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S. HRG. 109–374

INDIAN TRIBES AND THE FEDERAL ELECTION CAMPAIGN ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING REGARDING THE STATUS AND TREATMENT OF INDIAN TRIBES UNDER THE FEDERAL ELECTION CAMPAIGN ACT

FEBRUARY 8, 2006
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE

25–982 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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INDIAN TRIBES AND THE FEDERAL ELECTION CAMPAIGN ACT

WEDNESDAY, FEBRUARY 8, 2006

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

The committee met, pursuant to notice, at 9:30 a.m. in room 106 Senate Dirksen Building, Hon. John McCain (chairman of the committee) presiding.

Present: Senators McCain, Dorgan, Inouye, Johnson, and Thomas.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. I hope that the Senate will soon adopt lobbying reform that will help to dispel the public's sense of something rotten on Capitol Hill. We are embarked on that aspect of the Abramoff issue and the number of situations that it has brought to light.

But cleaning up our act in Congress is only part of what needs to be done. There are two sides to the perception that Congress can be bought, the receiver and the giver, and we should examine both.

Federal law has long recognized that restrictions on contributions are appropriate to remove the reality and the perception of undue influence. While the majority of the 562 federally recognized tribes make no political contributions or contributions that amount to no more than a few $1,000 a year, there are a number of tribes that contribute significant aggregate amounts to Federal candidates and committees. Before 2002, much of this money came in the form of unregulated soft money, but the Bipartisan Campaign Reform Act of 2002 ended this for tribes and others.

Still, hard money contributions from wealthy gaming tribes in recent elections have drawn attention. Certainly, when the Indian Gaming Regulatory Act was enacted in 1988, nobody anticipated that any tribe would make enough profit that it would donate hundreds of thousands of dollars to political campaigns.

Although I believe the tribes, most of which remain desperately poor despite gaming operations, can apply tribal funds, including gaming revenues, to better and more important uses than political contributions, I understand that there is a widespread fear in Indian country of losing a seat at the political table. Tribes fear that just as they are beginning to more fully participate in the political

process through campaign contributions, opposing interests have proposed reforms that could effectively exclude them.

I understand these concerns, but feel it is appropriate to examine how and why tribes, which truly are unique entities, are treated the way they are under the Federal Election Campaign Act and whether the law should be changed.

Over the years, I have been blessed with the support and friendship of many people from Indian country and I am committed to ensuring that they are treated justly and fairly by this Nation. Indian tribes are part of the constitutional fabric of this country and are uniquely impacted by congressional actions. They must be actively involved in the political processes that affect them. It is the form of participation, however, with which we concern ourselves at this hearing.

In the interest of protecting not just Indian tribes, but the perception of the integrity of our democracy, I intend to ask some hard questions today and in the days ahead. I thank the witnesses for appearing here today and look forward to their testimony.

Senator Thomas.

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS. Thank you, Mr. Chairman.

I am sorry. As you know, we all have two or three meetings going on at the same time this morning. I do want to tell you that I am very interested in this and appreciate your having this hearing. I think it is very important that we get some clarification on the roles here and what the responsibilities are. From what I am able to determine, there is some uncertainty as to how the various rules apply here and they should apply fairly to the tribes. So I appreciate what you are doing and want to work with you on it.

The CHAIRMAN. Thank you very much.

Senator Dorgan is also at a meeting and he will be joining us shortly. In the meantime, we will begin with our witnesses, who are Michael Toner, who is the chairman of the Federal Election Commission; Robert E. Lenhard, who is the vice chairman of the Federal Election Commission; and Philip Hogen, who is the chairman of the National Indian Gaming Commission, a frequent witness before this committee.

Welcome to the witnesses. Mr. Toner, we will begin with you.

STATEMENT OF MICHAEL E. TONER, CHAIRMAN, FEDERAL ELECTION COMMISSION

Mr. TONER. Thank you, Chairman McCain, for inviting Vice Chairman Lenhard and me to testify today on behalf of the Federal Election Commission regarding the status and treatment of Indian tribes under the Federal Election Campaign Act.

Vice Chairman Lenhard and I have submitted joint written testimony to the committee which we request be made part of the record.

Mr. Chairman, I want to emphasize three fundamental things today. First, Indian tribes, as you indicated, are nowhere mentioned in the Federal Election Campaign Act of 1971, nor in any of the subsequent amendments to the act. As a consequence, in its

decision making in this area, the FEC has been guided by its best sense of how Congress intended the statutory provisions of the act to apply to Indian tribes and to tribal activities.

In doing so, the Commission has drawn upon key statutory provisions in the Act, such as who is a person subject to the act's prohibitions and limits, and who is an individual who is subject to additional restrictions under the law.

However, there is no question that the Commission's task in applying the act in this area has been complicated by the fact that Indian tribes, as the Supreme Court has noted, do occupy unique status under our law. This unique status has created additional complexities in applying the Nation's campaign finance laws to tribal activities and I suspect that will always be the case, at least to a certain extent, regardless of what Congress and the Commission chooses to do in this area. Such complexities likely will always be with us.

Second, although the Commission has confronted a number of difficult issues in applying the act to Indian tribes, several things are clear. Most importantly, the Commission has made clear that the Nation's campaign finance laws apply to Indian tribes and to tribal activities. Over the years, a number of Indian tribes contended, due to their sovereign status, that they were exempt from the act and from FEC oversight.

The Commission rejected that contention, noting that there was no evidence in the legislative history of the Federal Election Campaign Act, nor in any of the subsequent amendments to the act, that Congress intended to exclude Indian tribes from the Nation's campaign finance laws. These Commission decisions have not been challenged by the tribes in court and I think it is fair to regard them as settled law today.

In addition, the FEC has made clear that Indian tribes are subject to the same contribution limits that apply to what any other entity or group of persons can contribute to Federal candidates, political parties, and political action committees. In making this determination, the Commission construed the act's statutory definition of a person, which is defined, among other things, as an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons, as applying to Indian tribes. Again, no Indian tribe has brought a legal challenge against the Commission on this key issue, and therefore this area of the law is settled as well.

Third, beyond these settled areas of law, there do remain a number of difficult and complex issues in applying the act to Indian tribes and to tribal activities. Our jointly submitted written testimony discusses some of these difficult interpretative issues, including the impact of various tribal business activities on the ability of tribes to make contributions to Federal candidates, such as when a tribe creates a business that is a Federal Government contractor.

In addition, another difficult issue has been whether the act's aggregate biannual contribution limits that apply to individuals should apply to tribal contributions as well.

With respect to these difficult legal issues in particular and to applying the Act to Indian tribes in general, the Commission would greatly benefit from a clear and definitive statement from Congress

on how the Nation's campaign finance laws should apply to Indian tribes and their activities.

A clear congressional declaration on how the act can best be applied to Indian tribes in particular circumstances, taking into account the unique status of Indian tribes in American society, would be enormously helpful to the FEC and to the regulated community, and the FEC is prepared to implement and enforce whatever statutory provisions Congress may choose to enact in this area.

Mr. Chairman, thank you again for inviting me to testify today. I look forward to the committee's questions.

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

The CHAIRMAN. Thank you very much.

Mr. Lenhard.

STATEMENT OF ROBERT E. LENHARD, VICE CHAIRMAN, FEDERAL ELECTION COMMISSION

Mr. LENHARD. Chairman McCain, Vice Chairman Dorgan and members of the committee, thank you for inviting us here today. I would like to begin by noting that I concur with the remarks made by my colleague, Chairman Toner.

I would also like to elaborate on two possible amendments to the Federal Election Campaign Act of 1971 that have been proposed in Congress or discussed in the press. While these proposals are examined in more detail in the written testimony we have submitted to the committee, I wanted to take a moment to describe the effect of these proposed changes on the legal status of Indian tribes under the Federal Campaign Finance law.

Before beginning, I want to highlight that the FEC does not advocate any specific change to the law. Instead, we want to provide the Committee with our assessment of the legal impact of these proposals. The FEC stands ready to implement any future legislation in this area.

We are aware of only one bill that is currently pending in either the House or the Senate that directly addresses the issue of Indian tribes making contributions to influence Federal elections. The effect of that bill, which was introduced by Representative Mike Rogers, would apply the same restrictions to Indian tribes that exist upon corporations, unions and national banks. As a consequence, tribes would be barred from making political contributions or expenditures from their general treasury funds.

Like corporations or unions, tribes could sponsor a PAC, but would have to register with and report its activities to the FEC. The PAC would be free to make contributions in Federal elections, but could only do so using money raised from tribe members. In order to raise money to make contributions, the tribal PAC would have to solicit voluntary contributions of up to $5,000 per year from members of the tribe.

This proposal would not place an overall limit on how much money the tribal PAC could contribute in a 2-year period because the aggregate limit does not apply to PAC's or other political committees. In addition, the tribe's PAC, like most corporate or union PAC's, could contribute more to a single candidate than tribes can now. This is because the contribution limit for a person under the law, which is how tribes are now classified, is $2,100 per election.

Most PAC's can give up to $5,000 per election to a candidate. On the other hand, a tribal PAC could not contribute as much to political parties as a tribe can now.

What has not been discussed in considering whether to treat tribes like corporations or unions is the very important question of who qualifies as a member of a tribe under Federal campaign finance laws. This question is important because if this change is adopted, a tribe's PAC will only be able to solicit contributions from members of the tribe. H.R. 4696 equates a tribe's membership to a corporation's stockholders, but does not further define who would be considered a member of a tribe. This may or may not be an appropriate analogy because tribal membership is more frequently a question of one's ancestry, rather than a commercial relationship of a stockholder.

It is our understanding that the question of who is a member of a tribe has been a topic of great concern to tribes and that tribes have taken different views on what standard should apply to determine if an individual qualifies as a member of a particular tribe. If Congress decides to amend Federal campaign finance law to treat Indian tribes in a way that is analogous to corporations and unions, it will be very helpful for Congress to use its expertise on the history and culture of Indian tribes to set a standard for what constitutes membership in a tribe in the context of Federal campaign finance law.

In addition to the pending proposal to treat Indian tribes like corporations and unions, there have also been discussions in the press implying that Indian tribes should have an aggregate contribution limit like the one imposed on individuals. For individuals, that limit is $40,000 to all candidates and $61,400 to all PAC's and parties, for a total limit of $101,400 on all Federal campaign contributions in a 2-year cycle.

Currently, this limit only applies to individuals, which the FEC has defined as actual human beings. Some have questioned why a similar limit does not apply to Indian tribes. If Congress were to adopt such a change, it would not prevent tribes from using the proceeds from unincorporated gaming or other tribal moneys to finance political contributions, nor would it improve the current levels of disclosure. It would, however, limit the amount of money that an Indian tribe could spend to influence Federal elections to a sum equal to what an individual can spend.

In conclusion, Mr. Chairman, I would like to thank you for giving us the opportunity to appear before the committee to discuss the application of Federal campaign finance law to Indian tribes.

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

The CHAIRMAN. Thank you.

Mr. Hogen.

STATEMENT OF PHILIP N. HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Mr. HOGEN. Good morning, Chairman McCain, Senator Thomas, Senator Johnson. I am Phil Hogen. I am an Oglala Sioux Indian from South Dakota. I am proud to chair the National Indian Gaming Commission.

I want to just take a quick look at the history of Indian gaming. I know you know this, but in the 1980's tribes started playing high-stakes bingo and it worked really well. States in some of those places were perplexed that this was happening in their midst, inconsistent with State bingo laws. So they took the tribes to court.

The courts eventually said, well, States, you permit bingo; you do not criminally prohibit it; you use your regulations; the tribe can use their regulations. That was eventually crystallized as the law of the land in the *Cabazon* decision decided by the U.S. Supreme Court in 1987. Of course, that was followed by the Indian Gaming Regulatory Act that I work under, which was adopted in 1988.

The CHAIRMAN. Could I interrupt you one second?

Mr. HOGEN. Certainly.

The CHAIRMAN. Many citizens understand that history as far as it goes. What a lot of citizens do not understand is that in South Dakota, they still allowed bingo on an occasional charity night where gambling was allowed for the benefit of the local hospital, et cetera. How did that transfer into allowing Indian tribes to open full-blown casinos?

Mr. HOGEN. Well, the Indian Gaming Regulatory Act divided the gaming into three categories.

The CHAIRMAN. Wasn't it a judge's decision that basically made it that if they are allowing bingo, therefore the Indian tribe can have roulette and crap tables?

Mr. HOGEN. Not in South Dakota. South Dakota law permits casino gambling in the historic gold-mining town of Deadwood. That is the only place you can do that in South Dakota. IGRA says if the State says somebody can do it someplace, then the State is obligated to negotiate a class III compact through the tribe so they can do it on their reservation, and that is what has occurred.

We have gaming in 28 different States. We have 28 different models of what the State permits and what the tribe is then able to negotiate. So one size does not fit all, but that is kind of the theory.

Tribes got into gaming not just to raise money, but to provide jobs. There is a great diversity in Indian gaming. In South Dakota, we have Bear Soldier Bingo up on the Standing Rock Reservation near McLaughlin, where they play a few nights a week. In Connecticut, the Mashantucket Pequots have the largest casino in the world. All of this gaming is done under the Indian Gaming Regulatory Act. This chart over here shows the revenues that have been generated from this activity that this year will be over $20 billion. It is on the rise. It is on the increase and it has worked better than any other economic development that was brought to Indian country.

It is not divided up equally, so to speak. There is great diversity. I have attached some charts to my testimony, which I hope will be incorporated into the record. Most of this $20 billion is generated by a small number of tribes; 15 percent of those some-225 tribes generated over two-thirds of that $20 billion; 30 percent plus is responsible for less than 1 percent of that total. So you can see not all tribes are making millions or billions of dollars.

The Indian Gaming Regulatory Act restricted what tribes could do with their gaming revenues, but the categories that were cre-

ated were very broad: to fund tribal government operations; to provide for the general welfare of the tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government.

In an effort to help tribes stay in these categories, NIGC last year issued a bulletin entitled "Use of Tribal Gaming Revenues," that we have attached to our testimony, that hopefully gives guidance to tribes so they can stay in those categories.

We are authorized to take enforcement when IGRA is violated, when our regulations are violated, or when the tribe's own gaming ordinance is violated. So indirectly, I think it can be concluded we have an oversight and enforcement responsibility with respect to tribes that do not spend according to the act. We have investigated a number of instances where it was alleged or we concluded or observed that the money was not being used properly. When dollars were being used to benefit just tribal officials or tribal factions, that we felt was not a proper use.

There were instances where tribal dollars were used to influence tribal elections, or taking one side against another. We inquired into that. There were dollars that were spent to secure contracts that some of the insider tribal members had financial interests in. We inquired into that. There were expenditures that were made inconsistent with what tribal law provided. We inquired into that. There were payments made to management contractors that did not have their contract reviewed and approved by the NIGC as IGRA requires. We looked into that. In other instances, a group wrested the leadership of the tribe from the recognized group without BIA recognition and we felt that that was not an appropriate use, then, of the dollars.

Those are among the categories where mis-spending, so to speak, has occurred and can occur.

With respect to the matter we are probably talking about today that got started inquiring into huge expenditures for lobbying expenses, NIGC got wind of that and referred it to law enforcement authorities not because we did not think money could or should be spent on lobbying, but the way those particular monies were spent did not appear to comport with what the tribe's own requirements were with respect to the expenditures of those dollars. IGRA does not say specifically how NIGC ought to or does oversee the expenditures of these dollars.

If we could look at the next chart, tribes are not all set up the same way, but typically the tribe and its membership will designate a tribal council that is responsible for the government. To run businesses, they typically will set up a board of directors or an enterprise board. So they try to separate the business from the government, so to speak. After the enterprise board gets set up, they can start the business, a casino or a bingo hall, and they can do it directly, hire a manager, kind of oversee it themselves, or they can enter into a management contract. Typically, tribes will also set up an independent tribal gaming commission that will have independence from the manager, have independence from the tribal council, but regulate, and then they will run the business.

Typically, if they run it well, they will have dollars to spend. Those dollars will come back to that enterprise board and then the

enterprise board will send them back to the tribal government. Typically, they will then go in to the treasurer's office where they will be commingled with the other moneys that the tribes might get from grazing or oil or timber or whatever.

NIGC looks most closely as those dollars come into the casino, and as they go through the vault and so forth, but we do not necessarily have a way to look at those dollars after they get back to the tribe and how they are spent. So that is typically the way it works. We do not allege that we follow every dollar that is generated by Indian gaming.

The Department of the Interior's Office of Inspector General did a report with respect to revenue allocation plans. Those are the plans that tribes have to adopt if they are going to make per capita payments. This report done in basically concluded that nobody was watching the store. That is, these revenue allocation plans, although they had to be approved by the Secretary of the Interior, were not then followed thereafter by the Department of the Interior or NIGC.

In fact, we found as we now started looking at those, many of those plans were obsolete. They did not comport with what the tribe was actually doing with its revenues, and the Department of the Interior is currently revising those regulations and we are participating in that.

We have never taken action against a tribe for making campaign contributions or lobbyist payments based on the proposition that those were not in compliance with those categories that IGRA provided for. We concluded that such expenditures were providing for the general welfare of the tribe, promoting economic development, or funding tribal operations.

Tribes, maybe more so than any other entities in the country, are at the mercy of Congress. They need to watch very carefully what happens in Washington, DC generally, and in this committee in particular. They need professional assistance often to do that, not only to report back to the tribes what is going on, but to provide input. They hire lobbyists to do this.

In some instances, lobbyists probably will be paid above the line, that is, so to speak, directly from the gaming operation. They will be hired, and that money will not go back to the tribal treasury. That I do not think is necessarily inappropriate. All businesses have some government relations offices.

But is this to say that these expenditures cannot be abused? I think they can be, and I think there have been some instances where they have been. We have seen exorbitant payments made to lobbyists and moneys contributed to causes that seem to have no relationship to the direct interests of the tribe. I think there has been a failure of due diligence on behalf of those tribes.

Having the economic wherewithal and having the prosperity to make these contributions is relatively new to tribes, because before Indian gaming, they just did not have the dollars to do this. So they are learning how to do it. But as they do this, you would think that it would be appropriate to look at other industries, look at similarly situated organizations. How much do they spend to do this sort of thing? And be guided in part by that.

So we have a wake-up call here and I think all tribes, as well as regulators like myself, need to exercise greater due diligence with respect to how this works.

Indian gaming is a very competitive industry. Gaming is a competitive industry. Sometimes tribes will spend dollars to protect their market share. Sometimes they want to protect that from sister tribes. That is not wrong, but if it is going to be done, it needs to be done fairly.

So tribes need to look before they leap when they spend dollars like this. They need to expend due diligence and they need to fully inform their tribal membership with respect to what they are doing with those tribal resources. There are going to be trade secrets. There are going to be political strategies that need to be closely guarded, but the tribal members are the shareholders, so to speak. I do not want to confuse my use of "shareholders" with Mr. Lenhard's explanation there, but they are the owners, so they ought to have a right to know what is going on and they have a responsibility to hold tribal leadership to account, account to give them the information about where the money is going, and if it appears it is not going into the right place, to demand compliance or replace that leadership.

If tribes operate with this transparency, I think they can continue to do right things with their dollars. It is extremely important to remember that Indian gaming is not a Federal program. These are not dollars that somebody gave the Indians. These are hard-earned dollars that they have produced themselves, and they were doing it long before the Indian Gaming Regulatory Act came along. The Indian Gaming Regulatory Act I think accommodated how it would work, but you cannot ignore the fact that these are their dollars.

We want to play an effective role in providing oversight. If Congress wants us to watch every dollars, we are going to need some different tools than we have right now.

I appreciate the opportunity to share this with the committee. I would be happy to respond to any questions.

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

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

Mr. Toner, the FEC determined in 1995 that tribes do not need to register with the FEC and report their contributions because, like some other entities, they are not "political committees" since campaign activity is not a "major purpose" of tribes. Do you think there is value in having tribes register and report their contributions?

Mr. TONER. Mr. Chairman, you are correct that that was the judgment the Commission made in applying Supreme Court precedent in terms of organizations and under what circumstances the Government can require them to be political committees. As you indicated, the touchstone that the Supreme Court has focused on is whether their major purpose is to influence elections. The Commission reached the conclusion that Indian tribes, given that they have a lot of other purposes totally removed from electoral politics, did not have as their major purpose was not influencing elections, and therefore, at least under existing law, it would not be appropriate to require them to register as political action committees.

Clearly, Congress could decide to broaden the political committee provisions under our law.

The CHAIRMAN. My question, Mr. Toner, was do you think there is value in having tribes register and report their contributions?

Mr. TONER. One of the big values for any entity that reports is that you have a more uniform reporting regime, because any entity that is a political committee is assigned.

The CHAIRMAN. Mr. Toner, in all respect, I would like, do you think there is value, and this is the third time now I have asked the question, do you think there is value in having tribes register and report their contributions?

Mr. TONER. Mr. Chairman, as I was saying, I think there could be value because there would be improved reporting if they were registered as political committees because they would then be provided a unique identifier number. Like any political committee, they would have independent reporting obligations to the government, as opposed to only having their activities reported by the entities that receive their contributions?

The CHAIRMAN. I see.

Mr. Lenhard, do you share that view?

Mr. LENHARD. I do, sir. I think that there is value. It would provide more easily accessible records as to the kinds of contributions the tribes were making. I think it lies within the discretion of Congress whether they choose to add that requirement or not. The tribes are like a number of other different kinds of entities. Individuals, for example, do not have to report their overall contributions, partnerships. I think the question for Congress is, has the level and kind of tribal political activity risen to the point where it is appropriate to have them register and report.

The CHAIRMAN. Thank you.

Mr. Toner, how are municipal and State governments treated under FECA?

Mr. TONER. Mr. Chairman, in terms of the coverage of FECA, the only entity that is clearly excluded from the Federal campaign finance laws in this respect is the Federal Government and the arms of the Federal Government. The Commission has concluded that State governments are subject to FECA's contribution limits. There has been an advisory opinion that made that clear.

It is also true that State governments have not been in the business of contributing to Federal candidates, but the agency has made clear that as a matter of Federal law, State governments are part of the Federal campaign finance laws.

The CHAIRMAN. So in theory, they could make contributions.

Mr. TONER. In theory, they could. What would be interesting is to see whether or not, apart from Federal law, are there any independent prohibitions under State law for State funds being used for those purposes.

