SUPREME COURT DECISION, CARCIERI V. SALAZAR, RAMIFICATIONS TO INDIAN TRIBES

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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OVERSIGHT HEARING ON "SUPREME COURT DECISION, CARCIERI V. SALAZAR, RAMIFICATIONS TO INDIAN TRIBES."

Wednesday, April 1, 2009
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to call, at 9:57 a.m. in Room 1324, Longworth House Office Building, Hon. Nick J. Rahall, II, [Chairman of the Committee] presiding.

Present: Representatives Rahall, Hastings, Kildee, Faleomavaega, Grijalva, Heinrich, Christensen, DeGette, Inslee, Herseth Sandlin, Sarbanes, Shea-Porter, Gallegly, Smith, Fleming, Lummis, and Cassidy.

STATEMENT OF THE HONORABLE NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

The CHAIRMAN. The Committee on Natural Resources will come to order early. The Committee is meeting today to conduct an oversight hearing on the recent Supreme Court decision in *Carcieri v. Salazar* and its effects on Indian tribes.

In the decision, the Supreme Court held that the Indian Reorganization Act did not allow land to be placed into trust for a tribe that was not now under Federal jurisdiction, referring to 1934, the date of enactment of the statute.

While there are those who want to portray this decision and its ramifications solely as a gaming issue, let me assure everyone that it is much more than a gaming issue.

Land is an essential component of sovereignty for any government, including tribal governments. Not only does a land base help promote cultural preservation, which is essential for the survival of a group of people, but it also affects the ability of a government to provide for its citizens.

Native Americans already suffer from higher death rates due to various diseases. They live in substandard housing. They have lower rates of educational achievement, and they experience an average poverty rate of 26 percent, with some tribes suffering from a poverty rate of over 50 percent.

Placing land into trust for an Indian tribe is an essential component of combating the situations experienced by Indian tribes as a

result of their treatment by the United States of America. Even beyond the legal responsibility, the Federal government has a moral responsibility to rectify this situation.

While all of the potential ramifications of this decision are not known at this time, there is one thing of which we are certain: This decision may result in many frivolous lawsuits being filed to challenge the status of virtually every tribe. This will require the Federal government and the American people to return to 1934 to determine what "now under Federal jurisdiction" means.

The early 1930s—now I was not here at the time, but some on this Committee may have been—was a time of racial segregation, with many people of color denied the right to vote and adequate health care and education was only available to a few. This is not a time to which I wish to return.

I look forward to hearing the testimony of the witnesses on whether or not the Court was correct in interpreting the legislative history of the IRA and how the administration has defined "now under Federal jurisdiction" since 1934.

That concludes my opening comments, and I recognize the Ranking Member, Mr. Hastings.

[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall, Ii, Chairman, Committee on Natural Resources

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In the decision, the Supreme Court held that the Indian Reorganization Act did not allow land to be placed into trust for a tribe that was not "now under Federal jurisdiction" referring to 1934, the date of enactment of the statute.

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I look forward to hearing the testimony of the witnesses on whether or not the Court was correct in interpreting the legislative history of the IRA, and how the Administration has defined "now under Federal jurisdiction" since 1934.

STATEMENT OF THE HONORABLE DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you very much, Mr. Chairman, for holding this hearing. I understand that the Department of the Interior may

not be prepared to give the Committee its testimony at this time, but I hope that when the relevant political appointees are nominated and confirmed that we will be able to hold maybe another hearing on this important subject.

I completely understand the anxiety that a number of recognized tribes that were not under Federal jurisdiction in 1934 must be feeling right now. Following this Supreme Court decision, some must undoubtedly wonder if they were under Federal jurisdiction in 1934 and who will make that determination and what it means for their trust lands.

As we seek answers to the questions that this case raises, I hope that we use this opportunity to open the record books and archives of the Department and the Committee. We are dealing with 75 years of history, with potentially dozens of tribes, thousands of acres of land, and with a Department whose implementation of a major law has been overturned by the Court.

It is important that Congress act carefully when addressing the effects of the Court's decision, and we must especially make certain that responsive action comes from Congress.

At the heart of the Supreme Court's ruling is that the authority to recognize tribes and take land into trust rests with Congress and not with the attorneys in the Executive Branch. It is our responsibility in Congress to determine how to act following the Court's ruling, not simply to sit and wait to rubber stamp a plan that is written and submitted by the Interior Department, whose actions, once again, were struck down by the Supreme Court.

So I look forward to hearing the witnesses' testimony, and I yield back my time.

[The prepared statement of Mr. Hastings follows:]

Statement of The Honorable Doc Hastings, Ranking Member, Committee on Natural Resources

Mr. Chairman, thank you for holding this hearing. I understand the Department of the Interior may not be prepared to give the Committee its testimony at this time, but I hope that when the relevant political appointees are nominated and confirmed then we will be able to hold another hearing on this important subject.

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I look forward to listening to the witnesses' testimony.

The CHAIRMAN. The Chair recognizes the gentleman from Michigan, the Chair of our Native American Caucus in the Congress, Mr. Dale Kildee.

Mr. KILDEE. Thank you, Mr. Chairman. A good part of my testimony—I will submit the entire statement for the record,

The CHAIRMAN. Sure, without objection.

STATEMENT OF THE HONORABLE DALE KILDEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. KILDEE.Mr. Chairman, like you, I am deeply troubled by the recent U.S. Supreme Court decision against the Narragansett Tribe of Rhode Island, in which the Court calls into question the authority of the Secretary of the Interior to take land into trust for Indian tribes not Federally recognized as of 1934.

The decision affects many Indian tribes, particularly those who obtained Federal recognition through the Department of the Interior's administrative process and Indian tribes whose recognition was obtained after 1934, including eight tribes from my own State of Michigan. This decision may affect their pending and future fee-to-trust applications.

Mr. Chairman, I do not believe that the Congress intended to craft a bifurcated system of doing this. I still think there are two ways in which they can get their sovereignty recognized—through the Congress and through the Department of the Interior—and I hope that the solicitor is soon appointed so he can act in his capacity to try to defend the rights of sovereignty of the Native American tribes. I yield back the balance of my time.

[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 am deeply troubled by the recent U.S. Supreme Court decision against the Narragansett Tribe of Rhode Island in which the Court calls into question the authority of the Secretary of the Interior to take land into trust for Indian tribes not Federally recognized as of 1934.

I disagree with the Court as I do not believe it was the intent of Congress to establish a bifurcated system that limits the Secretary's authority for approving trust land applications to tribes Federally recognized as of 1934.

This decision affects many Indian tribes, particularly those who obtained Federal recognition through the Department of the Interior's administrative process.

And for Indian tribes whose recognition was obtained after 1934, including 8 tribes from my own State of Michigan, this decision may affect their pending and future fee-to-trust applications.

Mr. Chairman, it is my understanding that the Department of the Interior's nominee for Solicitor has not yet been confirmed by the Senate. However, I look forward to a discussion with the Department as to how it plans to move forward in light of this decision.

Tribes across the country support legislative response to the Court's decision, which may have its own political challenges from state and local governments.

Mr. Chairman, I look forward to working with you to develop a legislative fix.

And I look forward to hearing the testimony today from our witnesses.

Thank you.

The CHAIRMAN. Does the gentleman from American Samoa, Mr. Faleomavaega, wish an opening statement?

STATEMENT OF THE HONORABLE ENI F.H. FALEOMAVAEGA, A DELEGATE IN CONGRESS FROM AMERICAN SAMOA

Mr. FALEOMAVAEGA. Yes, Mr. Chairman, I do, and I want to first welcome our witnesses this morning.

I am not the least bit surprised, Mr. Chairman, to the events that have transpired and the decision that the Supreme Court has made. This three-letter word, "now," has upset and turned over 75 years of legal precedent and historical decisions that have been made based on the Reorganization Act of 1934.

It really saddens me, Mr. Chairman, to the effect that even defining what an "Indian" is—we have gone through the whole ritual, and we have even been going through the recognition process, which was never done by the Congress—it was administratively done by the Department—and to the effect of defining an "Indian," it reminds me of defining what a "black" was, three-fifths of a person, by our own founders of the Constitution, now defining an Indian to have to have "50-percent blood," whatever that means.

So it goes down to the very essence of how we have treated the Native American community so poorly, and it is something that I am sure that we are not very proud of and that we are trying to seek remedies and find solutions to the problems that the Native American community has had to endure in the worst way, and I am just saddened that this is where we are, and I am hopeful that, by the recommendations of our panelists, we will find a quick remedy, legislatively this time, that there will be no question whatsoever as to the legislative intent of the law based on what was written then in 1934 and what the Secretary of the Interior has had to do to accommodate some of the problems that the Native American communities have had to go through for all of these years.

So, with that, Mr. Chairman, I do look forward to hearing from our witnesses this morning and thank you.

The CHAIRMAN. Thank you. With that, we will proceed with our witnesses.

We have a panel this morning consisting of the following individuals: Ms. Colette Routel, the visiting assistant professor, University of Michigan Law School, Ann Arbor, Michigan, and assistant professor, William Mitchell College of Law, St. Paul, Minnesota. Also is Mr. Michael J. Anderson, partner, AndersonTuell, LLP, Washington, D.C.; and our third witness is Mr. Donald Craig Mitchell, Esquire, of Anchorage, Alaska.

Lady and Gentlemen, we welcome you to our Committee on Natural Resources this morning. We appreciate your taking the time to be with us. We do have your prepared testimony. It will be made part of the record as if actually read, and you may proceed in the manner you wish and in the order in which I recognized you. Ms. Routel?

STATEMENT OF COLETTE ROUTEL, VISITING ASSISTANT PROFESSOR, UNIVERSITY OF MICHIGAN LAW SCHOOL, ANN ARBOR, MICHIGAN, AND ASSISTANT PROFESSOR, WILLIAM MITCHELL COLLEGE OF LAW, SAINT PAUL, MINNESOTA

Ms. ROUTEL. Good morning, Mr. Chairman and Members of the Committee. Thank you for giving me the opportunity to speak here

today about the Supreme Court's recent opinion in *Carcieri v. Salazar*.

The Indian Reorganization Act applies to Indians and Indian tribes, and these are defined terms. The term "Indian" includes "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction."

At issue in Carcieri, as you have mentioned, was how to interpret that word "now." Did the phrase, "now under Federal jurisdiction," require that the tribe be under Federal jurisdiction in 1934, when the IRA was adopted, or did "now" require tribes to be under Federal jurisdiction at the moment they sought to take advantage of the benefits of the Act?

The Department of the Interior adopted the latter interpretation, and, for the last 25 years, that has been formalized in regulations promulgated through notice-and-comment rulemaking.

Despite this, the Supreme Court recently limited the benefits of the IRA to only those Indian tribes under Federal jurisdiction in 1934.

As I have explained in detail in my written testimony, this decision is not supported by the legislative history of the Act.

During debate on the bill, Burton Wheeler, who was then Chairman of the Senate Committee on Indian Affairs, wanted to ensure that the IRA would not require all Indians under Federal jurisdiction in 1934 to remain that way indefinitely. Instead, he believed that the Secretary of the Interior should maintain the discretion to decide, at a later date, that a particular Indian had become fully assimilated and no longer needed the protection of the Federal government.

It was in response to these comments that Collier agreed to add the phrase, "now under Federal jurisdiction," to the definition of "Indian."

Thus, Congress could not have intended "now" to mean 1934. That would have frozen recognition decisions at that date, and it would not have addressed Wheeler's concern that the Executive Branch must continue to have flexibility to deny or to extend recognition to Indian tribes and individual Indian as it saw fit.

Carcieri ignored this legislative history, and, in my opinion, this led the Court to render an incorrect interpretation of the statute.

If allowed to stand, this decision will have profound effects on Indian Country. Obviously, the Secretary of the Interior will not be able to acquire trust lands for recently recognized tribes without additional congressional legislation. Their IRA constitutions and their Section 17 business corporations will be void, and tribal members will not be able to receive preference in employment with the BIA. These are rights found directly in that statute.

It is important to remember, however, that Congress has also tied other, more recent benefits to the definition of "Indian" in the IRA. For example, 25 U.S.C. Section 324 provides that the Secretary of the Interior cannot grant rights-of-way over trust lands without the consent of the affected tribe. The definition of "tribe" in that statute is linked to the definition of "tribe" in the IRA. So these sorts of linked benefits will also be lost.

How many tribes will be affected? Probably between 50 and 100, but it is impossible to tell for certain right now.

One of the problems inherent in the Court's decision is a practical one: Before the IRA was enacted, the Federal government never created a comprehensive list of recognized tribes. Additionally, no one is sure what the phrase, "under Federal jurisdiction," means. Was a tribe under Federal jurisdiction if it received a share of Federal appropriations specifically designated for tribes; if it had a treaty with the United States; if some of its members received services from the BIA?

The Supreme Court has offered little-to-no guidance in answering these questions. This existing uncertainty is likely to spawn lawsuits nearly every Federally recognized tribe must defend. One lawsuit involving a member of the Jamul Indian Village in California has already been filed. Tribes have scarce resources, and now they will be forced to spend millions of dollars defending their long-established rights.

The Supreme Court's interpretation of the IRA will create two classes of tribes, the haves and the have nots, and this is clearly contrary to current congressional policy.

In 1994, Congress passed legislation requiring that all Federally recognized tribes be treated the same, regardless of the time or manner of their recognition. In doing so, it realized that the date of a tribe's recognition is almost always accidental and is not substantive.

For example, tribes recognized in recent years, through the BIA's formal administrative process, have had to prove that they continuously existed as an Indian tribe, politically, socially, and culturally, from historic times to the present. So these were tribes that existed in 1934, and they should have been recognized by John Collier, and were only left off the list due to an omission or a mistake.

The rights included in and tied to the IRA are important rights. They are rights that are essential to achieving self-determination and economic sufficiently, and that is why I implore you to assist Congress in passing the legislative fix. Thank you.

[The prepared statement of Ms. Routel follows:]

Statement of Colette Routel, Visiting Assistant Professor, University of Michigan Law School, Assistant Professor, William Mitchell College of Law

The Indian Reorganization Act ("IRA"), 48 Stat. 984 (codified as amended at 25 U.S.C. §461 et seq.), is universally regarded as one of the most important pieces of legislation directly affecting Indians. When enacted by Congress in June 1934, it signaled a major reversal of governmental policy in Indian affairs. Previously, the United States had aggressively attempted to eradicate tribalism and assimilate individual Indians into white society. As the principal component of the Indian New Deal, however, the IRA was designed to promote tribal self-government and ultimately restore to Indian tribes the management of their own affairs.

Under the IRA, tribes were granted the ability to organize both constitutional governments and business corporations. The allotment program was abolished, and the periods of trust placed on Indian allotments were extended indefinitely. Unsold "surplus" lands and individual allotments could be returned to the tribe at the discretion of the Secretary of the Interior or individual allottee, respectively. The Secretary of the Interior was also authorized to acquire new trust land for Indian tribes and individual landless Indians. Lastly, individual Indians who sought positions in the Bureau of Indian Affairs were to be given preference in hiring.

The U.S. Supreme Court's recent decision in *Carcieri v. Salazar* threatens to eliminate these important IRA benefits (and all benefits that Congress has subsequently tied to the IRA) for many Indian tribes. In Carcieri, the Court concluded that the term "Indian," which is defined in the IRA to include "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction," unambiguously limits the benefits of the Act to those tribes that were under Federal

jurisdiction on June 18, 1934. This decision is contrary to the legislative history of the IRA and contrary to decades of executive branch practice in administering the Act. Unless corrected legislatively, Carcieri will have a profound impact on the more than fifty tribes that have been recognized by the federal government since 1934.

I. Background: Lack of Consensus Regarding the Meaning of "Indian" and "Indian Tribe" Prior to the IRA

Today, it is generally well-settled that when statutes apply to "Indian tribes" that term is meant to refer only to federally recognized tribes (i.e., Indian tribes that have a government-to-government relationship with the United States). Likewise, the term "Indian" as used in most federal laws refers to enrolled members of federally recognized tribes. It is easy to forget, however, that this clarity is rather recent in origin.

Before 1934, Congress had already enacted hundreds of statutes that applied to "Indian country," "Indian tribes," "Indians," "Indians not citizens of the United States," and "Indians not members of any of the states." These terms were left undefined by Congress. Consequently, the executive branch was entrusted with the authority to determine whether a particular tribe or individual Indian fell within the purview of a statute. Officials in the Department of the Interior made such determinations in an ad hoc manner; no criteria for tribal "recognition" existed. In fact, the concept of recognition of Indian tribes in the jurisdictional sense "was only beginning to take shape," and it "was not universally applied, accepted or, frankly, understood." William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 347 (1990). The terms "recognize" and "acknowledge" were more often used simply in the cognitive sense, indicating that a particular tribe was known to the United States. Id. at 339.

Once a determination had been made about the existence of a particular Indian tribe, federal courts generally refused to disturb that executive branch conclusion. See, e.g., The Kansas Indians, 72 U.S. 737, 755 (1866) ("If the tribal organization of the Shawnees is...recognized by the political department of the government as existing then they are...governed exclusively by the government of the Union"); *United States v. Holliday,* 70 U.S. 407, 419 (1865) (noting that "it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same"). But no comprehensive list of known Indian tribes was created before the enactment of the IRA.[1] As a result, situations necessarily arose where the executive branch had not previously considered the existence of a particular tribe.

In these cases, federal courts were required to decide whether an Indian tribe was included within the scope of a particular statute. In 1901, the Supreme Court finally provided a definition of the term "tribe" and "band" to aid lower federal courts in making these determinations:

> By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design.

Montoya v. United States, 180 U.S. 261, 266 (1901). Yet even with this simple definition, confusion remained.

