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IMPLEMENTATION OF THE TEXAS RESTORATION ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON IMPLEMENTATION OF THE TEXAS RESTORATION ACT

JUNE 18, 2002
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IMPLEMENTATION OF THE TEXAS RESTORATION ACT

TUESDAY, JUNE 18, 2002

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

The committee met, pursuant to notice, at 10 a.m. in room 485, Senate Russell Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye and Campbell.

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

The CHAIRMAN. The committee meets this morning to receive testimony on the implementation of the Texas Restoration Act. At issue is the Texas Restoration Act, a tribal resolution referenced in that act, and the interplay between that act and the Indian Gaming Regulatory Act [IGRA]. Also at issue are the laws of the State of Texas as they relate to gaming that is permitted to be played in the State.

The committee looks forward to hearing from the witnesses this morning as to the chronology of the events that informed the substance of the Texas Restoration Act, both as enacted and as applied.

Before we proceed, may I call upon the Vice Chairman.

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

Senator CAMPBELL. Thank you, Mr. Chairman.

Today's hearing is about a case that highlights one of the difficulties that occurs in a three branch system of government, such as we have in the United States. When statutes are vague or unclear, the Federal courts are asked to divine what is the Congressional intent. The best way to do that is to look at the plain language of the statute and to look at the legislative history of the statute, and finally, to look at the understanding given the words of the statute by its authors. Sometimes the courts get it right and sometimes they get it wrong.

In the 1987 *Cabazon* case, the Supreme Court affirmed an Indian tribe's right to operate the same games that a State does. In 1988, the Congress passed IGRA, confirming this right, so long as it is not prohibited by State law. Under the Texas Restoration Act,

when the legislation that became the Restoration Act passed Congress, Mo Udall, who was a great champion of Native American people and a person that many of us served with on the House side, shepherded it through while understanding that it would reflect the holding and rationale of the *Cabazon* case. Sometimes ambiguities in statute are benign and give no cause for concern. Other times, ambiguity can be devastating, as in the case of the Tigua Tribe, whose casino was shuttered by the decision of the Fifth Circuit Court of Appeals.

Objective observers will admit that gambling in the United States has grown in the past 25 years by leaps and bounds. Lotteries, river boats, charity nights, and Indian casinos have all sprung up to respond to the huge demand by the American public and our visitors from overseas. In the same timeframe, most States have substantially liberalized the types of gaming within their jurisdiction and many have themselves become gaming operators by establishing lottery games. Yet some of those same States are unwilling to accept that Indian tribes can offer the same type of games that they do.

Mr. Chairman, I don't want to re-litigate the *Tigua* case, but I do look forward to hearing the witnesses on this panel, particularly since Professor Skibine and Ginny Boylan have spent so much time with this committee in their previous lives. Nice to see both of you.

The CHAIRMAN. Thank you very much.

We have a panel of experts with us: The chairman of the Alabama Coushatta Indian Tribe of Texas, Kevin Battise; professor of law at the University of Utah, Salt Lake City, Alex Skibine; attorney at law, Dorsey and Whitney, Virginia Boylan.

May I now call upon Chairman Battise.

STATEMENT OF KEVIN BATTISE, TRIBAL COUNCIL CHAIRMAN, ALABAMA COUSHATTA INDIAN TRIBE OF TEXAS

Mr. BATTISE. Thank you, Mr. Chairman and members of the committee. Good morning. My name is Kevin Battise. I am the tribal council chairman of the Alabama Coushatta Indian Tribe of Texas.

First, I would like to thank Chairman Inouye and Senator Campbell for providing us this opportunity today to appear before the committee and relate our story. Our story is a noble story, but all too often contains sad chapters, such as the historical interpretation of the Texas Restoration Act. We the Alabama Coushatta, along with our brothers the Tigua of El Paso, and the Kickapoo of Eagle Pass are all that is left of the federally-recognized Indian tribes in the State of Texas.

I often hear the statement of people I encounter that they were unaware that there are any Indians in Texas. That is a very sad commentary, but it seems only to highlight America's historical illiteracy in the 21st century. America is losing its memory, a fact that has been highlighted in numerous American council of trustees and alumni surveys. In our historical story, chapters have been lost, and in the case of the Texas Restoration Act, have been rewritten.

It is my role here today to relate to you a more personal historical chapter in our story. I will leave it to Mr. Skibine and Ms.

Boylan to relate first-hand their stories and experiences as to what occurred or did not occur during Congressional debate and passage of the Texas Restoration Act. Therefore, our story begins with a simple question. I ask you today, where are my brothers, the Mescalero Apaches, the Karankawas, the Comanches, Wichitas, Wacos, Caddos? Their land in Texas, like their dreams, have been taken away.

It should be noted at the outset that the Alabama Coushatta Tribe of Texas has a long history of living in harmony with the citizens of Texas. In fact, the Alabama Coushattas participated in the Mexican War of Independence in 1812. Their bravery and skill were mentioned by several chroniclers of the fighting around San Antonio during the rebellion against Spain. Early in 1836, General Sam Houston's army was retreating eastward across Texas, pursued by the Mexican army under Santa Anna. As the revolutionary army marched toward San Jacinto, Houston received assistance from the Alabama Coushatta.

Sam Houston would later tell my ancestors:

> You are now in a country where you can be happy; no white man shall ever again disturb you. The Arkansas will protect your southern boundary, you will be protected on either side. The white man shall never again encroach upon you, and you will have a great outlet to the West. As long as the water flows or the grass grows or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government and never again removed from your present habitation.

Unfortunately, the late 1800's brought rapid deterioration in the Alabama Coushatta culture. Less than 100 years after our tribe settled in Texas, our lands were reduced from over 9 million acres to our current 4,600 acres. The influx of white settlers, the clearing of forests, the plowing of farm land nearly destroyed our hunting, fishing, and gathering practices. We were forced either to rely primarily on farming our limited reservation lands or to seek employment outside the reservation.

In the late 19th century, the indifference of the United States toward Alabama Coushatta Indians was so complete that not only didn't we count as representatives of a sovereign nation, we weren't even counted. The Bureau of Indian Affairs, [BIA] saw no need even to make a census count of the Alabama Coushatta Indians in Polk County. The tribe reached the lowest point of our history in the 1800's when the State abolished the post of agent for us. We had in effect vanished, we became invisible to our so-called trustees.

Over the next 100 years, the government-to-government relationship with the tribe shifted from the Federal Government to the State of Texas and then back to the Federal Government. During the time of our trusteeship under the State of Texas, we faced constant over-reaching by the State. This was demonstrated by the use of poll taxes, termination policies, edicts to cut our hair and to not speak our language or we would not receive an education.

We were managed by the Board of Texas State Hospitals in Austin, TX. We were told by the Attorney General for the State of Texas that we had no reservation and we were nothing more than a loose association of individuals, much like a fraternity. Moneys appropriated were subject to severe fluctuations, and if that were not enough, the State of Texas then sought to tax what little if any

was left. We were told of the need to protect charity bingo and we were told of the need to protect the lottery. We were even told by the Texas Comptroller that:

> Those Indians say they have a law, but that doesn't mean another Indian can't change it. You put a headdress on another Indian and you get another set of laws.

Unfortunately, as you can see, this modern day story has been one of poverty and little hope. Many of my Indian brothers and their local communities in Texas live on the outskirts of hope, some because of their poverty, some because of their color, and all too many because of both. Our task today in this hearing room and in our hearts and in our minds is to begin to replace despair with opportunity.

On our reservation, where we make our own war on poverty, the unemployment rate is 46 percent. Our median household income is 25 percent of what it is in the State of Texas. And only 1 percent of our tribal members have a four year college degree. We are once again facing the awesome weight of the State of Texas.

This campaign by certain public policymakers not only seeks to ignore history but also perhaps more astonishingly, seeks to rewrite history. These individuals envision a public policy arena where Congressional committee chairmen have no role and have no voice. Specifically, this is demonstrated by their subscription to the following Fifth Circuit Court of Appeals judicial opinion that states:

> We cannot set aside this wealth of legislative history simply to give effect to the floor statement of just one Representative that was recited at the 12th hour of the Texas Restoration Act consideration.

That one representative, Mr. Chairman, was none other than the chairman of the House Insular Affairs Committee, Mo Udall. This statement not only demonstrates enormous disrespect for Chairman Udall, but also displays an ignorance of the Congressional legislative process.

We realize our war will not be won by one battle in Washington, DC. Rather, battles must be won in the hills of Austin, in the cactus-draped community of Eagle Pass, the plains of East Texas and the piney woods of East Texas. Such a battle does not seek untold riches; rather, we seek to eliminate poverty. We seek what all Americans seek: better schools, better health and better homes.

You see before you today two possible futures that the attorney general for the State of Texas, John Cornyn, would allow us to pursue. As you can see, one future is another forced march to the unemployment line where Texas jobs and Texas benefits all too often today do not exist. Another is a future calling citizens to pursue the American dream, but the sign reads, "Native Americans need not apply." This I might note is said to a people who defend the dream in higher percentages than any other segment of our community.

Those who seek to deny us our American dream will tell us to diversify. I say, with what? They tell us to follow their law. I say, it is your view of law, not ours. They coerce a small, impoverished tribe into signing and agreement under duress, and they later enact perhaps the most sweeping lottery act in the country. In the summer of 2001, they stood in a U.S. District courthouse and stated to a U.S. District judge that Texas is not a gambling State. I say, I must live in another State, for what is a $2.7-billion lottery, where the State of Texas spends $40 million a year on marketing

alone; horse racing, dog racing, charity bingo, 45,000 eight-liners, cruises to nowhere, and casino nights? If that were not enough, what is $2.5 billion annually which finds its way from Texas pocketbooks to Louisiana and Las Vegas?

Unfortunately for the Alabama Coushatta Tribe of Texas and our surrounding communities, we are not part of the American dream mosaic. We have vanished once again.