The CHAIRMAN. Can I get back to the larger question for a second? Mr. Toner and Mr. Lenhard, are tribes being treated appropriately under Federal election campaign law? I understand this is not an easy question for either one of you. Go ahead.

Mr. TONER. Mr. Chairman, there is no question that Indian tribes have been very active in Federal elections. Press reports have indicated the broad ranges of contributions that have been

made by Indian tribes and by Native Americans. There is no question they are fully engaged in the political process. But as my opening statement indicated, there are also some difficult legal issues in terms of how to treat them. So the Commission has ruled that Indian tribes are not subject to the biannual aggregate limits that apply to individuals, and made that judgment based on the view that Indian tribes are not individuals. They are a distinct entity, recognized by Supreme Court case law and otherwise.

But I am the first to acknowledge that there is an anomaly in the law, and the Congress could take a hard look at that judgment. Another key issue is the sense that the Congress may be looking at is whether to essentially amend section 441(b) of our statute, which is what the Rogers bill on the House side would do, and basically say unincorporated Indian tribes would be subject to the prohibitions in 441(b). Therefore, their general treasury funds could not be used to make contributions for Federal elections, and they would have to set up a political action committee to be active in that process.

Clearly, that is a way that Congress could decide to go. It does place an added burden on any organization to set up a political action committee, but it is also true that a wide range of organizations do. There are thousands of PAC's that are registered with the FEC.

So in terms of the proper balance in treating Indian tribes under the law, I am the first to acknowledge that there are difficult interpretive issues that the agency has faced over the last 20 years, which is why I think more than anything else clear congressional direction would be really valuable to the FEC in this area.

The CHAIRMAN. Mr. Lenhard.

Mr. LENHARD. I agree with that. I think that the tribes have been treated by the FEC, along with a number of other entities, in a common way with partnerships and unincorporated associations. I think the question that presents itself here, which really I think is an appropriate one for Congress to consider, and especially this Committee to consider, is whether the nature of Indian tribes in the political process has changed over time.

They have some unique features to them. They are treated as sovereign nations under the law. One of the effects of that is that in the context of business activities, they often do not feel the need to adopt the corporate form. As a consequence, the prohibitions under the election laws on corporate activity do not apply to Indian gaming operations and other business operations.

The other thing that obviously has changed is with the rise of gaming, a number of Indian tribes, and the number may be small, but a number of Indian tribes have become very politically active. Again, I think it is reasonable for Congress to consider whether the aggregation of wealth in those entities has a distorting effect on politics that should cause the regulatory regime to increase.

Last, and again I note that this committee's jurisdiction seems particularly appropriate, there is a particular history of Indian tribes in this Nation which may have some bearing on this as well, both in terms of the interactions of the tribes and the American Government over the last 350 years, the economic opportunities

available to tribes, and the internal operations as sovereign entities within this country.

So I think that these are all factors that you have to consider and weigh as you discern whether it is valuable at this point to change the statutory treatment of these tribes.

The CHAIRMAN. I have just two more questions.

Transparency is always the first step whenever there is a problem that you take. Chairman Hogen, Mr. Toner and Mr. Lenhard, stated in their testimony that it is not easy to determine where tribal moneys come from. So how can the Commission know if the tribe is using funds received from a source that is prohibited from making political contributions? In other words, wouldn't it be better for us, if we do anything, is to make sure that we know where the money comes from?

Mr. Toner.

Mr. TONER. Mr. Chairman, that would be I think the single biggest change in the law, if 441(b) of the campaign finance laws was amended and tribes were required to set up political action committees to be involved in Federal elections, because then it is very clear that only the personal funds of the solicitable members of that tribe could——

The CHAIRMAN. But isn't there a way to determine where the money came from without saying you have to set up a PAC?

Mr. TONER. It is possible, but I think, Mr. Chairman, it is fair to say that it is more difficult perhaps in the Indian tribe setting because so many of these entities are unincorporated. For a corporate entity, it would be more straightforward because any funds passing through the corporate form could not be used in Federal elections.

Here we have, as I understand it, most of these tribes are not incorporated because they do not need to be. Because of their sovereign status, they do not have the same potential liability issues that other entities do. So you have an unincorporated entity, yet also a very healthy revenue stream, at least for some of the tribes, although I think Mr. Hogen's testimony is very valuable in pointing out that not all the tribes are operating at this level.

So you have large sums of money that typically in American society would pass through some type of corporate-type entity, that would be captured by section 441(b), and yet here that does not happen. So yes, it would be possible to try to assess where those funds are coming from, but based on how the tribes are structured, if the funds, say, of a casino are due and owing and essentially earned by the Native American peoples themselves, then an argument could be advanced that those are personal funds owned by those individuals, and all those issues would be set aside if Congress required them to set up PAC's.

The CHAIRMAN. Thank you.

I will forego my last question for later.

Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator DORGAN. Mr. Chairman, thank you very much.

First of all, I regret I missed the testimony. I was at a leadership meeting in the Capitol Building. I have read your testimony. Mr. Toner and Mr. Lenhard. Last evening when I read the submitted testimony, I thought it was very helpful to better understand what the issues are. Thank you for that.

Has the FEC ever required tribes to file reports prior to the time it made the decision that now exists? Have there ever been requirements that the tribes file reports with respect to campaign contributions?

Mr. TONER. Mr. Vice Chairman, the FEC has never required tribes to file reports and be political committees, and set up PAC's, under the view that at least under existing law, their major purpose was not to influence Federal elections.

Senator DORGAN. You testified about the difficulty of conducting searches for both tribal and individual contributions. How unique is that to tribes and individuals, versus other partnerships, other limited liability companies and so on? Is it specifically unique to tribes, or is that a more general problem?

Mr. TONER. Mr. Vice Chairman, it is something that we confront whenever there are unincorporated entities that are contributing funds from their general treasury funds. You mentioned a partnership. That is not incorporated. A partnership can give to Federal candidates, but the key from our perspective is whether or not the individual partners, the individual people who make up that partnership, we treat that as a personal contribution from those individuals.

An LLC, limited liability company, again we look at the tax status of that LLC. Do they elect to take the corporate tax treatment or do they elect not to do that, in terms of whether the LLC can give. As our written testimony indicated, we have dealt with a number of unincorporated associations, recreation associations, grassroots organizations, where we have made clear that those types of entities can give to Federal candidates without setting up a PAC. The fundamental difference is, of course, we are not talking about nearly the same scale of moneys in those types of organizations. As I indicated earlier, most entities who amass large sums of money often feel the need to incorporate for liability purposes, but that may not be the case with respect to Indian tribes, given that they are sovereign entities.

So in this respect, it has been difficult trying to figure where exactly to fit tribes within existing law, but it would be very helpful if Congress decided to give us clear mandates on where we need to go on that.

Senator DORGAN. Review just one more time for us the circumstance that requires corporations and labor unions, for example, to establish PAC's and contribute through those political action committees, whereas Indian tribes are not required to do that. Describe for me the difference that resulted in the thinking of the FEC on that.

Mr. TONER. Yes, Mr. Vice Chairman; section 441(b) of the original Federal Election Campaign Act of 1971, one of its core provisions was that corporations, labor organizations and national banks could not contribute any funds from their general treasury funds to Federal candidates period. It is an absolute prohibition under

Federal law. But 441(b) also made clear that those types of entities could set up political action committees, where the individuals who worked for the corporation or the union could donate their own personal funds to that PAC. Those PAC proceeds then could be given to Federal candidates.

With Indian tribes, the Commission made the judgment that based on prevailing Supreme Court case law in terms of what types of entities can be required to set up a political action committee, that the major purpose of Indian tribes is not to influence Federal elections. So in the advisory opinion, the agency has indicated that the tribes do not meet that major purpose. Congress in section 441(b) has set down a clear marker with respect to corporations and labor organizations and national banks: Per se they are going to have to set up PAC's to be involved in Federal elections. That really is what the Rogers bill on the House side would do. It would broaden 441(b) and apply it to unincorporated Indian tribes and put them on the same playing field as those other entities.

Senator DORGAN. Mr. Chairman, thank you very much.

I thank the witnesses.

The CHAIRMAN. Senator Johnson.

STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Senator JOHNSON. Thank you, Mr. Chairman, for convening this hearing.

A special welcome to Mr. Hogen from South Dakota.

I want to share a few observations at the outset. One is that we understand that this hearing is in to some degree a consequence of the follow-on concerns we have from the Abramoff scandal. And yet, I think that we ought at the outset recognize that there were very few tribes even indirectly involved in that matter, and to the degree a few were, by large measure they were victims, rather than involved actively with anything that Mr. Abramoff was trying to achieve.

Indian tribes are unique institutions. We have had some parallels drawn with political action committees, corporations and individuals. They are none of those. And so I think it may be a natural consequence of that that our treatment of Indian tribes relative to political activity may have to be indeed unique as well, recognizing the government-to-government relationship they have, the nature of the sovereignty that they have.

Right now, we have what appears to me to be perhaps a bit awkward, but nonetheless a compromise relative to tribal political contributions in the sense that they are not permitted to give as much to political candidates as political action committees are. They are limited to an individual-type contribution. On the other hand, there is no aggregate limit to how much they can give as is the case with political action committees that have no limit. Individuals do.

So they have a little bit of both worlds here. They limited to how much individually they can contribute, much as individuals are, but there is no aggregate limit, much as is the rule relative to political action committees. I think that it is appropriate that we take a look at whether there are some additional reporting or transparency issues that would be helpful, but I think we need to take

some care that we not come up with some regime that is unworkable or which would further restrict tribes' abilities to communicate and to become engaged in the political process.

I would also hope that whatever legislative steps we take, if any, are done in a consultative manner with the tribes themselves, rather than imposing solutions that may seem appropriate here, but which have not been fully thought through from the perspective of Native Americans themselves and their tribal leaders. So I would say that I hope that we would proceed with that in mind.

I do not have a particular question to ask of this panel other than to say that I appreciate the observations you shared with us and I look forward to working with the members of this committee on whatever legislative action, if any, we will deem appropriate.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Thank you very much, Mr. Chairman. I am sorry I am late, so forgive me for not being here in time to listen to your statement.

According to some of the papers I have read, I am advised that in the 2004 election cycle, Indian tribes and Indians provided less than one-third of 1 percent in political contributions nationwide. Is that correct?

Mr. TONER. Senator, there is no question that in terms of the total amount of giving in that cycle, it was a relatively small percentage. There certainly was a growth of contributions across the board in the 2004 cycle. Whether it is exactly that figure, I cannot confirm, but our best sense at the agency is that your figures are in the ballpark.

Senator INOUYE. In other words, assuming there was abuse, it is not a horrendous one, is it?

Mr. TONER. The issue, as Vice Chairman Lenhard and I tried to lay out in our testimony, is there is no question that Indian tribes are involved in Federal elections and there is a fair amount of contributions flowing from tribes to various Federal organizations, but also there is no question that they occupy unique status under American law and the Federal Election Campaign Act did not specifically refer to them. So the agency really in trying to figure out how best to apply the law to the tribes wanted to balance the ability for tribes and tribal members to be involved in politics and give Federal contributions with doing full faith and justice to the statutory provisions that Congress had passed in this area.

The Vice Chairman indicated that in some ways, there is kind of a trade-off in this area. In some respects the tribes are subject to additional restrictions than other entities, but in some respects they have broader ability to give. It really was a good-faith effort by the agency to try to apply statutory provisions that did not specifically mention Indian tribes to accomplish how we thought Congress intended for us to proceed.

Senator INOUYE. During the last 10 years, are you aware of any Indian tribes being criminally involved in the elections, Federal, State or local?

Mr. TONER. Senator, in terms of criminally violating the Federal Election Campaign Act, I am not aware of that. Whether or not they have been involved in criminal prosecutions of other Federal statutes, I would not be knowledgeable to be able to answer, but I am not aware, sitting here today, of criminal prosecutions of Indian tribes arising under the Federal Election Campaign Act.

Senator INOUYE. Whatever it is, it is not widespread, at least we do not know about it.

Mr. TONER. I think that is a fair assessment, yes, Senator.

Senator INOUYE. Do you think a law that singles out Indian tribes is necessary?

Mr. TONER. Well, Senator, I think, as I am sure you can appreciate, my role and Vice Chairman Lenhard's role is to do whatever we are directed by Congress. There is no question, as we indicated in our remarks, that the law is less than clear in terms of how the FEC ought to treat tribes. We really would welcome and benefit from clear direction from Congress on how you all come down on these issues. They are tough issues. They are difficult interpretive issues. Reasonable people can disagree about how to come out on them.

I think our main goal would be to make clear that we are prepared to implement and enforce whatever statutory regime Congress chooses to set up in this area.

Senator INOUYE. I am a politician, so I run for office, but I am required by law to submit disclosures. I believe it is sufficiently transparent. Is that enough?

Mr. TONER. As I indicated in response to some questioning from the chairman, one of the advantages of having tribes set up political action committees is reporting does become more transparent because political action committees are given a unique identifier number to independently report their activity to the Federal Government, as opposed to individuals or tribes or partnerships that do not have their own reporting obligations. We can rely only on the recipient committees, the entities that get the funds.

I have to say that type of reporting is not as clean, not as streamlined as when you have entities reporting directly themselves to the Federal Government. So I think that would be one of the improvements that would be made if Congress chose to go the PAC route in this area.

Senator INOUYE. So Mr. Toner and Mr. Chairman, I can conclude from this exchange that if there are abuses, we are not aware of them, and the contributions made nationwide would be small, one-third of one percent. Nodding means yes?

Mr. TONER. Senator, As I indicated, there was a huge growth of Federal contributions across the board in the 2004 cycle. I do not have any reason to doubt the accuracy of the figure you mention in terms of the portion of Indian tribe giving to the entire Federal giving in this country.

Senator INOUYE. Thank you very much, sir.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. Toner, the next panel of witnesses will say that if you made Native Americans form PAC's, it is very different from a bank or a corporation or a company because they have a certain number of wealthy employees and many of these tribes are very poor, and that to expect the tribal members to give large amounts of money to a PAC is going to be pretty difficult. Do you understand that argument?

Mr. TONER. Yes, Mr. Chairman.

The CHAIRMAN. Finally, Mr. Toner, by the way, I have to take a cheap shot here. Your comment that you do whatever is dictated by Congress: According to Federal court, 13 of the 15 regulations issued to implement BCRA were unconstitutional. I hope that you will do a little more in the area of carrying out the direction of Congress and not have 13 of the 15 next regulations that you issue to implement BCRA being declared as not only not in keeping with the law, but egregious violations of the law. That is according to a Federal judge, not me, although I certainly agree with her.

Anyway, in 2005, Mr. Toner, the FEC issued an advisory opinion in which it determined that an incorporated tribal enterprise could not make campaign contributions if it was a Federal contractor, but that the tribal enterprise was separate from the tribe and so the tribe could continue to make contributions from tribal funds.

You dissented in that advisory opinion, Mr. Toner. Could you tell us why and what you would have liked to have seen that opinion be?

Mr. TONER. Yes, Mr. Chairman; I think this has been one of the more difficult areas of applying the Federal Election Campaign Act to tribal activities because, as you now, there is an independent prohibition on Federal Government contractors giving to Federal candidates. So the Commission has confronted scenarios where tribes had qualified for Federal Government contractor status, and yet still wanted to have the ability to give to Federal candidates.

The agency, in a number of advisory opinions, has indicated that that can happen provided that there is really clear demarcation, clear separation between the Indian tribe itself and the Federal Government contractor entity. As you indicate, I did dissent from an advisory opinion in 2005 where the commission concluded that the Indian tribe at issue there and the Federal Government contracting entity did not preclude the Indian tribe from giving.

The main reason that I dissented, along with Commissioner David Mason, was that we felt under those circumstances that there was not a sufficient degree of separation, and unlike some earlier advisory opinions, this was a Government contractor that the tribe had set up that was seeking to do business across the country, not just in the Indian lands. So we are talking about a much broader-scale business activity, and the Government contracting entity there was really depending on its relationship with the tribe for the government contracting entity to succeed. It was seeking to have special status under the Small Business Administration Regulations.

The view that Commissioner Mason and I had was there was an inherent symbiotic relationship between the tribe and the Government contracting entity that really could not be disentangled and should not be disentangled. Given that government contractors are

independently barred from giving to Federal candidates, our view was that that should not place an undue interference on tribal activities. They just have to make a choice between giving to Federal candidates and setting up Federal Government contracting entities, which we think Congress has said you need to make that choice.

So I would have come out the other way in that advisory opinion for those reasons.

The CHAIRMAN. Mr. Lenhard, do you have a view?

Mr. LENHARD. In general, I think I share Chairman Toner's analysis of how the problem has sorted itself out. I think that the thing that is difficult in the area of Federal contractors in the context of tribes is two things. One is that the tribes have a history of performing a range of different roles and activities on reservations. One of the early cases that this came up in involved a tribe that had an electric power generating facility. They provided electricity to people who lived on the reservation. The Bureau of Indian Affairs ran a school on the reservation and there was an Indian Health Services Clinic on the reservation. So as a consequence, the tribe was selling power to the Federal Government for those particular facilities.

The question then became, have they become a Federal contractor and therefore covered under the Federal contractor bar? The FEC in a number of decisions over the years has tried to acknowledge the special role the tribes play, especially in the context of reservations, in providing services that are either incidentally also provided to the Federal Government or in some contexts where tribes are performing functions of the Federal Government.

My sense is, and I do not know very much about Indian tribes, but my sense is that over the years increasingly tribes have taken on the role of providing services under agreements with the Federal Government which could be viewed as contracts. I think there is a sense that, to a degree, in a number of these decisions that the FEC should follow the analysis used by the courts in viewing these, to the degree that the tribes set up a separate entity, they were rarely incorporated because of the sovereign status of the tribe, but to the degree that the tribe set up a separate entity to provide these kinds of services, even in the context of contracting some of those services for the Federal Government, it should not disqualify the tribe's other political activities.

The advisory opinion you cite involved an expansion of that in the context of the tribe that was setting up an entity that would do off-reservation construction work. The interlocks there between the tribe and the entity involved financial support or assistance in the form of, I believe it was, I cannot remember if they guaranteed a bond, but they provided a financial guarantee for the entity. I think that became a much closer question, but I think the chairman has accurately described how the commission has tried to sort through that problem over the years.

The CHAIRMAN. Thank you.

I thank the panel. Thank you. It has been very helpful to us. I appreciate your good work. Thank you very much.

Mr. LENHARD. Thank you, sir.

Mr. TONER. Thank you.

The CHAIRMAN. Our next panel is Ron Allen, who is the treasurer of the National Congress of American Indians; Larry Noble is the executive director of the Center for Responsive Politics; and Professor James Thurber is the director of the Center for Congressional and Presidential Studies. Welcome.

Ron, we are very happy to see you again, and thank you for coming back to visit us. Will you please proceed with your testimony?

STATEMENT OF W. RON ALLEN, TREASURER, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. ALLEN. Thank you, Senator. It is always an honor to be before this committee and testify on behalf of the tribes on issues that are of great importance to us, so I do appreciate you and Vice Chairman Dorgan for being here, as well as the other Senators who were here earlier this morning.

This issue is an issue that is of great importance to tribes. The concern for us is that the illegal actions of Jack Abramoff really is the issue that seems to have gravitated and turned into a different agenda for us. This is a lobbying scandal. This is not about a tribal scandal. This is not about anything that the tribes have done wrong.

When we look over our history of participating in the political process, we have done nothing wrong. We have complied with the laws. I think the earlier testimony reflects that agenda. So we personally feel that there is nothing wrong with the system. If there is going to be change in the system, we certainly do want to engage with the leadership of this committee.

We continue to always remind this committee and the members of Congress that we have worked hard in order for the Congress to understand who we are. I remember this committee when it was a select committee. You were not even sure this committee should be a permanent committee until it did finally become a permanent committee and recognize the unique status of tribes as sovereign nations.

So when we look at the history of tribes, the fighting we had over the Allotment Act, termination, removal and all the experiences that we have had and all the struggles that we have had over the years trying to become independent tribes and take care of the many, many needs of our community, we have to do that by engaging with the Congress. We have to deal with that in engagement with the Administration.

In terms of compliance with the FEC laws, we feel that we are complying with them. We have a high, strong interest in making sure that this Congress, all members of it, whether you have Indian tribes in your States or not, that you understand our issues, you understand our history, you understand what we have been trying to achieve, and what we are trying to do in order to address the many needs of our community.

We continue to remind you that despite and contrary to some perceptions, our communities are still at the lowest end of every economic and social category by which we measure the welfare of our society. The average income of our people still is only in the $8,000 per person range, $8,000 per person range. So we are one-half of the lowest spectrum of the United States by the standard

by which it measures the lowest level of economic standing of Indian people.

Earlier, Senator Inouye noted that in the 2004 elections, that we only contributed one-third of 1 percent. Now, when you talk about the $8 billion, people say, well, that is a lot of money. Well, against the backdrop of how much money is actually contributed in an election process, and it becomes one-third of 1 percent, then how much influence are we really having on the electoral process when you stretch those dollars across the United States, all different levels of the political spectrum with different candidates? Can you even compare $8 million to the $182 million given by lawyers and law firms in 2004? Or how about the $32 million, four times our number, given by leadership PAC's, which are well known in this Congress in terms of how they engage in this conversation. They are not subjected to any kind of caps at all.

We just feel that the issue of the agenda here really is about how the tribes get to stay at the table so that we can engage the Congress and work with the congressional leadership, whether they are incumbents or whether they are candidates, so that our issues are on their plate or on their radar screen when they are addressing our issues. If we do not, then what Congress could do is establish laws or regulations that disenfranchise us, that take us out of the process.

The earlier question that you had asked the FEC Chairman about should we be forced to establish PACs, well, quite frankly they can establish identifiers. We can identify the moneys that we contribute at various levels to the different congressional leaders and candidates, et cetera. So that is not a problem. We are already transparent. The money has to be recorded, so there is transparency. It appears to us you want more transparency.

We can tell you that the PAC idea is really a bad idea. It would disenfranchise people. It would disenfranchise our tribes. We have to remind the Congress that we have a very unique standing as sovereign governments, a very unique relationship with the Federal Government in our society, one of which it has regularly ignored us in terms of what our issues are.

Our people, who are as poor as anyone in America, depend on our government to defend their rights. The political system does not really provide the greatest vehicle for us. So our tax base are basically our businesses. That is the revenue we generate in order to use those kinds of revenues in order to engage in the political process so that we can make a difference.