Some of this confusion was due to the fact that Indian status was not static. The purpose of federal policy prior to 1934 was to disband tribes and assimilate their members. Thus, the executive branch and the federal courts frequently decided that individual tribal members were no longer wards of the United States because they had abandoned their tribal allegiance. Abandonment could be inferred by, for example, living within white settlements, possessing a certain quantum of white blood, or owning property in fee. See, e.g., *United States v. Kopp,* 110 F. 160 (D. Wash. 1901) (concluding that Puyallup tribal member was not an "Indian" because he owned his allotted land in fee simple); *Dred Scott v. Sandford,* 60 U.S. 393, 404 (1856) (noting that "if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people"). Like-

[1] In 1894, the U.S. Census Office published a report that included a list of "Principal Tribes known to the Laws of the United States," but as its name indicates, this was not a comprehensive listing of Indian tribes. See Report on Indians Taxed and Indians Not Taxed in the United States at the Eleventh Census: 1890 (1894). This report was not updated, and no other list of Indian tribes was created by the federal government prior to enactment of the IRA.

wise, Indian tribes ceased to be under federal jurisdiction during periods of time when their membership as a whole was considered to have fully assimilated into white society. Compare *United States v. Joseph,* 94 U.S. 614 (1876) (concluding that the Pueblos were civilized and therefore, they were not an "Indian tribe" under the Trade & Intercourse Acts), with *United States v. Sandoval,* 231 U.S. 28 (1913) (concluding that members of the Santa Clara Pueblo were uncivilized, and therefore, within the purview of statutes prohibiting the giving of intoxicating liquors to "Indians").

The IRA was drafted, debated and enacted against this backdrop.

II. Meaning of Indian in the IRA: The Legislative History

It is difficult to ascertain the actual "intent" of any legislation, and the IRA is no different in this regard. In fact, the legislative history of the Act is particularly challenging because the two individuals primarily responsible for its passage—Commissioner of Indian Affairs John Collier and Senate Indian Affairs Committee Chairman Burton Wheeler—had divergent views about the ultimate aims of federal Indian policy. Senator Wheeler still believed that the government should be pursuing a policy of forced assimilation, because Indian societies were inferior. Commissioner Collier, on the other hand, believed not only that the federal government should abandon its policy of assimilation, but that it should encourage the continuation and revitalized of traditional tribal religious beliefs, arts and crafts, and cooperative institutions. See generally Kenneth R. Philip, John Collier's Crusade for Indian Reform 1920-1954 (1977); Elmer R. Rusco, A Fateful Time: The Background and Legislative History of the Indian Reorganization Act 292-303 (2000). Because of these divergent perspectives, the legislative history of the IRA must be reviewed in its entirety to gain a full and correct understanding of who the Act was meant to benefit.

The original bill presented by Commissioner Collier in February 1934, took the unusual step of attempting to provide definitions for the terms "Indian" and "tribe":

> The term "Indian"...shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-fourth or more Indian blood...
>
> The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, band, nation, pueblo, or other native political group or organization.

The Indian Reorganization Act: Congresses and Bills 12 (Vine Deloria, Jr. ed., 2002). These definitions prompted a great deal of debate between Collier and Wheeler.

In six different hearings held throughout April and May of 1934,[2] Senator Wheeler expressed his concern that the IRA, as proposed, would apply to an unnecessarily broad number of people. To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2744 and S. 3645 Before the Senate Committee on Indian Affairs, 73d Cong. 266 (1934) (hereinafter "Senate Hearings"). First, he complained that non-tribal Indians should have at least one-half Indian blood before they were brought under the Act.[3] Collier ultimately agreed to this change. Yet as the hearings continued, Senator Wheeler proved far more adamant about another related topic: the need to ensure that the IRA would not require the guardian-ward relationship to be permanently maintained over tribal members that, in his mind, had already or would in the future become, fully assimilated into white culture.

More specifically, Senator Wheeler argued that certain Indians in California, Montana and Oklahoma were as capable of handling their own affairs as white men. He believed that these people should not be wards of the United States forever; at some point, they must be given the ability to manage their property as they deemed fit. Thus, Senator Wheeler repeatedly suggested that the draft bill be amended to

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[2] The Senate Committee on Indian Affairs held hearings on the draft bill on April 26, 28, 30 and May 3, 4, and 17, 1934.

[3] Senator Wheeler stated:

I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods... If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.

Senate Hearing, at 263-64.

ensure that the Secretary of the Interior would continue to have the discretion to decide that persons who had fully assimilated were no longer considered "Indians." See, e.g., Senate Hearing at 66-68, 80, 150-51,163-64, 175, 239, 266.

For example, Senator Wheeler's concerns are captured in the following exchange with Commissioner Collier on April 30, 1934:

> *Senator Wheeler:* ...There are Indians on some of these lands that are, say, an eighth blood. They are just as much white men as any man sitting here, and most of them are just as capable of handling their own transactions as anybody else. Now, if you pass, for instance, this law, saying that they shall not in any instance permit an Indian to be granted any land in fee, it simply means that some of these Indians are going to have their land tied up when they ought to be handling it themselves.
>
> We had an illustration of the former Vice President of the United States[4] having his land in Oklahoma some place being handled by the Government of the United States and not having a fee patent to it.
>
> *Commissioner Collier:* Upon his own petition, Senator.
>
> *Senator Wheeler:* Yes; upon his own petition. That ought not to be permitted as a matter of fact. It ought to be handled by the former Vice President himself rather than by the Government of the United States, thereby saving the Government that expense.
>
> Now, here is another case out in California, where we visited some of those reservations in northern California. There is not any more reason why those Indians out there should handle their own affairs than any white man. Hardly any of them are more than quarter-breeds, and most of them are eighths. They are white people. And yet the Government of the United States is handling their affairs. In my judgment, those Indians ought to have that land allotted to them. They ought to run their own affairs. They ought to come under the laws of the State of California, and the guardianship over those Indians ought to cease completely.
>
> Now, if you are going to pass this bill in its present form, you are going to prevent these lands from ever being taken out from under the Government supervision.

Senate Hearing at 150-51. In response to Senator Wheeler, Ward Shepard, a specialist on land policies in the Office of Indian Affairs, noted that the bill deliberately chose to eliminate the ability of the Secretary of the Interior to declare particular Indians fully assimilated or "competent." Historically, it was this discretion that caused Indians to lose millions of acres of land.[5] But Senator Wheeler was not deterred by these comments. He continued:

> *Senator Wheeler:* I think the Secretary of the Interior ought to have some discretion in this matter, for the simple reason, as I have said to you, there are Indians in my State that are just as capable of handling their own private affairs as any white man in this room, and there are innumerable Indians in California of that kind. As I say, that one reservation we visited and had hearings, the Commissioner or his representative was present. They are white people. They are not Indians. They are just as capable of handling their own affairs as they can be, and, in my judgment, they ought to cease to be wards of the Government of the United States, and their property ought to be turned over to them, and they ought to handle it in exactly the same way that any white man handles his property.
>
> What we are interested in particularly is protecting the long-haired Indians and the Indians that are incapable of handling their property. But we should not tie the Government up with handling property and keeping certain Indians as wards of the Government and their children as wards of the Government when they really no longer should be subject to that supervision.

Senate Hearing at 151.

Later in this same hearing, Senator Wheeler once again pressed the point. This time, however, Commissioner Collier agreed that the Secretary could retain discretion to decide that certain individuals would not longer enjoy the benefits of the Act:

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[4] Senator Wheeler is obviously referring to Charles Curtis, who served as the Vice President of the United States under Herbert Hoover. Curtis had approximately 1/3 Indian blood (Kaw, Osage and Pottawatomie) and as a tribal member, had been granted an allotment that was held in trust by the United States.

[5] Competency determinations had resulted in the issuance of fee simple patents to many Indian allotments that were then lost due to back taxes, shady dealings, or outright theft.

> *Commissioner Collier:* ...May I advert for a moment to this question of allotment being wholly discretionary with the Secretary of the Interior? One of the horrible examples of the effects of allotment is the Quanitos, where the timber has all been allotted and the result has been disastrous. That was done not through the initiative of the Department, but as a result of a mandamus, and the court sustained the mandamus and required the Department to proceed and allot.
>
> *Senator Wheeler:* Yes; but if you leave it to the discretion of the Secretary of the Interior and it is in his discretion, they could not go in and mandamus them to do it, if it were entirely within his discretion....
>
> *Commissioner Collier:* "we feel that looking back over the admitted errors of the past administrations, which have had terrible consequences, Congress ought to control that situation.
>
> *Senator Wheeler:* But the trouble is Congress cannot control it. I mean it is something that the Congress cannot control, because you have individual Indians on some of these reservations that are absolutely competent to take care of their own land, and they ought to be given the right to take care of their own land and carry on their own property if they are capable and want to do it, and they are capable of doing it.
>
> *Commissioner Collier:* If that were left as a discretion [sic], if it can be given the strong advantages we are talking about, it would be relatively unimportant then. We are not insistent upon that.

Senate Hearing at 163-64.

On May 17, 1934, however, when the Committee was reading through the bill for the final time, Commissioner Collier had still not incorporated the change suggested by Senator Wheeler. It was at this point that the phrase "now under Federal jurisdiction" was finally inserted into the IRA:

> *Senator Wheeler:* But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time—as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.
>
> *Senator O'Mahoney:* If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition [sic].
>
> *Commissioner Collier:* Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Senate Hearing at 266. And thus, the bill was amended.

This legislative history demonstrates that the Supreme Court's decision in *Carcieri v. Salazar* is exactly backwards. The addition of the phrase "now under federal jurisdiction" to the definition of "Indian" was not intended to fix application of the Act to only those under jurisdiction in 1934. Senator Wheeler repeatedly stated that he was concerned about Indians that were, at the time, admittedly under federal jurisdiction. The phrase in question was inserted to ensure that the Secretary would continue to have discretion to decide that individual Indians who had fully assimilated would no longer be granted the benefits of the IRA. "Now" must therefore refer to the date that the Act is being applied to the particular Indian in question.

Justice Thomas' majority opinion in *Carcieri v. Salazar* fails to contain any discussion of this legislative history. [6]

III. Executive Branch Practice

Rather than discussing the legislative history of the IRA, the majority in *Carcieri v. Salazar* supports its decision by reference to a single letter written by Commissioner Collier, which claims that the term "Indian" includes "all persons of Indian

[6] Justice Breyer's concurrence does refer to the legislative history of the IRA, but after seeming to review only a three-page excerpt of the Committee's final hearing, he misinterprets the discussion.

descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act." That letter, however, was written almost two years after the bill was enacted.

More revealing than this single, informal piece of correspondence is the consistent history of formal executive branch decisions acknowledging that certain groups are Indian tribes under the IRA. During 1934-35, Commissioner Collier decided that 258 groups were eligible to organize under the IRA. Yet after that initial wave of "recognition" decisions, Collier and others continued to recognize and apply the IRA to tribes without any consideration of whether they were "under federal jurisdiction" as of June 18, 1934. Additionally, for the past 25 years, the agency's construction of this statutory provision has been embodied in formal regulations that allow any Indian tribe currently recognized by the federal government to take advantage of the IRA's benefits. Since these regulations were promulgated, sixteen tribes have—often at the explicit direction of Congress—endured the grueling process of obtaining federal recognition through the Department's formal administrative process codified at 25 C.F.R. Part 83. The Supreme Court's decision in Carcieri threatens to eliminate many of the most important benefits of federal recognition for these administratively recognized tribes, even though in most cases, after reviewing copious volumes of primary and secondary documentation, the Department concluded that mistake or oversight was all that precluded their recognition in 1934.

I encourage the members of this Committee to right the injustice that *Carcieri v. Salazar* will cause by amending the definition of "Indian" contained in the IRA.

Disclaimer: The comments expressed herein are solely those of the author as an individual member of the academic community; the author does not represent the University of Michigan or William Mitchell College of Law for purposes of this testimony.

The CHAIRMAN. Thank you. Mr. Anderson

STATEMENT OF MICHAEL J. ANDERSON, PARTNER, ANDERSONTUELL, LLP, WASHINGTON, D.C.

Mr. ANDERSON. Thank you, Mr. Chairman and Members of the Committee and Ranking Member Hastings.

I am Michael Anderson of the Washington, D.C., firm of AndersonTuell here in Washington. I am pleased to present testimony today, based in part on my experience at the Department of the Interior as Associate Solicitor for Indian affairs and Deputy Assistant Secretary for Indian affairs, respectively, from 1993 to 2001.

The starting point for any discussion addressing Carcieri must begin with the United States Constitution and Congress's authority to regulate commerce with foreign nations, the several states, and with the Indian tribes. This constitutional doctrine, along with the President's power to make treaties with Indian tribe, the Executive Branch's trust responsibility to Indian tribes, Chief Justice John Marshall's recognition of Indian tribes domestic, dependent nations, which is really the foundation of modern Federal Indian law, and the inherent powers of Indian nations all provide the context for reviewing any Supreme Court decision, like Carcieri, that is detrimental to tribal sovereignty and Executive Branch powers.

Since the termination era ended in the 1950s, Congress, often through the leadership of this Committee, has stepped forward to build on this country's constitutional foundations to support tribal self-determination. Fortunately for Indian Country, the modern self-determination era has seen dozens of statutes that support Indian tribes and their powers.

Even in recent times, Congress has acted with dispatch when the full purposes of the IRA were not being met for all tribes.

As you know, the IRA was designed to reverse the assimilation policy of the General Allotment Act in the 1880s, which President Theodore Roosevelt described as "a mighty, pulverizing engine to break up the tribal mass."

I will highlight three recent examples where Congress acted to fully implement the IRA.

First, in 1994, Congress amended the IRA to prohibit Federal agencies from discriminating among Indian tribes with respect to their privileges and immunities. Until that law was passed, the Interior Solicitor's Office treated certain tribes as "created" and other tribes as "historic" based on their original organization.

In response, then-Native American Subcommittee Chairman Bill Richardson made this statement on the House Floor: "Tribal sovereignty must be preserved and protected by the Executive Branch and not limited or divided into levels which are measured by the Bureau of Indian Affairs."

Second, Congress passed another law, in 1994, that made clear, Indian tribes may be recognized in at least three ways: by Congress, by the FAP process, or by the courts.

Third, in 2004, Congress again amended the IRA to ensure that nothing in the IRA voids a tribal constitution adopted under a tribe's inherent powers, even if it is adopted after 1934.

Chairman Rahall, these three statutes, and many others, make clear that Congress will not tolerate the creation of second-class tribes.

While I was at the Department of the Interior, our practice was to presume that the Secretary had the authority to acquire land into trust for Indian tribes. This worked well for more than 70 years. Indeed, the strength of the IRA led to a renaissance in Indian Country. The tribes built headquarters, schools, housing, medical centers, police and fire stations.

Carcieri threatens to undermine these successes with the creation of a new class of tribes that would not be eligible for land-into-trust.

The time has come once again for Congress, and this Committee, to act by clearly affirming the authority of the Secretary of the Interior to take land into trust for all tribes. While waiting for congressional action, I would suggest that this Committee urge Secretary Salazar and Attorney General Holder to interpret the Carcieri decision in a way that protects completed land-into-trust conveyances, through the Quiet Title Act, and to promote future land acquisitions for all tribes.

The government should adopt a broad view of the "now under Federal jurisdiction" language in the IRA that would equate this jurisdiction to the broad powers of Congress under the Constitution.

In other words, virtually all tribes would continue to be covered by the IRA because Federal jurisdiction would be equal to Congress's plenary power. This legal principle could be argued in challenges to land-into-trust acquisitions and offered as guidance now for pending land acquisitions.

Even though the Secretary and the Attorney General, as trustees for American Indian tribes, should interpret the decision to minimize its impact, there is no doubt that Indian tribes will face years

of litigation from opportunistic plaintiffs if Congress does not act with urgency.

Regrettably, some attorneys and their clients may see the Carcieri decision as a springboard to revisit assimilationist and antisovereignty positions best left in the termination era. Facing such litigation or, possibly, after an erroneous decision by lower courts, the Department of the Interior could be compelled to examine the historical record for individual tribes.

My experience at the Department has shown that gaps in historic records, staffing shortages, restrictive interpretations, and well-funded opponents could delay land-into-trust acquisitions for years. This is especially true in light of my experience with the FAP process. Suffice to say that no one wants to create a new office of Federal jurisdiction that would repeat the history of the FAP process.

In closing, it is reassuring that Secretary Salazar has said he is disappointed with the Carcieri decision and that "the Department is committed to supporting the ability of all Federally recognized tribes to have lands acquired in trust."

President Obama also supports the principle of tribal self-determination and has said that the Federal government must fully enable tribal self-governance. This Committee has always been in the vanguard of protecting the full reach of the IRA. Indian nations across the country, again, look to you in the wake of the Carcieri decision.

Thank you, and I look forward to answering any questions that the Committee may have.

[The prepared statement of Mr. Anderson follows:]

Statement of Michael J. Anderson, AndersonTuell, LLP

Mr. Chairman and members of the Committee, I am Michael J. Anderson of the Washington, DC law firm of AndersonTuell, LLP. I am here today to present testimony based in part on my tenure at the United States Department of the Interior as Associate Solicitor for Indian Affairs and Deputy Assistant Secretary for Indian Affairs, respectively, from 1993 to 2001. This written statement is submitted for the record and offers the following points:

- *Carcieri v. Salazar* overturns nearly 75 years of settled land into trust policy by limiting the Secretary of the Interior's authority to accept land into trust for those American Indian Tribes "under federal jurisdiction" in 1934.
- While virtually all American Indian Tribes were "under federal jurisdiction" under the proper interpretation of that term, the *Carcieri* decision does not articulate a test or standard for resolving that question.
- It is inevitable that some private groups will argue that many recognized tribes should be excluded, and the Department of the Interior could potentially face dozens of lawsuits. It is possible that, facing such litigation, or possibly after erroneous decisions by the lower courts, the Department will be compelled to examine the historical record for individual tribes.
- The Department is ill-equipped to make such determinations due to a lack of resources.
- The decision is creating confusion within federal agencies and Indian Country.
- *Carcieri* is contrary to modern Congressional and Executive support for American Indian self-determination, Native Nation-building, and treating all Tribes the same with respect to authorities of the Secretary of the Interior.
- Congress should act now to restore the Secretary's authority to accept land into trust for all American Indian Tribes and all other Secretarial authorities potentially affected by the decision.
- Until Congress acts, it should urge the Attorney General, the Secretary of the Interior and the Chairman of the National Indian Gaming Commission to interpret the *Carcieri* decision in a manner that does not disturb past federal agency decisions and that maximizes the Secretary's current authority.