On February 14, 1854, a Senator told his colleagues in the U.S. Senate that they had to choose whether to:

> Deceive [the Indians] by promises or to confirm to them rights long promised. I am aware that in presenting myself as advocate of the Indians and their rights, I shall claim but little sympathy from the community at large, and that I shall stand very much alone pursuing the course which I feel it is my imperative duty to adhere to. [I]mplanted in me [is] a principle enduring as life itself. That principle is to protect the Indian against wrong and oppression, and to vindicate him in the enjoyment of rights which have been solemnly guaranteed to him by this Government.

That man's name was Sam Houston.

If our opponents are successful, the Alabama Coushatta Tribes of Texas and our local community face a future that does not include an appreciation of Native American history, Congressional legislative history or economic social justice. We know that the path we choose today is full of risk. But in the grand tradition of the State of Texas, we will take that risk as our ancestors did when they stood with Sam Houston. We will, as our friend, former Governor John Connally stated, take a risk for what we think is right. And for that, we will never quit taking risks.

In the end, we believe that like the son of the man you see in a reservation photograph to my left, we must not become two societies, one that believes in the American dream and one that is without such hope.

I would like to thank you once again, Mr. Chairman, committee members and staff, for this distinct honor. I will now make myself available for any questions from the committee. Thank you.

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

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

Now may I call upon Professor Skibine.

Mr. SKIBINE. Out of deference for my former colleague in the Senate, I'm going to let Ginny Boylan go first.

The CHAIRMAN. Ms. Boylan.

STATEMENT OF VIRGINIA W. BOYLAN, PARTNER, DORSEY AND WHITNEY

Ms. BOYLAN. Thank you, Mr. Chairman and members of the committee, for the opportunity to testify this morning on the implementation of the Texas Restoration Act of 1987.

I have a prepared statement that I ask be made part of the record for this hearing.

The CHAIRMAN. Without objection, so ordered.

Ms. BOYLAN. Thank you.

At the request of the Alabama Coushatta Tribes' attorney, I was pleased to testify on April 2, 2002 before the U.S. District Court for the Eastern District of Texas in the case of the *Alabama Coushatta Tribes of Texas* v. *State of Texas.* This pending case involves the efforts of the tribes to determine their rights under Federal law to conduct gaming in Texas, either under the auspices of

the Indian Gaming Regulatory Act or under the Supreme Court's holding in the *Cabazon* case.

In that court hearing my testimony was intended to shed light on the probable intent of the Congress with respect to the interconnection between the Texas Restoration Act, the Indian Gaming Regulatory Act, and the *Cabazon* decision. During the period when Congress was considering both the Restoration Act and the IGRA, I was privileged to serve on the staff of the Senate Committee on Indian Affairs and was assigned to the Indian Gaming Regulatory Act.

During the 18 months following *Cabazon* when the final language of the IGRA was being developed, the holding in the *Cabazon* case was certainly uppermost in the minds of those of us who worked on both the House and Senate gaming bills. This is so because the *Cabazon* language was unexpectedly strong in favoring tribal regulation of their own gaming in those States that allowed gaming to be played by any person or entity for any purpose.

The civil regulatory and criminal prohibitory tests had become mantra for those of us working on both sides of the Hill. I venture to guess the same is true for those staff who were responsible for the development of the language in the Texas Restoration Act, which was moving concurrently. I say this because the language of the sections of the Texas Restoration Act that were added at the end of the process reflects the *Cabazon* language and the language of IGRA that eventually passed 14 months later.

To give a short chronology, the bill to restore Federal recognition to the Coushatta Tribe, the Alabama Coushatta Tribes of Texas, and the Isleta del Sur Pueblo Tribe of Texas was first considered in the 99th Congress. The House passed the bill in December 1985, and the Senate approved modified version in September 1986. These modifications were to sections 107 and 207 and dealt with gaming by the two tribes. The Senate's action was vitiated the very next day after passage and the bill was returned to the Senate calendar. There was no further action in the 99th Congress.

Representative Coleman of Texas reintroduced the Texas Restoration Bill very early in the 100th Congress, as H.R. 318. This version, which Alex will talk about at greater length here, was identical to the Senate version which was passed and vitiated in September 1986. The House passed the bill on April 21, 1987, with further amendments that related to gaming and these came about no doubt because of the recently decided *Cabazon* case and concerns by Texas lawmakers about possible Indian gaming. The bill passed the Senate on July 23 and was signed into law on August 18, 1987. The Senate had again revised the gaming sections that came out of the House, sections 107 and 207, and the House concurred in those amendments. The language of these sections, while there is some ambiguity, I think clearly reflects the consideration by staff and members of the *Cabazon* decision and the civil regulatory-criminal prohibitory language of that decision.

Action on the Texas Restoration Act was, as I said, contemporaneous with consideration of S. 555, which you, Mr. Chairman, introduced on February 19, 1987, at the beginning of the 100th Congress. The Supreme Court handed down its *Cabazon* decision, you'll recall, just days later, on February 27, 1987. For some time, it's

been my strong belief that the Federal courts were in grievous error in 1994 in holding that the Isleta del Sur Pueblo of Texas is not permitted to conduct gaming under IGRA. The Fifth Circuit Court of Appeals decision in the case of Isleta del Sur Pueblo reversed an opinion of the Western District Court for the State of Texas and held that the language of the Texas Restoration Act prohibits the tribe from gaming except as determined by Texas law.

This decision, will no doubt impact the Eastern District Court's decision in a pending case with the Alabama Coushatta Tribes. I believe earlier cases are wrong on the facts and I believe they are wrong on the law. I have included in my written statement excerpts from a memorandum I prepared for the tribes' consultant that details my concerns about this bill in light of what I understood the language to mean at the time. Although I didn't work directly on the Restoration Act, I did work side by side with people who did. Mr. Taylor and Mr. Mahsetky I think were the two staff, and Ms. Zell as well.

This memorandum was written in response to another case involving Isleta del Sur Pueblo that was decided just last year, which relied on the 1994 case for its holding. Suffice it to say that the Federal Courts in Texas have undermined the sovereignty of the tribes who are subject to the Restoration Act. They have completely ignored the full implications of what Federal recognition is all about. It doesn't matter whether a tribe is restored or recognized by Congress or by administrative action of the Department of the Interior. In this case, both Texas tribes were restored to Federal status by the Congress. And nothing in the act indicates that Congress intended them to have any lesser status than any other federally recognized tribe.

There would be little point to restoration or recognition if courts can read into acts of Congress an intent to differentiate between tribes on basic matters like sovereignty or achievement of their full rights under Federal law, including the IGRA. In short, it is my view that the Federal courts cannot and should not differentiate among tribes based upon such flimsy reasoning as that of the 2001 decision which in turn relied on the 1994 case.

It would seem to be a clear case of judicial revision and activism in which courts have effectively undermined the intent of this Congress and even the authority of this Congress under the Commerce Clause to determine Indian law and policy. I believe only the Congress can correct the court's errors in this case.

Thank you, Mr. Chairman, and I'm happy to answer any questions.

[Prepared statement of Ms. Boylan appears in appendix.]

The CHAIRMAN. Thank you, Ms. Boylan.

Professor Skibine.

STATEMENT OF ALEX SKIBINE, PROFESSOR OF LAW, UNIVERSITY OF UTAH

Mr. SKIBINE. Thank you, Mr. Chairman, Senator Campbell. I was asked to summarize my written comments, which you have received, and I ask that they be made part of the record.

What I am going to do is talk about three points. First, the history of the bill; second, the nature of the ambiguity; and finally,

about the Indian liberal construction rule in statutory construction. Let me first start by the gaming section of this bill. There were in effect four versions of this bill.

The first bill, introduced in the House, basically said that there would be no gaming unless the tribe changed its mind and submitted a resolution to the Secretary of the Interior, who if he approved, would submit it to the Congress, who then would have the power to disagree with the tribe. So that was the first scheme. It was no gaming, but. That's the version that passed the House. Then it went to the Senate.

The second version was in effect a complete ban on gaming. The Senate vitiated action on this complete ban and nothing happened. So the next year, we reintroduced the bill on the House side. To my personal disappointment, Congressman Coleman decided to adopt the Senate version with the complete ban. I was disappointed because at that time we were working on the national Indian gaming bill. Chairman Udall was under great pressure to allow State jurisdiction over gaming on Indian reservations and Coleman's bill, in effect, forbade gaming.

So in order to protect us, we devised an amendment to the bill which basically said that there would be a complete ban, but that was done pursuant to tribal resolution. We did this to protect ourselves because we did not want to be viewed as anti-gaming or anti-Indian by the tribes and the people who were looking at us. So we said, listen, we're doing this, but it's because the tribes asked us.

This bill then passed the House and was received by the Senate. The Senate then amended this language. The new language that the Senate put in was in effect a codification of the *Cabazon* case. It basically said that gaming is only banned if it's prohibited criminally by the laws of Texas. When that bill came back to the House, I met with Mo Udall and then wrote a statement for him on the floor that basically said that this was an endorsement of the *Cabazon* decision. Mo Udall could not make it on the floor of the House at that time and he appointed Congressman Vento to ask for unanimous consent to take the Senate bill and pass it.

As you know, from your experience here in the Senate, when you ask for unanimous consent you have to clear this with a lot of people. Here we had to clear this with the Reagan administration, we had to clear that particular language with the Republican leadership on the House side, with the official objectors, and with Congressman Walker, who was pretty much an independent objector.

So we had to clear that with everybody, it was not just Mo Udall's own thinking. Everybody agreed that this was a codification. Then the House agreed to the Senate version and the bill was eventually enacted like that into law.

Is there an ambiguity in the bill? Yes, there is an ambiguity. What is the nature of the ambiguity? The nature of the ambiguity comes from the fact that when the Senate amended the bill to put in the *Cabazon* criminal prohibitory-civil regulatory test they did not take out the language that the House had put in concerning, the fact that this was done pursuant to the wish of the tribal resolution. The problem, of course, is that the tribal resolution endorsed a complete ban on gaming. So in effect, it's contradictory

with the *Cabazon* thing. On one hand, under the resolution, there's a ban, and on the other hand, gaming is not banned unless it's prohibited by the laws of Texas.