We are not opposed to reforms. We are supportive of reforms. We agree that the integrity of the FEC rules and the laws of elections are important. The tribes are very supportive of that. As we have already pointed out, we are in compliance with them and understand them, even recognizing the fact that the FEC acknowledges us as individuals, which we find rather peculiar because we are tribal governments. We are communities of a few thousand people to hundreds of thousands of people. So that is the category they put us, well, fine, then we live by those laws and by those rules.

So if there is any change, it has to be fair. You have to recognize that you have to provide the tribes the right to engage in the political process so that we can protect our interests, so that we can con-

tinue to advance our agenda. Otherwise, what you could easily do is you could push us back 20, 30, and 40 years so that we are not able to engage with the congressional leadership in a way that caused you to understand what our needs are.

Thank you, Mr. Chairman. I am here to answer any questions you may have.

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

The CHAIRMAN. Thank you for your usual mild and uncontroversial statement. [Laughter.]

Thank you.

Mr. Noble, welcome.

STATEMENT OF LARRY NOBLE, EXECUTIVE DIRECTOR, CENTER FOR RESPONSIVE POLITICS

Mr. NOBLE. Thank you.

Chairman McCain, Vice Chairman Dorgan, I appreciate the invitation to address the committee today on the regulation of Indian tribes under the Federal Election Campaign Act. I have submitted my full testimony. I would like to briefly summarize it here and ask that it be included as part of the record.

The CHAIRMAN. Without objection.

Mr. NOBLE. We are now in the midst of an influence-buying scandal that was in large part triggered by the activities of lobbyist Jack Abramoff and some of his Indian tribal clients. This has resulted in intense interest in the political giving of Indian tribes and how they are regulated under the election laws.

As you have heard already, under the Federal campaign finance laws, certain entities such as corporations and labor unions, are prohibited from making political contributions from their general treasury funds. Those entities who can contribute are subject to limits on how much they can give. Those defined as persons under the law, which include individuals, associations or any other organization or group of persons, are subject to a variety of limits on how much they can contribute to different political entities.

In addition to the limits on what a person can give to a single candidate, party, committee or political committee, there is also an overall aggregate limit on the total amount that those defined as individuals can give over a 2-year election cycle. For 2006, this is $101,400. Indian tribes are unincorporated associations and therefore do not fall within the corporate ban on giving directly from their general treasury funds. Since they are considered persons under the Federal election laws, they can make limited contributions to Federal candidates, political parties and political committees.

However, the FEC as you have heard has ruled that Indian tribes are not individuals under the law and therefore do not come under the aggregate limit for overall giving within a 2-year cycle.

So how does this affect tribal giving? Well, since 1989, Indian tribes, their political action committees, and individuals working for the tribes, have given almost $30 million to Federal candidates, political parties and leadership PAC's. About 99 percent of the tribal contributions have come from tribes with casino gaming interests, and $26.9 million has come directly from the Indian tribes' general revenue funds.

At the same time, not falling under the aggregate limit has allowed some tribes to contribute hundreds of thousands of dollars more to Federal candidates, political parties and committees in a 2-year cycle than they would be able to if they did fal under the aggregate limit. So far in the 2006 election cycle, 145 Indian tribes have made Federal political contributions from the general treasuries totaling about $3.1 million; 8 of these tribes have given a combined total of at least $533,000 in excess of what they could have given if the $101,400 aggregate limit applied. So if you applied that limit, all together at this point, we have at least $533,000 in excess of that limit.

In the 2004 cycle, about 224 Indian tribes directly gave $8.3 million. And 27 of those tribes gave a combined total of at least $3.4 million in excess of what would be allowed if the aggregate limit then, which was $95,000, applied.

Overall, Indian tribes with gaming casinos have become relatively big political contributors, but they are not at the top of the list. If we categorized Indian tribes as one of the 100 separate industries we rank in terms of political contributions, they would rank about 60th. But unlike other industries, 90 percent of their contributions, again totaling about $26.9 million, are coming from general treasury revenues. Unlike individuals who give in other industries, some individual Indian tribes are giving more than they would be allowed under the aggregate limit.

This has led some to question whether Congress should place additional restrictions on the giving of Indian tribes, and if so what those restrictions should be. In considering these questions, you should keep in mind that while tribes are not under the same restrictions of others, their contributions are not unregulated and they really do fall into somewhat of a unique area. They do fall under the per-recipient limit all persons have to follow.

Indian tribes cannot make their Federal contributions with money that is passed through tribes from entities that cannot contribute on their own. This is a very important point that has been brought up before. We assume the money that is being given by the Indian tribes is not directly coming from sources that would be otherwise prohibited from giving in Federal elections, such as corporations. If that rule is being enforced, then tribes cannot serve as a conduit for prohibited contributions. If that rule is not being enforced, then we may have a conduit situation.

As for the limit on aggregate contributions that applies to individuals, which have been defined as people, it is a good question whether you apply the same rule to a group of people. There are other unincorporated associations, but I am not aware of any that approach the level of giving of Indian tribes or who are in the same position as Indian tribes. Again, the fact is they are unique and they are unique entities under the Federal election laws.

There is also an issue of reporting. I do think there are improvements that can be made with reporting, and that is the lifeblood of what the Center for Responsive Politics does. But again, these are difficult issues because you would be treating them differently than you treat any other group.

I want to thank you for the opportunity to testify and I will be glad to answer any questions you have.

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

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

Professor Thurber, welcome.

STATEMENT OF JAMES THURBER, DIRECTOR, CENTER FOR CONGRESSIONAL AND PRESIDENTIAL STUDIES, AMERICAN UNIVERSITY

Mr. THURBER. Thank you for inviting me, Chairman McCain and Vice Chairman Dorgan. It is a privilege to speak before you. I think I am one of the only non-lawyers here, so I will speak very plain language. For 30 years I have taught courses on campaigns, campaign management and lobbying, including a course on ethics and lobbying, which is a very popular course these days.

I want to take just 1 moment to thank Senator McCain for being a strong and consistent leader with respect to bringing three streams of reform together. This hearing is part of that: First, campaign finance reform; second, lobbying reform; and third, procedural reforms. I see them all as interrelated, as I think you do, and I see this hearing in that context. The post-Abramoff hearing is about those three things.

I have written many books. I have had a 7-year grant to study campaign conduct from the Pew Charitable Trust, so I know many of the "tricks" in campaigns and I know many of the behaviors that go on within campaigns. I will summarize my remarks very briefly with respect to that experience of research and observation.

Again, the focus of this hearing is not about Jack Abramoff and his misuse of Indian funds, but it is about the large contributions to Federal election campaigns, PAC's, and the party committees in the last decade by Indian tribes. They have also, and I want to point this out, although it is outside the scope of the hearing, invested large sums in grassroots lobbying, coalition building and direct lobbying in Washington. Much of that is invisible, as you know, because it is not required to be recorded under the Lobby Registration Act. Ninety-nine percent of the contributions, as pointed out by Mr. Noble, come from Indian tribes that have gambling casinos.

Everyone before me has stated the case and the problem with respect to the so-called tribal loophole. Do not worry, I will not repeat all of that. I have a very simple approach to these problems, but let's begin with stating the problems associated with this. One is rules with regard to tribal campaign contributions with respect to unlimited overall contributions and the lack of reporting requirement. These combine to make Indian tribes fertile ground for raising campaign funds by political parties and candidates.

I think of Terry McAuliffe, former chair of the DNC, coming into my class bragging about the fact that when he was a young man, he wrestled an alligator in Florida in order to get a $25,000-contribution from an Indian tribe. He says that was the first time the Democratic Party found out that this would be a great source of campaign contributions. Now, Terry tends to exaggerate, so I am not sure whether all of this is true, but it points to the fact that Indian tribes are fertile ground for raising campaign funds.

The lack of reporting requirements throws a veil of secrecy over the arrangements between Indian tribes and candidates, in my

opinion. It is perhaps the last frontier of essentially unregulated campaign contributions. One way the contributions are increased, as we know, is through attributing the gifts to the same individuals and tribes, but using different names. Of the more than 200 Indian tribes who have given to candidates, 2,000 variations of their names have been used on checks to candidates. One tribe used 78 variations of its name. No one here would be surprised to learn that that particular tribe was a client of Jack Abramoff.

We in academia, and you, Senator McCain, and groups who advocate good government, and the media try to connect the dots to see who is giving campaign contributions to whom and on what issues they are lobbying on. It becomes very hard to follow the money if you do not have transparency.

What is the source of the money being contributed by Indian tribes? It is difficult, often, to determine that. The only way to follow the money is on the contribution reports from candidates and on their lobbying registration reports that is covered under the Lobbying Disclosure Act, and there is a great deal of degrees of freedom there in terms of whether you need to report.

The problem of lack of transparency in reporting requirements makes attribution of campaign money difficult if not impossible. It often makes it nearly impossible. Where is the money coming from? Incorporated gambling casinos? Other corporations? Individuals? There can be no transparency in this hide-the-ball environment. Let me say that I would recommend a very simple answer to this. The answer is related also to the unique status of Indian tribes as sovereign nations and governments.

I would recommend: First, reporting requirements as PAC's, but a unique solution to describe Indian tribe PAC's with their consultation; second, transparency with respect to these reporting requirements; and third, no aggregate limit in what they can give.

I think this solution allows tribes to maintain their special status as sovereign nations under campaign finance law, but improves the reporting of the way money is collected and spent. That is through this new reporting requirement. Like PAC's, tribes should be required to register with the FEC before making campaign contributions. Contributions should be reported by the name the tribe uses, not a new name created for this purpose, or multiple names. The source of the funds should also be reported. This will shine light on what contributions are being made and to whom. It is fair because it is, I believe, the same light that is shown on everyone else who contributes to campaigns.

Like PAC's, tribes should create a committee or a board of directors to decide what contributions will be made in each election cycle, and campaign finance law requires PAC's to name a treasurer who assumes responsibility for registering and filing contribution reports. Tribes should also be required to name and appoint a treasurer who will be responsible for submitting these reports.

Tribes are not the same as labor unions, corporations, or other groups that must form PAC's, and so there should be a difference in the treatment of Indian tribes and Indian PAC's under the campaign finance law. An important difference is that PAC's must collect checks from individual members which they pool together to contribute to campaigns. The source of funds for campaign giving

by Indian tribes should be left up to the discretion of tribal leaders, but the source should be reported.

Tribes should be allowed to continue to set up their own internal rules and systems for deciding what candidates to give to and how much. If that means writing checks directly from their tribal treasuries with no input from their members, so be it.

Campaign finance law should not dictate to sovereign tribal governments how they spend their money. What campaign finance law should do, however, is require the contributions and their source be made in full public view, and there should be no aggregate limits on those contributions.

Thank you very much for holding this hearing. I will take any questions. I will try to answer any questions that you might have. Thank you.

[Prepared statement of Mr. Thurber appears in appendix.

The CHAIRMAN. Thank you very much.

Senator Dorgan has to go. He has a question.

Senator DORGAN. Mr. Chairman, thank you very much. I do have to be at another function.

First, I will thank all three of you for your testimony.

Just a quick question for Professor Thurber. When you described your recommendations, you indicated that you felt that tribes should be organized as a political action committee, but should retain the characteristic of not having an aggregate limit, and a couple of other details. Is that because of the sovereignty of tribes and the unique circumstance of tribes? What is the basis for it?

Mr. THURBER. The basis of that is that is their sovereignty and their unique relationship with the Federal Government. Yes.

Senator DORGAN. Mr. Allen, thank you for your assertive testimony. And Mr. Noble, thank you for your work.

Let me also join Mr. Noble and Mr. Thurber in saying that the chairman of this committee has played a pretty instrumental role on the questions of transparency and campaign finance reform and other things over many, many years. So let me join you in paying homage to that work as well.

And thank you for your statements today. I think it is very helpful to this committee.

The CHAIRMAN. Thank you very much, Byron.

Mr. Noble, well, first I guess, Ron, what is your view of Professor Thurber's recommendations, and if you would like to examine them and get back to us for the record, but I would be interested in your initial impressions.

Mr. ALLEN. Well, first of all, I would like to get back to you, Senator, on that topic. Let me correct one of the points he made, that the tribes use multiple names. We do not use multiple names. It is how they record us. If they record us differently, then it appears like we are using different names. So I want to make sure that you understand that sometimes there is a perception of using different names or vehicles.

The CHAIRMAN. Who records it as different names?

Mr. ALLEN. Whoever we are making contributions to. They are Congressmen, the candidates. Whoever we are making contributions to will record where they are receiving that money, and it is how do they identify the tribe in their records. So they may not

record us exactly the same way, so it appears like multiple entities are using multiple vehicles.

The CHAIRMAN. Could I have Professor Thurber respond to that real quick?

Mr. ALLEN. Yes.

Mr. THURBER. I would like to put this in the context of the fact that Jack Abramoff had eight different names when he registered under the Lobbying Registration Act and he did it, some thought, to make his activities non-transparent with respect to his lobbying. There is some evidence that he gave a tribe advice to use different names. I do not know this independently; it is reported that the tribe had 78 different names associated with its contributions in order to cover up the fact that one tribe is giving money.

The CHAIRMAN. Surely, then, you would not have an objection if they do not do it to make sure that they do not do it.

Mr. ALLEN. Right.

The CHAIRMAN. Okay. Go ahead. Proceed.

Mr. ALLEN. When we write checks, they come under the tribe's name. It is as simple as that. We want to make sure that some issues like that or facts need to be clear on exactly how they get transacted.

With regard to his proposal, as I said earlier, I think that the tribes would be very comfortable with the idea of some sort of identifier. Whether or not there is a need to be a PAC, that is another question. A PAC creates a different kind or set of criteria and conditions. As I pointed out, because of the unique culture and nature of the tribes, PACs would not be appropriate for us because it would disenfranchise us. We would not be able to generate the revenue in order to make contributions.

It is true that a lot of the tribes now who have gaming operations now have resources to participate, and we are not going to apologize for that. It just happens to be one of the industries that became successful for tribes.

We also point out only 40 percent of the tribes in America have gaming operations. Maybe we are focusing on the top 15 percent, who are much more influential and effective in it. We appreciate them. But are we supportive of transparency? Yes, the answer is yes, Senator. We do not have a problem with transparency. We do not have a problem with some sort of identifier, if that makes Congress more comfortable with our contributions.

We definitely believe that the cap should not apply to us in the same way it does apply to other governments. We point out the other governments have a different vehicle of representation in Congress, and we would note, Congressmen and Senators, when you walk in your door, whose flag is outside that door? It is the State, but you do not see an Indian flag sitting out there.

So we have to participate in a little different way.

The CHAIRMAN. Well, I hope that you would extend that endorsement of transparency to better reporting procedures to be followed.

Mr. Noble, would you commend on Professor Thurber's comments?

Mr. NOBLE. Yes; I think Professor Thurber has a number of good ideas in terms of reporting, but I would want to point out that this standardization problem with names is not just a problem with In-

dian tribes. This is a problem across the board with contributions. The problem we have found is on both sides. It is often on the giver's side and sometimes it is on the recipient committee side, where they report the same giver slightly differently. In fact, at the Center for Responsive Politics, where our whole goal is to identify who the contributors are, much of our work is spent standardizing names. That is what we do. We go through and you might see a Larry Noble, a Lawrence Noble, a Lawrence M. Noble, some with my office address, some with my home address on it. So this problem really does go beyond the tribes.

The CHAIRMAN. It was just developed into a fine art by Mr. Abramoff.

Mr. NOBLE. Yes; it was developed into a fine art. Some of them do it with no bad intention. Others do it to try to hide where the money is coming from and make the aggregation harder. I think this is something the Federal Election Commission could look at.

Now, also talking about standardization and unique identifiers, that is already done with political action committees. Political action committees actually have to register under a specific name and they are given a number by the FEC, an identifying number. That makes it much easier to trace their political contributions.

If you require Indian tribes to report as PAC's, you do get into the situation that political action committees of corporations can have the corporation pay for all their administrative expenses. I assume the PAC's of the Indian tribes, since Indian tribes are not incorporated, are not having their administrative expenses paid for by the tribes themselves, or at least in excess of what the contribution limits would be. They cannot do that now. So you would have this problem that you are creating a slightly different animal in the sense that it is not a PAC, it is not an individual, it would be a tribal reporting entity.

I can give you one little bit of precedent for that, and this goes way back to my days at the Federal Election Commission. It actually came up, I believe, in an enforcement case, and it would not come out the same way these days with the Federal Election Commission, but a lot of things wouldn't. It was actually an unincorporated association in New York. It was not an Indian tribe, but it was an organization formed under New York State law that was not incorporated. They were making political contributions, and in the end the resolution of it was not that they report as a political committee overall, but they only report all of their political contributions. It was done in a settlement. What they had to do was just report the political contributions they made on the Federal level. If you did that for tribes, again, you would not really set the tribes up as a PAC but you could require them just to report all their Federal contributions, which would take a change in the law.

The CHAIRMAN. It would require a change?

Mr. NOBLE. It would require a change in the law, yes.

The CHAIRMAN. What would you think about that? If you want to digest some of this and respond to us in writing, Ron, I would be glad to have it.

Mr. ALLEN. I do, Senator. It is a proposition that causes me great concern, and the devil is in the details, as we always say. The main issue for us, as I pointed out earlier, is that tribes cannot be

disenfranchised. You know well that we are here always protecting our sovereignty, our treaty rights, advancing our health care and education issues. If we were so influential by our new contributions that have risen over recent years, why is our health care still falling? Why are we losing ground in health care? Why are we losing ground on education? Why are we losing ground with essential services from the BIA?

If we have no much influence, you look across the Indian programs, why are we losing ground? And we are, categorically. So I question that very nature. The Abramoff issue is a scandal, and because some of his clients were Indians, we do not want to be tainted or be disenfranchised from the political process.

So the idea of amendments to the act or regulations that would have improved their transparency and disclosure, we are supportive of it. So we would be delighted to work with you on the issue that you are proposing just as long as it does not push us back into our previous state 10 and 20 years ago.

The CHAIRMAN. All right. I know you fully appreciate that Mr. Noble and Professor Thurber are highly regarded as individuals who are simply committed to the cause of reform and have no bias in any way to Indian tribes. I hope you also understand that because of this cloud that exists, and average Americans as you know regrettably do not understand the status of Indian tribes, what tribal sovereignty means, and government-to-government relationships, that one of the things that would be very helpful to Native Americans is to remove this cloud and say we have acted so that, you can never prevent an unscrupulous lobbyist from coming to a Native American tribe and ripping them off.

As Ben Nighthorse Campbell said in our first hearing, it is another case in a long 300-year history of exploitation of Native Americans. But at least we could take action which would assure that if Native Americans were exploited, there would be transparency and reporting procedures so that not only would we know, but other tribal members would know. Many of the activities that took place and the exploitation of these tribes, the tribal members never knew what was happening, as you well know.

So I think it would be beneficial for tribal members to have more transparency in these activities, as well as all of us, because again, this scandal as it is has somehow in some ways tainted Indian tribes who frankly were the victims, and certainly not the perpetrators.

Mr. ALLEN. It is true, Senator. If you are asking about our support for transparency and disclosure, we are supportive of that, to improve the integrity as it applies to us in Indian country, as long as it is fair and balanced with respect to the rest of America.

But I do want to note, because we use one example of a small handful of tribes that were clients of Jack Abramoff, and because of an example or two there, that is not the norm in Indian country. Over the last 10, 15 to 20 years, our skill at working the Congress and engaging with them as tribal leaders to leaders in the Congress has increased and improved exponentially.

So we are very knowledgeable about how to work the system, and we want to maintain integrity, and we have disclosure at home. We have our own disclosure that we have to provide our

communities so that they know exactly how we are spending our money, including campaign contributions.

The CHAIRMAN. I would like for any tribal member to be able to call the FEC and find out exactly what the tribe is doing if he or she does not know it because of involvement in the tribal council decisions. As you know, many times these decisions are made outside of the tribal council and that is an internal matter for the tribes.

Mr. Noble, in summary, is transparency the only answer here? Or do nothing? Or adopt some of Professor Thurber's recommendations?

Mr. NOBLE. You have a broad range of options here. Professor Thurber has put out suggestions including putting certain additional limits on what tribes do. That is definitely an option. We do not take positions on substantive options like that. We focus on disclosure. But given the unique nature of the tribes, I think if you do decide to address the issue, you have to look at a variety of different things. You have to look at whether or not you want to put an aggregate limit on what they do—they are different than others—and whether or not you want to let them have separate PACs and support those political action committees.

As always in the law, with each obligation you give them, there will be another freedom they have to do something, and with each thing you allow them to do, there comes another obligation. I think that the focus on disclosure is a very important focus, but again the reality is that the Indian tribes now, at least the gaming Indian tribes, have become a political force. We are not saying there is anything wrong with that, but they have become a political force and they have to be looked at that way in terms of their political contributions.

The CHAIRMAN. Professor Thurber, with your view of history, how serious is this scandal and how serious is the state of corruption in the way that we do business here in the Congress?

Mr. THURBER. I think that the scandal is not associated with Indian contributions through campaigns.

The CHAIRMAN. No; I was asking for your view of history.

Mr. THURBER. Well, in my view of history, I think it is pretty bad. I started working here in 1973 for Senator Hubert H. Humphrey, and I have worked on four congessional reorganizations. I helped write part of the code of ethics in the House. I think you are the problem, Senator, not you personally. I think the individuals in the House and Senate should look at themselves and the staff should look at themselves very clearly and not totally beat up on lobbyists. Because much of what was associated with Jack Abramoff was going on for a long time by Members of Congress and staff. I think your reforms, I will not go through all of them, are a good step in the right direction.

I believe in enforcement and transparency. I believe in enforcement and transparency with respect to Members of Congress and staff. I have a book this thick, and you have seen it, of existing rules.

The CHAIRMAN. Which no one has read.

Mr. THURBER. Right. I have. I teach it to my students and they do case studies on conflicts of interest and ethical problems in lobbying.

I think that we are in a very low state in terms of the attitudes of the American public about Congress. I am very worried about it. I am glad you are trying to do something about changing the way things work here so that the American people will trust this institution.

Our democracy is defined by you, by the people in government each generation, and it is at a low. I am very worried about it. I see it with my students and their attitudes, but I also see it with my 93-year-old mother in Oregon, who thinks everybody is bought and sold in Washington, DC and I spend a long time explaining to her, no, that is not the case, but that is the perception.