I. PURPOSES OF THE IRA

The Supreme Court decision *Carcieri v. Salazar*[1] runs directly counter to federal laws and policies that have long expressly supported self-determination for American Indian Nations. The Indian Reorganization Act of 1934 was intended to improve the political, cultural, and economic status of Tribes by ending fifty years of forced assimilation initiated by the General Allotment Act of 1887,[2] described by President Theodore Roosevelt as a "mighty pulverizing engine to break up the tribal mass."[3] The IRA gave authority to the Secretary of the Interior to acquire new or repurchase former tribal lands on behalf of all Indian tribes.[4] The purpose behind the new tribal land-acquisition policy was to encourage tribal self-governance and promote tribal self-determination and economic development.

Since 1934, approximately six million acres of land have been acquired in trust for American Indian tribes.[5] The use of those lands by tribes has promoted tribal self-determination and well-being through uses as diverse as for health centers, government offices, and tribal cultural facilities. Moreover, such lands play a role in a wide range of economic activities whose benefits spill beyond tribes themselves to surrounding, non-Indian communities; such economic activities include agriculture, energy resources development, housing, clinics, and sacred site protection.

II. BACKGROUND OF CARCIERI

Carcieri v. Salazar, which construed Section 19 of the Indian Reorganization Act of 1934[6] ("IRA"), overturns nearly 75 years of well-settled legislative, judicial, and administrative policy and precedent with respect to the authority of the Secretary of the Interior to accept land in trust for Indian Tribes. The decision held that for purposes of the IRA, the Secretary of the Interior's authority to take land into Trust for a tribe is limited to those tribes "under federal jurisdiction when the IRA was enacted in 1934."[7] Justice Thomas wrote the majority opinion. Justice Breyer joined the opinion but filed a concurrence. Justice Souter concurred in part and dissented in part joined by Justice Ginsburg. Justice Stevens dissented.

The Supreme Court reversed the First Circuit's determination that "now under federal jurisdiction" applies to all currently recognized tribes and continues a trend wherein the Supreme Court reverses favorable interpretation of Indian rights from the Circuit Courts.[8] The Supreme Court's majority opinion did not set forth a test as to what "under federal jurisdiction" in 1934 encompasses, but ruled that it did not apply to the Narragansett Indian Tribe where in the majority's view the Tribe itself did not argue or contest that it was not under federal jurisdiction in 1934. Manifestly unfair to the Narragansett, the majority did not remand the case back to the First Circuit to allow the Tribe an opportunity to demonstrate that it was in fact under federal jurisdiction in 1934. Without explanation, the Supreme Court also ignored Congress' amendments to the IRA in 1994 stating:

> (f) Privileges and immunities of Indian tribes; prohibition on new regulations: Department or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.[9]

CONCERNS RAISED BY *CARCIERI* DECISION

By upending well-settled expectations, *Carcieri* is already creating confusion in Indian Country and within the Department of the Interior, the National Indian Gaming Commission, and the Department of Justice. As a result, it will undoubt-

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[1] —U.S.—, 129 S.Ct. 1058 (2009) ("*Carcieri*").

[2] 24 Stat. 388

[3] President Theodore Roosevelt. First Annual Message (Dec. 3, 1901). John T. Woolley and Gerhard Peters, The American Presidency Project [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). http://www.presidency.ucsb.edu/ws/?pid=29542.

[4] See Cohen's Handbook of Federal Indian Law (2005 ed.), § 1.05.

[5] U.S. General Accountability Office. BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Process of Land in Trust Applications. GAO-06-781 (July 2006), pp. 8-9.

[6] 48 Stat. 984, codified as amended at 25 U.S.C. 461 et seq.

[7] *Carcieri* at 1061.

[8] See, e.g., David H. Getches, Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values, 86 Minn. Law. Rev. 267, 280 (2001) (of forty Indian law cases decided by the Supreme Court between 1986 and 2001, tribal interests prevailed 22.5% of the time, a success rate lower even than that of convicted criminals).

[9] 25 U.S.C. § 476(f).

edly lead to delays, increased costs, and new legal challenges in the already cumbersome fee-to-trust process [10]. Dozens of pending land-into-trust applications may have to be reconsidered in the wake of the Supreme Court's ruling, dashing the hopes of tribes whose well-being depends on timely administrative action. There are already reports of vague directives from the Bureau of Indian Affairs requesting tribal confirmation of their jurisdiction under the IRA. Hindering the prospects for tribal economic development and self-determination during the worst economic downturn for generations, the economic consequences of *Carcieri* could prove irreversible.

While all tribes with established reservations should be appalled by the *Carcieri* decision, landless tribes may have the most to fear. Without a land base in trust, an Indian Nation's sovereignty over territory is virtually non-existent and its powers as a domestic Nation are severely compromised. With a land base, an Indian Nation can protect sacred places, create a homeland, foster economic development and employment. When Indian Nations do well, entire communities do well.

The decision in *Carcieri* illustrates once again the modern Supreme Court's rejection of time-honored and well-founded policies for American Indian Tribes. The many concerns raised by *Carcieri* are compounded by the Supreme Court's issuance of a new test of "under federal jurisdiction" in 1934. Without explanation or analysis, the majority simply held that the Narragansett Indian Tribe would have been unable to satisfy this newly established criterion back in 1934. In contrast to the majority's vague articulation (or more properly non-articulation) of a standard for what constitutes "under federal jurisdiction," the concurring opinion of Justice Breyer at least set forth a non-exclusive list of examples of what might provide evidence of being "under federal jurisdiction" in 1934; for example:

- continuing obligations by the United States to the tribe; [11]
- the continuing existence of a government-to-government relationship despite the federal government's mistaken belief it was terminated; [12]
- where the Tribe was the subject of a congressional appropriation or enrollment with the BIA
- cases where even later recognition decisions reflected earlier federal jurisdiction. [13]

The proper application of Justice Breyer's opinion by federal agencies and the correct interpretation of "under federal jurisdiction" could alleviate fall-out from the *Carcieri* decision and perhaps limit it to the Narragansett Tribe. Even so, such favorable determinations could face challenges by opportunistic opponents of tribal land acquisition who could delay conveyance of property to the United States for the benefit of Indian Tribes for years.

The responsibility of the Federal government over Indian tribes is historically rooted in the Indian Commerce Clause of the Constitution, which gives Congress plenary power over tribes, unrestricted authority to assert jurisdiction over Indian communities, and the ability to determine whether, to what extent, and for what time a tribal community shall be recognized. [14] Acknowledgment of a tribe implicitly recognizes that the tribe is a sovereign entity possessing all those inherent powers not otherwise inconsistent with its status as a dependent nation. [15] This wide constitutional authority is reflected in the broad jurisdictional authority of Congress over tribes, which extends to all Indian tribes, even tribes with which a government-to-government relation has not been expressly established. [16]

Against the historical backdrop of this policy and jurisprudence, instruction should be provided to interpret "under federal jurisdiction" as it appears in Section 19 of the IRA in an equally broad manner, on the understanding that, had Congress intended the statute to be construed narrowly, it would have made that desire clear.

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[10] See U.S. General Accountability Office, "Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Process of Land in Trust Applications," GAO-06-781 (July 2006).

[11] Id. at 1070 (citing Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980)) ("all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934, whether or not that obligation was acknowledged at that time").

[12] Id. (citing *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for Western Dist. of Mich.,* 369 F.3d 960, 961, and n. 2 (C.A.6 2004)).

[13] Id.

[14] U.S. Constitution, Art. I, Sec. 8, Cl. 3; *U.S. v. Sandoval,* 231 U.S. 28, 46 (1913).

[15] See *Worcester v. Georgia,* 31 U.S. 515 (1832); *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831).

[16] See, e.g., *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (1st Cir. 1975) (unrecognized tribe within federal jurisdiction for purposes of claim arising under Trade and Intercourse Act).

Had Congress intended to restrict Section 19, it could have used qualifying language. Or Congress could have expressly limited eligible tribes to those under formal Interior Department "supervision," "tutelage," or "guardianship," restrictive terms that appear in the legislative history of the IRA. Congress avoided such narrow language, using the broader "federal jurisdiction" based precisely on the broad scope of its authority as rooted in the Constitution.

THE DEPARTMENT OF INTERIOR IS ILL-EQUIPPED TO CREATE AND APPLY NEW *CARCIERI* TESTS FOR THE DETERMINING "UNDER FEDERAL JURISDICTION"

The Department of the Interior is ill-equipped to apply and construe IRA terms like "under federal jurisdiction in 1934," due to a lack of resources and an occasional history of misconstruing and limiting the IRA. For example, prior to 1994, the Interior Solicitor's Division of Indian Affairs, Tribal Government and Alaska office routinely misconstrued the IRA to contrive a distinction between what it termed "historic" tribes and so-called "non-historic" tribes—which referred to tribes originally organized as communities of adult Indians. This dubious distinction was nowhere found in the original IRA. It was also undercut by the 1988 Amendments to the IRA which deleted the language regarding "adult Indians residing on a reservation" and simply referred to tribes as "tribes." In addition, it was impliedly overruled by the definition of "tribe" in statutes such as the Indian Land Consolidation Act,[17] the Indian Child Welfare Act,[18] and other laws with broad definitions of "tribe," such as that used in the Indian Self-Determination and Education Assistance Act.[19]

The invidious distinction between historic and non-historic tribes was summarized in a now infamous Bureau of Indian Affairs letter from Acting Assistant Secretary Wyman Babby to Chairman George Miller of the House Resources Committee in 1994 (the "Babby Letter").[20] The firestorm that erupted in Indian Country as a result of this letter led concerned Members of Congress to reverse the so-called distinction within months. In 1994, Congress amended the Indian Reorganization Act to prohibit the classifications asserted by the Office of the Solicitor, Division of Indian Affairs and to ensure the same rights and obligations of federal recognition that are available to all federally recognized tribes.[21] Congress also clarified that:

> "(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;"[22]

Moreover, in 2004, Congress again amended the IRA to ensure that the IRA did not invalidate tribal constitutions that were adopted after June 19, 1934 (the date of the original IRA) where such constitutions are adopted under a Tribe's "inherent sovereign power"[23]. Any attempt to resuscitate such distinctions between tribe's privileges, immunities and inherent powers must be prevented.

Regrettably, the Department of the Interior Solicitor's Office last year lodged the 1994 Babby Letter with the United States Supreme Court after the briefing was closed in the *Carcieri* case (but before the decision was issued). This misleading filing was made without also lodging the 1994 privileges and immunities statute that reversed the historic non-historic tribal distinctions made in the letter. The Solicitor's Office also failed to file a July 13, 1994 memorandum from Solicitor John Leshy to Assistant Secretary Ada Deer that also recognized that Congress for the most part "makes no distinctions among Tribes." The Division of Indian Affairs incomplete lodging with the Supreme Court raises the specter that the discredited practice of classifying some tribes as "non-historic" could be revived by the Division of Indian Affairs in a new post-*Carcieri* analysis.

While at the Department, I also became aware of Interior Department practices in the federal acknowledgment process that if applied by the Department in the land in trust process could unduly restrict the Secretary's authority. Repeated reports of the General Accounting Office and this Committee's own hearings demonstrate the long delays, poor staff support, and unduly restrictive interpretations

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[17] 25 U.S.C. §§ 2201 et seq.
[18] 25 U.S.C. §§ 1901 et seq.
[19] 25 U.S.C. §§ 450 et seq.
[20] See United States Department of the Interior, Acting Assistant Secretary—Indian Affairs to Hon. George Miller (Jan. 14, 1994).
[21] See 25 U.S.C. § 476(f)-(g).
[22] 25 U.S.C.A. § 479a
[23] 25 U.S.C.A. § 476(h), Section 103, Public Law 103-454

of the Department's Office of Federal Acknowledgment ("OFA").[24] Transferring tribal history questions to OFA is a potential disaster in the making.

As Associate Solicitor, the Division of Indian Affairs' attorneys I supervised were not required to engage in an analysis of which tribes were "under federal jurisdiction" when considering land into trust applications for the simple reason that all tribes were presumed to be under the Secretary's trust authority, absent some express Congressional prohibition. The purpose and intent behind this long-standing practice was ignored in *Carcieri*.

Plainly the *Carcieri* decision runs directly counter to federal laws and policies that have long expressly supported self-determination for American Indian Nations. The Indian Reorganization Act of 1934 itself was intended to reverse fifty years of forced assimilation of tribes through allotment of tribal land by giving the Secretary of the Interior the authority to acquire lands in trust on behalf of all Indian tribes.[25] The purpose behind the new tribal land-acquisition policy was to encourage tribal self-governance and promote tribal self-determination and economic development.

The Executive Branch has followed a similar course as Congress in supporting and promoting policies of self-determination of Indian tribes. President Clinton's Executive Order 13084 of May 14, 1998, Consultation and Coordination with Indian Tribal Governments, mandates that federal agencies follow principles of respect for Indian Tribal self-government and sovereignty, for Tribal treaty rights and other rights and for the responsibilities which arise from the unique federal trust relationship.[26]

CONGRESS MUST PROVIDE A REMEDY NOW

Congress has the opportunity and duty to Indian Tribes to solve this problem now by confirming the Secretary's authority to take land in trust for all tribes rather than allowing new and convoluted bureaucratic processes to take root. Congress should provide an immediate statutory solution that (1) makes clear that the Secretary of the Interior has authority to accept land in trust for any and all federally recognized tribes; and (2) that ratifies all prior Secretarial decisions under the IRA, including trust acquisitions, that may be potentially affected by the decision.

Congress should enact new legislation that makes clear the Secretary of the Interior has authority to accept land in trust for all federally-recognized Tribes irrespective of a determination of whether or not they were under federal jurisdiction in 1934. While we wait for Congress to review the legislative record to restore the Secretary's authority, we cannot forget that legislative direction to federal agencies is necessary today. The Secretary of the Interior can make clear today that nothing from the *Carcieri* decision will disturb prior trust land acquisitions. For example, The Quiet Title Act contains an Indian land exception that expressly precludes lawsuits challenging the United States' title to "trust or restricted Indian lands."[27] All acquisitions prior to *Carcieri* should therefore continue to enjoy full effect and all future agency activities related to these lands must proceed as properly authorized.

In the meantime, this Committee could also give important direction to the Secretary of the Interior, Chairman of the National Indian Gaming Commission and Attorney General to interpret the *Carcieri* decision in the most legally permissible fashion possible, especially with respect to the standard to be applied for what tribes should be considered "under federal jurisdiction" after *Carcieri*.

Thank you for the opportunity to testify today and I look forward to answering any questions the Committee has today or may submit in writing.

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[24] See U.S. General Accountability Office, "More Consistent and Timely Tribal Recognition Process Needed," GAO 02-415T (Feb. 7, 2002); "Timeliness of the Tribal Recognition Process Has Improved, but It Will Take Years to Clear the Existing Backlog of Petitions," GAO-05-347T (Feb. 10, 2005).

[25] See General Allotment Act of 1887. 24 Stat. 388.

[26] Executive Order No. 13084, "Consultation and Coordination with Indian Tribal Governments." 63 Fed. Reg. 27655 (Apr. 14, 1998). See also President George W. Bush, "Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Government," (Sept. 23, 2004); President George H.W. Bush, Statement Reaffirming the Government-to-Government Relationship between the Federal Government and Tribal Governments (June 14, 1991); President Ronald M. Reagan, Statement on American Indian Policy (Jan. 24, 1983), in 19 Weekly Comp. Pres. Doc. 98; President Richard M. Nixon, Special Message on Indian Affairs, in Public Papers of the Presidents of the United States: Richard Nixon, pp. 564-67, 576.

[27] 20 U.S.C. § 2409a. See also *Sac & Fox Nation of Missouri v. Salazar,* No. 08-3277 (10th Cir. Mar. 3, 2009); *Neighbors for Rational Development, Inc. v. Norton,* 379 F.3d 956 (10th Cir. 2004).

EXHIBITS

EXHIBIT A

25 U.S.C.A. § 476 (PARTIAL)

(f) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; PROHIBITION ON NEW REGULATIONS.—Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; EXISTING REGULATIONS.—Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act——

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

EXHIBIT B

25 U.S.C.A. § 479

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

EXHIBIT C

25 U.S.C.A. § 479A

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.
(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

Relevant Findings of 25 U.S.C.A. § 479a

Section 103 of Pub.L. 103-454 provided that: "The Congress finds that——
"(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court;"

EXHIBIT D

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3

The Congress shall have power...
To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

United States Constitution, Article II, Section 2, Clause 2

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur....

EXHIBIT E

U.S. Department of the Interior
Office of the Solicitor
Washington, D.C.