So the next question is, why is there an ambiguity? Basically, I think that it was just a staffing mistake. When everything else fails, Senator, just blame it on the staff. [Laughter.]

I think this was just an omission. The reason I say that is because the Supreme Court last year in the *Chickasaw* v. *United States* case found a similar mistake made in the Indian Gaming Regulatory Act. The *Chickasaw* case had to do with freedom of taxation for Indian tribes. The Supreme Court said that in effect, that for purposes of taxation, tribes could not be considered as states.

But there was language in IGRA that seems to indicate that they might be. The Court said, well, you know, that language was left by mistake. There was a drafting mistake here and really what we think is that they are not treated like States for the purpose of taxation, only for the purpose of reporting and withholding. Ultimately, I think that's what happened here also.

So we have an ambiguity that is created by a mistake. What should the Court have done? Basically, in Indian law, there is a rule called the Indian liberal construction rule, under which statutes are supposed to be construed liberally to the benefit of the Indians, with all ambiguities resolved in their favor. This is the rule that this particular Court, the Fifth Circuit, completely ignored.

Where does this rule come from? Some people think this is just like a canon of statutory construction, like those Latin canons, and that the Court can pick and choose which to use. But in effect, it's not. This rule was first devised by Justice Marshall, and it's tied to the incorporation of tribes into the political system of the United States. So in fact, it's a substantive rule of statutory interpretation. It does not come from the fact that we're only going to be nice to Indians because they are weak and defenseless. That's not the reason for the rule.

Marshall in effect was not that nice to the Indians. First, he said they were not foreign nations, they could not sue directly in the Supreme Court, they were just domestic dependent nations. Previously, he had said that they were subject to the rule of discovery. The rule of discovery allows Congress to take the land of the tribes by conquest or purchase without being subject to either international law or constitutional constraints. So in effect, he gave it to the Indians: "you're not sovereign and we can take your land if we want to."

In return, in *Worcester* v. *Georgia,* he said, "but when Congress acts toward you, we are going to presume that it acts for your benefit." So in effect it was to counterbalance the harshness of the rule of discovery and the fact that Indian tribes were now domestic dependent nations. Marshall said, the reason we are going to assume they act for your benefit is because, Congress is your trustee: There is a trust relationship." So as a result of that, whenever Congress acts, it has plenary power, largely because of its commerce power and the trust relationship. This plenary power is a big deal for Congress.

But to counterbalance the plenary power, the Court basically continues to say, "whenever you act, we are going to surmise, or

to presume that you act for the benefit of the Indians." So this is where the Indian liberal construction rule comes from. And if the Fifth Circuit had used this rule, it seems that there would be no question, given the ambiguity, that it could easily have resolved that ambiguity in favor of the tribe. But in effect, the Court didn't really cite the rule at all. There's one footnote in the opinion that refers to, when Congress acts, it has to be very clear about everything. But the Court never invoked the rule.

Let me conclude by saying that, the other thing that worries me is that I think this case, the Fifth Circuit case, part of a trend led by the Supreme Court that whenever States' rights are infringed as a result of Congressional action, the Court somehow is going to demand more of Congress concerning why they are doing certain things. Those are the cases that you're familiar with involving federalism, the *Lopez guns in school* case, the *Morrison* case, were in effect Congress using its commerce power, interfering with States' rights. In those cases somehow the Court seems to treat Congress like an executive agency, basically demanding Congress, to establish a record. They're asking more of Congress.

I think that's a dangerous trend, because Congress is a co-equal branch. And Congress can do things the way that in effect executive agencies can. That's a political prerogative of Congress. I see this as, this case is part of that trend. For instance, this case involved, at first there is a bill that basically says, Texas law shall govern and gaming shall be prohibited. Then it's changed to this criminal prohibitory stuff. So ultimately, that's a gain for tribal jurisdiction, and it's perhaps a loss for the State of Texas.

So just because there's that change, and the change was made really, we don't know why it was made, it was just made. But there's no record of why the Senate changed it. So it's like the Court saying, well, since we don't know, we're going to pretend that you just never did it. But in effect, that's not the right thing to do, because Congress can do things because of the political nature of the Senate and the House.

Thank you very much. I'm available for questioning.

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

The CHAIRMAN. Thank you.

Let's start off with a technical question. When was the Texas Restoration Act enacted?

Ms. BOYLAN. April 1987.

The CHAIRMAN. And when did Texas enact laws to provide a wide array of gaming?

Mr. BATTISE. In 1991.

The CHAIRMAN. So the Restoration Act was passed before gaming was approved in Texas.

Mr. BATTISE. Yes.

The CHAIRMAN. In other words, the tribe adopted a resolution saying that they would not engage in gaming at a time when there was no gaming in Texas.

Mr. BATTISE. Yes, sir; there was very little charity bingo at the time. There was some charity bingo, but there was no lottery, commercial bingo, horse racing, or dog racing. There was none of that activity allowed in Texas at the time.

The CHAIRMAN. And now that the laws have changed, your tribe is the only one that's not conducting gaming?

Mr. BATTISE. We are conducting gaming. We just opened a facility 6 months ago.

The CHAIRMAN. Do you have a compact?

Mr. BATTISE. We don't have a compact, no, sir.

The CHAIRMAN. You do not have a compact. So under what law are you operating those casinos?

Mr. BATTISE. I want to refer to my legal counsel, Scott Crowell.

The CHAIRMAN. Please come forward.

Mr. CROWELL. Thank you, Mr. Chairman. I'm Scott Crowell, legal counsel for the tribes.

The Fifth Circuit in the Tigua litigation ruled that the Restoration Act and not the Indian Gaming Regulatory Act governed gaming activities conducted by tribes in the State of Texas. The District Court in the Tigua litigation has ruled under the Indian Gaming Regulatory Act entirely in favor of the Tigua Tribe, saying that they're entitled to the full range of games. The Fifth Circuit said, well, that would have been nice under IGRA, but IGRA doesn't apply here, the Restoration Act applies.

The Restoration Act provision for gaming adopted 1 year before the Indian Gaming Regulatory Act has two parts to it. The first part is that the tribe will not engage in those gaming activities that are prohibited by the laws of the State of Texas. The second part says that nothing herein is intended to be an infringement or a surrender of the tribe's civil regulatory jurisdiction over gaming activities.

So it left open the question then of what governs the tribe's gaming activities. It's the tribe's position that the Cabazon civil regulatory-criminal prohibitory standard is what governs the activities. The tribe has asked the State to enter into negotiations for a compact. In fact, we have pointed out that the very first tribal-State compact between the Fort Mojave, I believe it was Fort Mojave in the State of Nevada, was negotiated prior to the passage of the Indian Gaming Regulatory Act. But the State says, no, we won't negotiate.

So the tribe is operating under tribal law, in tribal regulation at the current time. And the State has filed a counterclaim against the tribe's action, seeking an injunction to shut the tribes down. That litigation is currently pending in Federal court.

The CHAIRMAN. What relief do you hope to get from this committee?

Mr. CROWELL. I think that Professor Skibine answered the question very well. That is that there's the possibility that this is a situation to where the courts have over-reached and tried to interpret a statute differently than what the language of this committee did when it amended the Restoration Act in 1987 to incorporate Cabazon. We believe that corrective amendments to the Restoration Act could provide the remedy that the tribe desires to basically make even more clear what the Senate intended to do in 1987, or a separate, standalone technical amendment that would subject the Alabama Coushatta Tribes to the Indian Gaming Regulatory Act and put us in the position of tribes in any other State in the country with the exception of Rhode Island and Maine.

The CHAIRMAN. Do you have language prepared that we can study?

Mr. CROWELL. Yes; I believe that we have already submitted that to your staff.

The CHAIRMAN. Mr. Vice Chairman.

Senator CAMPBELL. Thank you, Mr. Chairman.

I have a couple of questions, but if I can just digress for a moment or two. I was particularly interested in the very poignant statement by Chairman Battise. I don't know if you've seen this book, Mr. Chairman, or if anybody in the audience has, it's the new book that was recently released by the Census Bureau. Believe me, every number you can possibly imagine about everything that is tracked by the Federal Government is in that book. In fact, I was amazed that there were so many different statistics. I just got this yesterday and I was looking through it last night at home and again this morning.

What is interesting to me is that the places that it does track American Indians, such as American Indian-owned businesses or per capita income or household income, teen births, death rates by all kinds of things from diabetes to TB to so on, victims of high crime, things of that nature, they are listed in here in one place or another, and they're almost always somewhere near the top of any ethnic group. Any ethnic group, black, Hispanics, you name it, Indian are near the top.

And yet other places in the book where you would like to find some information, they're not even listed, they're not even in there. Try to find something on adequate nutrition. There are sections in there dealing with every other ethnic group in the country, but not with Indians. Or home wealth, or the recipients of organ transplants, or the number of people in nursing homes or the number of substance abuse clinics for different ethnic groups in the country. Or national spending on different forms of education.

I guess the point I'm making is that for a long time, Indians weren't counted at all numerically. Now, unfortunately, they're not counted from a standpoint of fairness in the country yet. And yet, if you look at it compared to just 10 years ago, in 1990, the jump in Indian population has been huge, as you know, as everybody in the room knows. So I just point that out to re-emphasize that very often, the Federal Government still isn't listening to Native peoples.

Let me ask you a couple of things, Chairman Battise, or perhaps for your attorney there, dealing with gaming in Texas. As I understand it, Texas allows private clubs, private clubs, to offer gambling for money. I also note the Texas Attorney General's opinion of 1983 that the Alabama Coushatta Tribe was a private association, like a country club. Does that mean that if you called yourselves a private club, would it enable you to offer casino card games for money? If you were a club instead of a tribe?