Support in the polls for Congress is very low, a historic low, and I think it is directly related to Abramoff and other things, but the general perception is that this place needs to be cleaned up, and I think you are doing the right thing to push in a variety of ways with procedural reforms on earmarks, with campaign finance reform (we know your history there) and with lobbying reform right now.

Now, I can give a 55-minute lecture if you want me to. I am used to that, but I am not going to.

The CHAIRMAN. Could I first of all say that I think it is right, and I think Mr. Noble would agree, that we ought to emphasize that it is the system that creates the lobbyists which creates the abuses. If every town in America believes that the only way that they are ever going to get, or Indian tribe in America believes the only way they are going to get anything in Congress is to get an earmark, therefore they have to hire a lobbyist, that accounts for the now 34,000 or whatever it is lobbyists.

I know I stray from the subject from the hearing, but I would like to ask both Mr. Noble and Professor Thurber, in the view of many, BCRA has failed. It has not achieved the anticipated or the desired results so far. Do you agree with that, Mr. Noble, and if so, why?

Mr. NOBLE. No; I do not agree with that. BCRA was a reform law that was aimed at getting at certain specific abuses, most notably the soft money abuse. What we know at the Center from following the contributions is that soft money is not going to the political parties anymore. It successfully cut off the soft money to the political parties.

It also was aimed at stopping Federal candidates from soliciting soft money. It has done that, though I think, there is a problem in terms of how the Federal Election Commission, [FEC] has interpreted the law in terms of what is a solicitation and what Federal candidates can do. But putting the FEC aside, I think that BCRA did there what it was intended to do.

Most of BCRA was held constitutional, which many people doubted it would be. So I think as a reform law intended to stop soft money, it was effective. It did not get at this issue of Indian tribal giving. It was not intended to get at the issue of Indian tribal giving, though I would note that prior to BCRA, the Indian tribes were giving a lot of soft money. Like everyone else, when BCRA

came into being, they stopped giving soft money. So it did affect them in that way.

On a broader point, I also agree that the problem we are seeing now, the lobbying ethics scandal is really a two-part problem. Yes, lobbyists are part of the problem, or some lobbyists are part of the problem, but I agree with Professor Thurber that it is also members of Congress. It is a culture.

Lobbyists would not be making the contributions, would not be providing the trips, if members did not want them, if members were not asking for them, and some members do solicit them. So that is definitely part of the problem.

Enforcement is part of the problem. I agree with Professor Thurber on that issue. Whether you are talking about campaign finance laws or ethics laws, you have to have enforcement. Without enforcement, you are going to have everybody pushing the envelope. Some people will start pushing more and more, and then eventually they will just rip right through it.

Also, there is this question of whether any law, whether it is a law aimed at further disclosure for Indian tribes or a law aimed at ethics, it will clean up the system. No law is ever going to clean up the system. We are dealing with money, politics and power. It is the very nature of a democracy. What I often say is, there is no end game in a democracy.

The CHAIRMAN. But there are cycles.

Mr. NOBLE. There are cycles. You never reach a point where you say, this law, be it BCRA or any other law, solved all of our problems, because in the nature of a democracy, people are going to try to find ways around the law. People are going to push on certain parts of it and you have to come back and revisit it. We are going through that cycle right now on the ethics side where Congress has to come back and revisit what is going on.

The CHAIRMAN. Professor Thurber.

Mr. THURBER. I think the FEC has been a failure in terms of enforcement. It is deadlocked. It does not have enough money. It allowed the 527's to exist, which was, as you well know better than anyone in America, a way for the stream of money to go around the regulatory dam. Therefore we had hundreds of millions of dollars of soft money as well as issue ads in 2004.

Let me talk about something else that you are trying to improve, and that is the regulation of lobbying. About $2.1 billion was spent in lobbying in Washington, DC last year. That is almost $4 million dollars per member per year. That is over $327,000 per member per month. We are awash in money and that is probably only one-fifth of what is being spent on lobbying, because that is only the required lobbying registration. As you well know, we do not have to record grassroots, top-roots, astro-turf, coalition building, TV ads, issue ads in print and radio. If you add that, it is probably a factor of five, $10 billion. We are awash in money with respect to lobbying.

Now, that is fine because we have First Amendment rights. We have the right to assembly, to petition Government for grievances and speech, but we should make that more transparent, as you are trying to make it, so that people can make a decision. So if the candidate runs against you, Senator, they can see what has been hap-

pening with respect to the money on the outside trying to influence you. It can become, then, an issue in a campaign, and we have more competition against people that seem to be overly influenced by the special interests.

Also, with earmarks, do not forget about all types of earmarks, such as appropriations, taxes, and authorizations. There are thousands of earmarks in tax bills. There are thousands of earmarks, as you well know, in the energy bill, the transportation bill, and authorization bills.

The CHAIRMAN. The highway bill.

Mr. THURBER. The highway bill, right. As you well know, I am just stating what you have stated so well. We should be looking at those and making those more transparent, associating them with a particular member of requiring a justification for each, and voting on them separately if we can.

Washington is in trouble. I think members do not realize they are on the gallows right now. They should be thinking about the epiphany that occurs when standing on the gallows and support reforms like yours and others.

The CHAIRMAN. I do not want to drag this out, but this is very helpful to me, and I hope for the record.

Mr. Noble, on the subject of 527's, my understanding of the 1974 Act is that any organization that engages in partisan political activity for the purposes of affecting the outcome of an election falls under campaign contribution limits. How, then, could the 527's exist?

Mr. NOBLE. I agree. The problem is that 527 organizations, which as you know is an Internal Revenue Code designation, have as their purpose, their major purpose, influencing elections. Not all 527s work on the Federal level, so put aside the ones on the State level.

My view of it is that the, and I have said this to the Federal Election Commission, that the 527's which are active in Federal elections by definition have their major purpose being involved in elections, and therefore should be treated as political committees. I have testified to that effect before the Federal Election Commission. The Federal Election Commission has not adopted that view. I think that the 527 situation is at this point totally a creation of the Federal Election Commission, and they have the power and the authority to do something about it, and the obligation to do something about it.

The CHAIRMAN. I think you would both agree, like any other evil, if these are unchecked, they can have an incredible influence, particularly on congressional elections. If somebody parachutes in with $5 million in a congressional race, it is going to have huge implications for anybody's election or reelection.

Mr. NOBLE. And in some ways, Senator McCain, they became the new soft money recipients. What did happen is, some of the soft money, not all of it, but some of the soft money that the parties can no longer accept, ended up going to 527's, which were in some cases run by former party officials. That did not have to happen.

Mr. THURBER. I would like to add one other aspect of BCRA, and that is the enforcement of the rules associated with coordination. I would say from my research over many years, but especially the

seven years supported by the Pew Charitable Trusts, there was a great deal of illegal coordination going on in campaigns. I would add that to the 527 problem. It is related.

Mr. NOBLE. And Senator McCain, if you would indulge me for 1 moment. There is one other issue I did want to bring up. It is related to all of this. When we talk about disclosure and transparency, again, that is the lifeblood of our group. Whatever you do would be greatly helped if in fact we moved all of the disclosure into the modern era of electronic disclosure, and that includes the Senate.

The Senate right now does not report electronically. Lobbying data is not being reported electronically. My group's, our Senate data is way behind the data we get from the House and others because of that problem. I think that is another place where the Senate really needs to look at itself and say why won't it join, let along the 21st century, the 20th century.

The CHAIRMAN. I think that has to be a fundamental. I think we are totally knowledgeable of the fact that transparency is the first step, which brings me back to you, Ron. I appreciate your commitment to greater transparency in this process.

I can assure you that from the comments of members of this committee, there is no intent nor desire nor would we possibly impair, I believe, the concept of tribal sovereignty, which has been upheld many, many times in our Supreme Court and here in Congress. We recognize our unique responsibilities.

I thank the witnesses. Thank you very much.

[Whereupon, at 11:18 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF DR. JAMES A. THURBER, DISTINGUISHED PROFESSOR AND DIRECTOR, CENTER FOR CONGRESSIONAL AND PRESIDENTIAL STUDIES AMERICAN UNIVERSITY WASHINGTON, DC

I would like to thank Chairman McCain and the members of the Committee on Indian Affairs for the opportunity to testify today on tribal campaign contributions and related matters. I want to thank Senator McCain for his strong leadership in campaign finance reform and lobbying reform. You help to build more confidence and trust by the American public in Congress through your reform efforts.

My name is James A. Thurber, Distinguished Professor and Director of the Center for Congressional and Presidential Studies at American University in Washington, DC. I have taught seminars on campaign management and lobbying for over thirty years and I direct the Campaign Management Institute and the Public Affairs and Advocacy Institute at AU. I have just completed a 7-year study funded by a grant from the Pew Charitable Trusts on how to improve campaign conduct. In the course of my research and teaching, I have reviewed many campaign and lobbying problems and reform proposals by Members of Congress, including proposals advocating disclosure of campaign conduct and strengthening oversight and enforcement of campaign finance activities.

I would like to express my appreciation to the chairman for holding these important hearings on Indian Tribes and the Federal Election Campaign Act. This hearing is in the context of the Jack Abramoff scandal and his use or misuse of large sums of Indian tribal money. The focus on lobbyist Abramoff and his use of Indian tribal client funds has led to an inquiry into the issue of the so-called "tribal loophole" in campaign contributions to Federal candidates. Indian tribes have been large contributors to Federal election campaigns, PAC's, and party committees in the last decade as documented by the Center for Responsive Politics. They have also invested large sums for grassroots lobbying, coalition building and direct lobbying in Washington. Most of these contributions and investment in lobbying has come from tribes with gambling casinos (or those who would like to have a casino). The loophole in the Federal Election Campaign Act [FEC] that allows tribes to avoid the overall aggregate on what an individual can contribute to Federal candidates, political parties and other political committees is the topic of my testimony.

The so-called "tribal loophole" is basically an exemption for Indian tribes from the requirement to report certain kinds of campaign contributions. Under Federal election law, Indian tribes are subject to the contribution limits that apply to individual candidates and committees, which is currently $2,100 per election to Federal candidates, $5,000 per year to PAC's, $10,000 per year to state party Federal accounts, and $26,700 per year to national parties. Unless a tribe is prohibited from making campaign contributions because it is a corporation or Federal Government contractor, tribes must adhere to these contribution limits. Indian tribes are not required to report these contributions to the FEC; rather, the contributions are disclosed to the FEC on the recipients' disclosure statements.

In addition to the limits on giving to individual candidates and committees, Federal election law also sets an aggregate giving limit of $101,400 for individuals. This means that an individual donor can only give $101,400 in a 2-year period to any combination of candidates, PAC's, or party committees, at the same time adhering to the individual contribution limits imposed on candidates and committees. This requirement applies only to individual donors—not PAC's and not Indian tribes. Since 1978, the FEC has considered Indian tribes to be "persons" under campaign finance law, which is different from the category "individual"[1]. In May 2000, the FEC clarified that Indian tribes are not subject to the aggregate individual contribution limit because tribes are organizations, not individual human beings.[2] Under the Federal Election Campaign Action and as interpreted by the Federal Election Commission, Indian tribes are subject to individual, PAC, party committee limits, except the overall aggregate limit. Tribes can lawfully give an unlimited amount of campaign money in the aggregate. The central question about the "tribal loophole" is why the aggregate limit does not apply to Indian tribes? Is it to protect the sovereignty of American Indian tribes?

There are two problems with the current procedure for making tribal campaign contributions: The unlimited overall contributions and the lack of reporting requirements. These combine to make Indian tribes fertile ground for raising campaign cash by political parties and candidates. The lack of reporting requirements throws a veil of secrecy over the arrangements between Indian tribes and candidates. It is perhaps the last frontier of essentially unregulated campaign cash contributions.

One way the contributions are increased is through attributing the gifts to the same individuals and tribes but using different names. Of the more than 200 Indian tribes who have given to candidates, 2,000 variations of their names have been used on the checks to candidates. One tribe has used 78 variations of its name.[3] No one here would be surprised to learn that that particular tribe was a client of Jack Abramoff.[4]

When groups advocating good government, the media, or academics try to "connect the dots" to see who is giving campaign contributions to whom and what issues they are lobbying on, it becomes very hard to follow the money. What is the source of the money being contributed by Indian tribes? It is difficult to determine. The only way to follow the money is on the contribution reports from the candidates and on the lobbying registration reports (for lobbying activities covered under the Lobbying Disclosure Act of 1995). This is not transparent because some groups contribute to a candidate using multiple names and the source of the funds is far from clear.

The problem is a lack of transparency and reporting requirements makes attribution of campaign money difficult, if not impossible. Where is the money coming from, incorporated gambling casinos, companies, individuals? There can be no transparency in this "hide the ball environment." Without rigorous FEC enforcement of prohibited sources of money for campaign contributions or new reporting requirements the non-transparent situation will continue, to no one's benefit.

Several solutions have been proposed. Some have called for Indian tribes to be considered "individuals" under Federal election law, which would force them to adhere to the $101,400 contribution ceiling for overall giving. I think this designation would unfairly limit tribes—who are obviously not individuals, but groups of many individuals. Forcing entire tribes to adhere to the same contribution limit as an individual would severely diminish their ability to contribute and essentially hold them to limits so strict that they could not hope to have any influence as sovereign governments.

Others have called for Indian tribes to be treated the same as corporations or labor unions, which must form PAC's in order to collect checks from individual members to be pooled together to give to candidates. However, tribes are considered sovereign governments under Federal law, not corporations or unions, thus the designation would be inappropriate.

I think there is a way to allow tribes to maintain their special status as sovereign nations under campaign finance law, but improve the way money is collected and spent. That is through new reporting requirements. The new requirements for tribal campaign contributions should take some of the requirements that are currently in place for PAC's. Like PAC's, tribes should be required to register with the FEC before making campaign contributions. The contributions must be reported by the

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[1] FEC Advisory Opinion 1978–51.

[2] FEC Advisory Opinion 2000–5.

[3] According to PoliticalMoneyLine, the Agua Caliente Band of Cahuilla Indians used 78 variations of its name for campaign donations.<http://www.politicalmoneyline.com/cgiwin/indexhtml.exe?MBF=tribal> Accessed 1/31/06.

[4] <http://www.capitaleye.org/abramoff.asp> Accessed 1/31/06.

name the tribe uses, not a new name created for this purpose. The source of the funds should also be reported. This will shine a light on what contributions are being made and to whom. It is fair because it is, I believe, the same light that is shone on everyone else who contributes to campaigns.

Like PAC's, tribes should create a committee or Board of Directors to decide what contributions will be made each election cycle. Campaign finance law requires PAC's to name a treasurer who assumes responsibility for registering and filing contribution reports. Tribes should also be required to name appoint a treasurer who will be responsible for submitting the required information to the FEC.

But tribes are not the same as labor unions, corporations and other groups that must form PAC's, and so there should be differences in the treatment of PAC's and Indian tribes under campaign finance law. An important difference is that PAC's must collect checks from individual members, which they pool together to contribute to campaigns.

Indian tribes should not be required to collect checks from individual members. The source of funds for campaign giving by Indian tribes should be left up to the discretion of tribal leaders, but the source should be reported. Tribes should be allowed to continue to set up their own internal rules and systems for deciding what candidates to give to and how much. If that means writing checks directly from their tribal treasuries with no input from their members, so be it. Campaign finance law should not dictate to the sovereign tribal governments how they spend their money. What campaign finance law should do, however, is require those contributions and their source to be made in full view of the public.

Thank you for holding this hearing and the opportunity to testify. I would be pleased to try to answer any questions related to this proposed reform and other questions you might have with respect to my testimony at this time or after this hearing.

James A. Thurber is Distinguished Professor of Government and Director of the Center for Congressional and Presidential Studies. He was the principal investigator of a 7-year [1997–2004] grant from The Pew Charitable Trusts to study campaign conduct. Dr. Thurber has been a professor at American University since 1974 and was honored as the University Scholar-Teacher of the Year in 1996. He is a Fellow of the National Academy of Public Administration.

He is author, co-author, and editor of numerous books and more than 80 articles and chapters on Congress, congressional-presidential relations, interest groups and lobbying, and campaigns and elections, including *Rivals for Power: Presidential Congressional Relations,* Third Edition (2005), *Campaigns and Elections, American Style,* Second Edition (with Candice Nelson, 2004), *Congress and the Internet* (with Colton Campbell, 2002), *The Battle for Congress: Consultants, Candidates, and Voters* (2001), *Crowded Airwaves: Campaign Advertising in Elections* (with Candice Nelson and David Dulio, 2000), *Campaign Warriors: Political Consultants in Elections* (2000), *Remaking Congress: The Politics of Congressional Stability and Change* (with Roger Davidson, 1995), *Divided Democracy: Cooperation and Conflict Between Presidents and Congress* (1991), and *Setting Course: A Congressional Management Guide* (with Chaleff, Loomis and Serota, 1988).

Dr. Thurber earned a BS in political science from the University of Oregon and a PhD in political science from Indiana University and was an American Political Science Association Congressional Fellow. He has worked on five reorganization efforts for committees in the U.S. House and U.S. Senate from 1976 to present. He was also Director of the Washington, DC, based Human Affairs Research Centers of the Battelle Memorial Institute.

The **Center for Congressional and Presidential Studies** [CCPS], located in the Nation's capital at American University under the sponsorship of the School of Public Affairs, provides an integrated teaching, research, and study program focusing on Congress, the presidency, and the interactions of these two basic American institutions. Established in 1979, CCPS has a long and venerable history of scholarly research and practical training. CCPS capitalizes on its advantageous location in Washington, DC, by bringing together public policy practitioners and academics to share their research, knowledge, and experiences in a series of advanced institutes, conferences, and workshops on applied politics.

W. Ron Allen, Treasurer
National Congress of American Indians
Testimony

Oversight Hearing
On Indian Tribes and the Federal Election Campaign Act
February 8, 2006
Senate Committee on Indian Affairs

Good morning Chairman McCain, Vice-Chairman Dorgan and members of the Committee. My name is W. Ron Allen, and I am the Treasurer and former President of the National Congress of American Indians and Chairman of the Jamestown S'Klallam Tribe in Washington State.

As you know, NCAI is the oldest and largest American Indian organization in the United States. I sit before you today representing over 275 tribal governments and hundreds of thousands of American Indian and Alaska Native people. Since NCAI was founded in 1944, we have fought to preserve the rights of Indian tribes and Indian people to participate fully in the political system. NCAI was instrumental, for example in securing the right to vote for Indian people in Arizona in 1948.[1] We remain as dedicated to protecting our right to participate today as we were then.

Thank you for giving me the opportunity to testify before you today. In the past few weeks, there have been several news articles riddled with factual inaccuracies and distortions about the participation of Indian tribes in the political system. I would like to thank the Federal Election Commission for the advisory it issued last week clarifying how tribes are treated under the Federal Election Campaign Act,[2] and I am happy to have the opportunity today to help set the record straight.

First, it is important to note what is driving the intense focus on the part of the media and some Members of Congress on this issue at this moment. Last year, this Committee's investigations revealed that Jack Abramoff and his associates defrauded, lied to, and personally disparaged his tribal clients. We want to thank you Mr. Chairman and Vice Chairman Dorgan for helping us bring these criminals to justice.

Other investigations showed that Abramoff violated the trust of not only Indian tribes, but also public officials, banks and major corporations, charitable organizations, a Federal territory, his own law firm and the public. He pled guilty to conspiracy to commit mail and wire fraud, tax evasion, and bribery and fraud of public officials. However, no Indian tribe, or other client, is accused of wrongdoing whatsoever.

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[1] Inter Tribal Council of Arizona, "The History of Indian Voting in Arizona," *available at* http://www.itcaonline.com/event001/historyofindianvotinginaz.pdf.
[2] Federal Election Commission, "Advisory on Indian Tribes," issued February 2, 2006 (attached).

None of the campaign finance related proposals that have been discussed recently in the media would have prevented the crime committed by Mr. Abramoff against his tribal clients. This is a distraction that prevents constructive reform in areas where it is needed and that is preventing us from talking about the real issues facing Indian Country.

With that said, I would like to share a few relevant facts that put tribal campaign donations in perspective:

- In the 2004 election cycle, tribes made 0.3% of the total federal campaign donations ($8.6 million of the nearly $3 billion in total donations), yet Indians represent about 4% of the total population—we are underrepresented in our campaign contributions.

- Another way to say this is that the $8.6 million given by tribes works out to about $2 per Indian in total contributions made. In contrast, if the total amount of contributions made in the 2004 cycle had been distributed evenly across the U.S. population as a whole, it would have been over $10 per person.

- In 2004, the South Dakota Senate race alone cost $36 million.[3] The $8.4 million given by tribes was for all federal races combined.

- Many industries are making significantly larger campaign contributions. The real estate industry, for example, donated over $95 million in the 2004 cycle, while lawyers and law firms gave more than $182 million. Contributions from Leadership PACs totaled $32 million in 2004. [4] Tribal contributions are miniscule in comparison.

- Like MANY others entities that are classified as "persons" under the FECA, tribes are limited to donations of $2100 per candidate per election cycle. The suggestion that tribes are flooding the system with unlimited campaign donations is simply not borne out by the facts. We are not buying the system $2100 at a time.

- Tribal donations are legal and transparent. I am aware of no action taken by the FEC that would suggest that tribes are violating the campaign finance laws.

Our adversaries have attempted to paint a picture of "newly-rich tribes buying influence." But this image is not consistent with the facts. And, it is important to remember that there are higher principles at stake here. This is about the fundamental right of Indian tribes to participate equally in the political process in all of the ways that are available to them.

Indian Tribes in the Political Process

[3] Data from the Center for Responsive Politics website, www.opensecrets.org.
[4] Data from the Center for Responsive Politics website, www.opensecrets.org.

Whenever we are considering how federal policy should treat Indian tribes, historical context is important. I would like to take a few moments to talk about the place that tribes occupy in the federal system and the history of Indian participation in the political process.

Status of Tribal Governments

The laws of the United States recognize Indian tribes as "domestic dependent nations."[5] The Constitution, the Supreme Court, and numerous Acts of Congress affirm the tribal right to self-governance and the unique status of Indian tribes in the federal system. Although tribal members are citizens of the states in which they reside, the tribe itself is not subject to the sovereign authority of the state or states with whom it overlaps, but rather has its own sovereignty. At the same time, the sovereign authority of both state governments and tribes is subordinate to federal authority. The structure of the federal government, however, is intended to give state governments a voice in the federal system in a way that it does not for tribal governments. For example, the Constitution provides for direct representation of states in Congress, but there is no similar direct representation for Indian tribes. As a result, despite the fact that there are approximately as many Indians in the United States as the population of Kentucky (the 26th most populous state), we have no guaranteed representation in Congress.

