservation because the right-of-way deprived the tribe of the power to exclude. Under *Merrion's* more expansive view of tribal power, jurisdiction to regulate would not have depended on a right to exclude.

The trend, therefore, away from a territorial-geographical view of tribal governmental power is one more facet of the general shift in Supreme Court jurisprudence toward a highly restrictive view of tribal authority.

All of these doctrinal trends of the Supreme Court cases, which have led to a far more restrictive view of tribal power than existed in the 1960's, were judicial constructs. The Supreme Court did not take its lead in these matters from congressional or executive policies. Indeed, as I observed earlier, Congress in 1934, and again consistently since 1968, has placed its emphasis on the strengthening of tribal self-government. The executive branch has done the same since 1970. It is hard to

see where the new direction in restricting power comes from, other than from the Supreme Court.

In fairness, the Supreme Court has acknowledged that its actions dealing with tribal authority were taken in the absence of controlling statutes, and have recognized the appropriateness of Congress delineating the extent of tribal authority. See, e.g. *Oliphant,* 435 U.S. at 212. It is also possible that at least some of the Justices have not understood what an enormous change their recent jurisprudence represents in Indian country. In *Hicks* for example, the State judge had done what virtually any State judge in the West would have done in the last 50 years; he told the State officers that his writ was of no effect against an Indian on the reservation and that any search warrant he issued would have to be approved by the tribal court before it could be executed on the reservation. Under the rationale of the Supreme Court in *Hicks*, however, the State judge was just engaging in an unnecessary nicety; the tribe had no authority at all over the State officers on the reservation. Similarly, the extradition arrangements that many tribes have worked out with the States over the past decades are just so much waste paper; no extradition is necessary under the rationale of *Hicks*. *Hicks* thus upsets settled expectations in Indian country to a degree that may not have been apparent to all of the Justices (or many others). Just how disruptive *Hicks* will be may depend on the local relationship between particular tribes and the State and local governments; some may continue to function cooperatively as before. As a matter of doctrine, however, *Hicks* does not encourage such cooperation, and removes its necessity.

There was an instance about a decade ago when Congress promptly overruled a decision of the Supreme Court dealing with tribal power. In *Duro,* v. *Reina,* 495 U.S. 676 (1990), the Supreme Court ruled that it was inconsistent with the domestic dependent status of tribes to exercise criminal jurisdiction over non-member Indians who commit crimes in Indian country. Congress, first temporarily and then permanently, overruled this decision by enacting the following provision:

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.

(2) "Powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial,..; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

25 U.S.C. § 1301(2) (emphasis added to new language).

The effect of this provision was recently the subject of an en banc decision of my court (I was not a member of the en banc panel) in *United States* v. *Enas,* 255 F.3d 662 (9th Cir. 2001) (en banc), cert. denied, 122 S.Ct. 925 (2002). The question was whether, after the above amendment was enacted, a non-member Indian could be tried both by a tribal court and a Federal court for the same offense without violating the double jeopardy clause of the Constitution. In the ordinary case, there is no problem with such double prosecutions because each sovereign, the tribe and the Federal Government, acts on its own authority. *United States* v. *Wheeler,* 435 U.S. 313 (1978). The question posed by *Enas* was whether the tribal authority recognized by the statutory amendment of 25 U.S.C. § 1301(2) was a form of inherent tribal authority or was a grant of delegated Federal authority. If it was delegated, then the tribe in prosecuting was exercising a form of Federal authority and the Federal Government could not then conduct a second prosecution. The en banc court in *Enas* unanimously held that the tribe was exercising its own sovereign authority in prosecution *Enas,* so the double jeopardy clause was not violated by a later Federal prosecution. Six judges I ruled that Congress was correcting the history discussed by the Supreme Court when it decided *Duro.*

Because this history was a matter of Federal commonlaw, not constitutional law, Congress had the power to revise it. With the history corrected, it was clear to the six-judge majority that the tribal power was historical and inherent.

A five-judge concurring opinion took a more direct view stating that when Congress authorized a tribe to prosecute, it was simply enabling the tribe to exercise an independent sovereign power which did not necessarily depend on history.

Under both views expressed in *Enas,* there is no question of Congress' power to modify the boundaries of tribal power as? delineated by the Supreme Court. Under the six-judge majority view, the recognition by Congress of a new, non-historical tribal power would be a Federal delegation of power, the exercise of which by the tribe would be subject to the double jeopardy clause and many additional constitutional restraints. By the five-judge concurring view, any congressional recognition of governmental power by tribes would result in the tribes' exercising their own sovereign power, subject of course to the restraints of the Indian Civil Rights Act but not the Federal Constitution. I must say that I am a partisan of the five-judge con-

curring view. The most important point, however, is that the entire en banc panel saw no difficulty in recognizing the effectiveness of the congressional overruling of *Duro;* the only discussion was over the collateral effects of such overruling.

In summary, the recent decades have seen a significant change in the Supreme Court's view of the inherent power of Indian tribes. Many decisions, culminating in last term's *Atkinson* and *Hicks,* have substantially changed what has long been assumed to be the boundaries of tribal and State power in Indian country. The new restrictions on tribal power represent a judicial trend only; they have not been paralleled by any changes in congressional or executive policies concerning Indian affairs. None of the changes in the boundaries of tribal and State power effected by Supreme Court decisions are based on the Constitution; they accordingly are subject to modification at the will of Congress in the exercise of its power over Indian affairs.

That concludes my testimony. Mr. Chairman and members of the committee, I thank you for giving me this opportunity to express my views to you.

United States Senate
Committee on Indian Affairs

Hearing on Rulings of the Supreme Court
Affecting Tribal Government Powers and Authorities

Testimony of W. Ron Allen
Chairman, Jamestown S'Klallam Tribe

February 27, 2002

Mr. Chairman and Vice-Chairman, members of the Committee, tribal leaders and members of the public. Thank you for the opportunity to provide testimony to you today on the issues that tribal governments are facing under recent decisions of the United States Supreme Court. My name is W. Ron Allen and I am the Chairman of the Jamestown S'Klallam Tribe, which is located on the Olympic Peninsula in Washington State, and my tribe is a signatory to the 1855 Treaty of Point No Point between the United States and the S'Klallam Tribes.

In the recent past I have had the great honor of serving as the President and Vice President of the National Congress of American Indians. In this capacity I have served in a leadership role in a national tribal initiative to address the recent decisions of the Supreme Court. I am here today to describe to you in a general way the profound concerns that tribal leaders in every part of the country have expressed about the recent direction and impact of the Supreme Court's decisions.

I am not an attorney, but as a tribal leader I am involved on a daily basis in matters that relate to governance on tribal reservations. I will describe to you the concerns that I have about the recent Supreme Court decisions from the perspective of a government leader who needs to have a practical sense of what the law is and how the federal courts treat tribal government authority.

The speakers who have gone before me have covered in some detail the issues and concerns that have developed as a result of the Supreme Court decisions regarding tribal self-government under the principles of federal Indian law. I will not reiterate those matters at this time. Suffice it to say that the basic principle established in our treaties, in the U.S. Constitution, and in federal law is that Indian Nations, first and foremost, have the authority to govern ourselves, to provide for the needs of our people and to protect our cultures.

As tribal leaders, we have always understood the fundamental rule of federal Indian law: Indian tribes retain their inherent sovereignty except where explicitly limited by treaty or by federal statute. Tribes have all of the basic authorities of governance over matters on their lands – the power to regulate and to make our reservations safe, the power to tax and raise revenue, etc. – unless there is a specific federal law that limits our jurisdiction. Of

course, Congress has written hundreds of laws that do limit tribal jurisdiction – Public Law 280 is a good example of that. But the value of this basic rule is very clear. It respects tribal sovereignty. It puts the Congress in its appropriate role under the U.S. Constitution as the branch of the federal government that determines the political relationship with Indian tribes. It is a clear and easy rule for everyone to understand: Tribes have jurisdiction on their lands unless Congress has written a law otherwise.

Our concern about the recent string of Supreme Court decisions is that they have taken this fundamental principle and turned it on its head. Beginning with Oliphant v. Suquamish Tribe (1978), the Supreme Court has reasoned that it need not look for an Act of Congress, but that the federal courts have the authority to determine that there are inherent limitations on tribal powers. The Court decided that tribes have no jurisdiction over non-Indians who commit crimes on our reservations. In Montana v. United States (1981), the Court expanded this reasoning to conclude that where non-Indians are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes...." There the Court decided that tribes could not regulate hunting on land within a reservation that is owned by a non-Indian.

The most recent cases also make it very clear that almost nothing is "necessary to protect tribal self-government." The Court ruled in Atkinson Trading Co. that a tribe may not tax a business within the reservation on non-Indian fee land even where the tribe provides significant governmental services to that land. The Court ruled in Hicks that tribal courts do not have the authority to protect tribal members from unlawful searches and seizures by state law enforcement officials, even where the illegal actions took place on tribal trust land.

Based on the way these Supreme Court decisions are heading, we are supposed to govern our reservations, but we can't prevent non-Indians from committing crimes, we can't regulate matters that occur non-Indian owned land (and of course the federal government has sold huge amounts of our reservation land to non-Indians), we can't tax non-Indian businesses on our reservations even when we provide all the roads, water, law enforcement and other services, and we can't prevent state officials from coming onto our reservations and violating the civil rights of our tribal members.

Of course there are some attorneys who will tell you that the court decisions aren't as bad as we believe. They argue that tribes still have the authority to regulate matters that are "necessary to tribal self-government" and that the holdings of these Supreme Court cases are more limited than you might think. Maybe that is true. But one of the great impacts of these Supreme Court decisions is that they are creating a great deal of uncertainty about the scope of our powers and authorities. What is the fundamental rule of federal Indian law now? It is that Indian tribes may regulate their lands unless the Supreme Court decides otherwise on a case-by-case basis? As a practical matter, how are we supposed to understand that rule of law and apply it to the problems and responsibilities we are facing on our reservations? Every time we stick our neck out and regulate something we are

risking years of litigation, hundreds of thousands of dollars, and an ultimate decision by a federal court that could take one more big bite out of tribal sovereignty for all the tribes. What governmental tools and legal authority are we supposed to use to solve the problems on our reservations? Recent studies from the Department of Justice show that American Indian women are more likely to be physically abused than any other group of people in this country, and that they are most likely to be abused by a non-Indian man. What are our tribal police departments supposed to do about that? We don't have jurisdiction over the non-Indian. Do you think the state or county police are anxious to come onto the reservation to handle domestic abuse cases? Let's put it this way: they have other priorities. The federal government generally only gets involved in major felony cases. As a result, domestic violence on Indian reservation goes unaddressed and offenders go unpunished. It is an enormous tragedy.

Tribes are trying to build the infrastructure that Indian reservations so clearly lack. Simple telephone service on Indian reservations reaches only 50% of the population. Reservations lack electricity, clean drinking water, sewage treatment, and waste pick up. Tribes are trying to provide these services and to do that we have to set up reservation-wide systems and make sure that everyone gets hooked up. But we are running into roadblocks. The FCC recently issued an opinion where a tribe was attempting to designate a rural service provider for telephone service, so that the provider could receive the rural service assistance subsidies that are available under federal law. However, the FCC reviewed the Supreme Court's decisions and decided that the tribe did not have the authority to be designated the rural service provider for the non-Indians who lived on the reservation, only for the Indians. How are we going to build infrastructure and provide services under a rule of law like that?