July 13, 1994

Memorandum

To: **Ada E. Deer**
Assistant Secretary — Indian Affairs

From: **John D. Leshy**
Solicitor

Subject: Amendment of the Indian Reorganization Act

This responds to your request for my views on the meaning of Section 5(b) of die Technical Corrections Act of 1994 (Pub. Law 103-263; 108 Slat. 707) which amended Section 16 of the Indian Reorganization Act of 1934 (ERA), 25 U.S.C. § 476. by adding two new subsections. The new subsections provide:

(f) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; PROHIBITION ON NEW REGULATIONS.-Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; EXISTING REGULATIONS.-Any regulation or administrative decision or determination of a department or agency of die United States that is in existence or effect on die date of enactment of this Act and that classifies, enhances, or diminishes die privileges, and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of [heir status as Indian tribes shall have no force or effect.

These subsections were added to unrelated technical amendments on the Senate floor immediately prior to enactment. The only relevant legislative history is a col-

loquy between Senators Inouye and McCain.[1] In proposing the amendment. Senator McCain stated:

The purpose of the amendment is to clarify that section 16 of the Indian Reorganization Act was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes. In the past year, the Pascua Yagui [sic] Tribe of Arizona has brought to our attention the fact that the Department of the Interior has interpreted section 16 to authorize the Secretary to categorize or classify Indian tribes as being either created or historic.

140 Cong. Rec. S6147 (daily ed. May 19, 1994).

It is clear from their colloquy that Senators Inouye and McCain are referring to the interpretation in the Solicitor's Opinion dated April 15, 1936, styled "Sioux—Elections on Constitutions" (1 Op. Sol, on Indian Affairs 618 (U.S.D.I. 1979))("Opinion")[2]. The Opinion concluded that, in authorizing the adoption of tribal constitutions in Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 476, Congress distinguished between the governmental powers which may be exercised by, respectively, what have come to be known as "historic" tribes on the one hand, and "non-historic" or "created" tribes or adult Indian communities on the other. While not expressly using the term "non-historic" or "created" tribe, the Opinion referred to the latter as Indian "groups" which were "organized on the basis of their residence upon reserved land." Opinion, at 618.

As you know, my office was in the final stages of reviewing that Opinion, pursuant to your request, when Congress acted. Your January 1994 Senate testimony on the Pascua Yaqui legislation was sharply critical of the distinction.

The amendment, signed into law by President Clinton on May 31, 1994, overrules the 1936 Opinion.[3] You should therefore instruct the Bureau of Indian Affairs to place no reliance on it in future dealings with Tribes. You may also want to notify the Tribes that have previously been regarded as "created" of this change.

While my reconsideration of the Opinion is now moot, some discussion of it may be helpful to you in applying the new law. With little elaboration, the Opinion based its conclusion that the IRA authorized a distinction between "historic" and "non-historic" or "created" tribes on a single sentence found in Section 16 of the IRA.

Section 16 as originally enacted provided, in relevant part:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

The effect of the distinction drawn in the 1936 Opinion was that a community of adult Indians organized on reserved land under Section 16 of the IRA may not have certain sovereign powers enjoyed by other "historic" tribes, unless the powers have been delegated to the tribe by the Secretary of the Interior or are incidental to the tribe's ownership of the property or to the carrying on of business. The tribe's power to regulate law and order, for example, could only be sustained where there was a delegation of power from the Secretary of the Interior. Other powers possibly affected include the power to condemn land of community members; to regulate inheritance of the property of community members, and to levy taxes upon community members and others.

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[1] These subsections were previously introduced in independent bills in the Senate (S. 2017) and House of Representatives (H.R. 4231) in mid-April. No action was taken on either bill. In remarks nearly identical to those he made upon introduction of the language added to the Technical Corrections Act, Senator McCain noted that the Department might take action on its own to modify its prior interpretation of section 16. 140 Cong. Rec. S4339 (daily cd. April 14, 1994). When he introduced H.R. 4231, Congressman Richardson made similar, albeit more brief, remarks. There is no other legislative history from the House.

[2] The same opinion appears with the heading "Powers of Indian Group Organized Under IRA But Not As Historical Tribe" as Solicitor's Opinion, April 15.1938.1 Op. Sol, on Indian Affairs 813 (U.S.D.I. 1979). The date of 1938 appears to be a typographical error, because the elections for the Lower Sioux Indian Community and Prairie Island Indian Community referred to in the opinion in the future tense were held on May 16 and 23, 1936, respectively.

[3] The amendment, which was not provided to my Office in advance of its introduction, and upon which we had no opportunity to comment, is not merely a simple overruling of the 1936 Opinion, and Senator McCain made dear in his-floor statement that its reach was not confined to the IRA. Instead, he characterized it as "intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify, or implement the categories or classifications." 140 Cong. Rec. S6147 (daily ed. May 19, 1994). This memorandum does not address other possible applications of the amendment beyond the 1936 Opinion.

The distinction drawn in the 1936 Opinion has had a limited practical effect. The occasions for applying it have been relatively infrequent; principally, in BIA review of tribal constitutions or constitutional amendments pursuant to Section 16.[4] In the nearly sixty years since the Opinion was issued, in fact, fewer than twenty of the more than 500 federally recognized tribes have received notice that their particular constitution or their exercise of constitutional powers might be impermissible because they were considered to be "created" rather than "historic" tribes.

The Opinion's impact has also been limited because it recognized that "created" tribes may exercise some of the powers listed above as incident to other powers they have that do not derive from sovereignty. As the Opinion put it: "The group...may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior." Opinion, at 618.

The underlying question is solely one of statutory interpretation—of the meaning to be ascribed to this sentence in Section 16 of the IRA. In legislating in the arena of tribal powers. Congress can and sometimes has differentiated among the powers and authorities of tribes or Indian groups.[5]

While my office was reexamining this Opinion, our research into its history unearthed some interesting background; specifically, memoranda from two Assistant Solicitors taking contrary positions on the question shortly before the Opinion was released. In one, Charlotte Westwood argued that no distinction should be drawn, while in the other Felix Cohen, a pioneering figure in Indian law, argued for the distinction. In the end, the Solicitor sided with Cohen.[6] The two memoranda are attached for your information.

Notwithstanding the Solicitor's interpretation, the Opinion has come into serious question in recent times. For one thing, the distinction it drew is not based on the express terms of Section 16 of the IRA.[7] For another, it may also have been undercut by the 1988 amendments to Section 16. See Pub. L. No. 100-581, 102 Stat. 2938; in the following paragraph, the 1988 additions are shown in boldface and the deletions struck-through.

> (a) Any Indian tribe, ~~or tribes, residing on the same reservation,~~ shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—
>
> (1) ratified by a majority of the adult members of the tribe, or tribes ~~of the adult Indians residing on such reservation, as the case may be,~~ at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe;

Section 19 of the IRA defines "tribe" to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." The definition was not changed by the 1988 amendments. The legislative history of the 1988 amendments simply notes:

> The amendment deletes reference to residence on a reservation and eliminates reservation status or ownership of a tribal land base as a condition precedent to organization under this Act.

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[4] In 1988 Congress amended Section 16 of the IRA to require the Secretary to hold elections on proposed new tribal constitutions and constitutional amendments within stated time periods. The 1988 amendments also required the Secretary to advise the tribe in writing 30 days prior to calling the elections of any provision which he found contrary to applicable law.

[5] Title 25 of the United States Code is replete with special legislation limiting or otherwise affecting the powers of individual tribes, such as the Navajos and the Hopis, or groups of tribes,.such as the Five Civilized Tribes (Cherokees, Creeks, Chickasaws, Choctaws and Seminoles) or all those tribes in a particular state. For example, all matters involving tribal powers, immunities and jurisdiction of the Catawba Tribe are governed by a settlement agreement and the Congressionally sanctioned State Act (25 U.S.C. §941h); Oregon has been granted civil and criminal jurisdiction within the boundaries of the Coquille Reservation (25 U.S.C. §715d); New York has criminal jurisdiction on Indian reservations (25 U.S.C. §232) and New York courts have civil jurisdiction (25 U.S.C. §233); Kansas has criminal jurisdiction on Indian reservations (18 U.S.C. 5 3243), see., *Negopsott v. Samuels.* U.S., 113 S.Ct. 1119 (1993); Maine has civil and criminal jurisdiction over, reservations (25 U.S.C. § 1725); Texas has civil and criminal jurisdiction over the Ysleta Del Sur Pueblo (25 U.S.C. §1300g-4(f)).

[6] But see the statements of Senators McCain and Inouye in introducing the recent amendment on the Senate floor. 140 Cong. Rec. S1646 (daily ed. May 19, 1994).

[7] After nearly sixty yean of relative obscurity, this Opinion has, as you know, recently gained a surprising amount of attention. A front-page article in the April 4, 1994, *Seattle Post-Intelligencer,* for example, quoted tribal officials and attorneys who characterized the Opinion in strongly negative and sweeping terms; e.g., that it "came out of nowhere," was "just wrong, historically," and could be applicable to more than 200 tribes.

> The Committee's deletion of the references to the rights of Indians residing oil the same reservation to organize under the 1934 Act does not alter the authorities with respect to the organization of such Indians because of the definition of "tribe" in section 19 of the 1934 Act (25 U.S.C. 479) which includes "the Indians residing on one reservation." In the case of such a "tribe" the members of the tribe are the residents of the reservation.

S. Rep. No. 100-577, 100th Cong., 2d Sess. 2 (1988).

Moreover, the modern trend of Federal statutes affecting Indian tribal, governmental powers on a national basis is to define "tribe" in broad terms. See, e.g., the definition in the Indian Civil Rights Act of 1968: "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government." 25 U.S.C. § 1301(1). See also, the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801(5).

Congress effectively limited or partially overruled the 1936 Opinion in the Indian Land Consolidation Act by defining "tribe" to mean "any Indian tribe, band, group, pueblo or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). The power to regulate inheritance of property of community members was one of the sovereign powers not vested in "created" or "non-historic" tribes, according to the 1936 Opinion, but the Land Consolidation Act authorizes any Indian tribe so broadly defined, subject to approval of the Secretary, to "adopt its own code of laws, to govern descent and distribution of trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction." 25 U.S.C. § 2205<a).

The Indian Child Welfare Act defines "tribe" to mean: "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in Section l602(c) of Title 42." 25 U.S.C. § 1903(8). The Indian Self-Determination and Education Assistance Act, one of the more important pieces of Indian legislation in the last 20 years, defines Indian tribe to mean:

> [A]ny Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

25 U.S.C. § 450b(b). See also, the Indian Child Protection and Family Violence Prevention Act; 25 U.S.C. § 3202(10).

As these varied yet uniformly sweeping statutory definitions of "tribe" make clear, Congress has long been aware of the ethnological, cultural and historic differences ' among Indian governance organizations, yet Congress for the most part makes no distinctions among tribes in recognizing their existing authorities or vesting them with new ones. But see footnote 5, above. In any event, apart from these specific statutory modifications, Congress has now sealed the debate by rejecting the distinction drawn in the 1936 Opinion.

There remains the question of how the recent amendment is to be implemented with respect to tribes heretofore regarded as "created," whose constitutions contain limitations based upon the 1936 Opinion. The need for and the process to be employed in amending these constitutions may raise legal issues that will have to be addressed in my office. I believe the best course is to await a specific factual context before attempting to resolve any such issues. Please consult my office when such requests for amendments are made.

Attachments

cc: Associate Solicitors
All Regional and Field Solicitors

The CHAIRMAN. Thank you. Mr. Mitchell?

STATEMENT OF DONALD CRAIG MITCHELL, ESQUIRE, ANCHORAGE, ALASKA

Mr. MITCHELL. Thank you, Mr. Chairman. I appreciate the opportunity to be here this morning. I began testifying in front of this Committee on these issues in 1977, and this morning is the first time I have ever done so on my own, not representing a client.

I mention that for two reasons. The first is that, unlike Mr. Anderson, who, to the best of my knowledge, does have attorney-client relationships with tribes that have a very strong interest in this matter, and, unlike Professor Routel, who participated in the U.S. Supreme Court litigation, I do not come here with any of that baggage. In short, I do not have a dog, in the literal sense, in this fight.

I believe I was invited by the Committee, however, because I have a long history of following Congress's entanglements with Federal Indian policy and what has happened at the Department.

In 1978, as the Chairman knows, the very first Assistant Secretary of Indian Affairs was a wonderful fellow named Forest Girard, and Forest invited me to be one of his first special assistants, and, for a variety of reasons, I turned the invitation down, but I mention it only to say that I have been around these issues for a long time.

Now, having said that, and at the risk of sounding like the pedantic high school civics teacher that I am not, let me make just one principal point, and that is, independent of Indian subject matter, the system that the Constitution sets up is really pretty darned simple, and here is how it works, and, again, I do not mean to be pedantic about this, but this is an important point that goes to the heart of thinking about the Carcieri decision, and that is, under our Constitution, it is Congress that makes policy choices. Congress codifies those policy choices in its statutes. It is the responsibility of the Federal Executive to implement Congress's policy choices, not the policy choices that the Federal Executive thinks might be appropriate.

Congress has a constitutional right occasionally not even to know what it is doing, but it is Congress's policy choices.

Now, that is how it works. Now, what the courts do is they correct errors. If Congress makes a policy choice in a statute that the U.S. Supreme Court believes is not authorized by the Constitution, Congress corrects the error. If the Federal Executive Branch is not implementing Congress's policy choices, the U.S. Supreme Court corrects the error.

It is as simple as that, and what happened in this case was that, for, certainly since the late 1970s that I have been involved in this, the Department of the Interior and, specifically, the Indian Affairs Division of the Office of the Solicitor has decided, on its own, what the best Indian policy should be for this nation, and reasonable people can differ about that, in terms of what these policies should be. These are very difficult choices, and I agree with the public intellectual, Gary Wills, who once said that "our nation's Indian policy is America's original sin, with slavery being second," and we are still attempting to recovery from that.

As I said, having a policy debate about what to do in the 21st century about all of this stuff is a very interesting subject that this Congress has not had in a number of years.

Now, all that the United States Supreme Court did was to apply basic canons of statutory construction, and no other witness has mentioned the fact that what this case went off on was not all of the stuff about John Collier; what it went off on was the basic rule of law that there is a presumption that when Congress uses unde-

fined terms in a Federal statute that Congress intends those terms to have the common dictionary meaning. It is as simple as that, and the Court looks at the text of the statute, and they applied that rule, and they came up with the result that they did.

Now, after they did that, they then spent some time analyzing that had gone on with respect to the Federal Executive's implementation back at the time the statute was enacted, and they said that the original implementation was consistent with the common dictionary meaning.

Now, that is how we have gotten to this situation, and there is no overreaching by the Court. There is nothing untoward here, and what is untoward, and my time is up, or I could spend the rest of the morning talking about how the situation has evolved inside the Bureau of Indian Affairs and the Indian Affairs Division of the Office of the Solicitor. It is a scandal, frankly, and it is time for Congress to reassert its commerce clause authority to once again be in charge of the nation's Indian policies. Thank you, Mr. Chairman.

[The prepared statement of Mr. Mitchell follows:]

Statement of Donald Craig Mitchell, Esquire, Anchorage, Alaska

Mr. Chairman, members of the Committee, my name is Donald Craig Mitchell. I am an attorney in Anchorage, Alaska, who has been involved in Native American legal and policy issues from 1974 to the present day in Alaska, on Capitol Hill, and in the federal courts.

From 1977 to 1993 I served as Washington, D.C., counsel, then as vice president, and then as general counsel for the Alaska Federation of Natives, the statewide organization Alaska Natives organized in 1967 to urge Congress to settle Alaska Native land claims by enacting the Alaska Native Claims Settlement Act (ANCSA). From 1984 to 1986 I was counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations and authored the Task Force's report on the history of Alaska Native tribal status that the Alaska Supreme Court later described as an analysis of "impressive scholarship." And from 2000 to 2009 I was a legal advisor to the leadership of the Alaska State Legislature regarding Alaska Native and Native American issues, including the application of the Indian Gaming Regulatory Act in Alaska.

I also have written a two-volume history of the federal government's involvement with Alaska's indigenous Indian, Eskimo, and Aleut peoples from the Alaska purchase in 1867 to the enactment of ANCSA in 1971, Sold American: The Story of Alaska Natives and Their Land, 1867-1959, and Take My Land Take My Life: The Story of Congress's Historic Settlement of Alaska Native Land Claims, 1960-1971. Former Secretary of the Interior Stewart Udall, a distinguished former member of this Committee, has described Sold American as "the most important and comprehensive book about Alaska yet written." And in 2006 the Alaska Historical Society named Sold American and Take My Land Take My Life two of the most important books that have been written about Alaska.

I first testified before this Committee in 1977 and I very much appreciate the opportunity to testify again today on the ramifications of the decision of the U.S. Supreme Court in *Carcieri v. Salazar,* Slip Opinion No. 07-526 (February 24, 2009).

Section 5 of the Indian Reorganization Act (IRA), Pub. L. No. 73-383, 48 Stat. 984, delegates the Secretary of the Interior authority to acquire land, and to take title to the acquired land into trust, "for the purpose of providing land for Indians." (emphasis added).

In *Carcieri,* five-members of the Court—Chief Justice Roberts and Justices Thomas, Scalia, Kennedy, and Alito—held that the 73d Congress, which in 1934 enacted the IRA, intended the phrase "recognized tribe now under Federal jurisdiction" (emphasis added) in the section 19 of the IRA definition of the term "Indian" to prohibit the Secretary of the Interior from acquiring land for an "Indian tribe" pursuant to section 5 of the IRA unless that "Indian tribe" was both "recognized" and "under Federal jurisdiction" on the date of enactment of the IRA, i.e., on June 18, 1934.

Three other members of the Court—Justices Breyer, Souter, and Ginsburg—disagreed in part with that determination of congressional intent and opined that the 73d Congress intended the phrase "recognized tribe now under Federal jurisdiction" to require an Indian tribe to have been "under Federal jurisdiction" on June 18,

1934, but to allow the tribe to have been "recognized" years or decades after that date.