In addition, the Constitution limits the authority of Congress vis-à-vis the state governments, but the Supreme Court has interpreted the Indian Commerce Clause as giving Congress plenary power over Indian affairs. As a consequence, tribes have a more limited ability to participate in federal governance than states, and at the same time, have more at stake. Some have argued that Congress' expansive authority over Indian tribes, coupled with the structural lack of representation of tribes in the federal governance structure, runs afoul of the fundamental democratic principles upon which this country was founded.[6] Be that what it may, structurally, tribes are dependent on the good-will of federal officeholders to protect their rights and interests. This is a precarious position.

Frequently, the interests of tribes and states coincide. At times, however, conflicts arise and federal policy-makers find themselves in the position of weighing the interests of one against the other. The federal trust responsibility and the government-to-government relationship are the fundamental principles that are intended to protect the interests of tribal governments in these situations. For this reason, it is critically important to Indian tribes and Indian people that those individuals elected to federal office are committed to these principles. Tribal members have a strong interest in participating in the democratic process and supporting candidates who they believe respect the relationship of tribes to the federal government. Historically, the avenues available to tribes to exercise this support have been limited.

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[5] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831).
[6] *See, e.g.*, Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002).

History of Disenfranchisement

Indian people have had to fight hard to secure the right to participate in the political process. We were the last group of people in our country to be granted the right to vote--it happened within living memory of some of our citizens.

Although African Americans were given the right to vote with the passage of the 15th Amendment in 1870, Indian people were not made citizens of the United States until 1924. And even after passage of the Indian Citizenship Act, it took nearly 40 years for all 50 states to give American Indians and Alaska Natives the right to vote. For years, a number of states denied Indians the right to vote because they were "under guardianship." In other places, Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties. New Mexico was the last State to remove all express legal impediments to voting for American Indians in 1962, three years before the passage of the Voting Rights Act.

In addition to this disenfranchisement as a matter of law, American Indians and Alaska Natives have experienced many of the discriminatory tactics that kept African-Americans in the South from exercising the franchise, including poll taxes, literacy tests, and intimidation. Native people continue to face ongoing struggles when trying to exercise their right to vote today. For example, many American Indian and Alaska Native people live in rural reservation communities and have to travel long distances to get to their polling places, which are more conveniently located for non-Indian voters. In addition, vote dilution continues to be a problem for many Native communities, and large numbers of Native voters continue to report intimidation and harassment at the polls. Overt hostility to Indians voting, unfortunately, also persists in some areas. For example, in 2002 a South Dakota State legislator stated on the floor of the Senate that he would be "leading the charge… to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty."[7]

And this disenfranchisement has had real consequences. History has shown that treaties and the federal trust responsibility are not always sufficient to protect Indian tribes from misguided or even hostile policies enacted by Congress. In the 1830's thousands of Cherokee citizens in Georgia signed a petition asking the federal government to protect their homes. But these people could not vote, and they were forced from their homeland. We will never know if the Cherokee's long walk on the Trail of Tears could have been prevented if the 80,000 Indians who were forced from their homelands and driven west at bayonet point after the passage of the Indian Removal Act had been able to vote in the 1830's. Likewise, in the 1880's the Dawes Act gave away two thirds of reservation land, and I believe it would have been much more difficult to pass if tribes had access to all the levers of power in our system of government at that time.

[7] *Boneshirt v. Hazeltine*, 200 F.Supp.2d 987, 1046 (quoting Rep. John Teupel).

During each session of Congress literally hundreds of bills are introduced that impact tribal governments and Indian people. An entire section of the United States Code is devoted to laws that impact Indian tribes. Tribal leaders have an obligation to utilize every legal means available to them to make sure that the individuals serving in Congress understand Indian issues, protect tribal rights, and live up to the obligations under treaties and the federal trust responsibility. With so much at stake, the suggestion that the federal election laws should be amended to limit the participation of tribes in the political process is troubling.

Indian tribes realize that the best way to protect our rights is through participation in the political system. The very existence of the National Congress of American Indians, which was founded for the purpose of protecting and promoting the rights of Indian tribes during the Termination Era, is evidence of our recognition of this reality. Although years of disenfranchisement has caused voter participation rates to be low in Indian communities historically, this is beginning to change. Indian people are voting in greater and greater numbers and even running and winning elections for local, state, and federal office. In 1982 in South Dakota, only 9.9% of Indians were registered to vote. By the 2002 election, turnout on many reservations had increased dramatically and the Indian vote has made a difference in several close federal elections. Tribal members have become more politically active in recent years and one of the important ways that tribes participate is by supporting the candidates of their choice in federal elections.

In addition to encouraging tribal members to turn out to vote, one way tribes can choose to demonstrate this support is through campaign contributions. The Supreme Court has recognized that the First Amendment protects the fundamental right to political association in the form of campaign contributions. According to the Court, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals."[8] So long as the system continues to include financial support of the candidate of one's choice as a legitimate form of political expression, it is vital that Indian tribes have the option of participating on an equal footing. And, yes, as our financial resources have increased, so have our donations to the campaigns of the candidates of our choice.

The very nature and function of a tribal government necessitates that it speak for the members and resources of the tribe in a unique way. Allowing tribal campaign donations makes sense for tribal governments and their citizens and is consistent with the unique relationship of Indian tribes to the federal government. Tribes represent a class of people who have been constitutionally unrepresented, and whose only recourse is through the wider political process.

Addressing Specific Concerns

[8] *Buckley v. Valeo*, U.S. 1 (197_).

I'd like to turn now to some of the specific questions and concerns that have been raised about the way that Indian tribes are treated in the campaign finance system.

Aggregate Caps
The purpose of the aggregate cap when it was first applied to individuals was to prevent affluent individuals from having a disparate electoral impact. This cap was deliberately not applied to any group of individuals in order to foster and encourage collective action. Tribes, by definition, are groups of individuals and therefore, aggregate caps have never been applied to tribes, or to **any other group** representing more than one individual.

Because there has been so much confusion about this, let me say it again: There is no entity or group that is subject to an aggregate cap under the current campaign finance laws. Partnerships, law firms, limited liability corporations, political action committees -- none of them is subject to the aggregate cap. They can all make contributions to an unlimited number of candidates, and they do. Given this reality, proposals that suggest that aggregate caps should be applied only to tribes are both unfair and unnecessary.

Disclosure
Some have asked why tribes are not required to disclose their campaign contributions. First, it is important to remember that all campaign contributions made by tribes are disclosed and information about tribal campaign contributions is publicly available. For a number of reasons, however, the policy decision has been made that in the case of tribal contributions, the administrative burden of disclosure rests on the recipient of the donation rather than on the donor. This is also true for donations made by other unincorporated groups and individuals. Political Action Committees (PACs) are the exception. Because PACs are formed for the express purpose of engaging in political activity, the burden to disclose contributions falls on the PAC as well as on the recipient of a PAC contribution. In the case of tribal governments, placing the burden on the recipient rather than on the tribe may be the best way to ensure full transparency while still respecting the right of the tribe, as a sovereign government, to be free from unnecessary federal regulation.[9]

Why the General Revenue Fund and not PACs?
Some critics have asked why Indian tribes are permitted to make campaign contributions from their general revenue fund or why tribes are not required to form PACs and raise money from individual tribal members. This question is usually raised by those concerned about revenue generated from what they consider to be a commercial activity.

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[9] "If the purpose of the [California law requiring disclosure of campaign contributions] is to ensure that voters are not misled in the election process by the hidden interests of a candidate or the invisible supporters of legislation, the source of the disclosure, whether tribe or candidate, is irrelevant. That the tribes themselves are not required to provide disclosures does not destroy these purposes; the dual disclosure requirements provide that all financial contributors to a candidate's campaign are disclosed by the candidate." Cameron Reese, *Tribal Immunity from California's Campaign Contribution Disclosure Requirements*, 2004 B.Y.U. L. Rev 793 (2004).

First, PACs are not a good cultural fit for Indian country. The purpose of PACs is to encourage individuals with common interests to pool their resources and act collectively. In many ways, this is what the tribal government already does. Historically and culturally, resources are held collectively with the tribal government, which has a responsibility to provide for the best interests of the community.[10] Tribal members rely on their tribal governments to represent the interests of the tribe in interactions with the federal government. This is one reason why voter turnout has historically been low in Indian country. Tribal governments making donations on behalf of the tribe and its members is consistent with the relationship between a tribal government and its members.

In addition, treating tribes as corporations, as has been suggested in a bill currently pending in the House (HR 4696), is inconsistent with the status of tribes in the federal system. Tribes are constitutionally-recognized sovereigns with whom the government has a trust responsibility. The same cannot be said of corporations.

All governments, including Indian tribes, raise their revenue from a variety of sources. Many governments raise a large portion of their revenues through various forms of taxation: property, income, sales, etc. Other governmental revenue sources frequently include fees for services such as hospital and education fees or parks, income from real estate, fees and licenses, return on investments, or lottery income. Tribal governments, however, have a limited tax base because of the trust status of Indian land and the very low incomes of most tribal members. Unlike corporations, tribal business ventures are not privately-owned entities nor are they for profit. Rather income from tribal businesses generates governmental revenue to be used for the benefit of all tribal citizens.

Requiring tribes to form PACs would also likely have the practical impact of severely limiting the ability of tribes to support the candidates of their choice in a federal election. Real per-capita income of Indians living on reservations is $8000, still less than half of the national average. In many of the poorer tribes, tribal members simply do not have the resources to make individual campaign contributions.

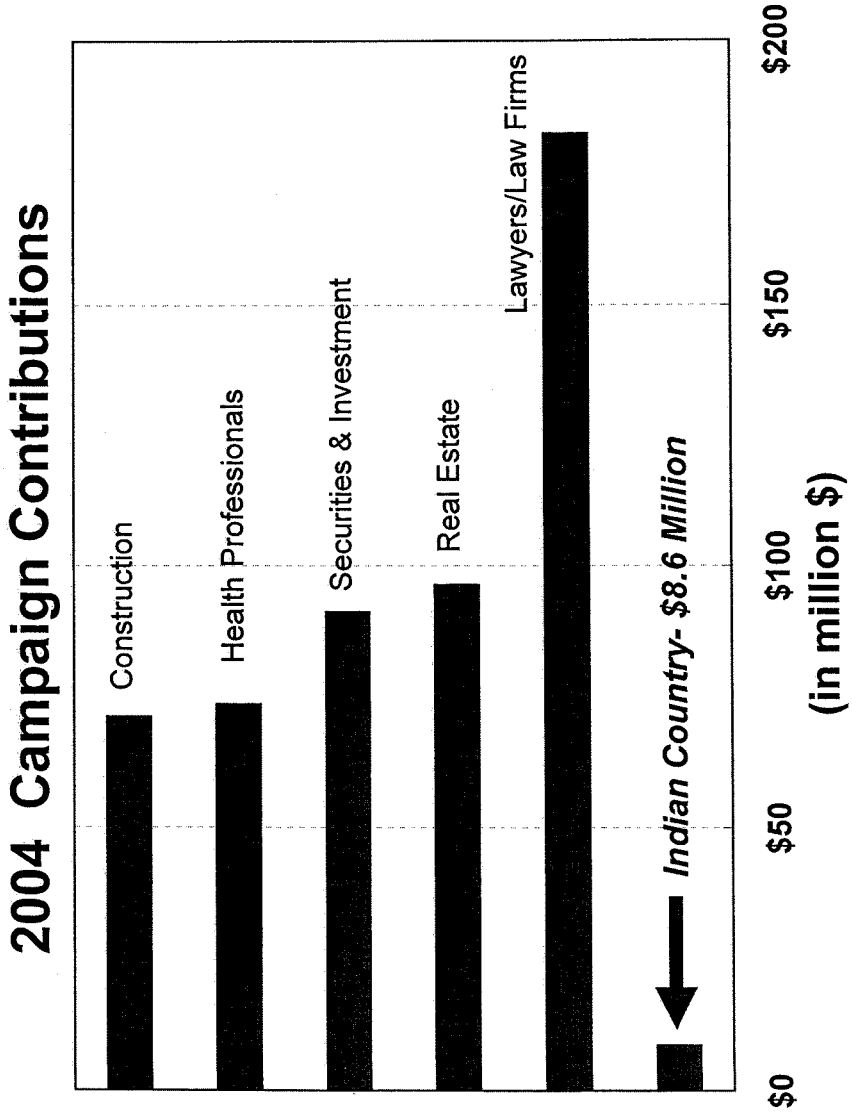
Conclusion

In closing, there is still tremendous need for many of our rural, remote tribes who are faced with limited opportunities for economic development, profound health care challenges, and persistently high unemployment rates. As Chairman Michael B. Jandreau of the Lower Brule Tribe in South Dakota wrote recently in the Wall Street Journal: "The world is changing at a rapid rate. This change, however, is bypassing the Indian reservations of America." Despite this reality, we are not here today talking about how to improve the lives of Indian people and this is not the story that has appeared on the front

[10] COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, 2005 edition, pg. 966 (stating that "[t]ribal property is a form of ownership in common" and "tribal property interests are held in common for the benfit of all living members of the tribe.").

page of major newspapers. Instead, as a result of a lobbying scandal where a felon defrauded several tribal clients, some Members of Congress are calling for a change in campaign finance laws that does not relate to the lobbying abuses, but does relate to how tribes will be permitted to participate in the electoral process, or whether we will in effect be disenfranchised again.

Let me make clear that Indian tribes do not oppose reforms that will increase the integrity of elections and lobbying in the United States government. And I assure you, that as we always have, we will carefully comply with whatever system this Congress and the FEC devise for the financing of campaigns. I urge you, however, to look carefully at how tribes are currently treated under the law, how tribes are participating in the election process, and the unique place that tribes occupy in the federal system. I think you will find that the current system is functional, fair, and allows tribes to participate on equal footing in the political process. As you move forward, we hope to work with you to devise reform proposals that treat everyone in the system equitably.


2004 Campaign Contributions
Construction
Health Professionals
Securities & Investment
Real Estate
Lawyers/Law Firms
Indian Country- $8.6 Million
$0
$50
$100
$150
$200
(in million $)

PROTECT LAW-ABIDING CITIZENS!

DO NOT PUNISH NATIVE AMERICANS DEFRAUDED BY CORRUPT DC LOBBYISTS

Dear Colleague:

I would like to bring to your attention the attached letter by W. Ron Allen, Chairman of the Jamestown S'klallam Tribe and former president of the National Congress of American Indians. This letter appeared in *Roll Call* on January 30, 2006.

As you know, the Jack Abramoff scandal has heightened everyone's awareness of the need for lobbying reform, and rightfully so. The crimes Mr. Abramoff and his associates have admitted to in federal court are disgraceful and repugnant to us all.

One thing that has been lost in the coverage of this scandal has been the fact that a few Native American tribes were abused and misled by the very people they trusted to represent their interests here in Washington. It is very important to remember that no one has ever accused any tribe or tribal member of breaking the law or acting in an inappropriate manner.

Unfortunately, some proposals have emerged that have the effect of punishing tribes for the misdeeds of Washington, D.C. lobbyists. These proposals seek to either severely limit or eliminate altogether the ability of tribes to contribute to federal candidates and committees.

It is absolutely unjust to strip tribes of their ability to exercise their political rights through campaign contributions. As stated by Mr. Allen, "we were the last group of people in our country to be given the right to vote--it happened within living memory of some of our oldest citizens. The very nature and function of a tribal government necessitates that it speak for the members and property of the tribe in a unique way. That should not be overridden because of the illegal actions of a corrupt lobbyist or on the basis of factually inaccurate information." One way tribes have historically legally exercised this right is through contributions made from their general treasury.

The Federal Election Campaign Act of 1971 (FECA) defined both a "person" and an "individual" for regulating campaign contributions. A "person" includes corporations, unions, or "any other organization or group of persons." An "individual," not being defined in the act, holds the meaning as constituted in the dictionary. Based on the law, an "individual" is subject to the aggregate limit and a "person" is not. Consistent with the fact that a tribe is not considered an "individual" because a tribe is inherently not an individual, the Federal Elections Commission released an advisory opinion in 2000 stating a Native American tribe falls under the definition of a "person" as established in FECA, and therefore is not subject to the aggregate limit.

Unfortunately, a misperception has arisen that because tribes are not subject to an aggregate limit, they are taking advantage of some sort of loophole in the system. This is absolutely incorrect. First, we must remember that tribes have been operating within the law as established and intended by Congress. Secondly, no one has ever accused any tribe or tribal member of breaking the law or acting in an inappropriate manner. Thirdly, tribes are not the only unincorporated association or organization not subject to the aggregate contribution limit for individuals. Other examples include community homeowner associations, agricultural

cooperatives, and limited liability corporations. And lastly, it should be noted that tribes contributed a minute 0.3% of the total campaign contributions made in 2004.

As we move forward with lobbying reform, we must work in a bipartisan fashion to protect Native Americans and their full rights to participate in the democratic process. It is the duty of Congress to protect law-abiding citizens, and not attack them because of an inaccurate view that they have somehow taken advantage of the law. I respectfully call on members of Congress to work in concert to protect tribes who have done no wrong and yet still face the threat of being stripped of some of their political rights.

Sincerely,

Tom Cole
Member of Congress

Letter to the Editor in Roll Call

January 30, 2006

I read, with some alarm, Cleta Mitchell's Jan. 23 Guest Observer, "Close the Tribal Loophole in McCain-Feingold," regarding the aggregate contribution caps as applied to American Indian tribes. As the tribal chairman of the Jamestown S'klallam Tribe, I followed with some concern the scandal surrounding Jack Abramoff and Michael Scanlon. It outraged me, the entire American Indian and Alaska Native community, and many other Americans.

I was heartened when I saw the concrete steps that the Justice Department took to address this issue and the proper oversight conducted by Sen. John McCain's Indian Affairs Committee. However, I am genuinely mystified by what I am now witnessing. In response to the actions of corrupt lobbyists, Mitchell suggests that Congress should strip away tribal First Amendment rights.

Indian tribes were not responsible for Abramoff's illegal actions and have not been accused of any wrongdoing in the scandal. So, rather than blaming the tribes, let's put the blame where it counts, on Abramoff and Scanlon, two self-confessed felons. It amazes me that the basis of their confessions is now used to justify punishing those who were defrauded.

Mitchell is right; aggregate caps have never applied to any tribal nation, nor was it ever intended that they should. Just like they do not apply to political action committees, such as the one operated by Mitchell's law firm. When the Federal Election Campaign Act of 1971 was amended in 1974 to create aggregate caps, Congress chose not to apply these caps to the tribes. Nor did Congress apply them to states (a sovereign entity), localities (a sovereign entity), certain limited liability corporations, agriculture cooperatives, community homeowners associations and other unincorporated associations.

Is this preferential treatment? Is this a McCain-Feingold loophole? I think not. It was the way the law was written. The purpose of the aggregate cap was to prevent affluent individuals from having a disparate electoral impact. But tribes are not individuals and the simple reason that tribes should not be covered by the aggregate caps is that they are different.

Inherently, tribes are not individuals, we are governments that occupy a unique place in the federal system. To compare tribes to foreign countries as if both were equivalent sovereign entities, as Mitchell does, is an assault on reason. Everyone knows that the tribes are inherently American. In fact, they pre-date the settlement of the United States. Insofar as they are sovereign, tribes and their citizens are also American. Tribes represent a class of people who have been constitutionally unrepresented, and whose only recourse is through the wider political process.

American Indians and Alaska Natives are proud to be citizens of the United States and we guard our right to express ourselves and to participate in elections. We were the last group of people in our country to be given the right to vote--it happened within living memory of some of our oldest citizens. The very nature and function of a tribal government necessitates that it speak for the members and property of the tribe in a unique way. That should not be overridden because of the illegal actions of a corrupt lobbyist or on the basis of factually inaccurate information.

If it were a different time in our country, I would consider this situation quite differently. One would assume discrimination as a root motive. I don't believe that to be the case. However, when American Indians and Alaska Natives are coming into their own for the very first time, it's hard not to at least consider this possibility when the first reaction is to restrict our First Amendment rights on the basis of inaccurate information. Using the lies and deceits of corrupt Washington lobbyists as a smokescreen for unjustly stripping tribes and their members of their ability to be fully enfranchised citizens of this country... is a disservice to us all.

W. Ron Allen
Chairman
Jamestown S'klallam Tribe
Former president
National Congress of American Indians

Testimony for Philip N. Hogen, Chairman
National Indian Gaming Commission

Senate Indian Affairs Committee
February 8, 2006

Good morning Chairman McCain, Vice-Chairman Dorgan and members of the Committee. I am Philip Hogen, Chairman of the National Indian Gaming Commission. Currently the NIGC consists of two members, Associate Commissioner Cloyce Choney and myself. Mr. Choney is in Oklahoma recuperating from surgery and cannot be here today but extends his best wishes to the Committee.

I understand the Committee seeks to gather information, generally about lobbying fees and political contributions paid by tribal governments and specifically about whether tribal revenues generated by Indian gaming are or can be used for such purposes; what laws, regulations and procedures are in place that would bear on such use of tribal gaming revenues; and the administration of such statutes, regulations or policies.

HISTORICAL SUMMARY

To put all of that information in proper context, I want to briefly discuss the history, nature and extent of the Indian gaming industry. In the 1980s, and perhaps even earlier, a number of tribes in pursuit of economic development opportunities for depressed tribal reservation communities and economies turned to high-stakes bingo games as a means of

generating tribal revenues. Due to good tribal management, promotion, and favorable market opportunities, many of these high-stakes bingo operations thrived and prospered. Some states were perplexed by this gaming activity in their midst, and questions were raised regarding the legality of such tribal activity when that activity did not comport with those states' laws, regulations or limitations governing the play of bingo.
Although in 1953, Public Law 280 was passed conferring state criminal and civil jurisdiction over Indians in Indian country in a number of states, the extent and nature of that jurisdiction evolved in the courts. The doctrine that resulted was that the civil jurisdiction conveyed by Public Law 280 was not as broad as some states had imagined, and it was held only to provide tribes and Indians with access to states' civil court systems on tribal lands. It did not extend the full regulatory power of states to Indians in Indian country, nor did it permit state taxation of Indians in Indian country.