Finally, the Hicks decision is causing some of the greatest concerns in Indian Country today. Although we think this is a limited decision, there are a number of state and local police departments who have interpreted the decision for themselves. They have decided that they have the authority to come onto reservations and enforce state law. We have a growing number of reports of this happening throughout Indian Country, and it is a monumental concern. What happens to the basic sovereign right of Indian tribes to self-government if state law is applied on our reservations? What happens to our treaty rights to the exclusive use and occupation of our reservation lands?

This new direction in the Court's Indian law cases poses a very serious threat to the ability of tribal governments to provide essential governmental services and authority on Indian lands and in the long term, to maintain the culturally separate identities of Indian communities. If the Court continues on the current path, we believe that the exercise of state authority over tribal matters will become commonplace, and that nearly all of tribal sovereignty will become hollow. To say that we are concerned is an understatement of epic proportions.

Tribal leaders have come together in an unprecedented way in order to address the threats posed by the trend in the Supreme Court's decisions. On September 11th, 2001, tribal leadership from across the country met in Washington, DC to discuss these issues.

The forum came upon the occasion of a great tragedy, terrorist attacks in New York, Pennsylvania and Washington, D.C. that killed thousands of innocent people. The meeting was changed decidedly as the participants grieved and offered prayers for the victims and their families. Detained in Washington, D.C. for several days by these circumstances, the tribal leadership continued their discussion of Supreme Court's efforts to remove the sovereign rights of Indian Nations and the need for tribal leaders to unify and organize our response to protect our sovereign rights. These discussions were heightened due to the sense of loss caused by September 11th's terrible events.

The assembled tribal leaders reached a consensus to begin an organized effort to address the Supreme Court's erosion of tribal sovereignty. We have begun our efforts already by convening a broad discussion among tribal leaders across the country about what we need in order to govern our territories and provide the public safety, services and economic infrastructure so desperately needed by Indian Country. We plan to move forward in a deliberate and methodical fashion to assess the appropriate scope of effective and appropriate remedies. We believe that this assessment should be made in a government-to-government dialogue with Members of Congress because Congress is the trustee with the ultimate responsibility for protection of tribal self-government, treaty commitments and tribal sovereignty.

We are also organizing ourselves to coordinate better in our efforts to educate the federal courts, the Congress and the American public about tribal governments, our historical standing in the American political system and the current needs of our communities in today's world.

We are currently having an extensive discussion about these issues in Indian Country, and it may take us the rest of this year to complete our talks. Tribes across the country are very different, and they have different ways of governing themselves, and different treaty rights, executive orders, lands and histories. We have to move forward very carefully to be sure that all of the tribes have a chance to get involved in the discussion. Moreover, we don't believe Congress is ready to tackle this issue this year. This will be a short legislative year, there are too many other issues crowding the agenda. We also have a lot of work to do to gather the facts, build the record and make the case to both Congress and the Administration.

We want to thank the Senate Committee on Indian Affairs for convening today's hearing as a starting point for discussion with Congress about these vital issues. The tribal leaders know that we have a lot of work to do and a lot of discussions ahead of us. However, I can tell you that tribal leaders are determined to move forward collectively on these matters and that we will not cease until we have protected our rights and restored our sovereignty. Thank you very much for having me here today, and I can assure you that we will be back seeking your support and assistance.

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Testimony of David H. Getches
Raphael J. Moses Professor of Natural Resources Law
University of Colorado School of Law
Boulder, Colorado

United States Senate
Committee on Indian Affairs
February 27, 2002

Thank you for the opportunity to testify on the impact of recent Supreme Court decisions on Indian tribal sovereignty. For most of my professional life I have been involved in Indian law as an attorney, public official, and scholar. For the past several years I have been studying the Supreme Court's jurisprudence in Indian law. My biographical information is attached as Appendix A.

For most people, Indian law is an arcane curiosity. But for Indians, it is vitally important to everyday life. The law includes the tools of cultural preservation – and destruction. It makes tribes sovereigns and guarantees insulation of reservation Indians from intrusions by state governments and laws. It also empowers Congress to revise and even extinguish Indian rights and property interests. Indian law defines a body of law that is both cherished and feared by Indians.

Congress has enunciated a policy of Indian self-determination and has repudiated past policies that stripped tribal powers and rights. But today, the Supreme Court is abandoning its enshrined principle of deferring to Congress and is itself re-shaping and diminishing tribal rights and undermining Indian policy. The Court is ignoring the basic principles of Indian law and it appears that only Congress can set Indian law right.

The Foundational Principles in Indian Law Favor Tribal Self-Government Except as Altered by Congress

Indian law is fraught with heady complexity, but the law concerning tribal governments is founded on a few, very basic principles. They were well-articulated by the late Felix S. Cohen:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles:
>
> 1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state.
> 2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, e.g., its powers of local self government.
> 3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[1]

Embedded in these principles is a continuing, inherent right of tribal self-government. But this right is subject to express limitation by Congress. Sometimes

judicial deference to Congress worked to the disadvantage of tribes, such as when policies destructive of tribal rights and self-government were announced by Congress. In fact, Congress at times has been extreme in divesting Indian rights. Ill-conceived policies such as Allotment and Assimilation in the late 1800s and Termination in the mid-1900s began dismantling tribal governments and land holdings. These two policies were each repudiated by Congress after they proved disastrous for Indian people. But before Congress reversed itself, Indian people challenged the laws implementing these policies. The courts, however, led by the United States Supreme Court refused to alter policy, deferring to Congress.

Likewise, when unique rights of Indian tribes – treaties that afford special fishing rights, immunity from state taxes, governance of hunting by non-Indians on the reservation – have been challenged by others, the Court has said that if these laws result in inequities or represent outmoded policy it is up to Congress to change them. More often than not, though, the decisions affirmed the rights of tribes to the extent they had not been explicitly curtailed by Congress. Relying on foundational principles, the Court typically upheld tribal treaty rights, powers of self-government, and prevented states from imposing their legislation and taxes on Indian reservations.

From the Nation's Founding Until Recently, the Supreme Court Has Deferred to Congress to Make Indian Policy

The Court has repeatedly said that in absence of a clear statement by Congress, Indian rights cannot be diminished. The tradition of judicial deference to Congress in Indian affairs has been solidly maintained by the Supreme Court, at least until the last fifteen years. The earliest decisions of the Court found the governmental status of Indian tribes to be grounded firmly in the Commerce Clause of the United States Constitution. From the days of Chief Justice John Marshall until the mid-1980s, Indian decisions left to Congress the decision whether to alter venerable principles. A trilogy of cases decided by the Marshall Court recognized the independence of tribes and the political relationship between tribes and the United States. These cases were cited in nearly every Indian decision for 150 years and remain as the foundation of Indian law.[2]

From the 1960s until the mid-1980s, a period known as the "Modern Era" in Indian law, the Court decided a large number of Indian cases and reiterated the principles that tribes retain all their aboriginal powers, except as diminished by Congress.[3] The Court looked at "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[4] In case after case, consistent with the foundational principles in Indian law, the Supreme Court sustained tribal rights and powers unless there was a clear indication from Congress that those rights and powers were extinguished. See Appendix B. For instance, in the Modern Era, the Supreme Court:

- Upheld tribal taxes on non-Indian oil development on the Jicarilla Apache reservation[5]
- Allowed the Mescalero Apache Tribe to regulate and license non-Indian hunting and fishing on its reservation[6]
- Denied state jurisdiction to impose income taxes on an Indian employee of a bank on the Navajo Reservation[7]

- Rejected a double jeopardy claim when the federal government prosecuted a defendant for a sex offense that had been prosecuted by a tribe, because the tribe is separate sovereign[8]

Today, however, there has been a sea change in Indian law. The Supreme Court now will deny or diminish tribal powers and rights whenever it does not find explicit congressional *affirmation* of tribal power. This turns on its head the usual presumption that tribal powers and rights continue in absence of a clear *extinguishment* by Congress. The Court appears to be resolving the cases consistent with its own subjective policy preferences.[9]

Supreme Court Decisions are Undermining Congressional Policy Favoring Indian Self-Determination

For the Court to interpose its own policy judgments is especially surprising since Congress has adhered to a strong and constant policy of Indian self-determination and economic self-sufficiency for over thirty years. In that period Congress has passed dozens of laws bolstering the authority of tribal governments in Indian country and implementing the prevailing self-determination policy with an impressive body of laws and programs strongly supporting the sovereignty of tribes.[10] These laws provide for Indian control of education and health care,[11] tribal regulation of environmental quality on reservations,[12] and the restoration and consolidation of the tribal land and resource base.[13] Congress has even tried to roll back some of the Supreme Court's ventures into policymaking that were in conflict with tribal political and cultural autonomy.[14]

Indian Rights and Sovereignty are Being Destroyed

The abrupt shift in Indian law jurisprudence since the mid-1980s has resulted in a dramatic record of damaging results for Indian tribes. The record is revealing in terms of wins and losses. In the last ten terms, Indian tribal interests have lost 77% of all their cases in the Supreme Court.[15] It is difficult to find another class of cases or type of litigant that has fared worse in the Supreme Court. Indeed, even criminals seeking reversals of their convictions succeeded 36% of the time in the Rehnquist Court compared to the tribes' 23% success rate!

The consequences of the tribes' dismal record before the Court are serious. Since 1986 tribes have lost 70% of all jurisdiction cases. The Court has rejected nearly all attempts to extend tribal law over non-Indians on Indian reservations. Its decisions have prevented tribes from trying and punishing non-Indian criminal defendants,[16] from regulating nonmembers' fishing and hunting on non-Indian land,[17] from zoning nonmember land in communities on the reservation populated by large numbers of whites,[18] from taxing non-Indian hotel guests on the reservation when the hotel is on non-Indian land,[19] from hearing personal injury lawsuits between non-Indians for accidents on non-Indian land within the reservation,[20] and from hearing suits brought by tribal members for torts committed against them on tribal land by non-Indian state officials.[21] Even in cases concerning state jurisdiction over Indians on the reservation, tribes have lost a majority of the time and the Court has allowed state tax collection and regulation of Indians on their own reservations.[22]

These decisions create practical problems. The Court's increasingly complicated jurisdictional rules depend on multiple factors such as the race and tribal membership of parties and ownership of individual parcels of land. This seriously complicates the work of police, courts, and administrators, whether they are employed by tribes or by non-Indian local or state governments.

Consider the result in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.[23] The Court divided zoning authority over nonmembers' land within different parts of the Yakima Reservation between the tribe and the county based on whether non-Indians owned an unspecified percentage of land in a portion of the reservation. Besides the grave implications for tribal sovereignty, it is nearly impossible for tribal and county officials—not to mention property owners—to apply the decision rationally on the Yakima and other reservations. Zoning jurisdiction based on property ownership not only creates practical problems but also can undermine land use planning objectives because the success of zoning laws depends on comprehensive planning over a substantial area.

