H.R. 521 and H.R. 791

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

May 8, 2002

Serial No. 107-115

Printed for the use of the Committee on Resources

Available via the World Wide Web: http://www.access.gpo.gov/congress/house
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

79-494 PS WASHINGTON : 2002

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C Of N T E N T S

LEGISLATIVE HEARING ON H.R. 791, TO PROVIDE FOR THE EQUITABLE SETTLEMENT OF CERTAIN INDIAN LAND DISPUTES REGARDING LAND IN ILLINOIS; AND H.R. 521, TO AMEND THE ORGANIC ACT OF GUAM FOR THE PURPOSE OF AMENDING THE LOCAL JUDICIAL STRUCTURE OF GUAM.

Wednesday, May 8, 2002
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to call, at 10:04 a.m., in room 1334, Longworth House Office Building, Hon. James Hansen (Chairman of the Committee) presiding.

STATEMENT OF HON. JAMES HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

The CHAIRMAN. The Committee will come to order. Today's hearing is on two bills that address very different issues. The first is H.R. 791, which was introduced by Congressman Tim Johnson in response to the Miami Tribe's lawsuit against private landowners in Illinois. H.R. 791 seeks to extinguish all land claims in Illinois asserted by the Miami and Ottawa Tribes of Oklahoma and the Potawatomi Tribe of Kansas and provides the tribes with recourse to pursue their claims against the United States in the U.S. Court of Federal Claims.

The CHAIRMAN. The second bill is H.R. 521, introduced by Congressman Underwood. This legislation attempts to amend the Organic Act of Guam to modify the internal structure of the Guam local court system. H.R. 521 has generated a great deal of controversy in Guam over whether U.S. Congress or the local Guam Government is in the best position to address the internal structure of the local courts.

The CHAIRMAN. We appreciate the efforts of the witnesses in being here today and look forward to hearing from them this morning. I would like to express special thanks to Justice Carbullido and Judge Lamorena for literally traveling halfway around the world to be at this hearing.

Before we begin with our first panel, I would like to mention that the administration, in lieu of presenting testimony today on H.R. 791 has submitted a letter for the record.

I ask unanimous consent that following the testimony, the gentlemen from Illinois, Mr. Johnson and Mr. Shimkus, be allowed to sit on the dais and participate in the hearing.

Is there objection?

Hearing none, so ordered.

I have a number of things to do today, and I have asked my good friend from Arizona, Mr. Hayworth, if he would take the gavel and conduct this meeting. He is also our expert on some of these areas and a very qualified individual. So with that said, Mr. Hayworth, thank you so much for being here, and thank all the witnesses. I will turn the gavel over to you, sir.

[The prepared statement of Mr. Hansen follows:]

Statement of The Honorable James V. Hansen, a Representative in Congress from the State of Utah

Today's hearing is on two bills that address very different issues. The first is H.R. 791, which was introduced by Congressman Tim Johnson in response to the Miami Tribe's lawsuit against private landowners in Illinois. H.R. 791 seeks to extinguish all land claims in Illinois asserted by the Miami and Ottawa Tribes of Oklahoma and the Potawatomi Tribe of Kansas and provides the tribes with recourse to pursue their claims against the United States in the U.S. Court of Federal Claims.

The Second bill is H.R. 521, introduced by Congressman Underwood. This legislation attempts to amend the Organic Act of Guam to modify the internal structure of the Guam local court system. H.R. 521 has generated a great deal of controversy in Guam over whether U.S. Congress or the local Guam Government is in the best position to address the internal structure of the local courts.

We appreciate the efforts of the witnesses in being here today and look forward to hearing from them this morning. I would like to express special thanks to Justice Carbullido [Car-bo-lee-doe] and Judge Lamorena [La-mo-ren-a] for literally traveling half-way around the world to be at this hearing. Before we begin with our first panel I would like to mention that the Administration, in lieu of presenting testimony today on H.R. 791, has submitted a letter for the record.

STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. HAYWORTH. [presiding] Mr. Chairman, we thank you. We will move forward to panel one, which currently includes two of our members. We also would make note that our other colleague from Illinois, Mr. Phelps, may join us, and we would certainly welcome his statements as well for the record.

But the Chair would first call on our colleague from Illinois, the author of H.R. 791, the Honorable Timothy V. Johnson.

Congressman Johnson, the Chair and the Committee are very happy to hear your testimony and welcome you to the Resources Committee, sir. And we would point out for the record that your statements would be put in the record in their entirety, and we thank you for your testimony today. That will be true for every witness who joins us.

Thank you, sir, and welcome.

STATEMENT OF THE HON. TIMOTHY V. JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this important hearing regarding Indian land claims in Illinois. I also want to thank the Members of the House Resources Committee for their time and attention today.

In the summer of 2000, 15 landowners in east-central Illinois received notice that the Miami Indian Tribe of Oklahoma was suing them. These 15 individuals from 15 separate counties were told that they were being sued because the Miami was claiming that some 2.6 million acres in east-central Illinois rightfully belonged to them under a treaty, the Treaty of Grouseland, signed in 1805.

Illinois was granted statehood in 1818, a full 13 years after the Treaty of Grouseland was signed by the U.S. Government and the Miami Tribe. For this reason, I introduced H.R. 791. Basically, the legislation will waive sovereign immunity and says that if, in fact, there is a valid claim—and we do not make judgment on that—the claim is to be filed against the Federal Government and not against innocent landowners, 15 of whom have been specifically named; one of whom is over 100 years old and a good friend of mine in the Champaign County area, and a number of others over whom a cloud hangs on their title anytime land is transferred in this 2.6 million acre area.

As I indicated, the Potawatomi and Ottawa Tribe have also made similar claims in Speaker Hastert's district, and that provision is included in this bill. There is a significant problem not only with the sword of Damocles, so to speak, hanging over the head of a number of landowners—all the landowners—in a wide, multicounty area, including part of the area that is in the current 19th District but obviously with the transference of land within that area.

Whether or not there is a valid claim—and there is no question there have certainly been examples throughout history of wrongs committed on Native Americans—my constituents are innocent. This treaty was executed before Illinois was a state. They have done nothing wrong, and the whole essence of this bill is to say we want to provide justice for everyone, and we want to assure once and for all that people in 2.6 million acres do not have to live with the potential of losing their land.

I believe that this is a just bill, a just approach, a shotgun approach—a rifle approach as opposed to a shotgun approach that is sometimes taken. There is counterpart legislation in the Senate. I have reason to believe that this ought to enjoy and has enjoyed widespread support, and I certainly appreciate, Mr. Chairman, yours and the other members of the Committee's consideration here, consideration of what I think is a very common sense bill. I appreciate it.

[The prepared statement of Mr. Johnson follows:]

Statement of The Honorable Timothy V. Johnson, a Representative in Congress from the State of Illinois

Thank you Chairman Hansen, for holding this important hearing regarding Indian land claims in Illinois. I also want to thank the Members of the House Resources Committee for their time and attention today.

In the summer of 2000, fifteen landowners in east-central Illinois received notice the Miami Indian Tribe of Oklahoma was suing them. These 15 individuals from 15 separate counties were told they were being sued because the Miami was claiming that some 2.6 million acres rightfully belonged to them under a treaty, the Treaty of Grouseland signed in 1805.

Illinois was granted statehood in 1818, a full 13 years after the Treaty of Grouseland was signed by the United States Government and the Miami Tribe. For this reason, I introduced H.R. 791. Basically, the legislation will waive sovereign immunity and allow the tribe to file its claim in the U.S. Federal Court to seek settlement. I'm not in front of this Committee today to say whether the Miami tribe is right or wrong in its pursuit of this claim. I am here today, however, to say that the property owners of east-central Illinois should not be part of this claim. The Miami's fight should not be with the hard-working, honest citizens of Illinois, nor should it be with the state of Illinois, but rather with the Federal Government.

I am not opposed to the Miami Indian Tribe as a society within our great nation. I fact, I am encouraged by their stature and their ability to diversify our country and influence our future. And, I will concede that at one point in our nation's history, the Miami may have been rightful owners of the land they are now trying to reclaim. However, I do not feel they are justified in victimizing hard working landowners who live within the area I represent. Those families have owned and paid taxes on their land, in some cases for many generations. The Miami Indian Tribe alleges that the U. S. Government never properly obtained land title from them as required by the 1805 Treaty. Therein lies the dispute.

No one would argue that Native Americans were not wronged in our country's past. We would also welcome all attempts to improve the standard of living to which our Native Americans are subject. However, the landowners of east central Illinois should not pay this price.

Just over a year ago, Speaker of the House, Dennis Hastert and I, visited the home of one of the landowners being sued. His name is Rex Walden of Urbana, Illinois. Mr. Walden is a 98-year-old retired farmer. He told the Speaker and I about his life spent on the farm. All he wants now is to leave the farm to his children. Mr. Walden worked the farm and paid taxes all his life. To be sued and face the possibility that he could lose that land because of a 200 year-old treaty is unjust, at best.

The problem goes beyond Rex Walden and the 14 other landowners. A cloud has been cast over the titles of all property in the 2.6 million acre region. Imagine if you were thinking of locating a business in east central Illinois. Why locate in the region in question when you could locate that business, those jobs, and that tax revenue outside that region?

In closing, I want to thank you again, Chairman Hansen and the Members of the House Resources Committee for holding this hearing. This issue, while regional in scope, is of the utmost importance to the citizens of my congressional district in east central Illinois.

Mr. HAYWORTH. Congressman Johnson, we thank you for your testimony.

Now, we turn to your colleague from the 20th District of Illinois, the Honorable John Shimkus. Good morning, Congressman Shimkus, and thank you for joining us.

STATEMENT OF THE HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. Good morning. Thank you, Mr. Chairman and members of the Resources Committee. It is a pleasure to be here today on H.R. 791, a bill that would protect private landowners in Illinois from American Indian claims to their land.

The bill was introduced by my friend and colleague, Mr. Tim Johnson, and I want to thank you for the opportunity to debate and discuss this.

First, I would like to commend Congressman Johnson for introducing this important piece of legislation. During my campaign for

office, I ran on just a few central promises. One of my promises to voters was that I would protect private property rights. My voting record in Congress so far would strongly back up that claim. That is why I cosponsored this legislation, even though at the time, it did not impact any part of my Congressional district. However, under a new Congressional map, 3 of the 15 counties impacted by this claim could be in my new Congressional district.

The legislation is straightforward and fair to both sides. First, it protects property owners in Illinois who have acted in good faith and done nothing wrong and ensures that they will not lose their homes, farms and businesses. Second, it provides the tribes recourse to the Federal courts. The Miami claim is based upon an assertion that the U.S. Government never properly obtained land title for the tribe, as required by an 1805 treaty between the tribe and the Federal Government. This legislation would allow them to pursue their claim against the United States, with whom their argument is, really, since Illinois was not a state until after 1805; in fact, 13 years later, 1818.

The State of Illinois has carefully reviewed this claim and thoroughly studied the issue raised by the tribe and the relevant historical documents. Based upon this review, the state concluded that the claim lacks any merit. These claims have been made for the sole purpose of establishing a casino and not for any true reparations for the tribe. State law in Illinois limits casino gambling to the 10 existing licenses.

Furthermore, I firmly believe that the current landowners cannot and should not be held accountable for any claims by the Miami or any other Native American tribes. They are innocent people in this claim.

Mr. Chairman, thank you again for allowing me to testify on this important piece of legislation, and I am willing to answer any questions the Committee might have, and I yield back my time.

[The prepared statement of Mr. Shimkus follows:]

Statement of The Honorable John Shimkus, a Representative in Congress from the State of Illinois

Mr. Chairman, members of the Resources Committee, it is a pleasure to testify today on H.R. 791, a bill that would protect private landowners in Illinois from American Indian claims to their land. The bill was introduced by my fellow Illinois Congressman, Tim Johnson. Thank you for the opportunity to share my thoughts with you and your Subcommittee.

First, I would like to commend Congressman Johnson for introducing this important piece of legislation.

During my campaign for office, I ran on just a few central promises. One of my promises to the voters was that I would protect private property rights. My voting record in Congress so far would strongly back up that claim. That is why I cosponsored this legislation, even though, at the time, it did not impact any part of my Congressional District. However, under a new Congressional map, 3 of the 15 counties impact by this claim will be in my new District.

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The State of Illinois has carefully reviewed this claim and thoroughly studied the issues raised by the Tribe and the relevant historical documents. Based upon this review, the State concluded that the claim lacks any merit.

These claims have been made for the sole purpose of establishing a casino and not for any true reparations for their tribe. State law in Illinois limits casino gambling to the 10 existing licenses. Furthermore, I firmly believe that current landowners cannot and should not be held accountable for any claims by the Miami or any other native American tribes. They are innocent people in this claim.

Mr. Chairman, thank you again for allowing me to testify on this important piece of legislation. I am willing to answer any questions the Committee might have.

Mr. HAYWORTH. Thank you, Congressman Shimkus. And the Chair would note that you have been joined at the witness table by our friend, Congressman Phelps.

We welcome you, sir, and look forward to hearing your comments on this legislation as well.

STATEMENT OF THE HON. DAVID PHELPS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. PHELPS. May I proceed now, sir?

Mr. HAYWORTH. Yes, indeed, you may proceed, and we thank you for joining us.

Mr. PHELPS. Thank you, Mr. Chairman, for the opportunity, even though I just heard a few minutes ago that this hearing was taking place on this subject. I wanted to jump to the chance and let the record show my support. I have several counties presently—I represent the 19th District—that are involved in this situation, and hopefully, it is going to be resolved, because it is an issue that encompasses a rather large part of my district in central Illinois.

This issue has been of great concern for quite awhile now, and I am pleased that we are working here today to get it resolved once and for all.

The Miami Tribe is currently seeking to claim 2.6 million acres of property, including Illinois' Wabash watershed, which includes all or part of 15 counties. Fifteen landowners have been named in the lawsuit, one in each county affected by the lawsuit. The tribe claims this land was not included in the 1805 Treaty of Grouseland. They gave up most of their land to the Federal Government for $600 when they signed that treaty.

The tribe now estimates that the value of the land to be around $30 billion. I am in support of Congressman Johnson's legislation, H.R. 791, and I commend him for his leadership on this issue, which will place this issue's accountability where it belongs, with the Federal Government. This is not a question of who is right and who is wrong, the Miami Tribe or the landowners. This is a question of who is going to take responsibility.

It is no secret that Native Americans have not been treated fairly in the past. However, it is not fair to place blame on the hard-working landowners of today when the whole issue has been brought about by a mistake that the Federal Government made over 150 years ago. These landowners have gone through much hardship to get where they are today, and they should not have their life's work taken right out from underneath them.

Again, I recognize the problems that this issue has brought about to many people, including several of my constituents, and I hope that this hearing will bring us one step closer to ending this issue.

So thanks again, Mr. Chairman, for the opportunity to speak on behalf of the landowners in the 19th District in Illinois. I appreciate it.

[The prepared statement of Mr. Phelps follows:]

Statement of The Honorable David D. Phelps, a Representative in Congress from the State of Illinois

Thank you Chairman, for the opportunity to speak today on this issue that encompasses a rather large part of my district in central Illinois. This issue has been of great concern for a while now, and I am pleased that we are working here today to get it resolved once and for all.

The Miami Tribe is currently seeking to claim 2.6 million acres of property included in Illinois' Wabash Watershed, which includes all or part of 15 counties. Fifteen landowners have been named in the lawsuit one from each county affected by the lawsuit. The Tribe claims this land was not included in the 1805 Treaty of Grouseland. They gave up most of its land to the Federal Government for $600 when it signed that treat. The tribe now estimates that value of the land to be around $30 billion.

I am in support of Congressman's Johnson's legislation, H.R. 791, which will place this issue's accountability where it belongs, with the Federal Government. This is not a question of who's right and who's wrong, the Miami tribes or the landowners. This is a question of who is going to take responsibility.

It is no secret that many Native Americans have not been treated fairly in the past, however it is not fair to place blame on the hardworking landowners of today when the whole issue has been brought about by a mistake that the Federal Government made over 150 years ago. These landowners have gone through much hardship to get where they are today and they should not have their life's work taken right out from underneath them.

Again, I recognize the problems that this issue has brought about to many people, including several of my constituents, and I hope that this hearing will bring us one step closer in ending this issue. Thank you again, for giving me the opportunity to speak on behalf of the landowners of the 19th district of Illinois.

Mr. HAYWORTH. And, Congressman, we thank you for your testimony.

The Chair would invite any questions from either side of the aisle, if there are any questions from our colleagues.

Ms. CHRISTENSEN. I do not have a question, Mr. Chairman. I just ask unanimous consent that two documents be placed in the record. One is a statement by Congressman Dale Kildee, and the other is a Department of the Interior memo released in July of 2000.

Mr. HAYWORTH. Without objection, we are happy to enter that into the record, and the Chair would also note that our trio from Illinois is cordially invited to join us on the dais to hear subsequent testimony about this legislation, if you care to and can accommodate your schedules. Please, by all means, gentlemen, join us here on the dais.

[The prepared statement of Mr. Kildee follows:]

Statement of The Honorable Dale E. Kildee, a Representative in Congress from the State of Michigan

Mr. Chairman, I oppose H.R. 791, a bill that extinguishes any claim to land, including the claim of aboriginal title, or interest in land within the State of Illinois by the Miami Tribe of Oklahoma, the Ottawa Tribe of Oklahoma, and the Potawatomi Tribe of Kansas or their members or predecessors or successors in interest that could be derived from treaties.

This bill also:

1. gives exclusive jurisdiction of claims to the U.S. Court of Federal Claims;
2. limits liability to the United States thereby preventing potential claims arising out of other Federal statutes;
3. gives Indian tribes one year from date of enactment to file claims; and
4. provides only monetary compensation for claims against the United States.

The Department of Interior has acknowledged the validity of one the tribe's claims. Last year, the Interior Department wrote a letter to Speaker Dennis Hastert and Illinois Governor George Ryan stating that the Prairie Band of Potawatomi has a credible claim to certain land in Illinois. The letter also states the U.S. continues to bear a trust responsibility for that land.

I believe that Congress would be in breach of its trust responsibility to these three tribes by passing this bill. This bill does not provide the same structure afforded to other tribes that are negotiating a fair settlement between all interested parties. Instead, the bill establishes restrictions for these tribes that are not currently set for all other tribes negotiating settlements for claims against the U.S.

Furthermore, this bill would reverse longstanding Federal policy, several Federal laws, and Federal court decisions allowing tribes to pursue claims.

That concludes my remarks. I look forward to hearing the testimony today. Thank you.

[The memorandum dated July 24, 2000, from Derril B. Jordan, Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, submitted for the record on H.R. 791 follows:]

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JUL 24 2000

Memorandum

To: David Hayes, Deputy Secretary
Kevin Gover, Assistant Secretary - Indian Affairs

From: Derril B. Jordan, Associate Solicitor,
Division of Indian Affairs

Subject: Illinois Land Claim of the Prairie Band of Potawatomi

On January 14, 1998 Mamie Rupnicki, Chairperson of the Prairie Band of Potawatomi Indians of Kansas requested Larry Morrin, Area Director, Minneapolis Area Office, Bureau of Indian Affairs to review her tribe's claim to the Shab-eh-nay Band Reservation in De Kalb County, Illinois and render an opinion on its merits in preparation for litigation to regain possession of the Reservation. Ms. Rupnicki's request was transmitted to Hilda Manuel, Deputy Commissioner of Indian Affairs. In a March 25, 1998 memorandum, Deputy Commissioner Manuel requested David Hayes, Counselor to the Secretary, to determine whether the land claim of the Prairie Band of Potawatomi was valid. Subsequently, a member of Mr. Hayes' staff, Heather Sibbison, informally requested the Associate Solicitor, Division of Indian Affairs, Office of the Solicitor, to review the claim and provide a legal opinion on its merits. This memorandum is in response to that informal request for a legal opinion on the validity of the Prairie Band of Potawatomi's claim to the Shab-eh-nay Band Reservation.

The area encompassing the Shab-eh-nay Band Reservation is located in Shabbona's Grove, Illinois. It includes Section 23, the west half of Section 25, and the east half of Section 26 in Township 38 North, Range 3 East, Third Principal Meridian in Illinois. In Indian Land Cessions in the United States by Charles C. Royce (Washington, GPO,1900), the claimed area is described as part of Royce Area 148 in Illinois. Currently, the area is in the possession of a few non-Indian families and the State of Illinois, which owns and operates a park in the area.

BACKGROUND[1]

[1] The preparation of this section has been based primarily on copies and transcriptions of historical documents assembled by the attorneys for the Prairie Band of Potawamis in support of the tribe's request for an analysis of its claim to the Shab-eh-nay Band Reservation. Unless otherwise noted, the attorneys for Prairie Band represent that these documents were obtained from the National Archives. Copies of the documents submitted by the attorneys for the Prairie Band of Potawatomi Indians of Kansas are on file in the Office of the Solicitor. For the purpose

The United Tribes of Ottawas, Chippewas, and Potawatomis residing on the Illinois and Milwaukee Rivers and their waters, as well as the southwestern parts of Lake Michigan[2], entered into a treaty of friendship with the United States on August 24, 1816, 7 Stat. 146. Article 1 of the Treaty of August 24, 1816 provided that the United Tribes would relinquish to the United States all rights, claim, and title to the northern portion of those lands in northwestern Illinois which the United States acquired by cession from the United Sac and Fox Tribes in the Treaty of November 3,1804, 7 Stat. 84. Pursuant to Article 2 of the Treaty of August 24, 1816, the United States relinquished its interest in the southern portion of the United Sac and Fox cession of 1804 to the United Tribes and confirmed and recognized the title of the United Tribes to the area.

Some thirteen (13) years later, the United Nations of Chippewa, Ottawa, and Potawatomi Indians of the waters of the Illinois, Milwaukee, and Manitoouck Rivers ceded their lands around the southern shore of Lake Michigan and in northern Illinois to the United States in the Treaty of Prairie du Chien of July 29, 1829, 7 Stat. 320. The lands which were ceded were the same lands to which the United Tribes received recognized title pursuant to Article 2 of the Treaty of August 24, 1816. Article 3 of the Treaty of July 29,1829 provided that the lands of three chiefs and their bands would be reserved from the cession. Among the lands reserved from cession were those of Chief Shab-eh-nay, a prominent leader among the Potawatomi, and his Band, who received two sections (1,280 acres) at their village near Paw Paw Grove, Illinois. In Citizen Band of Potawatomi Indians of Oklahoma v. United States, 391 F. 2d 614 (Ct. Cl. 1967), cert. denied 389 U.S. 1046 (1968), the Court of Claims held that by the Treaty of August 24, 1816, the United States conveyed recognized title to the lands ceded to the United Tribes of Ottawas, Chippewas, and Potawatomis. While most of lands conveyed to the United Tribes in 1816 were reconveyed to the United States in the Treaty of Prairie du Chien of July 29,1829, the legal status of the lands of the three chiefs and their bands did not change. The three chiefs and their bands held recognized title to the lands reserved for them in the 1829 treaty.

As its non-Indian population increased, the United States bought more land from the tribes in Ohio, Michigan, Illinois, Indiana, Wisconsin, and Minnesota to sell to non-Indian settlers. As part of its effort to remove all Indian tribes from Illinois, the United States purchased tribal lands and began to settle the Indian population of Illinois on reservations west of the Mississippi. Additional treaties ceding tribal lands were negotiated with the Potawatomi bands and other tribes in the 1830's. The treaties which are pertinent with regard to the Prairie Band of Potawatomi's claim to the Shab-eh-nay Band Reservation are the Treaty of October 20, 1832, 7 Stat. 378, which was signed at Tippecanoe, and the Treaty of September 26, 1833, 7 Stat. 431,

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of this preliminary report, the Office of the Solicitor has relied on the correctness of these copies and has not obtained certified copies of the documents or conducted independent research in the National Archives.

[2] The United Tribes of Ottawas, Chippewas, and Potawatomis were designated the United Nations of Chippewa, Ottawa, and Potawatomi Indians in subsequent treaties with the United States. .

which was signed at Chicago.

The Treaty of October 20, 1832, also referred to as the Treaty of Tippecanoe, contained cessions of land by the Potawatomi Tribe of Indians of the Prairie and Kankakee to the United States. Article 2 of the treaty provided that several tracts for individuals would be excluded from the cession. Among the areas excluded was a tract of two sections (1,280 acres) for Sho-bon-ier at his village. Sho-bon-ier, who was French and Potawatomi, was a less prominent chief than Shab-eh-nay. Because he was half French, Sho-bon-ier was referred to in some contemporary documents as Chevalier. Article 4 required the United States to pay money to a number of individuals for the loss of their horses. Among those receiving such payments was Sho-bon-ier., even though he was a signatory to the treaty. Many chiefs signed the treaty, including Shab-eh-nay, whose name was transcribed as Shab-eh-neai.

The Treaty of September 26, 1833, 7 Stat. 431, also known as the Treaty of Chicago, was a cession of approximately five million acres in Illinois and Wisconsin by the United Nations of Chippewa, Ottowa, and Potawatomi Indians to the United States. It should be noted that both Shab-eh-nay and Sho-bon-ier were signatories to this treaty as well. The Treaty of Chicago also contained modifications of title to some of the lands reserved in the Treaty of Prairie du Chien and the Treaty of Tippecanoe. In particular, Article 5 of the Treaty of Chicago provided that the title to the Shab-eh-nay Band Reservation would be converted to the private property of Shab-eh-nay and his heirs.

During its deliberations on the ratification of the Treaty of September 26, 1833 (the Treaty of Chicago), the Senate rejected Article 5, striking it from the document. 4 Journal of the Executive Proceedings of the Senate 384 (April 7, 1834). With the elimination of Article 5, title to the two sections of land in what is now De Kalb County retained the status of tribal communal land with recognized title remaining in Shab-eh-nay and his Band. The Senate's rejection of Article 5 is one of the sources of the confusion concerning the ownership of the property in later years. Apparently unaware that Article 5 was no longer part of the treaty, Shab-eh-nay's Band acted in accordance with the belief that the treaty provision required them to leave Illinois with the other Indian tribes. In an 1859 letter, a former officer in the United States Army, Captain J. B. F. Russell, stated that he had been employed in 1836 by the War Department to remove the Potawatomis near Chicago to Council Bluffs, Missouri. In his letter, Captain Russsell also stated that Shab-eh-nay had assisted in the successful removal of his tribe[3].

Another account of the removal of Shab-eh-nay and his Band is found in the affidavit of George E. Walker, a resident of La Salle County who had known Shab-eh-nay since 1827. According to Walker, Shab-eh-nay and his Band accompanied hundreds of Indians from the tribes that were

[3] Letter of May 31, 1859 to Lewis Cass, Secretary of State, from J. B. F. Russell. Captain Russell's account notwithstanding, it is believed that Shab-eh-nay and his Band made the move without reliance on a government conductor since there are no official records showing who traveled with Shab-eh-nay. *See, Affidavit of Dr. James Clifton 12 (Jan.5, 1998).*

being removed from the area east of the Mississippi to the west bank of the river in Kansas [Territory] in 1837. Affidavit of George E. Walker (October 24, 1864)[4]. Walker's affidavit also states that Shab-eh-nay and his family returned to Shab-eh-nay's or Shabonna's Grove (the Shab-eh-nay Band Reservation) about two years later in 1839.

Walker's recollection of the events surrounding the removal of the Indian tribes from Illinois, as stated in his affidavit of October 24, 1864, is consistent with Shab-eh-nay's understanding of the 1833 treaty. Pursuant to Article 5 of the Treaty of 1833, which was striken from the Treaty by the Senate during ratification, title to the Shab-eh-nay Band Reservation would have been converted to Shab-eh-nay's personal property. The return of Shab-eh-nay to Illinois after the 1836 removal of the tribes provides an indication that Shab-eh-nay did not know that the Senate had rejected Article 5 of the 1833 treaty. On his return journey to Illinois, he was accompanied solely by his family and not by any other members of the Band because it was believed that the Reservation had become his personal property, and that the Treaty of 1833 required all of the tribes to leave Illinois. Affidavit of Dr. James A. Clifton (January 5, 1998) at pages 12-13[5].

Shab-eh-nay and his family lived on the Reservation in Illinois from 1839 to 1849, making three or four trips to Kansas to visit relatives who had moved with the Prairie Band to the reservation in Kansas. Shab-eh-nay's loss of possession of the Reservation had its origin in his purported sale of part of the Reservation. According to an October 15, 1845 letter to President James K. Polk written by Coalman Olmstead, a resident of Shabbona's Grove, Shab-eh-nay sold the west half section of Section 25 (320 acres) of the Reservation to Wilbur F. Walker for $600 dollars in 1839[6]. According to Olmstead, Walker paid Shab-eh-nay only $200 of the agreed purchase price of $600.

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[4] In a July 25,1864 letter to Secretary of the Interior J.P. Usher, Shab-eh-nay's widow, three of her daughters, and a grandson wrote that they had requested E. S. Smith, a Chicago attorney, to initiate an ejectment suit or otherwise reclaim their rights, as survivors of Shab-eh-nay's Band, to the land granted in the 1829 treaty. Apparently Mr. Smith requested affidavits from George E. Walker, General R. K. Swift, William Norton, and Levi Kelsey (or Kelsig) because he subseqently enclosed those affidavits and written statements in a January 27, 1865 letter to H. J. Alvord, requesting the matter be investigated and action taken. This letter has been published in James P. Dowd's biography of Shab-eh-nay, Built Like a Bear (Fairfield, Washington, 1979), at pages 165-166. The letter is at the National Archives in Reserve File A-416.

[5] Dr. Clifton is a well known ethnohistorian and author of a history of the Potawatomis entitled People of the Prairie. He was retained as an expert by the attorneys for the Prairie Band of Potawatomi Indians of Kansas to assist in the preparation of the Prairie Band's claim to the Shab-eh-nay Band Reservation.

[6] A transcription of that letter is in Dowd's Built Like a Bear at pages 145-146. The letter is at the National Archives in File A-416.

In his October 15, 1845 letter to President Polk, Olmstead claimed that Shab-eh-nay refused to give Walker a deed for the 320 acres because Walker had not paid him the remaining balance of the purchase price. Olmstead claimed that he purchased the property from Walker for $1,400 in 1840 and received a deed from Walker, adding that he, Olmstead, offered to pay Shab-eh-nay the $400 balance due from Walker in order to obtain a deed to the 320 acres. Despite Shab-eh-nay's purported consent to the arrangement, Olmstead did not receive the deed. Olmstead asserted that Shab-eh-nay was persuaded not to go through with the transaction by one of the Gates Brothers, who were land speculators. Olmstead asked President Polk to withhold approval of any deed issued by Shab-eh-nay to the Gates Brothers. Olmstead requested that the President approve a deed from Shab-eh-nay to him, provided that he paid Shab-eh-nay the $400 balance due from Walker. It appears that Olmstead did not receive a reply to his request because he wrote to the Commissioner of Indian Affairs, William Medill, on November 24, 1845, offering to pay Shab-eh-nay $400 in exchange for a deed.[7]

While Olmstead was corresponding with government officials to get approval of the proposed payment to Shab-eh-nay to complete the alleged sale of 320 acres of the Reservation, Orrin (aka William, Worsham, Wiram or Wyram, Wyman) Gates, one of the Gates Brothers, was attempting to get deeds for the entire Reservation approved in Washington with the assistance of his district's representative, John Wentworth. In a May 6, 1848[8] letter to Commissioner of Indian Affairs Medill, Representative Wentworth requested that the three deeds enclosed with his letter, which were for the purported sale of the Shab-eh-nay Band Reservation by Shab-eh-nay to the Gates Brothers, be approved. Wentworth stated that the Gates Brothers had informed him that Shab-eh-nay sold the Reservation to them in 1845. Two of the deeds enclosed with the letter were made to Ansel (aka Asel) Gates, one for 320 acres and one for 640 acres, while the third deed was made to his brother, Orrin (aka Wyman) Gates, for 320 acres.[9] All three deeds were

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[7] Olmstead's claim that Shab-eh-nay attempted to sell part of the Reservation to Walker has not been confirmed by any documentation that has been cited by the Prairie Band's experts or the attorneys for the State of Illinois in their analysis of the Reservation.

[8] A transcript of this letter appears in Dowd's Built Like a Bear at page 146. The document is in Reserve File A-416 at the National Archives. The letter states that deeds were enclosed, and references other unspecified letters that Representative Wentworth sent to the Department of War.

[9] The three deeds were mentioned briefly in a May 27, 1848 letter from Commissioner of Indian Affairs Medill to Representative Wentworth. The transcript of that letter appears in Dowd's Built Like a Bear at pages 146-147. The document is in Reserve File A-416 at the National Archives. In that letter Commissioner Medill stated that the three deeds, which had been submitted with Representative Wentworth's letter of May 6, 1848, were being returned.

dated December 1, 1845 and were reputedly signed by Shab-eh-nay in Washington, D.C.[10]

In his May 27, 1848 letter responding to Representative Wentworth, Commissioner of Indian Affairs Medill stated that Article 3 of the Treaty of Prairie du Chien of July 29,1829 granted two sections of land to Shab-eh-nay and his band. He declared that he believed that the 1829 treaty did not give Shab-eh-nay authority to sell the Reservation. Commissioner Medill stated that the Treaty of Prairie du Chien gave Shab-eh-nay and his band the right to use the two sections, but when the property was abandoned it became part of the public domain. Commissioner Medill declared that since the people for whom the Reservation was created (Shab-eh-nay and his band) appeared to have ceased to use it, the Commissioner of the General Land Office had the right to reclaim it as public land. There is no indication that Commissioner Medill made any inquiries or conducted an investigation to determine whether or not Shab-eh-nay and his family had actually abandoned the Reservation. His letter of May 27, 1848 implies that the alleged attempt by Shab-eh-nay to sell the Reservation was sufficient to establish that the Reservation had been abandoned.

On August 12, 1848, the General Land Office issued an order to sell the Shab-eh-nay Band Reservation at public auction[11]. At the request of Orrin (aka William) Gates, the auction was postponed on October 17, 1848 to permit him time to seek Congressional authorization for the

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[10] In a July 3, 1849, letter to the Commissioner of Indian Affairs Medill, Orrin Gates admitted that he did not pay the remaining balance to Shab-eh-nay for land on the Reservation. A transcript of that letter appears in Dowd's Built Like a Bear at pages 147-148. The document is in Reserve File A-416 at the National Archives.

The purported deeds that Gates and his brother presented to Representative Wentworth may have been fraudulent. This inference prompted by a deed dated March 5, 1847 and recorded March 11, 1847 in De Kalb County, Illinois, which is an "indenture" between Asel A. Gates and his wife, Mary, and Francis Howe, trustee for Shambenee [Shab-eh-nay], an Indian Chief of Chicago, Illinois. The "indenture" is for the sale of 50 acres in the South East corner of Section 26, T. 38 N, Range 3 E, Third Prinicipal Meridian in Illinois for $450. The land in the legal description is within the external boundaries of the Reservation. If the three 1845 deeds were valid, this 1847 purchase would not be necessary. The 1847 deed implies that at least one of the Gates Brothers did not believe that they owned all of the two sections that constituted the Reservation. A copy of the 1847 was provided by the attorneys for the Prairie Band of Potawatomi.

[11] This information was obtained from a July 14, 1849 letter from the Commissioner of the General Land Office, Butterfield , to the Commissioner of Indian Affairs, Brown. The letter is printed in Dowd's Built Like a Bear at pages 149-150.

purported 1845 sale[12]. In a July, 1849 letter to the Commissioner of Indian Affairs, Gates acknowledged that he was not successful in getting an act of Congress passed and would not be able to pay Shab-eh-nay what he owed him for the land.[13]

In a letter dated July 10, 1849, Commissioner of Indian Affairs Orlando Brown, wrote to the Commissioner of the General Land Office, J. Butterfield, about Shab-eh-nay's purported sale of the Reservation to the Gates Brothers, and enclosed a copy of a letter he received from William (aka Orrin) Gates[14]. In his July 14, 1849 letter[15] responding to Commissioner Brown. Commissioner J. Butterfield, suggested that the Office of Indian Affairs conduct an investigation into the purported sale of the Shab-eh-nay Band Reservation, including the consideration paid for the land and the length of time Shab-eh-nay occupied the Reservation. Commissioner Butterfield stated that he knew Shab-eh-nay personally and was aware of his good character and long period of residence on the Reservation. He suggested that the Office of Indian Affairs sponsor legislation to grant fee title to Shab-eh-nay, subject to the restriction that the President approve any conveyance.

Commissioner Brown rejected both of Commissioner Butterfield's suggestions in his letter of July 18,1849[16]. Brown stated that a review of the records of the Office of Indian Affairs indicated that on November 8, 1841 Shab-eh-nay applied to Congress for an appropriation of $1,600 as compensation for the two sections of land he received in the Treaty of Prairie du Chien, but noted that no subsequent action was taken. He also stated that other people had alleged claims to portions of the two sections that composed the Reservation, claiming that the land had been purchased. He added that in each case, the claimants had been informed that the treaty did not grant Shab-eh-nay or his band authority to sell the Reservation, and that the President could not sanction any sale that might have been made. In addition, Commissioner Brown asserted that the Treaty of Prairie du Chien had not vested any title in Shab-eh-nay and his band because it only granted them the right to use the land. In particular, he relied on the fact that the Senate had removed Article 5, which would have granted the title to the Reservation in

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[12] The transcript of a letter dated July_, (the date is not legible) 1849 from William (Orrin) Gates to Commissioner Medill requesting the delay was printed in Dowd's Built Like a Bear at pages 147-148. The letter is in Reserve File A-416 at the National Archives.

[13] Id.

[14] Id. at pages 148-149. The letter is in Reserve File A-416 at the National Archives.

[15] Id. at pages 149-150. The letter is in Reserve File A-416 at the National Archives.

[16] Id. at page 151. The letter is in Reserve File A-416 at the National Archives.

fee simple to Shab-eh-nay and his Band[17], from the Treaty of Chicago of 1833. He noted that the attempts by the Gates Brothers to obtain legislation authorizing the sale had failed. In light of those circumstances, he would not reopen the case or otherwise alter Commissioner Medill's decision.

The General Land Office at Dixon, Illinois held a public auction of the two sections of the Shab-eh-nay Band Reservation on November 5, 1849[18]. The lands were acquired by non-Indians, who received patents from the United States on June 1, 1850[19]. When Shab-eh-nay and his family returned to Illinois in 1851 or 1852 after an extended visit with relatives in Kansas, non-Indians had taken possession of the Reservation. According to the information submitted by attorneys for the Prairie Band, all subsequent attempts by Shab-eh-nay and his relatives and friends to regain possession of the Reservation were unsuccessful. Shab-eh-nay was able to remain in the area near the Reservation through the generosity of his non-Indian friends. He died in 1859 in Grundy County, Illinois without regaining possession of the Reservation or receiving compensation for its loss. Like Shab-eh-nay, his heirs were not able to obtain any form of redress for the loss of the Reservation despite numerous attempts.

Walker's account of the movements of Shab-eh-nay and his family is corroborated by William Norton in an affidavit dated October 18, 1864[20]. Norton, a resident of De Kalb County Illinois, stated that Shab-eh-nay and his family were living on the Reservation at Shab-eh-nay's or Shabonna's Grove when he arrived in 1845. According to Norton, Shab-eh-nay and his family left their home on the Shab-eh-nay Band Reservation to go to Kansas in about 1848 (but it may have been 1849) and stayed there for about a year (probably longer), leaving the Reservation in his care. Approximately two months after Shab-eh-nay and his family departed for Kansas, an agent of the General Land Office sold the Shab-eh-nay Band Reservation at public auction.

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[17] Commissioner Brown's statement is incorrect. Article 5 of the 1833 Treaty of Chicago would have granted fee simple title to Shab-eh-nay and his heirs, and would not have granted such title to the Band.

[18] Letter of May 2, 1896 from D. F. Best, Assistant Commissioner of the General Land Office, to the Commissioner of Indian Affairs. A transcript of this letter appears in Dowd's Built Like a Bear at page 175. The letter is in Reserve File A-416 at the National Archives.

[19] United States Patent Certificates 31284 through 31291 were issued to Reuben Allen and United States Patent Certificates 31290 through 31299 were issued to William Marks by the General Land Office. Copies of these patent certificates were provided by the attorneys for the Prairie Band of Potawatomi Indians of Kansas.

[20] Affidavit of William Norton (October 18, 1864) was enclosed with E. S. Smith's letter of January 27, 1865 to H. J. Alvord. Transcripts of the letter and the affidavit, which was one of three, were printed in Dowd's Built Like a Bear at pages 165-167 and 169-171. Both of the documents, the letter and the affidavit, are in Reserve File A-416 at the National Archives.

Norton stated that Shab-eh-nay was unaware of the sale of the Reservation until about later, when he and his family returned to Illinois and Norton told him about it.

The events recounted by Walker and Norton were substantiated several years later by nay himself, when he sought to regain possession of the Reservation with the help of several attorneys and friends. In a June 17,1853 letter written by John H. Kinzie[21] to the Commissioner of Indian Affairs, and a September 6, 1854[22] letter from his attorney, J. W. Paddock of Paddock and Ward, to the Secretary of the Interior, Shab-eh-nay requested information on the status of the title of the Reservation and the basis for its sale. A response to Mr. Kinzie was provided by the Acting Commissioner of Indian Affairs Charles E. Mix in a letter dated June 25, 1853[23]. Acting Commissioner Mix responded to Messrs. Paddock and Ward in a letter dated October 5, 1854[24]. In each response Acting Commissioner Mix repeated the assertion that Shab-eh-nay and his Band only had the right to use the Reservation, repeating Commissioner of Indian Affairs William Medill's erroneous statements of fact and law by asserting that Shab-eh-nay and his Band lost the right to use the Reservation by abandoning it. Years later, the assertions in Commissioner of Indian Affairs Medill's letter were cited again as fact by government officials who received inquiries concerning the existence of the Band's reservation[25].

ISSUES

I. What type of title to the Reservation did Shab-eh-nay and his band possess? Has that title been extinguished?[26]

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[21] The transcript of this letter appears in Dowd's Built Like a Bear at page 152. The letter is in the National Archives in Reserve File A-416.

[22] The transcript of this letter appears in Dowd's Built Like a Bear at pages 153- 154. The letter is in the National Archives in Reserve File A-416.

[23] The transcript of this letter appears in Dowd's Built Like a Bear at pages 152- 153. The letter is in the National Archives in Reserve File A-416.

[24] The transcript of this letter appears in Dowd's Built Like a Bear at page 154. The letter is in the National Archives in Reserve File A-416.

[25] Shab-eh-nay submitted letters of inquiry through his friends and attorneys in 1853, 1854, and 1859. Following his death in 1859, Shab-eh-nay's family continued the attempt to regain possession of the Reservation, corresponding with government officials in 1864, 1896, 1897, and 1902. The transcripts of these documents appear in Dowd's Built Like a Bear at pages 152-178. The documents are in Reserve File A-416 at the National Archives.

[26] This discussion of recognized title and aboriginal title does not include an analysis of the Court of Federal Claims' decision in Alabama-Coushatta Tribe v. United

Under the doctrine of discovery, legal title vested immediately in the sovereign nation of the explorer who discovered it, subject to the right of use and occupancy of the Indians who were living on it. Sac and Fox Tribe of Indians v. United States, 383 F. 2d. 991,996-997 (Ct. Cl.1967). In that case, the Court of Claims discussed both the title of the United States, which possessed sovereign title, and the title of theTribe, which possessed Indian (aboriginal) title. Id. Referring to Justice Marshall's decision in Johnson and Graham's Lessee v. MacIntosh, 21 U.S. 543, 570-603 (1823), the Court of Claims stated that discovery of new land by European nations carried with it the right of sovereignty or sovereign title. Sovereign title gave the government of the European nation that discovered the land the legal title and the absolute right to extinguish Indian title. However, the right of sovereignty over discovered land was always subject to the right of use and occupancy of the land by the Indians inhabiting it. This right of use and occupancy is known as Indian title. Indian title is owned by a tribe and is subject to the tribe's laws and customs. Furthermore, Indian title may not be sold to another sovereign nor to any person without the approval of the government of the discovering nation. Holden v. Joy, 84 U. S. (17 Wall.) 211 (1872) quoted in Felix S. Cohen, Original Indian Title, 32 Minnesota Law Review 28, 52 (1947).

The right of an Indian tribe to use and occupy land that it inhabited was acknowledged by the United States Government in its acquisition and sale of land subject to Indian title. The Sac and Fox Tribe of Indians v. United States, 383 F. 2d. 991,996-997 (Ct. Cl.1967). Indian title can be extinguished only by an act of the sovereign, and only Congress can divest an Indian tribe of its title to land. United States v. Celestine, 215 U.S. 278, 285 (1909) quoted in Solem v. Bartlett, 465 U.S. 464, 470 (1984). The Supreme Court has ruled that Indian title may be abrogated "by treaty, by the sword, by purchase, [or] by the exercise of complete dominion adverse to the right of occupancy" United States v. Santa Fe Pacific Railroad, 314 U.S. 339, 347 (1941). However, Indian title is not extinguished in the absence of a plain and unambiguous expression by Congress of its intent to do so. Id. at 353-354.

In the early to mid-nineteenth century, Indian title included both treaty recognized title and aboriginal title. The distinction between the two types of "Indian title" was not important because the United States paid compensation to Indian tribes for their lands whether or not their title had been recognized in a treaty or statute. Kelly, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Columbia Law Review, 655-686 (1975). As Felix Cohen stated in Original Indian Title, 32 Minnesota Law Review 28-59 (1947), much of the United States' territorial expansion was accomplished through treaties in which American Indian tribes ceded lands to which they held Indian (aboriginal) title in exchange for treaty recognized title to smaller portions of that land which became known as reservations. In Lac Courte Oreilles Band v. Voigt, 700 F.2d 341, 352 (7th Cir. 1983), the Court noted that "treaty recognized title" referred to congressional recognition of a tribe's right to occupy land permanently, and constituted a legal interest in the land. As such, it could be

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States, Congressional Referral 83,- which was released on June 19, 2000. The decision and its possible impact on the Shab-eh-nay Band Reservation is being studied.

extinguished only upon the payment of compensation. United States v. Creek Nation, 295 U.S. 103 (1935) and United States v. Sioux Nation, 448 U.S. 371, 415 n. 29 (1980).

As Kelly observed, the respect for Indian title that has been demonstrated in Congressional recognition of Indian tribal lands was the result of an awareness that Indian tribes could be formidable enemies. Early in the history of the United States, the Supreme Court held that the Constitution vested the whole power of regulating political and economic relations with Indian tribes in the federal government. Worcester v. Georgia, 31 U.S. 515 (1832), and Cherokee Nation v. Georgia, 30 U.S. 1 (1831). Having established that relations with Indian tribes were exclusively within the purview of the federal government, the Supreme Court held that abrogation of treaty recognized property rights was not to be lightly imputed to Congress. Menominee Tribe v. U.S., 391 U.S. 404, 412-413 (1968).

In Lone Wolf v. Hitchcock, 187 U.S. 553, 564-565 (1903), the Supreme Court acknowledged that Congress has exclusive and plenary power to deal with matters of Indian title. The unilateral action of an officer of the executive branch which has not been authorized by Congress cannot eliminate or extinguish Indian title. Cramer v. United States, 261 U.S. 219 (1923), Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 945 (Ct. Cl. 1974), 203 Ct. Cl. 426. Any actions taken by the executive branch to extinguish Indian title depend for their efficacy upon Congress' acquiescence. United States v. Southern Pacific Transportation Co., 543 F. 2d 676, 689 (9th Cir. 1976). Furthermore, the United States cannot convey an interest that it does not possess. United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941), Mitchel v. United States, 34 U. S. (9 Pet.) 711, 743 (1835).

When the foregoing rulings are applied to the Shab-eh-nay Band Reservation, it becomes evident that the Shab-eh-nay Band Reservation continues to exist. In Citizen Band of Potawatomi Indians of Oklahoma v. United States, 391 F. 2d 614 (Ct. Cl. 1967), cert. denied 389 U.S. 1046 (1968), the Court of Claims held that under the terms of the Treaty of August 24, 1816 the United States conveyed recognized title to the United Tribes of Ottawas, Chippewas, and Potawatomis in the areas that were subsequently ceded to the United States in the Treaty of Prairie du Chien of 1829. Thus, the three individual leaders and their bands that retained reservations in the ceded area pursuant to the Treaty of Prairie du Chien of July 29, 1829 held recognized title, rather than mere aboriginal title, to those reservations. Through ratification of the Treaty of Prairie du Chien of July 29,1829, the United States confirmed its recognition of tribal title to the lands the tribes retained under the treaty.

Moreover, there is no evidence to support the contention that Shab-eh-nay and his band voluntarily abandoned the Reservation. However, even if it were true that Shab-eh-nay's Band had abandoned the land, the Band's treaty recognized title to that land could not be extinguished without Congressional action. As a matter of law, voluntary abandonment could not extinguish recognized title without Congressional action. The necessity for the expression of Congressional intent and action on recognized Indian title is so important that land which had never been occupied by an Indian tribe has been held to be that tribe's land because Congress had recognized

its title to it over a period of years. *See* New York Indians v. United States, 170 U.S. 1 (1898), modified on other grounds, 170 U.S. 614 (1898).

Furthermore, Commissioner of Indian Affairs Medill's conclusion that the Shab-eh-nay Band Reservation had been abandoned was factually erroneous. It was erroneous because Shab-eh-nay and his family, who were members of the Band, resided on the Reservation from 1839 to1849, when they were dispossessed. During this period of residency, Shab-eh-nay placed the property under the care of a friend or neighbor when he and his family went to visit his relatives in Kansas. *See* Affidavits of George E. Walker and William Norton.

Congress has never passed any statute or ratified any treaty which would have extinguished the Shab-eh-nay Band's title to the Shab-eh-nay Band Reservation. In fact, the Court of Claims ruled that the Potawatomi successors in interest to the United Nations of Chippewa, Ottawa, and Potawatomi Indians were to receive the value of Royce Area 148 (where the Shab-eh-nay Band Reservation is located) less the 16,640 acres which had been reserved for the individual bands under Articles 3 and 4 of the Treaty of Prairie du Chien of 1829. Citizen Band of Potawatomi Indians of Oklahoma v. United States 391 F.2d 614, 622-625 (Ct. Cl. 1967) cert. denied 389 U.S. 1046 (1968). Because no statute or treaty has been enacted or ratified which would provide for the payment of compensation for the Shab-eh-nay Band Reservation, the Reservation continues to exist.

II. What tribe is the successor in interest to the Shab-eh-nay Band?

Because a reservation was retained for Shab-eh-nay and his Band out of the cession of the Treaty of Prairie du Chien of July 29, 1829, it is necessary to determine what current tribe is entitled to assert a claim to that reservation. It is clear that the Shab-eh-nay Band no longer exists as a separate entity. Therefore, we had to determine what tribe, if any, is the successor in interest to the Shab-eh-nay Band. Both the Prairie Band of Potwatomi Indians of Kansas and the Ottawa Tribe of Oklahoma have alleged that they are the successor in interest to the Shab-eh-nay Band. The Prairie Band of Potawatomi have presented substantial materials to support their claim and the Ottawa have indicated that they intend to submit materials, though they have not done so to date. No other tribes have expressed an interest in pursuing this claim.