When high-stakes tribal bingo games were challenged as being in violation of state law, including criminal statutes which limited the scope of the play of bingo (hours of operation, prize and pot limits, etc.), tribes defended on the grounds that those states did not criminally prohibit bingo. Rather, states regulated that activity, and hence tribes were free to similarly permit the activity and impose their own regulation, even if it differed from the states'. State challenges to high-stakes tribal bingo reached the federal courts, and those courts ruled that the tribes' gaming activity was permissible. Consistent with the evolution of the scope of state civil jurisdiction under Public Law 280, courts drew a criminal-prohibitory / civil-regulatory distinction, holding that when states did not criminally prohibit an activity but rather permitted and regulated it, such activity was similarly permitted in Indian country, subject to tribal regulation that might differ from state regulation.

When the United States Supreme Court denied petitions for writs of certiorari in two of those cases,[1] more and more tribes throughout the country began engaging in high-stakes bingo activity for economic development on their reservations, and it proved quite

[1] Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983); Butterworth v. Seminole Tribe of Florida, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

successful, particularly where there were large markets. A culmination of state challenges to such tribal activity occurred when the United States Supreme Court decided California v. Cabazon Band of Mission Indians in 1987.[2] Thereafter, in 1988, Congress enacted the Indian Gaming Regulatory Act, which provides the current structure for tribal gaming activities, created the NIGC, and tasked it with an oversight role with respect to tribal gaming.

Thus, as this committee studies Indian gaming and its ramifications, it should never lose sight of the fact that Indian gaming is not a federal program. The tribes invented it and were making it work prior to IGRA's enactment in 1988.

In my view and experience, Indian gaming has been the most effective economic development tool ever brought to Indian country nationwide. Its success, of course, depends not only on wise management, but also on market opportunities, and thus it does not work as an economic development tool equally for all tribes. Those tribes that are in remote and rural areas likely will never enjoy large revenues, whereas tribes situated near populated areas may find it extremely profitable and successful.

Revenue generation, of course, is not the only objective or benefit for tribes. In many instances, even small, rural tribal gaming operations have brought employment opportunities to tribal members where none existed before. I am a member of the Oglala Sioux Tribe from the Pine Ridge Reservation in South Dakota. Unfortunately, our reservation is located in the poorest county in the United States, and our rural location out in the Badlands will likely never permit the tribe to solve the great economic challenges it faces through gaming alone. Nevertheless, when my tribe opened the Prairie Winds Casino on the west edge of our reservation, it created approximately 200 jobs, 99% of which are filled by Indians, and most of them are our own tribal members. For many, these were the first long-term jobs they ever held or had the opportunity to hold.

INDIAN GAMING REVENUE

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[2] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

Indian gaming has grown dramatically since the enactment of IGRA in 1988, and the attached chart, Exhibit 1, shows the increase in those revenues from 1995 through 2004. Today Indian gaming generates over $20 billion in gross gaming revenues – that is, the amount wagered at Indian casinos, less the amount returned to patrons as jackpots and prizes.

This gaming is conducted on Indian lands throughout the country by approximately 225 tribes, which together operate over 400 tribal gaming operations. The diversity among these operations is dramatic. They vary from the largest casino in the world, Foxwoods, operated by the Mashantucket Pequot Tribe on its land in Connecticut, to Bear Soldier Bingo on the Standing Rock Reservation in South Dakota, where bingo is played for small crowds 4:30 pm to 10:30 pm five days a week.

With this diversity in mind, it is instructive to examine how gaming revenue is distributed among the 367 tribal gaming operations reporting financial information to NIGC. Three further charts, Exhibits 2-4, are attached to my testimony. These reflect that most of the $19.4 billion generated in 2004, the last year for which we have final figures, is generated by a relatively small number of facilities. As shown, 55 of the 367 operations in 2004 – 15% of them – grossed $13.5 billion, just over two-thirds of the total revenues. By contrast, 116 of the 367 operations, representing those that are the smallest – 31.6% of operations overall – generated less than 1% of total revenue.

As this demonstrates, a relatively small number of tribes have very large tribal gaming revenues, while a large number have relatively small tribal gaming revenues.[3]

PERMISSIBLE EXPENDITURES GENERALLY AND NIGC MONITORING OF INDIAN GAMING REVENUE

[3] The committee should bear in mind that I have discussed gross – rather than net – gaming revenues. Thus, the numbers here do not reflect expenses and do not reflect cash on hand available for tribal government use or other permissible uses for gaming revenue.

The Indian Gaming Regulatory Act restricts the purposes for which tribes can spend their gaming revenues. These categories are very general and very broad. Found at 25 U.S.C. §2710(b)(1)(B), these categories are: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies. To provide guidance on the uses of gaming revenue, the NIGC issued Bulletin 01-05, which discusses and illustrates permissible and prohibited uses. I have attached this bulletin to my testimony as Exhibit 6.

The Indian Gaming Regulatory Act also authorizes the use of tribal gaming revenues to make equal, per capita payments to tribal members, but only if a tribe first adopts a revenue allocation plan that is then reviewed and approved by the Secretary of the Interior.

Not every tribe makes per capita payments, for to make them or not is a sovereign tribal decision. Tribes that do make per capita payments allocate in their revenue allocation plans a percentage of gaming revenues to most or all of the other permitted categories as well as a percentage to per capita payments. (The Interior Department regulations require a revenue allocation plan to "reserve an adequate portion of net gaming revenues ... for one or more" of the permitted categories in § 2710(b)(1)(B). 25 C.F.R. § 290.12(b)(2)). However tribes decide to distribute gaming revenue, if they use it for purposes inconsistent with the aforementioned restrictions, or if their distributions are inconsistent with an approved revenue allocation plan, they would violate IGRA.

The NIGC is authorized to take enforcement actions against tribes that violate IGRA, regulations promulgated by the NIGC, and the tribes' own tribal gaming ordinances, which must meet requirements in IGRA and be approved by the NIGC Chairman before they are effective. In this way, the NIGC has an oversight responsibility with respect to tribes' expenditures of tribal gaming revenues. We take this responsibility seriously and will be looking at ways to enhance our enforcement of IGRA requirements.

The standard underlying the NIGC's approach to expenditures is that where gaming revenues are spent in a manner that does not benefit the tribal government or tribal membership as a whole, then the NIGC will investigate. In taking this approach, we have encountered instances where tribal gaming revenues were not expended for authorized purposes, and we initiated investigations and enforcement actions. Included in these situations were instances where gaming revenues were expended: 1) for the benefit of certain tribal officials or tribal factions rather than the benefit of the tribe as a whole; 2) to influence the outcome of tribal elections; 3) to secure contracts in which certain individuals had an undisclosed financial interest; 4) without the required approvals designated by tribal law; 5) as payments to an individual or entity that was managing the tribe's gaming operation under a contract that had not been approved by the NIGC; 6) by a tribal entity that was not recognized by the Bureau of Indian Affairs as the lawful tribal government; and 7) to provide unauthorized or unlawful incentives for certain patrons of a gaming operation.

We have also found or are investigating allegations where tribes were not spending revenue consistently with their revenue allocation plans; where tribal council members were making so-called discretionary payments to preferred tribal members to the exclusion of others in violation of the per capita payment requirements in its revenue allocation plan; where per capita payments were not properly held for minors or incompetent individuals; and where per capita payments, or the lack thereof, are inextricably tied up with tribal membership disputes. I should also note that in a number of circumstances, our investigation discovered evidence of possible criminal activity. As required by IGRA, we referred the relevant information to the appropriate law enforcement agency for further investigation.

Lastly, we took this investigative approach with regard to what has become the widely publicized investigation that has brought so much attention to the question of lobbying fees. In its investigation, the NIGC identified concerns about the propriety of certain expenditures of tribal gaming revenue – not because gaming revenue was spent on

lobbying, but because the circumstances surrounding the expenditure suggested potential criminality, and so we referred the matter to the Interior Department Office of Inspector General for further investigation.

All of that said, however, exactly how the NIGC should best oversee or monitor the expenditure of gaming revenue is not clearly specified in IGRA, in the NIGC's regulations, or in regulations of the Bureau of Indian Affairs. Attached to this testimony is a fifth chart, Exhibit 5, which generally depicts the line of authority with respect to the operation of tribal gaming operations and the flow of revenues generated thereby. Most tribes directly manage their gaming operations by themselves, employing both tribal members and non-members to operate the gaming business at the tribe's direction. In other instances, tribes enter into management agreements with outside third parties (and the NIGC Chairman must review and approve those agreements).

Further, in most instances under their gaming ordinances, tribes will attempt to separate governmental operations from gaming business operations and tribal gaming regulation. Ordinarily, a tribal council will serve as the governing body for the tribe; the council will create a board of trustees or enterprise board which will oversee the tribe's businesses, including gaming activities, and an independent tribal gaming commission will provide regulatory oversight. When the gaming business generates its revenues, typically they will be passed back to the tribe's enterprise board, which in turn will disperse them to the tribal government, through its treasurer's office or otherwise. Thereafter, those funds may well be placed in the tribal general fund, where they are commingled with tribal revenues from other sources such as grazing, forestry, oil and mineral revenues. From that general fund, the tribe will operate its programs for the benefit of its tribal members. These include health and public safety programs, housing programs, educational programs and the like. The NIGC does not attempt to follow each dollar of tribal gaming revenue after it is dispersed from the tribal gaming operation, and nowhere is it required to.

In a report issued by the Office of Inspector General for the Department of the Interior on June 11, 2003, the Inspector General observed that there is not presently in place a

mechanism that would closely monitor the expenditure of such revenues. If Congress desires greater scrutiny of the expenditures of these dollars, directions therefore would not seem to be found in IGRA as it is now written. We should be careful, however, to ensure that any outside direction of the tribes' expenditure of their own earned revenues is consistent with IGRA's stated: tribal economic development, tribal self-sufficiency and strong tribal government. 25 USC 2701 (4).

POLITICAL SPENDING

I understand that a concern of this committee and the focus of this hearing is the expenditure of tribal funds for political purposes, lobbying expenditures, and the making of campaign contributions in state and federal elections. To date, the NIGC has not initiated enforcement action against a tribal government for making such campaign contributions, because such expenditures were deemed to fall into one or more of three permissible expenditure classifications: providing for the general welfare of the tribe and its members, promoting tribal economic development, and funding tribal governmental operations. In addition, lobbyists may arguably be engaged and paid for by the gaming operation, just like any non-Indian business, and not by the tribal government. In other words, lobbyists may also be paid not out of net gaming revenues but as an expense for the gaming operation.

Tribal businesses generally, and tribal gaming businesses specifically, are dependent on the statutory and regulatory basis within which they operate, and tribes often need professional assistance in monitoring legislative and administrative developments which may influence and even eliminate those activities.

Can expenditures of this nature be abused? Undoubtedly they can. Are there recent examples where this has occurred? Yes. Can or should Congress enact enforceable legislation that would more severely limit the purposes for which tribes may make expenditures of tribal gaming revenues or change how those expenditures are reported or overseen? That is a question for the Committee to consider..

Where tribes have expended seemingly exorbitant amounts for lobbying services or contributed million of dollars to causes that seem to have little relationship to their immediate economic development interests, there may be cause for concern about the due diligence exercised by those tribes. While economic prosperity and the wherewithal to make political contributions are relatively recent developments for most tribes, some general inquiries into the nature and magnitude of political contributions by others would put into perspective what might be reasonable expenditures of tribal assets to promote the political viewpoints of tribal governments. When tribal governments make contributions that are grossly disproportionate to what others spend, great caution ought to be in order.

I believe that the great attention that has come to this area, including this committee's scrutiny, as further evidenced by today's hearing, will send a clarion call to all of us, including tribes, that greater diligence and transparency is in order.

Indian gaming is a very competitive industry, and it is becoming more so. Tribes are necessarily protective of their market share, and this will sometimes manifest itself in political and legal efforts. When it occurs, it ought to occur fairly and openly.

Due diligence in this connection is required at several levels. Tribal leaders – tribal governments – should look before they leap. They should make every effort to be certain that precious tribal dollars are spent in the tribes' interest and that tribal dollars are truly being utilized as represented. Further, they must exert diligence in fully informing their tribal membership with respect to the extent and nature of their significant expenditures. Certainly there are "trade secrets" and political strategies in the Indian gaming industry, as well as elsewhere, that from time to time need to be closely guarded. However, tribal members are the shareholders in the tribal gaming operations, and they have a right to be informed of, and to influence, where their money is going. Similarly, tribal members themselves have a sacred duty to hold their leadership to account and to demand information to which they have a right. Thus, the whole Indian community has an obligation to help ensure that abuses do not occur.

The NIGC will continue to attempt to fulfill its oversight responsibilities, including oversight of the expenditure of tribal gaming revenues for those limited purposes identified in IGRA. If greater scrutiny is expected of the NIGC in this area, additional tools would likely be required. As I have said, however, I believe that the current system can work, but it will only work if the tribal gaming community itself calls on the community of tribal nations to use greater due diligence as it participates in the political process. It will work if tribes operate with a transparency that permits tribal members to be fully informed about tribal activities and that allows individuals and institutions such as Congress and this committee to have confidence that the economic development opportunity which IGRA fosters is not abused.

Growth in Indian Gaming

Source: National Indian Gaming Commission

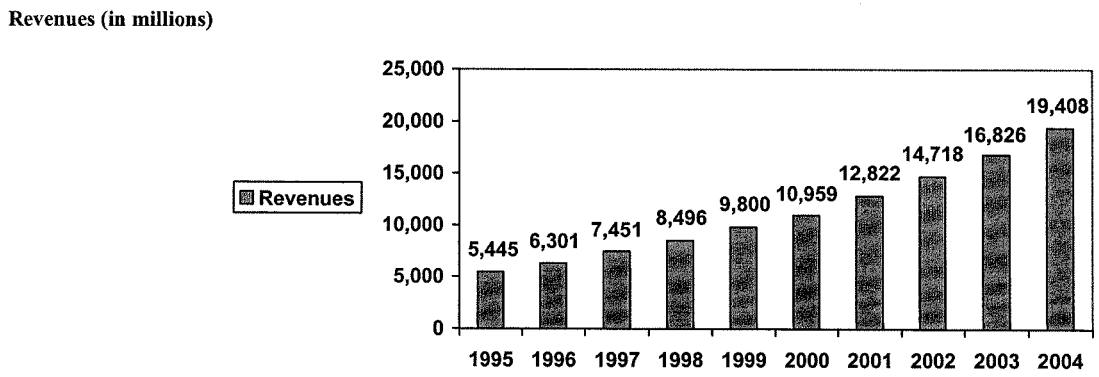

EXHIBIT 1

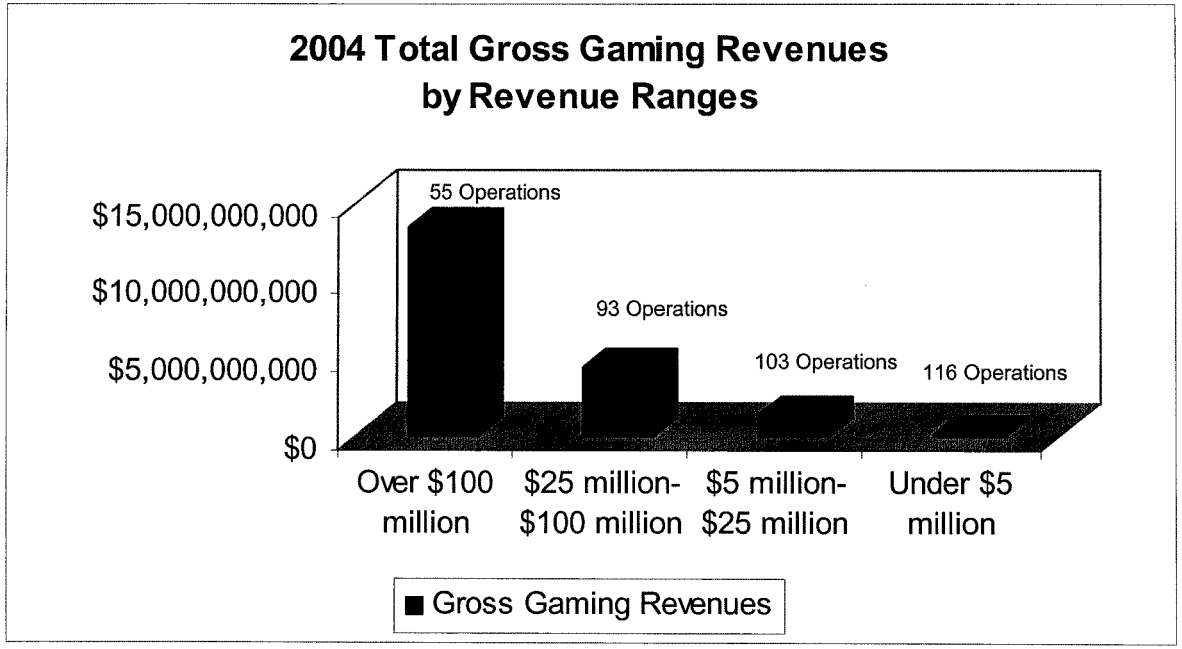
2004 Total Gross Gaming Revenues
by Revenue Ranges
$15,000,000,000
$10,000,000,000
$5,000,000,000
$0
55 Operations
93 Operations
103 Operations
116 Operations
Over $100 million
$25 million-$100 million
$5 million-$25 million
Under $5 million
Gross Gaming Revenues

Exhibit 2

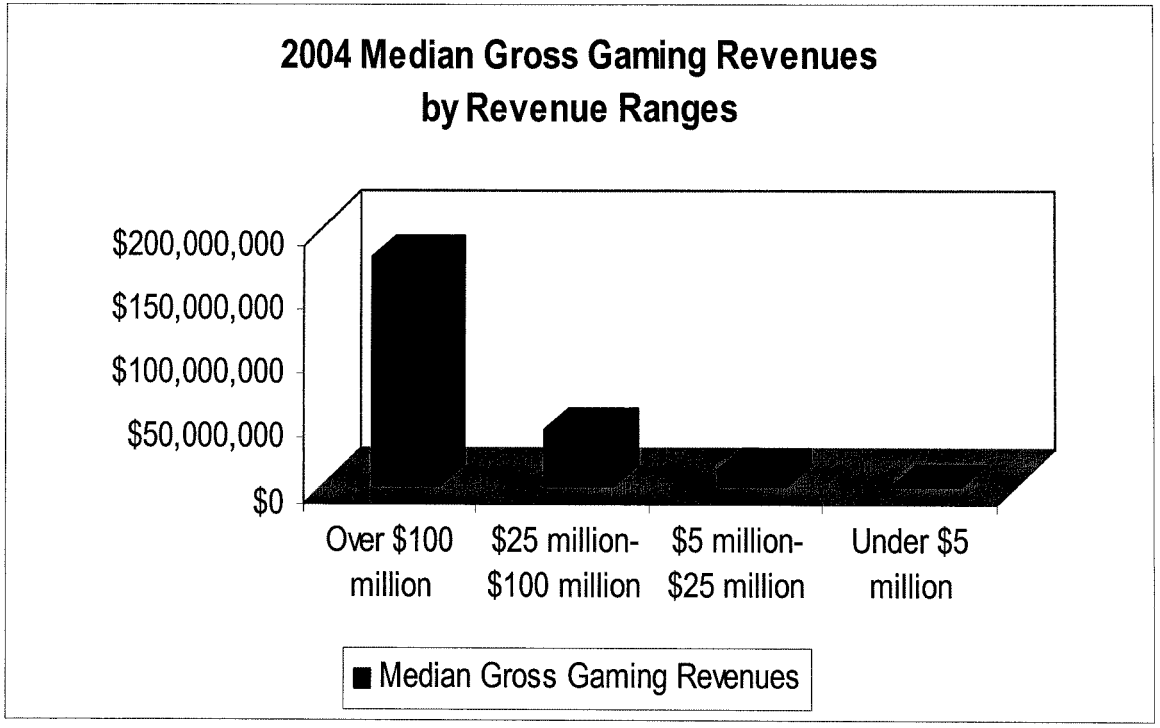
2004 Median Gross Gaming Revenues
by Revenue Ranges
$200,000,000
$150,000,000
$100,000,000
$50,000,000
$0
Over $100 million
$25 million-$100 million
$5 million-$25 million
Under $5 million
Median Gross Gaming Revenues

Exhibit 3

2004 Tribal Gaming Revenue Information

Gross Gaming Revenue Ranges	Number of Operations	% of Total Operations	Gross Gaming Revenues	% of Total Gross Gaming Revenues	Median Gross Gaming Revenues
Over $100 million	55	15.0%	$13,478,609,000	69.5%	$178,721,000
$25 - $100 million	93	25.3%	$4,384,506,000	22.6%	$43,548,000
$5 -$25 million	103	28.1%	$1,378,021,000	7.1%	$12,345,000
Under $5 million	116	31.6%	$166,374,000	0.9%	$984,000
Total	367	100.0%	$19,407,510,000	100.0%	

Exhibit 4

Indian Gaming

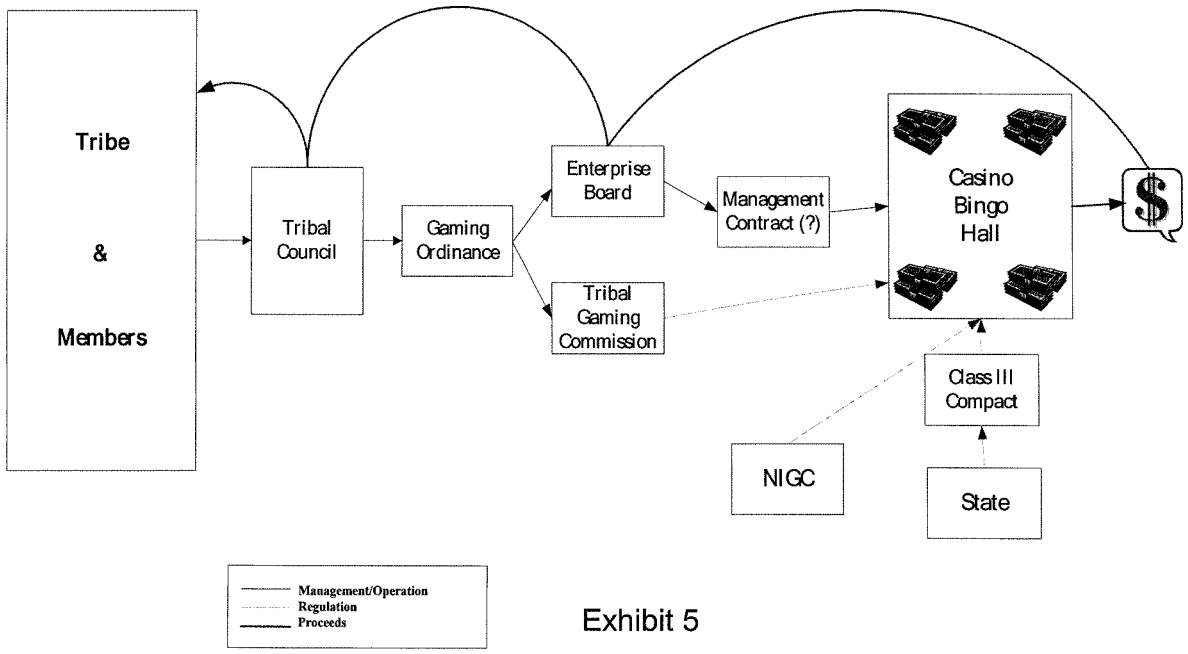

Exhibit 5

No. 01-05

Date: 01/18/05

Subject: Use of Net Gaming Revenues Bulletin

Introduction

The goals of federal Indian policy that the Indian Gaming Regulatory Act ("IGRA") was enacted to promote include tribal economic development, tribal self-sufficiency and strong tribal governments. Implicit in these goals is the concept of tribal self-determination. That is, it should be the tribe that determines its future, not outsiders, and certainly not just federal officials. Thus, decisions about how tribal gaming revenues are to be utilized should be made and implemented by tribes, through their duly authorized tribal governments.