The Court created a similarly impractical jurisdictional rule when it said tribal courts did not have jurisdiction over a lawsuit for personal injuries caused by non-Indians on the reservation if they occurred on many (but not all) roads on reservations.[24] The recent *Hicks* case left reservation Indians at the mercy of non-Indian law enforcement officers when it held that state game wardens were immune from tribal jurisdiction even when they invaded an Indian home on tribal land and allegedly damaged property of the Indian resident.[25] And the *Venetie* decision declared that tribal governments lacked jurisdiction over hundreds of remote Alaska Native villages, leaving the residents with little available law enforcement or government regulation.[26]

The Rehnquist Court's decisions, meanderings from the settled principles and approaches embraced by all its predecessors, have created a judicial atmosphere that threatens economic development efforts as well as the political and cultural survival of Indian tribes. This inevitably causes confusion among state, local, and tribal governments, heightens tensions among Indians and their non-Indian neighbors, undermines reservation economic development efforts, and frustrates lower federal and state courts. Investors and businesses seek certainty and the jurisdictional situation created by the present Court has made the provision of government services and the regulatory situation unacceptably ambiguous. Thus, the recent decisions have begun to dismantle Indian policy.

It is ironic that, in an era when many tribes have gained the greater respect and competence needed to deal effectively in the political arena, and when Congress has made clear a strong policy of Indian self-determination, that the Court should, for the first time in the nation's history, assume the prerogative of altering Indian policy instead of deferring to Congress.

Congress Should Provide Guidance to the Court and Rectify its Misadventures in Indian Law

Indian policy-making belongs in Congress, not in the courts. Nothing the Court has said has questioned the continuing existence of Congress's plenary power in Indian affairs. Not only is it consistent with the constitutional separation of powers for Congress to articulate Indian policy regarding tribal powers, but the legislative process also has an

advantage over adjudication. Congress can frame policy that looks beyond a single fact situation. Unlike a judge, who must decide an issue based on whatever record was assembled below, Congress can focus broadly on the issues it addresses and base its ultimate decision on a full consideration of all the implications of the policies and programs it develops.

Although Indians have not always fared well in Congress, American Indian policy, based on a commitment to promoting tribal self-determination, has been rather constant for many years. In part this is because tribes now participate fully in the legislative process.

My research has concluded that, rather than having a specific "Indian agenda," the Rehnquist Court is pursuing certain strongly held values that underlie its larger agenda. That agenda seeks to strengthen states' rights, to insist on color-blind justice, and to advance mainstream values. These three themes dominate virtually all of the Court's work in every field. The Court seems to view Indian law cases as being at odds with these values – involving attacks on state rights, claims of racial preferences, and practices or rights that depart from or disrupt mainstream values. Moreover, it appears that some of the recent Indian cases were selected by the Court because they presented a fact situation in which it could tackle an issue like state sovereign immunity or limits on the free exercise of religion, and the cases just happened to involve Indians.

The Justices' values concerning broader issues in society have informed their views on the merits of Indian cases that, in another era, would be seen as uniquely Indian law matters. When Indian rights and tribal sovereignty are cast as separatist battles that undermine state jurisdiction for the sake of smoke shops and gambling enterprises, they are not viewed favorably by this Court. More appropriately, Indian rights should be seen for what they are, and historically have been: the fulfillment of a political relationship between the United States and self-governing tribes.

The Rehnquist Court has shown that it does not view tribal sovereignty either in a historical context—as part of the arrangements a superior power has made with indigenous sovereigns to secure peace and access to most of the land on the continent—or as an instrument to achieve the current Indian policy goals of economic and political independence set by Congress.

Congress could legislate to reaffirm the self-determination policies and longstanding principles of Indian law that support tribal sovereignty. This would provide guidance to the courts for their decision of Indian law cases. Doing so might return the Court to a more thoughtful consideration of Indian law as a distinct field with its own doctrines and traditions rooted in the nation's history and Constitution.

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1. Felix S. Cohen, Handbook of Federal Indian Law 123 (1941).
2. Worcester v. Georgia, 31 U. S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S, (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
3. The term "modern era" for that period was coined by Charles F. Wilkinson, American Indians, Time and the Law (1987). All Indian law cases decided by the Supreme Court from the modern era through the 2000-2001 Term of the Court are cited and described in Appendix B.
4. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
5. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
6. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
7. McClanahan v. Ariz. Tax Commission, 411 U.S. 164 (1973).

8. United States v. Wheeler, 435 U.S. 313 (1977).

9. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Calif. L. Rev. 1573 (1996).

10. *E.g.*, Indian Self-Determination & Education Assistance Act, 25 U.S.C. § 450a-450n (1994) (allowing contracting by tribes to perform services formerly performed by the BIA); Indian Self-Determination Contract Reform Act, 25 U.S.C. § 450b, 450c, 450e, 450f, 450j, 450j-1, 450k-450m-1, 450n (1994) (strengthening the contracting authority of tribes); Tribal Self-Governance Act, 25 U.S.C. § 450a, 450aa note, 450aa-450gg (1994) (allowing tribes to participate in a "self-governance" project with funds administered under a program akin to block grants); *see also* Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1994) (establishing a comprehensive scheme for adjudication of child custody cases, giving primacy to tribal courts); Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2809 (1994) (strengthening reservation administration of justice).

11. *See* Indian Health Care Improvement Act, 25 U.S.C. §§ 1613-1682 (1994); Tribally Controlled Community College Assistance Act, 25 U.S.C. §§ 1801-1852 (1994); Indian Alcoholism and Substance Abuse Prevention Act, 25 U.S.C. §§ 2040-2478 (1994); Tribally Controlled School Grants Act, 25 U.S.C. §§ 2501-2511 (1994); Indian Education Act, 25 U.S.C. §§ 2601-2651 (1994); Indian Child Protection and Family Violence Protection Act, 25 U.S.C. §§ 3201-3211 (1994); *cf.* Native American Languages Act, 25 U.S.C. §§ 2901-2906 (1994) (encouraging teaching of indigenous languages). Legislation has also supported tribal economic development. *E.g.*, Indian Financing Act, Pub. L. No. 90-499, 98 Stat. 1725 (1984) (codified as amended in scattered sections of 25 U.S.C.); *cf.* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994) (establishing a regime for tribal gambling businesses that modified but did not substantially undermine tribal immunity from state law).

12. Amendments to federal environmental statutes gave tribes the option of being treated as states for the purpose of carrying out programs on their reservations. *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136u (1994); Clean Water Act, 33 U.S.C. §§ 1370-1377 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-11, 300h-1 (1994); Clean Air Act, 42 U.S.C. §§ 7474, 7601(d) (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(c) (1994); *cf.* Surface Mining Control Reclamation Act, 30 U.S.C. § 1300 (1994) (affording special treatment to Indian lands).

13. See Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1994), and amendments to deal with fractionated ownership of allotments, 25 U.S.C. §§ 372, 373-373b (1994). Congress also passed at least ten major land claims acts, DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 231 (4th ed. 1998), and sixteen water rights settlement bills since 1982, *id.* at 849-50. In addition, tribal control and management of natural resources has been enhanced. *See* Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1994); National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (1994).

14. *E.g.*, 25 U.S.C. § 1301(4) (1994) (amendment affirmed tribal criminal jurisdiction over nonmember Indians, effectively overriding the Supreme Court decision in *Duro v. Reina*, 495 U.S. 676 (1990)); 42 U.S.C. §1996(a) (1994) (enacted to deal with the effects of the *Smith* decision on members of the Native American Church); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4 (1994) (attempting to override the Supreme Court's rejection of the compelling interest test in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)); Public Law No. 101-612, 104 Stat. 3209 (1990) (designating as part of a wilderness area the sacred lands denied protection in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1980), thereby assuring that the challenged road would not be built).

16. My study of Indian law in the Supreme Court showed that from 1986-2001, the Court decided forty Indian law cases of which tribal interests won only nine, or 23%. This covers the fifteen terms of the Court since William Rehnquist became Chief Justice and can be compared to the seventeen terms of the predecessor Burger Court when tribal interests prevailed in 58% of the cases. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 280-81 (2001).

16. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978).

17. *See* Montana v. United States, 450 U.S. 544, 565-67 (1981); *see also* South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (holding that Congress's authorization of a water project had

"abrogated the Tribe's 'absolute and undisturbed use and occupation' [of certain lands] and thereby deprived the Tribe of the power to license non-Indian use of the lands").

18. *See* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 421-33 (1989).

19. *See* Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825, 1835 (2001).

20. *See* Strate v. A-1 Contractors, 520 U.S. 438, 456-59 (1997).

21. *See* Nevada v. Hicks, 121 S. Ct. 2304, 2318 (2001).

22. *See, e.g.*, Dep't of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61, 78 (1994) (holding valid a New York law requiring tribal record keeping of cigarette sales to non-Indians); Hagen v. Utah, 510 U.S. 399, 421-22 (1994) (holding that the tribe's criminal jurisdiction over non-Indians had been diminished by Congress); cf. Duro v. Reina, 495 U.S. 676, 698 (1990) (holding that Indian tribes lack criminal jurisdiction over nonmembers).

23. 492 U.S. 408 (1989).

24. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

25. Nevada v. Hicks, 121 S. Ct. 2304 (2001).

26. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998).

Appendix A

David H. Getches
Biographical Information

David Getches is the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado School of Law. He teaches and writes on Indian law, water law, public land law, and environmental law. Professor Getches has published several books on Indian law and water law including *Federal Indian Law*, with Wilkinson and Williams (1998). He has written many articles and book chapters that appear in diverse scholarly and popular sources, including recent articles analyzing the Supreme Court's departures from traditional principles in Indian law.

Mr. Getches was the first attorney in the Southern California office of California Indian Legal Services, which he opened in 1969. He was the founding Executive Director of the Native American Rights Fund (NARF) where he developed the staff, funding, and program of this national, nonprofit Indian-interest law firm. Major cases he litigated include a Northwest Indian fishing rights case (*United States v. Washington*, known locally as "the Boldt decision") and a case on behalf of Eskimos to establish the North Slope Borough, the largest municipality in the world, which includes the Prudhoe Bay oil fields. His other cases dealt with water rights, land claims, federal trust responsibilities, environmental issues, education, and civil rights on behalf of Native American clients throughout the West.

In 1983, David Getches was appointed Executive Director of the Colorado Department of Natural Resources by Governor Richard D. Lamm. The department includes ten divisions of state government that deal with parks, wildlife, land, water, and minerals. During his three and one-half years in that post he strongly advocated water conservation, pressed for groundwater law reform, advanced ideas for better cooperative management and control of the Colorado River, urged expansion of the state's wilderness areas, and spoke out on the importance of recreation and wildlife to the state's economy.

Professor Getches has consulted widely with governmental agencies, Indian tribes, and non-governmental organizations throughout the United States and in several foreign countries. He is a graduate of Occidental College and the University of Southern California Law School.

Appendix B

Supreme Court Cases in Indian Law: 1958-2000
(decided on the merits with opinion)
David H. Getches*

1958 Term

1. Williams v. Lee, 358 U.S. 217 (1959), upholding exclusive tribal judicial jurisdiction over actions involving contracts entered into on an Indian reservation between a non-Indian plaintiff and an Indian defendant.

1959 Term

2. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), construing the Federal Power Act, 16 U.S. C. §§ 796(2) and 797(e) (1982), as authorizing a licensee of the Federal Power Commission to take lands owned in fee simple by an Indian tribe upon the payment of just compensation.