Based on our review of historical documents and legal analysis[27], we have determined that the Prairie Band of Potawatomi Indians of Kansas has the strongest claim that it is the successor in interest to the Shab-eh-nay Band and is entitled to enforce the land claim. The Prairie Band has shown that the Shab-eh-nay Band merged with the Prairie Band while they were on the Council

[27] The Branch of Tribal Government and Alaska within the Division of Indian Affairs has prepared a more extensive memorandum addressing the historical record, the legal arguments, and the potential claimants. The memorandum is available upon request. The analysis was based primarily on materials submitted by the Prairie Potawatomi. We are certainly willing to consider any materials presented by other tribes.

Bluffs Reservation in Iowa. Because the two groups merged, the Prairie Band at Council Bluffs became the successor in interest to the Shab-eh-nay Band, and the rights of the Shab-eh-nay Band became those of the larger group. The present day Prairie Band of Potawatomi Indians of Kansas evolved from the Prairie Band at Council Bluffs. Therefore, the Prairie Band of Potawatomi Indians of Kansas is entitled to assert the claim to the Shab-eh-nay Band Reservation.

REBUTTAL TO THE ARGUMENTS PRESENTED BY THE STATE OF ILLINOIS IN SUPPORT OF THE DISESTABLISHMENT OF THE SHAB-EH-NAY BAND RESERVATION

The Governor of Illinois, through private counsel, has presented a number of factual and legal arguments in support of the theory that the Shab-eh-nay Band Reservation has been disestablished by Congress. Some of these arguments are based on erroneous facts or erroneous statements of law. The following is a discussion of those errors:

1. Shab-eh-nay and his band held only aboriginal title, and lost that title when they abandoned the Reservation voluntarily.

This statement is both legally and factually inaccurate. In the Treaty of November 3, 1804, 7 Stat. 84, the United States acquired the interest of the United Sac and Fox Tribe. Then, the United States conveyed its interest in that land to the United Tribes of Ottawas, Chippewas, and Potawatomis in the Treaty of August 24,1816, 7 Stat. 146. The title that the United States conveyed to the United Tribes was recognized title, according to the ruling of the Court of Claims in Citizen Band of Potawatomi Indians of Oklahoma v. United States, 391 F. 2d 614, 622-625 (Ct. Cl. 1967) cert. denied 389 U.S. 1046 (1968). Thus, reservations for the three chiefs and their bands that were provided for in the Treaty of Prairie du Chien of July 29,1829 were not lands that were held under aboriginal title, but were lands that were held under treaty recognized title.

The State of Illinois is also relying on a September 20, 1833 opinion written by Attorney General Roger B. Taney on the title to the Potawatomi reservations created by the Treaty of October 20, 1832 at Tippecanoe, 7 Stat. 378. 2 Op. Atty. Gen. 587, Sept. 20, 1833. Attorney General Taney concluded that Indian title (i.e. aboriginal title) to the reservations which were withheld from the lands ceded to the United States was not extinguished by the ratification of the Treaty of Tippecanoe. The State of Illinois argues that the Potawatomis held merely the right to use (usufruct) the lands that were reserved for individuals from the cession made in the Treaty of Tippecanoe, or in other words, that recognized treaty title was not created by the Treaty. By making this argument, the State is trying to provide a legal basis for the assertion that title to the Reservation was extinguished by unilateral, voluntary abandonment. Furthermore, the State of Illinois contends that the type of title or interest the Potawatomis held in lands reserved by the Treaty of Tippecanoe is the same type of title under which the reservations referred to in the Treaty of Prairie du Chien were held.

The State of Illinois' arguments are invalid because, as discussed above, the Shab-eh-nay Band Reservation was created by treaty, which conveyed recognized title to Shab-eh-nay and his Band. Voluntary abandonment is a defense to aboriginal title because aboriginal title is dependent on actual, continuous, and exclusive possession of the land. Cayuga Indian Nation of New York v. Cuomo, 758 F. Supp. 107, 110 (N.D. New York 1991). Voluntary abandonment is not a defense to treaty recognized title because extinguishment of treaty recognized title requires the consent of the sovereign. United States v. Santa Fe Pacific Rail Road Co., 314 U.S. 339 (1941); Buttz v. Northern Pacific Railroad, 119 U.S. 55 (1886). Treaty recognized title can be extinguished only by statute or treaty expressing a clear intention by Congress to extinguish it. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967); United States v. Northern Paiute Nation, 183 Ct. Cl. 321, 393 F.2d 786 (1968).

The distinction between treaty recognized title and aboriginal title emerged after the Supreme Court's decision in Tee Hit-Ton v. United States, 348 U.S. 272 (1955). In Tee Hit-Ton, the Supreme Court held that the Fifth Amendment did not apply to aboriginal title but did attach to recognized or treaty title. Recognized or treaty title must be extinguished by Congress in a statute or treaty and the tribe must be compensated. Recognized or treaty title cannot be extinguished by the mere assertion of an official of the executive branch that the Indians occupying the land have abandoned it. Rather, Congress must clearly express its intent to permit extinguishment of title to an Indian reservation. United States v. Santa Fe Pacific Rail Road, 314 U.S. 339, 347 (1941). In addition, Illinois' argument that aboriginal title can be voluntarily abandoned ignores the policy that the United States pursued during that period, which was to compensate Indian tribes for all lands they occupied and used. Id. at page 345. That policy also required that Indian title (which at that time included aboriginal title as well as recognized title) be extinguished by obtaining a voluntary cession of the land. Congress pursued a policy of negotiating cessions of tribal lands from 1795 through 1871. Those negotiations included aboriginal as well as treaty recognized lands. Cohen, Handbook of Federal Indian Law (1982 ed.), at page 517.

With regard to the factual issue of voluntary abandonment, Illinois is relying upon Commissioner Medill's letter of May 27,1848 and Commissioner Manypenny's letter of April 12, 1856, both of which are contained in House Report 34-40, as evidence that Shab-eh-nay and his Band abandoned the Reservation. A careful reading of the correspondence between the Office of Indian Affairs and the General Land Office indicates that no investigation was ever conducted to determine whether or not Shab-eh-nay and his family or members of his band were occupying the Reservation in 1849. However, there are two 1864 affidavits by George Walker and William Norton which state that Shab-eh-nay and his family were living on the Reservation in 1848 and had just departed for Kansas for a period of one to two years to visit friends and relatives when the General Land Office sold the Reservation in 1849. Both men declared that Shab-eh-nay left the Reservation in the care of non-Indian friends during his periodic trips to Kansas.

2. Congress extinguished any tribal title through the appropriation of 1852.

This assertion is factually inaccurate and emphasizes the confusion that has occurred because Shab-eh-nay and Sho-bo-nier (aka Chevalier) were contemporary Potawatomi leaders of separate bands that received reservations in provisions of two distinct treaties. The property which was the subject of the Act of July 21,1852. 10 Stat. 20, was land which was reserved for the Potawatomi chief, Sho-bo-nier. He received a reservation of two sections of land near his village under Article 2 of the Treaty of October 20,1832, 7 Stat. 378. However, Sho-bo-nier's village was in Indiana and was not part of the land ceded to the United States in Illinois in the 1832 treaty[28]. Letter of July 29, 1851 from Parks and Elwood, attorneys for Shab-eh-nay, to Commissioner of Indian Affairs Lea, and letter of September 24, 1863 from Acting Commissioner of Indian Affairs Mix to Secretary of the Interior Usher. Due to the mistaken description of his village's location, Sho-bo-nier did not receive actual possession of any land in the ceded area. Letter of September 24, 1863 from Acting Commissioner of Indian Affairs Mix to Secretary of the Interior Usher. However, it was determined that he should be paid an amount equivalent to the value of two sections of land in the area of the cession. Letter of July 1, 1839 from Thomas H. Crawford, War Department 's Office of Indian Affairs to Major John Dougherty. Although Sho-bo-nier died in 1851, his heirs received payment for his interests in two unspecified sections of land in the ceded area in accordance with the Act of July 21, 1852. On March 21, 1853 the heirs of Sho-bo-nier relinquished their claim to the land for $1,600. Letter of October 26, 1877 from E. Haut to S.C. Linn. The documents referenced in this paragraph are in Reserved File B-27 at the National Archives. Transcripts of these documents were published in Dowd's Built Like a Bear at pages 115-133.

3. Most historians agree that the Treaty of October 20, 1832 at Tippecanoe merely confirmed those lands reserved in the Treaty of Prairie du Chien of 1829.

This argument is also incorrect. Dr. James Clifton, an expert ethnohistorian , was retained to assist in the preparation of the Prairie Band of Potawatomi's claim to the Shab-eh-nay Band Reservation. In his July 21, 1998 supplementary affidavit, Dr. Clifton addressed the validity of the sources of information used by the historians of the nineteenth century who wrote about the Shab-eh-nay Band Reservation. Dr. Clifton points out the factual inaccuracies in the works of those historians, most of which were based on secondary sources. He observed that those historians appear to have been unaware that Shab-eh-nay and Sho-bo-nier were two different Potawatomi leaders.

Regardless of what may have been the opinions of most nineteenth century historians, it is clear from reading the two treaties that the assertion that the reservations contained in both documents are the same is not based on fact. Articles 3 and 4 of the Treaty of Prairie du Chien of 1829 contain a list of reservations to separate bands and individuals which are readily distinguishable from those persons named in articles 2 and 3 of the Treaty of Tippecanoe of 1832. The reservation for Shab-eh-nay in the 1829 treaty is not related in any way to the reservation for

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[28] Reserved File B-27 at the National Archives contains the documentation related to Sho-bo-nier and the purchase of his reserved sections of land.

Mr. CARSON. Mr. Chairman, can I ask unanimous consent also to submit an opening statement for the record, please?

Mr. HAYWORTH. Without objection, the Chair would welcome opening statements from all those inclined to offer them this morning, and we make note of that and thank the gentleman from Oklahoma.

[The prepared statement of Mr. Carson follows:]

Statement of The Honorable Brad Carson, a Representative in Congress from the State of Oklahoma

Thank you Chairman Hansen and Ranking Member Rahall for providing this Committee with the opportunity to examine the serious implications of this legislation. I would also like to thank the witnesses for being here today to present their testimony.

H.R. 791 would extinguish treaty claims to land within the State of Illinois by the Miami and Ottawa Tribes of Oklahoma, two Tribes within my district, and the Prairie Band of Potawatomi Nation. Furthermore, the bill would limit the Tribes to monetary damages filed against the Federal Government in the United States Court of Federal Claims.

I have some serious concerns about this bill. While I can appreciate the land claim as a regional issue that the Members from Illinois would like resolved for their constituents, I do not support the Federal Government unilaterally abrogating terms of a treaty entered into in good faith by an Indian Nation. I hope that the parties involved can work to find a better alternative.

In following this issue, I have noted a common statement made by property owners and other affected parties. They state that, although historically Native Americans in this country have been treated very poorly, today's property owners are not to be punished for the sins of the past. With this thought in mind, I would like to conclude my statement with one question—by unilaterally and irrevocably terminating the terms of a Treaty, agreed to in good faith by an Indian Tribe and the Federal Government, are we not in fact repeating the sins of the past?

Mr. HAYWORTH. With that in mind, we welcome our friends from Illinois to the dais if that accommodates their schedules.

And even as we welcome them to the dais, we welcome panel two concerning H.R. 791, and our panelists include Gary Mitchell, the Vice Chairman of the Prairie Band of the Potawatomi Tribe of Kansas; Larry Angelo, the Second Chief of the Ottawa Tribe of Oklahoma; and Jacqueline L. Johnson, Executive Director of the National Congress of American Indians.

Again, we welcome you to our hearing this morning. We look forward to your testimony, and again, the Chair would note that your entire statements would be included in our record, and we would appreciate a summation in a 5-minute time period of the gist of your statements, and then, of course we invite you to remain for questions.

So with that in mind, we are ready to begin the testimony from our second panel, and we would begin with Vice Chairman Mitchell of the Prairie Band Potawatomi Tribe of Kansas.

Mr. Vice Chairman, we welcome you, and we would appreciate hearing your testimony now, sir.

STATEMENT OF GARY MITCHELL, VICE CHAIRMAN, PRAIRIE BAND POTAWATOMI TRIBE OF KANSAS

Mr. MITCHELL. OK; good morning, Mr. Chairman and members of the Committee. My name is Gary Mitchell. I am the Vice Chairman of the Prairie Band Potawatomi Tribe in Kansas. Our reservation is located 20 miles north of Topeka and 80 miles due west of

Kansas City. And in some circles, I am regarded as a tribal historian. I have a B.A. in political science and a master's degree in history, and I wrote a history of our tribe, and we have that on the Internet if anyone wants to read it.

And I am thankful and honored that you asked me to come here and talk in front of this Committee. We would just like to outline—we already had this testimony submitted already, and I would just like to outline some of the things that went on with our tribe here and our association with Shab-eh-nay, the Shab-eh-nay land up there.

We had a treaty in 1829, the Prairie-Du-Chien treaty, and our tribe, we gave up quite a bit of land there in the Illinois area. And we were relocated to Missouri, the Black Country. Then, we went to the Council Bluffs area then to Kansas in 1846. So we had 5 million acres at those two sites. And the Shab-eh-nay land, he was married into our tribe, and that is how the association came about with our tribe. And he had—he believed in our people, and he followed us down when we went to the Council Bluffs area. And he did not want to leave us, because we wanted to stay together.

Then, eventually, he had time to—when he went down there, they made all of these claims that he abandoned his land. And he did not abandon any of the land. They just made an opinion. There was another tribal member—his name was Shab-eh-nera, and they thought that when he died in 1852, that was him that was the man of record. The Shab-eh-nay were still there.

And our focus is not so much like some of the testimony you heard here before. We are not here to say no, we are just going to take this land away from them. What we want to do is to do a fair and equitable manner here. You know, we want to buy the land back at whatever today's prices are. We are not trying to take anything away from anybody. That has not been our focus at all.

Like I said, in that area, Shab-eh-nay, the people thought a lot of him because he helped them there. And they gave him 20 acres of land just south of there, and he eventually died there, and that is where he is buried today. So we have documentation of all of the Boy Scout markers; the school kids, what they did with his—they wanted to remember him. And we have, as this lady over here said, we are submitting the BIA's opinion on that where it says that we have some say in this yet. So we submitted that part of the record, and we have another one that I would like to submit sometime. It is testimony from one of our tribal members. Her name is Elizabeth Hale, and she was 92 at the time she signed this affidavit. And she was the granddaughter of Shab-eh-nay, and she outlines in this affidavit how our governing body was there for the last 150 years, and we have been trying all this time to get this land back. It has not been something that we have done just here in the last few years. This has been an ongoing effort, and that was what our people believed in.

It was our land, and we wanted to keep it. And we are going to try to be as fair as possible in all of our dealings with everybody here. We are not going to go into a court case and say we want this back and take it away from people. Like it was stated earlier, that is not our primary focus here.

And just some of the—I want to, like they said in that movie, the Godfather, I do not want to insult your intelligence here, so I do not want to read word-for-word what I submitted here. So if you want to ask, you know, any questions, I could do the best I can to answer them.

[The prepared statement of Mr. Mitchell follows:]

Statement of Gary Mitchell, Vice Chairman, The Prairie Band of Potawatomi Nation

Good morning, Mr. Chairman and Members of this Committee. My name is Gary Mitchell. I am the Vice Chairman of the Prairie Band of Potawatomi Nation, a Federally recognized tribe presently located on our reservation 20 miles north of Topeka and 80 miles northwest of Kansas City. I am also the Tribe's historian. The Tribe maintains a government-to-government relationship with the United States. Thank you for inviting me to testify before you today on H.R. 791, a bill "to provide for the equitable settlement of certain Indian land disputes regarding land in Illinois."

The Prairie Band does not want a dispute with its Illinois neighbors and wishes a truly fair settlement of its land claim in Illinois. The Shab-eh-nay land and Shab-eh-nay himself have been a part of the Tribe's interest, history and culture for more than 150 years and earlier efforts have been made to pursue the Potawatomi Nation's claim. We do not believe that H.R. 791 would provide such a settlement, as I will explain to you.

Perhaps I should say right up front that the Prairie Band's claim is to 1280 acres of land set aside by treaty, that the reservation still exists, that the Prairie Band is the legal successor in interest to the rights under that treaty and that the Nation does not want to displace any land owners from their homes. As an Indian Nation, we know all too well how that feels and its devastating effect.

May I first tell you about the history of the Potawatomi Nation in relation to the treaty and land referred to in H.R. 791. On July 29, 1829, the Treaty of Prairie du Chien between the United States and The United Nations of Chippewa, Ottawa and Potawatomi, reserved two sections of land in Northern Illinois, the future Dekalb County, as a reservation for the Potawatomi Chief Shab-eh-nay and his Band. Although the Illinois–Wisconsin Potawatomi ceded 5 million acres west of the Mississippi in the 1833 Treaty of Chicago and most were removed west, they did not cede the Shab-eh-nay Band's reservation. Nonetheless, in late 1836, the Shab-eh-nay Band was driven from their land and eventually relocated to Council Bluffs, Iowa, where they merged politically and culturally with most of the Illinois–Wisconsin Potawatomi removed west after the 1833 Treaty. This coalition, including the Shab-eh-nay Band proper, relocated to a new reservation in Kansas after the Treaty of 1846, which officially renamed the United Bands the "Potawatomi of the Prairie," already known as the Prairie Band Potawatomi.Based on falsified deeds submitted by Ansel and Orin Gates, the Gates brothers whose sordid and criminal reputation was well known in Illinois, commonly known as the "Bogus" Gates, part "of the west Paw Paw banditti, linked with horse thieving and counterfeiting," the Commissioner of Indian Affairs determined that Shab-eh-nay's Band had abandoned the Illinois reservation. Then the Commissioner mistakenly concluded that Shab-eh-nay was another Indian, Shobonnier, who died in 1852 and had received his land as an individual grant under the Treaty of 1832.

Based on these misassumptions, on November 5, 1849, the Shab-eh-nay Band's reservation was sold by the United States General Land Office. Shab-eh-nay died in 1859 and the Illinois lands were reserved by the Treaty of 1829 for his band, not for him or his family as individuals. Tribal treaty title is recognized and held in trust by the United States. The lands were not public lands within the General Land Office's jurisdiction. They could neither be abandoned nor sold absent express congressional authorization. The patents issued on the lands in 1850 are void, and the land remains in trust.

When the Shab-eh-nay Band merged with the Prairie Band Potawatomi at Council Bluffs, it conveyed to the Prairie Band any treaty rights the Shab-eh-nay Band held at the time. Thus, the Prairie Band is the rightful beneficiary of the lands originally reserved for Chief Shab-eh-nay and his Band under the 1829 Treaty of Prairie du Chien.

After the disgraceful theft of the Illinois reservation lands, Shab-eh-nay struggled in vain to regain their possession. The Prairie Band has continued that struggle to this date. The historical record is replete with documentation of this 150-year

tragedy. We would be glad to present to you that documentation. The Nation's interest in this land did not arise within the last thirteen years.

The historical record is also replete with evidence of the affection and respect of the non–Indian people in the now Dekalb County area for Shab-eh-nay as a great leader and friend. In that regard, I would like to tell you a few things. By 1857, Shab-eh-nay, disposed of the Band's reservation in northeastern Illinois, moved around the surrounding area continuing to pursue recourse from the Federal Government. Local settlers in the area of Morris, Illinois (about 20 miles southeast of the reservation) took up a collection to purchase a tract of land for Shab-eh-nay to provide him with a permanent home. Shab-eh-nay selected a 20-acre parcel on a bluff overlooking the Illinois River. This land was set aside for the chief and his heirs forever and removed from the tax rolls. P.A. Armstrong, The Black Hawk War 591–593, Springfield, Illinois (1887)(no publisher listed). The deed granting "20 acres off S.E. T420: 33.6, [from] John Batcheller and Wife," dated June 27, 1857, reads as follows:

> "This grant to be held in trust for the use and benefit of Cabana, Indian Chief of the Pottawattamie tribe, and his heirs forever, the use, rents and profits thereof to be enjoyed by said Shabana and his heirs exclusively."

Recorded 9–23–1857, Book R., Page 215, Grundy County Courthouse, Morris, Illinois. That same year, a group of women in Ottawa, Illinois organized a fund-raiser ball to erect a small cabin on the land. Shab-eh-nay attended the ball. Armstrong 592.

In 1958, local Boy Scout Troop 25, Theodore St. Ev. Lutheran Church, Joliet, Illinois, erected a marker on the site of Shab-eh-nay's cabin with a granite memorial; "On this site Chief Shab-eh-nay occupied a cabin given to him by white friends in 1857, resided here until his death, July 27, 1859." Records of the Shabbona Trail Committee, Troup 25, Boy Scouts of America, 1015 Bury Ave., Joliet, IL 60435.

Shab-eh-nay died on July 17, 1859, from an illness following a hunting excursion. He was buried in Lot 59, Block 7, in the Evergreen Cemetery in Morris, Illinois, about twenty miles south east of Shab-eh-nay's cabin. Sextant's Records, Evergreen Cemetery, Morris, Illinois. Evergreen Cemetery in Morris, Illinois. The exact site is Lot 59, Block 7.

A project was begun in 1861 to raise the funds needed for a monument to Shabbona, but the Civil War left the project incomplete. Letter from Frances Rose Howe to Charles Goold (September 1, 1860), on file with Chicago Historical Society.

On August 19, 1897, the 29th reunion of the Old Settlers of La Salle County discussed placing a monument for Shab-eh-nay. It was unanimously agreed that a committee should be formed to devise ways and means for the erection of a suitable monument. Letter of P.A. Armstrong to Miss McIlcvane (17 October 1903), on file with Chicago Historical Society.

The monument decided upon was a large boulder inscribed simply, "Shabbona 1775—1859." It was placed on his grave at Evergreen Cemetery in 1903. Letter from P.A. Armstrong to Miss McIlvane (17 October 1903), on file with Chicago Historical Society.

In 1922, construction began on Shabbona Elementary School near Shabbona Grove. The students of the classes of 1922—1923 dedicated a handsome monument, containing his sculptured image, to Shab-eh-nay. www.homestead.com/shabbonaelementary/history

Now, I would like to turn to the legal aspects of the Prairie Band's efforts to obtain conformation of its Shab-eh-nay claim by the Department of the Interior. For two and one-half years, the Potawatomi Tribe submitted extensive supporting materials from esteemed legal and academic professionals to support the Tribe's claim. In July 2000, the Office of the Solicitor, Division of Indian Affairs, issued two internal legal opinions concluding that based on their review of the Potawatomi Tribe's submitted materials, the Tribe has a credible claim that the lands reserved for the Shab-eh-nay Band by the 1829 Treaty of Prairie du Chien constitute a treaty reservation and that the Prairie Band Potawatomi Nation is the sole successor in interest to the rights of the Shab-eh-nay Band under that treaty. Relying on those opinions, the Tribe's research and additional research by the Division of Indian Affairs, on January 18, 2001, the Solicitor, John Leshy, sent a letter opinion to the Illinois governor and the congressional representative in whose district the Shab-eh-nay reservation is located. The Solicitor concluded that the Prairie Band is the lawful successor in interest to Chief Shab-eh-nay and his Band, that the reservation still exists and that the United States owes a trust responsibility to the Prairie Band Potawatomi for these lands. I have the January 18th Solicitor's opinion with me ask that it be made a part of the record of this earing. I would like to quote just one paragraph from page two of that opinion to you:

> Our research has also led us to the conclusion that the Prairie Band is the lawful successor in interest to Chief Shab-eh-nay and his Band. The Prairie Band did bring a claim against the United States under the Indian Claims Commission Act of 1946 and was paid for the loss of certain lands in northern Illinois. However, the reservation of land for Chief Shab-eh-nay and his Band was specifically excluded from the lands for which the Commission awarded payment. 11 Ind. Cl. Comm. 693, 710 (1962). As a result, we believe the U.S. continues to bear a trust responsibility to the Prairie Band for these lands.

The Tribe has arranged to maintain an option on a portion of privately owned property defined as reservation land by the Department of the Interior. The Tribe wants to clear title of the landowners, have first right of refusal to purchase land within the reservation boundaries from willing sellers and reach an agreement with the state and the county regarding ownership, access to and management of the wildlife refuge and park within the reservation boundaries. The Tribe wants to work with the state, the county and individual landowners.

Please note that during the entire time of our preparation of the legal, historical and anthropological elements of the Tribe's claim and also during the entire time of its consideration by the Department of the Interior, and since the issuance of the legal opinions by the Office of the Solicitor, there has been no animosity or legal threat by the Tribe. Neither, we note, has there been any such animosity or legal threat to the Tribe by the state, county or individual landowners.

Land title records show that approximately 52% of the two sections of reservation land is now an Illinois state park, 7% is a Dekalb County Forest Preserve, 10 %is a 128 acre farm owned by the Ward family, 5% is owned by the Indian Oaks Country Club, 10% is owned by nine separate landowners and the remaining 2% comprises homes on small tracts owned by 21 separate landowners. It is the Tribe's hope that it can reach an agreement with all parties which can be affirmed by Federal legislation. To do so has been the announced policy of the Prairie Band of Potawatomi Nation since 1997. The Nation has advised the Illinois governor's representatives and the Speaker of the House of Representatives in whose district the reservation lands is located of its policy.

H.R. 791 would extinguish the rightful claim of the Prairie Band Potawatomi Nation to its treaty rights under the Treaty of Prairie du Chine. It would rob the Tribe of a significant part of its heritage. I am sure you must ask why money damages are insufficient for the Potawatomi Nation. I ask you simply, "Could money replace your ancestry, your religion, your home?"

We hope that the two opinions, two legal memoranda, from the Division of Indian Affairs of the Office of the Solicitor have been transmitted by the Department of the Interior to you and that they will be made a part of the record of this hearing. If this has not yet transpired, we request that this Committee obtain those opinions, consider them and make them a part of the record.

Thank you for giving me the opportunity to present the strongly held beliefs and legal position of the Potawatomi Nation to you today. I ask that my written testimony be made a part of the record.

[A letter and affidavits submitted for the record by Mr. Mitchell follow:]

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May 29, 2002

The Honorable James V. Hansen
U.S. House of Representatives
Committee on Resources
Washington, D.C. 20515

Dear Mr. Hansen:

Thank you for your May 14, 2002 letter regarding H.R. 791. I am glad to respond to your specific question about payment having been made to the heirs of Shab-eh-nay. The answer lies in the confusion of the identity of two individuals, Shab-eh-nay and Sho-bon-ier, confusion likely resulting from references in the 1979 book, *Built Like a Bear,* by James Patrick Dowd, a biography of Shab-eh-nay. I am submitting with this letter the affidavit of Mr. Dowd attesting that his references to the two individuals as one and the same are in error and attesting how that error occurred. Chief Shab-eh-nay was the leader of an Illinois River Potawatomi Band called the Shab-eh-nay Band. Article III of the Treaty of Prairie Du Chien, July 29, 1829, 7 Stat. 320, reserved two sections of land in Northern Illinois for the Potawatomi Chief Shab-eh-nay (spelling used in the treaty) and his Band. As a treaty reservation for a Band, the land could not be sold by anyone, including Chief Shab-eh-nay, without an Act of Congress.

The man named "Sho-bon-ier," received his land as an individual, not as a reserve for a Band, pursuant to Article II of the Treaty with the Potawatomi, Oct. 20, 1832. On July 21, 1852, in 10 Statutes at Large 20, Congress appropriated $1600.00, for "Shobonnier," conditioned upon the relinquishment of all rights in that land by him or his heirs, to the U.S. The distinction between Shab-eh-nay and Shobonnier is clearly evidenced in the September 26, 1833, Treaty of Chicago, 7 Stat. 433, which Shab-eh-nay and Shobonnier *both* signed.

Shab-eh-nay died in 1859. *See* my May 8th testimony; Sextant's Records, Evergreen Cemetery, Morris, Illinois. Sho-bon-ier died in 1851, having previously petitioned Congress for compensation for his land, and in 1853 his heirs, David Edward Samson, John Aquaneid and Ma-Ma-ke, in consideration of the 1852 appropriation, relinquished to the U.S. their right and title to the 1832 Treaty land. *See* letter from E.A. Haut to Shobonnier's descendants, (Oct. 26, 1877)(on file with National Archives, M 234, Kansas Potawatomi Agency Letters, Roll 693).

The Prairie Band did bring a claim against the United States under the Indian Claims Commission Act of 1946, for underevaluation of certain lands ceded in the 1829 to the United States, but the reservation land reserved for Chief Shab-eh-nay and his Band was specifically excluded from the lands for which payment was awarded because the lands reserved in Article III of that treaty were a valid reservation, had not been sold and therefore should be excepted from the land for which the Potawatomi could be compensated. Citizen Band of Potawatomi Indians v. United States, 11 Ind. Cl. Comm. 693), *aff'd* Citizen Band of Potawatomi Indians v. United States, 179 Cl. C. 473 (1967, *cert. denied, 389 U.*S. 1046 (1968). This decisions are clear evidence that Chief Shab-eh-nay, his Band nor his heirs received compensation in 1852 for the land reserved under the Treaty of 1829.

The issue of genealogy was raised in the May 8th hearing. Although the primary legal issue in the entitlement to 1829 Treaty claim is the political entity, genealogy aside, which succeeded to the treaty rights. I am including the affidavit of certified genealogist, James Patrick Dowd, that the Prairie Band of Potawatomi in Kansas have numerous descendants who are our tribal members, members and that the critical linage of historical documents connects early Illinois Shab-eh-nay family members with an early 1865 Prairie Band tribal roll (or census).

I want to state briefly that the January 18 letter opinion of Solicitor John Leshy was a well-researched, analyzed legal opinion. The Nation submitted five volumes of legal, historical, anthropological and genealogical materials to the Department in January 1998. In July of 2000, two lengthy legal memoranda were written in the Solicitor's Office examining the Nation's claim, and providing ample support for the Leshy opinion. We have submitted for the Committee's files examples of the correspondence between the Tribe and the Interior over the course of three years regarding Interior's intent to bring closure to this issue. The Leshy opinion does, in the first paragraph, refer to his office's "considerable review" of the Nation's claim. We understand that the Committee has requested the July 2000 opinions.

The Shab-eh-nay Band and the Prairie Band have records of attempts over the course of 150 years to regain the 1829 Treaty land. Two recent examples are evidenced by a July 31, 1890, letter of the Minneapolis Interior Field Solicitor to the Minneapolis BIA Area Director and a 1980 memorandum from the BIA Acting Director of Trust Responsibilities to the Minneapolis Area Director. Please note that the latter specifically explains that Shab-eh-nay and Shabonnier are two different individuals and notes that Shab-eh-nay left numerous heirs, none of whom were related to the four heirs of Shabonnier. We can also provide copies of these documents for the Committee's files.

I am submitting for the Committee's printed record a copy of the affidavit of Dr. James A. Clifton, distinguished social anthropologist and ethnohistorian, and expert on the historic bands of Potawatomi and the Prairie Band of Potawatomi. Dr. Clifton attests the accuracy of the statements in my testimony of May 8th and in this letter. He attests that our Nation is the successor in interest to the rights of the Shab-eh-nay Band under the 1829 Treaty of Prairie du Chine and that no other tribe is a successor to those treaty rights.

Finally, I refer you to my testimony regarding the Nation's commitment to negotiation, not litigation. Our claim is strong and well-documented, but we have chosen to seek agreement with the State, the County and the landowners in the 1280 acre claim area (including clearance of title to land whose owners do not wish to convey to us), which can be affirmed in legislation.

The limitations inherent in a brief congressional hearing and its limited record are inadequate to address the Potawatomi claim or to distinguish its merits from others. There is no statute of limitations on tribal land claims. If the Congress wishes to consider legislation extinguishing Indian treaties, the law of the land under the Constitution, it should not do so as proposed in H.R. 791. Such legislation would be a radical departure from 150 years of judicial and congressional policy. If such is even thought about, it should be addressed extensively by Congress in extensive consultation and hearings, as was done with a similar bill in 1982, the "Ancient Indian Land Claims Bill," whose printed Senate Committee record is about three inches deep.

I respectfully request that my letter and three affidavits be printed in the record.

Sincerely yours,

Gary Mitchell, Vice Chair

Enclosure (3 affidavits)

AFFIDAVIT OF JAMES PATRICK DOWD

1. I, James Patrick Dowd, am a certified genealogist who has specialized for more than twenty years in the family history of Potawatomi Indians who inhabited northern Illinois. I am the author of the 1979 book *Built Like A Bear*, a biography of the Potawatomi Chief Shabbona. (Attachment A, Dowd Certification)

2. I understand that the issue of genealogical descendancy from members of the historic Shabbona Band was raised during a hearing held in the House Natural Resources Committee on May 8, 2002.

3. I have examined hundreds of historical documents while conducting extensive genealogical research regarding the Prairie Band Potawatomis of Kansas. These documents include numerous federal documents, including but not limited to annuity payrolls, emigration journals, heirship documents, probate records, allotment rolls, and census records. I have also conducted extensive research at local and regional archives in Illinois and Kansas that shed additional documentary light on the federal record.

4. My research has focused specifically on lineal descendants of the Shabbona Band. The documentation concerning Shabbone Band families show that at least four Shabbone Band members have numerous descendants who are members of the Prairie Band Potawatomi.

5. The critical linkage of historical documents connects early Illinois Shabbona family members with the 1865 Prairie Band tribal roll. Subsequent census and heirship records, probate files, allotment rolls and tribal enrollment files all contribute strong evidence of lineal descent between modern-day Prairie Band Potawatomi members and their Shabbona Band ancestors.

FURTHER AFFIANT SAITH NOT.

James Patrick Dowd James Patrick Dowd May 23, 2002

Subscribed and sworn to before me
this 23 day of May, 2002.

Paulette E Charhut

"OFFICIAL SEAL"
PAULETTE E. CHARHUT
Notary Public, State of Illinois
My Commission Expires 7/13/04

5. At the time, I also inadvertently concluded that Shab-eh-nay had received payment for the sale of his reservation. He did not. In 1992 I found documentation in the National Archives showing that "Shobonnier" descendants received $1,600 for the land reserved in Indiana, not for land in Illinois. Further, none of the three Shobbonier descendants listed in reference to the payment documents descend from Shab-eh-nay.

6. I have reviewed, collected, amassed and referenced thousands of documents about Shab-eh-nay since the 1979 book publication. I have not seen any documents showing that Shab-eh-nay ever received payment for his Illinois reservation.

FURTHER AFFIANT SAITH NOT.

James Patrick Dowd James Patrick Dowd
May 23, 2002

Subscribed and sworn to before me
this 23 day of May, 2002.

Paulette E Charhut

"OFFICIAL SEAL"
PAULETTE E. CHARHUT
Notary Public, State of Illinois
Commission Expires 7/13/04

AFFIDAVIT OF DR. JAMES A. CLIFTON

I, Dr. James A. Clifton, being duly sworn, do hereby state as follows:

1. I am presently the Scholar-in-Residence of the Department of Anthropology at Western Michigan University, and Adjunct Professor with the United States Marine Corps Command and Staff College. In 1990, I retired from my position as Frankenthal Professor of Anthropology and History at the University of Wisconsin in Green Bay. Over the past thirty-eight years I have worked as a professional social anthropologist and ethnohistorian. In this period, my research and writing have emphasized contemporary community studies and longitudinal historical studies of the native peoples of North America, especially so those of the western Great Lakes region. I am author of a dozen scholarly books and monographs and some one hundred and forty essays in peer-reviewed journals and standard reference works. My resume is set forth more fully in Exhibit 1, attached to this Affidavit.

I researched the Prairie Band of Potawatomi intensively in the period 1962-1968, and since that date have continued these anthropological and historical studies intermittently, often with respect to other Potawatomi communities, sometimes in connection with other research projects. I have published numerous books, monographs, and essays concerning Potawatomi culture and history, and on various occasions I have spent time among all of the numerous Potawatomi communities in the United States and Canada, excepting the Citizens Band of Oklahoma. My peers in anthropology and history commonly identify me as a leading scholarly authority on Potawatomi culture and history.

I have also conducted considerable research on and written about other tribes of the western Great Lakes region, with whom the Potawatomi were historically associated. In particular, I have conducted an intensive, long-term study of the application of the American Indian Removal Policy to all the native communities of the Old Northwest, including the Potawatomi and their neighbors. That comparative research is especially pertinent to certain opinions expressed in this affidavit. In connection with this and other research, I have developed a computerized database which abstracts and categorizes salient features of all ratified American Indian treaties, which I have drawn upon for parts of this affidavit.

I have been retained as an expert social anthropologist-ethnohistorian by Morisset, Schlosser, Ayer, and Jozwiak, attorneys representing the Prairie Band of Potawatomi, in connection with matters associated with the consequences of the Treaty of July 29, 1829 (7 Stat, 320). These attorneys have delivered me a series of queries pertinent to these matters; and my responsibility has been to develop documented, fact-based expert opinions in response to each query. In forming these opinions, I have relied on my own publications, the publications of other recognized scholarly authorities, numerous original (primary source) documents, my own research archives, the computerized treaty database aforesaid, and my own special knowledge concerning Potawatomi culture and history. The following statements of fact and opinion are based upon these sources.

2. In negotiating the 1829 Prairie du Chien treaty the United States acknowledged that certain "bands" (i e., local communities) of Potawatomi held two tracts of land located in northern Illinois and southern Wisconsin in recognized (rather than original) Indian title .

3. In the 1829 treaty, these bands were identified as the "United Nations of Chippewa, Ottawa, and Potawatomie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers. This "United Nations" appellation was a legal fiction constructed by the United States for its purposes, especially so as to forestall the possibility that Ottawa and Chippewa bands located in other regions might subsequently press a claim for the two tracts that were being ceded by this treaty. There were in fact small minorities of ethnic Chippewa and Ottawa resident among, as guests and by the permission of these Potawatomi communities, communities which for years had occupied and exploitcd parts of the two areas intensively At the time of the 1829 treaty, the ethnic Chippewa among these Potawatomi villages constituted about eight per cent (8%) of the total population, and the guest Ottawa about fifteen per cent (15%). Moreover, at the time that these Illinois-Wisconsin Potawatomi bands were obligated to evacuate the region (starting in 1833) under the removal policy, nearly all of the visitant Chippewa and Ottawa refused to migrate westward with them, instead electing to move back into Chippewa and Ottawa tribal territory in northern Wisconsin, Michigan, or Canada

4. A more accurate designation for the communities involved in and affected by the 1899 treaty is as follows: the "Potawatomi bands of northern Illinois and southern Wisconsin." Such an appellation is based on the scholarship of various anthropologists and historians, and will be used hereafter in this affidavit. At that time, there were approximately fifteen such band-villages in this region. All of these bands spoke a single separate language in common with all other Potawatomi, which was most closely related to the Chippewa-Ottawa language.

5. By the time of the 1829 treaty, the historic Potawatomi **tribal** polity was breaking up. This was the consequence of two major factors. ONE: the great territorial spread of the Potawatomi population had created internal stresses, problems of coordination and cooperation between the many widely separated Potawatomi villages, as well as regional differences in subsistence patterns and political-economic interests. TWO: in order to deal more effectively with the Potawatomi tribal polity, the United States had been following a policy of divide and dispossess. Indeed, the 1829 treaty was both an example of the application of this divisive policy, and an example of the growing schisms within the historic tribal entity, since for this treaty the United States elected to deal exclusively with the Illinois-Wisconsin bands, and these bands cooperated without consulting others in distant locales. Eventually (by the late 1820s), the consequence of these developments was the establishment of several emergent, geographically isolated, autonomous (multiple band) tribal peoples, and several other isolated, smaller bandcommunities of Potawatomi. By the early 1840s, approximately two thousand Potawatomi, as individuals and family groups, had sloughed off and become assimilated into other tribes and Indian communities, including the Kansas and Mexican Kickapoo, the Mesquakie, and the American and Canadian Chippewa and Ottawa.

6. At the time of the 1829 treaty, one of these several emergent Potawatomi tribal polities consisted of the fifteen or so northern Illinois-southern Wisconsin Potawatomi bands. At that time, these bands were functioning as a solidary coalition in their political-economic affairs—in process of developing a separate tribal polity—particularly so in their dealings with the United States, and they had been doing so for several years beforehand. The external affairs of this coalition of bands or emergent tribal people were then being administered by a type of "council-manager" governing system. The governing tribal "council" was composed of the most influential, well respected senior chiefs of the constituent bands. The "managers" employed by this council were outsiders with special talents and skills (e.g., bilingualism, literacy, bookkeeping, etc.), men such as Billy Caldwell, Alexander Robinson (AKA Chichibin-way), and, the last of these (as of 1846), Richard Smith Elliott. After 1846, the band chiefs and their successors no longer employed an outsider as manager to serve their interests, to assist, and to represent them. These constituent bands were commonly identified by the names of their principal **wkamek** (chiefs).

7. One such constituent band making up this emergent northern Illinois-southern Wisconsin Potawatomi tribal polity was that of a senior chief named Shabeni (this phonetic spelling is used by anthropologists, while the name is rendered in historical documents variously, e.g., Shab-ch-nay). Shabeni, by birth and through his young manhood an ethnic Ottawa, more than a decade before 1829 had settled among and married into the northern Illinois Potawatomi, in a village where he achieved the position of **wkama** (chief). Throughout the balance of his life, until his retirement from an active tribal leadership position (ca. 1846), Shabeni served as a prominent member of this emergent tribe's governing council of band chiefs. In contemporary social science terms, after about 1816 Shabeni had become an assimilated Potawatomi.

8. When the three American treaty commissioners and the Illinois-Wisconsin tribal council assembled to negotiate the 1829 treaty, the Potawatomis' then business manager, the Anglo Irish-Mohawk frontier businessman, Billy Caldwell, handed the American commissioners the written draft of a treaty which had been prepared beforehand on behalf of these Potawatomi.

9. Included in the Potawatomis' own draft of a proposed treaty were two requirements concerning the reservation of several tracts from the areas they offered to cede to the United States. One consisted of "grants" of twelve allotments to as many named individuals, all of them identified as either "half-breeds" or the Potawatomi wives of French and American men. The others consisted of the establishment of three reservations, within one of the ceded areas, for the bands of three chiefs, namely, the Wabansi band, the Awnkote band, and the Shabeni band.

10. The American treaty commissioners accepted the Potawatomis' written proposals concerning reserved tracts (as well as other tenders) and—with one qualification as regards the twelve individual grants—wrote them into the final treaty almost verbatim. These Potawatomi requirements became Article III (for the three band reservations) and Article IV (the twelve individual grants) of the final treaty. This engrossed draft treaty the Potawatomi chiefs and the treaty commissioners signed. Subsequently, the United States Senate ratified the 1829 treaty unchanged, including the language of Articles III and IV.

11. The one qualification, which the American treaty commissioners insisted on, affected only the titles to the twelve individual grants. Article IV clarified this matter by stipulating that these twelve allotments were to be restricted fee titles held by the named individuals. That is, these twelve grants were heritable private property, but they could not be conveyed to third-parties without the permission of the President.

12. No such qualification, nor any other, was attached to the titles of the three band reservations being established by this treaty. Therefore, because these tracts had not been ceded to the United States but had been withheld and allocated to the three named bands as political entities, the recognized Indian title remained intact. That is, these tracts were not the private property of the three named chiefs; and the band reservations could not be conveyed to anyone except the United States.

13. Similarly, there were no other qualifications or restrictions stipulated in Article III of the 1829 treaty concerning the possibility of loss, cancellation, alteration, or conveyance of title to these newly established band reservations, qualifications such as title loss because of abandonment or depopulation, etc. Such restrictions on or qualifications to the continuity of title to reservations were sometimes written into other treaties, whenever the United States saw fit to include such provisions. Therefore, each of these newly established reservations was to be held in unqualified, perpetual, recognized title collectively, as the in-common property of one or another of the three bands, or until the Illinois-Wisconsin Potawatomi saw fit to negotiate their cession to the United States.

14. These three band reservations were contained within the boundaries and were withheld from the cession of one of the two large tracts the Illinois-Wisconsin Potawatomi ceded to the United States that year. This tract is commonly identified as Royce Area 148. There were no known permanent

Potawatomi villages in the second tract, identified as Royce Area 147 (i.e., the so-called "mineral" or "lead mine region"). The latter point is significant because it indicates that these Potawatomi well understood that they did not have to actually occupy an area to hold it in recognized Indian title, and the United States as well.

15. The 1829 treaty established the Shabeni band's new reservation at the site where this band had located itself on Big Indian Creek, more than a decade earlier. The fact that this location was, at the time of its founding, distant from other Northern Illinois Potawatomi band-villages would not have had and did not have any effect on the affiliation of the Shabeni band with the other bands making up the Illinois-Wisconsin coalition. Historically, the Potawatomi expanded their territory by establishing new villages some distance removed from affiliated kindred bands; and, customarily, they periodically moved their villages sites short distances to compensate for the exhaustion of local resources (e.g., declining soil fertility and fuel sources), without affecting their standing regional alliances. So there was nothing unusual about the Shabeni band's original settlement at a distance from others in this coalition.

16. Two documented historical incidents are particularly telling in demonstrating the emergent autonomous tribal identity of the Illinois-Potawatomi bands. FIRST: At a time when the Illinois-Wisconsin bands were being pressured to abandon their western Iowa reservation and to join the Michigan and Indiana Potawatomi (or "Mission bands") on a "national reservation" in Kansas, their subagent at Council Bluffs, Dr. Edmund James, on December 18, 1837, explained to St Louis Superintendent William Clark why they were opposed to doing so. Dr. James stressed, "I hope it will be remembered that they [the Prairie bands] are essentially a distinct people from the Potawatomies of Indiana and by far the larger and more reputable part of them wish to remain so." Dr. James was a highly educated physician-geographer-linguist well experienced with Great Lakes area Indians. SECOND: Following Billy Caldwell's death in 1841, the council of chiefs petitioned the Commissioner of Indian Affairs, requesting that thereafter they be called "The Prairie Indians of Caldwell's Band of Potawatomies." Although this appellation was never formally adopted or used, its significance is that these northern Illinois-southern Wisconsin "Prairie Potawatomi" were signaling to American authorities their intention to continue their opposition to arbitrary treatment, and their desire to be treated as a tribal entity separate from the other Potawatomi groups. This petition is of interest, also, because it is one of the first instances where these Illinois-Wisconsin bands referred to themselves as the Prairie Band Potawatomi.

17. Following the 1829 treaty, which established the Illinois reservation allocated to the Shabeni Band, the emergent Prairie Band tribal council negotiated four successive additional treaties, any one of which might conceivably have included stipulations altering that Illinois reservation's status, by converting its title to fee simple, for instance, or by ceding it to the United States. None of these treaties, as amended and ratified by the Senate, included provisions doing so. These were the treaties of Chicago, September 26 and 27, 1833 (7 Stat., 431 and 442); the treaty of June 5 and 17, 1846 (9 Stat., 853); the treaty of November 15, 1861 (12 Stat., 1191); and the treaty of February 27, 1867 (15 Stat., 531).

18. In Article 3 of the ratified 1833 treaty, two of the three band reservations established by the 1829 treaty were in fact ceded to the United States. These were the reservations of the Wabansi band and the Awkote band, and these two bands were compensated for these cessions. In contrast, Article 5 of the original **draft** treaty in 1833 contained provisions for converting the Shaberri band's reservation title to fee simple. However, the Senate flatly and pointedly refused to give its advice and consent to this change in title, and struck out Article 5. So, once ratified, the 1833 treaty left intact the recognized Indian title of the Illinois-Wisconsin Potawatomis' Shabeni band to this reservation.

19. In the 1846 treaty, the Prairie Band ceded their separate Iowa reservation and accepted, in partial compensation therefor, a share of the new "national reservation" in Kansas. Article 2 of the 1846 treaty stipulated that it was mutually understood that, "these cessions are not to affect the title of said Indians to any grants or reservations made them by former treaties." Therefore, rather than altering the status of the Shabeni Band's title to the Illinois reservation, the 1846 treaty reaffirmed and reinforced it.

20. The 1861 treaty partitioned the "national reservation" in Kansas, which had been established by the 1846 treaty. A pro rata portion of this reservation was allocated to the Prairie band, to be held in-common by them, with the balance of the lands to be allotted in severalty to the members of the now detribalized Citizens (or Mission) band, or declared surplus and sold to third-parties. Nothing in this treaty had any explicit, specific bearing on the Shabeni band's reservation in Illinois.

21. The last of the Potawatomis extraordinarily lengthy series of treaties was that of 1867, reestablishing the Citizens Band on a new reservation in Oklahoma The Prairie Band, whose autonomous tribal status was now fully recognized by the 1861 treaty, was not directly involved in this treaty. So, this treaty had no effect on the title or tenure rights to the Illinois reservation.

22. The Chicago treaty of 1833 obligated the Illinois and the Wisconsin bands to evacuate the ceded territory and to make their way the West, where they were to resettle on lands assigned them in westernmost Missouri on a tract known as the "Platte Purchase." Because at the time the State of Missouri was in process of annexing that same area, the emigrant Potawatomi were allowed to remain on the Platte Purchase tract only temporarily, and they soon agreed to substitute a reservation in westernmost Iowa. This 1833 treaty obligated the Illinois bands to emigrate immediately upon ratification of the treaty, while the Wisconsin bands were allowed a three year grace period before being required to emigrate.

23. The removal provisions of the 1833 Chicago treaty created an anomaly with respect to the Shabeni band. The anomaly rested on two facts. ONE: although the Shabeni band held title to an unceded reservation in Illinois, they also shared in the rights this treaty granted the Illinois-Wisconsin Potawatomi coalition of bands to a new, separate reservation in the West; and, TWO: despite their valid title to the Illinois reservation, like almost all other Potawatomi signatory to this treaty, they were nominally supposed to evacuate Illinois at a time-certain (upon the treaty's ratification) and emigrate to their new lands.

24. So, soon after the 1833 treaty was ratified (February 21, 1835), Shabeni and his band had to confront and cope with several conflicting, interlocked problems. FIRST: he himself remained one of the senior, most influential **wkamek** of the IllinoisWisconsin bands' governing council; but these bands were soon to evacuate their ceded lands and resettle in the West. SECOND: he had to deal with the anomaly of his own band's holding recognized title to both the Illinois reservation and their in-common share of the new, valuable, game-rich tract west of the Mississippi, with the possibility of their being subject to pressure for resettlement there. THIRD: the environment surrounding the Illinois reservation had so changed—with increasing American settlement, the decline or disappearance of the big game herds on which the Potawatomi had depended for subsistence, and competition between the remaining Potawatomi and the settlers for the remaining game—that it was no longer possible for his entire band to sustain themselves by hunting while based on that reservation. FOURTH: the whole Shabeni band, numbering approximately 130-140 persons, could not sustain themselves if confined to the resources available on the Illinois reservation, which consisted of merely 1,280 acres. FIFTH: Article 4 of the 1833 Chicago treaty stipulated that, after three years, all annuities due the Potawatomi signatories would be paid only in the West, and only to those Potawatomi who were located there. 1837 was to be the last year any annuities would be paid to any Potawatomi who had not resettled in the West. (This stipulation did not apply to Shabeni's personal lifetime annuity of $200 granted him by this treaty.)

25. Saabeni, certainly after seeking the consensus of the headmen of his band and his own adult sons, resolved these conflicting problems, in part by adopting a strategy that had been traditional among the Potawatomi for several centuries—fission and migration. When faced with the problem of declining local resources insufficient to support a growing band population, for many decades Potawatomi bands had habitually subdivided or fissioned, with part of the population resettling elsewhere. In addition, Shabeni himself (with some of his family) adopted a pattern of alternating residence, between the collectively held new lands at Council Bluffs and the band's reservation in Illinois. This enabled him, for several years, to continue to discharge his responsibilities as a senior chief in the Prairie Band's tribal council on the Council Bluffs reservation, to collect his family's per capita share of tribal annuities when they were paid at that location, and also, with much reduced population pressure, to maintain his ties to the -- now adequate in size -- Illinois reservation. It should be added that, as one of the principal negotiators of the 1829 treaty, in which the Illinois-Wisconsin Potawatomi bands ceded a tract to which they held recognized title but which they did not actually occupy, and in which no conditions or limitations were attached to perpetual title of the three band reservations established thereby, Shabeni understood that continuous week-to-week occupation of the Illinois reservation was not required of him or his people in order to maintain their treaty granted tenure rights.