Subsequent to the 73d Congress's enactment of the IRA in 1934, and particularly subsequent to the 100th Congress's enactment of the Indian Gaming Regulatory Act in 1988, the Secretary of the Interior has acquired numerous parcels of land pursuant to section 5 of the IRA for numerous groups of Native Americans that were not "recognized" as "Indian tribes" and were not "under Federal jurisdiction" on June 18, 1934. Today, on a number of those parcels a number of those groups operate gambling casinos that collectively annually generate billions of dollars of revenue. For those reasons, the majority opinion in *Carcieri* has quite understandably roiled Indian country.

To decide on its position regarding the legal and policy consequences that flow from the *Carcieri* decision requires the Committee on Natural Resources to consider three questions:

1. Does the majority opinion in *Carcieri* accurately discern the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction"?
2. If the answer to that question is yes, is the policy result that the 73d Congress intended to effectuate in 1934 appropriate in 2009?
3. If the answer to that question is no, what should the Committee recommend to the 111th Congress regarding amendments to section 5 and/or section 19 of the IRA whose enactment will effectuate the policy result that the Committee determines is appropriate?

To the extent the Committee may find them of use, my views regarding the answers to those questions are as follows:

The Majority Opinion in *Carcieri* Accurately Discerned the Intent of the 73d Congress Embodied in the Phrase "Recognized Indian Tribe Now Under Federal Jurisdiction."

The majority opinion in *Carcieri* easily reasoned to its result by concluding that the intent of the 73d Congress embodied in the phrase "recognized Indian tribe now under Federal jurisdiction" (emphasis added) is clear and unambiguous because the U.S. Supreme Court may presume that, like every Congress, the 73d Congress intended undefined words in its statutory texts to have their common dictionary meaning, and in 1934 the common dictionary meaning of the word "now" was "at the present time; at this moment." See Majority Opinion, at 8.

However, the Majority Opinion also relied on the extrinsic fact that in 1936 Commissioner of Indian Affairs John Collier believed that that was the result the 73d Congress intended. See id. 9-10. In his concurring opinion, Justice Breyer also found that same extrinsic fact determinative. See Concurring Opinion, at 2 (Justice Breyer noting that "the very Department [of the Interior] official who suggested the phrase to Congress during the relevant legislative hearings subsequently explained its meaning in terms that the Court now adopts").

The Court's reliance on Commissioner Collier's interpretation in 1936 of the intent of the 73d Congress embodied in the word "now," rather than on the contrary interpretation that the Bureau of Indian Affairs (BIA), through the Solicitor General, presented to the Court in 2008, is an important development whose consequence for relations between Congress and the executive branch transcends the statutory construction dispute the Court decided in *Carcieri*.

A quarter of a century ago in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the U.S. Supreme Court invented the analytical construct that if the meaning of the text of a statute is ambiguous, Congress, by creating the ambiguity, intended to delegate the executive branch agency responsible for implementing the statute authority to resolve the ambiguity by making whatever policy choice that it—the executive branch agency—deems appropriate without any investigation of what the Congress that enacted the statute actually intended. As the Court recently explained in *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980 (2005):

> In *Chevron,* this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts.

But, as the Court noted in *Carcieri*, the reason a federal court should give deference to an interpretation of the intent of Congress embodied in the text of statute made by the executive branch agency that is responsible for implementing the statute is not because Congress has delegated the agency authority to impose the agency's, rather than Congress's, policy choices. Rather, it is because the agency's involvement in Congress's enactment of the statute makes its understanding of what

Congress intended more authoritative than a guess by a federal judge based on often nonexistent legislative history.

That was the situation in *Carcieri*. See Majority Opinion, at 10 n. 5 (Justice Thomas noting that "[i]n addition to serving as Commissioner of Indian Affairs, John Collier was a principal author of the IRA. And...he appears to have been responsible for the insertion of the words "now under Federal jurisdiction" into what is now 25 U.S.C. 479")(citation and internal punctuation marks omitted).

But for the U.S. Supreme Court, or any lower federal court, to rely on the interpretation of the intent of Congress embodied in the text of a statute made by the executive branch agency responsible for implementing the statute because the agency's involvement in Congress's enactment of the statute makes its understanding of what Congress intended authoritative presupposes that, in reasoning to its interpretation, the agency has vigorously—and intellectually honestly—analyzed what the Congress that enacted the statute intended. See *United States v. Wise,* 370 U.S. 405, 411 (1962)(noting that "statutes are construed by the courts with reference to the circumstances existing at the time of the passage").

But during the thirty-five years I have been involved in litigating, and in participating in Congress's enactment of, statutes dealing with Native American subject matters I have not encountered an executive branch bureaucracy more committed than the BIA (and the Division of Indian Affairs in the Office of the Solicitor that serves it) to discharging that obligation in the breach.

Examples, while legion, are beyond the scope of this hearing. What can be said here is that, despite the efforts of the BIA and its Solicitors to prevent it from doing so, in *Carcieri* the U.S. Supreme Court did its job. And that job was to correctly interpret the intent of the 73d Congress embodied in the phrase "recognized tribe now under Federal jurisdiction."

The *Carcieri* Decision Presents an Opportunity for the 111th Congress to Reassert Congress's Indian Commerce Clause Authority Over the Nation's Native American Policies.

The reason the *Carcieri* decision has roiled Indian country is that since June 18, 1934 Congress and, most importantly, the Secretary of the Interior have created at least 104 "federally recognized tribes" that were neither "recognized" nor "under Federal jurisdiction" on the date the 73d Congress enacted the IRA. As a consequence, the Secretary had no authority pursuant to section 5 of the IRA to acquire land for any of those tribes.

Sixteen of those tribes were created by Congress. The other 88 were created by the Secretary of the Interior through ultra vires final agency action, and by the U.S. District Court acting, at the request of the Secretary of the Interior, beyond its jurisdiction and in a manner that violated the Doctrine of Separation of Powers. [1]

Between 1984 and 1996 when I researched the book that became Sold American, I read the John Collier papers that are generally available on microfilm, the Felix Cohen papers at the Beinecke Library at Yale University, and the Central Office Files (Record Group 75) of the BIA for the years 1933 to 1953 at the National Archives in Washington, D.C.

While that was some years ago, I do not recall reading any letter, memorandum, or other document in which John Collier or any other BIA employee or Felix Cohen suggested that they thought that new "federally recognized tribes" would be created subsequent to the enactment of the IRA. With respect to the accuracy of that assumption, it is significant that it would be thirty-eight years after the enactment of the IRA before Congress would create a new tribe. See Pub. L. No. 92-470, 86 Stat. 783 (1972)(Payson Community of Yavapai-Apache Indians "recognized as a tribe of Indians within the purview of the Act of June 18, 1934").

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[1] Appendixes 1 through 3 in the brief that a group of law professors, appearing as amici curiae, filed with the U.S. Supreme Court in *Carcieri* list forty-eight of the 104 tribes. The list does not include the Seminole Indians who in 1957 were residing in Florida and to whom in that year the Secretary of the Interior issued an IRA Constitution that designated the group as the Seminole Indian Tribe of Florida, even though no treaty or statute had granted that legal status to the individual Seminoles, and their descents, who had escaped the efforts of the army, which ended in 1858, to relocate the Seminoles to the Indian Territory. The list also does not include 55 "federally recognized tribes" in California that operate gambling casinos, most of which gained that ersatz legal status in settlement agreements in lawsuits brought by California Indian Legal Services and to which the Secretary of the Interior and the Assistant Secretary of the Interior for Indian Affairs were party. See e.g., *Scotts Valley Band of Pomo Indians v. United States,* U.S. District Court for the Northern District of California No. C-86-3660, Stipulation for Entry of Judgment, Paragraph No. 3(c)(federal defendants agree that the Scotts Valley and Guidiville Bands of Pomo Indians, the Lytton Indian Community, and the Me-Choop-Da Indians of the Chico Rancheria "shall be eligible for all rights and benefits extended to other federally recognized Indian tribes")(emphasis added).

I would proffer that the reason John Collier and Felix Cohen did not think that new tribes would be created was that, while they were privately committed to bolstering (and indeed inventing) tribal sovereignty, they knew that the members of the Senate and House Committees on Indian Affairs believed, as their predecessors had since the 1880s, that assimilation should be the objective of Congress's Native American policies. As Representative Edgar Howard, the chairman of the House Committee on Indian Affairs, explained to the House prior to the vote to pass the Committee's version of the IRA, the Committee's rewrite of the bill that John Collier and Felix Cohen had sent to the Hill "contains many provisions which are fundamentals of a plan to enable the Indians generally to become self-supporting and self-respecting American citizens." 78 Cong. Rec. 11,727 (1934). [2]

That remained Congress's policy objective until the beginning of the Kennedy administration in 1961 when the Native American tribal sovereignty movement that today is pervasive throughout Indian country began.

During the nascent days of the movement, in 1975 the 94th Congress established a twelve-member American Indian Policy Review Commission. The Commission was chaired by Senator James Abourezk. The late Representative Lloyd Meeds, a respected attorney, a former distinguished member of this Committee, and between 1973 and 1976 the chairman of the Committee's Subcommittee on Indian Affairs, was vice chairman. The Commission assembled a paid and unpaid staff of 115 people.

On May 17, 1977 the Commission delivered its 563-page report to the 95th Congress. See AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (1977) [hereinafter "Final Report"]. The report contained a wish-list of 206 recommendations.

Recommendation Nos. 164 through 177 dealt with "unrecognized" tribes. See Final Report, at 37-41. Recommendation No. 166 urged Congress—not the Secretary of the Interior—to "by legislation, create a special office...entrusted with the responsibility of affirming tribes' relationships with the Federal Government and empowered to direct Federal Indian Programs to these tribal communities." Id. 37-38. Recommendation No. 168 provided:

> Tribe or group or community claiming to be Indian or aboriginal to the United States be recognized unless the United States acting through the special office created by Congress, can establish through hearings and investigations that the group does not meet any one of the following definitional factors....

Id. 38-39.

Representative Meeds, the vice chairman of the Commission, was so disturbed by the polemical tone of the report that he filed dissenting views. See Final Report, at 571-612. Representative Meeds stated his principal objection as follows:

> [T]he majority report of this Commission is the product of one-sided advocacy in favor of American Indian tribes. The interests of the United States, the States, and non-Indian citizens, if considered at all, are largely ignored....
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> [T]he Commission's staff interpreted the enabling legislation as a charter to produce a document in favor of tribal positions....
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> For Congress to realistically find this report of any utility, the report should have been an objective consideration of existing Indian law and policy, a consideration of the views of the United States, the States, non-Indian citizens, the tribes, and Indian citizens. This the Commission did not do. Instead, the Commission saw its role as an opportunity to represent to the Congress the position of some American Indian tribes and their non-Indian advocates.

Id. 571.

Of Representative Meeds's myriad objections to the report's recommendations, one of the most important related to the recommendations dealing with "unrecognized tribes." Representative Meeds explained his concern as follows:

> Because the Constitution grants to the Congress the power to regulate commerce with Indian tribes, article I, section 8, the recognition of Indians as

[2] I would encourage every member of the Committee who is interested in understanding the policy objectives that Congress—as opposed to John Collier and Felix Cohen—believed that its enactment of the IRA would advance to read the House and Senate debates on the bill. 78 Cong. Rec. 11,122-139, 11,724-744 (1934).

> a tribe, i.e., a separate policy (sic) [polity], is a political question for the Congress to determine...Hence, in any given context, resort must be had to the relevant treaties or statutes by which Congress has made its declaration. The Commission fails to appreciate this fundamental principle of constitutional law. (emphasis added).

Id. 609.

In light of the fact that, as a consequence of the *Carcieri* decision, it now appears that the Secretary of the Interior has unlawfully acquired land pursuant to section 5 of the IRA for as many as 88 ersatz "federally recognized tribes" that gained that legal status through final agency action of the Secretary of the Interior that was ultra vires, Representative Meeds's concern that the Commission did not understand that the Indian Commerce Clause reserves the power to grant tribal recognition to Congress—not to the Secretary of the Interior, and certainly not to the U.S. District Court—today appears prescient.

Seven months after the Commission delivered its report to the 95th Congress, Senator Abourezk introduced S. 2375, 95th Cong. (1977), a bill whose enactment would have delegated Congress's authority to create new "federally recognized tribes" to the Secretary of the Interior. See 123 Cong. Rec. 39,277 (1977). Two similar bills, H.R. 11630 and 13773, 95th Cong. (1978), were introduced in the House and referred to this Committee.

None of those bills were reported, much less enacted.

Instead, two months after the Commission delivered its report to the 95th Congress (and in complete disregard of Representative Meeds's admonishment that, pursuant to the Indian Commerce Clause, tribal recognition is exclusively a congressional responsibility), the Deputy Commissioner of Indian Affairs published a proposed rule whose adoption as a final rule would promulgate regulations granting the Secretary of the Interior authority to create new "federally recognized tribes" in Congress's stead. The Deputy Commissioner explained his rationale for doing so as follows:

> Various Indian groups throughout the United States, thinking it in their best interest, have requested the Secretary of the Interior to "recognize" them as an Indian tribe. Heretofore, the sparsity of such requests permitted an acknowledgment of a group's status to be at the discretion of the Secretary or representatives of the Department. The recent increase in the number of such requests before the Department necessitates the development of procedures to enable that a uniform and objective approach be taken to their evaluation.

42 Fed. Reg. 30,647 (1977).

In his proposed rule, the Deputy Commissioner asserted that Congress intended 5 U.S.C. 301 and 25 U.S.C. 2 and 9 to delegate the Secretary of the Interior authority to create new "federally recognized tribes" in Congress's stead. See id. However, those statutes contain no such delegation of authority. See William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83, 17 American Indian Law Review 37, 47-48 (1992)(5 U.S.C. 301 and 25 U.S.C. 2 and 9 discussed). See also Federal Recognition of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs, 95th Cong. 14 (1978)(Letter from Rick V. Lavis, Acting Assistant Secretary, to The Honorable Morris Udall, dated August 8, 1978, admitting that "there is no specific legislative authorization" for the Secretary's tribal recognition regulations).

Nevertheless, on September 5, 1978 the Deputy Assistant Secretary of the Interior for Indian Affairs published a final rule that promulgated the regulations. See 43 Fed. Reg. 39,361 (1978). [3]

That was more than thirty years ago.

Today, as a consequence of the *Carcieri* decision, neither Congress nor the Secretary of the Interior can any longer ignore the mess that the Secretary's refusal to heed Representative Meeds's admonition, and Congress's failure to defend its constitutional prerogative from usurpation by the BIA, has wrought. And the mess is that there are 88 Native American organizations, and probably more, whose members believe that they are members of a "federally recognized tribe" but who have no such legal status. And for many of those ersatz "federally recognized tribes," the Secretary of the Interior has acquired land pursuant to section 5 of the IRA that, for the reasons the U.S. Supreme Court explained in *Carcieri*, he had no legal authority to acquire.

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[3] The regulations were codified at 25 C.F.R. 54.1 et seq. (1978), today 25 C.F.R. 83.1 et seq. (2009).

By focusing the attention of this Committee on the situation the *Carcieri* decision has done a large service. Because it is more than three decades past time for Congress to retrieve from the BIA (and the Solicitors who serve it) the plenary authority that the Indian Commerce Clause of the U.S. Constitution confers on Congress—and only on Congress—to decide the nation's Native American policies.

With respect to those policies, to fashion a response to the *Carcieri* decision the 111th Congress must decide its position regarding two questions:

Is it appropriate during the first decade of the twenty-first century for Congress to designate—or for Congress to authorize the Secretary of the Interior to designate—new groups of United States citizens whose members (as 25 C.F.R. 83.7(e) describes the criterion) "descend [with any scintilla of blood quantum] from a historical tribe" as "federally recognized tribes" whose governing bodies possesses sovereign immunity and governmental authority?

Is it appropriate during the first decade of the twenty-first century for Congress to authorize the Secretary of the Interior to transform additional parcels of fee title land into trust land over the objection of the governments of the states, counties, and municipalities in which the parcels are located?

Mr. Chairman, if the Committee finally is ready to focus its attention on those extremely important policy questions, and if it would be useful to the Committee for me to do so, I am available to share my views regarding those questions with the Committee at any time and in any forum of its convenience.

Thank you.

The CHAIRMAN. Thank you, Mr. Mitchell.

Let me ask both, Mr. Anderson and Professor Routel. You both have testified that a legislative fix is needed here. Could you elaborate on that just a little bit more, please?

Mr. ANDERSON. Certainly. I think there are basically two elements of a legislative fix, one that would ratify and make clear that all prior decisions, under the Secretary's presumed authority for 70 years, is valid—that would be one element—and, second, that, for future acquisitions, the Secretary would clearly have the authority for all tribes, that there is not a second class of tribes for those that were not under jurisdiction in 1934, but for all tribes, just as Congress did in 1994, when it said that there was no difference between created and historic tribes.

So I think those two elements of basically an affirmation or ratification of prior conveyances and then a clear authority for future conveyances would be the two major elements of legislation.

I think it would not have to be terribly complicated or long. The other IRA fixes were fairly brief, legislative, statutory language fixes, and I think the same thing could be achieved here.

Ms. ROUTEL. I would agree, I think, fully with that response that it is two pronged. You need to make sure that Congress is ratifying the actions that have taken place in the past and then also assure that, going forward, all tribes, not matter when they were recognized or allowed to receive the benefits of the IRA. I think, today, you could just do that by eliminating the phrase, "now under Federal jurisdiction," from the statute.

Today, the word "recognized" is a term of art, and it means a tribe that is believed by the Federal government to be an Indian tribe with a government-government relationship, and it is a tribe under Federal jurisdiction.

Back in 1934, the term "recognized" was used in the cognitive sense; that is, the Federal government knew of this tribe.

So, today, clarifying and using that word as a term of art, I think, would clarify the matter.