1960 Term

3. Seymour v. Superintendent, 368 U.S. 351 (1962), upholding exclusive federal judicial jurisdiction over prosecutions for offenses covered by the Major Crimes Act that are committed by an Indian on lands held in fee patent by a non-Indian within the exterior boundaries of an Indian reservation.
4. Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962), upholding the secretary of the interior's authority to license the manner in which the Metlakatla Indians fish on lands reserved for the use of the tribe by the Act of March 3, 1891.
5. Organized Village of Kake v. Egan, 369 U.S. 60 (1962), striking down the authority of the secretary of the interior to authorize fishing by Thlinget Indians, for whom no reservation had been set aside, in a manner contrary to state law.

1962 Term

6. Arizona v. California, 373 U.S. 546 (1963), upholding the authority of the United States to reserve water rights for Indian reservations originally established by executive order; defining the quantity of water reserved for Indian reservations as being enough water to satisfy the future, as well as present, needs of the reservations, including enough water to irrigate all of the practicably irrigable acreage on the reservations.

1964 Term

7. Warren Trading Post v. Arizona State Tax Comm'n, 380 U.S. 685 (1965), striking down the imposition of a state gross receipts tax on income earned by a federally licensed trader on sales to Indians on a reservation.

1965 Term

8. Arizona v. California, 383 U.S. 269 (1965), ordering the secretary of the interior and states of Arizona, California, and Nevada to furnish the Court with a list of their present perfected

* Through the 1985 Term of the Court is based on the virtually identical compilation in Charles F. Wilkinson, American Indians, Time and the Law 123-132 (1987). The rest of the list was compiled by David H. Getches.

rights (including Indian reserved rights) and claimed priority dates to waters in the Colorado River.

1967 Term

9. Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968), upholding an Indian landowner's standing to sue to enforce an oil and gas lease, approved by the secretary of the interior, for use on land held by the Indian under a trust patent.
10. Peoria Tribe of Indians v. United States, 390 U.S. 468 (1968), holding the United States liable for the investment that would have been earned on the proceeds from the sale of lands ceded by the tribe had those lands been sold at their public auction value, as required by the Treaty of May 30, 1854.
11. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), upholding the Menominee Tribe's retention of its treaty hunting and fishing rights despite the Termination Act of 1954.
12. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968), upholding the state's authority to regulate the manner in which a tribe exercises its off-reservation treaty fishing rights where such regulations are reasonable and necessary to conserve fish and wildlife resources and are nondiscriminatory.

1968 Term

13. Makah Indian Tribe v. Tax Comm'n, 393 U.S. 8 (1968) (per curiam), dismissing, for lack of a substantial federal question, the tribe's appeal of the Washington Supreme Court's holding that application of a state cigarette tax to wholesalers who distribute cigarettes to retailers doing business on the reservation did not violate the Indian Commerce Clause, U.S. Const., art. III, § 8, cl. 3.

1969 Term

14. Tooahnippah v. Hickel, 397 U.S. 598 (1970), striking down the secretary of' the interior's authority to disapprove an Indian's testamentary disposition of trust property on the secretary's subjective belief that the disposition is not "just and equitable."
15. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), upholding the Cherokee, Chickasaw, and Choctaw Nations' title to lands underlying a ninety-six mile navigable stretch of the Arkansas River.

1970 Term

16. Kennerly v. District Court, 400 U.S. 423 (1971), striking down asserted state judicial jurisdiction over civil contract actions brought by a non-Indian against an Indian concerning a transaction occurring on the reservation.
17. United States v. Southern Ute Tribe, 402 U.S. 159 (1971), barring, as res judicata, the tribe's claim for compensation for lands ceded pursuant to the Act of June 15, 1880.

1971 Term

18. Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), upholding the termination of the federal government's supervision of trust property held by individual mixed-blood Utes after the secretary of the interior's issuance of' a termination proclamation.

1972 Term

19. United States v. Jim, 409 U.S. 80 (1972), upholding Congress's authority to redistribute mineral royalties generated by tribal lands to a larger class of Indian beneficiaries without incurring a Fifth Amendment obligation to compensate the original, smaller class of Indian beneficiaries.
20. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), upholding the imposition of a state gross receipts tax on income earned from a tribal business conducted on off-reservation lands where the tax does not discriminate against Indians.
21. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), striking down the imposition of a state tax on income earned on a reservation by a tribal member who resides on the reservation.
22. Keeble v. United States, 412 U.S. 205 (1973), construing the Major Crimes Act as entitling Indian criminal defendants to a jury instruction on a lesser-included offense that is not an offense enumerated in the act.
23. United States v. Mason, 412 U.S. 391 (1973), upholding a federal administrator's authority to rely on prior Supreme Court cases that the Court has not later overruled or questioned in discharging the government's fiduciary obligations to Indians.
24. Mattz v. Arnett, 412 U.S. 481 (1973), upholding the continued existence of the Klamath River Reservation despite the Act of June 17, 1892, which opened the lands within the reservation to settlement under the homestead laws.

1973 Term

25. Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973), striking down, as discriminatory against Indians, a state regulation that completely banned net fishing for steelhead trout.
26. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), upholding federal judicial jurisdiction over an action brought by a tribe claiming that political subdivisions of the state were interfering with the tribe's possessory rights to aboriginal lands.
27. Morton v. Ruiz, 415 U.S. 199 (1974), striking down a regulation of the Bureau of Indian Affairs (BIA) that denied general assistance to unassimilated Indians living in an Indian community near their native reservation.
28. Morton v. Mancari, 417 U.S. 535 (1974), upholding a BIA regulation providing for Indian preference in promotional opportunities within the agency.

1974 Term

29. United States v. Mazurie, 419 U.S. 544 (1975), upholding Congress's authority to delegate to tribal governments the authority to regulate the distribution of alcoholic beverages on a reservation.
30. Antoine v. Washington, 420 U.S. 194 (1975), upholding Congress's authority to enact legislation limiting a state's power to regulate tribal hunting and fishing rights on lands ceded by the tribe.
31. DeCoteau v. District County Court, 420 U.S. 425 (1975), construing the Act of March 3, 1891, as having disestablished the Lake Traverse Indian Reservation.
32. Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395 (1975), construing § 4(e) of the Federal Power Act (16 U.S.C. §§ 791a-823 (1982)) as not authorizing the

Federal Power Commission to issue licenses for the construction of thermal-electric power plants.

1975 Term

33. Fisher v. District Court, 424 U.S. 382 (1976) (per curiam), upholding exclusive tribal jurisdiction over an adoption proceeding where all of the parties to the proceeding were members of the tribe and resided on the reservation.
34. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), upholding the dismissal of an action brought by the United States in federal court to adjudicate federal and Indian reserved water rights when there is a concurrent adjudication of the same issues in state court.
35. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), striking down the imposition of a state cigarette tax on on-reservation sales by Indians to Indians; upholding the imposition of a state cigarette tax on on-reservation sales by Indians to non-Indians.
36. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976), upholding the authority of Congress to transfer mineral rights from individual Indian allottees to their tribe without compensation where the act authorizing allotment of tribal lands severed the mineral and surface estates.
37. Bryan v. Itasca County, 426 U.S. 373 (1976), striking down the imposition of a state tax levied on personal property located on a Public Law 280 reservation.

1976 Term

38. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), upholding the exclusion of the Kansas Delawares from an act distributing judgment funds to the Delaware Tribe.
39. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), construing the acts of April 23, 1904, March 2, 1907, and May 30, 1910, as having disestablished a portion of the Rosebud Sioux Reservation.
40. United States v. Antelope, 430 U.S. 641 (1977), upholding the first degree murder conviction of an Indian under the Major Crimes Act where the conviction of a non-Indian for the same offense in state court would have placed a higher burden of proof upon the state.
41. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977), upholding the state's authority to regulate the tribe's on-reservation treaty fishing rights when such regulations are reasonable and necessary for the conservation of fish.

1977 Term

42. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), striking down tribal jurisdiction over crimes committed by non-Indians on a reservation.
43. United States v. Wheeler, 435 U.S. 313 (1978), upholding successive tribal and federal prosecutions of an Indian for crimes arising out of the same offense committed on a reservation.
44. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), holding the writ of habeas corpus to be the exclusive remedy available for alleged violations of the Indian Civil Rights Act.
45. United States v. John, 437 U.S. 634 (1978), striking down state jurisdiction over the prosecution of an Indian for an offense included in the Major Crimes Act and committed on lands purchased for the Mississippi Choctaws, a remnant band of the Choctaw Tribe.

1978 Term

46. Washington v. Confederated Bands of the Yakima Indian Nation, 439 U.S. 463 (1979), upholding the authority of an optional Public Law 280 state to assert partial jurisdiction over an Indian reservation.
47. Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), construing 25 U.S.C. § 194 (1982) as shifting the burden of persuasion to non-Indian parties, except states, involved in land ownership disputes against an individual Indian or tribe.
48. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), upholding the Pacific Northwest tribes' treaty right to take up to 50 percent of the harvestable fish passing through the tribes' usual and accustomed fishing places.

1979 Term

49. United States v. Clarke, 445 U.S. 253 (1980), striking down the authority of Alaska municipalities to acquire individual Indian allotments by inverse condemnation.
50. United States v. Mitchell, 445 U.S. 535 (1980), construing the General Allotment Act as creating only a limited trust relationship that does not impose a fiduciary obligation on the United States to manage the allottees' timber resources properly.
51. Andrus v. Glover Construction Co., 446 U.S. 608 (1980), construing the Buy Indian Act (25 U.S.C. § 47 (1982)) as requiring the department of the interior to advertise for bids pursuant to the Federal Property and Administrative Services Act (41 U.S.C. §§ 251-60 (1982)) before entering into road construction contracts.
52. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), upholding the imposition of state cigarette and sales taxes on on-reservation sales by a tribe to nonmembers of the tribe.
53. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), striking down the imposition of state motor carrier license and fuel use taxes on a non-Indian corporation engaged in logging activities on a reservation pursuant to a contract with the tribe.
54. Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980), striking down the imposition of a state gross receipts tax on on-reservation sales by a non-Indian to a tribe, where the non-Indian seller is not licensed to trade with Indians and has no permanent place of business on the reservation.
55. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), upholding the United States' obligation to compensate the tribe for taking the Black Hills in 1877.

1980 Term

56. Montana v. United States, 450 U.S. 544 (1981), striking down the tribe's authority to regulate non-Indians' hunting and fishing on a state-owned navigable watercourse traversing the reservation.

1981 Term

57. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), upholding the tribe's authority to impose a severance tax on oil and gas production on reservation land.
58. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982), striking down the imposition of a state gross receipts tax on a non-Indian corporation constructing school facilities on reservation land.

1982 Term

59. Arizona v. California, 460 U.S. 605 (1983), barring, on the basis of finality, an increase in tribes' water rights based on additions to the tribes' practicably irrigable acreage, except as to lands judicially determined to have extended the reservation boundaries.
60. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), upholding exclusive tribal regulatory jurisdiction over hunting and fishing by members and nonmembers within the reservation.
61. Nevada v. United States, 463 U.S. 110 (1983), barring, on the basis of res judicata, the tribe's assertion of a reserved water right to maintain Pyramid Lake.
62. United States v. Mitchell, 463 U.S. 206 (1983), construing various timber management statutes as imposing a fiduciary duty on the United States to manage individual Indian allottees' timber resources properly.
63. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983), upholding the dismissal of an action brought in federal court by an Indian tribe to adjudicate its reserved water rights when there is a concurrent adjudication of the same issue in state court.
64. Rice v. Rehner, 463 U.S. 713 (1983), upholding concurrent tribal and state regulation of on-reservation sales of alcoholic beverages.