26. It should be emphasized that the pattern of alternating residence adopted by Shabeni was not unique. In 1847, for example, Little Miami declined to settle on the newly established "national" reservation in Kansas but instead led most of his band back to Wisconsin, where their descendents remain today.

27. The efforts of Indian Department agents to implement the removal provisions of the 1833 treaty commenced in early summer, 1835. That June, as provided for by the treaty, a large exploring party supervised by William Gordon and led by Billy Caldwell journeyed west and examined the tracts in western Iowa and Missouri that had been set aside as a reservation for the signatories to the Chicago treaty. Then, the first organized removal party of 712 persons was assembled by subagent John Russell and departed Illinois in late September, destination the Platte region. Shabeni had not joined the exploring party, and declined Russell's overtures to add his band to the group of Potawatomi emigrants this "conductor" had assembled that year.

28. Russell was replaced by Gholson Kercheval as the subagent responsible for removing the Illinois Potawatomi bands July 26, 1836, and shortly thereafter the latter started work trying to persuade the remaining bands to join his emigrating party that fall. In his reports on these efforts, Kerdheval indicated that Wabansi and his band had refused his overtures to remove that season. This probably included Shabeni's band, as well, because as events determined Wabansi and Shabeni were making their own joint arrangements for traveling west, independently of Kercheval and party, relying on their own transportation and securing their own subsistence (mainly by hunting along the way). This reluctance to rely on government "conductors" and the services they provided was not unusual for the Illinois-Wisconsin Potawatomi bands: a substantial majority of these, similarly, arranged their own transportation and subsistence, traveling in their own time by routes they preferred. However, this means that there are available no official rolls for Shabeni's party of emigrants. Such lists were kept only by the government conductors for groups whose emigration they managed. Two such lists were required by Indian

Service removal regulations, the first consisting of persons enrolled at the start of the journey, the second of the group actually delivered at their destination. There are none such for Shabeni's band.

29. In Kercheval's journal of events for his party's journey, in October, 1836, he noted that upon arriving at the Mississippi River he had learned that Wabansi and Shabeni's group were traveling west some distance behind him. On several successive days Kercheval halted his group and waited, anticipating that they would join up with him. Wabansi and Shabeni never did so. Instead, they went on their own way, relying on their own means. Shabeni's group halted in the Platte lands, while Wabansi went own to the Osage River tract, where he stayed briefly.

30. Later, in 1837, Shabeni's group, in company with the band of Perish LeClerc, traveled north to the newly agreed on "final" destination, the reservation near Council Bluffs, where they settled in with the other Illinois-Wisconsin bands. In August, 1837, the new Chicago subagent, L. H. Sands, knew that the Shabeni band was located in the West, because at that time he dispatched their share of treaty annuities to the St. Louis Superintendency so that it could be distributed to them there. In the Iowa lands, these relocated bands continued their standard practice of establishing their villages many miles from one another. The Shabeni band's village was probably located about thirty miles south of Council Bluffs, along the bands of Shabbonne Creek, near present Tabor, Iowa.

31. The years spent on the Iowa reservation were momentous for the coalition of Illinois-Wisconsin bands (sometimes called the United bands, or the Prairie Band as they were soon known). There the bands merged, to form a new, autonomous tribal polity. The merged bands continued their older practice of council-manager governance for some years. This tribal council, especially so in its dealings with American authorities, consisted of a small cadre of highly respected, capable, elder band chiefs. These band chiefs, in Potawatomi custom, were serving not only as representatives of their own bands, but as **kiktoweninek** ("speakers") for all Potawatomi on the Iowa reservation. This council, representing the now merged Prairie Band tribal entity, functioned autonomously in governing the external affairs of this tribal people, quite independent of and separate from any other Potawatomi groups located elsewhere. Until his death in 1841, Billy Caldwell continued to serve as their business manager.

32. Between 1837 and early 1846, annually, the Prairie band tribal council was involved in a regular flow of exchanges with American authorities. On the one hand, these consisted of either face-to-face conferences with their Indian agents, the St. Louis regional superintendents, military officers, and treaty commissioners dispatched to negotiate with them, as well as sundry other parties such as Catholic missionaries and Mormon leaders. On the other hand, they consisted of written petitions, memorials, appeals, and letters dispatched to various officials, often to the President. The substance of these communications, verbal or written, was of vital importance to these Potawatomi. In the main, it consisted of their efforts to persuade American authorities to abide strictly by and to implement the terms of the 1833 Chicago treaty; and of their responses to the efforts of American authorities to persuade them to cede their separate reservation and to give up their autonomous status, in exchange for a "national reservation" in Kansas, where Americans officials wished them to "rejoin" the other Potawatomi bands and form "one nation." This latter overture the Prairie band effectively and bitterly resisted, until they finally relented and agreed to the Treaty of 1846.

33. In this period, at least through year-end, 1845, perhaps into early 1846, Shabeni regularly was one of the leading chiefs reported as being active on the tribal council, participating in debates, placing his name on the memorials and petitions, and so on. Indeed, on at least one occasion he acted as **kiktowenine** (speaker) for the tribal council, a position at other time assumed by elder chiefs Wabansi, Padegoshuk, or Miamise. Moreover, Shabeni was one of the cadre of chiefs which hotly debated the three treaty commissioners dispatched to meet with them in the summer of 1845; and he was one of the select delegation the Prairie Band dispatched to Washington in late 1845, there to negotiate with the President and hammer out terms agreeable to themselves for ceding the Iowa lands and resettling in Kansas. Also in this period, Shabeni and family began their practice of alternating stays on the Iowa reservation and on the Illinois band reservation. Consequently, he was not always present in Iowa to participate in tribal council affairs; but neither was any other senior chief invariably present for such deliberations.

34. For this reason, most likely, Chief Shabeni apparently did not participated in the final negotiation of the Treaty of June 5 and June 17, 1846 (9 Stat., 853), although he had been active in working out the preliminaries for same. He certainly did not place his mark on this agreement, signifying his approval of it. Had he done so, he would have signed this treaty near the top of the list of chiefs and headmen, so reflecting his senior rank, in company with such other elder Prairie band chiefs as Miamise and Abtegizkek. Had he done so, the secretary recording his presence would have rendered his name as "Shah-benay," which is the spelling the same treaty commission secretary had been using since 1845. There is a name, third from last of the long list of chiefs and headmen signing this treaty which might be confused with that of Shabeni (or Shah-benay, as the secretary wrote it), but only if handled carelessly. This name the commission secretary rendered, in the hand written draft treaty, as "Sha-bon-nish," although due to a typographical error it appears on the printed treaty as "Shau-bon-ni-agh." This is not the name Shabeni. It is the name of a minor chief or headman whose village before removal had been on the Kankakee River. This person (AKA Chevalier) was apparently a Franco-Potawatomi, and the name itself is not of Potawatomi provenance. The spelling used by the treaty commission's secretary, "Sha-bon-niah," is an American's effort to render in English orthography the Potawatomi pronunciation of a French word, Chevalier (phonetically -- /shval'lje/). Because the Potawatomi language has no /r/, /l/, or /v/ phonemes, speakers of this language pronounce Ws as /shbon'ije/, phonetically, which the secretary rendered as "Shaboniah"

35. There are various conceivable and plausible reasons that might explain why Shabeni apparently did not participate in the final negotiation of the 1846 treaty, and why he certainly did not sign it. In their report, the 1846 treaty commissioners emphasized that all the Prairie band chiefs and headmen who were present gave their consent and signed the treaty. If this is accurate, then Shabeni was not present for these negotiations. Exactly why he was not present, absent further documentation, is an unresolved question. What is known is that, about this time, either somewhat before or shortly after the 1846 negotiations (when he was about sixty-five years old), Shabeni in effect retired from political leadership in the Prairie Band tribal council, eventually returning to Illinois permanently to live out his remaining years. Although Shabeni in his last years settled in Illinois with a several members of his family, the Shabeni band proper remained a constituent part of the Prairie Band in Iowa, until they resettled together in Kansas soon after the 1846 treaty was ratified.

36. Once the Prairie band moved onto the "national" reservation, they continued to express their separate political identity by deliberately isolating themselves geographically, minimizing contacts with the Mission bands from Indiana and Michigan. The latter, by-and-large, established their settlements south of the Kaw River. The Prairie Band placed their settlements in the northwest corner of this new reservation. In so doing, the Prairie Band were following an ancient practice, that of expressing political-cultural differences and their separate social identity as a distinct people spatially.

37. Soon after their settlement on the Kansas reservation, the older band social organization which had characterized the Illinois-Wisconsin Potawatomi in earlier generations began breaking down. By the early 1860s and after, it is not possible for an ethnohistorian to discern separate and distinct bands. One reason for this was that the elder generation of influential band chiefs were now deceased or aged and incapacitated. But the central cause was that, confined as they were to a highly restricted land-base, there was no longer sufficient territory for them to establish widely separated band-villages. In any respect, the memberships of the several bands melded into one tribal population on this much smaller reservation, including the members of the Shabeni band.

38. Nevertheless, the Prairie Band tribal council continued functioning, and has done so to the present day. However, by the 1860s, rather than representing geographically isolated bands and villages, the chiefs and headmen represented segmentary kin groups, such as patrilineal clans and lineages or extended families, the memberships of which were, increasingly, intermixed geographically. Included among these were the descendants of the Shabeni band, for some time including most of Shabeni's lineal and collateral descendants. So, despite the 1846 treaty, the preamble of which represented an American conception of a "unified nation," the Prairie Band successfully sustained their separate existence.

39. For example, starting in 1853, for several years there was a concerted effort on the part of the United States to break up and to diminish or disestablish all the reservations in eastern Kansas, which had been awarded to the tribes relocated from the Great Lakes-Ohio valley region under the now obsolete removal policy. These were to be allotted in severalty to the members of the resettled tribes, with the members eventually to become citizens, and the "surplus lands" of the reservations placed on the market and sold. The Kansas Potawatomi, led by the Prairie Band chiefs, refused to accept this and (as it happened temporarily) avoided the application of this policy to all Kansas Potawatomi. So, by the winter of 1854-1855, the "national reservation," including the Prairie Band Potawatomi area, was the only intact reservation remaining out of all those established for the resettled eastern tribes.

40. That changed six years later. Nevertheless, the separate political existence of the Prairie Band tribal entity was confirmed by the United States with the Treaty of November 15,1861 (12 Stat., 1121). By the terms of this treaty, the members the Mission bands (hereafter known as the Citizens band), accepted a share of the Kansas reservation, which share was allotted to them in severalty, with provisions for fee patenting these allotments, and American citizenship. As a consequence, the Citizens Band was detribalized, and was no longer to have government-to-government relations with the United States. Not so the Prairie Band. Their tribal council refused to countenance such steps, insisted on remaining a tribal entity, and retained a pro rata share of the reservation, which provisions the 1861 treaty sanctioned, stipulating that their now much diminished reservation would be held in-common, i.e., in recognized Indian title.

41. A quarter century later, following passage in 1887 of the General Allotment (Dawes) Act, the United States undertook to implement this legislation by securing Prairie Band consent to the allotment in severalty of their reservation. The Prairie Band's leaders fought a bitter, losing battle against this, preferring to continue their in-common tribal ownership of their remaining lands. In the end, the United States arbitrarily allotted the reservation without their consent, with no attention to local community or kinship ties and preferences. Thus the Prairie Potawatomi's membership was left scattered willy-nilly across the reservation, with each family or individual holding title to a small, privately held patch of ground. Once their titles were converted to

fee simple, the process of land loss began. So, by 1962, the Prairie Band held only eighty acres in common, with but twenty-two percent (22%) of the original reservation lands (out of 121 square miles or 77,440 acres) still held in restricted fee titles or by multiple owners (i.e., heirship tracts).

42. Politically speaking, the contemporary Prairie Band of Potawatomi, a federally recognized entity with a tribal government conducted under the terms of an Indian Reorganization Act Constitution and By-laws, is the direct, lineal successor to the coalition of northern Illinois-southern Wisconsin bands who negotiated the Treaty of 1829. That coalition of bands remained together following their several dislocations and treks, first to the Platte Purchase, thence to the Iowa reservation, finally to the corner of the "national" reservation they elected to occupy in Kansas, finally on their own separate reservation which was established at their insistence by the Treaty of 1861, where they remain today. Over the years they were known by several different names, including: the United Bands of Chippewa, Ottawa, and Potawatomi, the United Bands, the Prairie Indians of Caldwell's Band of Potawatomies, and, finally, simply the Prairie Band of Potawatomi. These are no more than successive synonyms for the same historic political entity.

43. Throughout this period, until the Indian Reorganization Act was imposed on them in the mid-1960s, the Prairie band was governed by a tribal council of their own selection, according to their own preferences. Originally and for many years, this council consisted of the **wkamek** (chiefs) of the constituent bands, with the most senior and influential chiefs acting as an executive cadre in important dealings with the United States. For some years thereafter, after the band organization had fallen into disuse, the leadership of this tribal council represented clans and extended kin groups. By the early 1960s, the tribal council consisted of the key leaders of a set of unstable parties or factions, mostly kin group based. Since their IRA constitution was approved, their leaders have been elected by secret ballot, but for the most part they continue to represent extended kin groups. Throughout this political history, the politics of the Prairie Band have been kinship based, whether band or clan or kindred.

44. Interestingly, while the contemporary Prairie Band's secular affairs are managed by a democratically elected tribal council which follows Robert's Rules of Order in its decision making, these Potawatomi have also preserved in a second institutional form their ancient, traditional political structure, but in a sacred arena. In their Dream Dance Religion (or Drum cult) there are six segments or religious sodalities, iterating the ancient clans or bands in ritualized form. Each of these six sodalities consists of a series of formal "offices," or ritual roles, including Chief, Speaker, Pipeman, Herald-Messenger, Chief of Warriors, Chief Woman, and so on. These are the traditional leadership roles of the early historic Potawatomi bands. Following a ritual calendar, every season, and at other times during the year, the Prairie Band adherents of this religion come together and reconstitute, in a sacred place, these ancient political institutions, there exhibiting their preferences for traditional values and ways.

45. One of these six ritual sodalities commemorates the memory of Chief Shabeni, being named for him. In the early 1960s, the Shabeni Drum was kept in the home of **Pkuknokwe**, Shabeni's great-grand-daughter, then reputed to be over one-hundred years of age. **Pkuknokwe**'s husband, Frank Masha, was also a (collateral) descendent of Shabeni. This was the only one of the six sacred Drums named for one of the prominent **wkama** (or any lesser chief or headman) dating to the early nineteenth-century period of the Prairie band's Illinois-Wisconsin history. There was, for example, no Caldwell, or Abtegizhek, or Miamise, or Padegoshuk Drum, nor any other celebrating the memory of one of Shabeni's contemporaries. Thus, in a sacred arena, the contemporary Prairie Band Potawatomi preserve and honor the political identity and the institutional forms of the historic Shabeni band.

46. In many other respects -- in language preservation, food-preferences, traditional medicines, cosmology, values, etc. -- the Prairie Band is one of the two most culturally conservative of all the numerous Potawatomi communities in the United States and Canada, a close second only, perhaps, to the Forest County Potawatomi of Wisconsin, a much smaller and far more isolated community.

47. There is a story, told by a Citizens Band Potawatomi to anthropologist Alanson Skinner in 1923, to the effect that those Potawatomi who had sided with the dissident Sauk leader, Black Hawk, had denounced Shabeni because he had betrayed Black Hawk's plans and led his people into American ambushes. There is no historical evidence in support of any part of this derogatory legend, and much that contradicts it. In the first place, none of the Potawatomi are known to have "sided" with Black Hawk during his incursions, which precipitated the "Black Hawk War." Instead, the Potawatomi either entirely avoided these Sauk, or they sided actively with Americans, as did Shabeni and numerous others. Moreover, during this period Shabeni had no direct contact with Black Hawk and his "British band," so he could not have led them into ambushes or betrayed their plans, assuming that Black Hawk had a plan of some sort. Again, this legend is counterfactual, little more than malicious gossip.

48. There is no other Potawatomi community, band, tribe, nation, or group in the United States or Canada which can legitimately claim to be the political successor to the historic Shabeni band of northern Illinois, other than the Prairie band.

49. It is true that a good many of Shabeni's own lineal and collateral descendants live in other places, are not enrolled members of the Prairie Band, and may be enrolled in (or are presently seeking enrollment in) some other Potawatomi band, as well other tribes such as the Kansas Kickapoo. Shabeni had several wives, who bore him numerous children. Six to eight generations later, these descendents have multiplied considerably. Some of these disaffiliated themselves with the Prairie Band by migrating elsewhere in search of better economic opportunities. Some married spouses in other tribes, where their children were enrolled, losing their legal Potawatomi identity. If any portion of these descendants assemble temporarily, they would constitute what anthropologists call an "ancestor based kindred," rather like a collection of persons who might claim descent from Thomas Jefferson, but who otherwise have little to do with one another. This would constitute a special or single-purpose secondary group or voluntary association, not a band or community of any sort, which are face-to-face groups characterized by intensive, regular interaction for many, varied purposes. In any respect, such persons are merely some, not all of Shabeni's descendants. Of greater importance, the Treaty of 1829 did not establish the Shabeni band's reservation as his private property, which could thereby have been passed on to his progeny. This was established as a collectively owned reservation, with the title held by a political unit, the Shabeni band, which long since has been merged politically into the Prairie Band of Kansas. Further, in 1833, when the United States Senate was presented with a draft treaty containing a proposal to convert the band's collective title to a conveyable or heritable fee simple title in Shabeni's name, the Senate flatly rejected this, leaving the collectively held band title to this reservation intact.

I, Dr. James A. Clifton, declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 5th Day of January 199X

James A. Clifton, Ph.D.

Subscribed and sworn to me this 5th Day of January 199X.

"OFFICIAL SEAL"
TIMOTHY S. RUSSELL
Notary Public
Johnson County, KS
My Commission Expires 9/26/2002

Notary Public

Mr. HAYWORTH. Well, Mr. Vice Chairman, we very much appreciate both your written testimony, your oral testimony here today and your generous offer to answer our questions. We are sure that there will be questions that will be forthcoming.

I just would make a note that Ms. Hale's affidavit, per your request, will be included in our record today without objection, and we appreciate the opportunity to have that as part of your testimony and point of view as well.

[The affidavit of Ms. Hale follows:]

AFFIDAVIT OF ELIZABETH HALE

1. I, Elizabeth Hale, am a current member of the Prairie Band Potawatomi Tribe. I have been a member since my birth on March 11, 1905 .

2. I am very knowledgeable of the Prairie Band Potawatomi's history, culture, and traditions. Our people today, like our ancestors before us, strive to conserve our old traditions and ancestral culture. Each generation passes to the next our history, traditions, and culture through our strong oral tradition. We teach our children at a young age our tribe's history, and to respect and practice the ways of our ancestors. Our traditions play an important role in our lives, and define who we are as a people.

3. Our tribe has existed for over 150 years. Our history says that the Prairie Band came from Council Bluffs, Iowa, in 1847 and settled in the northern part of the Potawatomi reservation. Different bands from elsewhere settled on the southern part. A treaty in 1861 recognized that the northen part of the Kansas reservation belonged to the Prairie Band Potawatomi and reserved this land separately for us. Today, we still reside on this reservation. Our tribal council has also existed for over 150 years. It is how we have governed ourselves since we were at Council Bluffs.

4. Chief Shab-eh-nay and the members of his Band have been preserved in the Prairie Band Potawatomi's oral history for as long as our tribe has been in Kansas. The Prairie Band people have always recognized their descendence from the Shab-eh-nay Band.

5. As a child I was taught that my grandfather was Shab-eh-nay's grandson. I am Shab-eh-nay's great-great granddaughter. And I was also taught since a child that our tribe's reservation in Illinois was stolen from Chief Shab-eh-nay by the government and settlers in the 1840's.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 16th day of October, 1997.

Elizabeth Hale

Subscribed and sworn to me this 16th Day of October, 1997.

James M. Potter
NOTARY PUBLIC
STATE OF KANSAS
MY APPT EXPIRES 9-26-2000

Notary Public

Mr. HAYWORTH. So we thank you very much for your testimony, Mr. Vice Chairman, and we will have questions.

Now, we turn to Larry Angelo, second chief of the Ottawa Tribe of Oklahoma. Chief Angelo, welcome, and we appreciate your testimony now.

STATEMENT OF LARRY ANGELO, SECOND CHIEF, OTTAWA TRIBE OF OKLAHOMA

Mr. ANGELO. Good morning, Mr. Chairman, members of the Committee. I am Larry Angelo, Second Chief of the Ottawa Tribe of Oklahoma, and I thank the Committee and Chairman for inviting me to testify on behalf of the Ottawa Tribe of Oklahoma on H.R. Bill 791, a bill to extinguish our recognized treaty title and authorize condemnation of property rights of the Prairie Band of Potawatomi and the Ottawa Tribe of Oklahoma to the Shab-eh-nay reservation in DeKalb County, Illinois.

This legislation is intended to take our tribal property rights, confirmed by treaty, to the two sections of land as described in Article 3 of the Prairie-Du-Chien Treaty of 1829. The Ottawa Tribe agrees that a legislative solution is needed; however, that that solution is to honor the Prairie-Du-Chien Treaty of 1829 and pay for the lands recognized by treaty title.

As Congress is aware, Fifth Amendment taking is worth hundreds of millions of dollars. The background of this bill or our role in this is the bill before you in H.R. 791 would extinguish treaty title to our land in Illinois, which includes a reservation of two sections of land, 1,280 acres, that was set aside for Ottawa Chief Shab-eh-nay and his Ottawa Band in the Treaty of Prairie-Du-Chien, dated July 29, 1829.

The Ottawa Tribe of Oklahoma did receive a letter from the Office of the Solicitor on January 18, 2001. In that opinion letter, Solicitor John Leshy determined that the Prairie Band of Potawatomi is one successor in interest to the Shab-eh-nay's band. The Ottawa Tribe responded stating our research was ongoing, and a report would be forthcoming. My tribe has completed its historic review and can document that our Ottawa Tribe, in fact, has an interest in the land as a successor-in-interest.

About H.R. 791: this bill is inconsistent, because it extinguishes title to existing property rights based on treaties. These are not just aboriginal claims. Enactment of the legislation relieves the concern of non-Indian landowners in Illinois and transfers the debt for taking private tribal property to the U.S. Government. Although it also purports to extinguish the title of any Indian tribe or individual to claims filed in Illinois within 1 year of enactment of the bill, it does not extinguish Congress' obligation to the Ottawa Tribe.

The bill does not provide for the payment of compensation for taking of tribal or individual Indian lands. In this instance, if this bill is enacted into law, the United States will be responsible for paying for the present value of the land plus other damages to our treaty-reserved rights.

In conclusion, the Ottawa Tribe of Oklahoma agrees that the claim will require a legislative solution. However, this particular bill in its present form is not beneficial or helpful to any tribe in

the State of Illinois, nor is it in the best interest of the United States.

Attempts were made to resolve this land claim issue with the State of Illinois from 1997 to 1999. All these attempts have failed. The message received from the Illinois representatives was we got rid of the damn Indians over 100 years ago, and we are not going to have them back. This continues to be a historical theme of racism toward American Indians.

Therefore, the Ottawa Tribe of Oklahoma strongly opposes H.R. 791 unless the issues referenced above are addressed, and the land is returned to us, or the bill is modified to authorize just compensation for past and future damages.

I thank you, and I am ready for questions whenever you want.

[The prepared statement of Mr. Angelo follows:]

Statement of Larry Angelo, Second Chief, Ottawa Tribe of Oklahoma

Good morning, Mr. Chairman and members of the Committee. I am Larry Angelo, Second Chief of the Ottawa Tribe of Oklahoma. I thank you Mr. Chairman, and members of the Committee for permitting me to testify on behalf of the Ottawa Tribe of Oklahoma on H.R. 791, a bill to extinguish our recognized Treaty title and authorize condemnation of the property rights of the Prairie Bank of Pottawatomi and the Ottawa Tribe of Oklahoma to the Shab-eh-nay reservation in Dekalb County, Illinois. This legislation is intended to take our tribal property rights confirmed by treaty, to the two sections of land as described in section III of the Prairie–Du–Chien Treaty of 1829. The Ottawa Tribe agrees that a legislative solution is needed: that solution is to honor the Prairie–Du–Chien Treaty of 1829 and pay for lands recognized by Treaty Title. As Congress is aware, this Fifth Amendment "taking" is worth hundreds of millions of dollars.

Background

The bill before you, H.R. 791 would extinguish Treaty Title to our land in Illinois, which includes a reservation of two sections of land (1,280 acres) that was set aside for the Ottawa Chief Shab-eh-nay and his Ottawa Band in the Treaty of Prairie-du–Chien, dated July 29, 1829.

The Ottawa Tribe of Oklahoma received a letter from the Office of the Solicitor on January 18, 2001. In that opinion letter, Solicitor John Leshy determined that the Prairie Band of Pottawatomie is one successor in interest to Shab-eh-nay's Band. The Ottawa Tribe responded stating "our research was on-going and a report would be forthcoming." My Tribe has completed its historic review and can document that our Ottawa Tribe, in fact, has an interest in the land as a successor in interest.

H.R. 791

The bill is inconsistent because it extinguishes title to existing property rights based on treaties. These are not just aboriginal claims. Enactment of the legislation relieves the concern of non–Indian land owners in Illinois and transfers the debt for taking private Tribal property to the United States government. Although, it also purports to extinguish the title of any Indian Tribe or individual Indians to claims filed in Illinois within one year of enactment of the bill, it does not extinguish Congress obligations to the Ottawa Tribe. The bill does not provide for the payment of compensation for "taking" of Tribal or individual Indian lands. In this instances, if this bill is enacted into law, the United States will be responsible for paying for the present value of the land, plus other damages to our Treaty reserved rights.

Conclusion

The Ottawa Tribe of Oklahoma agrees the claim will require a legislative solution, however this particular bill in its present form is not beneficial or helpful to any Tribe in the State of Illinois. Nor is it in the best interests of the United States. Attempts were made to resolve the land claim issue with the State of Illinois from 1997 to 1999. All the attempts have failed. The message received from the Illinois representative was, "We got rid of the Damn Indians over one hundred years ago and we are not going to have them back". Therefore, the Ottawa Tribe of Oklahoma strongly opposes the passage of H.R. 791, unless the issues referenced above are ad-

dressed and the land is returned to us or the bill is modified to authorize just compensation for past and future damages.

[Mr. Angelo's response to questions submitted for the record follows:]

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON RESOURCES
RE: OTTAWA TRIBE OF OKLAHOMA
RESPONSE TO QUESTION
PRESENTED BY
HON. JAMES V. HANSEN, CHAIRMAN

May 29, 2002

QUESTION: *The Potawatomi and Ottawa Tribes' land claim rests on the theory that the* 1829 *treaty created recognized title in a permanent reserve that could only be extinguished by Congress, and that Congress has failed to validly extinguish that reserve. It is the Committee's understanding that in* 1852, *Congress appropriated $1,600.00 for payment to Indians claiming descent from Shab-eh-nay, and that Congress intended that this payment would extinguish the* 1829 *treaty reserve.*

How is this not extinguishment of the 1829 *reserve to which you 're claiming title?*

RESPONSE: The Ottawa Tribe of Oklahoma has been ask to respond to the above question in an attempt to clarify certain issues regarding our claim to the 1829 treaty reserve land title of "Shab-eh-nay and his band."

Requests were made to the Office of Native American and Insular Affairs on May 17,2002 to obtain the documents that led to the Committee's "understanding that 1852, Congress appropriated $1,600.00 for payment to Indians claiming descent from Shab-eh-nay, and that Congress intended that this payment would extinguish the 1829 treaty reserve." The Ottawa Tribe was denied any documents from the Office of Native American and Insular Affairs. Their reasons are unknown. We can only presume the Committee was referring to the Act of July 21, 1852, 10 Stat. 20 which "appropriated $1,600.00 to Shobonier or his heirs."

Did Congress extinguish the 1829 Prairie-du-Chien treaty reserve land title given to Shab-eh-nay and his band by the Act of July 21, 1852? The answer is unequivocally no! The assertion that this occurred is factually inaccurate and emphasizes the confusion that has occurred because Shab-eh-nay and Shobonier (aka Chevalier) were contemporary leaders of separate bands that received reservations in provisions of two distinct treaties and two different States. The property which was the subject of the Act of July 21, 1852, 10 Stat. 20, was land which was reserved for the Chief, Sho-bo-nier. He received a reservation of two sections of land near his village under Article 2 of the Treaty of October 20, 1832, 7 Stat. 378. The Treaty of October 20, 1832, also referred to as the Treaty of Tippecanoe, contained cessions of land by the United Bands of Ottawa, Potawatomie, and Chippewas of the prairie and Kankakee to the United States. Article 2 of the treaty provided that several tracts for individuals would be excluded from the cession. Among the areas excluded was a tract of two sections (1,280 acres) for Sho-bon-ier at his village. Sho-bon-ier, who was French and Potawatomi, was a less prominent

chief than Shab-eh-nay, who was full Ottawa. Because he was half-French, Sho-bon-ier was referred to in contemporary documents as Chevalier. Article 4 required the United States to pay money to a number of individuals for the loss of their horses. Among those receiving such payments was Sho-bon-ier, even though he was a signatory to the treaty. Many Chiefs signed the treaty, including Shab-eh-nay, whose name was transcribed as Shab-eh-neai. Shab-eh-nay was representing the United Bands of Ottawa, Pottawatomie, and Chippewas.

Sho-bo-nier's village was in Indiana and was not part of the land ceded to the United States in Illinois in the 1832 treaty (Reserved File B-27, National Archives). Letter of July 29, 1851 from Parks and Elwood, attorneys for Shab-eh-nay, to Commissioner of Indian Affairs Lea, and letter of September 24, 1863 from Acting Commissioner of Indian Affairs Mix to Secretary of the Interior Usher. Due to the mistaken description of his village's location, Sho-bon-nier did not receive actual possession of any land in the ceded area. Letter of September 24, 1863 from Acting Commissioner of Indian Affairs Mix to the secretary of the Interior Usher. However, it was determined that he should be paid an amount equivalent to the value of two sections of land in the area of the cessions. Letter of July 1,1839 from Thomas H. Crawford, War Department's Office of Indian Affairs to Major John Dougherty. Although, Sho-bo-nier died in 1851, his heirs received payment for his interests in two unspecified sections of land in the ceded area in accordance with the Act of July 21, 1852. On March 21, 1853, the heirs of Sho-bo-nier relinquished their claim to the land for $1,600.00. Letter of October 26, 1877 from E. Haut to S.C. Linn. *(The documents referenced in this letter are in reserved File B-27 at the National Archives. Transcripts of these documents were published in James Dowd's book Built Like a Bear at pages* 115-133.)

The reservation for Shab-eh-nay and his band in the 1829 treaty is not related in any way to the reservation for Sho-bo-nier in the 1832 treaty. In a letter dated October 16, 1837, Representative Albert S. White wrote to Secretary of War Jacob R. Poinsett about two sections of land reserved for Sho-bo-nier, asking for detailed information on the proposed location of Sho-bo-nier's Reservation, which he described as Sections 8 and 17 of Township 34 North, Range 8 West in Lake County, Indiana. The Shab-eh-nay Band Reservation includes Section 23, the west half of Section 25, and the east half of Section 26 in Township 38 North, Range 3 East, Third Principal Meridian in Illinois. These descriptions clearly indicate that two distinct reservations were created by separate treaties at different times. Acting Commissioner of Indian Affairs Charles E. Mix, confirmed that the reservations were distinct in a letter to J.P. Usher, Secretary of the Department of the Interior dated September 24, 1863. In that letter, Commissioner Mix stated it appeared that Sho-bo-nier's Reservation had never been located, but that Sho-bo-nier's right to the land had been purchased by the United States in 1852. *(This letter is in Reserved File A-416 at the National Archives.)*

It has been clearly established that Shab-eh-nay and Sho-bo-nier were two different individuals. Both men are listed as signatories to the Treaty of September 26, 1833 at Chicago. Sho-bo-nier died in 1851, which is two to three years before Shab-eh-nay engaged attorneys to help him regain

possession of his band's reservation. Furthermore, burial records indicate that Shab-eh-nay died in Grundy County, Illinois in 1859.

Conclusion: Shab-eh-nay and his Band obtained recognized land title to a reservation of 1,280 acres near Paw-Paw Grove, Illinois in the Treaty of Prairie-du-Chien of 1829. The reservation became known as Assiminikon. Through the unauthorized acts of Department of the Interior officials, the United States purported to sell the Shab-eh-nay Band Reservation in fee to non-Indian settlers as part of the public domain. The sales were conducted by the General Land Office and fee patents were issued on the mistaken assumption that the Reservation had been abandoned by Shab-eh-nay's Band, thereby merging legal and equitable title in the United States. Shab-eh-nay's Band was forced to remove in the fall of 1836 and the Ottawa Tribe of Oklahoma members are descendents of this Band. Sho-bo-nier and Shab-eh-nay are two different individuals with land reserves in two different States. Because the Congress of the United States has not extinguished the recognized title of Shab-eh-nay's Band, the Reservation still exists.

Respectfully,

Larry Angelo Second Chief,
Ottawa Tribe

Mr. HAYWORTH. Thank you, Chief Angelo. I appreciate your testimony.

And finally in panel two, we hear from the Executive Director of the National Congress of American Indians, Jacqueline L. Johnson.

Ms. Johnson, welcome. We look forward to hearing your testimony.

STATEMENT OF JACQUELINE L. JOHNSON, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Ms. JOHNSON. Good morning, Mr. Chairman and members of the Committee. As stated, my name is Jacqueline Johnson. I am the Executive Director of the National Congress of American Indians, and I thank you for inviting us to testify for you today on H.R. 791, a bill regarding certain Indian land disputes in Illinois.

The National Congress of American Indians, NCAI, was established in 1944 and is the largest and the oldest, most representative national American Indian-Alaskan Native tribal government organization. We appreciate the opportunity to be able to participate on behalf of our member Indian nations in this legislative process of the U.S. Congress to provide this Committee with our views.

NCAI is opposed to H.R. 791 and requests this honorable Committee, after giving this bill full and fair consideration, not to report H.R. 791 to the full House of Representatives. In support of this request, we ask that NCAI Resolution MSH-01021, opposing H.R. 791, which is attached with my testimony, which was passed at the 2001 mid-year session of the National Congress of American Indians, be made part of the record of this hearing.

We oppose H.R. 791 because it would extinguish any and all claims to land within the State of Illinois by three tribes whose

claims arise from treaties entered into with the United States. These tribes are the Potawatomi Tribes of Kansas; the Miami Tribe of Oklahoma; and the Ottawa Tribe of Oklahoma, who entered into the 1829 Treaty of Prairie-Du-Chien, the Treaty of Grouseland and the 1816 Treaty with the United States, Tribes of the Ottawas, Chippewas and Potawatomis.

The Indian tribes party to these treaties believe that the United States made solemn commitments, legally binding both to the tribes and to the United States. They believe that they would be able to live forever upon these lands reserved as their homelands from the vast areas that they once occupied.

The faith of these tribes proved to be unfounded. The tribes never ceded these lands but were forcefully driven from them, and these lands were sold to others in the United States. I will not here address the particular facts of these three tribes named in H.R. 791. In particular, the history of each tribe and treaty named in this bill differ in each case and underscores the inequity of sweeping all of the claims together and dealing with them exactly in the same manner with this legislation.

I want to emphasize that there is an appropriate role for Congress' involvement in and oversight of Indian land claims, including land claims in Illinois. But that is not at this early stage. The Federal courts and the legal process is there for a reason: because Indian land claims are extremely fact-specific and based on treaties and historical circumstances, Congress is not in a good position to declare what is fair until there has been a full development of the record and an effort to settle by the parties.

The better process is one that first allows the validity of the land claim to be legally tested, and we should note that the land claims are very difficult to prosecute. It also becomes clear that a claim is a valid claim, and when the tribe should have a chance to work with the state and the local government and the land owners through settlement discussions to come to a resolution. Everyone gets a hearing; all the issues are placed on the table, and the parties can forge relationships, resolve issues and hopefully come to a resolution that everyone can live with.

Alternative dispute resolution is a very good option, because parties have the ability to create solutions to fit unique circumstances and because parties have a much better chance of coexisting over a long period of time with a negotiated resolution than with one that is dictated by the court or by Congress. This is a process that has been working for the last 25 years and has been effective in coming to resolution on quite a number of very significant Indian land claims. There has never been an Indian land claim that went all the way to a final judgment where a Federal court has thrown non-Indians off their land.

There are incentives for parties to work together and to come to a resolution. We should encourage Congress and the administration to stay the course and to continue to strive for equitable settlements of Indian land claims. Congress must ratify any settlement involving land claims, so Congress always retains the ultimate control over the land claim process as outlined above.

After the parties have had a chance to develop a record and come to a resolution, that is when Congressional action is appropriate.

In Illinois, that has not had the chance to occur. H.R. 791 would short-circuit the legal process and the settlement process and perpetuate even more injustices against these three tribes. Even if H.R. 791 were to become law, the tribes would be back here next year and for the next thousand years attempting to resolve their claims.

Congress cannot simply resolve Indian land claims in this one-sided fashion. It is my hope that there will be agreement among the parties in Illinois that the tribes will receive fair resolution of their claims, and there will be no harm to the people who have done no wrong. I sincerely believe this would happen if the parties would set down together and work to resolve their issues. I know that at least one of the tribes has withdrawn its lawsuit, and the others are working to resolve their issues in the fairest way possible.

However, I also think that the controversy that has been raised in Illinois should be placed in its proper context. Indian people were thrown out of their homes, and their treaty lands were taken from them. Now, we are going through some minor amount of legal discussion in Illinois regarding these lands and fair resolution of the tribal claims, and in balancing the equities, Congress should not choose to undermine the legal rights of tribes.

Thank you for this opportunity to be able to appear before you today, and I appreciate the work of the Chairman and the members of this Committee, and we would be willing to assist if there is anything that we can possibly do. Thank you.

[The prepared statement of Ms. Johnson follows:]

Statement of Jacqueline Johnson. Executive Director, National Congress of American Indians

Good morning Mr. Chairman and Members of the Committee. My name is Jacqueline Johnson. I am the Executive Director of the National Congress of American Indians. Thank you for inviting us to testify before you on H.R. 791, a bill regarding certain Indian land disputes in Illinois. The National Congress of American Indians (NCAI) was established in 1944 and is the oldest, largest, and most representative national American Indian and Alaska Native tribal government organization. We appreciate the opportunity to participate on behalf of our Member Indian Nations in the legislative process of the United States Congress to provide this Committee with our views.

NCAI opposes H.R. 791 and requests that this honorable Committee, after giving the bill full and fair consideration, not report H.R. 791 to the full House of Representatives. In support of this request, we ask that NCAI Resolution MSH–01–021 opposing H.R. 791, which passed at the 2001 Mid–Year Session of the National Congress of American Indians, be made a part of the record of this hearing.

We oppose H.R. 791 because it would extinguish any and all claims to land within the State of Illinois by three tribes whose claims arise from treaties entered into with the United States. The tribes are the Potawatomi Tribe of Kansas, the Miami Tribe of Oklahoma and the Ottawa Tribe of Oklahoma who entered into the 1829 Treaty of Prairie du Chien, the Treaty of Grouseland and the 1816 Treaty with the United Tribes of the Ottawas, Chipawas and Pottowotomees. The Indian tribes party to these treaties believed that the United States made solemn commitments, legally binding upon both the tribes and the United States. They believed that they would be able to live forever upon the lands reserved as their homelands from the vast areas they once occupied.

The faith of these tribes proved to be unfounded. The tribes never ceded these lands, but were forcefully driven from them, and the lands were sold to others by the United States. I will not address the particular facts of each of the three tribes named in H.R. 791. The particular history of each tribe and treaty named in this bill differ in each case. These circumstances underscore the inequity of sweeping all

of the claims together and dealing with them in exactly the same manner in one piece of legislation.

I want to emphasize that there is an appropriate role for Congress in involvement in and oversight of Indian land claims, including land claims in Illinois, but that it is not at this early stage in the process. The Federal courts and the legal process are there for a reason. Because Indian land claims are extremely fact-specific and based on treaties and historical circumstances, Congress is not in a good position to determine what is fair until there has been a full development of the record and an effort to settle by the parties. The best process is one that first allows the validity of the land claim to be legally tested (and we should note that land claims are very difficult to prosecute). If it becomes clear that a claim is a valid claim, then the tribe should have a chance to work with the state and local governments and the landowners through settlement discussions to come to a resolution. Everyone gets a hearing, all the issues are put upon the table, and the parties can forge relationships, resolve issues, and hopefully come to a resolution that everyone can live with.

Alternative dispute resolution is a very good option because the parties have the ability to create solutions to fit unique circumstances, and because the parties have a much better chance of co-existing over a long period of time with a negotiated resolution than with one that is dictated by a court or by Congress. This process has been working for the past twenty-five years and it has been effective in bringing to resolution a number of very significant Indian land claims. There has never been an Indian land claim that went all the way to a final judgment where a Federal court has thrown non–Indians off their land. There are incentives for the parties to work together and come to a resolution. We would encourage Congress and the Administration to stay the course and continue to strive for equitable settlements of Indian land claims.

Congress must ratify any settlement involving Indian land. Thusly, Congress always retains ultimate control over the land claims process outlined above. The appropriate time for Congressional actions is after the parties have had a chance to develop the record and come to a resolution. In Illinois, that has not had a chance to occur. H.R. 791 would short-circuit both the legal and the settlement processes and would perpetrate even more injustices against these three tribes. Even if H.R. 791 were to become law, the tribes would be back here next year and for the next one thousand years attempting to resolve their claims. Congress cannot simply resolve Indian land claims in this one-sided fashion.

It is my hope that there will be agreement among the parties in Illinois, that the tribes will receive fair resolutions of their claims, and that there will be no harm to people who have done no wrong. I sincerely believe this will happen if the parties sit down together and work to resolve the issues. I know that least one tribe has withdrawn its lawsuit, and that the others are working to resolve issues in the fairest way possible. However, I also think that the controversy that has been raised in Illinois should be placed in its proper context. Indian people were thrown out of their homes and their treaty lands were taken from them. Now we are going through some minor amount of legal discussion in Illinois regarding those lands and the fair resolution of the tribal claims. In balancing the equities, Congress should not choose to undermine the legal rights of the tribes.

H.R. 791 would refer the named claims to the United States Court of Federal Claims with money damages as the only remedy. If, indeed, any of the treaty tribes or their successors in interest believes that money is the appropriate and preferred remedy, they are certainly entitled to support H.R. 791. NCAI has been advised that the factual situations of each claim differ and we strongly urge you to hear what the tribes testifying before you today have to say and to give their circumstances your respect.

Thank you for the opportunity of appearing before you today. We greatly appreciate the work of the Chairman and the Committee on Indian issues, and would request that our written testimony and the aforementioned resolution be made a part of the record.

NATIONAL CONGRESS OF AMERICAN INDIANS

THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION #MSH-01-021

Title: To Oppose H.R. 791 and S. 533 Which Would Extinguish Indian Land Claims in the State of Illinois

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest, largest, and most representative national American Indian and Alaska Native tribal government organization; and

WHEREAS, H.R. 791 and S. 533 have been introduced by certain members of the Illinois congressional delegation to extinguish any and all claims to land within the state of Illinois by the Miami Tribe of Oklahoma, the Ottawa Tribe of Oklahoma and the Potawatomi Tribe of Kansas or their members or predecessors or successors in interest arising out of Article IV of the Treaty of Grouseland, Article II of the 1816 Treaty with the United Tribes of the Ottawas, Chipawas and Pottowotomees, or Article III of the1829 Treaty of the Prairie du Chien; and

WHEREAS, the bills would also extinguish all claims for land within Illinois of the named tribes and allow treaty and aboriginal claims by the named tribes to be brought only against the United States as the defendant and only in the United States Court of Federal Claims with monetary damages as the only available remedy; and

WHEREAS, H.R.791 and S. 533 are politically motivated targeted attacks against certain tribes to stop them from exercising their legal rights and pursuing justice based upon prior treaty commitments of the United States which are solemn promises and the supreme law of the land; and

WHEREAS, the Solicitor of the Department of the Interior has acknowledged the legitimacy of at least one of the Tribe's claims making H.R.791 and S.533 mere political tools introduced as a desperate effort to circumvent justice and impede potential fruitful discussions with the state of Illinois and fair resolution of the claim; and

WHEREAS, such targeted attacks will disallow Tribes to exercise their governmental authority to pursue claims to lands which were reserved to them in treaties with the United States, but are now illegally in the hands of non-Indians and allows the United States to breach its treaty commitments, thus eroding the sovereignty of all tribes as well as the value of the United States' promises and the relationship between the United States and the 561 Indian nations within its borders.

NOW THEREFORE BE IT RESOLVED that NCAI hereby opposes H.R. 791 and S. 533 and asks the sponsors of the bills to withdraw their legislation; and

BE IT FURTHER RESOLVED that if the sponsors fail to withdraw the legislation, NCAI hereby urges the Members of the House Resources Committee and the Senate Committee on Indian Affairs and all other Members of Congress to condemn this legislation as an egregious attack on tribal treaty and aboriginal rights and work to defeat the legislation in committee and otherwise; and

BE IT FINALLY RESOLVED that NCAI calls upon the Administration to oppose H.R. 791 and S. 533 and requests that the President of the United States veto such legislation if it ever comes before him to be enacted.

CERTIFICATION

The foregoing resolution was adopted at the 2001 Mid-Year Session of the National Congress of American Indians, held at Foxwoods Resort Casino in Mashantucket, Connecticut on May 13-16, 2001, with a quorum present.

Susan Masten, President

ATTEST:

Juana Majel, Recording Secretary

Adopted by the General Assembly during the 2001 Mid-Year Session of the National Congress of American Indians, held in Mashantucket, Connecticut on May 13-16, 2001.

Mr. HAYWORTH. And, Ms. Johnson, we thank you for your testimony and the willingness of all three of you now to answer questions from the Chair.

Just one thing at the outset, Chief Angelo. You offered a statement that I think was disturbing to every member of the Committee, and I just want some amplification on it. And I may be paraphrasing a bit. You said in the minds of some in Illinois, and I do not know if this is a direct quote or not; maybe you are talking about overriding sentiment, we got rid of the Indians 100 years ago. We do not want that back.

Mr. ANGELO. Yes.

Mr. HAYWORTH. Or that situation back, something along those lines.

Chief Angelo, was that said to you specifically by any governmental official in the State of Illinois, by any Federal officeholder?

Mr. ANGELO. Yes.

Mr. HAYWORTH. Could you name the person who made that statement and in what forum that came?

Mr. ANGELO. His name was Mark Warnstein. He was a special counsel or counsel to the Governor. It occurred in my last meeting, our last meeting, in the company of others, and that the situation—let me give you some background on how it occurred—he was questioning whether or not Shab-eh-nay was truly—and his band were truly Ottawa, and of course, this has been a question in the minds of the Illinois people, and I gave him a string of documents bringing out where Shab-eh-nay is listed as an Ottawa and even during the 1829 treaty, in the minutes of that treaty, where he actually received the land, he is documented as an Ottawa chief.

And he got upset during that exchange, and I assume he was embarrassed, and he fired out this line to me, and my attorney or ex-attorney was present as well as another witness, and also a BIA agent from Miami Agency was present. And I was offended by this, deeply offended, and I terminated our—basically our meeting at that point. But it was definitely offensive to us.

Mr. HAYWORTH. Well, Chief Angelo, I just wanted to say that in the opinion of the Chair, I think every member of this Committee regardless of political label or partisan division that, you know, we all share your concern about that statement. But I just wanted that amplified if, in fact, that was made to you. And I think you will certainly find, sir, that on this Committee, regardless of some disagreements about public policy, that is not the sentiment shared—the Chair feels confident in saying that—for anyone here, and I thank you for amplifying exactly how and under what circumstances such a comment was made.

Mr. ANGELO. Well, I appreciate your concern and am grateful that you are making this stance.

Mr. HAYWORTH. And I will call on the gentleman from Illinois later. The Chair would reserve the right as Chairman to first handle questions, and then, we will go alternating with the majority and the minority sides.

Let me turn now to Vice Chairman Mitchell. And in listening to the testimony this morning from both you, Mr. Vice Chairman, and Second Chief Angelo, the Potawatomi and Ottawa Tribes' land claim rests on the theory that the 1829 treaty created a recognized

title and a permanent reserve that could only be extinguished by Congress and that Congress has failed to validly extinguished that reserve.

Now it is this Committee's understanding that in 1852, Congress appropriated $1,600 for payment to Indians claiming descent from Shab-eh-nay and that Congress intended that this payment would extinguish the 1829 treaty reserve. How is this not a valid extinguishment of the 1829 reserve to which you are claiming title?

Mr. MITCHELL. Well, we spent two and one half years gathering all of this research material together, and we relied on the academic professionals and all of this to develop material, and all of the—even the Leshy opinion said that we were the sole successor to the property there. And as far as the details of any settlement, the other land that we lost in the Illinois area, we were compensated for that, but it was never anything done with that portion of the Shab-eh-nay land.

So I would have to go back and look at our research to fully answer that question.

Mr. HAYWORTH. OK; and Mr. Vice Chairman, you will have the option—in fact, in writing, to respond with a more formal and more complete assessment. The Chair and the Committee would certainly welcome that.

Chief Angelo, you mentioned in your testimony the opinion letter from John Leshy that he rendered on his final day as solicitor. Aside from that opinion, has the tribe received any formal determinations regarding the validity of its claim?

Mr. ANGELO. We have not submitted to the solicitor yet. We are within 45 to 60 days from submitting our final report. We are in a rough draft form currently, and new and material evidence has surfaced that, without a doubt, puts us in as a successorship. I might add that one of the issues that we had which we wanted to confirm was a band list, and I think the Potawatomis would agree that—and even the solicitor's office would agree that it was very difficult to find that.

We have found a band list that outlines who was on his—who was in his tribe or in his village, and our report will display that as well as how they came into our tribe in Kansas at the time.

I would also like to answer your previous question. What was that asked to Vice Chief Mitchell?

Mr. HAYWORTH. Well, to return to that, the Potawatomi and Ottawa Tribes' land claim rests on the theory that the 1829 treaty created a recognized title and a permanent reserve that could only be extinguished by Congress and that Congress has failed to validly extinguish that reserve.

Now, we understand—the Committee's understanding is that in 1852, Congress appropriated $1,600 for payment to Indians claiming descent from Shab-eh-nay and that Congress intended that this payment would extinguish the 1829 treaty reserve.

So the question becomes, Chief, how is this not a valid extinguishment of the 1829 reserve to which you are claiming title?

Mr. ANGELO. Well I think in our instance, you mentioned descendants of Shab-eh-nay. Remember, this treaty in 1829 says Shab-eh-nay and his band, and you are forgetting about the band. They are not descendants of Shab-eh-nay. So it is not strictly to de-

scendants of Shab-eh-nay; it also includes his band, and that has been our issue, and that we have uncovered the band list.

