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Introduction

Good afternoon Mr. Chairman and members of the Committee. Thank you for the opportunity to present my views on the United States Supreme Court's recent Indian law decisions. I teach Indian law at the University of Washington School of Law in Seattle and I also am the Director of the Law School's Native American Law Center. Prior to joining the faculty, I was Counselor to Secretary of the Interior, Bruce Babbitt and held the position of Associate Solicitor for Indian Affairs within the Interior Department. I also worked as a Senior Staff Attorney for twelve years with the Native American Rights Fund.

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

unprecedented fashion.

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

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

Many have questioned the moral basis for the very notion that "discovering" European nations were entitled to usurp the rights of Indian tribes to deal with their own property or engage in foreign relations<sup>1</sup>. The law recognized by the Marshall Court, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), nevertheless provided a sound basis for legal insulation of Indian tribes from the authority of the States. The Court soundly rejected Georgia's attempt to assert jurisdiction over Indian country and recognized tribes as domestic dependent Nations. In tandem with the Indian Commerce Clause of the U.S. Constitution, the basic

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

principle set out in these cases is that Indian tribes are free to govern themselves and others who enter their territory to the exclusion of state power.

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

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

The development of the Court's general doctrine up to the *Oliphant* decision in 1978 reveals

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<sup>2</sup> *Morton v. Mancari*, 417 U.S. 535 (1974).

considerable deference to congressional action and continuation of rules that insulated Indian tribes from state authority. In the case *Williams v. Lee*, 358 U.S. 217 (1959) the Court ruled that disputes over debts incurred on an Indian reservation must be heard in tribal court because allowing state court jurisdiction infringed on the right of tribal self-government. Similarly, in *Fisher v. District Court*, 424 U.S. 382 (1976) state court jurisdiction was denied over an adoption proceeding involving tribal members. The Court reasoned that denying state court access furthered the congressional policy of tribal self-government. Important to the Supreme Court in all of these cases was the bedrock presumption that Indian country is beyond the reach of state courts and state jurisdiction, unless and until Congress provides otherwise.

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

The same rule applied to federal court incursions on tribal authority and thus buttressed the notion of tribal independence. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) the Court refused to allow federal courts to hear alleged violations of the Indian Civil Rights Act (ICRA). The Court rested on the bedrock principles that tribes are autonomous, absent governing acts of Congress.

The Court also took notice of the fact that Congress had expressly provided for federal court review in habeas corpus actions. It was accordingly appropriate for the Court to leave it to Congress to determine whether to further intrude on tribal self-government by providing for federal court review of alleged violations of ICRA.

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

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

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

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

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

Not long after passage of the IRA, Congress again shifted its approach and called for the termination of a number of tribes in the United States. This "termination" of the federal-tribal relationship for some Indian tribes was accompanied by the adoption of Public Law 280, which authorized (and in some instances required) states to extend their jurisdictional reach into Indian country. This termination period galvanized Indian tribes to fight for their political existence and

prompted the congressional termination experiment to fizzle out by the early 1960s. See Stephen Cornell, The Return of the Native 123-124 (1988).

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

There is likely no statute that surpasses the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450, et seq., in importance and effectiveness. The Act allows tribes to operate dozens, if not hundreds, of programs previously carried out by federal agencies like the Bureau of Indian Affairs and the Indian Health Service. Congress has amended the statute on a number of occasions to spur the Executive Branch to contract more and more programs out for tribal administration and with increased flexibility for the tribes. See 25 U.S.C. §§ 458aa, et seq. The Self-Determination Act and Self-Governance Act have assisted in building tribal governmental infrastructure, while maintaining the federal-tribal trust relationship. Other statutes provide directly for the exercise of tribal or delegated federal authority of tribal territory and all those within it. Examples include the Indian

liquor laws, 18 U.S.C. § 1152,<sup>3</sup> and a number of environmental statutes. The Clean Air Act, 42 U.S.C. §§ 7401-7642 directs the Administrator of the EPA to treat Indian tribes as States under the Act. Tribes exercise delegated federal authority over members and non-members within Indian country. Similarly, the Clean Water Act, 33 U.S.C. §§ 1251-1377, provides that tribes may be treated as States and exercise either inherent, or delegated authority over members and non-members within Indian country. See *City of Albuquerque v. Browner*, 97 F.3d 415 (10<sup>th</sup> Cir. 1996); and *Montana v. EPA*, 137 F.3d 1135 (9<sup>th</sup> Cir. 1998). See also, Safe Drinking Water Act, 42 U.S.C. §§ 300j-f; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657; Surface Mining Reclamation Act, 30 U.S.C. §§ 1201-1328; and Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (all providing for some measure of tribal authority over land for both members and non-members).<sup>4</sup>

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

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<sup>3</sup> See *United States v. Mazurie*, 419 U.S. 544 (1975).

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

Congress has unequivocally acted to support Indian tribes and has even delegated federal authority to tribes in many circumstances.

By way of contrast, since the passage of the Self-Determination Act, the Supreme Court has gone out of its way to implement long-abandoned policies that increase state authority and reduce the power of tribes. For example, in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), the Court stretched to implement policies embodied in an obscure proviso the repealed allotment act in order to uphold county real estate taxes on tribal property. The Court appears oblivious to the past 35 years of congressional policy even as it abandons the previous 140 years of Supreme Court doctrine.<sup>5</sup> It bears emphasizing that even as Congress implemented failed policies such as allotment, assimilation and termination, the Supreme Court during that time adhered to the basic policy enunciated by the Marshall Court. Thus, in 1883 which was the heart of the assimilation era, the Court secured tribal Indians from federal prosecutions in recognition of their status as separate sovereigns. Likewise, during the termination era of the 1950s the Court upheld the right of “Indians to make their own laws and be ruled by them.” The Court thus adhered to the Marshall Court’s rule that Indian tribal powers and immunities continue until Congress acts clearly to diminish those powers, or authorizes state incursions into Indian country.

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

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<sup>5</sup> The Honorable Judge Canby’s testimony eloquently reveals the Supreme Court’s doctrinal evolution.

for Indian tribes and their authority.

### III. Executive Branch Policies Similarly Support Indian Tribe Jurisdiction.

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

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

of their authority and only Congress can right the wrongs committed by the Supreme Court.

### Conclusion

Congress has always led the way in setting federal Indian policy as provided in the Constitution. I respectfully suggest that Congress should act to correct the Supreme Court's mistaken notions of what is best for governance in Indian country. This should be done with deliberation and full consultation with Indian tribes. I commend the Chairman and members of the Committee for holding this hearing. Thank you very much. I would be pleased to answer any questions.