1983 Term

65. Solem v. Bartlett, 465 U.S. 463 (1984), construing the Cheyenne River Act as having opened a portion of the Cheyenne River Sioux Reservation to settlement by non-Indians, but as not having disestablished the opened lands from the reservation.
66. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), upholding the authority of the secretary of interior to impose mandatory conditions on Federal Energy Regulatory Commission licenses for construction, operation, and maintenance of hydroelectric project works located on Indian reservations; finding that Indian reserved water rights are not protected reservations within the meaning of the Federal Power Act.
67. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984), upholding concurrent tribal and state judicial jurisdiction over actions brought by an Indian tribe against a non-Indian defendant for claims arising in Indian country.

1984 Term

68. United States v. Dann, 470 U.S. 39 (1985), holding that the Shoshone Tribe's aboriginal title to lands in several western states was extinguished when, pursuant to a judgment awarded the tribe by the Indian Claims Commission, the United States placed $26 million in an interest-bearing trust account for the tribe.
69. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), upholding the tribe's federal common law right of action for a violation of its possessory rights to aboriginal lands that occurred in 1795.
70. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985), upholding the authority of a non-IRA tribe to impose possessory interest and business activity taxes on mineral production within the reservation without the approval of the secretary of interior.
71. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985), striking down the imposition of a state tax on tribal royalty interests in mineral leases on reservation land.

72. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), construing 28 U.S.C. § 1331 (1982) as conferring jurisdiction on federal, district courts to hear actions alleging that a tribal court has exceeded its jurisdiction after the appellant has exhausted tribal court remedies.
73. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985), construing § 17 of the Pueblo Lands Act of 1924 as authorizing the conveyance of the nineteen New Mexico Pueblos' land upon the approval of the secretary of the interior.
74. Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), upholding the authority of the state to regulate tribal members' hunting and fishing on former tribal lands ceded by the tribe in 1901.

1985 Term

75. California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) (per curiam), upholding the authority of the state to require the tribe to collect an excise tax on tribal cigarette sales to non-Indians where the incidence of the tax falls upon the purchasers.
76. South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986), holding that the Catawba Indian Tribe Division of Assets Act of 1959 requires the application of the state statute of limitations to the tribe's land claim.
77. Bowen v. Roy, 476 U.S. 693 (1986), holding that the right of Indian parents to exercise their religion under the Free Exercise Clause was not violated by the government's use of their child's Social Security number.
78. United States v. Dion, 476 U.S. 734 (1986), holding that Congress, in the Eagle Protection Act, set out a clear and plain intent to abrogate the treaty rights of Indians to hunt eagles.
79. United States v. Mottaz, 476 U.S. 834 (1986), holding that a suit against the United States by an Indian, claiming that the sale of her allotment interests was void, was barred by the 12-year statute of limitations period of the Quiet Title Act, 28 U.S.C.A. § 2409a (1982).
80. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986), holding that Public Law 280 preempted state's disclaimer of jurisdiction over suits brought by Indian tribes against non-Indians in state court.

1986 Term

81. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9(1987), holding that tribal courts have jurisdiction over nonmember activities in Indian country unless jurisdiction is limited by explicit treaty or statutory language.
82. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), holding that a tribe in a Public Law 280 state is not subject to state laws that regulate specific types of gambling.

1987 Term

83. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988), holding that the federal government was not prohibited by the Free Exercise Clause from logging and construction on National Forest lands used by tribes for religious purposes, even though the activities could have devastating effects on Indian religious practices.

1988 Term

84. Employment Division, Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660 (1988), holding that tribal members who used peyote for religious purposes could be denied

state unemployment compensation benefits if the state prohibited peyote use and this prohibition was not unconstitutional.

85. Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989), holding that the possible existence of a tribal sovereign immunity defense did not convert state tax claims into federal question.
86. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), holding that exclusive jurisdiction over custody proceedings where the child is domiciled on a reservation is given to the tribe under the Indian Child Welfare Act (ICWA).
87. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), holding that a state severance tax on a non-Indian minerals company, that was operating on reservation lands, was not preempted by federal law or the imposition of a tribal tax.
88. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989), holding that the tribe had jurisdiction to zone nonmember fee lands on the reservation that were not open to the public, but the county had jurisdiction to zone nonmember lands in the open portion of the reservation.

1989 Term

89. Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), holding that a tribal member was not excused under the Free Exercise clause for violation of state peyote laws that represented generally applicable prohibitions of socially harmful conduct.
90. Duro v. Reina, 495 U.S. 676 (1990), holding that the tribe could not assert jurisdiction over non-member Indians for crimes committed on the reservation.

1990 Term

91. Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991), holding that the tribe had not waived its sovereign immunity to suit by the state, when it sought an injunction to prevent state taxation of cigarette sales to tribal members, but that sovereign immunity did not prevent the state from taxing sales to nonmembers on allotted lands.
92. Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775 (1991), holding that the Eleventh Amendment state sovereign immunity doctrine protected states from suits by tribes.

1991 Term

93. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992), holding that the county could impose an ad valorem property tax on Indian-owned lands within the reservation that had been patented in fee under the General Allotment Act.

1992 Term

94. Negonsott v. Samuels, 507 U.S. 99 (1993), holding that federal jurisdiction over crimes covered by the Major Crimes Act was not exclusive and did not prevent the state from prosecuting the same conduct, if it also violated state law.

95. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993), holding that the state was preempted from imposing income or motor vehicle taxes on tribal members who lived within Indian Country.
96. Lincoln v. Vigil, 508 U.S. 182 (1993), holding that the Indian Health Services did not need to conduct notice and comment rulemaking procedures under the Administrative Procedure Act before discontinuing mental health services to handicapped Indian children.
97. South Dakota v. Bourland, 508 U.S. 679 (1993), holding that Congress abrogated tribal treaty rights to regulate non-Indian fishing and hunting on reservation land when it took the land for construction of a dam and reservoir for public use.

1993 Term

98. Hagen v. Utah, 510 U.S. 399 (1994), holding that Congress intended that surplus land acts would diminish the reservation, based on the circumstances surrounding passage of the acts and current demographics showing a high population of non-Indians on the land.
99. Dept. of Taxation and Finance of New York v. Milhelm Attea & Brothers, Inc., 512 U.S. 61 (1994), holding that federal Indian Trader Statutes did not preempt the state's interest in taxing non-Indian purchases of cigarettes on reservation lands, thus allowing state to regulate sales to Indians as means of enforcement.

1994 Term

100. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995), holding that the state may impose income tax on tribal members who live outside of the reservation but who are employed by the tribe on the reservation.

1995 Term

101. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), holding that Congress cannot abrogate state sovereign immunity to suit by enacting legislation under the Indian Commerce Clause that allowed tribes to sue states for failure to negotiate gaming complaints in good faith.

1996 Term

102. Babbitt v. Youpee, 519 U.S. 234 (1997), holding that the escheat provision of the Indian Land Consolidation Act of 1982, held unconstitutional and subsequently amended by Congress, still constituted an unconstitutional taking without just compensation.
103. Strate v. A-1 Contractors, 520 U.S. 438 (1997), holding that the tribe lacked jurisdiction over a civil case between tribal nonmembers, which was based on a traffic accident that occurred on a state highway over a reservation right-of-way.
104. Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261 (1997), holding that the tribe was barred from suing state of officials under the Ex Parte Young doctrine because their suit was the equivalent of a quiet title action and could extinguish state control over the land.

1997 Term

105. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), holding that the statutory language of the surplus land act combined with the commitment by the U.S. to pay for ceded lands, served to diminish the reservation, and thus the tribe lacked jurisdiction over non-Indian land.

106. Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), holding that the tribe lacked jurisdiction to tax non-Indian property in native villages, which was not a "dependent Indian community" defined by 18 U.S.C. § 1151, because lands were not set aside for the use of Indians under the superintendence of the federal government.
107. Montana v. Crow Tribe, 523 U.S. 696 (1998), holding that the tribe was not entitled to the proceeds of state taxes that were collected in violation of federal law, because that state could have lawfully collected some of the taxes and it was unfair to allow the tribe to have them all.
108. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), holding that a tribe is protected from suit under the soverign immunity doctrine, even for off-reservation activities, unless Congress authorized the suit or the tribe waived its immunity.
109. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998), holding that alienable lands that had been repurchased by the tribe were subject to state and local taxation unless they were restored to federal trust protection under the Indian Reorganization Act.

1998 Term

110. Arizona Dept. of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999), holding that a state may tax a private company for on-reservation work based on its contract with the BIA, if the legal incidence of the tax falls on the private company, and Congress does not expressly preempt the contract from taxation.
111. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), affirming fishing and hunting rights on ceded land in present-day Wisconsin and Minnesota under 1837 treaty.
112. El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999), holding that the doctrine of tribal court exhaustion does not apply in a case under the Price-Anderson Act, which if brought in a state court would be subject to removal.
113. Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999), rejecting tribe's claim that coal owned by tribe under former reservation lands the surface of which patented to settlers, but subject to a reservation of the "coal," included valuable coalbed methane gas.

1999 Term

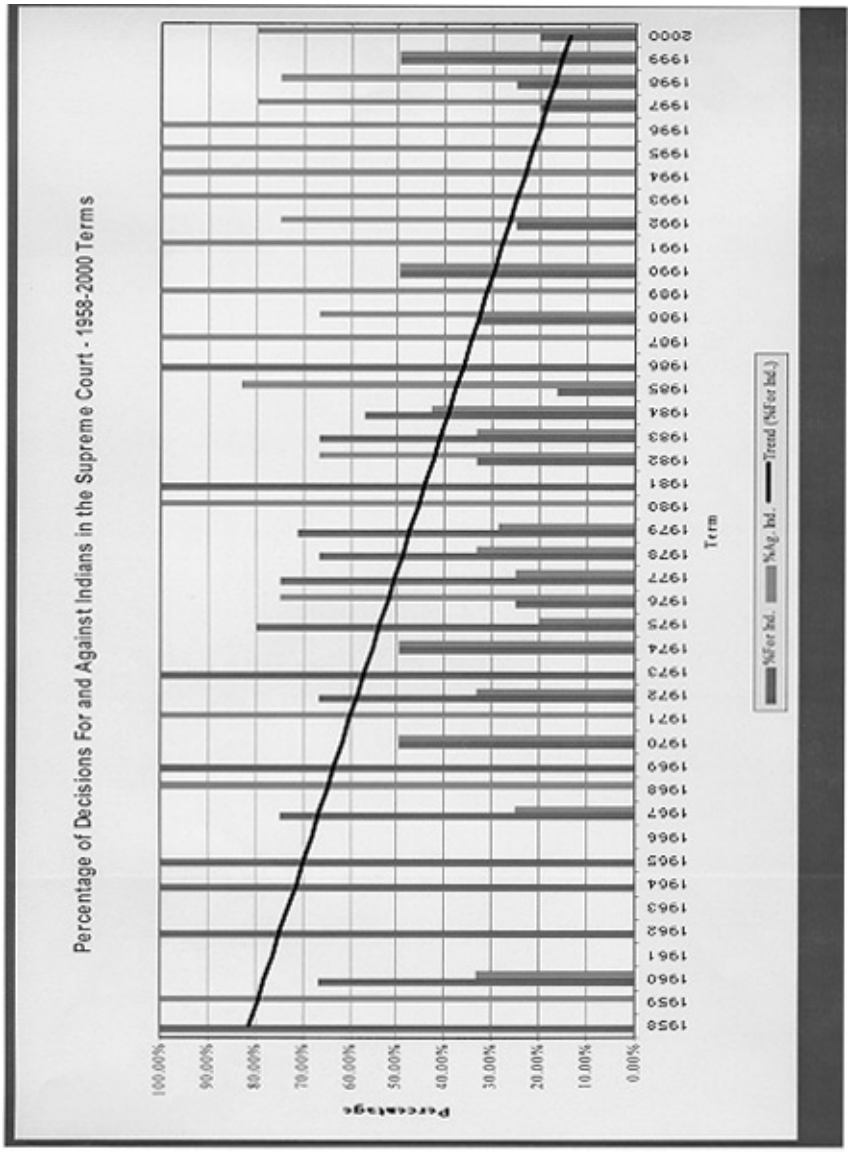
114. Rice v. Cayetano, 528 U.S. 495 (2000), rejecting Hawaii's voting scheme that limits the election of trustees who administer funds for Native Hawaiians to ancestral descendents of Native Hawaiians, as a violation of the Fifteenth Amendment.
115. Arizona v. Californina, 530 U.S. 392 (2000), allowing the tribe to assert claim to water rights.