They are not necessarily descendants of Shab-eh-nay. There were eight to nine heads of family listed on an 1833 annuity role that were part of his village. And clearly, the 1829 treaty says Shab-eh-nay and his band, not his descendants. So to me, the 1852 documentation or legislation did not clearly clear the band. Do you have any information where it did that?

Mr. HAYWORTH. Chief, just wanted to get your perspective on it for the record.

Mr. ANGELO. OK.

Mr. HAYWORTH. And I thank you for that.

Mr. ANGELO. Thank you.

Mr. HAYWORTH. The Chair would now turn to the minority side, and I see my good friend, the Co-Chair of the Native American Caucus, the gentleman from Michigan.

Mr. KILDEE. Thank you, Mr. Chairman and Co-Chair of the Native American Caucus, one of the founders.

I think this Congress should be extremely reluctant to do anything that sets aside the treaties. Our Constitution says that this Constitution and all treaties entered into are the supreme law of the land, and that is very, very, important. John Marshall's decision equated Indian treaties with treaties with France or any other country. There are three types of sovereignties that the Constitution recognizes: the sovereign states, sovereign nations overseas, and sovereign Indian tribes.

And these treaties have the same validity as the Constitution, as this Constitution. And all treaties entered into are the supreme law of the land, so Congress should be most reluctant to do anything that would infringe upon the strength and the sovereignty of those treaties.

I yield back the balance of my time, Mr. Chairman.

Mr. HAYWORTH. I thank the gentleman from Michigan and turn to my friend from Illinois, the sponsor of the legislation, for any questions or comments he might have for the panel.

Mr. JOHNSON. I will be very brief, and I appreciate, Mr. Chairman, and the Committee your indulgence in allowing me to sit on the panel. This is my honor.

I will point out first of all they certainly had very credible presentations; that Mr. Mitchell, Mr. Angelo represent tribes that are not involved in the claim for which I am advocating. That is a different claim, different year, different issues. And so, with all due respect, any responses that may have been made to you in that regard, while I certainly do not in any way validate any claims or statements that may in any way be racist, I would simply say that our claim is something that stands of its own footing and also simply point out to you, ladies and gentlemen, as members of the Committee, that our attempt in this bill is as narrow an attempt as one could possibly effect to obtain justice for everyone.

We are not in any way claiming that this is an invalid treaty, although I believe that in our case, the Miami Indians actually have dismissed their case without prejudice. This is simply an attempt to bring closure to the situation in fairness to the landowners. We are simply saying that if, in fact, there is a valid claim,

at least in the case of the Miami Indians, and the same thing is true with you, that that claim is vis-a-vis the Federal Government and not against innocent landowners in 2.6 million acres, and we framed this legislation as narrowly as possible, despite the parallel legislation that was pending a year ago in the Senate, which was broad-based legislation, which would do what the distinguished ranking member said, and that is simply to obliterate all claims of Native Americans.

We do not want to do that. We want to effect justice for everybody, but justice also includes people who were not around in 1805, just like Illinois was not a state in 1805, and still be able to strike a balance on your behalf.

So I do respect and appreciate your testimony as well as the indulgence of the members of the Committee and hope that you agree that our approach is one that is moderate and fair.

Mr. HAYWORTH. I thank the gentleman from Illinois.

Gentleman from Hawaii, any questions, comments?

Mr. ABERCROMBIE. No.

Mr. HAYWORTH. My friend from New Mexico? Friend from Texas? New Jersey, Mr. Pallone?

Mr. PALLONE. Thank you, Mr. Chairman.

I just wanted to take issue with what my colleague from Illinois said. I think this is a major change in policy here with this bill. I mean, the way I understand it, basically, you would be extinguishing the land claims, and, you know, that is a pretty meaningful, significant thing that would happen here. And it also, I think, sets a bad precedent for other land claims that might be out there not only in Illinois but in other states that would just sort of, you know, willy nilly extinguishing land claims without an opportunity for, you know, for the tribes and others to have some sort of negotiations.

Just listening to what the panel said, I think that it was quite clear that the panel members were saying, you know, look: we have these claims out there. We want to be able to sit down and have some sort of consultation and some sort of opportunity to negotiate this issue. One of the suits was dropped, I think, because the feeling was that, you know, rather than take this to court, it made more sense to try to sit down and work this out.

And this is what is done throughout the country with land claims. We just had the situation in New York State, where there were a number of land claims, and they sat down with the Governor and the state representatives, and they worked out their differences and came to a settlement that, from what I understand, the legislature, the Governor and everyone—I mean, I am sure that everyone is not always happy with anything, but it seemed to me that most of the people who were involved were very happy with that result.

And I think the same thing can happen here. I think it is very premature for us to try to move legislation that would extinguish the claims when the precedent in Indian Country is the opposite, which is to sit down and consult. From what I understand, there has been no consultation or very little consultation if any with the tribes on this issue, and I just wanted to ask Jacqueline Johnson: my understanding from what you said in your testimony is that

you have actually talked about an alternative solution that would have some structure in terms of arbitration or some kind of consultation.

Did you want to maybe elaborate that on a little more? It sounded eminently reasonable to me, and I just wanted you to, you know, give a little more detail if there is some detail.

Ms. JOHNSON. Well, basically, what we are trying to say is following pretty much on what you just said is that there needs to be an opportunity for the tribes to build the record. You actually heard comments and questions given to both of these tribal members, representatives here today, and help build records. And on both sides, there are records on both sides that people need to sit down and to discuss those, to negotiate.

We saw the cases with the Oneidas of Wisconsin, the Stockridge Muncies, the other tribes who have been going through these various land claims processes and negotiating them out with the states and trying not to harm innocent landowners as well as innocent tribal members who had their lands taken away from them to work those things through.

Sometimes, you know, the lawsuits continue, and the court helps resolve those, but in most cases, they are done through a negotiated process, and I would just recommend that that negotiated process continue.

Mr. PALLONE. And to me, that makes sense. One thing here today, and I think my colleague Mr. Kildee made the point, what we are saying with this legislation is that we do not want to do that. We just want to extinguish the claims, and I think it is an affront to Indian sovereignty, and it is an affront to our obligations under the Constitution that, you know, treaties have to be upheld, and we should not just get in there and overrule everything with this legislation.

I think it is a huge mistake, and I would hope that we would not move the bill.

Thank you, Mr. Chairman.

Mr. HAYWORTH. I thank the gentleman from New Jersey.

The Chair just feels constrained to follow up on this whole notion that Ms. Johnson raises in her testimony and my colleague from New Jersey brought up now. In terms of land claims and a sufficient record being developed, in part what we are doing here today with the hearing on the legislation—Ms. Johnson, when do you consider the record fully developed, and how long do you believe Congress should allow the process to go on before there is Congressional involvement vis-a-vis legislation?

Ms. JOHNSON. I do not know that you can put a timeframe on that, and like I said in my testimony, every case is individual. And every case has different circumstances. Even the three tribes that are mentioned here today, they all have totally different circumstances. And so, you know, the record develops as you come through negotiations. I know that the Department of the Interior—I believe that they are also wishing that we would allow the process to continue.

You, Mr. Chairman, as much as anybody else in this room, know the frustrations we have dealt with with dealing with the Department of the Interior on a number of other issues. And at some

point, you know, when we feel like we have no other recourse, we always turn to you and to the Members of Congress to assist us through that. I just think it is a little premature at this point in this particular case. And I am very concerned about the precedent it may set for other states where these issues have not been fully discussed or developed.

Mr. HAYWORTH. Thank you, ma'am, for your amplification on that particular issue.

The gentleman from Oklahoma?

Mr. CARSON. Thank you, Mr. Chairman.

Let me say I have a great personal interest in this matter, as Mr. Angelo and the Ottawa Tribe are my constituents in northeast Oklahoma, and my father was superintendent of the Potawatomi Tribe reservation as well as the Kickapoo and Iowa and Sackenfox reservations in the 1970's, so I know that area well.

I do think it is important when we try to adjudicate these very complicated land disputes with a history that goes back now well over a century that involves archival evidence that is sometimes very difficult to retrieve and to assimilate, that we take these matters very deliberately and work as slowly as possible.

Now, I understand the concerns of Mr. Johnson, Mr. Shimkus and Mr. Phelps in saying that for the current landowners that we do not want to hold them responsible for what they have called the sins of the past. We need to be very careful that we, ourselves, do not commit the sins of the past in extinguishing land title for tribes that exists validly, as Mr. Kildee points out, recognized in the Constitution and as a tremendous asset to these tribes, tribes that, many times, find themselves bereft of those kinds of efforts.

And so, let me thank the panelists for being here. Let me state my opposition to this bill as it currently is and urge everyone on the Committee who is concerned about these issues to go very slowly in trying to deal with these matters and let the tribes develop the kind of archival record it takes to properly ascertain who has title to these lands.

Mr. HAYWORTH. I thank the gentleman from Oklahoma.

Any questions from the majority side or comments at this point?

If not, happy to turn back to the minority and entertain any other comments or questions for this panel.

Hearing none, we thank the witnesses for their testimony and subsequent amplification of the testimony, and we look forward again to any written testimony they may want to offer in the days ahead to offer further quantification of their viewpoint.

Thank you to panel two.H.R. 521

Mr. HAYWORTH. Now, the Committee will entertain panel three, and this panel will deal with H.R. 521, the legislation sponsored by our friend from Guam, Mr. Underwood. And we welcome to the witness table Chris Kearney, the Deputy Assistant Secretary for Policy and International Affairs, from the Office of Policy Management and Budget in the Department of the Interior; the Honorable F. Philip Carbullido, the Acting Chief Justice of the Guam Supreme Court, obviously from the Supreme Court of Guam; and the Honorable Alberto C. Lamorena III, Presiding Judge of the Superior Court of Guam.

Welcome all to the table, and we thank our witnesses from earlier, and as we have a little rearranging and people meeting their schedules, we will allow for the traffic of both witnesses and those in the public area to subside, and we will allow you to get a glass of water to deal with dehydration. Those of us from Arizona have more than a casual interest in water. So if you would like to get a drink of water, we are happy to have that.

And first, we will hear from Deputy Assistant Director Kearney. Welcome, sir, and we look forward to your testimony.

STATEMENT OF CHRIS KEARNEY, DEPUTY ASSISTANT SECRETARY, POLICY AND INTERNATIONAL AFFAIRS, OFFICE OF POLICY MANAGEMENT AND BUDGET, U.S. DEPARTMENT OF THE INTERIOR

Mr. KEARNEY. Thank you, Mr. Chairman, and good morning, members of the Committee.

It is a pleasure for me to be here to appear before you today to discuss the administration's views on H.R. 521, a bill to amend the Organic Act of Guam to clarify Guam's local judicial structure. H.R. 521 would establish the local court system of Guam as a third coequal and unified branch of government alongside the legislative and executive branches of the Government of Guam.

Enacted by Congress, the Organic Act of Guam is the equivalent of a constitution in one of the 50 states. Amendments over time have continually added to self-government in the territory. The Organic Act established a Legislature and was later amended to change the executive from an appointed Governor to an elected Governor and in 1984 to authorize the Legislature to establish a local appeals court.

In 1994, under the authority granted in the Organic Act, the Legislature of Guam established a Supreme Court. But 2 years later, the Legislature removed from the Supreme Court its administrative authority over the Supreme Court of Guam, and since then, Guam has had a bifurcated local court system at a time when virtually all states have unified court systems.

It is argued that only—I am sorry. H.R. 521 would amend the judicial provisions of the Organic Act of Guam to specifically name the Supreme Court as Guam's appellate court and outline the powers of the Supreme Court, including full administrative authority for the Supreme Court over the local court system. It is argued that only an act of Congress can bring unity and dignity to Guam's local courts. Proponents of H.R. 521 suggest that if the Legislature retains control, the court system is subject to influence by the Legislature. Only by placing local court authority in Guam's "Constitution," that is, the Organic Act of Guam, can the judiciary of Guam be a coequal and independent branch of the government.

Opponents suggest that the system is working fine and that an administrative function divided between the Supreme Court and the Superior Court is healthy for the judicial system.

The structure of Guam's local judiciary is largely a self-government issue for Guam. As such, opinion from Guam should be given the greatest consideration as long as issues of overriding Federal interest are not involved. In 1997, the executive branch examined H.R. 2370, an earlier version of the bill under consideration today.

A number of suggestions were made at the time for improving the bill and harmonizing it with the Federal court system. H.R. 521 includes the suggested modifications in language. The administration, therefore, has no objection to the enactment of H.R. 521 in its present form.

That concludes my statement. I would be happy to answer any questions.

[The prepared statement of Mr. Kearney follows:]

Statement of Christopher Kearney, Deputy Assistant Secretary for Policy and International Affairs, U.S. Department of the Interior

Mr. Chairman and members of the Committee, it is a pleasure for me to appear before you today to discuss the Administration's views on H.R. 521—a bill to amend the Organic Act of Guam to clarify Guam's local judicial structure. H.R. 521 would establish the local court system of Guam as a third co-equal, and unified branch of government, alongside the legislative and executive branches of the Government of Guam.

Enacted by the Congress, the Organic Act of Guam is similar to a constitution in any of the fifty states. Amendments over time have continually added to self-government in the territory. The Organic Act established a legislature. It was later amended to change the executive from an appointed Governor to an elected Governor, and in 1984, to authorize the Legislature to establish a local appeals court. In 1994, under the authority granted in the Organic Act, the Legislature of Guam established the Supreme Court of Guam. But, two years later, the Legislature removed from the Supreme Court its administrative authority over the Superior Court of Guam. Since then Guam has a bifurcated local court system at a time when virtually all states have unified court systems.

H.R. 521 would amend the judicial provisions of the Organic Act of Guam to specifically name the Supreme Court of Guam as Guam's appellate court, and outline the powers of the Supreme Court, including full administrative authority for the Supreme court over the local court system.

It is argued that only an act of Congress can bring unity and dignity to Guam's local courts. Proponents of H.R. 521 suggest that if the Legislature retains control, the court system is subject to influence by the Legislature. Only by placing local court authority in Guam's "constitution"—the Organic Act of Guam—can the judiciary of Guam be a co-equal and independent branch of the Government of Guam. Opponents suggest that the system is working fine, and that an administrative function divided between the Supreme Court and Superior Court is healthy for judicial system.

The structure of Guam's local judiciary is largely a self-government issue for Guam. As such, opinion from Guam should be given the greatest consideration, as long as issues of overriding Federal interest are not involved. In 1997, the Executive branch examined H.R. 2370, an earlier version of the bill under consideration today. A number of suggestions were made for improving the bill and harmonizing it with the Federal court system. H.R. 521 includes the suggested modifications in language. The Administration, therefore, has no objection to the enactment of H.R. 521 in its present form.

Mr. HAYWORTH. Thank you very much, sir.

And now, we turn to Chief Justice Carbullido. Mr. Acting Chief Justice, welcome. We appreciate your testimony.

STATEMENT OF THE HON. F. PHILIP CARBULLIDO, ACTING CHIEF JUSTICE OF THE GUAM SUPREME COURT

Justice CARBULLIDO. Thank you, Mr. Chairman and members of the Committee. For the record, my name is Philip Carbullido, and I am the acting chief justice of the Guam Supreme Court. It is an honor to speak before this distinguished Committee on a bill that will have a profound impact on the advancement of the Territory of Guam.

H.R. 521 was conceived because of the infirmities of the current language of the Organic Act. The point I want to make today is that the existing framework in which our local government is structured is deficient. The Organic Act of Guam functions as Guam's constitution. While the Organic Act establishes the executive and legislative branches of the Government of Guam, the act does not establish a judicial branch. Instead, in 1984, the U.S. Congress passed the Omnibus Territories Act, amending the Organic Act and giving the Guam Legislature the authority to create the courts of Guam, including an appellate court.

Under this language, the Guam Supreme Court's existence and the scope of the court's powers has been subject to and remains subject to frequent legislative manipulation. Because of the current language of the Organic Act, the existence and organization of Guam's judicial branch is plagued by lingering uncertainty. Nowhere else in this nation does this occur.

The present situation is such that it has fostered a peculiar and unprecedented system wherein our island's judicial branch is marked not by independence but rather by political influence. It is this condition that has necessitated the introduction of H.R. 521. The measure would firmly establish within the Organic Act Guam's judicial branch as a coequal independent branch alongside the executive and legislative branches.

Senator Mark Forbes, the Republican majority leader of the 26th Guam Legislature and Chairman of the Committee on Rules stated in his written testimony on H.R. 521 that the original language in H.R. 521 that establishes the Supreme Court of Guam within the Organic Act is logical. To avoid permanently placing Guam's judiciary clearly among the three branches of the Government of Guam is an error.

I am aware that the bill as currently drafted has been criticized as a Congressional attempt to legislate on a uniquely local issue. These criticisms likely arise from the portions of H.R. 521 which comprehensively delineate the jurisdiction of the Supreme Court and inferior courts as well as the powers of the Chief Justice. We have reviewed the criticisms and recognize the concerns voiced by opponents of H.R. 521. We now propose changes to the bill which address these concerns.

The proposed changes to H.R. 521 both preserve the intent of the original bill H.R. 521 in creating an independent judiciary in the Territory of Guam with the Supreme Court of Guam as the administrative head while reserving powers for the local Legislature to modify administrative rules promulgated by the court. I have included a more detailed discussion of the new sections of the proposed bill in my written testimony submitted to this Committee.

I must also mention at this point that some individuals have expressed concern that the recent Ninth Circuit court opinion in the case of Pangelinan v. Gutierrez has negated the need for H.R. 521. This is clearly a misconception, and I clarify the issue in my written testimony. The creation of the judicial branch in the Organic Act is a measure that has been vigorously endorsed by Guam's legal community and the public at large and on a national level by the Conference of Chief Justices.

This avid support of a constitutionally established independent judiciary is not without precedent and is well-founded in American jurisprudence. The founders of this nation created a tripartite structure of government which has been unanimously adopted by the states of the union. The efficacy of this system of government, both at the Federal and state level, rests in checks and balances. The judicial branch of our territory can neither effectively operate as a necessary check on the other two branches nor properly fulfill its obligation to interpret the law without a constitutional—or, in this case, an organic—existence.

Under the current law, Guam's judicial branch has been created by local legislation and can just as easily be eviscerated by local legislation. This alarming reality is evidenced by the comment of the current Chairman of the Judiciary Committee of the Guam Legislature, who said, and I quote, some members of the legal community may be apprehensive over the fact that the Legislature has the authority to determine the court's future. It has been vested with the authority to create as well as abolish the Guam Supreme Court. I assure everyone concerned that there will be no repeal of the law creating the Guam Supreme Court.

That a local legislature has, in the same breadth, acknowledged the power of one branch of government to completely abolish another branch and pledged that this would not happen is far from assuring. The fact that a member of the Guam Legislature can make this statement is, to say the least, chilling. The substance of this statement patently offends the fundamental principles of a tripartite form of government. The ability of a local senator to make this statement is testament to the inadequate governmental structure currently set forth in the Organic Act.

In the same vein as the founders, we advocate an amendment to what is essentially our constitution to finally and permanently provide for an independent and coequal judicial branch.

Thank you, Mr. Chairman and members of the Committee. It has been a privilege to appear before you. We herein submit with my testimony the proposed amendments to H.R. 521 for your consideration.

Thank you.

[The prepared statement of Justice Carbullido follows:]

Statement of The Honorable F. Philip Carbullido, Acting Chief Justice, Supreme Court of Guam

Thank you Mr. Chairman. For the record, my name is Philip Carbullido, and I am the Acting Chief Justice of the Guam Supreme Court. It is an honor to speak before this distinguished Committee on a Bill that will have a profound impact on the advancement of the Territory of Guam.

H.R. 521 was conceived because of the infirmities of the current language of the Organic Act. The point I want to make today is that the existing framework in which our local government is structured is deficient.

The Organic Act of Guam functions as Guam's constitution. While the Organic Act establishes the executive and legislative branches of the Government of Guam, the Act does not establish a judicial branch. Instead, in 1984, the United States Congress passed the Omnibus Territories Act, amending the Organic Act and giving the Guam legislature the authority to create the courts of Guam, including an appellate court. Under this language, the Guam Supreme Court's existence and the scope of the court's powers has been subject to, and remains subject to, frequent legislative manipulation. Because of the current language of the Organic Act, the existence and organization of Guam's judicial branch is plagued by lingering uncertainty. Nowhere else in this nation does this occur. The present situation is such that it has fostered

a peculiar and unprecedented system wherein our island's judicial branch is marked not by independence, but rather, by political influence.

It is this condition that has necessitated the introduction of H.R. 521. The measure would firmly establish, within the Organic Act, Guam's judicial branch as a co-equal, independent branch alongside the executive and legislative branches.

I am aware that the Bill as currently drafted has been criticized as a Congressional attempt to legislate on a uniquely local issue. These criticisms likely arise from the portions of H.R. 521 which comprehensively delineate the jurisdiction of the Supreme Court and inferior courts, as well as the powers of the Chief Justice. We have reviewed the criticisms and recognize the concerns voiced by opponents of H.R. 521. We now propose changes to the Bill, which address these concerns. The proposed changes to H.R. 521 both preserve the intent of original Bill 521 in creating an independent judiciary in the territory of Guam, with the Supreme Court of Guam as the administrative head, while reserving powers for the local legislature to 2 modify administrative rules promulgated by the Court. I have included a more detailed discussion of the new sections of the proposed Bill in my written testimony submitted to this Committee.

In addition, Congressman Underwood, a Democrat, has been criticized as being political in introducing this Bill. Mr. David J. Sablan, the Chairman of the Republican Party of Guam in a letter to Senator Hansen stated, "Certain critics have labeled the Bill as "political." We do not think so. We simply believe it to be right. There is nothing political about wanting an independent judiciary.... The support for H.R. 521 transcends party lines. We believe in an independent judiciary and therefore support the passage of H.R. 521. This Bill's intent is correct and right."

I must also mention, at this point, that some individuals have expressed concern that the recent Ninth Circuit opinion in the case of Pangelinan v. Gutierrez has negated the need for H.R. 521. This is clearly a misconception; and I clarify the issue in my written testimony.

The creation of the judicial branch in the Organic Act is a measure that has been vigorously endorsed by Guam's legal community and the public-at-large, and on a national level, by the Conference of Chief Justices. (A copy of CCJ Resolution 17 is attached.) This avid support of a "constitutionally" established independent judiciary is not without precedent and is well-founded in American jurisprudence.

The founders of this nation crafted a tri-partite structure of government, which has been unanimously adopted by the states of the union. The efficacy of this system of government, both on the Federal and state level, rests in checks and balances. The judicial branch of our Territory can neither effectively operate as a necessary check on the other two branches, nor properly fulfill its obligation to interpret the law, without a "constitutional," or in this case, an "Organic" existence.

Under the current law, Guam's judicial branch has been created by local legislation, and can just as easily be eviscerated by local legislation. This alarming reality is evidenced by the comment of the current Chairman of the Judiciary Committee of the Guam Legislature, who said, and I quote, "some members of the legal community ... may be apprehensive over the fact that the Legislature has the authority to determine the court's future—it has been vested with the authority to create as well as abolish the Guam Supreme Court ... I assure everyone concerned that there will be no repeal of the law creating the Guam Supreme Court."

That a local legislator has, in the same breath, acknowledged the power of one branch of Government to completely abolish another branch, and pledged that this would not happen, is far from assuring. The act that a member of the Guam legislature can make this statement is, to say the least, chilling. The substance of the statement patently offends the fundamental principles of a tri-partite form of government. The ability of a local senator to make this statement is testament to the inadequate governmental structure currently set forth in the Organic Act.

In the same vein as the founders, we advocate an amendment to what is, essentially, our Constitution, to finally and permanently provide for an independent and co-equal judicial branch.

Thank you Mr. Chairman. It has been a privilege to speak before you. We herein submit with my testimony the proposed amendments to H.R. 521 for your consideration.

ATTACHMENT 1- PROPOSED AMENDED H.R. 521

TO AMEND THE ORGANIC ACT OF GUAM FOR THE PURPOSES OF CLARIFYING THE LOCAL JUDICIAL STRUCTURE OF GUAM.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2001

Mr. UNDERWOOD introduced the following bill; which was referred to the Committee on Resources

A BILL

To confirm the right of the People of Guam to establish an independent judiciary

WHEREAS, in 1950 Congress provided a civil government and confirmed the right of the People of Guam to an independent legislature in the Organic Act of Guam;

WHEREAS, in 1968 Congress confirmed the right of the People of Guam to an independent executive branch in the Guam Elective Governor Act; and

WHEREAS, Congress desires to confirm the right of the People of Guam to an independent judiciary—

NOW THEREFORE BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. TITLE.

This Act may be cited as the Guam Independent Judiciary Enabling Act.

SECTION 2. JUDICIAL STRUCTURE OF GUAM.

(a) JUDICIAL AUTHORITY; COURTS- Section 22 (a) of the Organic Act of Guam (48 U.S.C. 1424(a)) is amended to read as follows:

'(a) (1) The judicial authority of Guam shall be vested in a court established by Congress designated as the 'District Court of Guam, and a local judicial branch of Guam which shall constitute a unified judicial system and include an appellate court designated as the 'Supreme Court of Guam' which shall be the highest local court of Guam with final appellate jurisdiction, a trial court designated as the 'Superior Court of Guam', and such other lower local courts as may have been or shall hereafter be established by the laws of Guam.

'(2) The Supreme Court of Guam may, by rules of such court, create divisions of the Superior Court of Guam and other local courts of Guam.

'(3) The courts of record for Guam shall be the District Court of Guam, the Supreme Court of Guam, the Superior Court of Guam (except the Traffic and Small Claims divisions of the Superior Court of Guam) and any other local courts or divisions of local courts that the Supreme Court of Guam shall designate.'

'(4) The Supreme Court shall make and promulgate rules governing the administration of all local courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all local courts. These rules may be changed by the Legislature by two-thirds vote of the members.

'(5) The Legislature shall provide for the compensation of all justices and judges. The salaries of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of Guam.

(c) TECHNICAL AMENDMENTS- (1) Section 22B of the Organic Act of Guam (48 U.S.C. 1424–2) is amended——

(A) by inserting 'which is known as the Supreme Court of Guam,' after ' appellate court authorized by section 22A(a) of this Act,'; and

(B) by striking 'Natural Resources' and inserting 'Resources'.

(2) Section 22C(a) of the Organic Act of Guam (48 U.S.C. 1424–3(a)) is amended by inserting 'which is known as the Supreme Court of Guam,' after 'appellate court authorized by section 22A(a) of this Act,'.

(3) Section 22C(d) of the Organic Act of Guam (48 U.S.C. 1424–3(d)) is amended——

(A) by inserting ', which is known as the Supreme Court of Guam,' after ' appellate court provided for in section 22A(a) of this Act'; and

(B) by striking 'taken to the appellate court' and inserting 'taken to such appellate court'.

SECTION 3. RESERVATION OF RIGHTS TO THE PEOPLE OF GUAM.

The provisions of this Act may be altered or modified by the People of Guam by a duly adopted Constitution and by amendments thereto duly adopted from time to time.

[Responses to questions submitted for the record by Mr. Carbullido follow:]

SUPREME COURT OF GUAM

SUITE 300 GUAM JUDICIAL CENTER, 120 WEST O'BRIEN DRIVE, HAGATNA,

GUAM 96910–5174

TELEPHONE: (671) 475–3162 FACSIMILE: (671) 475–3140

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CHAMBER OF THE HONORABLE F. PHILIP CARBULLIDO

ACTING CHIEF JUSTICE

DIRECT LINE (671) 475–3413

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MAY 22, 2002

Hon. James V. Hansen, Chairman
Committee on Resources
United States House of Representatives
Washington, D.C. 20515

Re: H.R. 521

Dear Chairman Hansen:

This letter is in response to your letter dated May 14, 2002 wherein you propounded four additional questions in reference to H.R. 521.

Question No. 1:

In your testimony you elude to the fact that it is necessary to create an independent judiciary. Are you asserting that the disputes going on locally in Guam between and within the three branches of the local government, regarding the administration of courts, is preventing the Supreme court from ruling in legal cases according to its determination of what the law is in those or other cases?

Answer:

The dispute between and within the three branches of the local government, regarding the administration of the courts, has not compromised the Guam Supreme Court's opinion-writing and law-declaring duties. We have reviewed every case that has come before us objectively and in accordance with established legal principles.

However, the current system, wherein the legislature retains the power to dictate the authority of the Guam Supreme Court, has, in at least once instance, prevented the Supreme Court from reaching the merits of a case. On June 12, 1997, the Guam Legislature, by resolution, filed a request, (Supreme Court Case Number CRQ97–001), asking that the Court render a declaratory judgment on whether a measure ratified by the voters which reduced the number of senators from twenty-one to fifteen violated the Organic Act. The request was filed in the Supreme Court of Guam pursuant to a local statute, Title 7 Guam Code Annotated § 4104, which gave the Guam Supreme Court jurisdiction over questions, submitted by either the Governor or Legislature, asking for an interpretation of any law which affects the powers, duties and operations of the executive or legislative branches. Pursuant to internal procedures, on July 15, 1997, the Chief Justice certified the issues as being appropriate for consideration under section 4104.

On September 12, 1997, the Legislature filed a motion to withdraw the request. The court scheduled a hearing on the motion to withdraw. On September 15, 1997, four days before the hearing on the motion, the Legislature, without public hearing, inserted a rider to a bill unrelated to the judicial branch, which repealed and reenacted 7 GCA § 4104, to add a provision which removed the Supreme Court's jurisdiction in an action filed under section 4104 if the requesting party withdraws the request before an opinion is issued. On September 17, 1997, the Governor signed the Bill into law. Pursuant to the amended section 4104, on November 5, 1997, the Supreme Court dismissed the Legislature's request for declaratory judgment.

Therefore, while the Supreme Court has made all decisions in the cases before us in a fair and impartial manner, and in accordance with the law, the above-described

case illustrates that the Guam Legislature has used its authority over the structure and power of the judicial branch to shape the law in a manner that has influence over the outcome of a case filed in the Supreme Court.

Question No. 2:

Constitutional courts are defined by constitutions. Statutory courts are defined by statutes. The courts of Guam are either going to under a local statute or a Federal statute. How then does it promote judicial independence for the courts of Guam to be created by a Congress where the U.S. citizens of Guam do not have voting representation? Would it not be better for the local court system to be established by the local legislature where citizens do have voting representation?

Answer:

Guam's constitution is a Federal statute. Guam has not adopted its own constitution although it has had the authority to do so for the past twenty-five years. Guam's constitution, the Organic Act, was flawed from the start because it did not contain the foundation for a tri-partite system of local government. The only court specifically created by the Organic Act is the district court of Guam, which does not have jurisdiction over issues of local law. Under the Organic Act, the Legislature has plenary authority to establish local courts. Thus, the situation here is that one branch of government has unfettered control over another. This is the antithesis of judicial independence. H.R. 521 corrects the Organic Act flaw by properly creating a tri-partite system of local government, where each branch is independent and co-equal.

In the absence of a constitution, all branches of the government of Guam are statutorily created. The executive and legislative branches are established by Federal statute, the Organic Act, and the local judiciary is established by local statute. To even the playing field and to create three independent branches of government, the local court system must be created by Federal statute. This is similar to the Federal model where one supreme instrument, the United States Constitution, creates all three branches.

The alternative, to await the enactment of a local constitution, is unacceptable given the uncertainty that exists between the branches of government and inherent political disputes. It is necessary that three independent branches be constitutionally created now. H.R. 521 properly creates a tri-partite system of local government in our present constitution, the Organic Act.

We must emphasize that judicial independence is gained from the inability of the other branches to manipulate the internal workings of the judicial branch. This is not to suggest that the judiciary should be completely immune from appropriate legislation. However, it should be at least as difficult for the Guam Legislature to manipulate the judiciary as it is for the Rhode Island Legislature to manipulate the Rhode Island judicial branch, or for the United States Congress to amend laws affecting the authority of the United States Supreme Court. As the case shown in the answer to question number one illustrates, presently all it takes is eight votes by the Legislature and attachment of a rider to an important bill to effectuate a change in the authority and the jurisdiction of the Guam Supreme Court.

We further point out that although Guam does not have a voting representative in Congress, our interests are represented by Delegate Robert Underwood. Delegate Underwood is a locally elected official. We are confident in his ability to adequately protect the interests of the people of Guam.

Question No. 3:

Are you in favor of enacting a constitution for Guam?

Answer:

While a constitution would be ideal, it may not be appropriate for the judiciary to take a specific position on this issue. It cannot be overlooked, however, that Guam has had twenty-five years to enact such an instrument, but has yet to do so. Whatever the founding instrument may be, whether a Federal statute, a commonwealth act, or a constitution, it should create a tri-partite system of government, wherein each branch is co-equal and independent to assure a complete system of checks and balances. Given the current political reality on Guam, the enactment of a constitution will not occur soon and the establishment of a tri-partite system should not be delayed as a result.

Question No. 4:

In the Federal system, the U.S. Congress statutorily establishes the Federal courts (district courts, appellate courts, patent courts, tax courts, etc...). If we take the model proposed in H.R. 521 (Section 1(a)) to the Federal level, Chief Justice

Rehnquist, rather than Congress would have the power to unilaterally determine the structure and division on the court system. Why should we adopt a model for Guam that we would never adopt at the Federal level?

Answer:

Article III Section 1 of the United States Constitution provides that the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may establish. The goal of H.R. 521 is to parallel the local system to the Federal model, wherein the judicial power of Guam should be vested in the Supreme Court of Guam.

The current language of H.R. 521 which deviates from the Federal constitutional model mirrors Title 7 Guam Code Annotated § 2101, which provides "[t]he Supreme Court of Guam may, by rules of court, create such divisions of the Supreme and Superior Courts as may be desirable...." This section reflects the Legislature's intent to defer to the Supreme Court of Guam the authority to determine the structure and divisions of the local court system. The current language of H.R. 521, which vests in the Supreme Court of Guam the power to create divisions of the Superior Court of Guam, reflects the power the Legislature has already conferred to the Supreme Court.

The Legislature's grant of authority to the Supreme Court of Guam in this regard is not without precedent. The State of Vermont has similarly vested in its Supreme Court the power to create by judicial rules geographical and functional divisions within its court system. Vt. Const. chpt. 2, § 31. We note, though, that the Vermont Legislature shares this function.

To the extent that the language of H.R. 521 can also be read as granting the Supreme Court of Guam the power to create other local courts, it may have been a reaction to the Legislature's stripping of the court's authority. Admittedly, no other jurisdiction at the Federal or state level vests within its Supreme Court the power to create inferior courts. Thus, the amendment to H.R. 521 that I proposed addresses this matter, deleting this section and simply providing that the Guam Supreme Court is the highest local court of our territory with the Chief Justice at its head under a unified judiciary. This is similar to the court structures of the other fifty states. We only wish to be similarly treated.

If the Committee has any further questions, please do not hesitate to contact me.

Sincerely,

F. PHILIP CARBULLIDO
Chief Justice, Acting

Mr. HAYWORTH. Thank you, Mr. Acting Chief Justice. We appreciate your testimony and what you provided in writing. It goes without saying, but I will repeat: everyone's testimony will be made part of the complete record.

Now, we turn to Presiding Judge Lamorena. Sir, welcome. We look forward to your testimony.

STATEMENT OF THE HON. ALBERTO C. LAMORENA III, PRESIDING JUDGE, SUPERIOR COURT OF GUAM

Judge LAMORENA. Thank you very much, Mr. Chairman, members of the Committee. I would like to thank the Committee for inviting me to testify on H.R. 521.

The Organic Act of Guam is predicated on the principle that the United States citizens of Guam should be self-governing in the administration of their local civil affairs to the greatest extent possible, consistent with the current political status of Guam as an unincorporated territory.

Congress has shown restraint and declined to intervene in local affairs, even when requested by parties to the local debate and deliberative process unhappy with the results or outcome of the internal mechanisms of self-government under the Organic Act. The Organic Act provisions codified at 48 USC 1424, et al., carefully pre-

scribes the relationship between the Federal and local courts. In doing so, Congress clearly and unambiguously and explicitly identified what matters of judicial administration involve Federal interest and what matters of judicial administration were to be locally determined and regulated. Thus, Section 1424-1 states clearly that the organization and operation of the local courts shall be as prescribed by the laws of Guam.

Section 1424-2 addresses in exceedingly precise and exact terms the manner in which Federal interests would be preserved and protected during the transitional relations between the local and Federal courts necessitated by the establishment of the appellate court in Guam. In doing so, Section 1424-2 carefully preserves local authority under the local courts, respecting what can be referred to as a bright line between Federal and local law concerning operation and administration of Federal and local courts respectively.

Under any reasonable and rational standard, this represents a successful statutory policy to ensure that the exercise by Guam of its authority to establish the Guam Supreme Court will be managed properly to continue good, orderly relations between the local and Federal courts. Instead of a reasonable standard, H.R. 521 implicitly declares the Congressional policy embodied in the Organic Act, including Section 1424-2, a failure.

H.R. 521 is an attempt to enlarge and expand the scope and extent of Federal interest and the exercise of Federal powers to encompass and include matters already determined by Congress to be local. H.R. 521 proceeds from the false premise that the Guam Supreme Court should operate in a political vacuum. Under this bill, on the issue of defining its powers and role in the lives of the community it was created to serve, the Supreme Court will only answer to Congress, in which the United States citizens of Guam have no voting representation.

Even though the Guam Supreme Court is a local court created under local law, H.R. 521 proposes to isolate and insulate the Guam Supreme Court from the political and legal processes of the Organic Act, the very instrumentality through which the will of the citizenry and the consent of the government are redeemed as to all local institutions and civil affairs. If the manner in which local law governs and regulates the administration and operation of the local courts is so defective, so deficient and so disruptive to good order as the supporters of H.R. 521 claim, then how is it that the Ninth Circuit has found that the Supreme Court is functioning in a manner which fully vindicates Federal interest as defined by Congress in Section 1424-2?

In Section 1424-1, Congress vested in the United States citizens of Guam and their elected representatives the subject relations between and among the local courts. That is good policy today, just as it was when this Committee declined to approve H.R. 2370 after the hearing conducted on October 29, 1997. My previous testimony emphasizes the irony of Congressional authorization of a local appellate court became the pretext for Congress to take back the authority over local court organization it granted to Guam under the Organic Act. What have we gained if we are empowered to establish a local appellate court only to be disempowered as to the operation and administration of the entire local court system itself?

We believe the Superior Court is best able to determine what is necessary and proper in order to carry out the court's responsibility. The Superior Court should be responsible for hiring, promoting, assigning and managing its own personnel as well as preparing its own budget requests. That is why the great majority of judges of the Superior Court of Guam and the Guam Legislature support the judicial council model. It creates a check and balance between the trial court, with a caseload 400 times larger than the appeals court, and precludes control of the trial courts by a Supreme Court that does not understand or have to live with resource management challenges of the trial court.

The U.S. Supreme Court has recognized that the power to establish internal structure of local courts is at the heart of self-government. In the case of Calder v. Bull, it was noticed that establishing courts of justice, the appointment of judges and the making of regulations for the administration of justice within each state according to its laws on all subjects not entrusted to the Federal Government appears to me to be peculiarly and exclusive the province and duty of the state legislature.

For these reasons, we oppose H.R. 521 as an attempt to Federalize the local courts of Guam, which would be a step backwards from self-government and self-determination. Again, thank you for the Committee and Mr. Chairman for allowing me the opportunity to testify before you today.

[The prepared statement of Judge Lamorena follows:]

Statement of Alberto C. Lamorena, III, Presiding Judge, Superior Court of Guam, on H.R. 521

The Organic Act of Guam constitutes a fifty-two year old Federal statutory policy promulgated and sustained by every Congress for the last five decades. It is predicated on the principle that the U.S. citizens of Guam should be self-governing in the administration of their local civil affairs to the greatest extent possible, consistent with the current political status of Guam as an unincorporated territory.

Under the Organic Act, Congress has implemented a policy of democratic institution building, enabling Guam to develop the customs and capacity for internal self-government. The principal purpose of the Organic Act has been to promote local responsibility for local affairs, and to prepare the people of Guam for the time when Guam adopts a local constitution and addresses the question of its future political status.

Within the framework of the Organic Act, Congress has tended to legislate on local matters otherwise governed by the Organic Act only to the extent necessary to bring Guam within national law and policy, or under extraordinary circumstances. Congress wisely has exercised sparingly its power to legislate solutions to local problems.

As a general rule Congress has shown prudential restraint and declined to intervene, even when requested by parties to the local political debate and deliberative process unhappy with the results or outcome of the internal mechanisms of self-government under the Organic Act. Although the U.S. citizens of Guam do not live in a state of the union and under the protection of the 10th Amendment to the Federal constitution, the Organic Act and the manner in which Congress has implemented it are consistent with the principle of reservation of local power and responsibility over local issues.

This is particularly true with respect to the provisions of the Organic Act which govern the role of the Federal and local judiciary in Guam. Subchapter IV of the Organic Act, comprising the provisions codified at 48 U.S.C. 1424, et seq., is a carefully prescribed scheme of judicial empowerment which respects the principles of separation of powers and checks and balances that are the pillars of American constitutional democracy.

In addition to establishing and defining the jurisdiction of the Federal court in Guam, these provisions governing the judiciary prescribe the relationship between the Federal and local courts. In doing so, Congress clearly, unambiguously and ex-

plicitly identified what matters of judicial administration involved Federal interest, and what matters of judicial administration were to be locally determined and regulated.

Thus, Section 1424–1 states clearly that the organization and operation of the local courts shall be as prescribed by the laws of Guam. Nevertheless, Section 1424–2 also recognizes the unique circumstances surrounding the authorization by Congress for establishment under local law of an appellate court. In this provision Congress addressed in exceedingly precise and exact terms the manner in which Federal interests would be preserved and protected during the transition in relations between the local and Federal courts necessitated by the establishment of the appellate court in Guam.

Section 1424–2 is an artfully drawn statutory scheme that fully, adequately and effectively regulates relations between the newly established Supreme Court of Guam and the Federal courts. As such, it is dispositive with respect to Federal interest arising from the establishment of the local appellate court. There is no failure to anticipate additional Federal policy matters, no errors or omissions in the legislative language. Rather, Section 1424–2 carefully preserves local authority over local courts, respecting what can be referred to as a bright line between Federal and local law concerning operation and administration of Federal and local courts, respectively.

The best proof of this is the report that the Judicial Council of the Ninth Circuit submitted to Congress in 2001 as required by Section 1424–2. That report states that the decisions of the Guam Supreme Court are of comparable quality to decisions of the highest courts of the states in the Ninth Circuit, and "do not compel additional appellate review beyond that provided for decisions of the state supreme courts." This finding by the Judicial Council pursuant to its mandate under Section 1424–2 sets the stage for review of decisions of the Guam Supreme Court by the U.S. Supreme Court.

This means the transition in relations between the local and Federal courts is going very well, that Federal interests at stake in the transitional process, as defined by Congress, are being preserved and protected. Under any reasonable and rational standard, this represents a successful statutory policy to ensure that the exercise by Guam of its authority to establish the Guam Supreme Court would be managed properly to continue good order in relations between the local and Federal courts.

Instead of a reasonable standard, H.R. 521 implicitly declares the Congressional policy embodied in Section 1424–2 a failure. It is an assault on the carefully prescribed scheme determined by Congress for the very purposes of protecting Federal interests without intruding upon local authority over local courts. H.R. 521 is an attempt to enlarge and expand the scope and extent of Federal interests and the exercise of Federal powers to encompass and include matters already determined by Congress to be local.

H.R. 521 proceeds form the false premise that the Supreme Court of Guam should operate in a political vacuum. Under this bill, on the issue of defining its own powers and role in the lives of the community it was created to serve, the Supreme Court will answer only to a Congress in which the U.S. citizens of Guam have no voting representation.

Even though the Guam Supreme Court is a local court created under local law, H.R. 521 proposes to isolate and insulate the Guam Supreme Court from the political and legal processes of the Organic Act, the very instrumentality through which the will of the citizenry and the consent of the governed are redeemed as to all local institutions and civil affairs.

Again, the best proof that this in not warranted, that it is an invasion of already limited local self-government, is the report of the Judicial Council of the Ninth Circuit. For if the manner in which local law governs and regulates the administration and operation of the local courts is so defective, so deficient and so disruptive to good order as the supporters of H.R. 521 claim, then how is that the Ninth Circuit has found that the Supreme Court is functioning in a manner which fully vindicates Federal interests as defined by Congress in Section 1424–2?

If the independence of the Guam Supreme Court were being usurped, if the new court were institutionally dysfunctional, then perhaps Federal interests beyond those identified in Section 1424–2 might need to be addressed by further legislation. Similarly, if local political debate, legislative proceedings, as well as executive measures, were producing a crisis in the administration of justice in Guam for which there were no local remedy, then perhaps there would be a more compelling reason for this Committee to be considering this bill.

But the local political process under the Organic Act is the mechanism Congress created to address the subject matter of H.R. 521. The fact that it may take time

for that democratic process to play itself out is not a reason for Congress to return Guam to an earlier stage in the evolution of self-government by imposing a Federal solution. Indeed, resolving this issue locally, debating its merits, is part of the process through which Guam is preparing itself for eventual constitutional self-government and political status resolution.

H.R. 521 is an assault therefore, on democratic self-government and progress toward political status resolution through self-determination. The fact that local legislation addressing these local issues has been swept up in litigation having nothing to do with the subject matter of H.R. 521 is irrelevant. So the real question before us is whether there is a legitimate and compelling Federal interest that is being put at risk because Guam law, not Federal law, governs the operation and administration of the local courts?

The record before this Committee and Congress on this matter was complete after the hearing held in 1997 on H.R. 2370. The primary difference between circumstances at that time and the present is that the Ninth Circuit has confirmed that the Guam Supreme Court is ahead of the schedule many observers may have predicted in becoming the fully functional local high court of Guam that we all have envisioned for so many years.

The fact that the Ninth Circuit Judicial Council or other national or state organizations may have opinions about local court administration is well and good. However, under Section 1424–2, Congress did not empower the Ninth Circuit Judicial Council or any other organization to exercise an official responsibility in this matter. Rather, Congress defined the central role of the Ninth Circuit Judicial Council to reporting its findings on certain matters concerning relations between the local and Federal courts.

In contrast, under Section 1424–1, Congress vested in the U.S. citizens of Guam and their elected representatives the subject of relations between and among the local courts. That is good policy today, just as it was when this Committee declined to approve H.R. 2370 after the hearing conducted on October 29, 1997.

In my testimony at that time I pointed out that throughout U.S. history Congress has left the formation of the internal organizational structure of local court systems to the local political process in the states and the territories. These are issues that properly are determined under state and territorial constitutions or statutes.

My previous testimony also emphasized the irony if Congressional authorization of a local appellate court became the pretext for Congress to take back the authority over local court organization it granted to Guam under the Organic Act. What have we gained if we are empowered to establish a local appellate court, only to be disempowered as to the operation and administration of the entire local court system itself?

The U.S. Supreme Court has recognized that the power to establish internal structure of local courts is at the heart of local self-government. In the case of Calder v. Bull (1798), it was noted that "Establishing of courts of justice, the appointment of judges, and the making of regulations for the administration of justice, within each state, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province and duty, of the state legislature".

The fact that Guam is a territory and not a state is not a reason, or an excuse, to Federalize the administration of local courts. The mere fact that there is a robust debate in the local political process over how the local courts should be organized at this juncture in Guam's history is not an intrusion on judicial functions. Differences of philosophy among members of the Judicial Council of Guam do not threaten the independence of the judiciary.

The claim we have heard about the present local law being a threat to the independence of the judiciary is not a responsible way to frame this discussion. The lawmaking process through which the local community organizes its courts is political, but that does not invade the adjudicative function. The Guam Legislature has a duty to organize the local courts as it deems best, and doing so is no more an interference with the courts than the process for confirming judges.

Indeed, H.R. 521 is the real threat to the independence of the local judiciary. For in creating the Supreme Court the Guam Legislature reaffirmed the existence of the Judicial Council, a policy-making body since 1950. As in many other court jurisdictions in the United States, the administration of the court system is delegated to the Judicial Council. On Guam, the Council is made up of Representatives from the Supreme Court, the Superior Court, the Attorney General, and the Chairperson of the Legislature's Committee on Judiciary.

Similarly, in California, a judicial council made up of members of different courts, the state legislature, and the community oversees the administration of courts, set-

ting policies for a court system that handles one of the largest caseloads in the nation. Somehow the independence of that judiciary has not been usurped.

Likewise, in Utah and in the District of Columbia (also under Congressional control without 10th Amendment protection) a judicial council model is in place. I am told that in D.C. the trial and appeals courts are managed separately by the council.

On Guam the justices and judges are appointed by the Governor and confirmed by the legislature. We believe that the Superior Court is best able to determine what is necessary and proper in order to carry out the court's responsibilities. The Superior Court should be responsible for hiring, promoting, assigning and managing its own personnel, as well as preparing its own budget requests.

That is why the judges of the Superior Court and the Guam Legislature support the judicial council model. It creates a check and balance between the trial court with a caseload 400 times larger than the appeals court, and precludes control of the trial courts by a Supreme Court that does not understand or have to live with resource management challenges of the trial court.

In closing, I would like to return to the first point I made, which is that the Organic Act did not give control of the local judiciary to the local government by accident, or unintentionally. U.S. Senate report 2109 from the Committee on Interior and Insular Affairs described the charter for local self-government as follows: "This bill is reported in the belief that the time has come for the Congress to pass an organic act permitting the people of Guam to govern themselves. It establishes democratic local government for the island and guarantees human freedom under the authority of Congress,...a bill of rights is provided, a representative local government in the American tradition, an independent judiciary administering a system of law based on local needs and traditions, all within the American framework of fundamental fairness and equality."

Attached to this testimony is the response of the Superior Court of Guam regarding the report of the Ninth Circuit Judicial Council on the Supreme Court of Guam pursuant to 48 U.S.C. 1424–2. This document was transmitted to the Chairman of this Committee on November 30, 2001.

Thank you for the opportunity to submit this written testimony in opposition to H.R. 521.

SUPERIOR COURT OF GUAM

COMMENTS AND ANALYSIS REGARDING THE REPORT OF THE PACIFIC ISLANDS COMMITTEE

JUDICAL COUNCIL OF THE NINTH CIRCUIT

PREPARED PURSUANT TO TITLE 48, SECTION 1424–2, UNITED STATES CODE

On April 13, 2001, the Presiding Judge of the Superior Court of Guam was notified by the Chairman of the Pacific Islands Committee of the Judicial Council of the Ninth Circuit that its Report on the Supreme Court of Guam has been approved by the Council and transmitted to Congress in accordance with Title 48, section 1424–2 of the United States Code.

It is historic that the Council states at page 24 in Part IX that opinions of the Supreme Court of Guam are of sufficient quality that, "...they do not compel additional appellate review beyond that provided for decisions of state supreme courts." This recognizes that decisions by the territorial supreme court are "comparable" to decisions by the highest courts of other states in the Ninth Circuit, and sets the stage for direct review by the Supreme Court of the United States from final decisions of the Supreme Court of Guam.

It also is significant that Paragraph 8 in Part IX of the report calls upon the U.S. Congress to consider early termination of certiorari review by the Court of Appeals for the Ninth Circuit. This would accelerate state-like treatment for decisions by the local supreme court, as a judicial body operating under the laws of Guam.

The findings and conclusions referred to above, based on the quality of judicial decisions by the local supreme court, are matters clearly within the cognizance of the Council given its task of reporting to Congress as charged under Title 48, section 1424–2 of the United States Code. The Committee also comments on issues relating to judicial administration of local courts other than the Supreme Court. Within the framework of applicable Federal law, these matters involving administration of other local courts clearly remain within the cognizance of the legislative, executive and judicial branches of the local territorial government.