Mr. CROWELL. That's an argument that has been addressed in the litigation. The State statutes of Texas do have penal provisions regarding gaming, and then they have defenses. One of those defenses, if it's gaming operated at a private place, where the house does not have a stake in the outcome of the game, it's kind of contradictory, because it is clear that we invite the public or the peo-

ple of the State of Texas to come to the reservation. But we still maintain that it's a private place, it's a privilege to be there. In fact, we have a policy of requiring everybody to show i.d. and if they don't meet minimum qualifications, they're excluded from the facility.

The State also has dry counties where liquor cannot be served in public establishments. But these public restaurants have their private clubs to where you simply sign up at their public restaurant——

Senator CAMPBELL. Yes; I lived in Texas for a while. The only county that's a dry county is the name, Dry County. [Laugher.]

Mr. CROWELL. And that's really the source, it's not our major legal argument. But what we say is, State, you can't be contradictory, or you can't say that that's a private place where you buy liquor, but this is not a private place in the way the tribe excludes people from its gaming operation. It can't be a double standard. If that's private, then so is the tribe's operation. Clearly, as games that have been programmed for compacts, and the Pals band in California before the constitutional amendment there, and tribes in the State of Washington, the games can be programmed to take the house's stake.

Senator CAMPBELL. There's a lot of different kinds of gambling in Texas, I assume, they have a State lottery.

Mr. CROWELL. It's one of the largest gaming operations in the world.

Senator CAMPBELL. What are some of the other things? They have river boats in Texas?

Mr. CROWELL. They have cruises to nowhere, they have 45,000 eight-liner games around the State, the State says that some of those are illegal because they pay out too much in prizes, but they don't contest that the game itself is illegal. There's a huge charitable bingo operation. There's carnival nights that are operated where you bet money at the carnival nights, but what you do then is use that play money to auction off prizes at the end of the evening.

Senator CAMPBELL. Do non-profits use those, and churches, too?

Mr. CROWELL. Extensively.

Mr. BATTISE. As a matter of fact, Senator Campbell, we printed up this button that says, since Texas is not a gambling State, I just play bingo, lottery, eight-liners, go to dog races, horse races, and so forth, and pass it out. [Laughter.]

Senator CAMPBELL. That re-emphasizes the vagueness of the statute.

Well, it seems to me that much vagueness in the statute is a result, more often than not, in favor of the tribes. The Federal court agreed that there was some ambiguity in the Restoration Act language. Under that scenario, usually Federal courts apply the doctrine called the Indian Canon of Construction. Are you familiar with that? That basically says that the ambiguity should be resolved in favor of the tribe.

How did the court explain that the Indian canon did not apply in this case?

Mr. CROWELL. I believe Professor Skibine answered that question quite clearly. The court did, it dropped in a footnote regarding the

expectation that Congress be clear about expressing its intent. The Indian Canon of Construction was never even addressed in either the Fifth Circuit Court opinion in 1994 or in the more recent District Court opinion that led to the injunction against the Tigua El Paso. It's as if it didn't even exist.

We think that was a serious error.

Senator CAMPBELL. Are you one of the attorneys that argued before that Court?

Mr. CROWELL. No; that was Tom Diamond's firm out of El Paso. I believe that they currently do have a petition for certiorari pending to the Supreme Court to address that issue.

We make very clear to Judge Hannah the pending litigation involving the Alabama Coushatta tribe that that canon of construction is out there, and should, if there is any doubt left in his mind as to what Congress intended. We think it would create a pretty good record that it was clear what Congress intended, and that that doubt should be resolved in favor of the tribes.

Senator CAMPBELL. A few years ago in Florida, a Florida State court found that the Florida lottery machines were actually slot machines and would be illegal if operated by anyone else in the State. What kinds of machines were the tribe offering? Were they designated as lottery machines or slot machines? I guess it's a matter of semantics.

Mr. CROWELL. Actually, it is a matter of semantics. Slot machine is one of those terms that's defined differently in different States. The State lottery statute says that the State lottery can use any gambling device, which, if you're using a Johnson Act definition is any device that is a slot machine, the lottery can use any gambling device subject only to the restriction that it not use a video display. Hence, the majority of the machines operated by the tribe are the traditional spinning reel type of machines.

Senator CAMPBELL. And coins or something comes out, rather than redeemable chips?

Mr. CROWELL. That's right. I believe that the tribe has a dollar token, but other than that, quarters in, quarters out, nickels in, nickels out.

The tribe does have some video machines, but the State eightliner exception allows for truck stops, et cetera, to offer video slot machines, where the restriction is on the size of the prize that's allowed. But we believe that that's a regulatory restriction that is subject to the governance of the tribe and not the prerogative of the State.

Also, I think in understanding that question, you should look to, the machines again, the Pala device that was negotiated in California before the constitutional amendment, the *x* game operated by the tribes pursuant to compacts in Washington State, the machines operated by the Eastern Cherokee of South Carolina, they're all programmed so that they are not "slot machines" under those State laws. It's just a question of programming those machines.

If the State were to engage us in discussions and come up with some parameters on where they see the line between a legal lottery machine and an illegal slot machine, we'd be more than happy to engage that discussion.

Senator CAMPBELL. Well, in effect the same machine could be called a slot machine in one State and not in another State, the same machine?

Mr. CROWELL. That's correct.

Senator CAMPBELL. Holy smoke.

The Federal court seemed to think the tribal gaming resolution passed by the tribe was significant. Senator Inouye might have asked this, or very similar, but perhaps I wasn't listening. So refresh my memory, was that resolution intended to mean the tribe agreed to have no gaming whatsoever? Or did it mean the tribe agreed to not have gaming that was not allowed by the State of Texas?

Mr. BATTISE. I have researched this decisionmaking process back in 1986, when the resolution 86–05 was passed. The chairman at the time, Morris Bullock, who signed the resolution, clearly stated to me that there was no gambling in Texas at the time. And as a matter of fact, there's a paragraph in the resolution that says that, this resolution is passed by the tribe thinks we're unfavorably forced to pass this resolution, that the Texas Comptroller at the time, Bob Bullock, was forcing the Texas delegation in Washington not to pass the bill unless we passed that resolution.

The decision to pass the resolution was clearly because Texas was not allowing gaming at the time. We were always under the impression that we would change, it was our sovereign right to do in the future what we wanted to do if situations changed.

Senator CAMPBELL. Is it open or closed now?

Mr. BATTISE. We are still open.

Senator CAMPBELL. But you're in litigation?

Mr. BATTISE. Yes; we are. Matter of fact, Judge Hannah gave us a stay to remain open until a decision is made.

Senator CAMPBELL. Could you just give the committee a little short capsule—I happen to be supportive of gaming and I know that all tribes don't make a lot of money, but in some cases they provide jobs and services and so on.

Mr. BATTISE. Yes; exactly.

Senator CAMPBELL. Give a little capsule to the committee about what your benefits were, what was the tribal situation in terms of unemployment or something of that nature before and after.

Mr. BATTISE. We opened our small casino, we only have a 12,000-square foot facility. We have approximately 340 machines in the facility. We are running 24 hours a day. We have hired 300 people.

Senator CAMPBELL. How many of those are tribal members?

Mr. BATTISE. With approximately 80 who are tribal members. The rest of them are from the surrounding community.

Senator CAMPBELL. About two-thirds?

Mr. BATTISE. Yes; about two-thirds.

In the four county region around us, we hired people who were, I guess, minimum wage employees at the time. We pay considerably higher. Our unemployment rate as we took those 80 off the unemployment rate has dropped to around 20 percent, 15, to 20 percent.

Senator CAMPBELL. What is your tribal enrollment?

Mr. BATTISE. Our tribal enrollment is right at 1,000 tribal members.

Senator CAMPBELL. So you have about one-third of the number of people working for the casino of your tribal enrollment.

Mr. BATTISE. Yes; our funding for the functions of tribal government, roads, housing, all the other projects or the departments that our tribe funds, we were in the red. Without this revenue coming in from this entertainment center, we would have had to cut back or curtail a lot of these projects.

Senator CAMPBELL. Last question. Since you were able to provide jobs and help members of the tribe, were there benefits paid in any form through any social service program by the State of Texas that you have been able to take yourself off of now? What I'm trying to find out is, does it benefit Texas also to have this casino in operation?

Mr. BATTISE. We think it does. We think there's a trickle down effect. Like I said, most of the employees we've hired were employees that were on the fringes of society, minimum wage and so forth. A survey we took, we took approximately 80 or 90 people off of welfare rolls in the four county region, made them our employees.

Senator CAMPBELL. I have no further questions, Mr. Chairman. I guess I'm still trying to figure out what Texas is complaining about. Thank you.

The CHAIRMAN. Before I proceed with questioning, at the request of the Isleta del Sur Pueblo of Texas, the resolution adopted by the Pueblo is made part of the official record of this hearing.

When the Texas Restoration Act was considered on the floor of the House of Representatives, was it under the consent calendar?

Mr. SKIBINE. The last time?

The CHAIRMAN. Yes.

Mr. SKIBINE. The last time I think the bill just came from the Senate and we just had to go and make unanimous consent to pass the bill. I think the previous time it was under suspension of the rules, the first time it passed. But it came back from the Senate and we just stopped the bill at the desk, asked unanimous consent to just pass it with the Senate bill.

The CHAIRMAN. And there was no objection to that?

Mr. SKIBINE. No; if there is, then we have to proceed.

The CHAIRMAN. I presume it was cleared by all relevant committees and leaders?

Mr. SKIBINE. Yes.

The CHAIRMAN. Was there a committee report accompanying this bill?

Mr. SKIBINE. There was no committee report on the last action. There was a committee report the first time we passed the bill. But there was no committee report on the very last action, which was just a unanimous consent to stop the bill on the floor and pass it. There was the speech by Mo Udall, by Bruce Vento and by others.

The CHAIRMAN. Did anyone object to the first committee report?

Mr. SKIBINE. No.

The CHAIRMAN. Did anyone object to the Senate committee report?

Mr. SKIBINE. No.

The CHAIRMAN. And it passed without objection?

Mr. SKIBINE. That's right.

The CHAIRMAN. Did anyone object to the statement made by Mr. Udall?