In writing IGRA, Congress did, however, specify several broad categories for appropriate tribal expenditures of gaming revenues. These categories are discussed below.

Tribal governments determine the appropriate uses of net gaming revenues consistent with IGRA's designated categories. The National Indian Gaming Commission ("NIGC") acknowledges that tribal governments are well aware of the requirements for the uses of net revenues from Indian gaming under IGRA, and that tribal governments, in general, have committed gaming revenues to fund essential government services, including education, health care, police and fire protection, water and sewer services, and elderly and child care. For most tribal governments, this Bulletin will reinforce existing practices.

As might be expected, however, the NIGC often receives comments and complaints from tribal members with respect to their tribes' expenditures of tribal gaming revenues. While the NIGC is committed to a government-to-government relationship with tribes, and most of our dealings are directly with tribal governments through their tribal gaming commissions, tribal councils and other tribal governmental entities, when appropriate, we attempt to assist in the resolution of misunderstandings and disputes that can, and do, develop between tribal members and tribal entities regarding Indian gaming issues, such as expenditures of gaming revenues. Because tribes' utilization and expenditures of tribal gaming revenues are so fundamental to the purpose for tribal gaming and to its

continued success, the NIGC has deemed it appropriate to compile and share the information in this Bulletin to encourage tribes to employ policies and procedures in their expenditure of tribal gaming revenues that comply with IGRA and will minimize complaints and misunderstanding among the tribal membership and interested outside parties. The NIGC recognizes and respects that tribal governments are in the best position to determine tribal needs and priorities, and to incorporate tribal culture, traditions and values in the processes and programs that they develop, utilize and support with the expenditures of tribal gaming revenues. It is in this spirit that the information in this Bulletin is provided.

Net Revenues Used for Government Purposes and for Payments to Individual Tribal Members

IGRA requires that net gaming revenues from Indian gaming be used for public purposes that are consistent with those typically provided by governments. The five public purposes specified by IGRA for a tribe's use of net revenues from its tribal gaming operations are:

1) To fund tribal government operations or programs;
2) To provide for the general welfare of the Indian tribe and its members;
3) To promote tribal economic development;
4) To donate to charitable organizations; and
5) To help fund operations of local government agencies.

25 USC § 2710(b)(2)(B); *see also* 25 U.S.C. §§ 2710(d)(1)(A)(ii) and 2710(d)(2); 25 C.F.R. §§ 522.4, 522.6. The term "net revenues" is defined in IGRA as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16.

Direct distributions of payments to individual tribal members, outside of a government program, are not allowed under IGRA. However, there is an exception to this limitation. Tribes may distribute gaming proceeds to individual tribal members if the tribe has a Revenue Allocation Plan, or "RAP," that authorizes per capita payments and has been formally approved by the Secretary of the Interior ("Secretary"). 25 U.S.C. §§ 2710(b)(3); *see also* 2710(d)(1)(A)(ii). It is in the RAP that a tribe describes how it will allocate and distribute net gaming revenues for public purposes and to individual tribal members on a per capita basis. 25 C.F.R. § 290.2. "Per capita payment," within this context, is defined as "the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity." 25 C.F.R. § 290.2. The responsibility for reviewing and approving RAPs is delegated by federal regulations to the Bureau of Indian Affairs ("BIA") and the Secretary of the Interior, and not the NIGC. 25 C.F.R. Part 290.

Tribes are not required to make per capita payments from net gaming revenues to individual tribal members. If they choose to do so, however, they must comply with both IGRA and the administrative regulations of the BIA. 25 U.S.C. § 2710(b)(3); 25 C.F.R. Part 290. Tribes that elect to make per capita payments to individual tribal members from net revenues are required to take the following steps before making the payments:

1) Prepare a plan to allocate gaming revenues to one or all of the five public purposes specified in Section 2710(b)(2)(B) of IGRA;

2) Submit the plan to the BIA and have it approved by the Secretary as "adequate," particularly with respect to a tribe's funding of tribal government operations and programs, and promotion of tribal economic development;

3) Insure that the plan protects the interests of minors and other legally incompetent persons and makes per capita payments for them in amounts necessary for their health, education and welfare, under a plan approved by the tribe and the Secretary; and

4) Notify tribal members, when per capita payments are made, that the payments are subject to federal withholding and taxation as personal income.

25 U.S.C. § 2710(b)(3).

If tribes choose to make per capita payments to individual members, they must be made to *all* enrolled members, unless there is reasonable justification for limiting payments to a group of enrolled members and excluding the remaining enrolled members. 25 C.F.R. § 290.14. For example, a tribe may limit per capita payments to individual tribal members 65 years or older because of this group's greater financial needs due to not working and increased health care expenses. Importantly, according to 25 C.F.R. 290.12(b)(4), if tribes choose to make per capita payments, they are then required to notify members of the tax liability for the payments, and then withhold taxes for all recipients in accordance with the Internal Revenue Service ("IRS") regulations found in 26 C.F.R. Part 31.

Under the BIA's regulations, tribes making per capita payments to individual members are required to establish and use a tribal court system, forum or administrative process for the resolution of disputes concerning the allocation of net gaming revenues and the distribution of per capita payments. 25 C.F.R. § 290.12(b)(5). This requirement insures that tribal members are afforded a process for challenging and appealing the distribution and allocation of gaming revenues under a RAP. It gives tribal members the ability to have some recourse if they disagree with how tribal gaming revenues are being spent.

The NIGC shares regulatory authority and responsibility for the proper use of gaming revenues with the tribes, tribal councils and tribal gaming commissions. When exercising and discharging its regulatory authority and responsibilities under IGRA, the NIGC is committed to maintaining a respectful and meaningful government-to-government relationship with tribes and their authorized government leaders.

Permissible Uses of Gaming Revenues

Tribes typically allocate a substantial portion of their gaming revenues to the "general welfare" of the tribe and its members; to "tribal economic development"; and/or to "government operations or programs." When tribes establish government programs to benefit individual members, those programs should: 1) be created in response to a recognized need within the tribal community; 2) have eligibility criteria to determine which members qualify to participate in the program; and 3) not discriminate by including some members and excluding others without reasonable justification. Payments made and services offered should be made equally available to all those who meet program standards.

Government programs are set up to serve one or more needs or requirements of the tribal community. A fundamental part of any government program is the criteria established to determine which tribal members are eligible to participate in a program. The criteria are tied to the needs and requirements of the tribal membership, and are often tied to income levels and the financial needs of a group of members. Criteria can be based on needs other than financial ones, however, such as educational, medical or housing needs. Criteria can also reflect a historical lack of prosperity for a group of members like tribal elders, who missed out on the financial benefits of gaming for most of their lives.

Tribes have developed a broad range of tribal government programs using objective criteria based on the requirements and needs of the tribal membership. Examples of these are:

Elder programs
Daycare and early childhood development programs
Universal health care
Nutrition assistance programs
Housing assistance programs
Small business loan programs
Emergency loan programs
Legal aid programs
Public defender programs
Job training programs
Educational grants, loans and scholarships
Drug and alcohol treatment programs
Culture and language programs
After-school programs for youth
Burial assistance programs

Eyeglass programs
Programs offering culturally-based, alternative health care and treatments

The above list is not exhaustive, as there are hundreds of different government programs currently being offered by the more than 500 federally recognized tribes in existence today.

Tribes also commonly allocate gaming revenues for the creation and expansion of tribal government infrastructure under the government operations or general welfare provisions of IGRA. The following examples typify allowable expenditures of gaming revenues for these purposes:

Constructing tribal administrative office buildings
Installing a telecommunications center, including computers
Building and improving roads
Creating a tribal justice center, including trial and appellate courts, a law enforcement agency, a corrections facility, a prosecutors' office and a public defender office
Constructing a youth recreation complex
Constructing a fitness center
Constructing a community swimming pool
Constructing a retirement center for tribal elders
Establishing tribal credit unions
Creating a museum
Creating a library with computers available for members' use
Establishing utilities for the provision of water and sewer services
Establishing a waste treatment facility

In developing government programs that provide benefits to individual tribal members, it is important for tribes to consider and determine whether the benefits received by members will be subject to federal withholding and taxation. Bona fide tribal government programs can often be structured so that there is no tax liability for payments and services received by members. As discussed later in this Bulletin, tribes interested in achieving some certainty and assurances regarding the tax consequences of any tribal government program may wish to contact the IRS for guidance.

Impermissible Uses of Gaming Revenues

There are a number of ways in which tribes can misuse their gaming revenues and run afoul of federal law, including IGRA and the Internal Revenue Code ("IRC"). Many of these stem from an overly broad interpretation of what constitutes the "general welfare" of the tribe.

Generally speaking, gaming revenues used in ways in which the tribe as a whole is not the beneficiary is an impermissible use of revenues under IGRA. It cannot be said, for

example, that payments are for the "general welfare of the Indian tribe and its members" when tribes make direct payments to individual tribal members without an approved RAP or outside of a government program. A government program is one that is based on a need or requirement of the tribal community; that has specific eligibility criteria; and that does not discriminate. Whether the payments take the form of cash, gifts or services, if they occur without a RAP or outside of a government program, they are not permissible.

Impermissible use of gaming revenues also occurs when gaming funds are directly distributed to select individual tribal members for their personal use without a RAP or outside of a government program. Purchases or cash payments that are being used for personal reasons and not for tribal business purposes, or for the tribe as a whole, fall into this category. These include buying such items as personal cars, boats, houses andclothing, or other personal items. Unauthorized expenditures also include such things as non-business trips, visits to health spas, residential landscaping and payment of outstanding bills of tribal members. They also include payments to businesses or clubs that are owned by tribal members and may be located on tribal lands, but are not titled to or owned by the tribe.

Other impermissible uses can occur if a tribe creates a fund with gaming revenues, from which cash payments are made to individual tribal members without any objective criteria based on the needs and requirements of the tribal membership. An example of this is when an individual tribal leader is given a portion of gaming revenues for members residing in his or her district, and then gives it to some, but not all members for medical, emergency or other reasons, without using any eligibility criteria to determine who is entitled to receive a payment. A variation on this situation occurs when a tribal government makes loans to select individual tribal members, or to businesses owned by individual tribal members, with no eligibility criteria or expectation of repayment.

An example of how one tribe's distribution of gaming revenues to tribal members was found to be impermissible is reported in *Avis Little Eagle v. Standing Rock Sioux Tribal Council*, Standing Rock Sioux Tribal Court Memorandum Opinion, TRO-03-131 (2003). In that case, revenue payments were not based on or distributed pursuant to a bona fide tribal government program. Forty per cent of gaming revenues, or approximately $2 million, was being distributed through the Inyan Wakagapi Betterment Project to individual tribal members from a certain district, based solely upon membership in the Standing Rock Sioux Tribe. The Tribal Court characterized the payments as "simple cash payments to individual enrollees of a particular district with no strings attached" – in other words, per capita payments. Similarly, in *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (S.D.S.D. 1992), a federal district court ruled that calling gaming revenue payments made to individual tribal members "interim payments," "Reservation Lifestyle Betterment Grants," or "On-Reservation Lifestyle Betterment Grants" did not change the true nature of the payments. The Court held that they were really per capita payments, not exempted from IGRA's requirements for per capita payments. ("Just as a rose by any other name is still a rose, a per capita payment by any other name is still a per capita payment"). Both courts ordered that the payments from gaming revenues be stopped.

Compliance

There are a number of ways that tribes can avoid impermissible uses of gaming revenues. Foremost among them is by establishing tribal government programs with eligibility criteria for participation in the programs, and then implementing the programs in non-discriminatory ways.

A starting point in determining whether a program falls within IGRA's permissible purposes is to look at other, similar programs that are customarily offered by other governments – tribal, federal, state and local. Examples of such programs are listed above and include housing assistance, educational scholarships and nutrition assistance. Such government programs always address the needs and requirements of the tribal community, have eligibility criteria and do not discriminate.

Programs that are structured so that payments for services are made to the providers, instead of to individual tribal members, clarify the purpose and use of the payments. An example of this is when a tribal member qualifies for a tribe's higher education scholarship program, and payments are then made directly to the school instead of to the student. Structuring program payments in this way eliminates the potential for making direct payments to tribal members beyond established per capita amounts or without an approved RAP.

The tribal court system, forum or administrative process required by the BIA's administrative regulations plays an important role in the uses of gaming revenues by tribal governments. These judicial, or quasi-judicial, mechanisms serve as a check on improper distributions of gaming revenues to individual members and allocations of revenues to programs, as well as a vehicle for challenges by members. By establishing an internal tribal review process, the propriety of payments and programs can be challenged by tribal members and evaluated by the tribe itself.

Although there is little in IGRA regarding the specifics of acceptable government programs, the IRS provides some guidance. Not surprisingly, there is substantial overlap between the spending of gaming revenues that violates IGRA and spending that triggers tax liability under the IRC. The IRS has a specific department, the Office of Indian Tribal Governments, which was created to deal with tax issues emanating from tribal gaming, as well as other issues involving tribal governments, entities and enterprises. Its website, www.irs.gov/tribes, includes topics such as "Reporting of Per Capita Distributions by Tribal Members" and "Frequently Asked Questions." The Office also publishes a quarterly newsletter that deals with current tribal taxation issues.

At the request of a tribe, the IRS will informally discuss with tribes proposed distributions of gaming revenues to individual tribal members to see if they trigger tax liability. The IRS will also review and evaluate existing or proposed tribal programs for potential tax liability. Reviewing proposed gaming revenue distributions with the IRS can help a tribe avoid the possibility of exposing individual tribal members to unforeseen

tax liability. Regional and national contacts for arranging these kinds of informal discussions are listed on the IRS website referenced above.

If, after talking to the Office of Indian Tribal Governments at the IRS, a tribe wants more certainty about its tax liability, it can request a private letter ruling from the IRS Office of Chief Counsel. To receive rulings, a tribe submits specific facts about its programs to the IRS, and then has a discussion with the IRS if there is a disagreement on the tax consequences of the tribe's program. The ruling only applies to the particular tribe seeking the ruling. These rulings become public, but all identifying information is removed to maintain the privacy of the tribe requesting the ruling. To date, the IRS Office of Chief Counsel has issued approximately ten private letter rulings regarding tribal government programs or per capita payments to tribal members. There is currently a $6,000 fee for a private letter ruling. The Office of Indian Tribal Governments is available to assist tribes in navigating the submission process for these rulings.

An example of when an IRS private letter ruling might be useful to a tribe is demonstrated by the following fact situation. Tribal leadership asked its membership how much each member had spent on housing, transportation, etc., and then subtracted the combined amounts from the per capita payments being reported to the IRS. The IRS determined that the plan was structured to get around reporting and withholding on individual per capita payments, and, as a consequence, individual tribal members had large amounts of income taxes assessed against them. If the tribe had requested a private letter ruling before setting up its program, it would have been warned that the payment structure would result in taxes for its members. The tribe could have then revised its program to meet both the needs of the members and the requirements of the Tax Code.

In conclusion, the NIGC is hopeful that this Bulletin will be a helpful guide to tribes in their ongoing efforts to strengthen their tribal governments and effectively meet the needs of tribal members. If you have any questions regarding the use of gaming revenues, please contact the NIGC's Office of General Counsel or your NIGC Regional Office.

Testimony of Lawrence Noble
Executive Director and General Counsel
Center for Responsive Politics

Oversight Hearing Before the
Senate Committee on Indian Affairs
on
Indian Tribes and the Federal Election Campaign Act
February 8, 2006

I. Introduction

Mr. Chairman, Mr. Vice-Chairman and members of the Committee, my name is Larry Noble. I am executive director and general counsel of the Center for Responsive Politics, a non-partisan, non-profit research organization that studies money in politics and its impact on elections and public policy. I am also an Adjunct Professor at George Washington University Law School, where I teach campaign finance law. Prior to joining the Center in 2001, I was general counsel of the Federal Election Commission for 13 years. I appreciate the invitation to address the committee today on the regulation of Indian tribes under the Federal election campaign finance laws.

The Center for Responsive Politics was founded in 1983 by two U.S. Senators who wanted to make Congress more responsive to the public, Democrat Frank Church of Idaho and Republican Hugh Scott of Pennsylvania. As part of its mandate, the Center began to examine the relationship between money and politics during the 1984 presidential elections, when it first studied contribution patterns to Federal candidates. Since 1989, we have systematically monitored contributions to Federal candidates and political parties, both from political action committees and from individuals. Today, we publish the results of our work on our award-winning Web site, *OpenSecrets.org*. A *New York Times* editorial referred to the Center as "a research group dedicatedly nonpartisan in publicizing the power of money in politics."

The reason for our existence is simple: to inform citizens about who's paying for Federal elections and who is in a position to exercise influence over the elected officials who represent the public in our nation's capital. It is with this mission in mind that I offer these comments.

Testimony of Lawrence Noble
Center for Responsive Politics

We are now in the midst of a potentially far-reaching influence-buying scandal that was, in large part, triggered by the activities of lobbyist Jack Abramoff and his Indian tribe clients. This, in turn, has resulted in intense interest in the political giving of Indian tribes. As I will discuss in a few moments, there are a number of ways to count tribal political giving. But, it is safe to say that the total amount of money contributed to Federal candidates, political parties and leadership PACs since 1989 by Indian tribes, their political action committees and individuals working for the tribes—almost $30 million according to our latest count—has surprised many. This has led to discussion of what is now being called a "loophole" in the Federal Election Campaign Act (FECA) that allows the tribes to avoid the overall aggregate limit on what an individual can contribute in an election cycle to Federal political parties, candidates and other committees. As always in these situations, there is a fair amount of confusion and some misinformation about the law and its impact.

As a research group, the Center does not generally endorse or propose legislative changes. I offer my testimony today with the goal of trying to explain the legal landscape and the facts surrounding the amount of money Indian tribes contribute to Federal elections.

II. The Application of FECA to Indian Tribes

a. Contribution Limits

The best way to begin is to examine the campaign finance law as it has been applied to unincorporated Indian tribes. FECA established a campaign finance system involving disclosure, limits and source prohibitions on contributions to influence Federal elections. In general, Federal contributions must be disclosed, certain entities are prohibited from giving, and those who can give are subject to limits on how much they can give. Those who cannot give directly in Federal elections include corporations, labor unions and Federal contractors. However, even these entities can establish political action committees that can solicit contributions from those who are permitted to give. These committees can, in turn, make contributions to candidates and political parties.[1]

Those who can give are subject to a variety of contribution limits. For the 2006 cycle, a person may now contribute up to $2,100 per election to a Federal candidate, $5,000 per year to a political action committee (PAC), $10,000 per year to the Federal accounts of state party committees and $26,700 to national party committees. In addition, there is an overall aggregate limit of $101,400 on the total amount that an individual can give over a two-year election cycle.

As the law is now written and interpreted, Indian tribes are subject to each of these limits, *except* the overall aggregate limit. This means that an Indian tribe can give,

[1] Foreign nationals are prohibited from giving in any U.S. election, and foreign national corporations cannot establish PACs. U.S. subsidiaries of foreign national corporations may establish PACs under certain conditions.

in the aggregate, hundreds of thousands of dollars to Federal candidates, political parties and committees in a two-year cycle. For example, in the 2004 cycle, when the aggregate cycle limit was $95,000, the Morongo Band of Mission Indians gave in the aggregate almost $580,000—approximately $485,000 more than they would have been able to give if the tribe was subject to the aggregate limit. Given this, it is fair to ask why the aggregate limit does not apply to Indian tribes? The answer is in the wording of FECA.

The sections of FECA—2 U.S.C. §441a(a)(1) and (2)—that set the limits on the amount that can be contributed to individual candidates, parties and PACs refers to giving by "persons" and "multicandidate political committees." The section—2 U.S.C. §441a(a)(3)—that sets the biennial aggregate limit on overall giving (which is $101,400 for the 2006 cycle) applies that limit to "individuals." The word "person" is defined by FECA to mean,

> an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

There is no definition in FECA of the term "individual," and Indian tribes are not mentioned in the Act.

The first time the FEC addressed the application of the law to an Indian tribe was in a 1978 advisory opinion. In Advisory Opinion 1978-51, the Commission ruled that an Indian tribe was a "person" under FECA and was subject to what was then the $1,000 per election contribution limit. The FEC reached the same conclusion in 1999, when it held that an Indian tribe met the definition of "person" because it fit within the statutory phrase "any other organization or group of persons." (Advisory Opinion 1999-32. See also AO 1993-12 and AO2005-1.)