Unfortunately, the Council's comments on local court administration go beyond assessment of the quality of decisions rendered by the Supreme Court. Instead, the

Council has entered into the matter of local court administration even though it is an issue of local self-government under the Organic Act, and notwithstanding the deference of Congress to the local political process on this very matter.

For example, Part V of the Committee's report contains a discussion of the relationship between the Supreme Court of Guam and the other two branches of the local government, followed by the discussion in Part VI regarding relations with the Superior Court of Guam. Understandably given the actual purpose and scope of the report, these parts of the Committee's discussion describe some but not all of the legal and political nuances of the difficult history of efforts to establish a local supreme court in Guam.

While the discussion of local court administration policy in the report is insightful, regrettably both the nuances and insights in earlier parts of the report are lost in the summarization contained in Paragraph 7 of Part IX. Without duplicating here views previously presented in the already extensive record regarding local judicial administration now before the local and Federal courts, as well as the political branches of the both the local and Federal Governments, there are a few observations that should be made regarding Paragraph 7, which appears at page 26 of the Committee's report as follows:

> "7. An inordinate amount of time and effort is being expended on many fronts in attempting to resolve the issue of judicial administration of the Guam courts. Certainly, the perception, and perhaps the reality, is that judicial administration in Guam has become politicized. This situation has not helped the institution of the Supreme Court grow as it should. The judiciary should consider examining alternative models with shared responsibility which can begin on a very limited basis and grow over a period of time as the judges and justices desire."

A cursory reading of the Paragraph 7 might lead anyone not well informed about the evolution of local and Federal law concerning the administration of courts in Guam to conclusions that contradict those actual findings of the Council that are directly relevant to its mandate under Title 48, section 1424–2. Specifically, Paragraph 7 could lead many readers to believe the Committee found that local politics relating to court administration are encumbering the development, in the words of the Council's mandate from Congress, "...of institutional traditions to justify direct review by the Supreme Court of the United States" from decisions by the Supreme Court of Guam.

To avoid this misreading of Paragraph 7, it is important to recognize that the Council has found the Supreme Court of Guam to be functioning well enough for its rulings to receive state-like treatment even earlier than Congress has provided in the Federal statute defining the Council's role and the scope of the report. While it may be true as stated in the vague terms of Paragraph 7 that the debate over its relations with other local courts may not have "helped" the Supreme Court of Guam to develop its institutional traditions, that is not what the Council was asked by Congress to address.

Rather, consistent with its actual mandate from Congress the Council's report concludes that decisions of the Supreme Court of Guam are sufficiently "comparable to opinions of the supreme courts of the states in Ninth Circuit" that Congress should consider authorizing direct review of the territorial court's decisions by the U.S. Supreme Court." The clear result is that the debate over local court administration policy has not prevented the Supreme Court of Guam from developing the institutional traditions Congress necessary to its qualification for state-like treatment in the Federal judiciary appellate process.

In this context, it would have been more accurate if Paragraph 7 had noted that the Supreme Court is functioning as intended by Congress notwithstanding the debates which have taken place in the local legislative process regarding administration of courts in Guam. The fact that there is a debate over local policy on court administration, as a matter that Congress has vested in the political branches of the local government, does not mean that the orderly administration of justice has been "politicized" in a manner or to an extent that it has interfered with the ability of the Supreme Court of Guam to develop and define its role in the local legal and political process.

While it may be true that officials in all three branches of the local government have staked out differing positions on judicial administration issues, and, as we invariably find when comparable issues arise at the Federal level, the political parties tend to support the official policy positions staked out by officials who represent their party interests in the political arena. That is the essential nature of self-government and rule of law in an ordered but also pluralistic political system.

There is no way the Supreme Court of Guam can or should operate in a political vacuum free of a legitimate policy debate over its operations in the political

branches of the local government. As long as the independence of the judiciary in performing its judicial duties and role in the governmental system is not undermined, policy regarding court administration is a legitimate subject of legislative deliberations.

The fact that a political process has ensued and resulted in the current policy under local law with respect to administration of other local courts, at the same time the Supreme Court of Guam has been organizing and developing its jurisprudence, is entirely logical and fitting. This is especially true considering that the Superior Court of Guam has been functioning effectively for decades while the Federal political and judicial branches wrangled over the parameters for establishing the local Supreme Court in the first place.

That long and twisted history of the local high court's establishment was far more "politicized" in Congress, as well as the local legislature, than the more recent debate over its relationship with the local Superior Court of Guam. The political debate in at the Federal level has been the principle challenge faced in instituting the local Supreme Court, and in its development of institution traditions required for state-like treatment.

As to how "politicized" the local system for court administration has become, the Committee's report as approved by the Council notes that the Republican controlled legislature and the Superior Court bench have been supportive of the development of the institutional traditions of the Supreme Court of Guam in accordance with applicable Federal and local laws establishing the court. In addition, at Part VIII, page 22, the Council's report notes that in the Council's meetings with Superior Court judges, "There was unanimous rejection of the idea of eliminating the Supreme Court."

In Part V at page 17, the report states that, "In meeting with the Senate Judiciary Committee'the Subcommittee observed no indication that legislation might be introduced to eliminate the Supreme Court. Indeed, there appears to be general agreement that on issues of law, the Supreme Court is supreme." Thus, as to matters of substance and primacy of the local supreme court on matters of law, the local system of self-government is not politicized in a way that is impeding the court's progress.

Those unhappy with current local law and policy regarding judicial administration assert that budget execution and information system management. This is not a compelling reason for local political brinkmanship over court administration, much less Congressional intervention.

Unless the Legislature of Guam alters current law, the proposals to end decades of continuity in court operations in Guam in favor a of new order probably would better be the subject of deliberations and debate in the context of Guam's quest for a greater degree of self-government. For example, at such time as a constitutional convention is convened to replace the Organic Act structure for self-government with a commonwealth structure under a locally adopted constitution, the framers of a new charter for local self-government presumably would want to address the question of whether the existing court system should be preserved, modified or reorganized.

Thus, in the absence of local legislature action, the course most consistent with current Federal policy is to leave the present court system as it is, until a local constitution is adopted. This is especially true since Congress authorized state-like self-government under a locally adopted constitution under the terms of P.L. 95–584 two decades ago. It is through formulation of a local constitution that the reconciliation of competing institutional legacies in the structure of local self-government, including elimination of anomalies in structure of all three branches of the local government under the Organic Act, can be accomplished in a democratic and deliberative process.

That is why on June 17, 1998, the Chairman of the House Resources Committee, one of the two committees of jurisdiction over this matter to which the Council must submit its report under Title 48, section 1424–2 of the United States Code, made the following statement in opposition to H.R. 2370, Delegate Underwood's proposed legislation to preclude local self-determination in Guam of policies for administration of Guam's local courts:

> "...currently there is no compelling Federal reason for Congress to regulate the administrative operations of Guam's courts in order to promote Federal interests. Indeed, the greater Federal interest at this time is to promote local self-determination and self-government over Guam's internal affairs. Guam already has the tools of self- determination which augment the Organic Act and empower the residents of the territory to reform the local judiciary though adoption of a local constitution. Under Public Law 95–584, a constitution could establish the Commonwealth of Guam and enable the

> United States citizens of Guam and an internally self-governing body politic to exercise self-determination in local affairs...” Letter from Don Young, Chairman, Committee on Resources, U.S. House of Representatives, to Mark Charfauros, 24th Guam Legislature.

The argument against employing the P.L. 95–548 procedure for reform of the local government structure, used over the years by those who misconceived the process of self-determination for Guam under U.S. and international law, was that adoption of a local constitution would be used as an excuse by Congress to defer further self-determination on the ultimate status of Guam.

In this regard, it should be noted that October 13, 1998, the U.S. House of Representatives adopted House Resolution 494, expressly stating that, “Congress has continued to enact measures to address the various aspirations of the people of Guam, while considering legislative approaches to advance self-government without precluding Guam’s further right to self-determination.” In explaining the resolution to the House before it was adopted, Resources Committee Chairman Don Young made the following statement on the floor of the House that is now part of the legislative history of resolution 494:

> “Today, while the people of Guam continue their quest for increased self-government within the United States community, they can be assured that the adoption of a constitution as authorized by Congress will not prejudice or preclude their right of self-determination and the fundamental right to seek a change in their political status in the future.”

The significance of the preceding discussion of Guam’s local court structure is plain. The question of local court administration has been “politicized” by those who do not accept the outcome of the local process of self-government and want Congress to intervene to unilaterally alter the court system under the Organic Act, and thereby preempt determination of the future court system under a locally adopted constitution.

This would ignore that fact that Congress has authorized adoption of a local constitution that would resolve all organic issues that the existing governing system under the Organic Act has not addressed. Whether adoption of a local constitution would confirm or reform the current system of judicial administration would then be determined democratically.

If Congress is going to do anything more than it has already done by declining to intervene in this matter under the Organic Act, and by authorizing a local constitution, it should perhaps continue to sustain a policy of continuity in local court structure until a locally adopted constitution becomes the vehicle for a more permanent determination of this issue.

Thus, the Committee’s report, as now adopted by the Council, is directly on point in concluding, as noted above, that there is no issue of politicization of the process for development by the Supreme Court of Guam of institutional traditions to justify state-like treatment of the court’s rulings. That was, after all, the subject on which the Council was directed by Congress to report, and as the report states regarding the politicized debate among local political factions in Part V, at page 18, “‘the division is over administrative control.”

The Committee’s report as adopted by the Council then goes on to discuss the three options for resolving the question of court administration:

- Allow the judicial administration system established through the local political process to continue;
- Amend the Organic Act to transfer effective control over administration of all courts to the Supreme Court of Guam;
- Establish a consultative process through which the justices and judges of the Supreme Court of Guam and the Superior Court agree on arrangements to share administrative functions in order to create a blended system of judicial administration, integrating operations where possible and preserving separate administration where necessary.

While neither illogical nor without precedent as a model for court administration, the “third path” of partial integration faces one very serious and possibly fatal obstacle. For it contradicts the one element of Paragraph 7 with which all concerned with this entire matter must agree:

> “An inordinate amount of time and effort is being expended on many fronts in attempting to resolve the issue of judicial administration of the Guam courts.”

By every standard of measurement, the cost of the effort to end continuity and impose a new order through highly politicized initiatives has been too high. The ability to work toward local consensus has been undermined by the attempt of those unwilling to accept the outcome of local self-government to orchestrate the imposi-

tion of a result through high profile political tactics not normally associated with the issue of judicial administration.

To avoid a situation in which the performance of Guam's courts may be impaired by expenditure of time and effort addressing proposals for change of the current system of court administration, perhaps the best course for now is to operate as effectively as possible under the existing system. That may have to do until a consultative process can be established free of controversial proposals and high-pressure tactics.

[A letter and responses to questions submitted for the record by Mr. Lamorena follow:]

Honorable Congressman James V. Hansen
Chairman
Committee on Resources
Office of native and Insular Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Hansen,

I wish to thank you for the opportunity to testify before the Committee on Resources on Wednesday May 8, 2002 with regards to H.R. 521. Your efforts to allow the various views on Guam of an issue effecting Guam's people speaks well of you as Chairman and the Committee on Resources as a whole. I wish to thank you and all the members and I was certainly honored to participate and present my testimony.

I am writing in response to your letter of May 14, 2002 requesting a response to four additional questions the Committee had. I have attached my responses. I hope they prove of some assistance to the members as they deliberate on H.R.521.

Once again, on behalf of myself and the Superior Court of Guam, my sincerest dunkalo si Yu'os maase and thank you.

ALBERTO C. LAMORENA III

Response to questions submitted for the record by Presiding Judge Alberto C. Lamorena III

Committee Question on H.R. 521: "Do the three branches of the Government of Guam have the legal authority and governmental power to resolve the problems that have arisen over administration of the local courts?

Presiding Judge Alberto C. Lamorena III response:

Yes. It is important to recognize that the Organic Act was approved by a Congress in which the U.S. citizens of Guam do not have voting representation, and signed into law by a President chosen in a national election without participation by the U.S. citizens of Guam. As such, at both the Federal and local level, the Organic Act itself neither results from or by its nature implements the principle of government by consent.

1950 was the year Congress authorized adoption of a local constitution in Puerto Rico. In the case of Guam, Congress did not authorize a local constitution until 1976. Thus, the Guam Organic Act of 1950 represents a statutory policy to implement a more limited form of local self-government for Guam than for Puerto Rico, as an interim step until adoption of a local constitution was deemed appropriate and authorized by Congress.

However, the Organic Act does create a system of limited local self-government that allows government by consent as to local law. In order to make this step forward in the development of local government possible, Congress had to establish the political branches of government required to legislate and create a body of local statutory law with the consent of the governed. This is the most Congress could do to promote local self-government in the absence of a local constitution.

Recognizing that the citizens of Guam were not empowered by the Organic Act to establish by consent of the governed a "republican form of government" with "separate and co-equal branches," Congress determined to limit its exercise of plenary power to the two political branches of government, and allows establishment of the local courts by consent of the government under local law.

In this manner Congress committed the statutory establishment and regulation of the local judiciary to the people of Guam. Congress revisited this subject in order to authorize the establishment and regulation of the Guam Supreme Court under 48 U.S.C. 1424–1.

At no point since 1950 has Congress provided that these matters are committed to the process of local self-government only unless and until there is a serious political debate over an issue of local statutory policy between opposing factions in the local legislature. To the contrary, it has been the 50-year policy of Congress to allow local issues to be determined locally unless and until Federal interests compelled Congress to alter the Organic Act or local law.

Thus, the two political branches of the local government have the legal authority to establish and regulate the courts, and at this time the local courts have the legal authority to exercise the jurisdiction vested in them by local law. Since there is no constitutional form of local government creating separate and co-equal branches of government with consent of the governed, it is sophistry to argue that the Organic Act can be altered to establish the equivalent of a local constitutional system by edict of Congress.

Committee Question on H.R. 521: Can this problem be resolved without Congress Intervening?

Presiding Judge Alberto C. Lamorena III response:

Yes. The issues discussed at the hearing can and should be resolved at the local level without Congressional intervention.

The are two kinds of courts: constitutional and statutory. The existence and functions of a constitutional court cannot be regulated by the political branches of the government except as provided under the constitution itself. A statutory court is a creature of statute and subject to statutory regulation.

In his testimony before the Committee, the Chief Justice of the Guam Supreme Court suggested that it was an intolerable infringement on judicial independence for the local legislature to have the power to establish, regulate or terminate the functions of the court. Yet, as a statutory court the Supreme Court of Guam necessarily and by definition must be subject to the powers of both Congress and/or the local legislature.

The only Federal judges whose courts cannot be abolished by the Congress are the nine members of the U.S. Supreme Court. All other Federal judges, including those to whom decisions of the Guam Supreme Court can be appealed, carry out their duties independently while subject to the very legislative power that Guam's Supreme Court Chief Justice finds intolerable. That is the nature of a statutory judicial system as opposed to a constitutional court.

Thus, the question that should have been addressed at the hearing on H.R, 521 is this: Of the two legislative bodies with the power to regulate the Supreme Court of Guam, which should determine the policy for administration of the local courts and the relations between the Superior Court of Guam and the Supreme Court?

Should it be the Congress in which the citizens of Guam are not represented? Or, should it be the local legislature in which they citizens have voting representation?

Obviously, as long as Guam remains a territory, Congress retains plenary authority over the form of government in the territory. However, the question at hand is whether Congress or the local legislature should prescribe statutory policy for operation of statutory courts.

The Chief Justice of the Guam Supreme Court made it clear in his testimony before the Committee that he would rather entrust statutory policy-making over Guam's local courts to the Congress than to the people of the community which the court serves. This is nothing less than an invitation to Congress to take back control of a subject of statutory policy that Congress had transferred to the local level.

The Supreme Court Chief Justice's testimony does not call for an end of statutory control by a legislative body of the Supreme Court. H.R. 521 does not end the power of a legislative body to abolish the Supreme Court. Rather, the position of the Chief Justice and the bill itself is simply that Congress should be the legislative body with that power, instead of the local legislature.

In other words, the sponsor of the bill, Mr. Underwood, and the Chief Justice, trust a Congress in which the people of Guam are not truly or meaningfully represented more than they do the local legislature in which the people in Guam have voting representation. If that is their position, fine.

Why don't they just come out and say so, instead of distracting attention from the real issues by talking about separation of powers and co-equal branches of government, which can only be created with the consent of the governed under a local constitution?

Thus, all the rhetoric in the hearing about republican form of government and separate and co-equal branches of government was misplaced and misleading. H.R. 521 will not create a republican form of government with three co-equal branches. It will take the one branch of the local government over which the people have control and the power of consent and make it more like the two other branches of the government that were created by Congress without the consent of the governed. That is a step backward not forward for self-government.

If there real intention were to create a local Supreme Court that was not subject to regulation by the local legislature, the way to do that is to establish local constitutional self-government under a structure consented to by the people, and which includes co-equal branches of government with limited powers.

Committee Questions 3 & 4 on H.R. 521: "What is the basic difference between a Supreme Court having sole control over the administration of both courts versus a Judicial Council having the same powers?"

"In the Federal system, the U.S. Congress statutorily establishes the Federal courts (district courts, appellate courts, patent courts, tax courts etc"). If we take the model proposed in H.R.521 (Section 1 (a)) to the Federal level, Chief Justice Rehnquist, rather than Congress would have the power to unilaterally determine the structure and division in the court system. Why should we adopt a model for Guam that we would never adopt at the Federal level?"

Presiding Judge Alberto C. Lamorena III response:

H.R. 521 gives the Guam Supreme Court powers that the U.S. Supreme Court does not have in the Federal judicial system. That includes the power to create lower courts by rule of the Chief Justice, and to define by fiat the divisions and functions of the lower courts.

The creation of courts is a legislative function, and the establishment of court policies for administration of the judiciary and relations between local courts, to the extent not prescribed by statute, is a matter that can best be managed under the Judicial Council model. The local legislature, not Congress, should provide the statutory policy governing these matters.

Unless Congress is willing to cede its statutory power over creation of Federal courts, it should not take that power away from the Guam Legislature.

Mr. HAYWORTH. And we thank you, Judge Lamorena.

Let me begin the questions. Let us go to Secretary Kearney first from the Department of the Interior.

Mr. Deputy Assistant Secretary, which does the administration believe is the better way for Guam to improve the structure of local self-government? Is it for Congress to continually attempt to perfect the Guam Organic Act or for the people of Guam to enact a local constitution?

Mr. KEARNEY. Well there has been at least one effort some years ago by local effort to address the constitutional matter, and that was—while I am not familiar with all of the particular details was attempted to be addressed and was addressed unsuccessfully. So there is some question about the extent to which that could be a successful way to achieve it. Congress has plenary oversight responsibility in this area, so it is certainly reasonable and prudent for the Congress to review this matter.

I do not have a position one way or the other on which way is the best to proceed.

Justice CARBULLIDO. Mr. Chairman, may I add to that response?

Mr. HAYWORTH. Certainly, sir.

Justice CARBULLIDO. Thank you, Mr. Chairman.

Obviously, if we could put this in our constitution, that is the route to go. However, it has been 25 years since the Guam Government has been given the authority to write its constitution, and the very elected leaders who are suggesting that maybe this is some-

thing that should be included in the constitution have taken the position that we should not write a constitution until such time as the Federal-territorial relationship has been defined. It has been 25 years since they have been working on that, and we do not think that it would be wise to wait another 25 years before we can determine this should be put in the constitution.

And so, the Organic Act of Guam is Guam's constitution today, and this is exactly what is being asked, that we change Guam's constitution and put the judiciary on equal footing with the executive and legislative branch. That is all that is being asked today.

Mr. HAYWORTH. Judge Lamorena, would you like to weigh in on this?

Judge LAMORENA. The people of Guam have had the opportunity to create its own constitution, and I support that effort in creating its own constitution. I believe that the people of Guam in creating their own constitution do not abrogate their possibility with changing their political status with the United States. I do not think they are totally mutually exclusive. The constitution is essential, because the constitution is a document in which the governed set up parameters on how they are to be governed.

The Organic Act, yes, is considered the constitution of Guam, but it is still a Federal statute, and it can be changed by representatives who do not live on Guam. That is why I feel that any changes within the law should be given the opportunity for the people of Guam make those changes. And the Congress did that when Congressman Won Pat passed—the late Congressman Won Pat—passed legislation giving the people of Guam the authority to create the Guam appellate court system.

And with that, the Congress had great ability and confidence in the people of Guam to create their own self-governing body. And I would like Congress to keep going in that direction. In fact, recently, Congress passed a law authorizing the people of Guam to empower them to pass legislation to determine how their attorney general should be elected. The people of Guam, through their Legislature, have made the attorney general's position now an elected position. But they did not tell the people of Guam, like they are now doing with this legislation, this is what you should do. This is what you are ordered to do. They told the people of Guam we are giving you the enabling legislation to do what you think is right for you. And that is all we asked, and I think the members of the Legislature asked that, and the people have Guam have that to respect their decisions as people living in Guam.

Mr. HAYWORTH. Thank you, Judge.

The Chair would ask the indulgence of the other members, and I understand our friend who is the principal sponsor, the gentleman from Guam, has a statement and, if he so desires, after that statement, to ask a couple of questions.

STATEMENT OF HON. ROBERT UNDERWOOD, A DELEGATE IN CONGRESS FROM THE TERRITORY OF GUAM

Mr. UNDERWOOD. Well, thank you very much, Mr. Chairman, and I had an opening statement, and I will not belabor it. I will just ask that it be introduced into the record.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Underwood follows:]

Statement of The Honorable Robert A. Underwood, a Delegate in Congress from Guam

Mr. Chairman, thank you for holding today's hearing on H.R. 521, legislation important to the people and Territory of Guam. I would also like to thank the Ranking Member, Congressman Nick Rahall, for his continued support of the territories, and welcome two of our witnesses who have traveled a long way from Guam to testify. A warm Hafa Adai to the Honorable Philip Carbullido, Acting Chief Justice of the Supreme Court Guam and the Honorable Alberto Lamorena III, Presiding Judge of the Superior Court of Guam.

H.R. 521 seeks to amend the Organic Act of Guam for the purposes of clarifying Guam's judicial structure, both judicially and administratively. Currently, the Organic Act of Guam delineates the inherent powers of the legislative and executive branches of the Government of Guam. My bill would establish the local court system, including the Supreme Court of Guam, as a co-equal branch of the Government of Guam and place the judiciary on equal footing with Guam's legislative and executive branches of government.

I am certain that today's witnesses, as well as the abundance of written testimony that have been submitted for the hearing record, will provide the Committee with ample views on the merits of this legislation. The issue is not new. It is not partisan. It is not a matter of the Federal Government interfering with or taking over a local issue. It is a matter of whether Guam's judicial system should be subordinate to another branch of government, in this case the Guam Legislature, and whether Guam's judicial system should be treated any differently than the majority of judicial systems that exist across our nation, as an independent judicial branch. It has been brought to my attention that there needs to be clarification that the U.S. District of Court in Guam will not be affected by this legislation and I agree that we should do that.

I am proud that in the latest review of the Supreme Court of Guam by the Pacific Islands Committee of the Judicial Council of the 9th Circuit, whose review was authorized by Congress, the Committee has acknowledged that Guam's Supreme Court has done a good job by developing sufficient institutional traditions and rendering quality opinions that is generally well done and comparable to opinions fo the supreme courts of the states in the Ninth Circuit. Most notable, however, is that while the Committee has acknowledged that the Supreme Court has become a mark of pride in Guam, it has concluded that an inordinate amount of time and effort is being expended on many fronts in attempting to resolve the issue of judicial administration of the Guam courts. The Committee stated that "the perception, and perhaps the reality, is that judicial administration in Guam has become politicized. This situation has not helped the institution of the Supreme Court grow as it should." I believe that my legislation directly addresses this legitimate concern.

Mr. Chairman, our forefathers, the architects of the U.S. Constitution, had the foresight to establish an institutional mechanism that would protect this great nation from potential emergence of an autocratic regime. This mechanism, embodied in the Constitution is the construction of a democratic form of government of three separate but equal branches, each holding exclusive authority over the process of any given policy. This doctrine of separation of powers is the fundamental principle of this great nation and has since laid the foundation for the democratic system of government we now enjoy. The underlying feature of this system is that of checks and balances within the three branches that would ensure the integrity of each branch. The passage of this legislation would solidify the structure of Guam's judiciary and ensure its status as a separate and coordinate branch of government. It would define the Supreme Court's authority as the supreme court of origin and allay the danger in allowing one branch of government to determine the existence of another. This legislation is the work of many years of input from the people of Guam. It has been a long and laborious process and it is time a legitimate and separate branch of government, our judiciary, be afforded the people of Guam.

I am pleased that the Administration has no objection to the enactment of H.R. 521, and I commend the Interior Department for continuing to realize the importance of this legislation. I am also pleased by the support for the bill by the Conference of Chief Justices, Guam's Governor Carl T. C. Gutierrez, Guam's Lt. Governor Madeleine Z. Bordallo, Acting Chief Justice Philip Carbullido, the Guam Bar Association and individual attorneys on Guam, various members of the Guam Legislature, and other interested individuals. Guam's Pacific Daily News also supports H.R. 521 and has called on Guam's island government, business and community leaders to come together to support the measure. The PDN says "If we claim to be

a true democracy, we must work to make all three branches of government equal and distinctly separate."

I am hopeful that Committee Members will also recognize the need for this legislation and I look forward to hearing from today's witnesses.

Mr. UNDERWOOD. And I also ask that all of the other statements that have been submitted will be entered into the record.

Mr. HAYWORTH. Absolutely.

[The prepared statement of Speaker Hastert follows:]

Statement of The Honorable J. Dennis Hastert, Speaker, U.S. House of Representatives

Thank you Mr. Chairman for the opportunity to provide testimony to the Committee on H.R. 791. As you are well aware, my colleague from Illinois, Congressman Tim Johnson, introduced this legislation and I am an original cosponsor. I appreciate the Committee's recognition of the importance of this issue and thank you for holding today's hearing.

Several years ago, representatives of the Miami Tribe of Oklahoma and the Ottawa Tribe of Oklahoma filed claims to tribal land in Illinois. Of this land, the Ottawa Tribe claims 1280 acres of land adjacent to Shabbona Lake State Park in DeKalb County, which I represent. The Prairie Band of the Potawatomi Indian Tribe has also made a competing claim to the land in DeKalb County.

The claims of the Ottawa and Potawatomi Tribes are based on an 1829 Treaty between the United States and United Tribes of the Chippewa, Ottawa and Potawatomi that granted the DeKalb acreage for the "use" of a chief named Shab-eh-nay and "his band." Shab-eh-nay left the land in the 1830's and moved to Kansas with his band. When Shab-eh-nay attempted to sell the land in the 1840's, Federal agencies determined that the land had been reverted to Federal ownership when he moved west. The Ottawa Tribe, claiming to be a successor-in-interest to Shab-eh-nay's band, now assert that the 1829 Treaty granted a permanent or "recognized" tribal land title that could only be taken away by an act of Congress. The Potawatomi Tribe is a rival claimant because although Shab-eh-nay himself was an Ottawa, his wife and "band" appear to have been Potawatomi.

In addition to the claims made by the Ottawa and Potawatomi Tribes, the Miami Tribe of Oklahoma filed a Federal lawsuit against private landowners in fifteen Illinois counties covering most of east-central Illinois. The property in question includes private homes, farms, businesses, as well as the University of Illinois and part of Eastern Illinois University. The reach and impact of this claim cannot be understated: it literally threatens the lives and livelihoods of tens of thousands of people in my State.

As this Committee well knows, in order to reach and a fair and final resolution of outstanding Native American land claims, Congress established the Indian Claims Commission, which heard cases from 1946 until 1978. During this time, while the Miami Tribe did raise other claims and grievances before the Commission with respect to treaty conduct by the United States, they did not assert this claim even though the Commission considered the 1805 Treaty and land now in question with respect to compensation for two other Tribes.

The Miami Tribe claim is based on an assertion that the United States government never properly obtained land title from the Tribe as required by the 1805 Treaty between the Tribe and the Federal Government. This Treaty was negotiated between the U.S. government and several Native American Tribes, including the Miami. As such, the Miami Tribe claim involves a relationship between the Miami Tribe and the United States going back nearly two centuries. Mr. Chairman I think it is critical to understand that these actions occurred before there even was a State of Illinois.

Make no mistake about it; there is no allegation of wrongdoing by the State of Illinois or its citizens with respect to the 1805 Treaty. If the Miami believe its claim has merit, its argument should be with the Federal Government and not the citizens of Illinois. Because of sovereign immunity, however, Indian Tribes are prohibited from bringing direct claims against the Federal Government.

As a result, H.R. 791 provides what we the sponsors believe is a fair and common solution and one which protects the truly innocent property owners in the State of Illinois. H.R. 791 extinguishes the title claims of the Miami and Ottawa Tribes of Oklahoma and the Potawatomi Tribe of Kansas with respect to the lands in Illinois and remands these claims to the U.S. Court of Federal Claims to hear and deter-

mine the outcome. This legislation also allows the U.S. government to provide a remedy, if appropriate, in the form of money damages. This legislation makes no claim as to the merits of the case of any of these Tribes—those can and should be made by experts. It does, however, ensure that the citizens of Illinois can be secure in their homes, farms and businesses.

This is an important point: while the recent case filed by the Miami Tribe is no longer pending, they could still file another lawsuit against these private landowners at any time. Mr. Chairman, H.R. 791 is commonsense legislation which protects property owners in Illinois who have acted in good faith and done nothing wrong, and ensures that they will not lose their homes, farms, and businesses. In addition, I believe it provides the Tribes fair recourse to the Federal Courts for adjudication. Without judging the merits of their claims, this legislation allows them to pursue their claim against the United States—after all, if the Tribes have an argument, it is with the United States, not the State of Illinois.

Once again, I greatly appreciate the chance to offer my thoughts on this important legislation. It is my opinion that this legislation is especially important for the sake of protecting private landowners who have a legitimate right to their land, while providing fair and reasonable treatment for the Miami, Ottawa, and Pottawatomi Indian Tribes. I look forward to continue working with my colleagues and the Committee on this important issue.

[The prepared statement of Mr. Pallone follows:]

Statement of The Honorable Frank Pallone, Jr., a Representative in Congress from the State of New Jersey

Thank you, Mr. Chairman, for holding this hearing on a land right issue in the state of Illinois, which has frustrated Federal, tribal, state and local governments, as well as residents, for many years. Though I have thoroughly studied most, if not all, of the issues and perspectives related to H.R. 791, I look forward to hearing more about this legislation from my colleagues and the representatives that will testify.

It is my sincere belief that this hearing will assist in identifying and furthering solutions that meet the needs of all parties involved. I also hope that this hearing will be beneficial to the Miami, Ottawa and Potawatomi Tribes in their efforts to have their treaty rights honored or seek just compensation for lands taken without their consent.

As you may know, treaty rights are referred to as the supreme law of the land and as such require the Federal Government to execute related contract obligations with the utmost diligence and good faith. The United States has long recognized the sovereign status of tribes, based on Article I, Section 8, Clause 3 of the Constitution. Hundreds of treaties, the Supreme Court, the president and the Congress have repeatedly affirmed that Indian Nations retain their inherent powers of self-government.

The treaties and laws have created a fundamental contract between Indian Nations and the United States: Indian Nations ceded millions of acres of land that made the United States what it is today, and in return received the guarantee of self-government on their own lands. The provision of services to members of Federally recognized tribes grew out of the special government-to-government relationship between the Federal Government and Indian tribes. The United States government has a Federal trust responsibility to Indian tribes that, among other things, requires us to improve the quality of life in Indian communities.

Sometimes, as in the Treaty of Grouseland (1805), where ratification occurred prior to the existence of the state of Illinois, the tribe did not relinquish title to certain sections of their property. Such is the case along the Wabash River, where the Miami tribe did not give up their title to what encompasses parts of more than fifteen counties with an estimated value of $30 billion.

In cases such as this, where tribes have not ceded their land nor relinquished title in some other fashion, I believe more in-depth discussions and negotiations need to occur in consultation with the tribes and other related parties. I contend that through consultation and negotiation, rather than costly court proceedings and quick legislative fixes, mutually beneficial solutions to such land issues can be realized.

In light of this, I would like to take this opportunity to commend the Miami tribe for withdrawing their lawsuit against landowners in Illinois. Your actions are a clear indication of your willingness to participate in building a forum whereby alternative solutions may be sought.

In this same spirit, I ask Mr. Johnson and other supporters of H.R. 791 to stop this legislation from moving forward, and instead enter into a more meaningful resolution process with the parties related to this land issue. After all, H.R. 791 was not developed in consultation with the three tribes that this legislation will effect, and thereby ignores some of the primary stakeholders in this land issue.

This legislation will establish barriers and institute a tug-of-war between the effected parties and bog down our system of government, especially on the judicial side. As I stated earlier, the United States government has a Federal trust responsibility to Indian tribes that, among other things, requires us to improve the quality of life in Indian communities. This bill does not improve the quality of life in Indian communities; rather it erodes additional aspects of their sovereignty.

H.R. 791 as proposed would extinguish all Indian land claims under three 19th century treaties and terminate any aboriginal rights, including hunting, fishing, and related rights in Illinois.

Therefore, I urge Congress to withstand pressure from groups that call for backtracking to old Indian policies, such as termination and reduction of tribal sovereign rights. We must acknowledge and learn from our mistakes, and not repeat them because Indian country is relying upon our commitments. Therefore, I do not support H.R. 791, and I urge my colleagues to oppose this legislation as well.

Mr. UNDERWOOD. OK; thank you very much.

Basically, H.R. 521, because, obviously, what we have before us is testimony that seems to contrast two different elements to this, and I want to make sure that our colleagues on the Committee understand what is at stake in this particular piece of legislation. On the one hand, it has been argued and will be argued by the opponents that this is somehow or other a slap in the face of local self-government, that the Congress had given the Guam Legislature and the Government of Guam the full authority to create an appellate court, the Supreme Court of Guam, and that any attempt to clarify what that Supreme Court is, what is the third branch of government that will comport with what is the general practice in American government is somehow an intrusion on that authority.

The fact that the Acting Chief Justice has pointed out that the local legislature had made a statement that the local legislature could abolish the appellate court on its very own indicates that something is fundamentally flawed in the way that it has approached this.

I dare say that if anyone in the U.S. House or anyone in Congress said that you know, the Supreme Court of the United States can rest easy, because even though we have the authority to abolish them, we are not, would clearly understand that that is not the republican form of government that is associated with the United States of America. And yet, that is clearly what is at stake here. So it is the merits of that issue alone that I hope the Committee draws its attention to. I hope that in understanding what is at stake here that it is not the—although people will say that there is some political dimension to this, indeed, we are all in elected office—there is always some political dimension to every issue.

But in this case, I think the overriding concern should clearly be the merits. The nature of the testimonies that have been submitted, in which case, the practicing attorneys—in fact, almost virtually the entire legal community of Guam, absent the Superior Court judges is in favor of this legislation clearly indicates that this is a serious matter in Guam.

I would like to ask—and before I go into a couple of questions, I want to acknowledge the presence of my predecessor, the distinguished gentleman from Guam—he is still from Guam—Ben Blaz.

[Laughter.]

Mr. UNDERWOOD. So I wanted to acknowledge his presence.

And also, I wanted to thank all of the witnesses today, especially Judge Lamorena and Justice Carbullido, both of whom I have known virtually all of my adult life, and I remember very clearly Judge Lamorena being very avidly on the same side in defeating that constitution. And we worked very hard on that together.

[Laughter.]

Mr. UNDERWOOD. So I wanted to point that out for the record as well.

Judge LAMORENA. And I wish that we were on the same side as well.

[Laughter.]

Mr. UNDERWOOD. That is right. But we are not.

[Laughter.]

Mr. UNDERWOOD. But we are not.

[Laughter.]

Mr. UNDERWOOD. And so, here is the interesting part: it is trying to be framed as an issue of local control when clearly it is not.

You know, one of the basic tenets of American government is that there be three coequal branches of government; that there be a system of government where you have three branches that have separation of powers. Now, we are grateful that Congressman Won Pat introduced a small line that allowed for the creation of an appellate court, and you have pointed out, Judge Lamorena, that there has been no—that things are going well under the current system, and in fact, many of the people who oppose 521 say that absent a breakdown in the effective and efficient operation of the courts or rule of law, there is no need to act.

I do not know why we have to wait for a breakdown in the rule of law to act on this when it is clearly, on the merits of the case, we need to act, and that you assert as well, Judge Lamorena, that local laws, that unless the court were institutionally dysfunctional or that local laws so deficient and so disruptive to good order as the supporters of H.R. 521 claim, which is absolutely not true; I do not think anyone makes that claim that there is any deficiency in good order in Guam—what my question is is that in your testimony, you made reference to the fact that the Superior Court of Guam should have some administrative authority under local law because you want some system of checks and balances between the Superior Court and the Supreme Court.

Is it not more of an overriding concern to have some system of checks and balances between the entire judicial branch and the other branches of government?

Judge LAMORENA. I think there is no disagreement as far as checks and balances within the three branches of government. I think it is absolutely necessary that we do have that. And in Guam, we do have that. We do have the three branches of government. We have the Guam Legislature; we have the executive; and we have the Guam Supreme Court; and we have the three branches of government, judicial, legislative and executive.

What we have here is the basic issue is that the people of Guam, through their elected representatives, should have the opportunity to select what is best for them, and they have selected a system

that they feel is best for the people of Guam. And until such time as the people of Guam either defeats these people or changes its mind, I think that the laws passed by the Guam Legislature to their elected representatives should be the law of the land.

Mr. UNDERWOOD. And could you explain to the Committee how the law that granted the Superior Court this administrative authority—in what context was this law passed?

Judge LAMORENA. Well, the law was passed through a majority of the votes in the Legislature.

Mr. UNDERWOOD. And was it not attached as a rider to an entirely different bill without the benefit of a public hearing?

Judge LAMORENA. It was attached as a rider, like most legislation.

Mr. UNDERWOOD. Yes.

Judge LAMORENA. And I feel that if the Guam Legislature wanted to act in that way, they have that prerogative.

Mr. UNDERWOOD. Of course, and fortunately, the Ninth Circuit has now nullified bill, not on the merits—

Judge LAMORENA. Not on the merits of this issue.

Mr. UNDERWOOD. Not on the merits of this particular issue, but fortunately, it was tied to another issue. But my point is that do you not think that a change of this nature would at least deserve a public hearing?

Judge LAMORENA. Pardon? I think it does.

Mr. UNDERWOOD. And we are giving it a public hearing here.

Judge LAMORENA. You know, I am not a member of the Legislature, so I do not even want to place myself in the shoes of the Guam Legislature. But, you know, every bill deserves a public hearing. Every bill deserves views of all of the people of Guam. But the ultimate determination of what laws should be passed rests still with the legislative body, and the legislative body has spoken. Whether or not we may differ on the methodology, the results are still the same, and I feel that the Guam Legislature or Congress has the prerogative to pass any law it so wishes. That is their power under the Constitution.

Mr. UNDERWOOD. Whose power under the Constitution?

Judge LAMORENA. The legislative branch of government, the power to pass laws.

Mr. UNDERWOOD. Yes, they have the power to pass laws.

Judge LAMORENA. Yes.

Mr. UNDERWOOD. But in this particular instance, would you not concede that the Congress could not pass a law to nullify the very existence of the Supreme Court of the United States?

Judge LAMORENA. You know, I am not going to go into that debate.

Mr. UNDERWOOD. OK.

Judge LAMORENA. Because I am not a Member of Congress.

Mr. UNDERWOOD. But would you concede—

Judge LAMORENA. Congressmen have the prerogative to do or say what they wish to say, OK? That is their responsibility as being a representative of their constituency, and that is what the constituency elects them to do is to speak their mind and to vote on an issue that hopefully represents the people that they choose to represent.

Mr. HAYWORTH. The Chair has tried to show great indulgence in deference to the principal sponsor of the legislation. I think we have had a great exchange. But the bells have rung. We have 10 minutes remaining with three votes confronting us on the Floor. I would like to gauge the sentiment of members. I know that the gentleman from Arizona on the majority side has a couple of questions. Are there other questions that you would like to bring up?

Well, then, fine. If that is the case, then, what we will do is recess and pick up the questions at the conclusion of the three votes. It will be some time here, but we know it is important to add these things to the record and make sure everyone has a chance to ask questions in this open hearing.

So the Chair will deem the Committee now in recess. We will return following the votes.

[Recess.]

The CHAIRMAN. [presiding] The Committee will come to order.

I am given to understand that Mr. Underwood has just finished his line of questions, and I guess Mr. Flake would be the gentleman who would now be recognized.

Mr. Flake?

Mr. FLAKE. Thank you, Mr. Chairman.

I appreciate the opportunity; I appreciate the testimony. I have a bit of an interest in here. I have a constituent who spent a good deal of time on Guam and is familiar with the situation and has encouraged my involvement, and I enjoy this. I spent a year in southern Africa, in the country of Namibia, as they developed their constitution and were struggling with some of the same issues that you are dealing with there.

So I was interested in Judge Carbullido or Justice Carbullido, what you mentioned about the suggestion you have for the bill. Do you want to elaborate on that, in that you would allow the Legislature in Guam to have an impact on the ultimate decision on this? Do you want to explain or elaborate for me?

Justice CARBULLIDO. Yes, Mr. Congressman, thank you.

There are really two objections to the bill in all of the opposition testimonies that I have gleaned: No. 1, that this is a local issue, and it takes away authority from the Legislature to address the local issue.

I think it is important that I explain briefly the context of H.R. 521 and why that seems to be the case. H.R. 521, when it was originally introduced in its predecessor form by Congressman Underwood several terms ago was a reaction to the rider that was made reference that stripped the Supreme Court of its authority. The way it was done and how it was done created an uproar in terms of our legal community, and it was a reaction, and maybe it was an overreaction in retrospect.

Since then, there has been some sense of calmness in terms of the Ninth Circuit has deleted that. That is no longer with us today, and we have some semblance of an organized structure within our court system. And so, to take away the distraction that this is really a local issue, I have proposed an amendment where the Guam Legislature will continue to have authority in terms of the internal structure of the Guam judiciary, but it does not take away the fun-

damental issue that the three branches of government should be properly recognized in our Organic Act, our constitution.

The second objection that is common to those who oppose the bill is that this should really be left to the people of Guam. It needs to be recognized in our Organic Act, our constitution. The virtue of this bill is that we are trying to recognize the three branches on equal footing; there really should be no issue.

Mr. FLAKE. Mr. Lamorena, if the changes are made as suggested by the Justice, would you still object? And if so, why?

Judge LAMORENA. Yes, I will still object. I have not seen his proposal, so I am totally not familiar with it. But absent that, I will still object, because it runs against the fundamental concept of self-government. I think if the people of Guam wish to pass a law that affects them directly and that sets up a structure by which they are to be governed, I think the people of Guam should be the ones to determine that structure.

Like I quoted earlier, the U.S. Supreme Court said the judiciary is the heart of internal self-government and should be delegated to the state legislatures or to the people that live there. And what I am concerned about is Congress and this Committee have always had a policy to have the people of Guam determine what they want to be. Like I said earlier, the attorney general bill was amended, but it did not say the attorney general shall be elected by the people of Guam. Congress did not state that. Congress said the people of Guam may pass a law to elect an attorney general.

So what Congress has always done in the past has always given the option for the people of Guam to self-govern themselves. And I feel that when the late Congressman Won Pat introduced this bill, he was very sensitive to that. He, being a former Guam legislator at the time and former Guam speaker, was very sensitive to have the people of Guam determine what their judiciary should be.

Mr. FLAKE. Well, this fix, does it not address that concern? Because it says if Guam goes ahead and drafts its constitution that that will be the law rather than the Organic Act or rather than any fix that we make here. And just a follow-up question: is there a move at this point, what process are we in at this point on Guam in drafting a constitution?

Judge LAMORENA. On the first question, I hate to set conditions on what this will trigger in if the people of Guam do this. I think it is kind of a carrot thing, you know, dangling, saying, well, if the people of Guam will pass this law, this legislation, and the people of Guam do a certain thing and follow the carrot, then, it will go that way.

I think the whole principle of self-government is to allow the people to determine what they want to do. We all live on Guam, and we all have to live by the laws of Guam, and if the people of Guam decide that those laws should be changed or a constitution should be imposed, then so be it. But I think the people of Guam should determine that and not Congress. I think Congress should follow its policy of allowing the people of Guam the options to pursue its own course.

Mr. FLAKE. I would agree with that. I would just simply state that we are waiting—everyone is waiting for Guam to draft that constitution. We have said please, go ahead, but as long as Guam

does not, then, the Organic Act is what rules here. And so, I think it is incumbent on us to have something that makes better sense than what we have right now.

Just let me state for the record: I know there are concerns that the Supreme Court determining the structure of the inferior courts may impose or some say, you know, just assign dog bite cases to the rest of the structure and take everything else to itself. I worry less about that than I do having the Legislature have the ability to nullify and to simply get rid of the Supreme Court if they would like.

But I thank you, and thanks for your indulgence on this.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

The gentleman from Hawaii, Mr. Abercrombie?

Mr. ABERCROMBIE. Judge, but you would admit—sorry, Judge Lamorena—

[Laughter.]

Mr. ABERCROMBIE. We are operating under the Organic Act, right?

Judge LAMORENA. Yes, that is the Federal statute governing Guam.

Mr. ABERCROMBIE. That is right.

I mean, you cannot have it both ways, Judge. You know, this is a little ridiculous. You want independence for Guam, or you want to become a state? What do you want to do? I do not like to be lectured here about what my duties here are with respect to local jurisdiction in Guam or any other place. I do not like this whole colonial situation in the first place.

You know perfectly well you could have passed a constitution for 25 years; you have not done it. I do not think it is seemly for you to come in here as a jurist and lecture us in this way.

Now, the Organic Act, as long as you have the Organic Act, this Congress is going to do it. Now, we are not going to have a situation, as benign as you may want to characterize the situation, where legislatures, if they are in Zimbabwe right now, can overturn the judiciary. I mean, the singular democratic issue, it seems to me, is the equality of the branches of government in our democracy. But here, you have a situation which makes a mockery of it if the legislature can come in and overturn the judiciary anytime it sees some political advantage to do it.

Now, unless you can come up with something compelling with respect to whether or not we can pass this legislation, I think you have got a terrific burden to carry.

Judge LAMORENA. Do you want a response?

I feel that the concept—OK—of self-government is fundamental to all peoples, and I think Congress in the past has always given deference to the people of Guam in cases of changes in the Organic Act, the ability to pass laws that would meet the needs of their people.

Mr. ABERCROMBIE. You do not think equality of the judiciary is fundamental to the well-being of the people of Guam?

Judge LAMORENA. Well, if Congress had that position when Congressman Won Pat was there, they had that opportunity, but they did give the opportunity to the people of Guam to create the judici-

ary, and I feel that was confidence in the people of Guam through their Guam Legislature to create a structure in the judicial branch of government that would maintain the confidence of the people of Guam.

Mr. ABERCROMBIE. If something takes place, then, in Guam that the politicians do not like, that a decision is made in the courts, you want to say that you can change the structure of the courts in the Legislature?

Judge LAMORENA. Well, if you look at the issue of the structure of the courts, Congress can also add circuits to the Federal courts. I think as far as the structure of the court system itself, Congress has that prerogative, and I think the Guam Legislature should have that prerogative as well.

Mr. ABERCROMBIE. But this is a contradiction. I will just let it go. You want it both ways. If Congress—do we have the jurisdiction or do we not to pass this legislation?

Judge LAMORENA. Congress, as any lawmaking body, can pass any legislation it wishes.

Mr. ABERCROMBIE. Because you are under Federal jurisdiction, and you do not have a constitution that says otherwise now; is that not correct?

Judge LAMORENA. Right now, the Organic Act is the Federal statute—

Mr. ABERCROMBIE. Right now, and it has been for more than 25 years.

Judge LAMORENA. Well, I do not purport to speak for all of the people of Guam whether or not we should have a constitution. That is still an ongoing debate.

Mr. ABERCROMBIE. Well, in the absence of—when you say you do not purport to speak for them, but the facts speak for themselves. There is no constitution.

Judge LAMORENA. Well, in the absence of a constitution, then, the enabling legislation passed by Congress earlier under the late Congressman Won Pat, I think, is still good policy.

Mr. ABERCROMBIE. And speaking of enabling legislation, we will enable the people of Guam to have an equal judiciary if we pass this bill. Would that not be the case?

Judge LAMORENA. Well, I always feel that the people of Guam should be the ones to determine—

Mr. ABERCROMBIE. You mean your position is that the people of Guam can determine whether or not they are actually going to have an equal judiciary, and if they determined they did not want an equal judiciary that I should acquiesce to that as a Member of Congress?

Judge LAMORENA. But they have spoken already.

Mr. ABERCROMBIE. But I have sworn to uphold the Constitution of the United States, which emphasizes, I think, as a beacon to the whole world that we have the rule of law and not the rule of political fashion of the moment and that we uphold the idea that there are three equal branches of government. And for you to argue to me that you get to make a local decision as to whether or not, at any given point, people can decide whether to subject the judiciary to even more political—as Mr. Underwood said, there's politics in

everything, but to subject it to legislative fashion, it seems to me an extraordinary statement.

How does that comport with the entire history of the struggle for equality of people before the law and the idea of equal branches of government as a cornerstone of our democracy.

Judge LAMORENA. I think it complements it. One, it does allow the people of Guam to self-govern themselves. We may disagree what the people of Guam may be doing—

Mr. ABERCROMBIE. Judge, excuse me.

Judge LAMORENA. —but any legislative body passes laws that reasonable people can disagree about.

Mr. ABERCROMBIE. We are not talking about reasonable people disagreeing. It is not as if we are talking about what kind of coffee you prefer. You mean to tell me that if the people of Guam decide that if you are a Chamorro-American as opposed to Scottish-American like myself that you could be discriminated against, for example, because that is local decisionmaking? You do not contend that, do you? Of course, you do not.

So what you are saying here locally, if people decide locally they do not want to have equal justice that that is OK.

Judge LAMORENA. I am not saying that.

Mr. ABERCROMBIE. But that is the implication of your position, I believe.

I am sorry, Judge. You are not making a persuasive case here.

Thank you, Mr. Chairman.

Judge LAMORENA. Thank you.

The CHAIRMAN. The gentlelady from the Virgin Islands.

Ms. CHRISTENSEN. Thank you.

The CHAIRMAN. As you can see, we have got a vote on. We want to wrap this thing up.

Ms. CHRISTENSEN. Right, and I just want to make a brief statement and probably yield some time to my colleague, Mr. Underwood.

I think all of us support the need for Guam and my territory to draft their own constitution, but I just disagree with the position of my colleague on my right, Mr. Abercrombie, because I think the people of Guam have demonstrated that they fully support the separation of the judiciary from the other branches of government. And I just think the issue is one of until such time as we draft our constitution, turning over more authority and governance to the people of the territories, and that is what I see the recommended amendments as being, and I fully support that, and I have done that in several instances in the case of the people of the Virgin Islands.

I wanted to take the opportunity to welcome the witnesses from Guam and especially our former colleague, as Congressman Underwood has welcomed him, Congressman Ben Blaz. And I find the issue very interesting. It is one that the Virgin Islands has not yet done completely, anyway, and we still rely on our Federal District Court as our territorial appellate court. So we are even further behind Guam on some of the issues. However, there have been calls by our local bar association as well for the creation of a local appellate court. As a result of the experience of Guam in creating this independent judiciary, it would be key for us as a guide.