The CHAIRMAN. Mr. Anderson, as we all know, major crimes committed on Indian lands are Federal offenses. Is it possible that individuals who are convicted of a Federal crime may challenge their conviction by arguing that their tribe was not under Federal jurisdiction in 1934?

Mr. ANDERSON. Yes. I think that is a distinct possibility, Mr. Chairman. When a defense attorney, particularly on appeals, is looking for new, creative ways to challenge a conviction, jurisdiction sometimes, in Indian cases, whether it is a crime committed on fee land or allotted land or within a checkerboard reservation, frequently jurisdiction is seen as a potential challenge to that conviction.

Here, the fundamental acquisition itself could potentially be challenged, and so I think clever criminal defense attorneys across the country could look at this decision and mount potential challenges.

The CHAIRMAN. Mr. Mitchell, let me ask you, could certain government activities, such as operating medical facilities, social services, and providing low-income housing, operating on post-1934 land in trust, have their Indian land status be challenged?

Mr. MITCHELL. I am not sure, Mr. Chairman, that the land status necessarily would be completely relevant to that, in the sense that, in the Indian Self-determination and Education Assistance Act and other various statutes, Congress has defined certain Native American groups as tribes for purposes of those statutes, and most of the kinds of programs that you are talking about come through those statutes, and the eligibility of a group, as an Indian tribe, for purposes of those statutes, I think, is not affected by this.

I think, in response to what Mr. Anderson just said, as I indicated in my testimony, what is lurking out here as the elephant in the room is that Congress certainly has the constitutional authority to create new tribes. However, this Committee was told, in 1978, or, actually, a Subcommittee, the Indian Affairs and Public Lands Subcommittee, that there really was no statutory authority for the Secretary to get in the business of recognizing tribes, but, nevertheless, that has been going on for 30 years.

You bet, if I was an attorney that had an attorney-client responsibility to someone that became entangled with one of those tribes, if it was advantageous to me and my client, you bet I would challenge the tribal status of that group. That is why this, as I said in my opening testimony, is a mess.

Mr. ANDERSON. Mr. Chairman, may I just make a comment to that?

The CHAIRMAN. Sure.

Mr. ANDERSON. One, Congress does not create tribes. Congress recognizes or acknowledges the inherent authority of tribes that have been in the U.S. from time immemorial, so it is not a creation of a tribe but an acknowledgement of an inherent authority.

Second, while criminal defendants and their lawyers could challenge trusts and land acquisitions, I do not think they would be successful. I think the Quiet Title Act and other policies of the Federal government would prevent that so that they would lose in court. It would be a litigation, I think, headache for the Federal government. I think they would prevail.

In response to Mr. Mitchell's comment about status, even the Supreme Court did not go to the issue of the status of the Narragansett Tribe. No courts have upheld or reversed the Secretary's authority, under the Federal acknowledgement procedure, or congressional recognitions of tribes, and so I think any theory that would suggest that there could be a court that would undo tribal status is really at the fringe.

The CHAIRMAN. Professor Routel?

Ms. ROUTEL. Yes. I would like to quickly respond to a point that I think Mr. Mitchell has made on more than one occasion, and that is that the Executive Branch does not have the authority to recognize tribes but Congress does exclusively. I think it is wrong, as a matter of law.

If you look at the Organic Act, 25 U.S.C. Section 2 or Section 9, Congress has delegated the Department of the Interior very broad authority to make regulations in Indian affairs, and the Executive Branch has been recognizing, and ceasing to recognize, Indian tribes since this country was formed, and it was solely the branch that made these recognition decisions throughout the 1800s and throughout most of the 1900s.

While Congress certainly has plenary authority and can recognize Indian tribes, this Committee and other committees have routinely told tribes, "Please go through the OFA process." It is a formal process set up by the Department of the Interior, and they are the ones best equipped to analyze the historical information and to figure out if you truly have existed as a tribe continuously, and I think it would be quite unfair if Congress has been telling these tribes to go through this process, and they have spent 20 or 30 years going through that process, and they are now recognized, and the end result is that they do not have Federal recognition, and that recognition could only be extended by Congress.

Mr. MITCHELL. Mr. Chairman?

The CHAIRMAN. Yes, Mr. Mitchell.

Mr. MITCHELL. At the risk of allowing this to descend into a very, what I would consider, entertaining debate between the panelists, I would say that, with all due respect, everything you have just heard is legal nonsense, and that is not me saying it is legal nonsense; it is the former Member of this Committee, Representative Lloyd Meeds, who says that it is legal nonsense.

As the Chairman knows, how served with Mr. Meeds, Mr. Meeds was not only a wonderful human being who was a great personal friend to me, but he was a very smart lawyer, a very smart lawyer, and when this entire tribal recognition, inherent-sovereignty nonsense started with the American Indian Policy Review Commission, of which Representative Meeds was the Co-Chair, this stuff was too much for him, and he spent a great deal of time writing over 100 pages of minority dissenting views about this very issue.

I would encourage any Member of the Committee who truly believes that what you have just heard from the other panelist is legally true to do not pay a single word of attention to what I tell you but go back, get a copy of the American Indian Policy Review Commission, pour a cup of coffee or a glass of wine or whatever, sit down at night, and start at the beginning of Representative

Meeds's dissenting views and read it through to the end, and, at that point, you decide which of us here is right this morning.

The CHAIRMAN. To be continued but not on my time. The gentleman from Washington, Mr. Hastings.

Mr. HASTINGS. Thank you very much, Mr. Chairman.

In your opening remarks, Mr. Mitchell, you kind of might have anticipated a question I was going to ask, but I did want to ask all of you if you or your firm have any clients that are affected by that Supreme Court decision, and, for the record, Mr. Mitchell, we will start with you.

Mr. MITCHELL. Mr. Chairman, no, I do not. What I would say is I, obviously, am from Alaska. There was an incident back in the late 1970s where an ANCSA Village Corporation—I do not want to bore you with the Alaska situation—but the Venetie Village Corporation, which later led to the U.S. Supreme Court decision from Venetie, they took their ANCSA fee title land, the village corporation, conveyed it in fee to the IRA counsel that was still up in that community. The IRA counsel then went to the Secretary, in the late 1970s, and said, "Take all of this land back into trust under Section 5 of the IRA."

The associate solicitor for Indian affairs, at that point, took a look at this entire affair and said, "It would be an abuse of discretion for me to do so because Congress had made the decision that there was not going to be trust land in Alaska," and that is where it was left until Solicitor Leshy, on his way out the door, rescinded that opinion. But there is none of that in Alaska at the time——

Mr. HASTINGS. But you do not represent any tribes right now?

Mr. MITCHELL. No, I do not.

Mr. HASTINGS. That is my question.

Mr. MITCHELL. No, I do not.

Mr. HASTINGS. OK.

Mr. ANDERSON. Yes, Mr. Hastings. Our firm represents American Indian tribal governments. All would be concerned about the Carcieri decision and be looking to look at its impacts. At least one is in litigation, where private plaintiffs have raised Carcieri concerns, and so I certainly do represent tribes that have a valid interest, I think, in the outcome of this hearing and also interested in litigation positions that will be developed.

Mr. HASTINGS. OK. Dr. Routel?

Ms. ROUTEL. I am not currently representing any tribes that would be affected by the Carcieri decision. About two years ago, I embarked on this academic career, and, since then, I have restricted my practice primarily to just pro bono projects and submitting amicus briefs, like in this case, where I believe that there is a history or an academic perspective that may be useful to the Court.

I am still related as of counsel to an Indian law boutique firm in St. Paul, Minnesota, called Jacobson, Buffalo, Magnuson, Anderson & Hogen, and, to be honest with you, I have no idea whether they are representing tribes right now that may be affected by Carcieri. Primarily, our relationship is they continue to maintain my malpractice insurance so I can work on these pro bono cases, and I am not really involved in their day-to-day legal work.

Mr. HASTINGS. OK. I want to ask a question of all of you, if you would. Under that decision, how many tribes today were neither recognized nor under Federal jurisdiction in 1934, and how many acres of lands had been placed in trust for these tribes, pursuant to the Indian Reorganization Land, any of you?

Mr. ANDERSON. Since the IRA was passed, about four million acres have been taken into trust. I do not have the calculation of the tribes that may have been affected.

The question you asked, Mr. Hastings, about——

Mr. HASTINGS. Turn on your microphone. I do not think your microphone is on.

Mr. ANDERSON. I am sorry. About four million acres have been taken into trust since the IRA was passed for all tribes. There is not a calculation as to which tribes have been potentially affected by this decision and what that allocation is, but, really, depending on how you interpret the phrase, "under Federal jurisdiction," many tribes could be affected or even virtually none.

So, at this time, it is hard to say if anyone is going to be affected by this. Certainly, though, plaintiffs will raise challenges if it says tribes are affected by this decision. But, as I mentioned in my opening statement, if you take a very broad view of jurisdiction, you know, equating to Congress's powers, then basically every tribe now is under jurisdiction.

Mr. HASTINGS. Mr. Mitchell?

Mr. MITCHELL. Mr. Chairman, I do not know the answer to that, but it is an excellent question, and one of my thoughts about this is, I do not believe that this Committee or Congress can legislate until it has a clear answer to that question.

I know that the Committee has refrained from getting the Department up here until its new political staff is in the game, but once that happens, I think it would be appropriate for them to send up a list of every single tribe that has been created since 1934 to identify with specificity how that tribe was created. Was it an act of Congress? There are many tribes that were created by act of Congress since 1934.

Was it the Secretary of the Interior, through this administrative process, that Representative Meeds and I both believe is legally bogus, or was it a court, such as what has happened with all of the California rancherias, some of which have one person in the tribe?

Let us find out, with specificity, how these people became a tribe, and then let us find out, if they have trust land, how they got that trust land. That could be put on paper. That is a task that the Department could provide for the Committee, and, after the Committee gets that information, it is the Committee's prerogative, not any of us, to figure out what the implications of that are.

Mr. HASTINGS. Ms. Routel?

Ms. ROUTEL. I think this is a very difficult question because, as I mentioned, there was no list of recognized tribes under Federal jurisdiction when the IRA was passed in 1934.

After it was passed, John Collier essentially sat in his office for the next year and came up with a list of 258 tribes that he believed should vote on the IRA, but that list cannot be viewed as an exclusive list of tribes recognized and under Federal jurisdiction because, to vote on the IRA, you had to have had a land base. You

already have land or a reservation. That was a requirement in Section 16 of the Act that has since been deleted by Congress.

So there may be additional tribes that should have been on the list but were not simply because they did not have land.

Also, it is not clear whether Collier's decision should be given conclusive weight, if he forgot about a tribe that was recognized and under Federal jurisdiction, what that should mean.

I did attempt to signal the issue to the Supreme Court in terms of how large a number we were talking about by including an appendix in the law professor's amicus brief that lists each tribe that has been recognized in some way from 1960 to the present, whether by the Executive Branch, by Congress, in the Executive Branch, either by informal or formal procedures through that 25 C.F.R., Part 83.

I would be happy to provide the Committee with that list.

I started in 1960 because it is very difficult to determine what the Department of the Interior was doing between 1934 and 1960. It continued to recognize tribes without really indicating whether it was st getting around to acknowledge that they were under jurisdiction in 1934 or whether this was a tribe that they did not believe to be under Federal jurisdiction. The reason for that is the Department of the Interior interpreted this provision differently than the court did. So it is a difficult question.

I would like to say one other thing about California rancherias, since I did notice this in Mr. Mitchell's testimony. I do not think most of them are at play in this case because those are tribes that existed at the time of the IRA. They were terminated by Congress, or attempted to be terminated by Congress, in the fifties and sixties, and a court decision restored them to Federal recognition, deciding that their termination had been invalid, but, for most of these tribes, there is no claim that they were not tribes——

Mr. HASTINGS. As interesting as maybe the differences that you have, Mr. Mitchell has expressed that he, at least, thinks we should have that information.

Let me ask you two, before the Committee moves on whatever our solution may be on this, do you think we should have information based on the question that I asked you, how many tribes, and how many acres? Do you think we should have that information before we move forward?

Mr. ANDERSON. I would respectfully suggest that you do not need a list. I mean, the impact is broad. Whether you calculate exact numbers, the potential is very large. Having Interior do the analysis on all of these tribes to determine whether they are, in fact, impacted, I think, would take you several months, or maybe years, to do, and, rather than have that list really be misinterpreted, I think it would be a better course of action just to understand that there are many cases where this may affect a tribe.

Mr. HASTINGS. Dr. Routel, would you think that we should have that information?

Ms. ROUTEL. Well, I think it would be helpful. I agree that it is really impossible to determine that in a short period of time, just because, for each tribe, you are going to need to go through all of the correspondence with their Indian agent, figure exactly what kind of services they had in the 1930s.

Historically, this takes an immense amount of time for tribes to assemble, and I believe it would actually be years to create that kind of a list.

Mr. HASTINGS. Well, thank you very much, and thank you for indulging me, Mr. Chairman. I notice that, on that question, we had three different answers from three different panelists.

The CHAIRMAN. The gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. Thank you very much, Mr. Chairman.

Mike, or Mr. Anderson, you said that the Federal government, whether it be Congress or the Executive Branch, does not create Indian Nations, and that is certainly true; we recognize them. Article 1, Section 8, says: "The Congress will have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

So we do not create. We cannot create. They have a retained sovereignty. We do not create Indian tribes any more than when we recognize Bosnia, they celebrate and say, "The United States created this." No, the United States recognized Bosnia, the recognized France, and they recognized England. It is a recognition. It is not a creation, and I think that is one of the things that many people in Congress do not quite understand.

I carry this Constitution with me all of the time, and in talking about commerce, at least, it puts them at the same level: foreign nations, the several states, and the Indian tribes. It is sovereignty.

So I think, again, your point is very, very important in promulgating all of our thoughts on this, that this is a question of recognition and not creation.

Mr. Anderson, one of the things I worry about is that we are going to be creating perhaps another category of Indian sovereign tribes, those at 1934, those after 1934, who may have done it through the Congress, and before I suggest a third category, did the Supreme Court decision here nullify what we used to call the "bar decision," now the "FAP decision"? Did it nullify that?

Mr. ANDERSON. No. It did not nullify the status of the tribes, and no court has nullified a recognition of a tribe through the FAP process, and so that is very good authority, and then Congress, even in 1994, said expressly that tribes could be recognized through the FAP process.

Mr. KILDEE. So what Congress did in 1934—that was a congressional act—Congress can have subsequent legislation, too. That becomes law, does it not?

Mr. ANDERSON. Absolutely.

Mr. KILDEE. Thank you very much, Mr. Anderson.

The CHAIRMAN. The gentleman from Louisiana, Mr. Cassidy.

Mr. CASSIDY. I am new to this body of knowledge, and so I am new to this body. So if what I say seems already common knowledge, I apologize.

But following up what Congressman Hastings asked, it almost seems like some of your reservation about reviewing all of this material is that it would take so long and would be so involved, and yet kind of a constant theme of this testimony is the ambiguity created by previous legislation, which has then been seen as an avenue by the Bureau of Indian Affairs or otherwise commented on.

Is it possible just to take the material that we could get, in a relatively short period of time, and create a metric by which future decisions could be guided? So in that metric, we would have, OK, was it recognized before 1934, and did it go out of existence, or how many tribe members are there, whatever things that you know far more than me.

So, as opposed to attempting to get an exhaustive list and coming up with an answer for each, rather, getting as much of a list as we can and establishing what appears to be a fair metric with which to approach the rest, does that make sense?

Mr. MITCHELL. Mr. Chairman, I, of course, think it makes perfect sense, and this whole exercise is not that difficult.

In 1994, Congress directed the Secretary to annually publish a list of the Native American entities that he or she, depending upon who the Secretary was, believed to be Federally recognized tribes. Now, that list exists. It is quite simple to go through that list and mark the ones that were created after June of 1934.

Then, with respect to each of those, you do not have to do what the professor suggested, in terms of go to the National Archives. The solicitor says, "Well, how did these people get to be a tribe?" and he tells you, under the heading of the tribe, and then he can look and say, "Well, it was after 1934, did they have a land base? How did they get the land base?" This is not rocket science.

The other thing I would say, because I think it is important to put on the record, as long as we are actually getting to the bottom of this, is that I know that Representative Kildee has very strong views about inherent tribal sovereignty. I understand that, and I mean those no disrespect.

However, again, Lloyd Meeds said that that entire invention was a "political notion" that was being transformed into a "legal doctrine," and, in addition to citing Representative Meeds, there is no more authoritative and influential Native American historian and attorney in this country than Vine Deloria, who was the Executive Director of NCAI, for goodness sakes, and, in 1984, Professor Deloria wrote this book, The Nations Within, which is his spin on the Indian Reorganization Act, and he goes on at great length about how Felix Cohen bamboozled Congress.

After the IRA was enacted, he came back to his office, and he invented a solicitor's opinion that, out of the sky, invented inherent tribal sovereignty, and even Vine Deloria says that "modern tribal sovereignty begins with this solicitor's opinion, although it would be another generation before Indian tribes would understand the difference and begin to talk in the proper terms about their status."

This is not Don Mitchell; this is history. This is law, and this has drifted for 30 years, and it is great. The Carcieri decision has motivated the Committee and the Congress to finally pay attention to what has gone on here.

Ms. ROUTEL. If I may respond to that question also, I think it might be helpful to use an example here, and I am going to pick an example from Representative Kildee's state, the Grand Traverse Band of Ottawa and Chippewa Indians.

This is a tribe that had an ongoing treaty relationship with the United States in the 1800s, and, to me, treaties symbolize that you are a sovereign. If you are not a sovereign, if the United States is

not recognizing your sovereignty, it would be entering into contracts, and it would have to enter into contracts with every single tribal member to take tribal land. But the United States thought the Grand Traverse Band was a sovereign, and that is why it entered into a treaty that was ratified, multiple treaties ratified, by the Senate.