2000 Term

116. C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001), ruling that arbitration clause in commercial contract constituted tribe's waiver of sovereign immunity.
117. Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001), holding that communications between tribe and Bureau of Indian Affairs officials

and attorneys were subject to disclosure under a Freedom of Information Act request by adverse party in water rights litigation whether or not they were discoverable because the communications were not intra- or inter-agency.

118. Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001), holding that nonmembers of tribe were not subject to tribe's hotel occupancy tax where hotel was located on parcel of non-Indian land within reservation because there were no consensual relations between the hotel owners or guests and the tribe and hotel operations did not affect political integrity, economic security, or health and welfare of tribe.
119. Idaho v. United States, 533 U.S. 262 (2001), affirming finding that tribe retained title to bed of lake within reservation where evidence showed Congress intended that submerged land not pass to state on statehood without tribal consent, based on continuous pre-statehood understanding that the lands and related water rights were important to tribe.
120. Nevada v. Hicks, 533 U.S. 353 (2001) holding that tribal court did not have jurisdiction to adjudicate tort and civil rights claims by tribal member against state game warden sued in his individual capacity for allegedly exceeding the scope of a state warrant to search the Indian's home on tribal land within a reservation that had been validated by the tribal court, because of state's interest in asserting its jurisdiction over Indians.


Percentage of Decisions For and Against Indians in the Supreme Court - 1958-2000 Terms
Percentage
100.00%
90.00%
80.00%
70.00%
60.00%
50.00%
40.00%
30.00%
20.00%
10.00%
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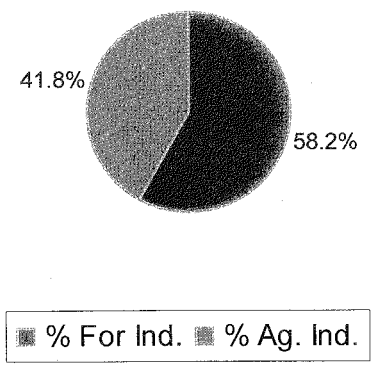
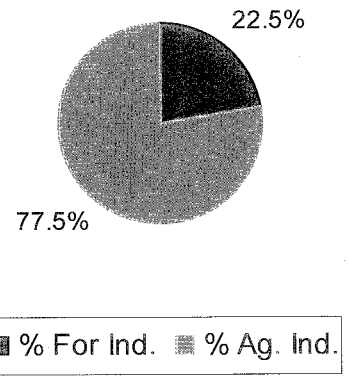
Indian Decisions: For and Against Tribal Interests
Burger and Rehnquist Courts

Burger Court - 1969-1985 Terms



Rehnquist Court - 1986-2000 Terms



Indians in the Rehnquist Court

Indians won only 23% of the time
(includes as appellant or respondent)

Convicted criminals won 34% of the time
(reversals of convictions)

Foundational Principles:

- Tribes are sovereigns
- Tribes became subject to legislative power of US and lost external sovereignty
- Retained tribal powers can only be qualified by congressional legislation or treaties

Source: Marshall Trilogy

INHERENT TRIBAL SOVEREIGNTY:

"Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*"

-- Felix S. Cohen, Handbook of Federal Indian Law, 1942

Tribal Powers

Modern Era:

"Until Congress acts, the tribes retain their existing sovereign powers."

UNITED STATES v. WHEELER (1978)

Rehnquist Court:

"Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in limited circumstances."

STRATE v. A-1 CONTRACTORS (1997)

Tribal Sovereignty

Modern Era:

"Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands is conditioned by the limitations the tribe may choose to impose."

Merrion v. Jicarilla Apache Tribe (1982)

Rehnquist Court:

"Only full territorial sovereigns enjoy the 'power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens,' and Indian tribes 'can no longer be described as sovereigns in this sense.'"

Atkinson Trading Co. v. Shirley (2001) (quoting Duro v. Reina)

Tribal Courts

Modern Era:

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over [nonmember] activities presumptively lies in the tribal courts unless limited by a specific treaty provision or federal statute."

Iowa Mutual Insurance Co. v. Laplante (1987)

Rehnquist Court:

"Limiting tribal court jurisdiction . . . fits with historical assumptions about tribal authority and serves sound policy. . . . [A] presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying Oliphant . . ."

Nevada v. Hicks (2001) (Souter, concurring)

Congressional Intent

- Modern Era

"Present federal policy seems to be returning to a focus upon strengthening tribal self-government . . .[and] courts 'are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'"

Bryan v. Itasca County (1976)

- Rehnquist Court:

"'It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.'"

Brendale v. Confederated Tribes and Bands of Yakima (1989)

TRENDS IN THE REHNQUIST COURT'S DECISIONS:

- *Claims of Racial Minorities Disfavored*
- *Interests of States Upheld*
- *Mainstream Values Favored*

Indians in the Rehnquist Court

State Jurisdiction over Indians

Rehnquist Court (12 years)	82%	favoring states
Burger Court (last 12 years)	45%	favoring states

Tribal Jurisdiction over Non-Indians

Rehnquist Court (12 years)	25%	favoring Indians
Burger Court (12 years)	80%	favoring Indians

States in the Rehnquist Court

States as Petitioners: (lost below)	93% reversed
States as Respondents: (won below)	47% reversed
(All cases in USSC	62% reversed)

TESTIMONY OF THE HONORABLE CHIEF JUSTICE OF THE NAVAJO NATION BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS REGARDING THE IMPACT AND AFFECT OF THE RECENT SUPREME COURT DECISIONS ON NAVAJO SOVEREIGNTY

INTRODUCTION

Yá át téeh, my name is Robert Yazzie. I am the Chief Justice for the Navajo Nation.[1] I want to thank Senator Inouye and the honorable members of the U.S. Senate Committee on Indian Affairs for inviting me here to comment on the recent U.S. Supreme court rulings as they affect the powers and authority of Navajo Nation sovereignty. The impact of these decisions has been profoundly severe and adverse for all Indian nations and the Navajo Nation in particular. However, these impacts can only be understood against a backdrop of settled Native American sovereignty and a brief overview of the Navajo Nation's judicial system.

The foundation principles of federal Indian law, under which the sovereignty of the Navajo Nation is legally defined, have evolved for over more than two hundred years in treaties,

[1] The Navajo Nation is the largest Indian nation in the United States. The Nation covers more than 17 million acres (27,000 square miles) spanning across Arizona, New Mexico, and Utah forming nearly 36 percent of all that remains of Indian lands in the lower 48 states. In fact, the Navajo Nation has been compared in size to such States as West Virginia and South Carolina. The Navajo Nation is largely rural and has a population density of about six persons per square mile. And like most Indian reservations or other rural communities, it is greatly affected by problems associated with a seriously depressed economy and an alarming rate of crime. According to the most recent figures available, 56.1 percent of Navajo families live below poverty level and our unemployment rate is 36 percent to more than 50 percent, depending on the season. Our per capita income averages $6,217.00 annually in comparison to the United States per capita income of $28,542.00. The population growth of the Navajo Nation is double the national rate and the median age is 22.4 years old. More importantly, with a citizenship of almost 300,000 enrolled members the Navajo Nation courts provides services to almost thirteen percent of all the federally recognized Indians within the United States.

statutes, court decisions and actions of the Executive branch of the federal government. These principles operate to preserve tribal rights and tribal government authority in a legal system in which tribes have little political influence. In his seminal *Handbook of Federal Indian Law*, Felix Cohen noted that

1. tribes originally had all the powers of any sovereign state;
2. they then became subject to the legislative power of the United States; but
3. they retained all their powers of self-government except as expressly limited by treaties or acts of Congress.[2]

In order to interpret and apply Congressional limitations on Indian sovereignty, the U.S. Supreme Court established canons of construction, or special rules that were designed "to narrow interpretation of federal treaties, statutes and regulations that intrude upon Indian self-determination and to promote broad interpretations of provisions that benefit Indians."[3]

The Court further developed the doctrines of reserved tribal rights (which states that many of the rights tribes possess were not granted to them but rather were reserved by them when they ceded lands to non-Indians by treaty); federal trust responsibility (which holds that the federal government has fiduciary obligations for the management of Indian trust lands, funds and resources); and the plenary power of Congress (under which Congress is said to be vested with very broad power over Indian affairs).

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[2] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1941).
[3] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv.L.Rev. 381, 418, n. 158 (1993).

The application of these foundation principles had provided broad geographic sovereignty to Indian nations for 150 years until the U.S. Supreme Court's decision in *Montana v. United States*.[4] This sovereignty was meant to be limited only by specific showings of Congressional intent. Beginning prior to *Montana*, with *Oliphant v. Suquamish Indian Tribe*, [5] and continuing through *Montana* and its progeny—specifically *Strate v. A-1 Contractors*,[6] *Nevada v. Hicks*,[7] and *Atkinson Trading Company v. Shirley*[8]--the U.S. Supreme Court has single-handedly succeeded in undermining Congressional intent and seriously threatened Native America's political, economic, and cultural survival.

None of these recent Supreme Court cases reveal evidence that Congress has explicitly taken away a sovereign power of any Indian Nation. Rather, the Court has applied a rule it unilaterally created in *Oliphant* called "implicit divestiture" which theorizes that "Indian tribes are proscribed 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]." Based on the aforementioned cases, Indian Nations are therefore implicitly divested of their civil jurisdiction over state process servers (*Hicks*), taxing authority over non-Indian hotel operators on private fee land located within our territorial boundaries (*Shirley*), criminal jurisdiction over non-Indians committing crimes within our reservation boundaries (*Oliphant*), regulatory power over hunting and fishing by non-Indians on private fee land within our

[4] 450 U.S. 544, 565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.")
[5] 435 U.S. 191 (1978).
[6] 520 U.S. 438 (1997).
[7] 121 S.Ct. 2304 (2001).
[8] 121 S.Ct. 1825 (2001).

territorial boundaries (*Montana*), and civil jurisdiction over non-Indians in cases arising on state rights-of-way crossing through our territorial boundaries (*Strate*).