And I want to take this opportunity to commend our colleague, Mr. Underwood, for this legislation, for the separation of the branches of government is a cornerstone of our democracy, and I trust that the whole Committee will support his bill and in doing so protect the rights of the people of Guam.

If my colleague would like some of my time, I would yield the rest of my time to Mr. Underwood.

Mr. UNDERWOOD. Thank you for yielding me the time. And basically, I just wanted to go over a couple of points that had been mentioned earlier, and I wanted to make sure for the record that it is clearly understood. Reference is made to the authority granted to the people of Guam to draft their own constitution. In doing so, Congress specified that there would be a republican form of government with three co-equal branches. So this is not—even if Guam were to draft its own constitution, I daresay that its constitution would end up looking like—would have the kind of judiciary that we are envisioning here, which is three co-equal branches of government.

Second, you have mentioned, Judge Lamorena, I think on several occasions that there was a grant of authority granted by Congress to create this appellate court, and at the same time, you have made comparisons to the creation of the attorney general. I know you have credited Congressman Won Pat repeatedly for the earlier version.

Judge LAMORENA. For the attorney general, I will credit you for that one.

[Laughter.]

Mr. UNDERWOOD. Thank you, thank you very much. I am glad you acknowledge that that was my legislation.

[Laughter.]

Mr. UNDERWOOD. But more importantly, in vetting that legislation, even though we allowed that to happen, to allow that according to whether the Legislature wanted to have an elected attorney general or not, we did structure it in a way to avoid the kinds of problems that we are simply having in this issue, which is to kind of clearly delineate what it would look like and had this kind of—maybe the Virgin Islands is smarter in this, because they are waiting to see what kind of experiences we have had on this.

But just so that I allow Mr. Kearney a chance to make a quick comment, Mr. Kearney, in your testimony, you stated that Guam has a bifurcated local court system at a time when virtually all of the states have unified court systems and by implication saying that, well, Guam is a little bit different than the rest. Can you elaborate on that a little bit?

Mr. KEARNEY. Well, mostly, it focuses on what we have been discussing here, that there is a potential role for the Legislature with respect to the judicial system in Guam currently that is not reflected in the other 50 states. And so, to the extent to which changes in this legislation would be consistent with those 50 states, it would address that inconsistency.

Mr. UNDERWOOD. OK; so this legislation addresses that inconsistency, and the administration has no objection to the legislation.

Mr. KEARNEY. That is correct.

Mr. UNDERWOOD. OK; and I would submit, Mr. Chairman, that some of the amendments that the Justice has proposed here deal, I think, with the issue of some of the underlying issues here regarding the actual structure and some of the politicization of this process and attempts to divorce that in an effort to make sure that what we are honing in clearly here is the separate and co-equal nature of the three branches of Guam. So I hope we will get a chance to look at those in a markup 1 day.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Mr. FLAKE. Mr. Chairman? Just 10 seconds?

The CHAIRMAN. The gentleman from Arizona.

Mr. FLAKE. I just wanted to state for the record that I, too, thank Mr. Underwood for bringing this bill forward, and I hope that the Committee has a chance to mark it up.

The CHAIRMAN. We would be happy to.

And also, I would like to submit some questions to the panel. I would appreciate your response, because we are not going to have time to go into those. I do want to thank all of the people who testified. We appreciate your attendance here at this time, and we will move ahead with this legislation, and Ben, it is always good to see you, my friend. Ben Blaz was one of the true gentlemen of Congress and one we will always remember.

So with that, we stand adjourned.

[Whereupon, at 12:32 p.m., the Committee adjourned.]

[The following information was submitted for the record:]

- Ada, Hon. Joseph F., Senator, 26th Guam Legislature, Letter submitted for the record on H.R. 521
- Ada, Hon. Thomas C., Senator, 26th Guam Legislature, Statement submitted for the record on H.R. 521
- Aguon, Hon. Frank Blas, Jr., Senator, 26th Guam Legislature, Letter submitted for the record on H.R. 521
- Arriola, Joaquin C., President, Guam Bar Association, Letter submitted for the record on H.R. 521
- Bernhardt, David L., Director, Office of Congressional and Legislative Affairs and Counselor to the Secretary, U.S. Department of the Interior, Letter submitted for the record on H.R. 521
- Blair, William J., et al., Law Offices of Klemm, Blair, Sterling & Johnson, Letter submitted for the record on H.R. 521
- Bordallo, Hon. Madeleine Z., Lieutenant Governor of Guam, Statement submitted for the record on H.R. 521
- Brooks, Terrence M., et al., Brooks Lynch & Tydingco LLP, Letter submitted for the record on H.R. 521
- Camacho, Hon. Felix P., Senator, 26th Guam Legislature, Letter submitted for the record on H.R. 521
- Charfauros, Hon. Mark C., Senator, 26th Guam Legislature, Letter submitted for the record on H.R. 521
- Cruz, Hon. Benjamin J.F., Honorable Chief Justice of Guam (Retired), Letter submitted for the record on H.R. 521
- Cunliffe, F. Randall, and Jeffrey A. Cook, Cunliffe & Cook, Letter submitted for the record on H.R. 521

[A letter from The Hon. Joseph F. Ada, Senator, 26th Guam Legislature, submitted for the record on H.R. 521 follows:]

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Hon. James V. Hansen
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Dear Chairman Hansen,

As the Chairman of the Guam Legislature's Committee on Power, Public Safety and the Judiciary, I would like to express my views on H.R. 521. I respectfully request that this letter be included in the hearing record.

The United States Congress rightfully granted Guam's lawmakers the authority to create a Supreme Court of Guam; a right exercised by our legislature in 1994. The Supreme Court of Guam has thrived under local law. The Pacific Islands Committee of the Judicial Council of the Ninth Circuit recently issued a highly favorable report on the Supreme Court of Guam's progress based on its performance in hearing appeals and rendering decisions in many cases. Unfortunately H.R. 521 in its current form goes beyond recognizing the Supreme Court's appellate role and seeks to establish the internal structure for the entire judicial branch of Guam's local government.

Like Guam's executive and legislative branches, Guam's Judiciary should be subject to the laws of Guam. I firmly believe that each branch of Government must be answerable and accountable to the will of the people it serves and nothing should deflect the ability of the people to determine the manner each branch of government serves them. This is the very essence of representative democracy embodied by the United States Congress and which the Guam Legislature, unless H.R. 521 becomes law, will to continue to embody.

Passage of H.R. 521 would render as moot the existence of the Judicial Council of Guam in place since the enactment of Guam's Judiciary Act in 1952, and further codified in the very law I signed during my term as Governor of Guam to create the Supreme Court of Guam.

Guam's Judicial Council exists with equal representation of both the Guam Supreme Court and the Superior Court. It is modeled after the Federal Court system's Federal Judicial Councils that have ably served the U.S. Supreme Court, Appellate and District Courts for the past two hundred and twenty four (224) years. The Guam Judicial Council does not remove the Supreme Court from being the head of Guam's Judiciary any more than the existence of the U.S. Federal Judicial Council removes the U.S. Supreme Court from being the head of the U.S. Judiciary.

It is our belief that H.R. 521 would not only undermine and repeal existing Guam law, but it would implement important decisions and policies for Guam and our judicial system that should be left to the people of Guam and our elected local lawmakers.

One main concern with H.R. 521 is that its passage would do much more than grant the Supreme Court of Guam administrative control over the courts of our island. Should H.R. 521 pass, it will repeal a variety of existing Guam law. Guam currently has a system much like that found in California. We have a Judicial Council made up of judges and justices, as well as the attorney general of Guam and the chairperson of the Guam Legislature's committee on the judiciary. The purpose and function of the Judicial Council is to handle administration of the courts, with local law carefully and specifically delineating the powers, duties and responsibilities of the council.

To exemplify this fact, there are currently contained in the Guam Code Annotated the same number of specific statutes that address the powers and duties of the Judicial Council as statutes delineating the duties and powers of the Supreme Court of Guam.

Pursuant to various Guam statutes set forth in the Guam Code Annotated, the Judicial Council is the body which is attached to the Judicial Branch for purposes of administration; responsible for administering the unified pay schedule for the judiciary; for adopting personnel rules for the judicial branch; for addressing employee grievances and appeals; for promulgating its own rules for conduct and operation; for recommending policies to the court and the legislature regarding the administration of the judicial system; for overseeing the judicial building fund.

This recitation is made simply to convey just a portion of the specific laws that will be repealed if H.R. 521 is passed. It is evident that the Judicial Council was the administrative body intended to, and empowered to, administer Guam's judicial system.

Currently the Supreme Court has formed a Unified Judiciary Committee and participates as members of the Judicial Council. However, only the Judicial Council is statutorily enacted. With one stroke of a pen the Guam Supreme Court Justices could abolish the Unified Judiciary Committee, removing any form of representation from the trial courts.

Testimony of Hon. Joseph F. Ada on H.R. 521 page 3 of 3

Today Congress separately reviews and appropriates the U.S. Supreme Court budget and the Appellate-District Court budgets. We do no less on Guam. Yet H.R. 521 disregards federal precedent and renders meaningless the existence of Guam's Judicial Council and much current Guam law.

I strongly believe that Guam's own people and their democratically elected representatives, the Guam Legislature, are in a better position to make these important decisions regarding the administration of Guam's court system. H.R. 521 does not advance any federal interest, but it does impede federal interest in the promotion of local self-government.

In closing, it is my belief that the Supreme Court of Guam should be insulated from administering a Superior Court or any other lower courts which handle court cases, magistrates and arraignments; supervises probation; conducts counseling of defendants; conducts defendant drug testing; serves subpoenas and summons; handles inmates; selects Grand, Petit and trial juries; appoints indigent attorneys and countless other duties and functions. Each of these functions and duties could contain issues that the Supreme Court of Guam may hear on appeal. I believe H.R. 521 would create a tremendous potential for conflicts of interest in a community of only 157,000 people and dilute the rights of individuals to appeal a case concerning policies and procedures of a trial court, particularly if the very Guam Supreme Court Justices whom would hear their appeal administered those policies and procedures.

Judicial independence, like the Declaration of Independence, does not tout the absence of law, but the very presence of laws and the right of individuals to have a say in a government under which they are governed. Although Congress has the explicit constitutional prerogative to impose law on Guam, imposing a federal requirement on the local government's judicial branch would compromise the consistent principle of respect for self-government.

I thank you for the opportunity to allow me to express my views on H.R. 521. I wish you and the Committee well in your deliberation on an issue that could potentially have a lasting impact on the island and people of Guam, as well as federal interest in our community.

Regards,

Joseph F. Ada

[A statement from The Hon. Thomas C. Ada, Senator, 26th Guam Legislature, submitted for the record on H.R. 521 follows:]

Statement of The Honorable Thomas C. Ada, Senator, 26th Guam Legislature

Mr. Chairman and members of the House Resources Committee, thank you for this opportunity to offer testimony in support of H.R. 521, to clarify, once and for all, that a truly classic, republican form of government, with three, separate but equal branches of government, will indeed exist for the people of Guam.

First introduced in the 105th Congress as part of a bill that addressed other judicial matters pertaining to Guam, the judicial structure issue became mired in a lawsuit in Guam. At the start of this year, the Ninth Circuit Court of Appeals ruled on that case, and in doing so, affirmed the authority of the Supreme Court of Guam, saying, "The Organic Act, as we have recognized, 'serves the function of a constitution for Guam' and the congressional promise of independent institutions of government would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act."

The Organic Act of Guam of 1950 created the legislative and executive branches of a civilian government for Guam, which had been under military rule since 1899. The Organic Act clearly delineated the powers and authority of the legislative and executive branches of the newly established Government of Guam, but the judicial branch was left to evolve and develop in fits and starts over the years, with jurisdiction and authority residing initially and completely with the Federal courts. Over the years, the Organic Act has been amended to fulfill the "congressional promise of independent institutions of government," In 1968, the Act was amended to provide for an elected governor; in 1972 for a non-voting delegate to the U.S. House of Representatives; in 1986 to provide for an elected school board; and most recently, in 1998, to provide for an elected attorney general. The original version of the elected attorney general bill, now Public Law 105–291, included the judicial structure clarification.

In comparison to its counterparts, the growth and development of the judicial branch of the Government of Guam has been a slow and laborious process and continues to this day. Guam's judicial structure must be clarified and clearly established, and its powers delineated under the Organic Act. Through its inclusion in the Organic Act, the foundation of the Supreme Court will be accorded the same protection from the political machinations that so besiege its counterparts. As a creation of local law, the Supreme Court of Guam remains vulnerable to the whims of the legislative branch. Until and unless it is firmly embedded in the Organic Act, the Supreme Court of Guam is not, cannot, will not be a separate and co-equal branch of the Government of Guam. And that condition, no matter how eloquently defended, is in direct contradiction of the "congressional promise of independent institutions of government" and the ideals of self-government.

The doctrine of the separation of powers, with its underlying system of checks and balances, is the fundamental principle of our democratic form of government and cannot be subject to reinterpretation or politically motivated redefinition. Passage and enactment of H.R. 521 would not only comport with the wisdom and foresight of the architects of the U.S. Constitution, it would restore the faith of the people of Guam in the sovereignty and autonomy of their judicial branch.

The people of Guam deserve no less than a free, impartial and independent court system, with, as its name implies, the Supreme Court indeed reigning supreme. I ask the members of this Committee to recall the opening line of Section. 4, Article Four of the U.S. Constitution:

"The United States shall guarantee to every State in this Union a Republican Form of Government..."

Mr. Chairman, in H.R. 521, although we are not a State, we in the Territory of Guam respectfully seek that guarantee.

Thank you.

[A letter submitted for the record by The Hon. Frank Blas Aguon, Jr., Senator, 26th Guam Legislature, on H.R. 521 follows:]

FRANK BLAS AGUON, JR.
Senator

May 03, 2002

Congressman James V. Hansen, Chairman
Committee on Resources
U.S. House of Representatives
1328 Longworth House Office Building
Washington D.C. 20515
Fax: (202) 225-5929

Dear Chairman Hansen,

As a Senator (D) of the Twenty-sixth Guam Legislature and member of the Committee on Power, Public Safety, Judiciary and Consumer Affairs, I would like to comment on H.R. 521 and respectfully request that this letter be included in the hearing record.

Congress gave Guam the authority to create a judicial system. In fact eight years ago we created the Supreme Court of Guam. Indeed, the Supreme Court of Guam and Superior Court of Guam thrive under separate administrations with oversight by a Judicial Council made up of both courts. Any changes needed to replace the existing system of checks and balances should be made by the people of Guam through their elected representatives.

Currently, under Guam law the Guam Judicial branch is in fact a separate and equal branch and has been treated as such by the Guam Legislature. While some say the Guam Legislature could remove the Supreme Court of Guam, I assure you this will not occur. Indeed, Congress could eliminate all Federal District and Appellate Courts, but has not done so. Both are events that exist in theory alone and have no basis in truth under any political reality. To promote such a theory is a serious miscalculation and misunderstanding of Guam's peoples' political will to embrace the basic forms of Government our nation has set forth by example.

Like both Guam's executive and legislative branches of government, Guam's Judicial Branch should be subject to the laws of Guam. No branch is above the law and must be answerable to the will of the people whom they serve. This is the very essence of a democracy. These are the powers of the government which the U.S. Congress exercises for the nation's U.S. Appellate courts, and which the Guam Legislature exercises on behalf of its people.

The proposed measured not only undermines and repeals existing Guam law, but implements important decisions and policies for Guam and its judicial system which should be left to the people of Guam and their elected law makers. I support the establishment of a Supreme Court and its ability to conduct court proceedings, render decisions and interpret law. However, I respectfully urge Congress to support the authority of a local legislature to pass laws governing the administration of all branches in a manner that best serves the needs of the people and their community.

I thank you for the opportunity to allow me to express my views on H.R. 521. I wish you and the Committee well in your deliberation.

SENATOR FRANK BLAS AGUON, JR.
Mina Bente Sais Na Liheslaturan Guahan
(Twenty-Sixth Guam Legislature)

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[A letter submitted for the record by Joaquin C. Arriola, President, Guam Bar Association, on H.R. 521 follows:]

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May 3, 2002

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Guam District Office
120 Father Duenas Avenue
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Facsimile No. (671) 477-2587

Re: H.R. 521 - Supreme Court of Guam

Hafa Adai Mr. Chairman Young and Members of Congress:

I am Joaquin C. Arriola, Jr. and I am the President of the Guam Bar Association (GBA), a public body corporate comprising of all of Guam's lawyers. There are currently 268 active and 119 inactive members of Guam's integrated bar. I am pleased to provide this written testimony on behalf of the Guam Bar in support of House Resolution No. 521, which establishes and affirms the authority of the Supreme Court of Guam through amendments to the Organic Act of Guam.

The GBA standing committee on legislation conducted a formal survey of our active membership on H.R. 521. The proposed legislation garnered formidable support from the GBA, where our members support the legislation by more than a three to one ratio. This is not at all surprising. Over the past several years, the Bar has consistently surveyed its membership on various pieces of local and federal legislation affecting the Supreme Court of Guam, its composition and authority. The Bar has consistently and overwhelming supported an amendment to the Organic Act which would define the authority of the island's highest court and establish it as a truly equal branch of our local government.

Most bar members believe it is imperative that the Supreme Court of Guam's authority be defined and affirmed in the Organic Act. Because it is presently a creature of local legislation, the Supreme Court is not immune from the political whims of the Guam Legislature. Since the Court was formed several years ago, the local legislature has attempted on several occasions, and succeeded on at least one, in changing the Supreme Court's jurisdiction and authority. In order to ensure stability, equality and self-governance in Guam's third branch of government, it is necessary for Guam's Organic Act to define the paramount authority of the island's Supreme Court, in all aspects of Guam's judiciary. The present state of the laws on Guam, which permits the local legislature to change the function and jurisdiction of the Supreme Court at any time for any reason, is contrary to the fundamental democratic concept of separate but equal branches of government. H.R. 521 ensures the stability of Guam's Supreme Court and the members of the Guam Bar ardently support the resolution as it relates to defining the authority of Guam's highest court.

Representing clients from all walks of life, from the foreign corporation based in Delaware to the indigent minor in need of protection from abuse, Guam's lawyers represent the pulse of our island community. As lawyers, litigators and officers of the courts, we are intimately familiar with the island's administration of justice. Indeed, Guam's lawyers are uniquely qualified to render our opinion on legislation which affects our profession, the clients we serve, and the administration of justice on Guam. On behalf of the lawyers of Guam, the Guam Bar Association expresses its enthusiastic support for H.R. 521. We hope the Congress acts promptly to adopt H.R.521 and to provide our island with a truly separate and equal third branch of government.

Very truly yours,

JOAQUIN C. ARRIOLA, JR.

[A letter submitted for the record by David L. Bernhardt, Director, Office of Congressional and Legislative Affairs and Counselor to the Secretary, U.S. Department of the Interior, on H.R. 521 follows:]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUN 1 2 2002

Honorable James V. Hansen
Chairman
Committee on Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request for the views of the Department of the Interior on H.R. 521 – a bill to amend the Organic Act of Guam to clarify Guam's local judicial structure. H.R. 521 would establish the local court system of Guam as a third co-equal and unified branch of government, alongside the legislative and executive branches of the Government of Guam.

Enacted by the Congress, the Organic Act of Guam is similar to a constitution in any of the fifty states. Amendments over time have continually added to self-government in the territory. The Organic Act established a legislature. It was later amended to change the executive from an appointed Governor to an elected Governor, and in 1984, to authorize the Legislature to establish a local appeals court. In 1994, under the authority granted in the Organic Act, the Legislature of Guam established the Supreme Court of Guam. But, two years later, the Legislature removed from the Supreme Court its administrative authority over the Superior Court of Guam. Since then Guam has a bifurcated local court system at a time when virtually all states have unified court systems.

H.R. 521 would amend the judicial provisions of the Organic Act of Guam to specifically name the Supreme Court of Guam as Guam's appellate court, and outline the powers of the Supreme Court, including full administrative authority for the Supreme court over the local court system.

It is argued that only an act of Congress can bring unity and dignity to Guam's local courts. Proponents of H.R. 521 suggest that if the Legislature retains control, the court system is subject to influence by the Legislature. Only by placing local court authority in Guam's "constitution" – the Organic Act of Guam – can the judiciary of Guam be a co-equal and independent branch of the Government of Guam. Opponents suggest that the system is working fine, and that an administrative function divided between the Supreme Court and Superior Court is healthy for judicial system.

The structure of Guam's local judiciary is largely a self-government issue for Guam. As such, opinion from Guam should be given the greatest consideration, as long as issues of overriding Federal interest are not involved. In 1997, the Executive branch examined H.R. 2370, an earlier version of the bill under consideration today. A number of suggestions were made for improving the bill and harmonizing it with the Federal court system. H.R. 521 includes the suggested modifications in language. The Administration, therefore, has no objection to the enactment of H.R. 521 in its present form.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

David L. Bernhardt
Director, Office of Congressional
and Legislative Affairs and
Counselor to the Secretary

[A letter submitted for the record by William J. Blair, et al., Law Offices of Dlemin, Blair, Sterling & Johnson, on H.R. 521 follows:]

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May 7, 2002

VIA FACSIMILE
(202) 225-7094

Congressman James V. Hansen
Chairman
Committee on Resources
House of Representatives
U.S. Congress
1324 Longworth House Office Building
Washington, D.C. 20515-6201

RE: HOUSE RESOLUTION 521

Dear Congressman:

This letter is submitted as testimony in favor of the passage of House Resolution 521, introduced by Guam Delegate Robert Underwood.

The undersigned members of this firm are all members in good standing of the Guam Bar Association, as well as the bars of several states of the United States. We have each chosen to live in Guam and practice our profession here. Several of our lawyers have practiced law in Guam for over 20 years. We have personally witnessed the evolution of the Guam judiciary to what it is today.

That evolution has been a tortured one. In 1977, the U.S. Supreme Court, in a 5-4 decision, struck down the Guam law creating the first Guam Supreme Court on the basis that Congress had not clearly expressed its intentions to deprive the citizens of Guam of direct access to the federal courts. Congress later rectified that situation by amending Guam's Organic Act, which functions as Guam's constitution, to allow the Guam Legislature to create a new supreme court. Due to the vagaries of local politics, that did not occur for many years.

In the intervening years, the Guam judicial system remained headless, the statutes on the books contemplating the existence of the now defunct Supreme Court. In the absence of a functioning Supreme Court, unintended power devolved to the Presiding Judge of the Superior Court, Guam's trial court. Appeals continued to go the Appellate Division of the District Court of Guam, a federal court, which had no administrative responsibilities with respect to the Superior Court.

The vacuum caused by the decapitation of the Guam judicial system resulted in the aggrandizement of power in the Presiding Judge, power that many in the legal profession believe has been abused. This power has been preserved and enhanced as the result of local politics.

Our consequence of this process has been a serious erosion of confidence in the integrity and independence of Guam's judiciary. With the recreation of the Guam Supreme Court it was hoped that confidence in the judicial system would be restored. Unfortunately, however, local politics took over once more and Guam's Legislature tacked on a rider to a completely unrelated piece of legislation, stripping the Supreme Court of its administrative supervisory powers over the Superior Court and reinvesting the Presiding Judge with the mutated powers that had previously evolved.

This situation has fortuitously been corrected as a byproduct of a federal appellate court decision dealing with a different issue, but the Guam judicial system remains vulnerable to local political maneuvering. There is nothing precluding the Guam Legislature from once again, in the middle of the night, revamping the judiciary to suit the current political whim or to satisfy the most recent political bargain.

The people of Guam require and deserve a judiciary in which they can have confidence. In other jurisdictions under the U.S. flag, politicization of the judicial branch, as has occurred on Guam, would not be possible, inasmuch as the independence of the judiciary is protected by constitutional provisions. Guam's residents enjoy no such protection, as, just as in the case of the Supreme Court,

local politics have not favored the process for Guam to adopt a constitution of its own, even though Congress has authorized that process to go forward.

In the meantime, the Organic Act remains the de facto constitution of Guam. In the Organic Act, Congress promised the citizens of Guam a republican form of government, one with three co-equal branches that check and balance one another. Delegate Underwood's proposed legislation would fulfill Congress' promise by elevating the judiciary to a truly co-equal status, a status that would have to be honored and respected by the other two branches of the government of Guam.

We are cognizant of the desire of Congress to defer to local elected officials in matter relating to self-government. However, this is a case in which such benign neglect harms, rather than advances, the political maturation of Guam. Unless the judiciary is also allowed to mature and develop into a sound and independent institution, the political evolution of Guam itself will continue to be stunted and malformed.

We urge you to look favorably on H.R. 251.

Very truly yours,

WILLIAM J. BLAIR

THOMAS C. MOODY

THOMAS C. STERLING by DWO

JEHAN'AD G. MARTINEZ

RICHARD L. JOHNSON

G49\ADMIN
J:\WORD97\OFFICE\WORDDOC\ADMIN\LTR\077-J V HANSEN
RE HR 521 - ORGANIC ACT.DOC

[A statement submitted for the record by The Hon. Madeleine Z. Bordallo, Lieutenant Governor of Guam, on H.R. 521 follows:]

Statement of The Honorable Madeleine Z. Bordallo, Lieutenant Governor of Guam, on H.R. 521

Chairman Hansen and Members of the Committee on Resources:

I am submitting this statement in support of H.R. 521 and I would kindly request that my testimony be entered into the record.

H.R. 521 would amend the Organic Act of Guam for the purposes of clarifying the local judicial structure of Guam. I believe that this legislation is appropriate and necessary for the proper operation of the Judicial branch of Guam.

Mr. Chairman, I was a Member of the 21" Guam Legislature in 1993 when the Frank G. Lujan Memorial Act was passed establishing the Supreme Court of Guam. I was proud to have had a role is shaping this local legislation and it was a great honor when the Supreme Court was installed during my first term as Lieutenant Governor.

Governor Gutierrez and the Guam Legislature had done a fine job in appointing and confirming outstanding jurists to serve on our Guam Supreme Court, and our Supreme Court has matured over the years.

The question before Congress is whether the provisions of H.R. 521 are needed to clarify the role of the Supreme Court. I believe that this bill is indeed necessary to ensure that the Judicial branch is unified and insulated from political pressure.

The Judicial branch has been buffeted by political maneuvering as control of the administrative and policy making process has been contested between the Supreme Court and the Superior Court. This is not what was envisioned by the authors of the local legislation. We believed we were enacting legislation that was creating a Supreme Court, with all that the term means, Supreme in every sense of the word, and as has been the practice for all similar Judicial systems throughout the United States.

H.R. 521 would clarify that the Supreme Court has distinct responsibilities in making Judicial policy and in administering the functions of the Superior Court and local court divisions. That we need this legislation is a clear indication that the Judicial branch has problems and that political interference has managed to seep into the Court processes on Guam. In 1998, in his State of the Judiciary Report to the people of Guam, Chief Justice Peter Siguenza stated that, "this branch was broken." In 1999, then Chief Justice Benjamin Cruz stated in his report to the people that, "things have gone from bad to worse." A 9' Circuit decision earlier this year restored the supremacy of the Guam Supreme Court and began a process of recovery.

H.R. 521 is needed to eliminate the interference of local politics in our court system. I commend the Committee for taking up this bill and I thank you for your kind consideration of my statement in support of H.R. 521.

[A letter submitted for the record by Terrence M. Brooks, et al., Brooks Lynch & Tydingco LLP, on H.R. 521 follows:]

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DAVID RIVERA

May 8, 2002

Via Facsimile: (202) 225-7094

The Honorable James V. Hansen
Chairman
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515-6201

Subject: ***House Resolution 521 re: Amendment of the Organic Act of Guam for the Purposes of Clarifying the Judicial Structure of Guam***

Dear Mr. Chairman:

As attorneys of this law firm, and as members of the Guam Bar Association, we would like to take this opportunity to thank the House Committee on Resources for holding a public hearing on this important matter.

House Resolution 521 has been introduced by Congressman Robert A. Underwood in order to finally settle the dilemma surrounding the Territory of Guam's judicial structure. The Organic Act of Guam, adopted by Congress on August 1, 1950, functions as Guam's constitution. Nevertheless, an attempt was made in 1977 to create Guam's own constitution. When the first Guam Constitution was drafted in December of 1977, the supreme court was recognized as the highest court of Guam. In addition, the chief justice was the administrative head of the judicial system. However, for various reasons unrelated to the judicial section of the proposed 1977 Guam Constitution, the voters of Guam rejected the proposed 1977 Constitution.

The U.S. Supreme Court in 1977 struck down a Guam law which attempted to create the Supreme Court of Guam. The U.S. Supreme Court held that Congress did not empower the Guam Legislature to create a supreme court. Congress in 1984 amended the Organic Act to authorize the Guam Legislature to create an appellate court through passage of the 1984 Omnibus Territories

Act. In 1993, the Guam Legislature passed the Court Reorganization Act which created the Supreme Court of Guam. The Supreme Court was recognized as the highest court of Guam. All parties involved, the executive, legislative, and judicial branches, the legal community, and community-at-large, put a lot of time, thought, and effort in reorganizing the judicial branch as a truly independent, co-equal third branch of government with the supreme court as the head of the judicial hierarchy. It took nearly a decade to fashion the legislation and pattern the Act properly like all other court systems nationwide. Nonetheless, within hours of the confirmation of the first justices of the Supreme Court of Guam, the Guam Legislature enacted legislation removing certain inherent powers of the Court. Shortly thereafter, the Supreme Court was stripped of its administrative authority over the lower courts. We can only ascertain that the Guam Legislature did what it did in passing such legislation for purely political reasons. The Guam Legislature has never given a satisfactory answer as to why the Supreme Court has been stripped of its administrative authority over the lower courts.

As it stands right now, the Guam Legislature has the power to create and abolish the Supreme Court of Guam. This reality has a chilling effect on Guam's legal community. In order to protect the integrity of a jurisdiction's judicial structure, the state supreme courts in all 50 states are founded in state constitutions. The reason for this is obvious. In our republican form of government with three separate co-equal branches, the source of authority for each branch emanates from the people through an adopted constitution. Guam is empowered by Congress to adopt its own constitution. Our current elected leaders are not in favor of establishing a Guam constitution until a newly defined federal-territorial relationship is negotiated. Guam has been engaged in commonwealth negotiations with the federal government for the last twenty years. Therefore, the source document in which the Supreme Court of Guam must be properly recognized as part of a third co-equal branch of government is the Organic Act.

Because the Organic Act did not establish the Supreme Court of Guam, the proposed amendments to the Organic Act contained in H.R. 521 are aimed at correcting this deficiency. The measure has been endorsed by the legal community and the public-at-large as a means of bringing stability to the judicial branch of the government of Guam. Stability within Guam's judiciary is what is needed. Stability will only be possible if the establishment of the Supreme Court of Guam is founded in Guam's current constitution, the Organic Act.

Since Guam represents America's presence in Asia, we respectfully urge that you and the U.S. Congress insure that we truly have a republican form of government with three separate co-

equal branches by adopting the proposed amendments to the Organic Act found in H.R. 521. We, as your fellow American citizens of the United States of America in Guam, must be accorded the same assurances and rights to an independent judiciary whose powers, functions, and very existence can not be eliminated by the legislative body as has happened in neighboring Asian and Pacific countries and even here.

Sincerely,

TERRENCE M. BROOKS, Esq.

SANDRA D. LYNCH, Esq.

PHILLIP J. TYDINGCO, Esq.

DAVID RIVERA, Esq.

[A letter submitted for the record by Hon. Felix P. Camacho, Senator, 26th Guam Legislature, on H.R. 521 follows:]

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THE OFFICE OF
Senator Felix P. Camacho
TWENTY-SIXTH GUAM LEGISLATURE

May 3, 2002

Honorable James V. Hansen
Chairman
Committee on Resources
U.S. House of Representatives
1328 Longworth House Office Building
Washington D.C. 20515
Fax: (202) 225-5929

Dear Chairman Hansen,

As a Senator of the Twenty-sixth Guam Legislature I would like to express my views on H.R. 521 and request that this letter be entered into the hearing record.

I certainly support the independence of all branches of government, inclusive of the judicial branch of Guam. However, H.R. 521 is inconsistent with the fundamental principle of respecting local self-government and goes far beyond establishing a separate branch of government. The only real effect of H.R. 521 is to take away the power of the people on Guam who enjoy self-government under the Organic Act. In fact, it would impose a federal requirement on the local government and diminish the ability of Guam's people to establish checks and balances within the administration of their respective branches, establish divisions of the courts, duties for court officers, separate budgets and set forth other local mandates. In sum, H.R. 521 seeks to place local legislative powers within the Judiciary.

The choice to have Guam's Judiciary administered by a Judicial Council, Supreme Court Justices or a combination thereof should be left to Guam's people through their elected officials or by a constitution. Congressional intervention in this matter does not advance that federal interest of self-government for Guam. A Judicial Council does not impede the ability of Judges and Justices to carry out their constitutional duty to interpret law, hear cases and render decisions as is the case of the Federal Judicial Council with relationship to the U.S. District Courts and Courts Appeals.

Both Guam's trial and appellate courts serve a community that elects lawmakers and governors, and retains judges and justices. All have their respective roles and responsibilities. I would not wish to see any governor empowered to create or dissolve agencies or administrative divisions within the executive branch through executive order void of a mandate from the Legislature, and I would not wish to see Supreme Court justices empowered to do likewise in the judicial branch.

Committee on
Tourism, Transportation
& Economic Development

The essence of a tri-partite form of government is the branches' ability to serve as a check and balance upon each other by carrying out their individual respective roles and duties. Given Guam's close-knit community, I feel that the appellate court should be insulated from any form of conflicts of interest, including that of administering a trial court whose very policies, practices and procedures could be matters of legal appeal. Moreover, I feel Congress should consider honoring the Supreme Court Justice's request of March 20, 2002, to "afford them the opportunity to resolve further issues pertaining to the judicial branch without external interference."

In closing, Guam's Judiciary continues to operate in a manner consistent with the U.S. Constitution. There is no need for federal intervention to establish the form of administration within any branches of Guam's government, inclusive of the Judiciary, though it certainly has the constitutional power to do so.

Thank for the opportunity to express my views on H.R. 521 and its effect on self-government, self-determination and local control over local matters.

Felix Camacho

[A letter submitted for the record by The Hon. Mark C. Charfauros, Senator, 26th Guam Legislature, on H.R. 521 follows:]

MARK C. CHARFAUROS
SENATOR
I Mina'Bente Sais Na Liheslaturan-Guåhan

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May 6, 2002

Congressman James V. Hansen
Chairman, Committee on Resources
U.S. House of Representatives
1328 Longworth House Office Building
Washington D.C. 20515
Fax: (202) 225-5929

Dear Chairman Hansen:

As a current Senator of the 26th Guam Legislature, a former Chairman of the 23rd Guam Legislature's Committee on Judiciary, and the author of P.L. 23-86 (which enacted the current composition of the Judicial Council of Guam), I would like to express my views on H.R. 52. I respectfully request that this letter be included in the printed hearing record.

The United States Congress rightfully granted Guam's lawmakers the authority to create a Supreme Court of Guam in 1994. H.R. 521 supersedes local law in an area that Congress properly and wisely vested in the people of Guam as one of the powers of local self-government that we have as a U.S. Territory. H.R. 521 is the exact bill introduced and heard in Congress in October of 1997. As I indicated before the Committee on Resources then, Guam already has the tools of self-government, which it has exercised for the last 51 years under the Organic Act of Guam.

In one of its first act as a Legislative body, the First Guam Legislature enacted P.L. 1-17, which provided for a Judicial Council to oversee the administration of Guam's Judiciary. Since then, the Legislature was empowered with enacting a Supreme Court of Guam, which it did in 1994. In 1996, the Supreme Court Justices were sworn in, and the Supreme Court of Guam came into existence. Likewise, the Guam Legislature exercised its responsibility to set the internal structure of that Judiciary by reconstituting a Judicial Council of Guam to include three Justices and three Judges, the Attorney General of Guam, and the Chairman of the Legislature's Judicial Committee. The concept of a Judicial Council has worked for the Federal Court system and the nation's largest jurisdiction (California) and smallest jurisdiction (Washington D.C.).

Despite changes in the majority of the Guam Legislature, there has been one constant with regards to the Judiciary of Guam; i.e. the separation of administration of the Supreme and Superior Court and the use of a Judicial Council to set policy for that administration.

I believe Guam has and continues to demonstrate its maturity in the handling of its internal affairs. Today, the Supreme Court of Guam seeks to oversee the administration of both courts under the context that it is part of its inherent role. Yet, the existence of Judicial Councils in the Federal and States system does not diminish the role of any Supreme Court contained in those court systems to hear appeals and set legal precedent for their respective jurisdictions. Moreover, H.R. 521 is not in response to any constitutional crisis or Guam's inability to handle its internal affairs. In fact, under the existing laws of Guam, the Supreme Court of Guam received high reviews for its decisions by the Pacific Island Committee of the Ninth Circuit Judicial Council. Likewise, the Superior Court of Guam is supported and funded by the U.S. Department of Justice and the U.S. Federal Bureau of Investigation for its work in networking nine (9) local and nine (9) federal agencies in the FBI"s National Criminal Information Computer system which serves the nation, and today serves as Guam's local repository for the Criminal Justice Information.

These are just a few of the achievements of Guam's Judiciary under local statute. I certainly recognize Congress's explicit constitutional power to impose a federal requirement on the local government's judicial branch. To do so, however, I feel that it would be inconsistent with the fundamental principle this Committee has tried to follow, respecting local self-government. H.R. 521 would overturn numerous sections of laws already enacted by the Guam Legislature. Guam does not enjoy fully government by consent, but we have government by consent in local affairs under the Organic Act. H.R. 521 would shrink the sphere of government by consent that Guam has under the Organic Act.

There are no compelling reasons for this, and the supporters of H.R. 521 cannot cite any compelling reasons. The claim that answering to the local law-making process and local voters interferes with judicial independence is simply illogical. Independence in the judicial function of judges in court cases is a different matter altogether than participating as an institution of government in the disciplines of the public policy process with respect to the organization and operation of the court system. Certainly, the rights of an individual to appeal their case and have their case heard by a judicial process established and protected under the U.S. Constitution is most enhanced by the administrative structure set forth by the elected representatives of those people or a Constitution adopted by those people.

Throughout the past 51 years, the United States Congress has exercised discretion with regards to imposing Federal mandates upon Guam with regards to its government's structure. As a fellow elected representative, who diligently serves the people, I hope you will join me in opposing this bill because it impairs the representative function of the legislature. I respectfully oppose H.R. 521 because it seeks to place in the Supreme Court of Guam the sole ability to dictate the divisions within the courts that are already established by local law. Furthermore, it effectively removes a Judicial Council of Guam that has representatives of both courts. Moreover, it

empowers the Justices of the Supreme Court whom have formed a Unified judiciary Committee to establish the make-up of that Committee and the powers of that Committee.

I would like to point out one particular area of concern, regarding the Supreme Court of Guam's use of powers it feels it has. The Justices of the Supreme Court of Guam, on two separate orders, have threatened the use of imposition of fines upon employees of the Judicial Branch (see attached). Nowhere in the nation, under any Civil Service, is the use of fines an acceptable punishment against employees for failure to comply with an order or to prevent their testimony on a budget effecting their operations before a Legislative Hearing. The latter, by its very presence, goes against the principle of freedom of speech. Letters of warning, reprimands, suspension, or dismissal are the acceptable practice. Whereas alleged crimes are certainly subject to prosecution, the removal of any form of protection of employees to appeal a case, much less defend their actions, through a judicial process is removed in light of the Administrative Orders handed down by the Supreme Court of Guam to the lower courts. This precedence is of great concern to me as a Senator and a citizen of Guam and the United States.

I thank you for the opportunity to allow me to express my views on H.R. 521. I wish you and the Committee well in your deliberation on an issue that could potentially have a lasting impact on the island and people of Guam.

Respectfully,

MARK C. CHARFAUROS

[A letter submitted for the record by The Hon. Benjamin J.F. Cruz, Honorable Chief Justice of Guam (Retired), on H.R. 521 follows:]

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Chambers of the Honorable Benjamin J.F. Cruz
Chief Justice

BENJAMIN J.F. CRUZ
HONORABLE CHIEF JUSTICE OF GUAM (RETIRED)
TESTIMONY IN SUPPORT OF H.R. 521

As the Retired Chief Justice of the Supreme Court of Guam, I concur with the statement submitted by Acting Chief Justice F. Philip Carbullido in support of H.R. 521.

I understand that the opposition to H.R. 521 is based on "States' Rights;" that this is a local issue which should be resolved by the local legislature. I understand that argument. However, it is superceded by the greater principle of assuring a democratic society a co-equal and independent judiciary. Appended to Justice Carbullido's statement is a copy of a Resolution unanimously adopted by the Conference of Chief Justices at its February 2001 Winter Meeting in Baltimore, Maryland. That Resolution supports the introduction and passage of an amendment to the Organic Act which ensures the independence of the Supreme Court of Guam and the entire Judicial Branch from legislative or executive interference.

At that February 2001 meeting, I described to the Conference of Chief Justices how the Guam Supreme Court was stripped of most of its powers by the Guam Legislature by use of a rider without benefit of a hearing. They could not believe that the Guam Supreme Court would be impacted so easily.

As the Congressman from Utah, I am sure that you are keenly aware of the fact that the Justices of all the State Supreme Courts, and especially the Chief Justices, are staunch if not solid supporters of "States Rights."

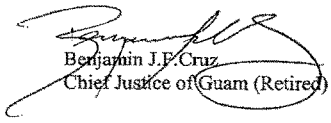
When I presented the Resolution to the Conference of Chief Justices, they did what they do on a daily basis. They placed "States' Rights" on the scales of justice and weighed it against the concept of a co-equal and independent judiciary. Every single Chief Justice present realized that there would be no "States' Rights" to protect if the state did not have a co-equal and independent judiciary free from interference and retribution from the other two branches.

I hope that you and your fellow committee members come to same realization. A democratic society would have no rights to protect, much less "States' Rights," if it did not have an independent co-equal judicial branch.

Some would argue that this would best be done in a constitution written by the People of Guam. The People of Guam have had the power to write a constitution for twenty-five (25) years and they have not chosen to do so. The Organic Act is currently Guam's "Constitution." Only the Congress can amend the Organic Act. As members of Congress it is your responsibility, if not your duty, to amend the Organic Act to assure that this American community in the Western Pacific has all its right protected by an independent co-qual judicial branch. Passage of H.R. 521 would fulfill that end.

Thank you for affording me the opportunity to submit this short statement. I look forward to your affirmative action to protect the Judiciary and the People of Guam.

Respectfully Submitted,



Benjamin J.F. Cruz
Chief Justice of Guam (Retired)

[A letter submitted for the record by F. Randall Cunliffe, and Jeffrey A. Cook, Cunliffe & Cook, on H.R. 521 follows:]

F. RANDALL CUNLIFFE
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May 7, 2002

Honorable James V. Hansen
Member of Congress
Chairman, Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515-6201

RE: **House Resolution 521 -Organic Act Amendment**

Dear Congressman Hansen:

Please accept this letter as recommendation for the passage of House Resolution 521. The proposed amendments to the Organic Act as contained therein, serve to elevate the Supreme Court of Guam to a co-equal branch of government. Guam will surely benefit from a Supreme Court whose authority arises from a constitutionally mandated separation of powers.

Our office respectfully urges the Committee to endorse the passage of House Resolution 521.

Sincerely,

CUNLIFFE & COOK

F. RANDALL CUNLIFFE

JEFFREY A. COOK

RICHARD PARKER ARENS

RPA:rsb WORK DOC 1 /Letters
RPA LTRS (May 2002) ADMIN

[A statement submitted for the record by Hon. Mark Forbes, Majority Leader, 26th Guam Legislature, on H.R. 521 follows:]

MINA ' BENTE SAIS NA LIHESLATURAN GUÅHAN

Kumitehan Areklamento, Hinanao Gubernamenton Hinirât, Rifotma yan Rinueba, yan Asunton Fidirât, Taotao Biyong yan Hinirât

Senadot Mark Forbes, Gehilu
Kabisiyon Mayurât

Testimony on H.R. 521

Presented by Senator Mark Forbes

Majority Leader, 26th Guam Legislature and
Chairman of the Committee on Rules; Government
Operations; Reform and Reorganization;
Foreign, Federal and General Affairs.

Mr. Chairman and members of the Committee, thank you for this opportunity to present testimony on H.R. 521.

In truth, what excites me the most about the opportunity presented by this measure is the chance it affords to make other critical changes to the Organic Act of Guam. These critical changes are as follows:

An amendment to section 1421g, adding a new (d) to establish an Office of the Treasurer of Guam. This amendment is the single most critical change needed in the Organic Act of Guam, under the dire present circumstances. Currently, the entire financial management system of the government of Guam is under the direct control of either the Governor of Guam or direct appointees of the Governor. This system has visited nothing less than constant fiscal misery upon the government and the people of Guam. Since the turn of the millennium, Guam has struggled under the burden of what was advertised as a "state of the art" financial management system, installed in part with federal funds. To call this "new system" a white elephant would be an insult to white elephants. It has, in short, failed not only to live up to its lofty expectations, it has failed to adequately provide even the modicum of information necessary to make the most rudimentary fiscal policy determinations in an educated fashion. As a result of this debacle, the government of Guam has been forced to upgrade and activate its prior financial management system, which was inadequate in the first place.

The tragedy that has been the implementation of the new financial management system is only symptomatic. While our troubles with fiscal management in this government have been exacerbated to an unprecedented degree of late, our financial management system has perennially been beset by problems, as decades of audits by the Inspector General of the Department of the Interior should eloquently attest. The root problem is systemic. There is inadequate accountability to the people in our current system, where all financial

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There is inadequate accountability to the people in our current system, where all financial management responsibilities reside in the office of the Governor. We need the manager of our accounts to feel, to recognize, a direct sense of accountability to the people – as opposed to governors. This is best accomplished by making the office of Treasurer elected, and by making the elected Treasurer the custodian of our accounts.

That this is commonplace throughout the vast majority of the States of the Union simply reinforces the wisdom of this. Our own experience in Guam, where recently we elected our Public Auditor also recommends this action. Once, our Auditor was a gubernatorial appointment, and in those days, the office of Public Auditor was most notable by its silence. Almost two years ago, our people elected their first Auditor, and the change has been remarkable. Audits are conducted regularly, and our public has been informed of results. This quantum increase in activity is attributable directly to the fact that Guam's Public Auditor is now elected by and accountable to the people of Guam. We look forward to a similar renaissance when Guam elects its first popularly elected Attorney General. This boon was bestowed upon our people by the wisdom of this House which empowered the Guam Legislature to act in this manner through an amendment to our Organic Act, and a local law I was pleased to author. I believe that experience demonstrates that an elected Treasurer would similarly exhibit far greater public accountability and responsiveness, and would perform at a much higher level of efficiency, competence and effectiveness. I would go so far as to say that in the absence of this change, the prognosis for the government of Guam's financial management system is very grim.

At this time, no day to day operational check and balance exists in the fiscal management of our government in Guam. The legislature has been forced to stretch the boundaries of appropriation authority to do everything possible in an often-vain attempt to force some degree of responsible decision making and behavior. An elected and independent Treasurer, hands firmly on the checkbook, would provide that day to day check against irresponsibility we so desperately need, and allow our legislature to revert to its proper legislative role.

I am convinced that the greatest single thing we can do to restore fiscal accountability in the government of Guam is to establish a Treasurer of Guam, elected by and accountable to the people of Guam.

A second change to the Organic Act that is literally a matter of life and death in Guam is a change to Section 1421g(a), with respect to our public health system. No one disputes that the Governor of Guam must be permitted to exercise extraordinary powers in the event of a legitimate public health crisis, such as an epidemic or a biological or environmental disaster. Unfortunately, the mention of a hospital in the same paragraph has been used by governors in Guam to justify extraordinary control over the day to day operations of Guam's only hospital in all and any circumstances. Often the purpose of such control has nothing to do with the maintenance of public health in Guam.

I would be pleased to report that the extension of these extraordinary powers to the day to day operations of our hospital has resulted in a trim, efficient and effective hospital that provides a high level and quality of service to the people of Guam, but I cannot. On the contrary, our hospital is in severe trouble, service to our people suffers, and much of this can be laid squarely at the door of political interference with the operations of our hospital.

Our hospital suffers from very significant shortages of critical medical and nursing personnel. It nonetheless has one of the highest ratios of staff to beds in the nation. The conclusion is obvious. We have experienced in recent times the suspension of the hospital board and the direct day to day control of the facility by the governor, without benefit of an experienced or qualified hospital administrator. This was certainly not the intent of the drafters of this provision.

A past Congress addressed a similar problem with our education system in Guam by making a simple amendment to the Organic Act. Replacing the phrase "the Governor' with a the phrase "the Government of Guam" in Section 1421g (b) worked in the case of our schools. Doing the same for 1421g (a) will also be beneficial.

Finally, Guam has been plagued by an unprecedented amount of litigation these past few years over the conduct of elections in our community. Currently, there is a dispute of almost two years over the composition of the Guam Election Commission that has resulted in court cases reaching as far as the Ninth Circuit Court of Appeals, and litigation on this matter has been revived in our own Superior Court. The disputes center around one central issue: Does the governor of Guam have unrestricted authority to appoint all members of the Commission unilaterally? The fact that litigation has now occurred in three courts underscores that this issue is not easily resolved through the courts and is not aided by confusing language in the current Organic Act.

Free and open elections are the bedrock of our democratic process and are the wellspring from which all-else flows. To resolve this persistent problem, I suggest language similar to what already exists in the Organic Act of the Virgin Islands. The Organic Act of our sister territory provides for an election commission elected by the people, or even better, language which establishes a Secretary of Guam whose powers and responsibilities would be similar to those exercised by the Secretaries of State of sundry states of the Union.

H.R. 521 affords a vehicle to accomplish these things where no other vehicle exists. In my view, these changes to the Organic Act are so necessary that their inclusion in H.R. 521 as amendments would make the entire bill unassailable. The original language in H.R. 521 that establishes the Supreme Court of Guam within the Organic Act is logical. We in Guam have created this Supreme Court, pursuant to provisions in federal law, and I cannot conceive of any instance in which Guam would pass a law abolishing our Supreme Court. Furthermore, the existence of the Supreme Court of Guam is an indication of our judicial maturity as a community and guaranteeing its permanence in the Organic Act memorializes that maturity. Why should Guam not wish that?

In fact, no one in Guam has a reasonable objection to that. The arguments in Guam over this issue have nothing to do with whether a Supreme Court should exist in Guam. That is beyond objection. Rather, the arguments have to do with far more parochial concerns, such as who gets to hire and fire within the judiciary, who gets to prepare budgets for submission to the legislature, should there be one financial management system within the entire judiciary and who has administrative control?

These concerns are no doubt persistent, if mundane. Arguments and laws have proliferated on this subject for many years now and have become tangled in a shifting web of local politics. All of this is unworthy of our judiciary and our government in general. Decisions about the organization of any branch of our government ought to be made irrespective of the ephemeral, partisan concerns.

Perhaps there is compromise language that can be achieved in H.R. 521 with respect to these mundane issues that can be agreeable to all parties concerned. I do not know. But to avoid permanently placing Guam's judiciary clearly among the three branches of government of Guam because of these mundane matters is an error.