Mr. SKIBINE. No.

The CHAIRMAN. Did anyone speak in opposition?

Mr. SKIBINE. No.

The CHAIRMAN. And the courts say that this does not constitute legislative intent?

Mr. SKIBINE. Well, the court just dismissed what happened as the 12th hour impression of a minor Congressman, which was unfortunate.

Senator CAMPBELL. Mr. Chairman, Mo Udall was no minor Congressman in this institution.

The CHAIRMAN. What do they consider to be legislative intent?

Mr. SKIBINE. I don't know.

The CHAIRMAN. Did the Court advise the parties as to what would constitute legislative intent?

Ms. BOYLAN. I think essentially what the Court said was, you know, here's this language, it's here. However, the language also refers back to a tribal resolution enacted in 1986 and that's what prevails. The language in the statute that Alex mentioned, was probably put in in error, but the Court used that as the entire basis for its argument, instead of looking at what else Congress had done. It didn't even address the issue.

The CHAIRMAN. So it completely disregarded the action taken by the Congress?

Mr. CROWELL. Right.

Ms. BOYLAN. It gave it validity whatsoever.

The CHAIRMAN. And I presume there were hearings on the measure before it got to the floor?

Ms. BOYLAN. I don't recall. There were hearings in the 99th Congress. But I think after the Senate vitiated the action, I don't think there were any hearings in the 100th Congress when the bill actually passed.

The CHAIRMAN. And I presume the bills were introduced by someone?

Ms. BOYLAN. Representative Coleman of Texas, El Paso, TX. Texas Congressman. And Charles Wilson, also, from the region where the Alabama Coushatta Tribe reside.

The CHAIRMAN. And Ms. Boylan, you consider the statement of Representative Udall at the time the measure was adopted as constituting legislative intent?

Ms. BOYLAN. I would absolutely say that, Mr. Chairman.

The CHAIRMAN. Well, I can assure you that we will study your language very carefully. But I presume the Texas delegation would be against the passage of this measure. The Texas Attorney General is against it. But we will do our best. There are many ways to do things around here. We will do it legitimately.

Well, do you have any further questions?

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

The CHAIRMAN. Well, I thank you all very much. It was almost like going back to law school. [Laughter.]

[Whereupon, at 11:26 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF KEVIN BATTISE, CHAIRMAN, ALABAMA-COUSHATTA INDIAN TRIBES OF TEXAS

Mr. Chairman and members of the committee, good morning. My name is Kevin Battise, chairman of the Alabama-Coushatta Indian Tribes of Texas. I would like first to thank Chairman Inouye and Senator Campbell for providing us this opportunity today to appear before the committee and relate our story. It is a noble story but which all too often contains sad chapters such as the historical interpretation of the Texas Restoration Act. We, the Alabama Coushatta, along with our brothers the Tiguas of El Paso and the Kickapoo of Eagle Pass, are all that are left of the federally recognized Indian tribes in the state of Texas.

I often hear the statement from people I encounter that they were unaware there were ANY Indians in Texas. That is a very sad commentary but it seems to only highlight America's historical illiteracy in the 21st century. America is losing it's memory, a fact which has been highlighted in numerous American Council of Trustees and Alumni surveys. In our historical story chapters have been lost and in the case of the Texas Restoration Act have been rewritten. I do not suggest today that we should be imprisoned by our history but we should use it to be informed, for to do otherwise is to always remain a child.

It is my role here today to relate to you a more personal historical chapter in our story. I will leave it to Mr. Skibine and Ms. Boyland to relate firsthand, their stories and experiences as to what occurred or did not occur during Congressional debate and passage of the Texas Restoration Act.

Therefore our story begins with a simple question. I ask you today, where are my brothers the Mescalero Apaches? The Lipan Apaches? The Karankawas? The Comanches? The Wichitas? The Taovayas? The Tonkawas? The Bidais? The Tawakonis? The Wacos? The Kiowas? The Cherokees? The Shawnees? The Caddos? The Delawares? The Anadarkos? The Hainais? The Kichais? The Biloxis? Their land in Texas, like their dreams, has been taken away—it is a modern day story of Exodus.

But I believe also in the power of reconciliation. St. Thomas Aquinas wrote that dialog is the struggle to learn from each other. Our struggle is like Jacob wrestling the angel—it leaves one wounded and blessed at the same time. So, let us begin to learn.

It should be noted at the outset that the Alabama-Coushatta Indian Tribes of Texas has a long history of living in harmony with the citizens of Texas. In fact, the Alabama-Coushattas participated in the Mexican War of Independence in 1812; their bravery and skill were mentioned by several chroniclers of the fighting around San Antonio during the rebellion against Spain. Early in 1836 Gen. Sam Houston's army was retreating eastward across Texas, pursued by the Mexican army under Santa Anna. As the revolutionary army marched toward San Jacinto, Houston received assistance from the Alabama-Coushatta.

Sam Houston would later tell my ancestors, "you are now in a country where you can be happy; no white man shall ever again disturb you; the Arkansas will protect

your southern boundary when you get there. You will be protected on either side; the white man shall never again encroach upon you and you will have a great outlet to the West. As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again removed from your present habitation." [*Writings of Sam Houston,* 1854]

Unfortunately, the late 1800's brought a rapid deterioration in the Alabama-Coushatta culture, less than a hundred years after our tribe settled in Texas our lands were reduced from over 9 million acres to a now existing 4,600 acres. The influx of white settlers, the clearing of forests, and the plowing of farmland nearly destroyed our hunting, fishing, and gathering practices. We were forced either to rely primarily on farming our limited reservation lands or to seek employment outside the reservation.

In the late nineteenth century, the indifference of the United States toward the Alabama Coushatta Indians was so complete that not only didn't we count as representatives of a sovereign nation, we were not even counted—the Bureau of Indian Affairs saw no need even to make a census count of the Alabama Coushatta Indians in Polk County, Texas The Tribe reached the lowest point of our history in the 1800's when the state abolished the post of agent for us. We had in effect vanished—we became invisible to our so-called trustees.

Over the next 100 years, the government-to-government relationship with the tribe shifted from the Federal Government to the State of Texas and then back to the Federal Government. During the time of our trusteeship under the State of Texas we have faced constant overreaching by the state. This was demonstrated by the use of poll taxes, termination policies, edicts to cut our hair and to not speak our language or we would not receive an education. We were managed by the Board for Texas State Hospitals in Austin Texas. We were told by the Attorney General for the state of Texas that we had no reservation and we were nothing more than loose association of individuals much like a fraternity. Monies appropriated when they even were appropriated were subject to severe fluctuations and if that were not enough—the State of Texas then sought to tax what little if any was left and if the taxes were not paid the reservation would be sold to pay its debts. We were told of the need to protect charity bingo and we were told of the need to protect the lottery. We were even told by the Texas Comptroller that "[those Indians] say they have a law, but that doesn't mean another Indian can't change it—you put a headdress on another Indian and you get another set of laws."

Unfortunately as you can see his modern day story has been one of poverty and little hope. Many of my Indian brothers and their local communities in Texas live on the outskirts of hope. Some because of their poverty, some because of their color, and all too many because of both. Our task today in this hearing room and in our hearts and minds is to begin to replace despair with opportunity.

On our reservation where we make our own war on poverty the unemployment rate is 46 percent, our median household income is 25 percent of the State of Texas average and only 1 percent of us have a 4-year college degree, we are once again facing the awesome weight of the state of Texas. This campaign by certain public policymakers not only seeks to ignore history but also perhaps more astonishingly seeks to rewrite history. These individuals envision a public policy arena where Congressional Committee Chairman have no role and have no voice.

Specifically this is demonstrated by their subscription to the following Fifth Circuit Court of Appeals judicial opinion that states and I quote "we cannot set aside this wealth of legislative history simply to give effect to the floor statement of just one representative that was recited at the twelfth hour of the [Texas Restoration Act] consideration." That one representative Mr. Chairman and committee members, was none other than the Chairman of the House Insular Affairs Committee—Mo Udall.

This statement not only demonstrates enormous disrespect for Chairman Udall but also displays an ignorance of the Congressional legislative process which would embarrass a first year law student.

We realize our war will not be won by one battle in Washington DC. Rather, battles must be won in the hills of Austin, in the cactus-draped community of Eagle Pass, and the plains of West Texas. Such a battle does not seek untold riches rather we seek to eliminate poverty. We seek what all Americans seek—better schools, better health, and better homes.

You see before you today two possible futures that the attorney for the Texas Lottery, John Comyn, would allow us to pursue. As you can see, one future is another forced march to the unemployment line where Texas jobs and Texas benefits all too often today do not exist. Another is a future calling us to pursue the American dream, but the sign reads, "Native Americans Need Not Apply." This I might note

is said to a people who defend it in higher percentages than any other segment of our society.

Those who seek to deny us our American dream tell us to diversify. I say with what? They tell us to follow their law. I say it is your view of the law, not ours. They coerce a small impoverished tribe into signing agreement under duress and then later enact perhaps the most sweeping lottery act in the country. In the summer of 2001 they stood in a United States District Courthouse and stated to a United States District Court Judge that "Texas is not a gambling State." I say I must live in another State, for what is a $2.7-billion dollar lottery where the State of Texas spends $40 million dollars a year on marketing alone; horse racing; dog racing; charity bingo where the grand prize one night was a picture of former Governor George W. Bush and Laura Bush; 45,000 eight-liners—10,000 more than Atlantic City; cruises-to-nowhere and casino nights at Texas A&M? If that were not enough what is $2½ billion annually which finds its way from Texas pocketbooks to Louisiana and Las Vegas?

The attorney for the Texas Lottery through his litigation seeks to bring the full weight of the State of Texas against a people who the President's United States Advisory Board on Race stated and I quote "on virtually every indicator of social and economic progress, the [Native American] people of this Nation continue to suffer disproportionately in relation to any other group. They have the lowest incomes, the highest unemployment, the lowest percentage of people who receive a college degree, the highest percentage of people living below the poverty level, and the highest suicide rate." In fact earlier this year a United States Center for Disease Control and Prevention study found that health care indicators improved for all segments of the U.S. population in the last 10 years save one—Native Americans.