In other words, there does not seem to be anything principled or doctrinally sound about the Court's recent jurisprudence in federal Indian law; rather, the Court's jurisprudence "seems based on [a] political expediency"[9] that solely benefits non-Indians and state governments. The combined result, or impact as this Committee seeks to determine, is the inability of the Navajo Nation to maintain its "political integrity, economic security, or the health or welfare" of its people.[10] In short, the Navajo Nation is faced with nothing less than a threat of cultural, economic, and political genocide.

In the end, we are talking about territorial integrity. We are talking about the ability of Indian nations to have effective control over *all* activities within their boundaries for the common welfare. At present, neither non-Indians nor Indians have a clear understanding of what happens when someone commits an act or causes harm within reservation boundaries. The jurisdictional confusion in criminal law caused by questions concerning inherent criminal jurisdiction over non-Indians and contested criminal jurisdiction over nonmember Indians leaves victims of crime unaided and helpless because of the failure of federal prosecutors to effectively prosecute crime.[11] Doubt over civil jurisdiction in either regulatory or adjudicative areas

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[9] N. Bruce Duthu and Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, Natural Resources & Environment (Fall 2001); *quoting* Alex Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 Tulsa L.J. 269, 303 (2000).
[10] 450 U.S. at 565-566.
[11] The Navajo Nation must coordinate the prosecution of Major Crimes with the U.S. Attorney's Office within New Mexico, Arizona, and Utah. Each of which operates independently utilizing three separate prosecutorial guidelines.

multiplies litigation and frustrates legitimate governmental policies, such as imposing a hotel occupancy tax on *all* business within the Navajo Nation, as do the surrounding states.

As for Justice Souter's concerns about protecting the civil rights of non-members, the fact is that the wealthy are able to seek federal review in all-or-nothing disputes over jurisdiction, while ordinary people do not have that luxury. The concern expressed about the use of customary law is unreasonable, because the Navajo Nation jurisprudence in that field is clearly pro-individual rights.[12] The Indian legal community and the academic community is moving swiftly to make sense of Indian customary law for everyone through court opinions, law journal articles, and training programs that stress the superior advantages of Indian customary law. It should be noted that there are growing movements in American law (restorative justice, therapeutic jurisprudence, and polycentric law) that hold up Indian customary law as a model to be adopted by Americans in general.[13] The limitations in the Indian Civil Rights Act identified by Justice Souter are negligible compared to the primary considerations of due process and equal protection that are required by the Act.

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[12] *See, for example, Begay v. Navajo Nation*, N.L.R. Supp. 13, 16 (Nav. Sup. Ct. 1988)(Navajo court proceedings must comply with the Navajo Bill of Rights and the Indian Civil Rights Act, and as such, we must insure compliance with procedural and substantive due process before someone is deprived of their private property); *Navajo Nation v. Atcitty*, 4 N.L.R. 76, 78 (Nav. Ct. App. 1983)(...due process protections [are] an important element in the jurisprudence dynamic found in the federal and state courts and is equally found within the mandates and procedures of the Courts of the Navajo Nation); *Mustache v. Navajo Bd. of Election Supervisor*, 5 N.L.R. 57, 59 (Nav. Sup. C 1987)(The Indian Civil Rights of 1968, 25 U.S.C.§1302(8), guarantees procedural due process in hearings before tribal administrative agencies).

[13] recent accounts estimate around 300 restorative justice programs throughout the United States, and similar processes have long been observed in pre-modern and indigenous societies. Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, SENTENCING AND CORRECTIONS, September 1999, No. 3 (Magazine of the National Institute of Justice, U.S. Department of Justice), at 4.

Justice Souter's concerns about the scope of the protection of individual rights are fully addressed in the Navajo Nation Bill of Rights.[14] It adopts all provisions of the United States Bill of Rights, with the exception of the right to appointed counsel for indigents in criminal cases. That gap was closed with adoption of an indigence policy, which requires appointed counsel in all instances where there is a "likelihood of incarceration." In addition, the Navajo Nation Bill of Rights guarantees the rights to life, liberty, and happiness, and also includes the right to gender equality (i.e., the Equal Rights Amendment) that is not a part of American Constitutional guarantees. It may be that Indian nations such as the Navajo Nation, which zealously promotes individual rights, should be given the first option for expanded criminal and civil jurisdiction.

SPECIFIC EXAMPLES OF NEGATIVE IMPACTS

The Supreme Court's recent decisions have created confusion for the Navajo Nation. Business entities such as electric utilities and natural gas pipeline companies possessing right of way grants or leases on tribal lands have challenged the authority of the Navajo Nation. These companies have argued that their right of way grants or leases are the equivalent of fee lands under *Strate vs. A-1 Contractors*. They alleged that the Navajo Nation's consent to their grants is not sufficient to retain jurisdiction. These challenges have adversely impacted the economic stability of the Navajo Nation government by jeopardizing future tax returns. The decreased revenues have a direct correlation on the level of essential governmental services that the Navajo government can or is able to provide to all residents and travelers of the Navajo Nation.

[14] 1 NNC §§1-9.

The *Strate, Hicks,* and *Atkinson* decisions also adversely impact economic development within the Navajo Nation. Businesses located on fee land are able to avoid paying tribal taxes while businesses located on trust lands continue to pay. The fee land businesses, for all practical purposes receive, a free ride and the benefits of a civilized society that are assured by the provision of governmental services by the Navajo Nation.

Within the realm of criminal jurisdiction, the following are brief examples of how these decisions have impacted the ability of the Navajo Nation's provision of public safety services and assuring victim's rights.

In December 1997, Russell Means, an enrolled member of the Lakota Nation, was arrested for two counts of battery and one count of threatening. It is alleged that Mr. Means struck his former father-in-law, an enrolled member of the Omaha Nation, and spit in the face of his nephew, an enrolled member of the Navajo Nation. These incidents occurred within the territorial jurisdiction of the Navajo Nation. To date, however, neither the victims nor the Navajo Nation have had their day in court as the Navajo Nation has diverted its attention from the actual criminal prosecution to a lengthy battle over jurisdiction. Although the Nation is now hoping to go to trial soon with the Supreme Court's recent denial of *certiorari* in the matter of *United States vs. Michael Enas*, Mr. Means has an appeal pending in the 9th Circuit Court of Appeals.

In the mid 1990's, Bruce Williams, a non-Indian, raced through a community located within the territorial jurisdiction of the Navajo Nation just to demonstrate that the Navajo Nation did not have criminal jurisdiction over his activities.

In July 2001, an enrolled member of the Navajo Nation battered his spouse on tribal fee land (a HUD Indian Housing cluster), but due to the Supreme Court's recent decision in *Alaska vs. Native Village of Venetie*, neither the Navajo Nation nor the United States Attorney's Office had jurisdiction over the matter. More importantly, the State of New Mexico did not demonstrate any interest in pursuing a prosecution. We have prepared a flow chart demonstrating the Navajo Nation criminal justice system to enhance your understanding of the complexity of our criminal justice system. This flowchart is attached.

In November 2001, an enrolled member of the Hopi Nation was arrested for unlawful weapons, possession and distribution of liquor within the exterior boundaries of the Navajo Nation's territorial jurisdiction. Unfortunately, he was arrested on a right-of-way granted to the State of Arizona by the Navajo Nation. Since then, the Navajo Nation has been embroiled in a jurisdictional dispute, ala *Strate* that promises to evade the merits of the case at least as long as the ongoing issue with Russell Means.

Several years ago, a county police officer engaged in a high-speed chase on a right of way granted by the Navajo Nation to the State of Arizona. This high-speed chase sadly resulted in the death of at least one individual when their vehicle missed a curve. County police officers are now entering the Navajo Nation and confiscating State license plates from vehicles owned by Navajos without going through any tribal process. County police officers are now also entering the Navajo Nation and removing or attempting to remove Navajos for crimes committed outside the reservation without going through the Navajo Nation's codified extradition process.

In fact, calls are received regarding possible attempts by creditors to repossess property without going through Navajo Nation process. Pursuant to Navajo law, self-help remedies are illegal and creditors must seek and obtain an official order from the Navajo Courts to repossess property.

Recently a public outcry arose when a severely intoxicated Navajo man killed four people on a State highway outside the jurisdiction of the Navajo Nation. Regardless of the fact that the driver was a BIA employee driving a BIA vehicle, media attention focused on the fact that the driver had numerous tribal DUI convictions that went unreported to State authorities. The Navajo Nation struggled to explain that reporting agreements between the Navajo Nation and state law enforcement agencies have consistently broken down because state courts will not recognize tribal court judgments. Tribal judges, operating under the constraints of a jail-conditions consent decree for limited jail space, often confiscate a state driver's license when the driver is found guilty of DUI. Unfortunately, all those drivers have to do at the State's Department of Motor Vehicle is to claim a lost license to obtain a duplicate.

The Congress, in 1994, passed the Violence Against Women Act. The VAWA purports to protect all women throughout the United States from domestic violence. However, pursuant to the present federal statutory scheme in Indian country regarding jurisdiction, whenever a Navajo woman is beaten by a non-Indian spouse neither the State nor the Navajo Nation is presumed to have jurisdiction over the matter, only the federal government can prosecute. However, because of the status of the crime in Indian country being a misdemeanor, which occurred outside the presence of a federal agent, there is not an immediate arrest. More

importantly, if the victim is not severely injured or killed then the United States Attorney's Office will generally decline the matter. It is important to note here that at least one federal district has suggested that they will at least issue the perpetrator a citation from the Central Violations Bureau. For all intents and purposes, this is a meaningless gesture, because this process does not remove the perpetrator from the home or proximity of the victim. It is similar to a civil traffic citation demanding that the person appear in court on a certain date.

Some scholars have suggested that the Nation exercise its right to exclude. However, an exclusion order is no more effective against domestic violence than a protection order or the above-described Central Violations Bureau citation. How many women across the United States have been either injured or killed while under the purported protection of restraining orders.

THE NAVAJO JUDICIAL SYSTEM

The "implicit divesture" doctrine that has so ravaged tribal sovereignty was based on wholly unjustified and subjective opinions about the competency of Indian courts. The *Oliphant* Court stated that tribal courts' attempts to exercise criminal jurisdiction over non-Indians was a "relatively new phenomenon" that lacked "any semblance to a formal court system," where the "emphasis was on restitution rather than on punishment."[15] While American penal institutions

[15] *See generally,* 435 U.S. 191 (1978). Navajo courts today are pressured to become mirror images of state courts. Despite that pressure, Navajo common law and statutory laws are the laws of preference in the Navajo Courts. Otherwise, applicable federal law is utilized. Lastly, state law may be applied. Navajo common law is the values and moral principles of the Navajo people, i.e., their traditional customs, usages, and ways of doing things. Lawyers and advocates regularly argue Navajo common law in the courts. Navajo common law is found in books and articles on Navajo culture and in Navajo Court opinions. Navajo elders and teachers of Navajo culture are also sources of Navajo common law. The choice of law statute of the Navajo Nation is found at 7 NNC §204 of the Navajo Nation Code. The Navajo courts also adopted various rules, which guide litigants through the courts,

are presently at overflow capacity, the merits of punishment versus restitution are beyond the scope of our discussion here. Rather, our emphasis must remain on the perceived lack of our courts' semblance to formal court systems.

In July 2001, U.S. Supreme Court Justices Sandra Day O'Connor and Steven Breyer joined a host of other federal and state judges at Window Rock, Navajo Nation; to acknowledge the vital role Indian courts play in Indian communities across the country. They discovered a sophisticated and competent Navajo judicial system that has existed since 1959 when, as an act of self-determination and an expression of tribal sovereignty, the Navajo Nation Council declared their right to create their own laws by abolishing the CFR court and replacing it with the Courts of the Navajo Nation.

