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Testimony on H.R. 1234 and H.R. 1291
Sub-Committee on Indian and Alaska Native Affairs
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Mr. Chairman, members of the Subcommittee. Thank you for inviting me to testify on these important bills. They are needed in order to fix the uncertainties created as a result of the Supreme Court decision in *Carcieri v. Salazar.*

I fully endorse H.R. 1234, sponsored by Congressman Kildee.

The other bill, H.R. 1291 by Congressman Cole is a little bit more complicated. In addition to amending the definition of "Indian" by deleting reference to being a member of a tribe under federal supervision as of 1934, it also amends the definition of "tribe" to basically mean any tribe "that the Secretary of the Interior acknowledges to exist as an Indian tribe." More importantly, however, it exempts Alaska from the provisions of section 5 of the IRA.

I have no initial position or objection to the new definition of "tribe" proposed in H.R. 1291. On the second point, I am not an expert on Alaskan Native issues but my understanding is that, at least in the past, the Department of Interior used to take the position that because of ANCSA, (the Alaska Native Claims Settlement Act), land cannot be taken in trust in Alaska pursuant to section 5. My first impression is that this part of H.R. 1291 seems to be a sort of pre-emptive strike. It attempts to moot any current or future challenge to the current regulations. Legally speaking, I tend to believe that to the extent that ANCSA created an ambiguity, under the *Chevron* doctrine, deference should be given to the Agency's position and the courts should end up upholding the current regulations. This means that this pre-emptive strike may not be really needed. On the other hand, I also believed that the Court should have deferred to the agency's interpretation in the *Carcieri* case. As we all know now, the Court did not.

I want to make a point perfectly clear. The two bills just restore the law the way it was understood by almost everybody before the *Carcieri* decision. It restores the law the way it had been functioning for many years and, in my opinion, restored the law the way Congress probably intended it to be since 1934. What the Court did in *Carcieri* was to rewrite the statute the way it wanted it to be written. Some may call this judicial activism.

My testimony is going to cover the following four points.

1. Why *Carcieri* was, legally speaking, a bad decision.
2. Is there enough standards controlling the Secretary's implementation of section 5?
3. Why it is a good idea to make the amendment retroactive as of 1934.
4. Why this legislation should not attempt to address issues relating to off reservation gaming.

1. Carcieri v. Salazar.

The issue in the case was whether the Secretary could place land into trust for the benefit of the Narragansett Indian tribe using section 5 of the 1934 Indian Reorganization Act. This section allows the Secretary of the Interior to acquire land into trust "for the purpose of providing land for Indians." 25 U.S.C. 479, however, defines "Indian" for the purposes of the Act to "include all members of any recognized Indian tribe now under federal jurisdiction." The issue in *Carcieri* was the exact meaning of the words "now under federal jurisdiction." Did "now" mean "as of 1934" when the Act became law or did it mean that the tribe had to be under federal jurisdiction at the time the land was taken into trust for its benefit? Speaking through Justice Thomas, the Court held that the unambiguous meaning of the words "now" meant as of 1934. This *(in turn)* meant that the Secretary could not use the authority given in section 5 to take land into trust for tribes, like the Narragansett Indian tribe, which were not under federal jurisdiction as of 1934.

What persuaded Justice Thomas that the word "now" was meant to restrict application of the Act to Indian tribes under federal jurisdiction as of 1934?

Evidently three things:

1. First he mentioned the ordinary meaning of the word "now."

2. He mentioned the context of the IRA. Justice Thomas thought it very meaningful that in section 468, the Congress used the words "now existing or and hereafter established" when referring to an Indian reservation.

3. He also mentioned one departmental letter which indicated that the Executive Department had a different construction of the Act at the time of enactment than it has now. This 1936 letter mentioned that the term "Indian" referred to all Indians who are members of any recognized tribe that was under federal jurisdiction at the date of the Act.

These three arguments were enough to persuade the majority of the Court that there was no ambiguity whatsoever and, therefore, decades of Executive interpretation of the statute as allowing transfer of land into trust as long as the tribe was now, meaning at the time of the proposed land transfer into trust, under federal jurisdiction was put to an end. Although the Secretary of the Interior and the tribes argued that there was no policy reason whatsoever to limit the statute to tribes under federal jurisdiction as of 1934 and that such an interpretation went against the very purpose of the statute, the Court just bluntly stated "We need not consider these competing policy views because Congress use of the word "now" speaks for itself."

Justice Stevens penned an interesting dissent where he took the position that since the word "now" only appeared in the definition of "Indian" but not in the definition of "Indian tribe," the restriction did not apply to tribes. Thus he concluded "The plain *text* of the Act clearly

authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of Indian tribes." The Act defined "tribe" as follows: "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."