Unfortunately for the Alabama-Coushatta Tribes of Texas, and our surrounding communities we are not part of the American dream mosaic. We have vanished but once again. This is especially sad given that recently over 2,000 people in our local community participated in a Celebration of Cultural Diversities which sought to honor the memory of Martin Luther King. It is worth noting that in the twilight of his struggle Rev. King stated and I quote "there are few things more thoroughly sinful than economic injustice." On February 14, 1854 a Senator told his colleagues in the U.S. Senate that they had to choose whether to, "deceive [the Indians] by promises, or to confirm to them rights long promised. I am aware that in presenting myself as the advocate of the Indians and their rights, I shall claim but little sympathy from the community at large, and that I shall stand very much alone, pursuing the course which I feel it my imperative duty to adhere to. [I]mplanted in me [is] a principle enduring as life itself. That principle is to protect the Indian against wrong and oppression, and to vindicate him in the enjoyment of rights which have been solemnly guaranteed to him by this Government." That man's name was—Sam Houston.

If our opponents are successful the Alabama-Coushatta Indian Tribes of Texas and our local community face a future that does not include an appreciation for Native American history, Congressional legislative history, or economic social justice. We know that the path we choose today is full of risk but in the grand tradition of the State of Texas we will take that risk as our ancestors did when they stood with Sam Houston.

We will, as our friend former Governor John Connally stated, take a risk for what we think is right and for that, we will never quit taking risks. In the end we believe that like the son of the man you see in a reservation photograph to my left, we must not become two societies—one that believes in the American dream and one that is without such hope.

I would like to thank you once again Mr. Chairman, committee members and staff for this distinct honor. I now make myself available for any questions and or comments you might have.

PREPARED STATEMENT OF VIRGINIA W. BOYLAN, PARTNER, DORSEY AND WHITNEY

Thank you Mr. Chairman and members of the committee for the opportunity to present testimony this morning on the implementation of the Texas Restoration Act of 1988. I was pleased to testify on April 2, 2002, before the U.S. District Court for the Eastern District of Texas in the case of the *Alabama-Coushatta Tribes of Texas* v. the *State of Texas* [9:01CV299-JH]. This pending case involves the efforts of the tribes to determine their rights under Federal law to conduct gaming in Texas, either under the auspices of the Indian Gaming Regulatory Act or under the Supreme Court holding in the case of *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987).

My testimony before the Court was requested by the tribes' attorney, Scott Crowell, and was intended to shed light on the probable intent of the Congress with respect to the interconnection between the Texas Restoration Act ("Act"), the Indian Gaining Regulatory Act ("IGRA") and the *Cabazon* decision.

During the period when Congress was considering both the Restoration Act and the IGRA, I was privileged to serve on the staff of the Senate Indian Affairs Committee and was assigned to the Indian Gaming Regulatory Act. During the 18 months following *Cabazon* when the final language of the IGRA was being developed, the holding in the *Cabazon* case was certainly uppermost in the minds of those of us who worked on both the House and Senate bills. This is so because the *Cabazon* language was unexpectedly strong in favoring tribal regulation of their own gaming operations in those states that allow gaining to be played by any person or entity for any purpose. The civil regulatory/criminal prohibitory test had become a mantra for those of us working on both sides of the Hill and I venture to guess that the same is true for those staff who were responsible for the development of the language of the Texas Restoration Act which was proceeding in the Congress during the same period as the IGRA was moving. I say this because the language of the sections of the act that was added actually reflects the *Cabazon* language and the language of IGRA that passed just 14 months after the Texas Restoration Act.

To give a short chronology, the bill to restore Federal recognition to the Alabama-Coushatta Tribes of Texas and the Isleta del Sur Pueblo Tribe of Texas (also referred to as the Texas Tiwas) was first considered in the 99th Congress. The House passed the bill on December 16, 1985. The Senate approved a modified version on September 24, 1986. These modifications were to the sections 107 and 207 dealing with gaining by the two tribes. The Senate's action was vitiated the next day and the bill was returned to the Senate calendar. There was no further action in the 99th Congress.

Rep. Coleman reintroduced the Texas Restoration bill in the 100th Congress as H.R. 318. This version was identical to the Senate version that was passed and vitiated in September 1986. The House passed the bill on April 21, 1987 with amendments related to gaining, no doubt because of the holding in the recently decided *Cabazon* case and concerns by Texas lawmakers about Indian gaming. The bill passed the Senate on July 23 and was signed into law on August 18, 1987, as Public Law 100–89. The Senate had revised the gaming sections of the bill (sections 107 and 207) and the House concurred in the amendments. The language of these sections of the statute clearly reflect consideration of the *Cabazon* decision and the civil regulatory/criminal prohibitory language of that decision. These sections read:

"(a) In General.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution R.C.–02–86 which was approved and certified on March 12 1986.

"(b) No State Regulatory Jurisdiction.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

"(c) Jurisdiction Over Enforcement Against Members.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." 25 U.S.C. 13000g–6; see also: 25 U.S.C. 737.

Action on the Texas Restoration Act was contemporaneous with consideration of the bill, S. 555, titled the Indian Gaming Regulatory Act. Chairman Inouye introduced this bill on February 19, 1987, at the beginning of the 100th Congress. The Supreme Court handed down the *Cabazon* decision just days later on February 27, 1987.

For some time, it has been my strong belief that the Federal courts were in grievous error in 1994 in holding that the Isleta del Sur Pueblo of Texas is not permitted to conduct gaming under IGRA. The Fifth Circuit Court of Appeals decision in the case of *Ysleta del Sur* v. *Texas,* 36 F.3d 1325 (1994) upheld an opinion of the Western District Court for the State of Texas that the language of the Texas Restoration Act prohibits the tribe from gaming except as determined by Texas law. This decision will no doubt impact the Eastern District Court's decision in the pending Alabama Coushatta Tribes' case.

I believe this case is wrong on the facts and wrong on the law. I am including here excerpts from a memorandum I prepared for the tribes' consultant that details

some of my concerns. This memorandum was written in response to another case involving Ysleta del Sur Pueblo that was decided on September 27, 2001 and relied on the 1994 decision for its holding. See: *State of Texas* v. *Ysleta del Sur Pueblo et al,* No. EP–99–CA0320-GTE 9 (hereinafter ("Decision").

Introduction: The Decision presents a virtual panoply of questions and concerns I will attempt to address singly, with the understanding that there will be inevitable overlap in the discussions. At the outset, I would say that in the Decision the Court ignores many well-established principles in Indian law, particularly vis a vis the relationship of federally recognized Indian tribes and the United States, and places too much emphasis on facts that are not relevant. I cannot say whether that is because of the way the cases were briefed and argued or whether the Court relied much too heavily on a previous decision of the Fifth Circuit Court of Appeals which is faulty at best. See, *Ysleta del Sur Pueblo* v. *Texas,* 36 F.3d 1325 (5th Cir. 1994); hereinafter "*Ysleta I.*"

Federal/State Jurisdictional Issues: All federally recognized tribes are treated the same as a matter of Federal law unless Congress expressly provides otherwise. As a general rule, states and state courts have no jurisdiction over civil and criminal matters tribal lands absent express congressional delegation of such jurisdiction, mostly under PL 280 and similar statutes. Thus, crimes and civil controversies that arise on Indian lands or reservations are generally subject to the jurisdiction of the United States and concurrently to tribal laws and their courts. The jurisdiction of the Federal Government and PL 280 States goes to individuals and the crimes or transgressions they commit; it does not go to the tribal governments with whom the United States has a government-to-government relationship.

In this case, the Ysleta Tribe's Restoration Act basically applied a PL 280-like jurisdictional structure for the State of Texas to exercise jurisdiction over crimes and some civil matters on tribal lands. See: Restoration Act, sec. 1300g–4(f). This jurisdiction is no more and no less than any other PL 280 state. Thus, State of Texas laws apply and its courts have jurisdiction over individuals who commit crimes on tribal lands. That fact, however, does not mean the State has civil or criminal jurisdiction over the tribal government itself. There was never any intent expressed by Congress in the Restoration Act to establish the tribe in the Federal family of tribes in any way that is different from all other federally recognized tribes despite the statement on page 27 of the Decision that the "tribe waived any parallel sovereign status claim" it may have had. There is no distinction in law between the sovereign powers (and sovereign immunity) as between some federally recognized tribes and other federally recognized tribes. Absent a clear and unambiguous indication of an intent on the part of the Congress to treat a particular tribe differently than all other tribes for purposes of sovereignty, a contrary decision is invalid.

PL 280 Jurisdiction and the Cabazon decision: Tribes in PL 280 States are able to conduct gaming under IGRA, even though these States have concurrent criminal jurisdiction with tribes over crimes on the reservations. In the case of the Ysleta Tribe, there was a clear intent on the part of Congress that the State of Texas *was not to have any special jurisdiction related to gaming.* See 1300g–6(b). I am quite certain that because the gaming bill, S. 555, was making its way through the Congress at the same time that the Restoration Act was under consideration, both sections 1330g–6(a) and 1330g–6(b) were drafted by the lawmakers to insure that the tribe was treated the same as other tribes, particularly since the *Cabazon* case had been decided in favor of tribes just months before the Restoration Act was passed in August 1987.

The Supreme Court decided the case of *California* v. *Cabazon* in February 1987. The State of California is a PL 280 State and the Court found that since California did not criminally prohibit the gaming in question [bingo] but merely regulated that game, tribes were free to operate that game without regulation by the State. Thus, tribes could conduct "high stakes" bingo on their lands free of state regulation. That is the essence of *Cabazon.* It is also the essence of the language in IGRA to the effect that gaming on Indian lands is valid as a matter of Federal law when the gaining is allowed to be played in the state by any person for any purpose.