The issue of the application of the overall aggregate limit to Indian tribes was addressed by the FEC in 2000. In Advisory Opinion 2000-5, the FEC noted that the aggregate limit applied only to "individuals" and "[a]lthough the Nation is a person under the Act, it is not an individual and is therefore not subject" to the overall aggregate limit on contributions.[2]

It is clear, therefore, that the FEC considers Indian tribes as falling within the definition of "persons" subject to the individual contribution limits, but not "individuals" subject to the aggregate limit. This means that the present biennial aggregate limit of $101,400 does not apply to an Indian tribe. The result is that a tribe can lawfully give an unlimited amount in the aggregate, as long as each contribution stays within the limit of

[2] Prior to the Bipartisan Campaign Reform Act of 2002, the aggregate limit was $25,000 per year. BCRA changed the aggregate limit to a total of $95,000 over a two-year period, beginning on January 1 of an odd-numbered year and ending on December 31of the next even-numbered year. 2 U.S.C. §441a(a)(3). That limit is adjusted for inflation and is $101,400 for the 2006 election cycle.

what a person can give to each recipient, and as long as the money is not from a prohibited source.

It is important to keep in mind that this statutory construction issue only affects hard money contributions coming directly from the tribes. If an individual associated with a tribe makes a contribution, that contribution does apply to his or her individual aggregate limit. Conversely, if a tribe's PAC makes a contribution, it is not under an aggregate limit because no PAC is under an aggregate limit.

Also, this issue has nothing to do with Indian tribe contributions made to 527 organizations or to influence state elections. Moreover, whether or not the individual aggregate limit applied to tribal contributions had no bearing on the soft money contributions made by the tribes prior to the enactment of Bipartisan Campaign Reform Act of 2002, since these contributions were not subject to any limits. Between 1992 and 2002 election cycles, Indian tribes gave a total of approximately $8.2 million in soft money. While BCRA stopped the soft money contributions from the tribes and raised hard money limits, including the aggregate hard money limit, it did not change the groups to which the aggregate limit applies.

b. Source of the Money Being Contributed

While there has been a lot of focus on the contribution limits that apply to money being contributed by Indian tribes, there is another question that has received less attention: what is the source of the funds they are contributing? As I noted earlier, the Federal election campaign finance laws have long imposed limits on how much can be given, as well as who can give those limited contributions. This is also part of the well-traveled world of hard and soft money. To put it simply, corporations, labor unions and government contractors cannot use their general treasury funds (soft money) to make Federal political contributions, and individuals are subject to contribution limits. Only individuals and unincorporated associations, either directly or through political action committees, can make limited contributions to influence Federal elections (hard money).

Nevertheless, as we all know, prior to the enactment of BCRA in 2002, a tremendous amount of corporate, labor and unlimited individual soft money was being given to party committees and leadership PACs to influence Federal elections. BCRA banned the national party committees and Federal candidates from soliciting or using soft money and tightened the use of soft money by state party committees. In so doing, it also stopped contributions from Indian tribes to national party committees and certain political action committees in excess of the contribution limits or from funds derived from prohibited sources.

While BCRA stopped everyone, including the Indian tribes, from making soft money contributions to national parties committees and Federal candidates, even prior to BCRA the money going to the hard money accounts of the party committees and Federal candidates could not come from a prohibited source. In fact, the central issue in AO

1999-32 and AO 2005-1 was whether a tribe was a Federal contractor and therefore prohibited from making contributions to Federal candidates, political parties and political committees. The FEC's answer in each case was that the tribe could make contributions because the commercial enterprise that contracted with the government (and was prohibited from making contributions) had a sufficiently separate identity from the tribe. Nevertheless, in both of these opinions, as well as in the others dealing with tribal contributions, the FEC issued a caution about the source of the money contributed.

In AO 1978-51, the FEC said that "[t]he community may make a contribution only if its general funds do not include monies from entities or persons that could not make contributions directly under the Act." Likewise, in AO 1999-32 and AO 2005-1, the FEC warned that the tribes could not use revenues from their Federal contractor commercial enterprises to make contributions.[3]

The FEC advisory opinions appear to make it clear that the money being contributed by Indian tribes to Federal candidates and parties cannot come directly from a prohibited source. That means that Indian tribe contributions cannot be made with money passed through the tribes from incorporated gaming casinos that could not make political contributions directly. Of course, if a tribe is using prohibited source money for contributions, the FEC already has the power, authority and responsibility to enforce the law. Nevertheless, I raise this issue because there has not been much public discussion of the source of the money being used by the tribes for their political contributions.

III. Political Contributions from Indian Tribes

Finally, I would like to address the question of how much money the Indian tribes have actually given in political contributions. Several different numbers have been reported, which is not surprising considering that the answer depends on the specific question and the methodology used. For example, do you want to include contributions that come directly from a tribe, a tribe's PAC or individuals identified as members of the tribe? Do you look only at tribes with gaming casinos or broaden it to all tribes making contributions? What about soft money and money going to 527 organizations? Obviously, you will get a higher or lower figure depending on what you include.[4] In order to get an accurate picture of the situation, the Center for Responsive Politics has analyzed the latest contribution data.

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[3] In AO 2000-5, where the Indian tribe asked about the application of the aggregate limit, the FEC made the following disclaimer:

> Since you have not requested an advisory opinion on the sources of funds that may be lawfully used by the Nation in making its contributions in Federal elections, the Commission does not issue an opinion at this time on that issue.

[4] In addition, the FEC is not consistent in how it categorizes Indian tribal contributions, sometimes counting them as individual contributions and other times as PAC contributions. An additional problem is that there is a variation in how an Indian tribe's name is reported by recipients of contributions.

a. The Big Picture

Since 1989, Indian tribes have contributed almost $29.9 million dollars in hard and soft money,[5] including money directly from the tribes, their PACs and individuals employed by the tribes. Of this, only $339,000 (1.1%) has come from Indian tribes without gaming casinos. $18.3 million of the overall total went to party committees, $8.6 million went to candidates and $3 million went to Leadership PACs.

Breaking down contributions by Indian tribes, their PACs and employees since 1989 by political party, we find that about $19.5 million (65%) has been contributed to Democrats and $10.4 million (35%) has gone to Republicans. Looking at just the 2006 cycle, however, the Indian tribes have so far given about $1.7 million (52%) of their money to Republicans and $1.6 million (48%) to Democrats.[6]

By comparison, contributions to candidates, parties and leadership PACs from gaming interests not affiliated with an Indian tribe have totaled approximately $36.5 million since 1989, with almost $22 million (60%) going to Republicans and $14.5 million (40%) going to Democrats.

The partisan giving pattern of Indian tribes who were clients of Jack Abramoff is also different from the overall pattern of tribal giving. Contributions made by Indian tribes after they became clients of Abramoff totaled approximately $3.4 million, with 67% ($2.3 million) going to Republicans and 33% ($1.1 million) going to Democrats.[7]

b. Direct Hard Money Giving by Indian Tribes

Since it is only direct tribal-related giving that would be affected if the aggregate limit applied to Indian tribes, we need to look at the hard money contributions that have come directly from Indian tribes. Between 1989 and 2006, Indian tribes have directly given approximately $26.9 million dollars in Federal contributions. Of this, only about $130,000 (0.5%) came from Indian tribes without gaming casinos.

In 2004, Indian tribes directly gave $8.3 million in hard money. Of this, the total given in excess of what would be allowed if the aggregate limits applied is over $3.4 million. This money is from 26 tribes that gave more than the $95,000 aggregate limit, with the amount in excess of the aggregate ranging from about $485,000 for the Morongo Band of Mission Indians to $500 from the Seneca Nation of Indians.

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[5] Soft money has only been tracked since 1991.
[6] All 2006 election cycle figures are from data downloaded from the FEC on January 23, 2006.
[7] These figures only include contributions from Indian tribes made after they became clients of Mr. Abramoff. They do not include tribes who were clients of Mr. Abramoff's associates, but not clients of Abramoff.

So far, in the 2006 election cycle, Indian tribes have directly given a total of about $3.1 million in hard money. Of this, the total given in excess of what would be allowed if the aggregate limits applied is more than $533,000. This money is from eight tribes that have given more than the $101,400 aggregate limit for this cycle. The amount in excess of the aggregate amount ranges from about $158,400 for the Morongo Band of Mission Indians to $17,600 for the Eastern Band of Cherokee Indians.

c. Soft Money Giving by Indian Tribes

Between 1989 and the banning of soft money in 2002, Indian tribes gave a total of $8.3 million in soft money contributions. Unlike some industries, the Indian tribes did not slow down their giving after soft money was banned. Tribal giving, including money coming directly from tribes, their PACs and those associated with the tribes, totaled $7.7 million in the pre-soft money ban 2002 election cycle and $9 million in the post-ban 2004 election cycle. For corporations, the soft money ban meant that they could no longer turn to their general treasury funds for any contributions. The Indian tribes, however, could continue to use their general treasury funds for contributions as long as they stayed within the contribution limits for each recipient.

IV. Conclusion

Indian tribes have become relatively big political contributors, with virtually all of the contributions coming from tribes with gaming casinos. In large part, they have been able to make these contributions because of two distinct features of the tribes. First, as unincorporated entities, they are not directly subject to the corporate ban on the use of general treasury funds in Federal elections. That is, in part, why $26.9 million in contributions since 1989 has come directly from the tribes, while only $2.4 million has come from individuals and $667,000 has come from PACs. Second, because the tribes are not subject to the overall individual aggregate limit, some tribes are able to give far more in an election cycle than they would be allowed to give if they were subject to the aggregate limit.

Thank you for this opportunity to testify and I will try to answer any questions you have.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

Testimony of Federal Election Commission
Chairman Michael E. Toner and Vice Chairman Robert D. Lenhard
On Indian Tribes and the Federal Election Campaign Act
Before the Senate Committee on Indian Affairs
February 8, 2006

Chairman McCain, Vice Chairman Dorgan, and Members of the Committee: Thank you for inviting us here today. We are pleased to provide some background and answer any of the Committee's questions regarding the application of the Federal Election Campaign Act to Indian tribes and the Federal Election Commission's past decisions in this area.

As the Supreme Court has observed, "Indian tribes occupy a unique status under our law." *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845, 851 (1985). The unique nature of this relationship has created its own complexities in applying the Federal Election Campaign Act of 1971, as amended (FECA), to Indian tribes' federal political activity. Indian tribes are not specifically mentioned anywhere in FECA. FECA's application to tribes has developed through the Federal Election Commission's (FEC or Commission) advisory opinion and enforcement processes.

Three main questions concerning tribes have come before the Commission. First, what provisions of FECA apply to tribes; second, whether FECA's aggregate contribution limit that applies to individuals applies to tribes; and third, whether a tribe may continue to make contributions from its general treasury if it has established a business that is either a corporation or a federal contractor. The FEC's interpretation of these questions is discussed below, along with an analysis of how certain legislative proposals would impact tribes' federal political activity.

FECA Provisions Applicable to Indian Tribes

Contribution Limits

A threshold question addressed by the FEC was whether FECA applied to Indian tribes at all. In several enforcement cases where Indian tribes were respondents, the tribes contended that they were not covered by federal campaign finance laws. *See* MUR 4867 (Tribal Alliance for Sovereignty/Five Civilized Tribes PAC), MURs 2465/1616/1557 (Seminole Tribe of Florida), and MUR 2302/2283/2274 (Sisseton-Whapeton Sioux Tribe). The tribes argued that FECA did not apply to them

both because FECA did not explicitly describe tribes as entities subject to regulation and because as sovereign nations, they were not subject to FECA.

The FEC determined that federal law did not require an agency to construe a statute's silence on whether it has specific jurisdiction over Indian tribes to mean that Indian tribes were exempt from the statute's provisions. The FEC also noted that the legislative history of FECA contained no evidence that Congress intended to exclude Indian tribes from FECA's coverage. Accordingly, the FEC determined that FECA is applicable to Indian tribes and proceeded with its enforcement actions. These decisions have not been challenged by the tribes in court.

With the question of the authority of Congress to regulate the federal campaign finance activities of Indian tribes having been settled, the Commission then confronted the issue of which FECA provisions are applicable to Indian tribes. As we noted at the outset, Indian tribes are not specifically mentioned in FECA. However, FECA does limit the amount of money that any "person" can contribute to a federal candidate, a political party, or to a federal political action committee (PAC).[1] The statute defines a "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. 431(11). In a 1978 advisory opinion, the FEC first concluded that Indian tribes are an "organization or group of persons" and, therefore, are subject to FECA's limits on how much a person can contribute to a political candidate, political party, or PAC. *See* Advisory Opinion ("AO") 1978-51 (Friends of Eldon Rudd). This conclusion was reaffirmed by the Commission in AO 1999-32 (Tohono O'odham Nation).

Aggregate Limits

Under FECA, an "individual" is subject to both the limits on how much a "person" can contribute to a candidate, party, or PAC, and also to an additional limit on how much they can give in aggregate to all candidates, parties, and PACs in a two-year election cycle. 2 U.S.C. 441a(a)(3).[2] FECA does not specifically define the term "individual." Accordingly, the FEC has had to address whether certain entities meeting the definition of "person" are also "individuals" and therefore are subject to the aggregate contribution limits. The FEC has determined that political committees, limited liability companies, and partnerships, although "persons" under FECA, are not "individuals" subject to the aggregate limits. See AOs 1986-36 (political committee), 1995-11 (limited

[1] The statutory language used for all of these entities is a "political committee." 2 U.S.C. 431(4). A political committee is a group of persons that receives in excess of $1,000 in contributions or makes in excess of $1,000 in expenditures in a calendar year, and whose major purpose is to influence the election or defeat of a candidate. 2 U.S.C. 431(4) and *Buckley v. Valeo*, 424 U.S. 1 (1976). Examples of political committees are candidate committees, political party committees, and corporate and labor organization PACs. For the purposes of this testimony, we will use the more commonly recognized terms of campaign committee, political party, and PAC.

[2] For the 2006 election cycle, the aggregate biennial contribution limit for individuals is $101,400 total, which includes a limit of $40,000 on all contributions to candidates and $61,400 on all contributions to PACs and political parties.

liability company), and 1979-28 (unincorporated recreation association); *see also* 11 C.F.R. 110.1(e) (partnerships).[3] Through these opinions, the FEC has interpreted "individuals" to mean particular human beings. This is also the common definition used in the English language dictionary. The FEC addressed the question of whether Indian tribes fell within the definition of an "individual" in 2000. Consistent with its prior decisions, the FEC determined that tribes, although "persons," are not individuals subject to the aggregate contribution limits. *See* AO 2000-5 (Oneida Nation of New York).

Reporting Requirements

Tribal contributions are reported to the FEC by the candidates, parties, and PACs that receive the contributions. Federal political committees are required to file disclosure reports with the FEC. 2 U.S.C. 434. These reports contain information on the committees' receipts and disbursements, and are available to the public on the FEC's website, www.fec.gov. Federal political committees include candidate committees, political party committees, and corporate and labor organization PACs. Tribes are not political committees because their major purpose is not to influence the election or defeat of candidates. *See Buckley v. Valeo*, 424 U.S. 1 (1976). *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("MCFL") (stating that if MCFL's independent expenditures "become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."). Consequently, tribes are not required to register and file reports with the FEC detailing their contributions. In this respect as well, tribes are treated like individuals, partnerships, homeowner's associations, and other entities that are permitted to make contributions but that do not qualify as federal political committees. These entities are all "persons" subject to FECA, but not "political committees" required to register and file reports to the FEC.

Although tribes are not required to file reports detailing their own contributions, tribal contributions are reported by the recipient and can be searched on the FEC database in the same manner as one would search for contributions by an individual or partnership. Searching for a tribe name in the FEC database will return a listing of all contributions by entities containing the name searched. However, this listing may not be comprehensive due to inconsistent recording of tribal names by individual political committees. For example, contributions from the Morongo Band of Mission Indians are recorded by the various political committees that received those contributions as coming from the "Morongo Band of Mission Indians," "Morongo Band of Indians," "Morongo Band-Mission Indians," and "Morongo Band." Therefore, searches by tribe name on the FEC database may not capture all contributions by a specific Indian tribe. This problem is not unique to tribes, but can occur when searching for contributions by individuals or any entity that does not have to register or file reports with the FEC. For example, different committees may have recorded the same John Q. Smith's contributions as having been received from "John Q. Smith," "John Smith," or "J. Q. Smith." A search for Mr. Smith's contribution may not return all of his contributions depending on the search terms entered into the database.

[3] The individual partners to whom contributions are attributed are subject to the aggregate limits.

Congress has Prohibited Certain "Persons" from Making Contributions

FECA specifically prohibits certain types of "persons" from making federal contributions, such as corporations, labor organizations, and national banks. 2 U.S.C. 441(b). FECA also prohibits foreign nationals and federal government contractors from making federal contributions. 2 U.S.C. 441e (foreign nationals); 2 U.S.C. 441c (government contractors). Because Indian tribes do not typically incorporate, are not labor organizations, and are not national banks, the prohibitions in 2 U.S.C. 441b on these entities making contributions do not extend to Indian tribes. Foreign nationals under FECA are defined as foreign principals as that term is used in 22 U.S.C. 611(b)[4] and as individuals who are not U.S. citizens or nationals and who are not lawfully admitted for permanent residence. 2 U.S.C. 441e. The foreign national prohibition does not apply to Indian tribes because they are not foreign principals and their members are U.S. citizens.

Through advisory opinions, the FEC has addressed whether a tribe which has created a business that is a federal contractor is prohibited from making contributions to influence a federal election. The FEC's analysis has turned on whether the tribes and the tribal federal contractors were two separate entities. *See* AOs 2005-1 (Mississippi Band of Choctaw Indians) and 1999-32 (Tohono O'odham Nation). In determining whether a tribe and a tribal federal contractor were separate and distinct entities, the Commission followed the analysis used by the federal courts in addressing whether an Indian tribe and a related business were a single or separate entity.[5] The FEC has considered factors that indicated the tribe's and the tribal federal contractor's independence from each other. These factors include: (1) whether they were separately incorporated; (2) whether they lease and own property separately; (3) whether any member of the tribal council may serve on the federal contractor's board; (4) whether the two entities have separate legal counsel, bank accounts, tax identification numbers, employees, personnel, and benefit policies; and (5) whether their funds are intermingled. In applying these factors to the facts in AOs 2005-1 and 1999-32, the Commission concluded that the related federal contractors operated sufficiently independent of the tribes to be considered separate entities. The effect of this conclusion is the tribes could continue to make contributions even though the tribal federal contractors cannot. However, the Commission has emphasized that none of the monies generated by the federal contractor could be used by the tribe to make contributions. *See* AO 2005-1 (noting that none of the funds from the federal contractor were intermingled with other tribal funds and concluding that "revenues from [the government contractor] may not be used to make contributions to federal candidates or political committees."). This same principle would apply to tribal businesses that are incorporated.

[4] This definition includes the government of a foreign country.

[5] *See, e.g., Navajo Tribe v. Bank of New Mexico*, 700 F.2d. 1285, 1288 (10th Cir. 1982) ("Where sovereignty is not an issue, courts have consistently held that tribal enterprises are separate and therefore, independent of the Tribe.") and similar cases discussed in AO 1999-32 (Tohono O'odham Nation).

Impact of Certain Legislative Proposals

Requiring Tribal PACs

We are aware of only one bill that is currently pending in either the House or the Senate that directly addresses the issue of Indian tribes making contributions to influence federal elections. A bill introduced by Representative Mike Rogers would apply the restrictions on corporate political activity to unincorporated Indian tribes. H.R. 4696, Section 401. As a consequence, tribes would be barred from making contributions or expenditures from their general treasury funds. Like corporations, tribes would be allowed to sponsor a separated segregated fund, or PAC, and that PAC would have to register and report to the FEC. The PAC would be free to make contributions in federal elections, but could only raise money by soliciting voluntary contributions from members of the tribe. Tribal members would be limited to $5,000 in contributions per year to the tribe's PAC.

This proposal would end the use of the tribe's general treasury funds, including unincorporated business and unincorporated gaming facility revenue, to make federal contributions. As a federal registered political committee, a PAC would also have to file disclosure reports with the FEC. However, this proposal would not place aggregate limits on the tribal PAC's contributions. In addition, if the tribe's PAC qualified as a multicandidate political committee,[6] which most PACs do, the amount of money that the tribal PAC could contribute to a single candidate would increase from $2,100 per election, the contribution limit for a "person," to $5,000 per election, the contribution limit for a multicandidate committee, while the amount that the tribal PAC could contribute to a national political party would decrease from $26,700 to $15,000 and from $10,000 to $5,000 for a state political party. 2 U.S.C. 441a(a)(1) & (2).

This proposal will also raise the question of what group of individuals qualifies as members of a tribe for the purpose of soliciting contributions to the PAC. The proposed bill equates a tribe's membership to a corporation's stockholders for solicitation purposes. H.R. 4696, Section 401. However, the bill does not define the individuals that are considered tribal members. It is our understanding that this topic has been of great concern to tribes and that tribes have taken different views of what standards should apply to determine if an individual qualifies as a member of a particular tribe. The FEC's current rules for what constitutes the member of a membership organization may be inappropriate in the context of Indian tribes. If Congress decides to amend FECA to treat Indian tribes in a way that is analogous to corporations, it would be very helpful for Congress to use its expertise in the complexity of the history and culture of Indian tribes to set a standard for what constitutes membership in a tribe for FECA purposes.

[6] A multicandidate political committee is defined as a political committee that has been registered at least 6 months, has more than 50 contributors and, with the exception of state party committees, has made contributions to at least 5 candidates for federal office. 11 C.F.R. 100.5(e)(3).

Treating Tribes as Individuals

A statutory change that treats Indian tribes as individuals would address the aggregate contribution limit issue discussed above, but would not restrict the use of unincorporated gaming facility revenues and other tribal monies to finance political contributions nor alter disclosure. As an individual, a tribe would become subject to the biennial aggregate contribution limit of $40,000 to all candidates and $61,400 to all PACs and parties. Under FECA, a contribution by an individual from his or her own funds is permissible unless reimbursed by another person. For example, an individual can make contributions from the funds he or she receives from salary, interest income, or ownership in a business. Accordingly, if a tribe were treated strictly like an individual, tribes arguably could continue making contributions from any of their own sources of income, including its unincorporated business and unincorporated gaming facility revenue. Further limitation on the source of funds a tribe could use for contributions would likely require a change beyond treating tribes as individuals. This statutory change also will not affect the disclosure issues discussed above.

Conclusion

We appreciate the opportunity to appear before the Indian Affairs Committee to discuss the application of FECA to Indian Tribes and the FEC's past decisions relating to tribal activities. If Congress chooses to amend FECA in this area, the FEC stands ready to implement and enforce any statutory changes that are made. Please do not hesitate to call us if the Committee has any further questions that the FEC can address.

Respectfully submitted,

/s/

Michael E. Toner
Chairman

/s/

Robert D. Lenhard
Vice Chairman

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