In summary, I urge that further amendments to the Organic Act of Guam be included in this bill. The first would add a new Section 1421g(d) to read:

"**(d) Office of the Treasurer of Guam; Office of the Secretary of Guam.** The government of Guam may by law establish an Office of the Treasurer of Guam. Qualifications to become a candidate for the Office of the Treasurer of Guam shall be those qualifications as exist in this Act for the Office of Governor. The government of Guam may by law establish an Office of the Secretary of Guam. Qualifications to become a candidate for the Office of the Treasurer of Guam shall be those qualifications as exist in this Act for the Office of Governor. The duties of the Secretary of Guam shall be those as determined by the laws of Guam, provided that the Secretary of Guam shall at a mimum be responsible for the conduct of elections in Guam."

The second amendment would amend Section 1421g(a) to read:

"**(a) Public Health services.** (Subject to the laws of Guam, the Governor) The Government of Guam shall establish, maintain, and operate public health services in Guam, including hospitals, dispensaries and quarantine stations, in such places in Guam as may be necessary, and (he) shall promulgate quarantine and sanitary regulations for the protection of Guam against the importation and spread of disease."

With the addition of these amendments, and with some possible modification of the original language of this measure, this can be a very important and beneficial law for the people of Guam.

MINA ' BENTE SAIS NA LIHESLATURAN GUÅHAN

Kumitehan Areklamento, Hinanao Gubetnamenton Hinirât, Rifotma yan Rinueba,
yan Asunton Fidirât, Taotao Hiyong yan Hinirât

Senadot Mark Forbes, Gehilu
Kabisiyon Mayurât

Mark Forbes is a four-term member of the Guam Legislature. He currently serves as Majority Leader of the 26th Guam Legislature and is also the Chairman of the Committee on Rules, which also has oversight over matters as diverse as general Government of Guam operations, land, telecommunications, reorganization and government reform, foreign affairs, and federal affairs.

Prior to his election to the 23rd Guam Legislature, Senator Forbes was the Deputy Chief of Staff and Director of Policy and Communications for Governor Joseph F. Ada, a post he held for eight years.

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[A letter submitted for the record by Seth Forman, Keogh & Forman, on H.R. 521 follows:]

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May 7, 2002

VIA FACSIMILE ONLY
202 225 7094

The Honorable James V. Hansen
Chairman, Committee on Resources
United States House of Representatives
1324 Longworth House Office Building
Washington, DC 20515-6201

Re: H. R. 521

Dear Mr. Chairman:

Thank you for the opportunity to submit written testimony in favor of H.R. 521, Delegate Underwood's proposed amendment to the Organic Act of Guam in order to establish a functional, permanent, apolitical judicial branch of the Government of Guam.

I am an attorney in private practice in Guam. Many other witnesses will surely address various compelling public policy and philosophical concerns which weigh heavily in favor of Delegate Underwood's proposal. While I may agree with these concerns, my clients, colleagues, and I have a more mundane concern. When gods go to war, mortals suffer. When judges or courts are locked in perpetual political struggle with each other, then litigants, attorneys and the general public suffer. So long as the structure of Guam's judiciary can be radically changed at the whim of a single Guam legislator by means of a late-night rider to an unrelated bill, a fair percentage of Guam's judicial resources will be devoted to political turf battles rather than to the resolution of pending disputes. The parties and attorneys who appear before Guam's courts must constantly worry about being caught in the judicial crossfire. The judiciary on Guam must be permanently established as a unified and independent third branch of government in order to function effectively and maintain public confidence. Delegate Underwood's measure will achieve this laudable goal.

Thank you again for the opportunity to express my views on these matters.

Sincerely,

Seth Forman

SETH FORMAN

SF/aoc

[A letter submitted for the record by Gerald E. Gray, Law Offices of Gerald E. Gray, on H.R. 521 follows:]

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May 7, 2002

VIA FAX TRANSMISSION
1-202-225-7094

U. S. House of Representatives
Committee on Resources

Re Public Hearing on H. R. 521 - Organic Act Amendment

Gentleman:

I write to inform you that I am in full agreement with the proposed Organic Act Amendment, House Resolution No. 521.

Sincerely,

Gerald E. Gray, Esq.

[A letter submitted for the record by The Hon. Lou Leon Guerrero, Senator, 26th Guam Legislature, on H.R. 521 follows:]

May 8, 2002

Honorable James V. Hansen
Chairperson
House Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515–6201

Dear Mr. Chairman,

My name is Lou Leon Guerrero and I am a Senator with the 26th Guam Legislature. I am writing this letter to support the passage of H.R. 521, which was introduced by Congressman Robert Underwood, Guam's Representative. H.R. 521 seeks to clarify the local judicial structure of Guam.

Local law created the Supreme Court of Guam. Since its establishment as an appellate court, there has been much controversy and discussion as to its responsibility and supervisory jurisdiction over the Superior Court of Guam and all other courts in Guam. There have been efforts made by both the Guam Legislature and Congress to clarify Guam's third branch of government. However, the fact remains that the Judiciary is not truly a co-equal, independent branch of government and subject to changes by the Guam Legislature.

If the Supreme Court of Guam is to truly serve as the highest court of the island, as what was originally intended, the amendments introduced in H.R. 521 must receive prompt action by the House of Representatives.

There is much support for the passage of this legislation within the legal community, the private sector and the government. By passing H.R. 521, I feel that this may be our only avenue to assure the judicial branch free from political interference and provide them the authority to act independently and be vested with those powers traditionally held and exercised by the highest court of a jurisdiction.

H.R. 521 is a vital piece of legislation for Guam and I humbly request its expeditious passage.

Respectfully,

Lou Leon Guerrero, RN, MPH
Senator and Assistant Minority Leader of the 26th Guam Legislature

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[A statement submitted for the record by The Hon. Carl T.C. Gutierrez, Governor of Guam, on H.R. 521 follows:]

Statement of The Honorable Carl T. C. Gutierrez, Governor of Guam, on H.R. 521

Mr. Chairman and Members of the Committee on Resources:

Thank you for inviting me to appear before the Committee on Resources to present testimony on H.R. 521. Although I am not able to attend this hearing, I would like to submit this testimony for the Committee's consideration and I would appreciate your entering my testimony into the record for this bill.

H.R. 521 is a bill to amend the Organic Act of Guam for the purpose of clarifying the local judicial structure of Guam. This bill would clarify the status of the Supreme Court of Guam and would give the Supreme Court of Guam administrative oversight and control of the Superior Court of Guam, divisions of the Superior Court and other local courts.

I am in favor of H.R. 521 and I would urge the Committee on Resources to report this bill to the House of Representatives with the Committee's favorable recommendation.

H.R. 521 would establish the independence of the Judiciary as a co-equal branch of the Government of Guam, and would insulate the Judicial branch from political interference by the executive and legislative branches. Without the clarifications of the Organic Act, we may find ourselves in the unfortunate situation where political favors are freely traded or where political pressure is applied to the Justices and Judges of the Courts of Guam.

The Justices of the Guam Supreme Court have requested this legislation because they know that the current operations of the Supreme Court and the Superior Court are neither efficient nor seamless. We have two policy-making bodies within the Judicial branch, and we have an unhealthy relationship between the Courts. Without

the clarifications of H.R. 521, we have a void that the politicians in the Legislature are all too eager to fill.

I am pleased that the Committee will hear firsthand from the representatives of the Supreme Court and the Superior Court. In the interest of Judicial independence, I will forego commenting on the current state of affairs of that branch, but I will note that the situation between the Courts cannot be described as ideal, even by the opponents of H.R. 521.

The Judicial branch should operate with integrity and should be above the political fray, not immersed in it. A Supreme Court that is not the highest Court is an anomaly and an aberration. A situation has evolved where the fight for Judicial supremacy has created uncertainty and political intrusion into the affairs of the Judiciary. H.R. 521 is a needed fix, and one that is overdue.

[A memorandum submitted for the record by Thomas J. Lannen, Dooley Lannen Roberts & Fowler LLP, on H.R. 521 follows:]

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Memorandum

To: Honorable James V. Hansen, Chairman
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
1324 Longworth House Office Building
Washington, D.C. 20515-6201

From: Thomas J. Lannen, Esq.

Date: May 8, 2002

Re: H.R. 521; An Amendment to the Organic Act of Guam

Dear Chairman Hansen:

I apologize for the informality of this communication. I have been away from Guam on business and just learned of the public hearing today on H.R. 521, introduced by Guam's Congressman Robert Underwood. H.R. 521 would amend the Organic Act of Guam and remove local legislative control over the Guam Supreme Court. I want to express my support for H.R. 521.

I have lived and practiced law on Guam for almost twenty years. Guam needs greater stability in many of its institutions, but nowhere is it more critical than in our institutions of justice.

The political maneuvering by the Guam Legislature since the realization in 1996 of a Guam Supreme Court has acted to destroy the solemnity and independence all of us on Guam expect of our court system. The manipulation of power and authority within the two levels of Guam's court system by the Guam Legislature is an embarrassment, both for lawyers who practice before the courts of Guam, and those who seek justice in an institution that is expected to be, in reality and in appearance, above political intermeddling.

Memorandum To: Honorable James V. Hansen
Re: H.R. 521

I believe Justice Carbullido of the Guam Supreme Court will testify on behalf of H.R. 521 and I urge you to carefully consider what I expect will be his thoughtful and compelling arguments in support of the bill.

I ask the House to make the authority of Guam's Supreme Court an element of the Organic Act rather than subject to local legislation. The brief history of Guam's Supreme Court has made clear the need for this federal legislation. H.R. 521 is well crafted and an appropriate measure which will provide the public and the bar with greater confidence in our justice system.

Respectfully,

Thomas J. Lannen

[A statement submitted for the record by Floyd E. Leonard, Chief, Miami Tribe of Oklahoma, on H.R. 791 follows:]

Statement of Floyd E. Leonard, Chief of the Miami Tribe of Oklahoma

Chairman Hansen, Congressman Rahall and Members of the Committee, I am Floyd E. Leonard, Chief of the Miami Tribe of Oklahoma. I wish to thank you for this opportunity to present written testimony to this Committee on Resources with respect to H.R. 791.

H.R. 791, if passed, would extinguish, terminate and take away the aboriginal or treaty titles, and related rights and interests, of the Miami Tribe of Oklahoma, the Ottawa Tribe of Oklahoma and the Prairie Band Potawatomi Tribe of Kansas, without their respective consent, in and to their respective land and land claims in the State of Illinois, and would relegate those Tribes to multiple monetary claims and lawsuits against the United States in the United States Court of Federal Claims for their respectively taken land in Illinois. The Miami Tribe of Oklahoma now accepts the proposition that it is prudent and necessary for the U.S. Congress to assume a material role in balancing equitably the interests of the State of Illinois, its citizens and property owners, at least with respect to the Miami Tribe of Oklahoma, and to legislate a good faith, fair and meaningful resolution of the land claims of the Miami Tribe of Oklahoma in Illinois. For that reason, the Miami Tribe of Oklahoma commends Congressman Johnson for his leadership in starting dialogue in Congress, by introducing H.R. 791. The Miami Tribe of Oklahoma, however, opposes H.R. 791 for the reasons that I will address briefly in this statement, but again accepts the proposition that Federal legislation, in a form and containing such terms that are different than the present form and terms of H.R. 791 but that are also fair and reasonable, is the most appropriate methodology for an expeditious resolution of the recognized and treaty title claims of the Miami Tribe of Oklahoma to land, and related rights and interests, in the State of Illinois.

Selected Historical Background—Miami Tribe of Oklahoma:

The Miami Tribe of Oklahoma, the Ottawa Tribe of Oklahoma and the Prairie Band Potawatomi Tribe of Kansas, and their respective treaty or aboriginal title claims to lands in Illinois, are the subject of H.R. 791. That is not the only thing these great and historic Tribes have in common. In addition to their rather dubious distinction of being the subject of H.R. 791, each such Tribe possesses a distinctive characteristic that is not shared by most other Tribes in the United States that have asserted or are presently asserting a bona fide land claim under a treaty with the United States. Each such Tribe, that is identified in and the subject of H.R. 791, is and has been since 1787, a beneficiary of the Northwest Ordinance of 1787.

The Continental Congress enacted the Northwest Ordinance in 1787, and the U.S. Congress adopted and ratified the Northwest Ordinance in 1789, during its first session after ratification by the original States of the new U.S. Constitution. Congress ratified the Northwest Ordinance as part of the exercise of its Commerce Clause, under Article I, Section 8, Clause 3 of the U.S. Constitution. The Northwest Territory, which was defined and created legislatively under the Northwest Ordinance, includes present-day Illinois, Indiana, Michigan, Ohio and Wisconsin. The Northwest Ordinance of 1787 is still valid U.S. law, and is part of the organic and constitutional laws of the States of Indiana and Illinois, and the other Northwest Territory States.

The Northwest Ordinance, as adopted by the Continental Congress and as ratified by the first U.S. Congress, fostered at least three (3) important national social policies with respect to the Northwest Territory: (i) the westward Euro–American settlement of the Northwest Territory; (ii) the abolition and prohibition of slavery in the Northwest Territory; and, (iii) the self-imposed affirmative duty by and on the part of Congress to use utmost good faith in its dealings with the Indians of the Northwest, and to not take the lands of the Indians in the Northwest Territory without the consent of those Indians. The "pro–Indian" component of the Northwest Ordinance of 1787 states, in part, that: "The utmost good faith shall always be observed towards the Indians [in the Northwest Territory]; their lands and property shall never be taken from them without their consent." Emphasis Added.

In 1795, and pursuant to the Treaty Clause, under Article II, Section 2, Clause 2 of the U.S. Constitution, and fresh on the heels of the espoused "pro–Indian" policy under the Northwest Ordinance, the United States, my client and several other Indian Tribes consummated the Treaty of Greenville. The Treaty of Greenville of 1795, along with other treaties entered into by the United States and the Miami Tribe of Oklahoma under the Treaty Clause of the U.S. Constitution, including the Treaty of Grouseland of 1805 as referenced in H.R. 791, is the "supreme Law of the

Land" under Article VI, Section 2 of the U.S. Constitution. Pursuant to the Treaty of Greenville of 1795, the Treaty of Grouseland of 1805 and other treaties between the United States and the Miami Tribe of Oklahoma, the Miami Tribe of Oklahoma still holds, and by corollary has never ceded, its recognized, acknowledged and treaty title to (i) approximately 2.6 million acres of land in Illinois, that is referenced specifically in H.R. 791, and (ii) other substantial and vast acres of land in the original Northwest Territory.

Present Status of Illinois Land Claims:

In 1999, the Miami Tribe of Oklahoma filed a lawsuit, in the U.S. District Court for the Southern District of Illinois, against several property owners in Illinois who hold titles to lands in Illinois to which the Miami Tribe of Oklahoma claims it owns superior treaty title under the Treaty of Grouseland of 1805. The Miami Tribe of Oklahoma, in 2001, voluntarily dismissed that lawsuit for the sole reason that the lawsuit was disruptive to those Illinois property owners, and would have continued to be disruptive during the anticipated lengthy period of pre-trial proceedings, trial and possible appeals relating to that lawsuit. In February 2001, after the Miami Tribe of Oklahoma had filed the lawsuit in Illinois in 1999, but before the Miami Tribe of Oklahoma voluntarily dismissed that lawsuit in 2001, Congressman Johnson introduced H.R. 791.

The U.S. Office of Solicitor has examined the recognized and treaty title claims of the Miami Tribe of Oklahoma to Illinois land under the Treaty of Grouseland of 1805, but, to our knowledge, has not issued a formal opinion or assessment as to the validity or breadth of those claims. The Miami Tribe of Oklahoma is aware generally that the U.S. Office of Solicitor has examined the aboriginal and/or treaty claims of the Ottawa Tribe of Oklahoma and the Prairie Band Potawatomi Tribe of Kansas, but is unaware as to the status or definitiveness of those examinations.

H.R. 791—General Points of Opposition:

The Miami Tribe of Oklahoma opposes H.R. 791, in its present form, based on the following general observations and for the following general reasons:

1. The Miami Tribe of Oklahoma has not consented to the confiscation and taking of land in Illinois, that it holds or claims by virtue of recognized title under the Treaty of Grouseland of 1805, or otherwise. H.R. 791, in present form, takes those recognized title and related land claims in Illinois of the Miami Tribe of Oklahoma (including, without limitation, all claims for trespass damages, use and occupancy, natural resources and hunting and fishing rights that relate to or arise from such lands), without the consent of the Miami Tribe of Oklahoma, in direct violation of the Northwest Ordinance of 1787, and of course in direct contravention of the policy and obligation of "utmost good faith" that the Miami Tribe of Oklahoma is afforded and entitled to receive from the United States and the State of Illinois.

2. The Fifth Amendment to the U.S. Constitution attaches to the land and recognized title claims of the Miami Tribe of Oklahoma in Illinois, including all claims for trespass damages, use and occupancy, natural resources and hunting and fishing rights that relate to or arise from such lands. H.R. 791, in its present form, is unfair and unreasonable, and for that reason and possibly other reasons H.R. 791 is or would constitute a violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

3. In addition, the taking or confiscation of the land and recognized title claims in Illinois of the Miami Tribe of Oklahoma under the Treaty of Grouseland of 1805 (including, without limitation, all claims for trespass damages, use and occupancy, natural resources and hunting and fishing rights that relate to or arise from such lands), as contemplated by H.R. 791, requires the payment of fair compensation to the Miami Tribe of Oklahoma under the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution.

4. H.R. 791, in its present form, is or would be a naked and unprecedented abrogation by the United States of its treaty obligations that it owes to the Miami Tribe of Oklahoma, and violates or would violate the Federal doctrine of trust responsibility. The Miami Tribe of Oklahoma exchanged its vast aboriginal and recognized title claims to land in the Northwest Territory, in reliance on the Northwest Ordinance of 1787 (and other applicable U.S. laws) and its negotiated rights, interests and claims that are set forth in the Treaty of Greenville of 1795, the Treaty of Grouseland of 1805 and the many other treaties between the United States and the Miami Tribe of Oklahoma. Pursuant to the Treaty of Greenville of 1795, the Treaty of Grouseland of 1805 and the many other treaties between the United States and the Miami Tribe of Oklahoma, the Miami Tribe of Oklahoma owns, among other claims, recognized title to land, and rights and interests that relate thereto, in Illinois, as well other areas of the original Northwest Territory. The United States

has a duty, pursuant to this trust responsibility, (i) to honor the trust relationship between the United States and the Miami Tribe of Oklahoma, (ii) to fulfill its treaty obligations to the Miami Tribe of Oklahoma, under the Treaty of Greenville of 1795, the Treaty of Grouseland of 1805, and otherwise, and, (iii) as a fiduciary of the resources of the Miami Tribe of Oklahoma, to act in good faith and utter loyalty to the best interests of the Miami Tribe of Oklahoma with respect to the recognized title claims of the Miami Tribe of Oklahoma in Illinois and elsewhere in the original Northwest Territory, and otherwise.

5. H.R. 791, in its present form, is internally inconsistent and legally problematic since it purports to extinguish the recognized title or claims to recognized title of the Miami Tribe of Oklahoma to lands in Illinois under the Grouseland Treaty of 1805, upon Congressional passage of the H.R. 791, but then relegates the Miami Tribe of Oklahoma to file a lawsuit or multiple lawsuits against the United States in the United States Court of Federal Claims for monetary damages attributable to such extinguished claims under the Grouseland Treaty of 1805.

6. The Miami Tribe of Oklahoma is presently investigating and has not determined definitively, as of this juncture, whether the State of Illinois, or any of its citizens or any other party violated the Trade and Intercourse Act of 1790, as amended, or any other applicable Federal laws, with respect to the recognized title or claims to recognized title of the Miami Tribe of Oklahoma to lands in Illinois. H.R. 791, in its present form, also purports to extinguish any claims by the Miami Tribe of Oklahoma, with respect to the recognized title or claims to recognized title of the Miami Tribe of Oklahoma to lands in Illinois, that relate to or arise from possible violations by the Trade and Intercourse Act of 1790, as amended, or any other applicable Federal laws.

7. The investigation and examination by the Miami Tribe of Oklahoma of its recognized title or claims to recognized title of the Miami Tribe of Oklahoma to lands in Illinois or any other part of the original Northwest Territory (including, without limitation, all claims for trespass damages, use and occupancy, natural resources and hunting and fishing rights that relate to or arise from such lands), or any related violations or potential violations under the Trade and Intercourse Act of 1790, as amended, or any other applicable Federal laws, requires the expenditure of significant resources and the compilation of extensive historical research and documentation pursuant to accepted methodologies, which generally cannot be completed within a twelve (12) month period. H.R. 791, in its present form, would purport to take away and terminate any claims, that relate to or arise from its recognized title or claims to recognized title to land in Illinois, or otherwise, that the Miami Tribe of Oklahoma may not presently be aware of or that may be subject to a present but incomplete examination, but that it may uncover or discover or complete its investigation or examination later than one (1) year after passage of H.R. 791.

8. The Miami Tribe of Oklahoma incorporates in this statement, by reference, the statements by or on the part of the Ottawa Tribe of Oklahoma and the Prairie Band Potawatomi Tribe of Kansas, the National Congress of American Indians, and others in opposition to H.R. 791, as presented before the U.S. House of Representatives, Committee on Resources, on May 8, 2002, which are not inconsistent with this testimony, and subject to any later clarification or other statement that is or may be furnished to the Committee on Resources by the Miami Tribe of Oklahoma.

Conclusion:

H.R. 791 purports to embody an "equitable settlement" of the recognized treaty title claims of the Miami Tribe of Oklahoma in Illinois under the Treaty of Grouseland of 1805. This characterization is a misnomer and is illusory. H.R. 791, in its present form, is not a "settlement" at all. H.R. 791, in its present form and if passed, is simply a bold and unprecedented abrogation by the United States of the treaty rights of the Miami Tribe of Oklahoma under the Treaty of Grouseland of 1805, and is an involuntary taking or confiscation of the recognized title of the Miami Tribe of Oklahoma to its land in Illinois. H.R. 791, in its present form and if passed, simply guarantees multiple lawsuits against the United States in the U.S. Court of Federal Claims, for monetary damages attributable to the taking and confiscation by the United States of the recognized treaty title claims of the Miami Tribe of Oklahoma in Illinois under the Treaty of Grouseland of 1805.

H.R. 791, in its present form and if passed, is not only a failure of "utmost good faith," but it is bad faith, a violation of due process and the trust doctrine, an involuntary taking, and a belittlement of the "supreme law of the land" and rule of law generally. In addition, H.R. 791, in its present form and if passed, is a tragic reminder of the disdain that the United States, through its policies and laws, has demonstrated historically to Indians and their Tribes, including the Miami Tribe of Oklahoma, as well as their respective lands and properties.

The Miami Tribe of Oklahoma acknowledges the perceived intent of Congressman Johnson, with respect to H.R. 791—a settlement and resolution of the recognized title claims of the Miami Tribe of Oklahoma in Illinois, under the Grouseland Treaty of 1805, is in the public's best interest, including the best interest of the United States, the State of Illinois and its citizens, and the Miami Tribe of Oklahoma and its peoples. When Congressman Johnson introduced H.R. 791, the lawsuit of the Miami Tribe of Oklahoma in Illinois, against Illinois property owners, was still pending. The Miami Tribe of Oklahoma dismissed that lawsuit, in good faith, to chart a course of resolution which is not threatening to or disruptive of the good citizens and property owners of the State of Illinois, or elsewhere, but which is also protective of the treaty rights guaranteed by the United States to the Miami Tribe of Oklahoma.

The Miami Tribe of Oklahoma is desirous of resolving its recognized title claims in Illinois, and, if appropriate, in the other areas of the original Northwest Territory, in a manner that is consistent with the intent and understanding of the Miami Tribe of Oklahoma and the United States when they negotiated and consummated the Treaty of Greenville of 1795, the Treaty of Grouseland of 1805 and any other applicable treaties. H.R. 791 is not an answer or a settlement—it is simply an invitation to multiple lawsuits and possible extraordinary monetary damages and injuries to the culture and interests of the Miami Tribe of Oklahoma. The Miami Tribe of Oklahoma is prepared now to take all necessary, reasonable and appropriate steps and actions to protect the rights of the Miami Tribe of Oklahoma under the Treaty of Greenville of 1795, the Treaty of Grouseland of 1805 and all other applicable treaties; and, without limiting the foregoing, the Miami Tribe of Oklahoma is hopeful that such initiatives will include a reasoned resolution of these claims of the Miami Tribe of Oklahoma. The Miami Tribe of Oklahoma stands firm with all other Tribes in the protection of tribal sovereignty and tribal treaty rights, and hereby reaffirms with the Committee on Resources that the Miami Tribe will not take any action in derogation of those principles.

I wish to thank the Committee on Resources for holding a public legislative hearing on H.R. 791, and for inviting allowing the Miami Tribe of Oklahoma to present written testimony to the Committee on Resources with respect to H.R. 791.

[A statement submitted for the record by The Hon. Pilar C. Lujan, Former Senator, Guam Legislature, on H.R. 521 follows:]

Statement of The Honorable Pilar C. Lujan, Former Senator of the Guam Legislature

Mr. Chairman and Members of the Committee on Resources:

I am honored to submit this statement for the record on H.R. 521 and to comment on an issue that my late husband and I have dedicated much of our public service to, the establishment of the Supreme Court of Guam.

I am Pilar C. Lujan, a former six term Senator in the Guam Legislature, and the widow of former Senator Frank G. Lujan who is memorialized in the Guam law establishing the Supreme Court of Guam. The Frank G. Lujan Memorial Act is the culmination of our combined careers in the Guam Legislature and it had been my honor to have authored this bill and managed its passage into law in the 21" Guam Legislature. I am also honored that one of the first Supreme Court Justices appointed was my daughter Monessa, who served a brief term prior to her untimely death due to illness.

I am enormously proud of my family's contributions to the Guam Supreme Court. My commitment to the Guam Supreme Court runs deep, some would say personal, and I am concerned today as much as I have ever been in its survival and its ability to succeed as the head of an independent branch of government.

I am a retired public servant, and although I am currently the Chair of the Board of Directors of the Guam International Airport Authority and the Vice Chair of the Democratic Party of Guam, my comments on H.R. 521 are in my private capacity as a citizen and as one who has had a lifelong commitment to the Judiciary on Guam.

The Frank G. Lujan Memorial Act, Guam Public Law 21–147, was the culmination of great effort spanning two decades. As a Senator, my husband authored the original legislation in the early 1970s establishing by local law the first Supreme Court of Guam. This local law was challenged successfully on the basis that the Guam Legislature did not have the authority under the Organic Act of Guam to establish a Supreme Court. The Guam Supreme Court was then dissolved while we

pursued an amendment in Congress to the Organic Act of Guam giving the Guam Legislature the authority to create the Supreme Court.

My husband passed away before the effort was completed, and I ran for a seat in the Guam Legislature to complete his mission. In every Legislature that I served in from the 17th to the 21st I introduced a bill to create the Supreme Court of Guam. I was fortunate to be the Chair of the Guam Legislature's Committee on the Judiciary and Criminal Justice in the 21" Guam Legislature and to be in a position to usher the Supreme Court bill through the legislative process.

We held hearings, received comments and suggestions, made changes and crafted a bill based on a broad consensus that was widely supported by both political parties. The establishment of a Supreme Court of Guam moved us ever closer to our goal of full self government. By having a Judicial branch complete with an appellate review process, we had signaled the maturity of our legal system and the capabilities of the attorneys who practice law on Guam, both in private practice and within the government, to manage our legal affairs.

As the principal author and the driving force behind the Frank G. Lujan Memorial Act, I must state for the record that we had always contemplated and envisioned a Supreme Court that would exercise authority over the Judicial branch, both in policy and in administrative matters. This is a founding principle of an independent Judiciary, responsive to the people and the legislature, but also immune from political machinations.

Since leaving the Legislature, I have seen the erosion of the authority of the Supreme Court of Guam by the efforts of the Guam Legislature to strip the Court of its oversight responsibilities of the local courts. We in the 21" Guam legislature had foreseen these very problems, and we had included provisions in the Guam law that would ensure the Supreme Court's oversight of all Judicial matters on Guam.

The latest efforts of the Guam Legislature to change the rules threatens the independence of both courts, and exposes the courts to possible political tampering. It should be most troubling to supporters of an independent and co-equal Judiciary that the legislature has the option of changing the rules or abolishing the Supreme Court at will.

The fix that H.R. 521 proposes is correct and timely. It is time to ensure an independent Judiciary by giving the Supreme Court of Guam a "constitutional" status by amending the Organic Act of Guam. We are appealing to Congress to support us in bringing stability to the Judiciary by clarifying the roles and responsibilities of the Supreme Court and the Legislature.

The Judicial branch on Guam should be headed by the Guam Supreme Court, including the administrative and policy making functions. All of my colleagues who worked so hard to establish the Guam Supreme Court did not intend anything less than having a Supreme Court that had authority over the lower courts, and this is exactly what the enabling legislation accomplished. That is how it is in the American system, and that is how it should be on Guam. I urge this Committee and Congress to pass H.R. 521.

[A letter submitted for the record by John B. Maher, McKeown, Vernier, Price & Maher, on H.R. 521 follows:]

FRANCIS M. MCKEOWN
D. PAUL VERNIER, JR.
JOHN G. PRICE[1]
JOHN B. MAHER[1]
COLIN C. MUNRO[1]
LOUIE J. YANZA[**]
MICHAEL D. FLYNN, JR.[**]

OF COUNSEL
DAVID T. LOOFBOURROW, JR.

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May 7, 2002

VIA TELECOPIER ONLY – (202) 225-7094

U.S. HOUSE OF REPRESENTATIVES
Committee on Resources
Washington, District of Columbia

RE: H.R. 521 – AMENDMENT TO THE ORGANIC ACT TO CLARIFY THE JUDICIAL STRUCTURE OF GUAM

To The Committee on Resources:

I have been a practicing attorney on Guam since 1984. I have been employed in both the public and private sectors.

I fully support House Resolution 521 and urge the passage of that legislation. Guam needs an independent and co-equal judicial branch of government. The present situation, wherein the administration and authority of the Guam judicial system is subject to the whim of the Legislature is intolerable. Political interference in the judicial branch has caused and will continue to cause, if not corrected, a steady erosion of faith in the fairness and impartiality of the judicial system. While the ultimate solution may be found in the enactment of a true Guam Constitution, a lack of political will and, frankly, self-interest, has prevented the implementation of this solution. As Guam's "Constitution", the Organic Act, is a creation of Congress, it is fitting and proper that Congress address and solve this fundamental problem in the structure of government on Guam. I urge you members of Congress to pass H.R. 521 and amend the Organic Act of Guam to establish an independent judicial branch, co-equal with the executive and legislative branches of the Government of Guam.

Sincerely,

John B. Maher

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[A statement submitted for the record by Judge Joaquin V.E. Manibusan, Jr., on behalf of the majority of Superior Court of Guam Judges, on H.R. 521 follows:]

WRITTEN TESTIMONY OF
JUDGE JOAQUIN V.E. MANIBUSAN, JR.
ON BEHALF OF THE MAJORITY OF SUPERIOR COURT OF GUAM JUDGES
WHOM ARE IN OPPOSITION TO H.R. 521
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
MAY 8, 2002

I WOULD LIKE TO THANK THE COMMITTEE FOR GIVING ME THIS OPPORTUNITY TO PRESENT MY TESTIMONY ON H.R. 521. I, ALONG WITH A MAJORITY OF JUDGES OF THE SUPERIOR COURT WOULD LIKE TO EXPRESS OUR OPPOSITION TO H.R. 521, A PROPOSAL TO "ORGANIZE" THE INTERNAL COURT SYSTEM OF GUAM.

WHILE CERTAIN MEMBERS MAY BE EXPRESSING THEIR OPPOSITION BASED UPON THE MERITS OF THE BILL, I EXPRESS MY OPPOSITION BASED UPON A MORE FUNDAMENTAL ISSUE THAT BESETS THE COMMUNITY OF GUAM.

THE SUPREME COURT OF GUAM SEEKS TO ESTABLISH JUDICIAL INDEPENDENCE BY AMENDING THE ORGANIC ACT OF GUAM SO THAT IT WOULD OBTAIN AN EQUAL STATUS AS THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE UNINCORPORATED TERRITORY OF GUAM. IT IS ARGUED THAT SINCE THE GUAM LEGISLATURE HAS BEEN GIVEN THE POWER BY CONGRESS TO ESTABLISH A SUPREME COURT OF GUAM, THAT THIS COURT COULD FACE LEGISLATIVE EXTINCTION FROM THE HANDS OF THE GUAM LEGISLATURE. NOTHING COULD BE FURTHER FROM THE TRUTH. MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, THE SUPREME COURT OF GUAM IS HERE TO STAY AND WE EMPHATICALLY OPPOSE ANY ATTEMPT TO ABOLISH THE HIGH COURT OF GUAM. CONGRESS WAS WISE IN ALLOWING THE GUAM LEGISLATURE TO CREATE A SUPREME COURT OF GUAM WHEN THE COURTS REACHED JUDICIAL MATURITY

AND THE SUPREME COURT OF GUAM HAS SHOWN THAT IT HAS INDEED REACHED JUDICIAL MATURITY IN THE QUALITY OF OPINIONS WHICH IT HAS WRITTEN.

JUDICIAL INDEPENDENCE AND POLITICAL MATURITY IS NOT REACHED BY AMENDING THE ORGANIC ACT OF GUAM. THERE IS A GREATER "CONSCIOUSNESS" THAT NEEDS TO BE ADDRESSED. ALLOW ME TO GIVE EXAMPLES FROM A RECENT PAPER WRITTEN BY A LAW STUDENT AT THE UNIVERSITY OF HAWAII LAW SCHOOL. THE STUDENT WRITES:

> *"GUAM HAS BEEN A POSSESSION OF THE UNITED STATES SINCE 1898. THE AMERICAN INFLUENCE HAS INCREASED MORE DRAMATICALLY IN THE WAKE OF WORLD WAR II AND THE IMPLEMENTATION OF THE ORGANIC ACT OF GUAM...THE ISLAND HAS UNDERGONE DRASTIC CHANGES TOWARD WESTERNIZATION SINCE THEN. GUAMANIANS ARE U.S. CITIZENS, HOWEVER—NOTWITHSTANDING THE FACT THAT WE CANNOT VOTE FOR PRESIDENT NOR DO WE HAVE A VOTING REPRESENTATIVE IN CONGRESS.*
>
> *AFTER WORLD WAR II, GUAM WAS DESIGNATED AN UNINCORPORATED TERRITORY OF THE UNITED STATES. UNLIKE AN INCORPORATED TERRITORY, IT WAS NOT ON ITS WAY TO BEING INTEGRATED WITH THE U.S. THROUGH STATEHOOD. FURTHER, GUAM WAS NOT DEEMED AN INTEGRAL PART OF THE UNITED STATES.*
>
> *IN 1950, IN RESPONSE TO GUAMANIAN DESIRE FOR INCREASED SELF GOVERNMENT, CONGRESS PASSED THE ORGANIC ACT OF GUAM. THE ACT CONTAINED A BILL OF RIGHTS AND ALLOWED FOR LIMITED SELF GOVERNMENT. IT ALSO GAVE U.S. CITIZENSHIP TO THE SO-CALLED GUAMANIANS. NOTWITHSTANDING THESE CONCESSIONS, GUAM REMAINS ONE OF ONLY SIXTEEN TERRITORIES THAT THE UNITED NATIONS HAS DECLARED TO BE "NON-SELF GOVERNING".*

FIFTY-TWO YEARS AFTER THE PASSAGE OF THIS ORGANIC ACT, THERE IS NOW A BILL TO AMEND IT TO ALLOW THE CREATION OF AN INDEPENDENT JUDICIARY FOR THE TERRITORY OF GUAM. WHENEVER GUAM DESIRES TO MAKE

FUNDAMENTAL CHANGES IN ITS CONSTITUTION, SHOULD IT ALWAYS COME TO CONGRESS AND KNOCK ON ITS DOORS AND ASK SEEK CONGRESS' PERMISSION TO AFFECT THESE FUNDAMENTAL CHANGES? ARE NOT THE CITIZENRY IN GUAM CAPABLE AND MATURE TO MAKE THESE CHANGES THEMSELVES? JUDICIAL INDEPENDENCE IS ACCOMPLISHED NOT BY AMENDING THE ORGANIC ACT OF GUAM BUT BY CONGRESS PASSING LEGISLATION AUTHORIZING A PLEBISCITE ON GUAM SO THAT THE PEOPLE OF GUAM CAN CHOOSE THEIR OWN POLITICAL STATUS AND DRAFT THEIR OWN CONSTITUTION AND CREATE AN INDEPENDENT JUDICIARY IF THAT BE THE WILL OF THE PEOPLE. WHILE I NOTE THAT CONGRESS HAS AUTHORIZED GUAM TO WRITE ITS CONSTITUTION, IT HAS NOT DONE SO IN RELATION TO ITS POLITICAL STATUS. GUAM REMAINS AN UNINCORPORATED TERRITORY.

GUAM PREVIOUSLY CONDUCTED A PLEBISCITE IN 1982. AS A RESULT THEREOF, THE DRAFT COMMONWEALTH ACT WAS RATIFIED BY A MAJORITY OF THE PEOPLE OF GUAM. DESPITE RATIFICATION BY THE PEOPLE, THE DRAFT COMMONWEALTH ACT HAS BEEN ON CONGRESS' TABLE FOR OVER A DECADE AND CONGRESS HAS YET TO APPROVE IT. IT APPEARS, A FORTIORI, THAT CONGRESS HAS YET TO APPROVE THIS CONSTITUTION FOR GUAM BECAUSE IT HAS NOT EXPRESSLY AUTHORIZED ITS PEOPLE TO CONDUCT A PLEBISCITE SO THAT THE PEOPLE CAN EXPRESS AND DETERMINE THEIR POLITICAL STATUS PREFERENCE.

IT SEEMS JUST, FAIR AND RIGHT THAT ONLY THE PEOPLE OF GUAM SHOULD DETERMINE WHETHER THERE NEEDS TO BE AN INDEPENDENT JUDICIARY. IRRESPECTIVE OF THE CHANGE THIS BILL SEEKS TO MAKE (WHETHER OR NOT THE SUPREME COURT HAS EQUAL FOOTING WITH THE OTHER TWO BRANCHES),

CONGRESS STILL HAS ULTIMATE DISCRETION OVER GUAM'S GOVERNMENTAL STRUCTURE BECAUSE THE ORGANIC ACT IS CONGRESSIONAL LEGISLATION. CONGRESS SHOULD NOT DETERMINE WHETHER GUAM SHOULD HAVE AN INDEPENDENT JUDICIARY AND SHOULD DEFER TO THE WISHES OF THE PEOPLE. BUT CONGRESS CAN RECTIFY ANY PAST UNFAIRNESS OR UNJUSTNESS IN GUAM'S QUEST FOR SELF DETERMINATION AND NEED FOR SELF-GOVERNMENT BY CREATING LEGISLATION WHICH WOULD AUTHORIZE THE PEOPLE OF GUAM IN A PLEBISCITE TO DETERMINE THEIR OWN POLITICAL STATUS PREFERENCE AND THUS EVENTUALLY WRITE THEIR OWN CONSTITUTION. ONLY THEN CAN THERE BE TRULY AN INDEPENDENT JUDICIARY CREATED BY THE WILL OF THE PEOPLE. AND CONGRESS IN ITS WISDOM AND BENEVOLENCE MUST AUTHORIZE THIS LEGISLATION NOW.

Superior Court of Guam
Judicial Center
120 West O'Brien Drive
Hagåtña, Guam 96910
Telephone: (671) 475-3410/3500
Fax: (671) 477-1852

Hon. Alberto C. Lamorena III
Presiding Judge

WE, THE UNDERSIGNED, HEREBY AGREE TO THE TESTIMONY SUBMITTED IN OPPOSITION TO H.R. 521
BEFORE THE
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
Office of Native American and Insular Affairs
Washington, D.C.
10:00 a.m., May 8, 2002

ALBERTO C. LAMORENA III
Presiding Judge

KATHERINE A. MARAMAN
Judge

JOAQUIN V.E. MANIBUSAN, JR.
Judge

STEVEN S. UNPINGCO
Judge

[A letter submitted for the record by Neal A. McCaleb, Assistant Secretary for Indian Affairs, U.S. Department of the Interior, on H.R. 791 follows:]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAY 07 2002

Honorable James V. Hansen
Chairman, Committee on Resources
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter responds to your request for views from the Department of the Interior on H.R. 791, a bill to provide for the equitable settlement of certain Indian land disputes regarding land in Illinois. The Department has reviewed the proposed legislation and has identified some issues on which we would like to work with the sponsor and the Committee as this bill moves forward.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Neal A. McCaleb
Assistant Secretary for Indian Affairs

cc: Honorable Nick J. Rahall II
Ranking Minority Member

[A letter submitted for the record by Joseph B. McDonald, Legal Counsel, Citibank N.A. Guam, on H.R. 521 follows:]

Joseph B. McDonald, Esq.
P.O. Box 3351
Hagåtña, Guam 96932

Honorable James V. Hansen
Member of Congress
Chairman, Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515-6201

Honorable Robert Underwood
Member of Congress
Guam District Office
120 Father Duenas Avenue Suite 107
Hagåtña, Guam 96910

May 8, 2002

RE: H.R. 521, a Bill to amend the Organic Act of Guam for the purposes of clarifying the local judicial structure

Dear Congressmen:

I am Joseph B. McDonald, legal counsel for Citibank N.A. Guam and former research attorney to the Supreme Court of Guam, licensed to practice law in Guam and the Northern Marianas Islands. I have had the honor of serving at the pleasure of retired Chief Justice Benjamin J.F. Cruz, Chief Justice Peter C. Siguenza, and Associate Justice Frances Tydingco-Gatewood. I would like to provide the following written testimony supporting H.R. 521. In short, the Organic Act of Guam needs amending to provide for a judicial branch that will administer justice as an independent branch of the territorial government.

Our great Forefathers had the vision to provide in the Constitution itself that the jurisdiction of the courts of the United States shall be vested in the Supreme Court and in such inferior courts as Congress from time to time shall ordain and establish. Today we recognize readily that there is an independent branch of government in which Supreme Court is the highest court in the land. However, it was not at least until 1803 that the role of the judicial branch began to take shape. Chief Justice John Marshall, in describing the relationship between the branches of government left us with these prophetic words:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on....
>
> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

The *Marbury* opinion tells us the obvious, that the judicial branch is to say what the law is and that acts of Congress which are repugnant to the Constitution are void. Great decisions like these helped the Court establish how the new government would develop and evolve around a political system with three separate but co-equal branches.

Unlike the United States and the several states, Guam has no constitution. Guam's analogue to the Constitution, the Organic Act, allows the local legislature to create a Supreme Court. The unfortunate result is that, because the organization of the territorial government does not expressly provide for a separate judicial branch, the island's judicial system suffers from the legislature's diffusion of judicial power. In 1993, Guam's legislature passed the Court Reorganization Act, creating the Supreme Court and establishing it as the highest court on the island. In 1996, the legislature stripped certain of the Supreme Court's inherent powers, and in 1998 the legislature attempted to deny the Supreme Court administrative powers. These absurd legislative acts did much to damage evolution of the local judicial system and are too gross to be insisted upon. While it can be said that the immediate cause of the frustration is a willy-nilly legislature, I submit that the proximate source of the frustration is the failure of the the Organic Act to establish a separate but co-equal branch of government which shall administer justice free of political whim.

House Resolution 521 would correct this failure. It makes clear what is presumed in all U.S. jurisdictions—that there is a judicial system administering justice independently and out of the reach of the other branches of government. House Resolution 521 establishes that, like in the several states and the United States, there shall a separate but co-equal judicial branch for Guam. The Supreme Court shall be the highest court on the island, vested with appellate jurisdiction and ordained with powers to affect orderly administration of justice. Moreover, by providing that the power shall be granted directly to the court by act of Congress, the independence and efficacy of the judiciary shall be ensured. Thus, for the foregoing reasons and because it is the right thing to do, Congress must make H.R. 521 law. I am

Very truly yours,

[A letter submitted for the record by Vicente C. Pangelinan, Minority Leader, 26th Guam Legislature, on H.R. 521 follows:]

Statement of Vicente C. Pangelinan, Minority Leader, 26th Guam Legislature

Hafa adai Sinot gehilo'

Ginen i taotao tano", un dangkolo na Si Yu'os Ma'ase put este na opottunidat ni para bai hu prisenta i tistigu-hu pagu na oga'an, put asunton I mas tatkilu na kotte gi ya Guahan.

Hafa adai Mr. Chairman,

From the people of the land, thank you for the opportunity to present my testimony today, on the topic of the Supreme Court of Guam as embodied in H.R. 521, a bill that would amend the Organic Act of Guam to make the Supreme Court of Guam the chief administrative arm of Guam's judicial branch.

The road to democracy for the people of Guam has been one mapped and charted for us by this dignified body. It is a journey on a road fraught with controversy and tenuous coalitions of political and at times personal interest. But throughout Guam's short history of political development and experimentations in democracy, we have met the challenges and our belief in our democratic system of government- rooted in the will of the people- has sustained our growth as a people and progress as a government.

Today, I have come to Washington to appear before you Mr. Chairman and quoting some lines from a modern day rock classic must say "what a long, strange trip its been." I first started this journey in the halls of the Guam Legislature in Hagatna, almost ten years ago when the first assault on an independent judiciary was launched; standing steadfast in the defense of a unified judiciary headed by the Supreme Court. Overrun by circumstances, events and legislative adventurism our defense efforts necessitated us to take our fight to court rooms of our local Superior Court and Supreme Court and on to that of the Ninth Circuit Federal District Courts. Undaunted and certain that we were fighting for a court system that will serve the best interest of the people of Guam, rather than the people with the robes, we defended our local Supreme Court victory in the Ninth Circuit Federal District Courts, where we once again prevailed.

Regrettably, for the people of Guam, all the court victories will not ensure an independent judiciary since the foundation that this honorable body laid for us in creating our third branch of government lacks the rock solid constitutional protection enjoyed by the executive and legislative branches. That is what I am here to advocate for today.

The people of Guam, whose self-government continues to be limited and confined by the lack of clarity on our political status, have strived to enhance our self-government through whatever means possible within the binding scope of the Congress that has plenary powers over our affairs. Notwithstanding these impediments, we have succeeded in gaining some ground. We have been able achieve, among others, an elected Legislature in the early 50's, elected Governor and Delegate to the Congress in the 70's, and most recently, the creation of our territorial Supreme Court. All have been results of a tedious process of persistent urging and lobbying by our dedicated leaders over a prolonged period of time. H.R. 521 if passed, will be hailed as another milestone in our limited self-government. It will result in a sound foundation—a "constitutional" one if you will—for our third branch of government, the courts.

When the Thirteen colonies declared independence from the Great Britain, the leaders of the Revolution discerned the need to establish an institutional mechanism in the newly-founded nation that would permanently protect the people from the emergence of an autocratic individual or a regime that they so despised and just extricated themselves from. Our forefathers did this at the great risk of life and liberty. Today we enjoy the protections of their toil and wisdom.

To that end, the architects of the U.S. Constitution carefully constructed a democratic structure of government comprised of three branches- the legislative, the executive and the judicial branches- with each holding an exclusive authority in the life process of any given policy. This doctrine of Separation of Powers, a basic benchmark and fundamental precept of our nation, laid the foundation for a perpetuation of a democratic system of government that we currently enjoy and cherish.

Defining feature of this is the system of checks and balances that would ensure the sanctity and the distinct integrity of the three branches that were created. Under this system, each one of the three branches has, and does practically exercise, its authority to ensure the fair and orderly operations of the others. The legitimate practice and preservation of this doctrine requires the understanding of and

conformance to the fine equilibrium that exists between the two notions by the three branches. When that equilibrium is breached, the foundation of our system of government is imperiled. The predicament that we encounter today in our territory infringes upon breaking that balance and corrupts the democracy of our forefathers—which we embrace and desire for ourselves.

The judicial branch of Guam, like its two other counterparts that have experienced a series of political evolution and growth, also has undergone a major reformation process to attain its present maturity. Its growth and maturation has however been subject to the whims of politics and interests beyond justice.

The Supreme Court of Guam, after a laborious process that lasted 21 years, realized through a local mandate, is administering all functions of the judicial branch, only recently restored by the aforementioned court victories. The Supreme Court of Guam has embarked on a noble task to enhance the efficiency and the effectiveness of our judicial system. Through its inclusion in the Organic Act, the foundation of the Supreme Court's place in our government will be accorded the same protection from erosion emanating from the rage of politics that the Executive and Legislative branch enjoy.

Any significant political change within our territory requires an act of Congress. It is a tedious task that nonetheless must be abided by at this juncture of our journey toward self-determination. H.R. 521 is another measure to effect piecemeal change to the Organic Act of Guam, to enhance our self-government.

If I may beg the indulgence of the Committee, Mr. Chairman, I wish to advance the following proposal in granting the people of Guam added measure of self-government. I ask the Committee to consider amending H.R. 521 that would allow the people of Guam through a the passage referendum with two-thirds vote by the people to amend the sections of the Organic Act relating to internal self government, much like the states amend their constitutions. The sections that affect territorial-Federal relations shall remain the purview of the Congress. This would be consistent with the authority Congress has granted to Guam to draft it own constitutions, but has been mired in the desire of the people and rightly so, to resolve the question of our ultimate political status. This devolution of the power that Congress grants to the states to the people of Guam and reservation of power that Congress retains for itself will be a small step for Congress to take in dealing with Guam, but is a giant leap in self government for the people of Guam.

I ask Congress to act on this proposal and empower the people of America's beacon of democracy in the Pacific with the life of a government emblazoned with democratic ideals and practice.

Once again, Hafa adai Mr. Chairman and I thank you and the Congress for is kind and studied consideration of my testimony.

[A letter submitted for the record by Thomas L. Roberts, Dooley Lannen Roberts & Fowler LLP, on H.R. 521 follows:]

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May 8, 2002

VIA FACSIMILE TRANSMISSION
202-225-7094

Honorable James V. Hansen, Chairman
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
1324 Longworth House Office Building
Washington, D.C. 20515-6201

RE: PUBLIC HEARING ON H.R. 521,
PROPOSED AMENDMENT TO THE ORGANIC ACT OF GUAM

Dear Chairman Hansen:

I have been practicing law in Guam for the past 19 years. I write to express my support for H.R. 521.

The 1984 Omnibus Territories Act, codified at 48 U.S.C. §1424-1 through §1424-4, authorized Guam's Legislature to create a Supreme Court of Guam with final appellate authority over cases arising in Guam. As a result, in 1993, Guam's Legislature passed Public Law 21-47, creating Guam's Supreme Court. Since the Supreme Court of Guam began hearing appeals and issuing decisions in 1996, both the Superior Court of Guam and the Supreme Court of Guam have continued to mature. Today, of the three branches of the government in Guam, the judicial branch is the most efficient and well respected, by attorneys and by the public at large.

Unfortunately, Guam's legislature has not continued to mature. Guam is a highly political place. Its fifteen senators are elected every two years. Many of them spend much of their term campaigning for the next election, passing special interest legislation, bickering with the governor, and attending weddings, christenings, funerals and rosaries. Since 1996, the Legislature has managed to turn the Supreme Court into a political football, vesting and then stripping it of administrative and other authority, usually in riders tacked on to other legislation. In my opinion, as long as the existence and functions of Guam's Supreme Court are subject to local legislative whim, the situation will never change.

Currently, the executive and legislative branches of the government of Guam are creations of Guam's Organic Act, as is the Superior Court of Guam. I urge the House to make the existence and authority of Guam's Supreme Court a function of the Organic Act rather than local legislation. H.R. 521 is appropriate and carefully drafted, and I would ask the House to pass it as presently constituted. Once the authority of Guam's Supreme Court is organically institutionalized, the curative effect on Guam's other two branches of government should be inevitable.