There are many textual arguments, besides the arguments made by Justice Stevens, to support Justice Stevens' understanding of the Act. As pointed by one scholar, section 479 defines the term "Indian" to "*include* all members..." In other words, the statute does not say the term Indians "shall be limited to...."[1]

At best, the use of the words "*now* under federal jurisdiction" made the section ambiguous. When faced with an ambiguity in a statute enacted for the benefit of Indians, courts are supposed to construe the statute liberally and resolve ambiguities to the benefit of the beneficiaries of the trust, the Indian tribes. So what is the meaning of *Carcieri*? To me, it means that if there is one tiny possibility to construe a statute to the detriment of Indians and Indian tribes, this Court will do it. In other words, the Indian canon of statutory construction has not been eliminated, it has been reversed: from all ambiguities being construed to the benefit of Indians, it has become "all ambiguities have to be construed to the detriment of Indians." The next section discusses the reasons for, and importance of, this canon of statutory construction.

The Indian canon of statutory construction and the trust doctrine.

Under the Indian canon, statutes enacted for the benefit of Indians are supposed to be liberally construed and ambiguous expressions resolved in their favor. It is true that the Supreme Court has not used the Indian canon consistently, especially recently.[2] Although one reason for this is that in many cases, the Court refused to find an ambiguity to start with, another reason is that some Justices think that the canon is just a technical or grammatical canon, just like some of these Latin phrase canons. Under this view, the Indian canon is not a substantive canon but one that courts are free to use or not, at their discretion. Proponents of this view take the position that the Indian Canon was first used out of judicial grace because Indians were "weak and defenseless." In other words, courts just felt sorry for the tribes. This position misunderstands the reasons for the Indian canon. As explained by the editors of the leading treatise on federal Indian law,

Chief Justice Marshall grounded the Indian law canons in the value of structural sovereignty, not judicial solicitude for powerless minorities... The consequence of understanding the Indian law canons as fostering structural and constitutive purposes are quite significant. The implementation and force of the canons do not turn on the ebb and flow of judicial solicitude for powerless minorities, but instead on an understanding that the canons protect important structural features of our system of governance.[3]

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[1] See Scott N. Taylor, *Taxation in Indian Country after Carcieri v. Salazar,* 36 Wm. Mitchell L. Rev. 590 (2010).

[2] See for instance, Chickasaw Nation v. United States, 534 U.S. 84 (2001).

[3] Cohen's Handbook of Federal Indian Law, 2005 Edition, at 123.

As eloquently explained by the late professor Philip Frickey, Chief Justice Marshall treated treaties made between the United States and the Cherokees as quasi constitutional documents and interpreted them the way he would interpret a Constitution.[4] Treaties made with Indian tribes can be viewed as documents incorporating the Indian nations into the United States political system as domestic dependent sovereigns. Marshall recognized that because of the commerce power, the treaty power and the war power, Congress had plenary authority over Indian tribes. As such, the United States was able to bargain with the tribes from a position of strength. Marshall also knew that the actions of the United States in this domain could not be judicially challenged. In order to counter the plenary power of Congress in this area, he devised rules of treaty interpretation which favored this under-enforced norm, incorporation of tribes as domestic dependent sovereigns through treaty-making. Eventually, the treaty power and the war power were no longer used by Congress to assume power over Indian tribes. However, the power remained plenary because of the trust doctrine.[5] Pursuant to this trust power, Congress began to assert power over Indian tribes through regular legislation rather than through treaties. This explains why certain rules applicable to the interpretation of Indian treaties should also be applicable to Indian legislation.

At times, the Court has stated that the Indian canon are "rooted in the unique trust relationship between the United States and the Indians."[6] That is true enough but, unfortunately, some Justices also misunderstand the trust doctrine and think that the doctrine was created just because Indians are weak and defenseless.

Where does the trust doctrine come from?[7]

Some have traced its origin to Marshall's famous reference in *Cherokee Nation v. Georgia,*[8] that the relationship between the United States and the tribes resembled that "of a Guardian to a Ward." Others have stated that it comes from the huge amount of land transfers from the tribes to the United States.[9] Under that theory, the trust doctrine is really derived from treaties and acts of Congress since that is the way such land transfers were effected. Other Scholars take the position that the trust doctrine originates from the Court's use of the doctrine of discovery according to which, the United States obtained "ultimate" title to all Indian lands within the United States.[10] Under that theory, since the doctrine of discovery was a doctrine of

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[4] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law,* 107 Harv. L. Rev. 381, at 408-411 (1993).

[5] See United States v. Kagama, 118 U.S. 375 (1884).

[6] See Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)

[7] For an excellent exposition of the trust doctrine and its evolution, see Reid Chambers, *Compatibility of the Federal Trust Responsibility with Self Determination of Indian Tribes: Reflections and Development of the Federal Trust Responsibility in the 21st Century,* Rocky Mountain Min. L. Found. Paper No. 13A (2005).

[8] 30 U.S. 1, at 54 (1831).

[9] See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited,* 1994 Utah L. Rev. 1471 (1994).