IGRA and the Restoration Act: The Court basically finds that because of certain language in the Restoration Act, IGRA does not apply to the Ysleta del Sur Pueblo ("Tribe"). (See: Decision, p. 6 and infra, relying on *Ysleta I.) That simply cannot be the case, regardless of the Ysleta I* finding. IGRA was enacted in October 1988, over 14 months after the Restoration Act of August 1987. Had the Congress intended that the tribe not be subject to the provisions of IGRA, it would have said so. There are numerous specific instances in IGRA where Congress treated certain tribes, and tribes in certain States, differently from all the other tribes covered by IGRA. See: 25 USC 2703(7)(C)(D)(E) and (F).

The decision in the *Cabazon* case set the stage for the language in both the Restoration Act and in IGRA. The revision of section 1300g–6(a) from the original Restoration bill that was introduced in the 100th Congress, is directly attributable to the language and the holding the in *Cabazon* case where the court found that even though California's criminal laws stated that bingo was "criminally prohibited," it was in fact for some purposes permitted to be played and regulated ("civil regulatory" or "permitted"). This was so because the State made exceptions for charitable gaming purposes.

Both the Restoration Act and IGRA provide that tribes cannot engage in gaming that is truly prohibited in the State. *See:* Restoration Act, 1300g–6 ["All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."] and IGRA, 2710(b)(1) ["An Indian tribe may engage in...class II gaining on Indian lands...if—(a) such Indian gaining is located within a State that permits such gaining for any purpose by any person, organization, or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)...).] and 2710(d)(1)(B) [class III gaming is lawful when "located in a State that permits such gaming for any purpose by any person, organization, or entity..."].

The reverse of "permits such gaining for any purpose" would be "prohibits such gaming for all purposes." In fact, they mean the same thing. Thus, the question is whether Texas law permits the kind of class III gaming for any entity (including the State) that the tribe seeks to operate. If it does, IGRA requires the State to negotiate a compact with the tribe for that gaming. The law of the State in which the tribe happens to be located governs what type of gaining, if any, a tribe can operate. Under IGRA, all tribes are prohibited from engaging in gaming that a state prohibits as a matter of State law; however, if the State merely regulates certain gaming and allows any person or entity to engage in that gaming for any purpose, the State must negotiate a compact with the tribe for those games and *may not impose the same regulatory restrictions on the tribe that it does on the other entities.* For example, the State of Utah completely prohibits all gaming of any kind for all purposes. Tribes in that State therefore have no opportunity to do any forms of gaining.

IGRA is a Federal Preemption Statute: IGRA is a Federal preemption statute and thus controls all gaining on lands of federally recognized Indian tribes. See: Section 23 of Public Law 100–497; codified at 18 USC 1166, 1167 and 1168; also See, *Gaming Corp. of American* v. *Dorsey & Whitney,* C.A.8 (Minn.) 1996, 88 F.3d 536.

Section 23 provides that for purposes of Federal law, all State laws pertaining to gaming apply on Indian lands except when the gaming on Indian lands is conducted under IGRA. Thus, if gaining is conducted on Indian lands that does not meet the requirements of IGRA, the State's laws will be used to prosecute. Under 18 USC 1166(d): "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe—has consented to the transfer to the State—jurisdiction with respect to gambling on the lands of the Indian tribe." In this case, the Tribe (and the United States) have consented to have the laws of the State of Texas apply to gambling on the Ysleta Tribe's reservation lands. However, under IGRA, those laws govern what gaming is prohibited and if prohibited gaining is being conducted by persons (other than the tribe) the State may prosecute. Neither the Tribe nor the United States has consented to the jurisdiction of the State over the tribe's own government.

IGRA—which passed 14 months after the Restoration Act—preempts all actions related to gaining against all federally recognized tribes and provides that only the U.S. Department of Justice may prosecute Indian tribes for alleged violations of state law. The act makes no distinction between tribes in Texas and tribes anywhere else. Had it intended that the provisions of IGRA not apply to Texas tribes, Congress would have so stated.

Sovereign Immunity: The Court's holding that the State of Texas has jurisdiction over the tribe is not correct. Neither IGRA nor the Restoration Act affirmatively give the State the right to bring any lawsuit against the tribe in any court of law, State or Federal. All federally recognized tribes are governments and as such enjoy the full immunity of the law. See discussion on Jurisdiction, supra.

Section 1300g–6 of the Restoration Act says that "Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas" is decidedly not the same as a waiver of the tribe's sovereign immunity. That waiver must be explicit. The 1300g–6 language only says that violations of the State's gaming law are subject to the "same civil and criminal penalties" as provided by Texas law; it does not say that the State of Texas is authorized to enforce those penalties against the tribe.

So while the United States may look to Texas law to see what gaining is or is not prohibited (or permitted, as the case may be), there is nothing to support the Court's conclusion that Texas can sue the tribe.

Tribes are Governments, Not Associations: Despite the Court's findings in the Decision at page 24, there is simply no support in Federal Indian case law or in any Act of Congress for the proposition that any federally recognized tribe is anything other than a tribal government, with governmental responsibilities for the welfare of their citizens. They are not clubs or associations.

Statutory Interpretation: If the words in a statute are unclear, courts may find an ambiguity and will look to legislative history for enlightenment. If the words are clear, as they surely are in the Restoration Act, the courts will implement the intent of the law as written. In the Restoration Act, all gaming that is prohibited by the State of Texas is prohibited by the tribe; the reverse is also true: All gaming that is permitted, therefore, is permitted to the tribe. In that way, the Restoration Act and IGRA are not mutually exclusive. They can and should be read together but also read in the context of the whole of Federal Indian law.

Summary: Tribes, like the Ysleta del Sur Pueblo, seek Federal recognition in order to enjoy the governmental status that all other federally recognized Indian tribes enjoy. The Ysleta Tribe was successful in achieving that status and that is why they are the same as other tribes. While the State of Texas does have limited civil jurisdiction over events that occur on reservation lands, it is indistinguishable from—and is in fact akin to—the jurisdiction of other states with jurisdiction under PL 280 or other statutory grants of authority by the U.S. Congress. In the Ysleta's Restoration Act, Congress granted the tribe recognition as a Federal tribe with all the privileges and obligations that come with that recognition. In Federal Indian law, some tribes simply are not more sovereign—or less sovereign—than other tribes. They have the same status, no matter how large or small, how many members they have, how big their reservations are, or how or why they became recognized. They each have a government-to-government relationship with the United States; the United States has trust obligations to them, and each enjoys the same immunity and other sovereign attributes as the others.

Suffice it to say that the Federal courts in Texas have undermined the sovereignty of the tribes subject to the Texas Restoration Act by completely ignoring the full implications of what Federal recognition is all about. It does not matter whether a tribe is restored or recognized by the Congress or by Administrative action of the Department of the Interior. Both Texas Tribes were restored to Federal status by the Congress and nothing in the act indicates that the Congress intended to have a lesser status than all other federally recognized tribes. There would be little point to restoration or recognition if courts can read into Acts of Congress an intent to differentiate between tribes on basic matters like sovereignty or achievement of their full rights under Federal law, including IGRA.

In short, it is my view that the Federal courts cannot and should not differentiate among tribes based on such flimsy reasoning as that of the 2001 Decision and that which it cites from the 1994 case. It would seem to be a clear case of judicial activism in which the courts have effectively undermined the intent of the Congress and even the authority of the Congress under the Commerce Clause to determine Indian law and policy. Only the Congress it can correct the courts' errors.

PREPARED STATEMENT OF ALEX SKIBINE, PROFESSOR OF LAW, UNIVERSITY OF UTAH

Mr. Chairman, members of the committee, thank you for scheduling this hearing and allowing me to testify on this important matter. Although I am currently a professor of law at the University of Utah and have been so for the last 12 years, I was deputy counsel for Indian Affairs for the House Interior Committee from 1981 to 1989. As such, I was the counsel assigned with the primary responsibility of overseeing passage on the House side of the bill restoring Federal recognition to the Ysleta del Sur Pueblo and the Alabama & Coushatta Tribes of Texas (hereinafter, the Texas legislation). Set forth below are my thoughts and recollection about what Congress did at the time the legislation was passed as well as my analysis of the subsequent court decisions.

1. Chairman Udall's role and my own interpretation.

An important and controversial part of the legislation recognizing the tribe were the sections dealing with gaining on the reservation. The original bill as passed by the House in the 99th Congress provided that gaming on the reservation shall be conducted pursuant to tribal gaming laws which shall be identical to the gaming laws of the State of Texas. However there was an important caveat: Such gaming laws could be amended by the tribe if the changes were approved by the Secretary

of the Interior and upon such approval, submitted to Congress which was to have 60 days to disapprove such amendments by enactment of a joint resolution.

That bill was referred to the Senate Select Committee on Indian Affairs which made further amendments to the bill to satisfy the concerns the state of Texas had expressed about the House passed version. These amendments in effect stated bluntly that gaming as defined by the laws of Texas was hereby prohibited on the tribe's reservation. Action on the Senate bill, however was vitiated by the Senate and as a result, the Texas legislation died in the 99th Congress.

I clearly remember how disappointed I was when the Senate first amended H.R. 1344, the bill I had worked on in the House. I was also disappointed when Congressman Coleman in the following Congress, the 100th Congress, decided to introduce a new bill, H.R. 318, which adopted the language passed but not enacted by the Senate in its previous session. This time, no hearings were held on that legislation but it was favorably reported by the House on March 11, 1987 and passed under suspension of the rules on April 21.

During the period the bill was pending in the House, one major event happened: The Supreme Court handed down its landmark decision in *Cabazon* v. *California* on February 25, 1987. This decision denied the State of California any jurisdiction over Indian gaming and therefore was considered a major victory for tribal gaming interests. However, the favorable decision also made it virtually certain that the Congress was going to proceed with the enactment of a comprehensive Indian gaming legislation. It is with that understanding that the Texas recognition bill was taken up one more time by the Senate Indian Affairs Committee. This time, the bill was reported out of the Indian Affairs Committee with an amendment in the nature of a substitute. The bill passed the Senate on July 23 and the House concurred with the Senate amendments on August l8, 1987.