The Navajo courts process roughly 90,000 cases annually. In fiscal year 2001, statistics illustrate that Navajo courts dealt with a caseload of 88,000 cases. Of these, 22,275 (25%) were criminal cases; 6,322 (7%) were criminal traffic cases; 27,980 (32%) were civil traffic cases; 5,150 (6%) were civil cases; 2,371 (3%) were family civil cases; 4,354 (5%) were domestic violence cases; 2,390 (3%) were delinquency cases; 489 (1%) were juvenile dependency cases; 988 (1%) were juvenile traffic cases; 13,400 (15%) were probation cases; 1,233 (2%) were peacemaking cases; and 168 (1%) were Supreme Court Cases.

A. Court Structure

The Navajo judicial system is a two-tiered system. There are seven district courts or trial courts located throughout the Navajo Nation. These courts generally have four divisions: 1)

including rules of pleadings and practice; criminal, civil, and appellate procedure; evidence; and domestic violence and probate procedures.

District Court; 2) Family Court; 3) Small Claims Court; and 4) the Peacemaker Division. Each judicial district has a district court and five of the seven districts have a separate family court. The courts located in Arizona are at: Tuba City, Kayenta, Chinle, and Window Rock. In New Mexico, they are located in Shiprock, Crownpoint, and Ramah. Two satellite courts under the Ramah district are located in New Mexico at To'Hajiilee and Alamo. Eighteen judges make up the Navajo judiciary.[16] Fourteen are trial judges who preside in the district and family courts. In the districts, the trial judge supervises the court staff and administers the court with the help of the court administrator.[17] Cases begin in the trial courts, and the decisions of these trial courts may be appealed to the Navajo Nation Supreme Court located in Window Rock, Arizona. The Supreme Court hears appeals from the trial courts on questions of law raised on the record and certain administrative agency decisions. Trial *de novo* is not allowed. Three appellate judges preside in the Supreme Court. One appellate judge is the Chief Justice and the other two are Associate Justices.[18]

B. Peacemaking

As mentioned earlier, the Navajo Nation employs two justice systems to resolve disputes: 1) the Anglo-American adversarial system of justice, and 2) the Navajo traditional justice system, or peacemaker division. The peacemaking division does not use judges, juries, lawyers, police officers, or jails. It is a system of court-annexed mediation and arbitration which draws on

[16] Of the eighteen Navajo judges, three are law school trained. Seven judges (half the trial bench) are women.
[17] The judicial branch employs approximately 140 persons, including court clerks, bailiffs, secretaries, probation and parole officers, and peacemaker liaisons. And there are five court staff attorneys the majority of who are Navajos.
[18] The chief justice also prepares the budget, sets and implements policies, and oversees Judicial Branch operations. The Navajo Nation Judicial Branch operates on funds from the federal government and Navajo Nation general funds.

the traditional Navajo institutions of family, clan, community and traditional leaders who are selected on the basis of wisdom, stature, and ability to solve problems.[19] The peacemaker is a persuasive leader who applies Navajo values to arrive at consensual solutions to disputes.

C. Judicial Code of Conduct

Judges carry out their duties and responsibilities guided by Title 7 of the Navajo Nation Code and the Code of Judicial Conduct that was adopted in 1991 and patterned after the ABA Model Code of Judicial Conduct.[20] An independent Judicial Conduct Commission reviews serious complaints of misconduct filed by the public against the Navajo Nation judges and can recommend removal of a judge to the Chief Justice. As their supervisor, the Chief Justice reviews minor complaints against all Navajo Nation judges. The Navajo Nation judicial system is structured to avoid abuses and non-legal attacks claiming that the court's decisions are unreasonable, biased, and motivated by political influence. The Code of Judicial Conduct, coupled with the authority of the Chief Justice to supervise the work of judges, reinforces the soundness of the decision-making process. In addition, members of the Navajo Nation Bar Association, the Judiciary Committee of the Navajo Nation Council and the Chief Justice evaluate Navajo Nation judges' judicial and administrative skills annually. These evaluations include independence in decision-making, knowledge of the law, courtroom demeanor, and staff

[19] The Peacemaking system is also adaptable to other forms of culture, including principles of Christianity. The parties themselves have the right to select who they deem to be a respected leader from their own particular community to act as "peacemaker."

[20] Judicial branch employees who are not judges work under the Judicial Branch Personnel Policies and Procedures and the Employee Code of Ethics.

supervision. These evaluations are used to identify the judge's strengths, weaknesses and areas of training need.

D. Court of Record

Contrary to the position of the federal courts and the United States Attorneys Office, all Navajo courts are courts of record. All trial proceedings are recorded. The Navajo Supreme Court issues written opinions and the lower courts issue opinions involving cases of first impression.[21]

E. Bill of Rights

The Indian Civil Rights Act (a federal law) and the Navajo Nation Bill of Rights require the Navajo courts to safeguard the rights of individuals and to settle their claims fairly. Court proceedings are conducted in both the Navajo and English languages. Navajo court interpreters can be used to assure that litigants understand what is said in court proceedings. There are extensive court rules, which govern how cases are handled and decided. Court rules are designed to ensure fundamental fairness and impartiality. The Navajo courts apply criminal and civil laws of the Navajo Nation, including statutes and Navajo common law. Where no specific Navajo law exits, applicable federal or state law is often used.

Although individuals have the right to represent themselves, Navajo judges will appoint counsel for a person if the person is unable to afford counsel. One important right is the defendant has a right to a jury trial in criminal cases. There are other rights guaranteed to the

[21] Twenty-three years ago, in 1969, the Navajo court of Appeals, now the Navajo Nation Supreme Court, issued its first written opinion. Today, all court opinions are reported in the Navajo Law Reporter, the Indian Law Reporter, and are made available for posting on www.tribalcourts.com.

criminal defendant by these laws. Indians have many civil rights; among them are protections in criminal proceedings. All persons, under the 1968 Indian Civil Rights Act; have a right to legal counsel in criminal cases at his or her own expense. Where appropriate, poor defendants have a right to appointed legal counsel. Members of the Navajo Nation Bar Association must represent poor defendants without charge. The Navajo Nation has no written constitution. A Bill of Rights is provided in the 1968 ICRA and the 1967 Navajo Bill of Rights. The Navajo Nation Bill of Rights provides for greater protection than the ICRA in the provisions of the Bill and the way Navajo Nation courts interpret it.

F. Appointment Process

The Navajo courts are independent from political influence and external pressures. Cases are decided using evidence properly admitted by the court and by applying applicable laws. To ensure that the Navajo courts will be free from political influence and bias, the Navajo nation Council in 1958, created a system for appointment (instead of election) of Navajo Nation judges. The Navajo Nation appoints its judges rather than elect them. When a judgeship vacancy occurs, Navajo candidates who meet the qualifications submit an application, which is reviewed and screened by the Navajo Judiciary Committee, a standing committee of the Navajo Nation Council. The committee evaluates each applicant based on educational attainment, professional experience, and knowledge of Navajo culture and the Navajo language. The top qualifying candidates are recommended to the Navajo Nation president. The president makes a final selection, which is submitted to the Navajo Nation Council for confirmation. Before permanent confirmation, each judge serves a two-year probationary period.

G. Navajo Nation Bar Association

The Navajo Nation Bar Association (NNBA) has several committees that operate the association. One committee is the disciplinary committee, which hears complaints against lawyers and advocates and disciplines when necessary. Only members of the NNBA can practice in the Navajo courts and before the several Navajo Nation administrative agencies that conduct hearings. To become a member, an applicant must have proper moral character and fitness and pass an examination. There are over 400 Indian and non-Indian members of the NNBA, attorneys (law school graduates) and lay advocates (non-law school graduates, but with legal training), who reside in Arizona, New Mexico, Utah, and Colorado. Some live in other states and foreign countries. To become a bar member, a person must pass an exacting bar examination.

H. Jury Trials

Jury trials are a matter of right in all criminal cases, but that is not an absolute right in civil cases. The jury consists of no less than six (6) jurors. Both Indians and non-Indians serve. They represent a fair cross-section of the community. Jurors are selected in accordance with court rules.

I. Jurisdiction

The Navajo trial courts have general civil jurisdiction and limited criminal jurisdiction.[22] Navajo civil jurisdiction extends to all persons (Indian and non-Indian) who reside in Navajo

[22] The Navajo family courts have jurisdiction over matters involving children, probate, name changes, quiet title, and domestic relations. Children's cases are handled with great care. The district courts have jurisdiction over all other matters that the family courts do not hear, including torts, contracts, and consumer transactions. The amount of

Indian Country or who have caused an action to occur in Navajo Indian Country. The Navajo Courts criminal jurisdiction extends to all crimes codified in the Navajo Nation Code along with its terms of punishment. However, the Navajo Nation is prohibited by Congress to impose any sanction greater than 365 days in jail and/or a $5000 fine.[23] Serious offenses, such as those listed in the Major Crimes Act, are tried in both the Navajo and federal courts.

CONCLUSION

For the past twenty-five years, the United States Supreme Court has ruled in an increasing number of cases that tribes, including the Navajo Nation, under federal law, lack jurisdiction over non-members in Indian Country. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978) (tribes lack jurisdiction to prosecute and convict non-Indians); *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053 (1990) (tribes lack jurisdiction to prosecute and convict non-member Indians); *Montana v. United States*, 450 U.S. 544 (1981) (tribes may assert authority over non-members only where such non-members consent to tribal jurisdiction or where the non-member's activity threatens the political or economic integrity or health and welfare of the tribe); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (the tribal court lacks authority to adjudicate a suit between non-members regarding an accident that occurred on the

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controversy is unlimited. More importantly, while it is presumed that there is no criminal jurisdiction over non-Indians, Navajo courts hear civil cases involving them. The Supreme Court has jurisdiction over appeals from final decisions of the trial courts and certain administrative agencies. The Supreme Court decides only on issues of law raised in the record of appeal.

[23] As a result of *Oliphant*, the Navajo Nation is prohibited from exercising criminal jurisdiction over non-Indians who commit crimes within Navajo Indian Country. Non-member Indians are also contesting the jurisdiction of the Navajo Nation raising issues of equal protection in that they are similarly situated as non-Indians.

reservation); *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001) (tribe lacks authority to impose a hotel occupancy tax on non-member guests of a hotel on the reservation); and *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) (tribal court lacks authority over state officers serving process upon an Indian on a reservation and also to hear federal civil rights claims under 42 U.S.C. § 1983).

> The challenge of the years to come regarding the powers of tribal governments will emanate primarily from the individuals and institutions that do not understand the unique positions Indian tribes occupy within the federal constitutional system. The most recent decisions by the United States Supreme Court add momentum to a jurisprudential trend advancing the sovereignty of states and the interests of nontribal members in Indian country at the expense of tribal rights to self-determination.... Congress has largely stood by as the Supreme Court has literally rewritten the law relating to the scope of inherent tribal sovereignty. [24].

The Navajo Nation looks to Congress to assist in addressing the needs of Indian courts and in the development of laws to reinvigorate tribal self-determination and self-government. We look forward to working with this Committee to jointly address these issues.

[24] Supra Footnote 8.

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