Sincerely,

DOOLEY LANNEN ROBERTS & FOWLER LLP

Thomas L. Roberts

[A letter submitted for the record by The Hon. James E. Ryan, Attorney General, State of Illinois, on H.R. 791 follows:]

May 6, 2002

The Honorable James V. Hansen
Chairman
House Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Hansen:

On behalf of the People of the State of Illinois, the Attorney General of the State of Illinois wishes to submit the following written testimony expressing the State of Illinois' full support for H.R. 791, a bill that concerns the resolution of Indian land claims in Illinois. The Attorney General wishes to thank the U.S. House of Representatives' Committee on Resources for the opportunity to present this written testimony, and believes that the State of Illinois has experience with the subject of this legislation that will benefit the Committee's consideration of H.R. 791.

H.R. 791. The proposed legislation concerns two specific treaty-based claims to lands in Illinois brought by Federal Indian tribes. One claim is based on the August 21, 1805 "Treaty of Grouseland." The other claim is based on the July 29, 1829 "Treaty with the United Nations, etc." The former treaty relates to a claim to 2.6 million acres in eastern Illinois, and the later treaty to much smaller claims to land in DeKalb county. Section (b) of H.R. 791 extinguishes all tribal claims based on both treaties, and Section (c) authorizes the claimant tribes to sue in the Court of Claims based on the treaties against the United States alone, for money damages.

Tribal Land Claims In Illinois. The legislation is necessary and important to the State of Illinois because based on the foregoing treaties, Indian tribes have asserted that they are the true owners and title-holders of millions of acres of Illinois lands. As of the middle of the 19th Century, the United States government believed it had properly extinguished any tribal claims to Illinois land through a series of treaties with the tribes and others who lived in our State. After executing these treaties, the United States proceeded to open lands in Illinois to private settlement. For the past 150 years, the tribes never asserted that they retained land rights in Illinois. Moreover, in the 1950s and 1960s, the United States created a Federal administrative forum for Indian claims against the Federal Government called the Indian Claims Commission, and the tribes never brought their current claims before that tribunal. Recently, however, for the first time in over 150 years, the tribes have claimed that the United States breached certain early treaties, and that valid tribal claims to Illinois lands persist. The lands claimed by these tribes are currently owned primarily by private citizens, and have been in private ownership since as early as the middle of the 19th Century. The current owners trace their title back to 19th Century grants from the United States government.

Tribal Land Claims Litigation. In June 2000, one tribe filed a Federal law suit in the United States District Court for the Southern District of Illinois claiming that it was the rightful owner of 2.6 million acres of Illinois. (Miami Tribe v. Walden et al., No. 00 CV 4142). The tribe named as defendants 15 randomly chosen private citizens who owned land in each of the 15 Illinois counties covered by the claim. On behalf of the People of the State of Illinois, the Attorney General of Illinois moved to intervene in the litigation. This motion was granted, and the State of Illinois filed a motion to dismiss the tribe's suit. The State's motion asserted that the United States was the only proper defendant, and that the suit against innocent modern-day owners must be dismissed because it was barred by the sovereign immunity of the United States and the State of Illinois. In June of 2001, the tribe voluntarily withdrew its suit without defending against the State's motion. However, the tribe continues to talk publicly about its claim, that claim has not been extinguished by Congress or the courts, and the claim continues to cloud title and property values in a huge expanse of Illinois.

Damage And Disrpution Caused By Tribal Land Claims. Despite the State's view that the tribal claims have no merit, the emergence of 21st century tribal claims that attack over 150 years of private ownership has adversely impacted land transactions and property values in our State. In particular, the Miami litigation caused great consternation in a 15-county area of east-central Illinois. Families who in some instances had held title to their farms for over 100 years were suddenly threatened with dispossession. The named defendant in the tribe's lawsuit was a 90-year old senior citizen. The tribe's suit treated private landowners in the 2.6 million acre claim area as trespassers. To protect these innocent people, the State of Illinois was forced to pass legislation providing funding for the legal defense of landowners

who in some cases had no title insurance and limited means to defend themselves. The State also retained certain private Special Assistant Attorneys General to assist in defending the novel historical and legal issues raised by the tribal claims.

The Need For A Federal Solution. The State of Illinois feels that the tribal claims lack merit, and that the nearly 200 year-old treaties cited by the tribes do not create any heretofore unknown tribal rights to Illinois land. Against this background, H.R. 791 offers the claimant tribes a generous resolution to their current claims. These claims attack the validity of actions taken by the United States government nearly 200 years ago. The legislation before this Committee, H.R. 791, protects innocent modern day landowners by prohibiting the tribal claimants from asserting claims to Illinois land based on these ancient treaties. The legislation is also fair to the tribes, however, because it authorizes them to sue the United States directly in the Court of Claims, so that they may obtain a judicial hearing on the treaty breaches they have alleged. The State of Illinois expects that the result of such a hearing would be a finding that the tribal claims lack merit. On behalf of the People of the State of Illinois, the Attorney General wishes to thank the Committee for hearing this testimony.

Sincerely

James E. Ryan
Attorney General of Illinois

[A statement submitted for the record by The Hon. Joe T. San Agustin, Former Speaker of the Guam Legislature, on H.R. 521 follows:]

Statement of The Honorable Joe T. San Agustin, Former Speaker of the Guam Legislature, on H.R. 521

Chairman Hansen and Members of the Committee on Resources:

Thank you for affording me this opportunity to provide written testimony on H.R. 521, to Amend the Organic Act of Guam for the purposes of clarifying the local judicial structure of Guam.

I am the former Speaker of the 20th, 21st and 22nd Guam Legislatures, and I had served ten (10) terms in the legislative branch as a Senator. I am currently the Chairman of the Democratic Party of Guam.

As the former Speaker of the 21st Guam Legislature, I presided over the session of the Guam Legislature during which the bill was passed establishing the Supreme Court of Guam (Guam Public Law 21–147). This had been an effort many years in the making, and the Frank G. Lujan Memorial Act was a bipartisan bill that enjoyed widespread support within the legal community.

The Court Reorganization Act, titled the "Frank G. Lujan Memorial Act", was an effort that had been undertaken with great care and deliberation and with numerous consultations with the legal community on Guam. From the first introduction of this bill in 1984 to its passage in 1993, we ensured that all segments of the community were consulted and that we were building a consensus. We knew that we were undertaking a most important court reorganization, and we wanted to be sure to get it right the first time.

The Frank G. Lujan Memorial Act passed unanimously in 1993 in the 21st Guam Legislature and was signed into law by a Republican Governor. There was no controversy then concerning Judicial oversight by the Supreme Court, and administrative and policy-making authority by the Supreme Court over the lower courts. These are relatively new issues, but we considered these settled issues in 1993 when the enabling legislation was passed.

The lesson that we now have learned is that the stability of the Supreme Court and the Judicial branch requires certainty that the Supreme Court would be insulated from the politics of the moment to do what is right for the Judicial branch and to avoid involvement in local politics. This can only be accomplished by ensuring that the Supreme Court of Guam is a "constitutional" court, by amending the Organic Act of Guam as H.R. 521 does.

I would like to point out that the Frank G. Lujan Memorial Act was a bipartisan effort, and that at that particular point in time, no one could predict whether a Democratic or Republican Governor would have the honor of appointing the first Supreme Court Justices after the gubernatorial elections of 1994. In a sense, we were operating based on our concept of how to best establish a strong and independent Judiciary, and we were free from the calculations of political advantage due to the timing of the gubernatorial election two years later. We worked to ensure a Judicial

branch that was a co-equal branch of government, that had its own internal administrative structure, and that was unified.

Since 1993, we have seen the turbulence caused by the legislature's exercise of its power to revisit the Judicial structure, and we have seen the negative consequences of an internal struggle over the authority of the Supreme Court of Guam. This is unfortunate and a step backward from where we wanted the Judiciary to be in 1993.

H.R. 521 clarifies the role of the Supreme Court of Guam as a constitutional court, and establishes the administrative structure of the Judicial branch as is the case throughout the United States. To do otherwise is to accept that Guam can have a Judiciary very different from that of the other states and territories with no rational basis for the distinction.

Congress amends the Organic Act of Guam. If there were another recourse, perhaps we would not need H.R. 521, but the only means now available to the people of Guam to establish a Supreme Court of Guam as a constitutional court is the Congressional process. H.R. 521 is needed to ensure a Judicial branch as a co-equal and independent branch of the Government of Guam. I strongly urge the Committee on Resources to report out H.R. 521 and I urge Congress to pass this bill for Guam.

[A letter submitted for the record by Marcelene C. Santos, President, University of Guam, on H.R. 521 follows:]

University of Guam
Unibetsedåt Guahan
OFFICE OF THE PRESIDENT
Legal Counsel
UOG Station, Mangilao, Guam 96923
Telephone: (671) 735-2978 • Fax: (671) 734-2296
Email: marcys@uog9.uog.edu

May 6, 2002

VIA FACSIMILE: (202) 225-7094

Rep. James V. Hansen, Chair
Committee on Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, D. C. 20515-6201

RE: H.R. 521 – Organic Act Amendment, Judicial Structure of Guam

Dear Rep. Hansen:

I write this letter in support of H.R. 521 that is scheduled for a legislative hearing on May 8, 2002.

I am a Chamorro woman and a practicing attorney, licensed in both Guam and California. Since my return to Guam in 1993, I have witnessed many instances of what has been termed "only on Guam" (OOG). As an attorney the "OOG" regarding the Supreme Court of Guam is untenable.

The "separation of powers" is the principle that ensures checks and balances among the three (3) branches of government. In the U.S. Constitution, the Supreme Court is established as one of the three (3) branches of the federal government and the Congress, as another branch, is empowered only to establish all lower federal courts. In the Organic Act the opposite is true. Currently the provision regarding the courts of Guam, 48 U.S.C. § 1424(a), grants the Legislature of Guam the authority to establish the local courts of Guam, and as of January 5, 1985, was further authorized to establish at its discretion an appellate court.

In 1998, Substitute Bill 495 was passed by the Guam Legislature to update Guam's Solid Waste Management Plan, commonly referred to as "the Garbage Bill," and also had a rider which acted to reorganize the distribution of power within the judicial branch. It supposedly lapsed into law as Public Law 24-139 without action by the Governor but it was challenged successfully. The Supreme Court of Guam that was upheld by the Ninth Circuit Court of Appeals held that PL 24-139 was never enacted into law since there was a valid pocket veto of the bill sent to the Governor of Guam. However, the legal battle surrounding Bill 495 lasted more than three (3) years and created dysfunction and dissention within the courts of Guam.

Given the current provision in the Organic Act, the Guam Legislature may at its discretion repeal the law that created the Supreme Court of Guam or pass another law to reorganize the distribution of power within the judicial branch. Fortunately, there has been no move in that direction so far. Passage of H.R. 521 will ensure that the judicial branch of government on Guam cannot be subjected further to political power plays.

In this election year, the financial turmoil on Guam only highlights a government in chaos. The Governor and Legislature have been embroiled in constant battles, some of which have come before the courts for resolution. To its credit, the Supreme Court of Guam has remained focused on the law and not the politics of the cases it hears. The separation of powers was devised by the framers of the Constitution to prevent the majority from ruling with an iron fist. The majority on Guam will determine who will be Governor and who will sit in the Legislature, the Courts however are bound by the rule of law and not majority rule. Therefore, it is even more imperative that Guam's courts be established as an independent third branch via the Organic Act and not local legislation.

I therefore respectfully submit this testimony in support of H.R. 521 and humbly request your vote in support as well.

Sincerely,

Marcelene C. Santos

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May 7, 2002

VIA TELEFAX: (202) 225-7094

The Honorable James V. Hansen
Chairman, Committee on Resources
U.S. House of Representatives
Washington D.C., 20515-6201

Re: TESTIMONY IN SUPPORT OF HOUSE RESOLUTION NO. 521

Dear Chairman Hansen:

Courts cannot exercise "co-equal" constitutional responsibilities unless they are given the necessary "co-equal" power to do so. The fair and impartial application of Guam and Federal laws cannot be assured so long as the jurisdiction of the courts of Guam remains under legislative control. Nor can the people of Guam be expected to exercise true self governance without "co-equal" branches of government. Nor can the Congress be said to have discharged its fundamental obligation to provide the people of Guam with the means to govern themselves unless and until all three branches established by the Organic Act of Guam have been properly constituted. H.R. 521 would properly constitute Guam's judicial branch by giving it the "co-equal" dignity it needs to effectively check and balance executive and legislative powers, prevent the tyranny of majority rule, protect constitutionally guaranteed freedoms and safeguard democracy.

In addition to giving Guam's Supreme Court an organic existence, it must be properly equipped to ensure the orderly administration of justice. The judicial branch in Guam should not consist of two separately governed court systems. It does today only because a coalition of local legislators has sought to influence judicial policy-making. As a result, the administration of justice has been politicized. The Judicial Council, whose voting members include partisan legislative and executive officials, should be abolished and a single, unified court system established with the Chief Justice of the Supreme Court of Guam as its head.

For these reasons, I urge the Committee on Resources to act favorably on H.R. 521.

Very truly yours,

Oliver Weston Bordallo

cc: The Honorable Robert A. Underwood

[A letter and supporting documents submitted for the record by Peter C. Siguenza, Jr., et al., Chief Justice, Supreme Court of Guam, follow:]

SUPREME COURT OF GUAM
Suite 300 Guam Judicial Center, 120 West O'Brien Drive, Hagåtña, Guam 96910-5174
Telephone: (671) 475-3162 • Facsimile: (671) 475-3140
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March 20, 2002

HAND-DELIVER

Honorable Antonio R. Unpingco
Speaker, Twenty Sixth Guam Legislature
155 Hesler St. Liheslaturan Guahan
Hagåtña, Guam 96910

Dear Mr. Speaker:

This letter is prompted by a series of legal events which has altered the structure of the local court system and has created issues pertaining to the administration of the courts. In light of the need for judicial independence and unification, we believe that the outstanding administrative issues which have been recently created should be handled by the courts. This letter is submitted to inform you of the actions currently being taken by the Supreme Court, as the head of the judicial branch of government. We write you in the interest of securing support for our pursuit of a unified judiciary.

In January of this year, the Ninth Circuit Court of Appeals issued a decision affirming a ruling by Guam's highest court which invalidated P.L. 24-139, the so-called "Garbage Bill." P.L. 24-139 removed the statutory status of the Supreme Court as head of the local judiciary and created a system of dual-management, conferring upon the Judicial Council powers specifically relating to the administration of the Superior Court. Last week the Ninth Circuit issued an order denying further review of the case. By this order, the Ninth Circuit effectively relinquished jurisdiction over the case and sustained its January decision that P.L. 24-139 is invalid.

As a result of the Guam Supreme Court and Ninth Circuit decisions, the law that existed prior to the enactment of P.L. 24-139 as it pertains to the Guam judiciary is now the current state of the law. Specifically, the Guam Supreme Court is restored to the position as head of the local Judiciary, with supervisory jurisdiction over the courts of Guam.

Furthermore, the powers granted to the Judicial Council in P.L. 24-139 are no longer in effect as a result of the recent court rulings. The Judicial Council is now mainly an advisory body, whose powers over both the Superior Court and Supreme Courts' administrative matters are limited to issues regarding personnel, compensation, and the Judicial Building Fund. A void therefore exists with regard to the powers formerly exercised by the Judicial Council over all other administrative issues. A concern similarly exists with regard to the validity of the Judicial Council's past actions. Specifically, the Staff Attorney of the Superior Court articulated concerns in his various motions to the Ninth Circuit and the U.S. Supreme Court that the actions of the Judicial Council since February 7, 1998 may be void due to the invalidation of P.L. 24-139.

Honorable Antonio R. Unpingco
Speaker, Twenty Sixth Guam Legislature

March 20, 2002
Page 2

Moreover, as competition for limited financial resources intensifies, the recent court events present a unique opportunity for the island's courts to review operations and curtail duplication and waste within the judicial branch. We believe that now is the time for us to actively work together within this branch towards greater fiscal efficiency and accountability.

In light of our supervisory role over the courts of Guam, and considering the current need for fiscal responsibility, the Supreme Court, sitting *en banc*, has formed Guam's' Unified Judiciary Committee consisting of the Chief Justice of Guam, the two Associate Justices of the Supreme Court, the Presiding Judge of the Superior Court, one Superior Court judge selected by the remaining judges, and the administrators of both courts. A copy of the Promulgation Order is attached for your information. The Committee will handle administrative issues pertaining to both the Supreme and Superior Courts not within the jurisdiction of the Judicial Council and will review certain prior actions taken by the Judicial Council in efforts to minimize the Superior Court's exposure to liability.

Judicial independence is the benchmark of a tri-partate system of government. With this principle in mind, we respectfully request that you and your colleagues respect and support our initiatives and afford us the opportunity to resolve further issues pertaining to the judicial branch without external interference. We are certain that our goal of establishing and operating a unified judiciary that is administratively efficient and fiscally accountable is worthwhile and in the public interest.

Sincerely,

PETER C. SIGUENZA, JR.,
Chief Justice

F. PHILIP CARBULLIDO,
Associate Justice

FRANCES TYDINGCO-GATEWOOD,
Associate Justice

Enclosure:
cc: All Senators

SUPREME COURT
OF GUAM

JUN 30 11 06 AM '97

RICHARD C. KANIBUSAN
CLERK, SUPREME COURT
BY:

Supreme Court

Territory of Guam

In The Matter Of The Promulgation Of The Rules Governing the Annual Budget of the Judicial Branch of the Territory of Guam

Administrative Order No. 97-0003 A

ORDER PROMULGATING THE RULES GOVERNING THE ANNUAL BUDGET OF THE JUDICIAL BRANCH OF THE TERRITORY OF GUAM

The Supreme Court of Guam, as the highest court of the Territory, possesses supervisory authority over all local courts of Guam and is the proper body to review, approve and submit the unified annual budget for the Judiciary to the Guam Legislature. *See* 7 GCA §5101, COMMENT; *See Also*, 7 GCA §2101, COMMENT; 7 GCA § 3107(b).

Before the creation of the Supreme Court, the budget for the Superior Court was approved by the Judicial Council. However as set forth at 7 GCA §5102 and consistent with the doctrine of the separation of powers, the Judicial Council is currently a non-governing advisory body. Any prior grants of power given the Judicial Council as contained in the Code of Civil Procedure and elsewhere were repealed expressly by 7 GCA §1115 or implicitly by operation of law when the Supreme Court of Guam certified its readiness to hear appeals on July 16, 1996.

Pursuant to the inherent powers of the Supreme Court, 7 GCA §§ 3102, 3107 and 7117 and the supervisory power of the Supreme Court over all lower courts, the annual budget of the Judiciary shall be reviewed and approved by the Supreme Court in accordance with the rules set forth below.

1) No later than a date designated annually by the Chief Justice, the Administrative Director of the Superior Court shall submit a draft budget proposal on behalf of that court to the Executive Officer of the Supreme Court.

2) Prior to the submission of the draft Superior Court budget to the Executive Officer, the Administrative Director shall provide a copy to each Superior Court judge and shall present such budget proposal to the Judges for review, comments and recommendations.

3) The Administrative Director of the Superior Court shall provide, in response to written questions from the Executive Director of the Supreme Court and within the time indicated by such request, all documents and other information requested which may have bearing on any item or amount contained in the draft budget proposal submitted.

4) The Executive Officer of the Supreme Court may return the draft budget proposal to the Administrative Director of the Superior Court with instructions to reconsider or provide additional justification for those items or amounts to be provided. The Administrative Director shall then resubmit the draft budget to the Supreme Court within the time allotted.

5) The Executive Officer of the Supreme Court shall prepare a draft proposed budget for the Supreme Court to be reviewed by the Supreme Court en banc, no later than a date indicated annually by the Chief Justice.

6) The Supreme Court en banc shall review the draft budget proposal for the Superior Court. The Administrative Director shall make a presentation of the budget proposal to the Supreme Court at a date and time set by the Chief Justice. The Justices may modify the proposed Superior and Supreme Court budgets as they deem necessary to the efficient operation of the Judicial Branch. The Supreme Court may conduct public hearings, take testimony, summon witnesses, and subpoena records and documents as is necessary to properly consider and approve the budgets of the respective courts.

7) The Executive Officer of the Supreme Court may utilize the resources and various personnel of the Judiciary in preparing and presenting the unified Judicial Budget.

8) The unified Judicial Budget, as approved by the Supreme Court shall be the only budget relating to the Judicial Branch which may be submitted to the Legislature. No courts of Guam, or divisions therein shall submit a separate budget request to the Legislature.

9) The unified Judicial Budget, as approved by the Supreme Court en banc, will be forwarded to the Legislature by the Chief Justice as the official budget request for the Judicial Branch. If the Legislature determines that hearings or meetings are necessary to review the budget, the Executive Officer shall appear before the Legislature to present the unified budget and to respond to any inquiries by the Legislature.

10) The Chief Justice may issue such administrative orders as are necessary to insure that the budget review process is completed in a timely manner.

11) Pursuant to 7 GCA § 3107(b), the Supreme Court may employ any remedies necessary to effectuate its supervisory authority over the courts below, including, but not limited to the imposition of contempt and lesser sanctions upon any judicial

officer or employee who shall wilfully disobey or disregard the rules contained herein.

12) Rules 1 through 12 set forth herein shall take effect on October 1, 1997.

13) The Administrative Director shall present a copy of the 1998 Superior Court Budget to the Supreme Court and shall provide, in response to written questions from the Executive Director of the Supreme Court and within the time indicated by such request, all documents and other information requested which may have bearing on any item or amount contained in the fiscal year 1998 draft budget proposal.

14) Rule 13 shall take effect immediately.

DATED: Agana, Guam, June 24, 1997

PETER C. SIGUENZA
Chief Justice of Guam

JANET HEALY WEEKS
Associate Justice

JOAQUIN C. ARRIOLA, SR.
Associate Justice, P.T.

JOSE T. LEON GUERRERO
Associate Justice, P.T.

EDUARDO A. CALVO
Associate Justice, P.T.

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court, Guam
Dated at Agana, Guam
6/30/97

IN THE SUPREME COURT OF GUAM

RE: CREATION OF THE UNIFIED JUDICIARY COMMITTEE

PROMULGATION ORDER NO.: 02-006

Pursuant to the authority granted in 7 GCA §§ 2101, 3101, 3102 and 3107, and by its inherent authority, the Supreme Court of Guam, sitting *en banc*, hereby adopts and promulgates the rules creating the Unified Judiciary Committee. The Unified Judiciary Committee shall have the powers and responsibilities hereinafter stated.

THE UNIFIED JUDICIARY COMMITTEE

1. The terms "Guam Judiciary" or "Judicial Branch" as used herein shall collectively mean the Supreme Court, Superior Court and their respective divisions.

2. The Unified Judiciary Committee.

(a) There shall be a Unified Judiciary Committee that shall consist of the following members: the Chief Justice of Guam, two (2) full-time Associate Justices of the Supreme Court, the Presiding Judge, one (1) judge of the Superior Court to be selected by the remaining judges of the Superior Court, the Administrator of the Supreme Court, and the Administrator of the Superior Court. The Chief Justice shall be Chairperson of the Unified Judiciary Committee. The Chief Justice may designate another member of the Unified Judiciary Committee to be Chairperson.

(b) The Unified Judiciary Committee shall operate in a wholly nonpartisan manner.

(c) The term of each member of the Unified Judiciary Committee shall be concurrent with the term of such member's respective office

(d) A quorum shall consist of no less than a majority of the members. No act of the Unified Judiciary Committee shall be valid except with the concurrence of no less than a majority of the

membership

(c) The Unified Judiciary Committee shall promulgate rules for its conduct and operation. Said rules shall include provisions designed to comply with the spirit and intent of Chapter 8 of Title 5 Guam Code Annotated, ***the Open Government Law of Guam.***

3. Powers of the Unified Judiciary Committee.

(a) The Unified Judiciary Committee shall have the following powers:

(1) to adopt policies and rules for the operations of the Judicial Branch, including, but not limited to, procurement, facilities and property and financial not otherwise within the jurisdiction of the Judicial Council as provided by law.

(2) to review the budget for the operation of the Judicial Branch and submit its recommendation to the Guam Legislature;

(3) to employ, retain or contract for the services of qualified specialists or experts, as individuals or as organizations, to advise and assist the Judicial Branch in the fulfillment of its duties;

(4) to adopt filing fees and other court fees not otherwise within the jurisdiction of the Judicial Council;

(5) to promulgate the Unified Judiciary Committee's own rules for its conduct and operation;

(6) to initiate, receive and consider charges concerning alleged misconduct or incapacity of any referee or administrative hearing officer of the Judicial Branch of Guam, and to form subcommittees that will determine and make recommendations as to the removal of any referee or hearing officer of the Judicial Branch;

(7) to adopt such rules as may be necessary for the exercise of the powers and performance of the duties conferred or imposed upon the Unified Judiciary Committee by this Promulgation Order and not inconsistent with this Promulgation Order.

(b) Nothing contained in this Promulgation Order shall be construed directly or by implication to be in any way in derogation or limitation of the powers conferred upon the Supreme Court of Guam or existing in the Supreme Court of Guam by virtue of any provisions of the Organic Act of Guam or any statutes of Guam or any other provision of the Guam Code Annotated.

4. Any action taken in violation of this Promulgation Order, or any policy or rule adopted pursuant to this Promulgation Order, is void. Any expenditure of Judiciary funds in violation of this Promulgation Order, or any policy or rule adopted pursuant to this Promulgation Order, is void. Any employee of the Judicial Branch who expends or authorizes the expenditure of Judicial Branch funds in violation of this Promulgation Order, or any policy or rule adopted pursuant to this Promulgation Order, shall be personally liable for the return of the funds to the respective fund of the Judicial Branch and may be subject to appropriate disciplinary action.

5. Any provision herein in conflict with Guam law shall not be valid. Such invalidity shall not affect other provisions herein which can be given effect without the invalid provision.

6. Effective Date. This Order shall be effective on the date herein promulgated.

SO ORDERED En Banc this 21st day of March, 2002.

F. PHILIP CARBULLIDO
Associate Justice

FRANCES TYDINGCO-GATEWOOD
Associate Justice

PETER C. SIGUENZA, JR.
Chief Justice

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

June 17, 1998

Honorable Mark C. Charfauros
24th Guam Legislature
777 Route 4, Sinajana, Suite 16B
Sinajana, Guam 96926

Dear Senator Charfauros:

Thank you for your letter of June 2, 1998, regarding the proposed legislative provisions relating to Guam's local judiciary in H.R. 2370. Only those changes to the Organic Act of Guam which are supported by the Government of Guam are expected to be approved by Congress. This would therefore exclude the controversial federal imposition on the local government's judicial branch, as there are clearly different views regarding Guam's judicial structure among leaders of the three branches of government in Guam. These divergent views are apparent based on the testimony submitted at the congressional hearing of October 29, 1997, on H.R. 2370, and in light of legislation enacted by the Guam legislature this year.

It would inconsistent with the fundamental principle of respecting local self-government to impose a federal requirement on the local government's judicial branch, although Congress has the explicit constitutional prerogative to do so. Furthermore, currently there is no compelling reason for Congress to regulate the administrative operations of Guam's courts in order to protect or promote federal interests. Indeed the greater federal interest at this time is to promote local self-determination and self-government over Guam's internal affairs. Congressional intervention in this matter does not advance that federal interest. Absent a breakdown in the effective and efficient operation of the courts or rule of law under the Organic Act, a federal mandate altering local law would indeed represent a step backwards in Guam's evolution toward greater self-government and self-determination. Similarly, Congress should not pre-empt judicial review or the authority of the local legislature to act, in light of any applicable ruling by a court of jurisdiction.

I appreciate your recognition that Guam already has the tools of self-government and self-determination which augment the Organic Act and empower the residents of the territory to reform the local judiciary through adoption of a local constitution. Under Public Law 95-584, a constitution could establish the Commonwealth of Guam and enable the United States citizens of Guam as an internally self-governing body politic to exercise self-determination in local affairs, as well as to address in a more democratic and orderly manner the question of Guam's ultimate political status.

No U.S. territory or trust territory has ever achieved a permanent political status within or outside of the U.S. constitutional system without first establishing local constitutional self-government as a step in the status resolution process. The Congress is currently engaged in responding to the aspirations of our fellow citizens in Puerto Rico for full self-government. After nearly 50 years of local constitutional government, Puerto Rico has demonstrated convincingly that they are prepared for full self-government as a separate sovereign or as an incorporated part of the Union.

Again, thank you for sharing your views with me on H.R. 2370. It is my hope that Guam will fully utilize the existing authority in federal law for increased self-government consistent with self-determination.

Sincerely yours,

DON YOUNG
Chairman

cc: Hon. Robert A. Underwood

[A letter submitted for the record by Charles H. Troutman, Compiler of Laws, Office of the Attorney General, Department of Law, Territory of Guam, on H.R. 521 follows:]

DEPARTMENT OF LAW

CARL T.C. GUTIERREZ
Maga'lâhi
Governor

MADELEINE Z. BORDALLO
Tinñente Gubetnadora
Lieutenant Governor

ROBERT H. KONO
Hinirât Abugao
Attorney General (Acting)

CHARLES H. TROUTMAN
Rikohidot i Lai Guâhan Siha
Compiler of Laws

Ufisinan Hinirât Abugao
Tiritorian Guâhan

OFFICE OF THE ATTORNEY GENERAL
Territory of Guam

May 8, 2002

HONORABLE JAMES V. HANSEN
Member of Congress
Chairman, Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515-6201

HONORABLE ROBERT A. UNDERWOOD
Member of Congress
Guam District Office
120 Father Duenas Avenue, Suite 107
Hagâtña, Guam 96910

Re: H.R. 521 - Supreme Court of Guam

Dear Mr. Chairman Young and Members of Congress,

I am Charles H. Troutman, Compiler of Laws for Guam and formerly Attorney General and counsel for the Commission on self Determination. I have been working with the issue establishing the supreme Court of Guam since before I argued the issue unsuccessfully in 1977 before the United States Supreme Court (*People v. Olsen*). Congress was looking at legislation similar to that presented here during the mid-1970s, but that was delayed pending the outcome of the Supreme Court case. Following that, the present law was adopted after much discussion. Even at that time I testified that a surer foundation was required for the Supreme Court.

I still believe that Guam needs a fully co-equal third branch of government. The same problems which plagued the court 0 legislative interference - in the 1970's are with us still. Nevertheless, I believe that H.R. 521 is too detailed. There are many areas where flexibility is a necessity and legislative discretion a positive benefit. Therefore, I would urge that this Bill be amended to more resemble the applicable portions of Article III of the United States Constitution rather than include the many details found in H.R. 521. My suggestions follow:

Compiler of Laws Division (Dibision Fanelikohiyan i Lai Guâhan Siha)
Judicial Center 2-200F, 120 W. O'Brien Drive, ○ Hagâtña, Guam 96910-5185 USA
Phone: (671)-475-3324 ○ Fax: (671-472-2493 ○ e-mail: troutman@mail.justice.gov..gu

1. I am concerned that subsection §22(a) (a)(1) and §22A (a)(1) would limit the present Supreme Court's jurisdiction by its reference to it as an "appellate" court and to the Superior Court as a "trial court". In the recent decision of*In re Request of the Governor Relative to . . . P.L. 26-35,* 2002 Guam 1 Appendix A - Partial Opinion), The Supreme Court, in justifying is jurisdiction to hear such declaratory judgments in the first instance, relied upon the Organic Act's grant to the Legislature to create any time of court of original jurisdiction, whether it be in the Superior Court of Supreme Court. This is very important and we should not limit this power. You will note from the Legislative history of that Guam Code Section (Appendix B), the states from which we adopted this provision do so in their Constitutions. If this section were to be carried over into this Bill part of my concern would be eased. However, there is still the question of new jurisdiction in the future. Under this bill, it is doubtful that the supreme Court could review decisions of government agencies much as the Circuit Court of Appeals review decisions of federal government agencies.

2. Therefore, I would suggest amending Section 2 of H.R. 512 to read:

Section 2. Judicial Structure of Guam.

(a) Section 22(a) . . . .

(a) (1) The judicial power of Guam shall be vested in one Supreme Court, and in such inferior courts as the Legislature may from time to time establish. The judges of both the supreme and inferior courts shall hold office and be compensated as provided by the Guam Legislature, but such compensation shall not be diminished during their term of office unless by a general law affecting all the salaried officers of Guam.

(2) The Judicial Power of Guam shall extend to all cases, in law and equity, over which any Court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section 1424(b) of this title.

(3) The jurisdiction and power of the Supreme Court of Guam shall consist of the power to hear all appeals from the inferior courts of Guam, and from actions of administrative agencies of the government of Guam, to issue any and all writs in aid of its appellate and original jurisdiction, pursuant to statutes of the Guam Legislature. The Supreme Court shall have such original jurisdiction as the Legislature may provide. The Supreme Court shall also have supervisory and administrative authority over the inferior courts through an organization prescribed by the Legislature, have authority to govern the practice of law in Guam, and prescribe rules of practice and procedure before the courts established under the Territory of Guam, all under rules adopted the Supreme Court. These rules may be changed by a statute passed by a vote of two-thirds of the Legislature.

(4) The Governor, in writing, or the Guam Legislature, by resolution, may request declaratory judgments from the Supreme Court as

to the interpretation of any law, federal or local, lying within the jurisdiction of the courts of Guam to decide, and upon any question affecting the powers and duties of the Governor and the operation of the Executive Branch, or the Guam Legislature, respectively. The declaratory judgments may be issued only where it is a matter of great public interest and the normal process of law would cause undue delay. Such declaratory judgments shall not be available to private parties. The Supreme Court shall, pursuant to its rules and procedure, permit interested parties to be heard on the questions presented and shall rendor its written judgment thereon.

(5) There shall also be a District Court of Guam, created and having the jurisdiction provided in Section 22 of this Act (48 U.S.C.A. § 1424).

3. Under the present law and the Guam Supreme Court, references in the Organic Act to the judicial authority of Guam residing in the District Court of Guam as well as in the local judiciary is confusing. The Organic Act contains other sections, notably §31) which gives exclusive jurisdiction over income tax matters to the District Court. That section is clear and should remain and changes to this section would not affect that. But since the District Court acts in other ways only as a federal, albeit an Article I or Article IV court, not an Article II court, and not as a court having local Guam jurisdiction, the Organic Act should be updated here, too, to reflect the reality of the situation. Therefore, I would suggest the following:

Section 22 (48 U.S.C.A. § 1424:

§1424. Courts of Guam; Jurisdiction; Procedure.

(a) District Court of Guam; local courts. The judicial authority of the United States in Guam ~~judicial authority of Guam~~ shall be vested in a court of record established by Congress, designated the "District Court of Guam". ~~, and such local court or courts as may have been or shall hereafter be established by the laws of Guam in conformity with section 1424-1 of this Title.~~

(b) Jurisdiction. The District Court of Guam shall have the jurisdiction of a district court of the United States, any specific jurisdiction given it by other Acts of Congress including this Act, including, but not limited to, the diversity jurisdiction provided for in 1332 of title 28, United States Code, and that of a bankruptcy court of the United States.

~~(c) Original Local Jurisdiction. In addition to the jurisdiction described in subsection (b) of this section, the District Court of Guam shall have original jurisdiction in all other causes in Guam, jurisdiction over which is not then vested by the legislature in another court or courts established by it. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by the laws of Guam for the purpose of determining the requirements of indictment by grand jury or trial by jury.~~

4. Finally, I would delete the remainder of section 22-B (48 U.S.C.A. 1424-2 because the substance of this subsection is contained in my first suggested amendment. :

~~(b) Local Court Jurisdiction. The legislature may vest in the local courts jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section 1424(b) of this title.~~

~~(c) Local practice & procedure; local judges. The practice and procedure in the local courts and the qualifications and duties of the judges thereof shall be governed by the laws of Guam and the rules of those courts.~~

Thank you for your consideration of this measure.

Sincerely yours,

Charles H. Troutman

CHARLES H. TROUTMAN
Compiler of Laws

Appendices A and B

In Re Request of the Governor, 2002 Guam 1 [5] (2/7/2002)
http://www.justice.gov.gu/supreme/op2002Guam01.htm

[5] The Organic Act provides for the creation of the Supreme Court in general terms:

> 1. Local Courts; Appellate Court Authorized.
> (a) Composition; establishment of local appellate court.
> The local courts of Guam shall consist of such trial court or courts as may have been or may hereafter be established by the laws of Guam. On or after the effective date of this Act
> [January 5, 1985], *the legislature of Guam may in its discretion establish an appellate court.*

48 U.S.C. § 1424-1(a) (1987) (emphasis added). The Legislature argues the Supreme Court's jurisdiction is limited by the language of the above-referenced section to that of an "appellate" court. However, section 1424-1(a) merely states that "the legislature of Guam in its discretion may establish an appellate court." It does not define appellate court. The Legislature refers to the generic definition of appellate court in Black's Law Dictionary to support its position that an appellate court does not review matters of first instance and is not a trial court. However, reliance on the dictionary definition is unsound in light of the provision of the Organic Act which provides:

> Local Court Jurisdiction. The legislature may vest in the local courts jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section 1424(b) of this title.

48 U.S.C. § 1424-1(b) (1987). This section of the Organic Act gives the Legislature broad authority to define the jurisdiction of local courts. The Legislature attempts to distinguish "local court" as used in section 1424-1(b) from "appellate court" as used in section 1424-1(a). However, section 1424-1(a) defines "local courts" as "such trial court or courts as may have been or may hereafter be established by the laws of Guam." Thus, the Supreme Court of Guam, as a court established by the laws of Guam, is included within the definition of "local court." The language of section 1424-1 is not ambiguous. Because section 1424-1 gives the Legislature the authority to grant jurisdiction to local courts, the Legislature may grant jurisdiction to the Supreme Court as it deems fit.[3] Moreover, unlike other state constitutions which define the respective jurisdiction of each court in that state, the Organic Act does not define or limit the jurisdiction of the Supreme Court of Guam. *Cf. State ex rel. Neer v. Indus. Comm'n*, 371 N.E.2d 842, 843 (Ohio 1978) (holding that because the Ohio constitution limited the court of appeals' original jurisdiction to certain matters not including declaratory judgments, the court of appeals lacked jurisdiction to render that type of j

Testimony of Charles H. Troutman
Compiler of Laws
Re: H.R. 521
Appendix A
Page 1

judgment). The only limitation placed on the Legislature's power to grant jurisdiction is in regards to causes within the exclusive jurisdiction of the federal courts. 48 U.S.C. § 1424-1(b). A declaratory judgment under section 4104 is not a cause within the exclusive jurisdiction of the federal courts. Therefore, it is within the Legislature's Organic Act powers to grant this court such original jurisdiction. Accordingly, we deny the Legislature's motion to dismiss and hold that this court has jurisdiction to consider a request for declaratory judgment pursuant to section 4104.

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NOTES TO 7 GUAM CODE ANNOTATED § 4104:

1985 SOURCE: Article 4(c) Constitution of Florida, as modified by Massachusetts Constitution, Article of Amendment No. 85 amending Art. 2 of Ch. 3 of the Mass. Constitution.

1985 COMMENT: Several states permit the governor, and Massachusetts permits the Governor, Legislature and Council, to seek opinions from their respective Supreme Courts on matters respecting the duties of the Governor and Legislature. It has been this drafter's experience that such a grant of jurisdiction would have solved many serious questions which have arisen, but which have lacked a forum for decision.

Under the usual rule, no case may be brought until it has ripened into a "case or controversy". This section will permit important issues to be decided before that time and will avoid the necessity of creating harm to some party in order to have a decision. Thus, a Massachusetts Opinion of the Justices determined certain powers of the Legislature and Governor before any employees had to be laid off. This Section would permit a better resolution of serious questions than occurred in the 1978 District Court decision of *Wong v. Camina* wherein the Court decided a question relating to federal grants. No defendant was forthcoming, so the case was decided essentially on a default. This Section would permit a full hearing in such cases and decisions rendered under this Section would be binding.

Note that the language permits the Governor to request opinions as the operation of the Executive Branch, including questions involving separation of powers, and the Legislature to request opinions on the operation of that Branch, but does not permit one Branch to request opinions as to the operation of the other where that operation does not impinge on the requesting branch's operations. The purpose of this limitation is to avoid one branch trying to regulate the other through the courts.

— — — —

[A letter submitted for the record by The Hon. Antonio R. Unpingco, Speaker, 26th Guam Legislature, on H.R. 521 follows:]

I MINA' BENTE SAIS NA LIHESLATURAN GUÅHAN
Twenty-Sixth Guam Legislature
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Chairman : Committee on Military, Veterans, and Micronesian Affairs

Office of the Speaker

May 3, 2002

Congressman James V. Hansen
Chairman
Committee on Resources
U.S. House of Representatives
1328 Longworth House Office Building
Washington D.C. 20515
Fax: (202) 225-5929

Dear Chairman Hansen,

As the Speaker of the Guam Legislature I would like to express my views on H.R. 521 and respectfully request that this letter be included as testimony in the printed record of thee hearing.

The United States Congress rightfully granted Guam's lawmakers the authority to create a Supreme Court of Guam, which it enacted in 1994. It is my hope that the people of Guam be allowed to do likewise for both the Executive and Legislative Branch in the future. Since 1996 the Supreme Court of Guam has thrived under local law, hearing appeals and rendering decisions in many cases. Unfortunately H.R. 521 has the different and unacceptable effect of federally determining local government operations in the judicial branch.

There is no compelling reason for Congress to regulate the administrative operations of Guam's courts to protect or promote federal interest. I feel the greater federal interest is to promote self-government over Guam's internal affairs. Absent a breakdown in the effective and efficient operation of the courts or rule of law under the Organic Act, a federal mandate altering local law would indeed represent a backward step in Guam's evolution toward a greater self-government and self determination. Such is not the case on Guam. I ask that any provisions concerning the internal structure of the courts be left to local law.

I hope this assists you in your deliberation of H.R. 521. I thank you for the opportunity to allow me to express my views on H.R. 521. I hope and trust the Committee will do the right thing and preserve the existing state of federal law granting local self-government to Guam.

Respectfully,

Speaker Antonio R. Unpingco

[Letters submitted for the record by Mark R. Warnsing, Deputy Counsel to the Goveror, State of Illinois, on H.R. 791 follow:]

OFFICE OF THE GOVERNOR
207 STATE CAPITOL, SPRINGFIELD, ILLINOIS 62706

GEORGE H. RYAN
GOVERNOR

May 8, 2002

Mr. Larry Angelo
Second Chief, Ottawa Tribe of Oklahoma
P. O. Box 110
Miami, OK 74355

Dear Mr. Angelo:

It has come to my attention, that during the House Committee on Resources hearing on H. R. 791, you told the Committee I had made certain disparaging comments to you regarding the Ottawa land claim in Illinois during a meeting in the late 1990's. You as well as I know that I never made any such comment to you or any other representative of the Tribe. I ask that you issue a retraction of the statement you made to the Committee on Resources regarding myself. The meetings that we had with you and the other representatives of the Ottawa Tribe were always amicable, so I do not understand why you would make such a statement now.

Anyone that has dealt with me in the 20 plus years I have been in public service, will tell you that I always conduct myself in a professional, ethical and businesslike manner. They would be as shocked, as I, that someone would attribute such a disparaging, insensitive and stupid comment to myself. Again, I ask that you please retract your statement regarding myself made to the Committee.

Sincerely;

Mark R. Warnsing
Deputy Counsel to the Governor

Cc: The Honorable J. D. Hayworth
The Honorable James V. Hansen
The Honorable Timothy Johnson

OFFICE OF THE GOVERNOR
207 STATE CAPITOL, SPRINGFIELD, ILLINOIS 62706

GEORGE H. RYAN
GOVERNOR

May 8, 2002

The Honorable J. D. Hayworth
United States House of Representatives
2434 Rayburn House Office Building (HOB)
Washington, DC 20515

Dear Congressman Hayworth:

It has come to my attention, that during the House Committee on Resources hearing on H. R. 791, that Mr. Larry Angelo of the Ottawa Tribe of Oklahoma attributed certain disparaging remarks to me in connection with the Ottawa land claim in Illinois. I did attend several meetings in 1996-1998 regarding the Ottawa claim, while serving as Assistant Legal Counsel to then Governor Jim Edgar. Never during these meetings or in any private discussion I had with Mr. Angelo or anyone else, did I ever make the remarks that Mr. Angelo attributed to myself. I can also state that I never heard any other person connected with the State Administration make any such comments to Mr. Angelo or other representative of the Ottawa Tribe. These meetings were attended by then Chief Counsel to the Governor J. William Roberts or his successor as Chief Counsel Ms. Elena Kezelis. Mr. Roberts is a former United States Attorney for the Central District of Illinois and now a partner with the Hinshaw & Culbertson law firm. Ms. Kezelis is now Executive Director of the Illinois Environmental Regulatory Review Commission. I have not contacted Mr. Roberts or Ms. Kezelis about this matter, but I encourage you or the committee staff to contact them regarding my conduct and their recollection of these meetings. Their address and phone numbers are:

J. William Roberts
Hinshaw & Culbertson
400 S. 9th St., Suite 200
Springfield, IL 62701
(PH: 217/528-7375).

Elena Kezelis
Executive Director, IERRC
1021 North Grand Avenue E.
Springfield, IL 62702
(PH: 217/557-0511)

A representative of the Bureau of Indian Affairs also attended many of the meetings, so you may check with that source as well. I am willing to personally appear before your committee to dispute Mr. Angelo's comment, if you deem that to be necessary.

When the various Native American land claims were first brought to the attention of the Edgar Administration in 1996, the Administration went to great lengths to address the claims in a professional manner. We met with the Tribes or their representatives when requested. These meetings took place over a period of three years. We spent considerable time evaluating the various land claims by conducting our own historical and legal research on the issues raised by the Tribes. We carefully considered all of the material given to us by the Tribes in support of the claims. Our meetings with the Ottawa Tribe and their representatives were always amicable. In the end, the Ottawa Tribe was not successful in convincing the State Administration or the State Attorney General that their claim had merit.

I am now Deputy Counsel in the Administration of Governor George Ryan. Anyone that has dealt with me in the 20 plus years I have been in public service, will tell you that I always conduct myself in a professional, ethical and businesslike manner. They would be as shocked, as I, that someone would attribute such a disparaging, insensitive and stupid comment to myself. I have no idea why Mr. Angelo would make such a false statement, other than to try and put the State of Illinois in a bad light before the Committee. Enclosed is a copy of my letter to Mr. Angelo. Thank you for taking the time to read my letter.

Sincerely;

Mark R. Warnsing
Deputy Counsel to the Governor

Cc: Honorable James V. Hansen
Honorable Timothy Johnson
Mr. Larry Angelo

[A letter and resolution submitted for the record by Annice M. Wagner, President, Conference of Chief Justices, on H.R. 521 follow:]

Conference of Chief Justices

May 6, 2002

The Honorable James V. Hansen
Chairman
Committee on Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, DC 20515-6201

Re: H.R. 521

Dear Chairman Hansen:

On behalf of the Conference of Chief Justices (CCJ), I write to provide you with CCJ's views on issues addressed in H.R. 521, which is before the Committee on Resources. As you may know, the CCJ is an organization comprised of the chief justice or chief judge of the highest court of each state, the District of Columbia and several territories, including Guam, working to improve the administration of justice in the United States. At CCJ's Twenty-Fourth Midyear Meeting in Baltimore, Maryland on January 25, 2001, the CCJ adopted a resolution renewing its support of congressional efforts to clarify federal law recognizing the Supreme Court of Guam as the highest court of Guam, assuring the independence of its judiciary and maintaining its judicial branch as a separate and co-equal branch of government, principles contained in H.R. 2370, the "Guam Judicial Empowerment Act of 1997." CCJ's January 2001 resolution also expressed continuing support of "similar successive legislation to be reintroduced in the first session of the 102nd Congress."

Thus, CCJ continues its strong support of the principles set forth in H.R. 521. Securing these fundamental principles is essential to our form of government.

Sincerely yours,

Annice M. Wagner

cc: The Honorable Robert A. Underwood
The Honorable George Miller

CONFERENCE OF CHIEF JUSTICES

Resolution 17

Recognizing the Supreme Court of Guam as the Highest Court of Guam

WHEREAS, the Conference of Chief Justices at its 1998 Midyear Meeting supported the efforts of Guam and the Congress to assure by legislation the independence of the judiciary and to maintain its judicial branch as a separate and co-equal branch of government; and

WHEREAS, the proposed legislation clarified existing federal law and recognized the Supreme Court of Guam as the highest court of the Territory; and

WHEREAS, securing these fundamental principles is essential to our form of government; and

WHEREAS, H.R. 2370 was not acted upon by the Congress; and

WHEREAS, Congressman Robert A. Underwood, D-Guam, intends to renew his efforts in securing the passage of similar legislation in the First Session of the 107th Congress; and

WHEREAS, the Conference wishes to express its continuing support of H.R. 2370 and similar successive legislation to be reintroduced in the First Session of the 107th Congress;

NOW, THEREFORE BE, IT RESOLVED that the Conference supports renewed congressional efforts to clarify federal law recognizing the Supreme Court of Guam as the highest court of Guam; and

BE IT FURTHER RESOLVED, that the Government Relations Office of the National Center for State Courts actively assist the Supreme Court of Guam in obtaining that objective.

Adopted as proposed by the State-Federal Relations Committee of the Conference of Chief Justices in Baltimore, Maryland at the 24th Midyear Meeting on January 25, 2001.

[A statement submitted for the record by The Hon. Judith T. Won Pat, Senator, 26th Guam Legislature, on H.R. 521 follows:]

Statement of The Honorable Judith T. Won Pat, Senator. 26th Guam Legislature, on H.R. 521

Mr:: Chairman and Members of the Committee on Resources:

I would like to thank you for affording me the opportunity to submit written. testimony on H.R. 521. My name is Judith T. Perez Won Pat, an elected representative of the people of Guam, and Assistant Minority Whip of the 26th Guam Legislature.

Let me first commend you for holding this hearing on H.R. 521 which seeks to clarify Guam's judicial structure by amending the Organic. Act. I am. in full support of the Guam Judicial Endowment Act by Guam's Honorable Robert Underwood. At this time, the Judiciary of Guam is not on equal footing with the other branches of the government.

The Honorable Antonio B. Won Pat was able to have the. Organic Act of Guam amended with. the passage of the Omnibus Territories Act of 1984. This authorized the Guam Legislature to establish an appellate court, but did not provide a structure for the new judicial system.

The Supreme Court of Guam was established in 1993 through the Frank G: Lujan Memorial Court Reorganization Act, but the lack of administrative direction in the Omnibus Act leaves the court vulnerable to the political changes of the Guam Legislature.

Since the court is the creation. of the Guam Legislature; only amending the Organic Act will: ensure permanence, parity and independence of Guam's Judicial. system.

The provisions of H.R. 521 would, once -and for all, clearly define the structure. of our Judicial branch within the framework of the Organic Act and establish the Supreme Court of Guam. as the judicial and administrative head of the Judiciary.

I believe that H.R. 521 is long overdue and direly needed to safeguard the integrity and autonomy of the Judicial branch from political interference from the executive and legislative branches.

I would urge the Committee to favorably report out this appropriate legislation to the House of Representatives. We need to ensure that the Judiciary can function as a separate but equal branch of government without the threat of the other branches having the authority to modify or strip the powers of the Supreme Court.

Once; again I thank you for your kind consideration on the submission of my testimony.

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