I remember how relieved I was upon being informed that the Senate had amended the House passed bill. I interpreted the change to be a meaningful one. One which would allow the tribe to enter into any form of gaming not prohibited by the laws of Texas. The change was meaningful because the previous version would have prohibited on the reservations any form of gaming as defined by the laws of Texas even if Texas allowed some forms of gaining outside the reservations.

I told Chairman Udall about my understanding and because he agreed with me, he decided to include that interpretation as part of his final remarks on the floor of the House. More importantly, Chairman Udall is not the only person who had to agree with this interpretation. That language had to be cleared by the minority, by Congressman Coleman, by the official Republican objectors on the floor which meant that the Reagan administration also had to give it its blessing, and finally by Congressman Vento who had been appointed by Chairman Udall to go to the floor of the House for the purpose of asking the House for unanimous consent to agree to the Senate amendments and send the bill to the President. To ascribe this statement as the last minute opinion of a minor congressman, as stated by the court is ludicrous and show a complete ignorance (or disregard) about how business is conducted by the House of Representatives.

2. The meaning of section 107: Plain meaning vs legislative history.

The legislation finally enacted by the Senate moved away from prohibiting all "gaming" as defined by the laws of Texas to only forbidding games "prohibited by the laws of the State of Texas." Although the plain meaning of the crucial sentence is clear and is almost identical to the language used by the Supreme Court in *Cabazon,* if there are any ambiguities, it comes from the last sentence of section 107 which mentions that the provision of this subsection are enacted in accordance with the tribal resolution of March 12, 1986. The problem comes from the fact that the tribal resolution purports to endorse a complete ban on all gaming on the reservation. Furthermore, the Senate Report contains language asserting that "the central purpose of the bill was still to ban gaming on the reservations as a matter of Federal law." So what we have here is an ambiguity. Yet, the Fifth Circuit Court of Appeals in litigation involving the Ysleta del Sur Pueblo but based on the same language decided to ignore the changes made by the Senate. In fact the court decided to pretend that the Senate had just approved the same bill passed earlier that year by the House. With all due respect, Mr. Chairman, this takes judicial activism to a whole other level.

The change made by the Senate cannot be ignored or considered meaningless. While the reference to the tribal resolution makes the sentence ambiguous, it cannot just be coincidental that the language used ended up being almost identical to the Court's reasoning in *Cabazon* and what eventually would become IGRA. It seems to me that the Senate realized that it was eventually going to enact a comprehensive gaming bill partly codifying *Cabazon* and attempted to make the Texas bill conform to what such a bill would eventually look like.

While the Fifth Circuit decided to focus on extraneous materials such as the Senate report to support its conclusion that gaming was still prohibited under the final version of the bill, it decided to totally dismiss other extraneous materials such as the fact that the *Cabazon* decision came down while the Texas legislation was being considered by the Congress, and more importantly from my perspective, Chairman Udall's own words to the effect that the bill as finally enacted was a codification of the civil/regulatory, criminal/ prohibitory test endorsed by the Supreme Court in *Cabazon*.

I do not know why exactly the Senate left the language relative to the tribal resolution. If I had to make an educated guess, I think it was just a drafting mistake. Staff just forgot to take the language out. Such mistakes happen. In last year's decision in *Chickasaw Nation* v. *United States,* the Supreme Court concluded that a similar mistake actually occurred during the passage of IGRA when the Senate took out the words providing for an outright tax exemptions to Indian tribes but kept in a parenthesis, references to chapter 35 of the Internal Revenue Code which is all about exemptions from taxation. The Court concluded that the Senate had left the language within the parenthesis by mistake and denied the tribes the tax exemption. I think a similar mistake can be inferred here. The Senate took away the words providing for an outright prohibition of gaming but inadvertently left the language referring to the tribal resolution. Following the methodology used by the Supreme Court in Chickasaw should lead courts to the conclusion that the Senate just forgot to take out the reference to the tribal resolution. There is one thing, however, that the Supreme Court was not willing to do in Chickasaw and that was to pretend that later amendments made to IGRA had no effect on the meaning of the legislation as finally enacted. Mr. Chairman, the same thing should have occurred here, yet the Fifth Circuit decided to ignore the later amendment.

Finally in defense of the staff, it is perhaps not irrelevant that there was a change in the leadership of the 100th Congress with the Democrat regaining control of the Senate. Perhaps the mistake is just the result of different staff being assigned to handle the bill from one Congress to another.

3. The Indian liberal construction rule.

Perhaps the biggest omission in both the district court and the Fifth Circuit opinions is the absence of any reference to the canon of statutory interpretation according to which statutes enacted for the benefit of Indians are to be liberally construed and any ambiguities resolved in their favor. While the Supreme Court has at times refused to extend application of the rule to statutes of general applications[1] or to statute which may not have been enacted "for the benefit" of Indians,[2] there is no doubt that the Texas legislation is a specific statute concerning Indians and enacted for their benefit. While the liberal construction rule should not be used to distort the plain meaning of otherwise unambiguous words and while other substantive canons of statutory construction may displace the rule,[3] none of these exceptions are present here. This case in fact is exactly the kind of case which calls for the application of the Indian liberal construction rule.[4]

4. Why Congress is right to pay attention to these issues.

Court decisions such as the one made by the Fifth Circuit on this issue should be scrutinized by Congress because they are part of a larger trend, led by the Supreme Court itself, which is to assert what we in academia call judicial supremacy in areas which should be reserved to the legislature. Thus there has been a slew of court decisions, especially in the area of federalism, which for some reason or another, either struck acts of Congress as being unconstitutional or seemed to disregard the will of Congress. Scholars have been perplexed by such decisions and have proposed various theories. While some scholars have taken the position that

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[1] See *Chickasaw Nation* v. *United States* (2001)

[2] See *Negonsott* v. *Samuels,* 507 U.S. 99 (1993).

[3] By substantive canons I mean such canons as the Chevron doctrine or the rule asking courts to interpret a statute so as to avoid raising serious questions concerning the constitutionality of the statute.

[4] Another mistake made by the Fifth Circuit was to hold that gaming on the Texas tribes' reservations was controlled by the restoration act and not by IGRA. I think a good argument can be raised that IGRA supplanted the Texas legislation. On this issue, I found the reasoning of the First Circuit in *Rhode Island* v. *Narragansett Indian Tribe,* 19 F.3d 685 (First Cir. 1994), to be more persuasive than the rather summary analysis given by the Fifth Circuit in the *Ysleta del Sur* case. As stated by the first circuit, IGRA is the later act and while the Fifth Circuit's asserted that the Texas Act is the more specific statute, this is only correct when it comes to determining the political relation ship between the Texas tribes and the Federal Government. When it comes to gaming, a good argument can be made that both acts are equally specific and therefore the later in time should govern, especially since it adopts a national policy governing gaming on Indian reservation.

the Court as an institution is just more pro state rights than the Congress and that the Court no longer believes that the rights of the states are adequately protected in Congress,[5] others see ideological and political motivation underneath the theoretical veneer of federalism.[6] Yet other scholars such as Phillip Frickey at Berkeley, a noted expert on the Legislative Process and Federal Indian Law, believe that rather than a love of the states, it is more a mistrust of Congress which leads the Court to appoint itself as the ultimate arbiter of power between the States and the Congress.[7] These scholars believe that this mistrust has made the Court eager to require more procedural safeguards on the Congress[8] Yet most of these scholars also believe that the Court's decisions are raising Separation of Power concerns and come from a misunderstanding about how Congress really works as well as a misconception about the proper role of the judiciary.[9]

Whatever the real reason, the decision by the Fifth Circuit in the *Ysleta* case fits such cases. Thus the decision involves an Act of Congress which at the last moment was amended in a manner which in retrospect turned out to be detrimental to State power.

Here, you also have the lack of an adequate record explaining why the amendment was adopted. If the thesis proposed by my colleague Phillip Frickey in his recent Yale Law Review article is correct, this is exactly the kind of scenario which have irked federalist courts in the past. Nevertheless, the amendment was appropriately made and it is not the role of the courts to require more explanation from the Congress just as they would be right to expect, for instance, from an administrative agency.

Conclusion

In conclusion, the actual words of the act with its emphasis on only preventing gaming prohibited by the law of Texas, the fact that the Senate amended what had previously been an unambiguous gaming ban, the similarities between the words used and the reasoning of the *Cabazon* case, and the House's understanding as reflected by Mo Udall's final words, all point to the fact that the District Court and the Court of Appeals were mistaken. However, to the extent that there is an ambiguity due to the mentioning of the tribal resolution endorsing a ban on gaming, the Indian liberal construction rule should have been used to resolve any ambiguities to the benefit of the tribes. As some scholars have remarked, in some of those cases, the Court seems to be "dissing" Congress.[10] I think this is what may be happening here. Thank you.

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[5] See Mitchell Lustig, *Rhenquist Court Redefines the Commerce Clause,* N.Y.L.J. 1 (Aug. 28, 2000).

[6] See Eskridge and FereJohn, *The Elactic Commerce Clause:* A Political Theory of American federalism, 47 Vand. L. Rev. 1355 (1994), Rubin and Feeley, *Federalism: Some Notes on a national Neurosis,* 41 UCLA L. Rev. 903 (1994).

[7] Philip Frickey and Steven Smith, *Judicial Review, The Congressional Process, and the federalism Cases: An Interdisciplinary Critique,* 111 Yale L. J. 1707 (2002).

[8] See William Buzbee and Robert Schapiro, *Legislative Record Review,* 54 Stan. L. Rev. 87 (2001).

[9] See Frickey, above at note 8. See also Larry Kramer, *Putting the Politics Back into the Political Safeguard ofFederalism,* 100 Colum. L. Rev. 215 (2000), and Frank Cross, *Realism About Federalism,* 74 N.Y.U. L. Rev. 1304 (1999).

[10] See Ruth Colker & James Brudney, *Dissing Congress,* 100 Mich. L. Rev. 80 (2001).