In the late 1800s, and this interpretation continued through the 1930s, the Executive Branch misinterpreted one provision from this 1855 treaty and thought that the tribe had agreed to dissolve itself. Since then, historians have gone back over the treaty journals, and they have looked at correspondence, and they all agree that the treaty provision was not meant to dissolve the tribe.

Mr. CASSIDY. But let me ask you, just because I think the light is about to flip off, is there a metric with which you could take that through and say, "What is the validity of that misinterpretation, et cetera?"

Ms. ROUTEL. What I am saying to you is that they might not have been considered to be under Federal jurisdiction because of a mistake in 1934.

Mr. CASSIDY. But couldn't you put in the metric where, if they did, they would lose their recognition from a mistake? If so, then, therefore, you are prejudiced to believing that they have recognition. Do you follow what I am saying?

Ms. ROUTEL. Sure, and I think you could, but I think the important point is that all of these tribes have proved that they were an historic tribe and that they were continuously existing as a tribe since historic times to the present. That is what it takes to get recognized through the FAP process today.

So any decision, really, in 1934 that these groups were not tribes was a mistake, or it was an omission, and that is why looking back at that historical period is not really very helpful to Congress in considering how to move forward.

Mr. CASSIDY. So what I gather from you, it is going to be critical how you draft the metric. A metric could potentially work, but the question is, how do you draft the metric? A fair statement?

Ms. ROUTEL. Sure.

Mr. ANDERSON. If I could have 30 seconds to respond to Mr. Cassidy.

A metric that says that the standard is whether you were under Federal jurisdiction would probably eliminate most of the tribes from the Carcieri decision. Even Justice Breyer said, "This may be less restrictive than it first appears."

The only case it applies to right now is the Narragansett because the Court found facts that suggested that they were not under their jurisdiction, but those facts have not been adjudicated or laid out for other tribes.

So to try to create a list of just tribes that were even recognized in the 1990s or 2000, I think, would be very misleading to put them on a list, when, as Ms. Routel said, some tribes, the Supreme Court even acknowledged, by Justice Breyer, that tribes being acknowledged in the 1980s or 1990s were not affected by the case.

So I just think how you design the metric will be very important, and I think, if it is designed properly, it is probably not going to have many tribes on the list.

The CHAIRMAN. The gentleman from America Samoa, Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I just wanted to ask, first, a question. I believe there are currently 569 Federally recognized tribes in the books, and I wanted to ask the panel, based on the Supreme Court's decision, what does this mean? Do we have to go through every one of these tribes to look at if it is in compliance with the most recent decision now that the Supreme Court has made, get rid of their lands and whatever it is that was made since the IRA Act in 1934, Professor Mitchell?

Mr. MITCHELL. Yes. Mr. Chairman, the short answer to that, in my view, is yes, which is why this is a mess. I would say that half of those purported tribes come out of my home State of Alaska, where Assistant Secretary of Indian Affairs Ada Deer waved a magic wand in 1993 and blessed them all as tribes.

So that is presently at issue up there and always has been ever since, so let us just take them out of the play. So that leaves you about 250. Of those, you have got——

Mr. FALEOMAVAEGA. My time is limited, and I do not want to get into that.

In essence, what is your best recommendation of how we can cure this problem that the Supreme Court has now presented to the Congress to fix? I assume this is really what the Supreme Court wants us to do, to fix the problem.

Mr. MITCHELL. Well, no. You may recall when Chief Justice Roberts was——

Mr. FALEOMAVAEGA. By the way, this is not a very persuasive decision because it was a split decision. Justice Stevens, I thought, gave a very good dissenting opinion. The other three justices were half and half. In fact, they even recommended that the case be remanded back to the lower courts for reconsideration.

So I just wanted to check with you, but this case is not persuasive.

Mr. MITCHELL. With all due respect, I call it eight-to-one.

Mr. FALEOMAVAEGA. Eight-to-one when it is——

Mr. MITCHELL. Be that as it may, I was going to say about the Supreme Court that when Justice Roberts was being confirmed——

Mr. FALEOMAVAEGA. Please, I do not want to get into the history. I just want to say to the point I wanted to suggest, even adding another question, Professor Mitchell. How did we end up with Native Alaskans being defined as the same equal status as American Indians when there were no Indians, and, as far as Alaska, there was not even the State of Alaska at the time?

Mr. MITCHELL. Representative, I spent 18 years writing two books about that, and I would be happy to send both of them to you.

Mr. FALEOMAVAEGA. Well, I am curious because the natives of Alaska are indigenous peoples to the state, the same way that American Indians are indigenous to the state, and the same problem we are faced with the Native Hawaiians that are indigenous to their state, and yet they are being denied the same status as Native Alaskans.

Mr. MITCHELL. At the beginning of the assimilation era, in 1884, Congress laid down the marker in the Alaska Organic Act that it

was going to have a Native American policy in Alaska that was completely different from everything we have been talking about this morning.

I am not defending it. I am not not defending it. I am just telling you, that is the historical reality——

Mr. FALEOMAVAEGA. Would you say that that was a mess also?

Mr. MITCHELL. No. I am telling you that Congress did that, and I would say, in terms of the Supreme Court, I was going to say about Justice Roberts, when he was being confirmed, and he was asked about this, he says, "You know, my job, as the Chief Justice of the Supreme Court, will be to just call the balls and strikes."

Mr. FALEOMAVAEGA. Yes, I know.

Mr. MITCHELL. And they called the balls and strikes on this one. Whether or not Congress wants to deal with it, I do not think—the Court does not have an institutional interest.

Mr. FALEOMAVAEGA. Professor Mitchell, taking back my time, I believe you. There is no question; there seems to be consensus that the majority of the Court, as it now stands, are strict constructionists of the Constitution; at least, that is how they interpret themselves.

So one little word, three-letter word, "now," has upset the whole basis of 75 years and all that has been done. You are saying that it was just a bunch of baloney.

Mr. MITCHELL. I am saying, as a lawyer, that words have consequences, and that is why there is a legislative counsel today sitting in the basement of the Cannon Building, the last time that I looked, that would not allow this situation to happen.

I have thought that it would be fun if you took Congress's policy choices in the IRA from 1934 and allowed technicians, like all of us today, to redraft that, it would look completely different.

Mr. FALEOMAVAEGA. Reclaiming my time, Professor Mitchell, we could talk about history until we are blue in the face, but the fact of the matter is, this is where we are at, and I am trying to get some best-offered suggestions on how we can cure the situation.

I would like to ask Mr. Anderson and Ms. Routel for their quick opinions before the red light comes on.

Mr. ANDERSON. If we ratify all prior conveyances made by the Secretary, and then we make it clear that the Secretary has authority now to take land into trust for all tribes, just one comment. Even the Alaska Supreme Court has upheld the sovereignty of Alaska Native sovereignty. The Congress has also recognized them through the list and, in addition, even Alaska tribes were formed under the IRA. So there is a long history of native sovereignty that shows the positions as espoused by Mr. Mitchell are totally not credible.

Mr. FALEOMAVAEGA. Ms. Routel?

Ms. ROUTEL. I would just second what Mr. Anderson has said. I really do not think there is any need to go back and redig through historical materials from the 1930s. I do not think that is relevant to Congress deciding how to proceed in this case.

Congress has authorized, through historical statutes and through shuttling tribes to the Executive Branch, Congress has authorized these tribes to be recognized and has continued to recognize these tribes, and the Supreme Court's decision really does not change

anything going forward, I think, in terms of Congress's policy, which is self-determination and economic self-sufficiency.

Giving these tribes less rights, when they are often the tribes that have been hardest hit; the mistakes that the United States has made them lose all of their land, and they are only now regaining a footing, and there is no reason to further that injustice by now deciding that they are going to be permanently second-class citizens.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

The CHAIRMAN. The gentlelady from Wyoming, Mrs. Lummis?

Mrs. LUMMIS. Thank you, Mr. Chairman. My apologies for joining this hearing late, but thank you, panelists, for joining us today.

My first question is for Ms. Routel. You state that the U.S. Supreme Court's recent decision threatens to eliminate important IRA benefits for many Indian tribes. Are you suggesting, then, that the decision affects not only the Interior Department's ability to take land into trust but other sovereignty benefits granted to tribes Federally recognized after 1934?

Ms. ROUTEL. I am. The definition that the Supreme Court was interpreting is the term "Indian" and actually the term "tribe" as well in the Indian Reorganization Act.

So, as an initial matter, any tribe that does not fit the Supreme Court's interpretation of that definition does not receive any of the benefits of the IRA. So individual members would not receive preference in hiring in the BIA. The tribe would not be permitted to continue as a constitutional government organized under the IRA. They would not be allowed to have those business corporations organized under Section 17.

So this is an issue that affects not only the ability of the Department of the Interior to acquire trusts for these tribes under Section 5 but essentially all of the IRA.

In my testimony this morning, I tried to highlight that Congress, in the years since 1934, has sometimes tied new benefits to the definition of "tribe" or "Indian" in the IRA, and we really need to look through all of those statutes, but the scope is going to be even broader than just those specific rights that are included in the IRA.

Mrs. LUMMIS. OK. Mr. Chairman, is it safe to say that your opinion is that the IRA should be interpreted to apply to tribes once under Federal jurisdiction rather than now under Federal jurisdiction?

Mr. ANDERSON. I would say the IRA should apply to all recognized tribes. Once a tribe is on the Federally recognized tribes list, then they should receive all of the benefits of the IRA.

Mrs. LUMMIS. OK. I have a memo here that Committee staff prepared, and they make a statement here that I want to run by you and see if you agree, and I would like to know if each of the three of you agrees.

The sentence is this: "The decision implies—" meaning the Carcieri decision—is that how you pronounce it?——

Mr. ANDERSON. Carcieri.

Mrs. LUMMIS.—Carcieri, thank you—"the Carcieri decision implies that Congress, and not the Department, was meant, by the authors of the IRA, to decide whether or not to acquire lands in

trust for tribes not under Federal jurisdiction in 1934." Do you agree with that statement or disagree with that statement?

Ms. ROUTEL. Could you repeat that one more time?

Mrs. LUMMIS. OK. Here is the sentence: "The Court decision implies that Congress—"

The CHAIRMAN. Would the gentlelady yield for a clarification?

Mrs. LUMMIS. Yes, sir.

The CHAIRMAN. That it is a minority staff-prepared——

Mrs. LUMMIS. Yes, yes. OK.

The CHAIRMAN. The majority staff would always be more clear.

Mrs. LUMMIS. [Laughter.] It is a minority staff briefing paper, OK, and here is the sentence: "The Court decision implies that Congress, and not the Department, was meant, by the authors of the IRA, to decide whether or not to acquire lands in trust for tribes not under Federal jurisdiction in 1934."

So I am curious here about, does the decision put obligations to act on Congress?

Mr. MITCHELL. Mr. Chairman, my answer to that would be, yes, that is a correct statement, that my reading of it, and I have described this in my written testimony, is that Congress and Commissioner Collier, in 1934, thought they were dealing, in my view, with the known universe, which was that there was not going to be any new tribes after 1934. You might have to go through some drill to figure out what tribes were there in 1934, but we are doing something in the IRA for the tribes that existed.

I see nothing, in my research over the years, having read all of the central office files of the BIA from 1933 all the way up to 1953, that indicates to me that they ever thought that Congress was going to start off creating additional tribes.

Now, if Congress wishes to do that, and it has in a number of statutes, then Congress then needs, in my view, to make a decision about what authority to delegate to the Secretary for that particular newly created tribe with respect to land. Maybe it wants to give it land; maybe it does not. That is Congress's business. But, yes, that is a factual statement as to what happened in 1934, you bet.

Mrs. LUMMIS. OK. Thank you. Mr. Anderson, do you agree?

Mr. ANDERSON. I think the IRA had very express, delegated authorities to the Secretary of the Interior. The Secretary of the Interior would not have authorities outside of the IRA, unless there was another statute. So I would agree that the language of the IRA is really the foundation of the Secretary's authority, and if the Secretary wanted to engage in additional acquisitions outside that authority, he would need Congress's approval.

Mrs. LUMMIS. Mr. Chairman, may I ask Ms. Routel to respond as well? Thank you.

Ms. ROUTEL. I think I agree with the statement, in that the way that the Supreme Court has interpreted the IRA, it means that the Secretary of the Interior can only acquire lands for these tribes that were recognized under Federal jurisdiction in 1934, and, therefore, you could imply that, for other tribes, either Congress needs to take land into trust, or Congress needs to go back and delegate that authority to the Secretary of the Interior.

I think what I am asking this Committee to do is to put forth a bill that would delegate the authority to the Secretary of the Interior that, in my mind, would correct the Supreme Court's decision.

Mrs. LUMMIS. OK. Thank you. Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you. The gentlelady from the Virgin Islands, Dr. Christensen?

Mrs. CHRISTENSEN. Thank you, Mr. Chairman, and thank you for holding this hearing so quickly upon the Supreme Court's decision, which threatens to set this country back and the first Americans back to some earlier times, and our determination is that that is never going to happen.

I have a few questions. Michael Anderson, the 1994 solicitor letter that you submitted concerns Section 16 of the IRA. Why or how does that affect the other provisions of the IRA?

Mr. ANDERSON. Well, it should have no effect, at this stage, but, at the time, what the Interior Solicitor's Office did, the Division of Indian Affairs branch of government in Alaska, was to devise a difference, really, two classes of tribes: one they called "created" when they were formed as an adult community of Indians on the reservation and then what they called "historic," tribes that are traditionally recognized through treaty rights or have reservations.

So Congress repaired that in 1994. The concern is that old lists could be revived in the context of whether the tribe was under Federal jurisdiction in 1934, and so this whole created historic distinction, which has been roundly rejected by Congress, could be revived in some way.

I should also note, Congresswoman, that that letter was filed with the Supreme Court in a lodging without the corrected memos that also interpreted and showed that Congress reversed that decision, and I think it was a misleading filing.

Mrs. CHRISTENSEN. I guess I would ask you and Attorney Mitchell, when the Dictionary Act was passed in 1947 that provided that when interpreting acts of Congress, unless the context indicates otherwise, words used in the present tense, like "now," include the future as well as the present, did not that clarify this issue?

Mr. MITCHELL. Well, I can only respond, based upon how the U.S. Supreme Court looked at that, and they indicated quite clearly in the opinion they looked at Black's Law Dictionary, and they looked at other dictionaries, and it was their view that the common dictionary meaning of "now" was "now," as in now, 1934. That was their call on it.

That would be how I would come out. If this was a statute that dealt with, you know, agriculture policy or something, and you were just doing statutory construction, I would come out in the same way.

Mr. ANDERSON. Yes. I think the First Circuit found that "now" is ambiguous and actually ruled in favor of the Narragansett.

The Dictionary Act, I think, was probably not applied here because there was more specific legislative history that the Court looked at rather than simply the phrase itself.

Mrs. CHRISTENSEN. OK. Both to Mr. Anderson and Ms. Routel, by calling into question which Federally recognized tribes are or

are not eligible for the IRA's provisions, could the decision threaten the adoption of tribal constitutions, the creation of tribal corporations, or debt obligations, or the validity of tribal business enterprises, and, in turn, undermine certain kinds of contracts and loans entered into by certain IRA-organized tribal governments?

Ms. ROUTEL. Yes and no. I mean, I think, after the Native American Technical Corrections Act, Congress has made it clear that tribes can organize constitutional governments outside of the Indian Reorganization Act, and, of course, tribes can organize tribally chartered business corporations or state-chartered corporations.

I think it still would be a tremendous loss for recently recognized tribes to not receive the benefits of the IRA because, as a non-Indian business, if you want to do business with a tribe, one thing that you are looking for is certainty, and that is, in a way, what the IRA provides.

If you have a Federally chartered corporation, you know it is not something that can just, poof, not be there the next day. If you have a Federally approved constitution, there is a process that you have to go through that is quite lengthy to amend the constitution.

So businesses, when they look at tribal governments that are formed under the IRA, or corporations formed under the IRA, they feel, "I have a lot of certainty about the deal that I am doing and that this corporation and this constitution will stay the same throughout the time period of the deal," and I think that is a very important provision for tribes that are looking to get capital in today's market.

Mr. ANDERSON. Just with respect to loans, if a lender is making a loan, and the collateral is trust land or businesses on trust land, not on the trust land itself, I think, and this decision has now been widely circulated, I think that lender is going to have some real concerns and may either decline the loan or raise the interest rate to carry that risk and have to get insurance to cover that risk. So it is going to have a profound impact, I think, on pending transactions.

Mrs. CHRISTENSEN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Arizona, Mr. Grijalva?

Mr. GRIJALVA. Thank you, Mr. Chairman.

Professor Routel, I think you mentioned in your testimony that Congress should fix the definition of "Indian" to correct the Court's decision. What would you recommend that definition be changed to?

Ms. ROUTEL. Today, the term "recognized tribe" is a term of art, and it does mean tribes that have a government-to-government relationship with the Federal government, and that is different from its usage in the IRA in 1934, when it was referring to known tribes in the cognitive sense.

So, really, today, all that you would need to say is that recognized tribes have all of the same benefits, under the IRA and under all other congressional statutes; that is, there is no two-tiered system.

And then, I think, as Mr. Anderson pointed out earlier, you would also need to clarify and make sure we have ratified all of the

past Executive Branch actions that occurred before Congress made that fix.

Mr. GRIJALVA. Let me just, if I may, Professor, a fellow panelist, Mr. Mitchell, in his testimony, said he believes the purpose of the IRA was to further the assimilation of Indians. You testified that the IRA was designed to promote tribal self-government. Tell me about that consistency.

Ms. ROUTEL. I think you can come to two different conclusions if you do not read the legislative history as a whole; that is, if you just go into the testimony, and you cherry pick what particular senators or particular representatives were saying because the IRA was a sea change. It was the beginning of an Indian "New Deal," and it was a change in Federal policy toward self-determination in tribal management.

Now, not everybody was on board with that sea change when it happened, and so, for example, I have talked about Chairman Wheeler's discussion with John Collier in the Senate Committee on Indian Affairs hearings, but John Collier was the primary proponent of the bill, and he was the primary drafter of the bill, and he spent a lot of time with Indian tribes in the Southwest and was convinced that assimilation had been a terrible policy for them and that what the government should be doing is allowing tribes to manage their own business and to preserve and protect tribal culture and tribal traditional governments. That, I think, is the well-recognized, scholarly view of the IRA.

Mr. GRIJALVA. And that is the policy position that prevailed.

Ms. ROUTEL. Yes. That is the policy that still prevails today.

Mr. GRIJALVA. Thank you. Mr. Anderson, it is estimated that, in Indian Country, Native Indian tribes have a significant amount of renewable energy—oil, gas, coal, et cetera—on their lands, including wind, solar, et cetera. How will the Court's decision affect the ability of tribal governments to develop these resources that they have?

Mr. ANDERSON. They could have a very negative impact on these tribes.

Just a couple of weeks ago, the Bureau of Indian Affairs announced a very large grant program for just the very types of programs you mentioned—alternative fuels, windmills—but you have to be on trust land. So if you are a landless tribe, and you cannot acquire this trust land, you are not eligible for a great program under the new Recovery Act.

Also, as I mentioned, loans, trying to get loans on current land could be a risk.

Mr. GRIJALVA. In your testimony, you talked about that virtually all tribes are under Federal jurisdiction under the proper interpretation of what that term means. Since Congress already prohibits the Department from treating tribes differently, should the proper interpretation be that once a tribe is recognized, it will be eligible for benefits and services, regardless of when or how it was recognized?

Mr. ANDERSON. That is a great formulation, yes, sir.

Mr. GRIJALVA. Thank you. Mr. Mitchell, going back to a point that the professor made, is it possible that this decision could cause two tiers of Federal recognition; in other words, two classes of trib-

al government: those that were recognized and under Federal jurisdiction since 1934, when the IRA was enacted, and those that were not, as a result of this decision?

Mr. MITCHELL. The short answer is, yes, that Congress said that it was delegating, in Section 5 of the IRA, a very narrow authority, and that authority goes to a certain class of tribes. There have been tribes that have been created, either lawfully or unlawfully, depending on who you want to talk to, subsequent to that date, and they are in another classification, and the Congress needs——

Mr. GRIJALVA. If I may, Mr. Mitchell, before my time runs out, it is your opinion that Congress should be the only body that can recognize Indian tribes and place land into trust for tribes.

Mr. MITCHELL. No. It is my opinion that, under the Indian commerce clause of the U.S. Constitution, that the Constitutional Convention of 1787, not Don Mitchell, has decided that that is how it should work. Congress certainly has the authority, constitutionally, if it chooses to do so, to delegate that, and we have not talked about the fact that Section 5 contains no standards whatsoever, and that was not at issue in the Carcieri decision, but that is the next thing that is heading like a freight train right at the Congress.

Mr. GRIJALVA. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from New Mexico, Mr. Heinrich?

Mr. HEINRICH. Thank you, Mr. Chairman.

Mr. Anderson, while Congress considers the best way to reverse this decision and make it clear that the 1934 Indian Recognition Reorganization Act applies to all Federally recognized tribes, and I guess I am communicating my bias on this issue, but is there a threat to lands currently held in trust for tribes whose status is in doubt as a result of that decision?

Mr. ANDERSON. Yes. I think there is a threat of lawsuits and challenges from some who may be opportunistic about this decision.

Mr. HEINRICH. In your opinion, what steps do you think that the Department can take to defend existing Indian lands from challenge under this decision?

Mr. ANDERSON. I think they should aggressively protect settled conveyances and use the Quiet Title Act to do that, to invoke the sovereign immunity of the United States to protect against those lawsuits.

Mr. HEINRICH. Ms. Routel, many tribes were recognized by the BIA and seemed to be under the phrase, "under Federal jurisdiction," in 1934, but, later, as you alluded to, the Federal relationship with many of those tribes, for instance, in California, was terminated and then later restored.

Does the Supreme Court's decision support a finding that once a tribe is terminated, the Department may still place land into trust for that kind of tribe?

Ms. ROUTEL. It does. I mean, that is one of the ironic parts of the holding, and I think it was something that was argued by both the United States and by a National Congress of American Indians in their briefing, which was that if you freeze recognition of tribes and of individual Indians in 1934, well, that means they are permanently recognized for purposes of taking land into trust, and, supposedly, the Secretary of the Interior could continue to acquire

land for these tribes that have been terminated, and that is particularly true, in light of the fact that the Court does view repeal by implications very narrowly.

So you would have to look at the Termination Act and say, "Well, hey, did it explicitly take away this authority from the Secretary of the Interior, or does that still survive?"

So I think it is one of the ironic parts about the decision.

Mr. HEINRICH. As you know, a number of tribes, many tribes, chose not to organize under the IRA. Did the BIA stop Federal relationships with those tribes, and are those tribes eligible to have land placed into trust for them under Section 5 of the IRA? Ms. Routel?

Ms. ROUTEL. I do not know of examples where the BIA chose to stop a government-to-government relationship with tribes that voted against the Act, and I certainly believe that the Department still thinks that it can acquire land in trust for them. You know, the New York Indians, for example, most of them voted against application of the IRA, and the Navajo Nation, of course.

So I do not believe this decision affects them, but we have yet to see how those arguments will play out.

Mr. HEINRICH. Mr. Chair, I will get ready here to yield back the balance of my time, but I do think it bears mentioning that the gentleman from Arizona, who just left, I think he really hit this issue on the head, that creating multiple classes of tribes is bad policy and, frankly, I do not think, a very moral approach to an issue that has been with us, as Mr. Kildee said, since we wrote the Constitution.

The CHAIRMAN. Thank you. The gentleman from Washington, Mr. Inslee?

Mr. INSLEE. Thank you. Maybe just a technical question. If this decision stands and is not remedied by Congress, who actually will become the owner of the property that the tribes have acquired?

Mr. ANDERSON. Well, I think it is very unlikely that the tribes will actually lose the Quiet Title Act defenses, but if they did lose the trust status, it would probably resort back to the tribe in fee, so they would still own it but without any preemption from the Federal preemption statutes.

Mr. INSLEE. So they would hold it just as any other fee-title holder, then——

Mr. ANDERSON. Exactly.

Mr. INSLEE.—without any trust application.

Mr. ANDERSON. The only consequence is maybe some abilities of the tribes are based solely on their trust land authorities. So, for example, some of these energy grant opportunities could be nullified by such a return back to fee-simple status.

Mr. INSLEE. I am sorry that I missed your earlier testimony. You have probably talked about this, but, as far as remedying this problem, just a simple do-over by Congress, saying, "These previous transaction are hereby deemed valid," and the blue ribbon seal of approval; that is doable. Is there any reason that that is constitutionally not doable?

Mr. ANDERSON. It is constitutionally doable, but also making clear that, for all tribes in the future, that they would also have those same authorities.

Mr. INSLEE. And who is voicing an argument that we should not do that?

Mr. ANDERSON. Today, no one has, as I understand it, weighed into Congress with an opposing view. There have been court cases, though, with people citing the current Carcieri case, to argue that certain transactions were not authorized, but I have not heard of any opposition to a bill to date.

Mr. INSLEE. So, Mr. Chair, I recommend unanimous consent to pass a bill that has not been written yet and solve this problem. I will look forward to that. Thank you.

The CHAIRMAN. The gentleman's suggestions will be taken into consideration.

The Chair is going to recognize Mr. Kildee for a second round of questions.

Mr. KILDEE. Thank you very much, Mr. Chairman.

Mr. Mitchell, you mentioned Lloyd Meeds, a mutual friend. I served with him here and had a glass of wine with him, as a matter of fact, at his home over here.

But I also read John Marshall. Now, I did not have a chance to have a glass of wine with him. I have been here a long time but not quite that long. John Marshall, in that very famous decision of *Worcester v. Georgia,* said, "The Indian Nations had always been considered as distinct, independent, political communities retaining their original natural rights as the undisputed possessors of the soil."

Then he goes on to say, "We have applied the words 'treaty' and 'nation' to Indians as we have applied them to the other nations of the Earth. They are applied to all in the same sense."

That is very strong language from a very famous decision of John Marshall. Now, Andrew Jackson did not obey that decision, but that was the decision of the Chief Justice of the U.S. Supreme Court, who gave us the principle of judicial review.

So while I respect Mr. Meeds' 90-page article, I am guided both by the Constitution and John Marshall's statement that it is a retained sovereignty, and the word "nation" is applied to Indian tribes, just as any other nation.

Mr. MITCHELL. As I indicated in my earlier remarks, I understand that you have very strong views about this, and I certainly mean those views no disrespect, but I would say that the Marshall opinions—someday, if I ever have nothing else to do, I would love to write a law review article about it.

John Marshall was not the Chairman of the Indian Subcommittee; he was a Federalist, and all of the Marshall decisions were Marshall enforcing Congress's will against the states. He was dealing with Federal treaties that state governments were not recognizing, and he shoved those treaties onto the states. He was enforcing the policy decisions that this Congress made, not just making stuff up.

To the extent he made stuff up, he was entitled to his opinion. I have not looked at those decisions in a long time, but my recollection is that those were multiple decisions in those cases by the U.S. Supreme Court, of which John Marshall opined with what he thought that day.

Mr. KILDEE. But he was not just someone sitting at the bar down maybe where the Willard sits right now. He was making those statements not as he was sipping his wine at some local pub. He was making those statements as Chief Justice of the U.S. Supreme Court.

You might want to demean him a bit by saying, "Well, he was a Federalist." Well, George Washington was a Federalist, too, not a bad guy. John Adams was a Federalist also.

Mr. MITCHELL. I am a Federalist.

Mr. KILDEE. God bless you.

Mr. MITCHELL. I was not using the term "Federalist" pejoratively by telling you that his decisions really did not have so much to do with Indians as they had to do with establishing some basic relationships between this Congress and the states at a very new time in our nation's history, and, as I said, John Marshall certainly had his views, but that does not mean that his views were the law.

Mr. KILDEE. I think, though, to determine the political affiliation of the Supreme Court is probably as useful as us trying to determine the political affiliation of Roberts. I mean, what the Supreme Court says does become the supreme law of the land, unless it is reversed by another Supreme Court.

So this language is certainly much stronger and of greater validity and force to us, as members of this Congress who take an oath to uphold the Constitution, than the great writings by a very good friend, Lloyd Meeds.

Mr. MITCHELL. And all I am saying is that the Constitution means what the U.S. Supreme Court says it means when there are five votes on the Court, and I am just saying that there were not five votes for many of John Marshall's pronouncements, and that is just a historical legal fact.

Mr. KILDEE. Well, I will tell you, five votes have made a great difference in this country in many, many instances, and when I agree with them, I am very happy; when I disagree, I am very unhappy, but the fact of the matter is, it is the law of the land, whether Dale Kildee is happy or not. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Faleomavaega, do you have anything?

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. Yes, I do.

The CHAIRMAN. OK.

Mr. FALEOMAVAEGA. I just have a couple of comments. I have so many questions, I do not know where to begin, but I just wanted to say that there was an earlier discussion about the tribes of California.

To my understanding, there are at least 100 tribes in California that are still yet to be recognized, and I want to say for the record, Mr. Chairman, these tribes were not terminated; they were decimated, a very dark page of our country's history on how we dealt with the tribes of California that, to this day, still has not been properly addressed.

What I do want to say, Professor Mitchell, like my colleague, Mr. Kildee, I, too, have a very, very affectionate memory of the late congressman, Lloyd Meeds, but I gather that you seem to say that because Senator Abourezk was the Chairman of that commission, as you know, you seem to suggest that everything was bent toward giving the Indians more rights and their sovereignty and all of that

and I gather that what Lloyd Meeds was simply trying to say, to make sure that there is an active participation on the part of the Congress, as expressly stated in the Constitution, but not to say that he was anti-Indian, to that extent, because you seem to suggest that, and he certainly was not that. He did all that he could to be of help to the needs of our Native American communities.

Mr. MITCHELL. And I think that is my point, Mr. Chairman. The track record of Representative Meeds as an advocate for Native Americans in this Committee is unparalleled. I was not around at the time, but I have written several books about the Native Claims Settlement Act, and I will tell you that it would not have happened the way it did, as fairly as it did, if a very junior Member of this Committee named Lloyd Meeds had not gone straight at Chairman Aspinall. He was a very tenacious advocate for Native Americans. However, there is a——

Mr. FALEOMAVAEGA. Mr. Mitchell, my time is up. I hate to cut you off like this, but are you suggesting that what we did to the Native Alaskans was not right, as a matter of policy and the law that we passed to give the Native Alaskans all of the benefits that they currently have under the way the Congress has structured that law?

Mr. MITCHELL. No. I am saying the opposite. I am saying that it would not have been as generous to the Native American community in Alaska as it was but for Representative Meeds' advocacy for them.

I have spent a quarter of a century making that statute work, and it would not have worked as well as it did, which has been an up or down track record, if it had not been for Representative Meeds.

Mr. FALEOMAVAEGA. I would like to ask one more follow-up question to the members of the panel.

Any other additional recommendations that you would like to offer to whatever bill that the Chairman and our senior Ranking Member may have intended in correcting this problem? There is nothing in the Supreme Court decision that says that Congress cannot take action. Right? It does not say that this is it and that we cannot do anything further. Am I correct on that?

Mr. ANDERSON. That is correct. It is a statutory interpretation that has been applied for 70 years. The First Circuit thought it was a fair one, and so, yes, Congress could certainly act, as they have done, as I mentioned in my testimony, three times over the last 10 years.

Mr. FALEOMAVAEGA. And Professor Routel, I noticed with interest, in your statement, that Senator Wheeler really went out of his way to say, We do not want too many Indians. Whether you are one-eighth or a quarter blood, make them one-half so that to prevent the Federal government from giving further assistance, economic assistance, to the Indians.

Wasn't this the basis of how the 50-percent blood quantum that is now, to me, in my opinion, is very racist? But it was a way to prevent more assistance to the Indians, and that is how it ended up with a 50-percent quantum. Am I correct on that?

Ms. ROUTEL. Absolutely, and that is why I think the real question for Congress is, you know, what should be a law going for-

ward, not looking back to 1934? And if you look at how the half-blood provision that you are referring to, how that was implemented back in the 1930s, when you had commissions out there that were going around measuring people's skulls, I mean, they did not know who was one-half or who was not.

They were making these decisions based on really racist assumptions. If you were part African-American, you could not be Indian. If you had a certain skull size, you were one-half. Then, of course, could you speak English, and were you assimilated?

Mr. FALEOMAVAEGA. Well, we did the same thing to the Native Hawaiians: a 50-percent blood quantum to be a Native Hawaiian.

They tried to do it on my people, too. To be considered a Samoan, you had to be 50 percent. What does that mean, a blue-eyed Indian, a Cherokee? Practically everybody in America is part-Cherokee, from what I hear.

Mr. Chairman, I know my time is up, but I gladly yield to my colleague from Michigan.

Mr. KILDEE. I want to clarify one thing to Mr. Mitchell. I hold Mr. Meeds in the same high regard as you do. He certainly was a great friend and passionate friend of the Indians. He was a very, very dear friend of mine. I want to make sure people understand that.

Mr. MITCHELL. And I recognize that. That is one thing. Reasonable people can disagree about these other issues, but we both agree, 100 percent, on that.

Mr. KILDEE. Thank you.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from New Mexico, do you have any further questions?

Mr. HEINRICH. No questions.

The CHAIRMAN. The gentleman from Washington?

Mr. HASTINGS. No, thank you.

The CHAIRMAN. If not, I will use my second round of questions to make a closing comment.

First, I do thank each of the witnesses for being here today. It has been a very interesting and informative morning, and we appreciate your time and your patience.

It is clear to me that the important issue here is not whether the Supreme Court's decision was correct or not. Instead, the issue is the need to clarify Federal policy regarding land-into-trust.

The Court has interpreted the IRA to require Indian tribes to have been under Federal jurisdiction in 1934 in order for the Secretary to place land into trust on the tribes' behalf. Although the decision appears to overturn Congress's clear statement, in 1994, that the Bureau of Indian Affairs is not to treat tribes differently, the decision has been made, and now we all must decide what, if anything, needs to be done.

If the decision stands unchallenged, the consequences could be severe. The Department of the Interior will surely be bombarded with litigation challenging the status of Indian lands. The Federal court system will be flooded with litigation. Federal prisoners will claim they were unfairly convicted as being on Indian land, and they would demand their release.

The mere existence of Indian housing, hospitals, schools, nursing homes, and businesses will be challenged, and Congress will have to enact legislation every time a tribe wants land placed into trust.

Indian tribes will have to spend valuable time and resources proving they were under Federal jurisdiction in 1934, despite the Federal government's atrocious treatment of them, and Indian communities, already experiencing conditions much worse than the rest of the U.S. population, will deteriorate.

In order to prevent these consequences, we must decide whether to continue the policy of encouraging strong tribal economies and tribal self-governance. We must also decide the best way to fulfill the United States' legal and moral responsibility to Indian tribes and Indian trust land, and the Committee will continue to work to address this matter and, again, I thank the witnesses, and I thank the Members of the Committee, those that have been here today for this entire hearing, and those who have come and gone, I appreciate very much, on both sides of the aisle, their participation. Thank you. The Committee stands adjourned.

[Whereupon, at 11:37 a.m., the Committee was adjourned.]