[10] See Robert J. Miller, Native America, Discovered and Conquered, (2006) at 166 (Stating "The trust doctrine plainly had its genesis in the discovery Doctrine.")

international law, the trust doctrine can be considered as derived from international law, at least as conceived by Chief Justice John Marshall.

I think all these scholars are correct. The trust doctrine is of course a judicially created doctrine. However, the trust also did arise from both the treaties signed with the Indian tribes and doctrines of international law, such as the doctrine of discovery. Acts of Congress, while not creating the doctrine, have added specific trust duties and thus further refined the trust doctrine and defined its contours. It is my position that, properly understood, the trust doctrine is a doctrine of "incorporation." It is the legal doctrine that succeeded to treaty making in politically and legally incorporating Indian tribes as quasi sovereign political entities within the federal system.

The trust doctrine and therefore the Indian canon of statutory construction are closely connected to the constitutional power of Congress to enact statutes in Indian Affairs. Although the power of Congress over Indian Affairs is said to be plenary, the Court has given different reasons for such power. During the Allotment era (1880's - 1934), the power was thought to come from two sources: first, the Congress was the trustee for the Indian tribes, and secondly, under the doctrine of discovery, the United States had "ultimate title" to all Indian lands.[11] Starting in the 1970's, the Court took the position that the power of Congress was really derived from the Indian Commerce clause and the treaty clause.[12] The power was still plenary, except that Congress could no longer violate the constitutional rights of Indians,[13] unless it was truly for their benefit.[14] In other words, the trust doctrine still played a role in augmenting the power that Congress possessed over Indian affairs. The Indian Canon is a substantive rule of statutory construction because it is derived from the trust doctrine and therefore connected to the plenary power of Congress over Indian Affairs, itself derived from the Constitution's Commerce clause.

Why is the Court abandoning these traditional principles of federal Indian law? I have in previous writings suggested that it has to do with the Court's misconception about the trust doctrine, and its refusing to include Indian tribes under a third sphere of sovereignty within our federalist system.[15] As tribes become more politically sophisticated, more economically self-sufficient, and as Indians become more educated, it has become hard to view them as weak and defenseless. If the Court takes the position that the trust doctrine, and all the legal principles derived from it, only exists to protect weak and defenseless Indians, then no wonder it has become reluctant to apply such legal principles. If Tribes are not viewed as quasi sovereign governmental entities within our Federalist system, then there is a real danger that the Court will view them as regular economic actors and will abandon the cardinal principles of federal Indian law.

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[11] See United States v. Kagama, 118 U.S. 375 (1886), Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).
[12] See Morton v. Mancari, 417 U.S. 535 (1974).
[13] See Delaware v. Weeks, 430 U.S. 73 (1977).
[14] See United States v. Sioux Nation, 448 U.S. 371 (1980),
[15] See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667 (2006).

2. History related to section 5 of the IRA: from no standards to too many standards?

From 1778 until 1871, the United States signed treaties with Indian tribes. In those treaties, the tribes ceded millions of acres to the United States and acknowledged their political dependence on the militarily stronger nation. In return, the United States set aside reservations for Indian tribes and promised that it would secure such reservations for the exclusive use of the Indian tribes. Except for land purchased by tribes on the open market and held in fee simple, all lands held by Indian tribes, even tribal treaty lands, are said to be held in trust by the United States. It has been estimated that by the 1880's, the amount of lands set aside for Indian tribes under such treaties was around 138 million acres.[16]

Starting in the 1880's, the United States adopted a policy of trying to assimilate the Indians into the mainstream of American society. One aspect of this policy was to transform Indians from hunters into farmers. To this end, the United States enacted the General Allotment Act of 1887,[17] the purpose of which was to break up the tribal land base by allotting Indian reservations. This meant that the tribal land base would be split up into allotments, generally of 80 or 160 acres of land, and given to each individual tribal member. These allotments were to be held in trust for the individual tribal members. The rest of the tribal land was considered "surplus" and made available for sale to non-Indians.

Initially, the United States believed that as a result of the treaties, the reservations could not be allotted without the consent of the tribes and therefore attempted to get the tribes to agree to the allotment of their reservations. The U.S. Supreme Court eventually held, however, that the treaties could be abrogated by the United States unilaterally even if such abrogation was alleged to be an unconstitutional taking of tribal property.[18] Furthermore, the Court held that the constitutionality of such action was not justiciable because it amounted to a political question.[19] It is estimated that as result of the allotment policy which was in effect between the 1880's and 1934, Indian tribes lost over 90 million acres of land so that by the end of the allotment policy, the tribal land based had shrunk to 48 million acres.[20]

Eventually, the allotment policy was deemed a failure and was repudiated with the enactment of the Indian Reorganization Act of 1934. Section 5 was enacted so that the Secretary of the Interior could start the process of correcting the wrongs inflicted on the tribes as a result of the Allotment policy

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[16] See County of Yakima v. Confederated Tribes, 502 U.S. 251, 255-56 (1992).

[17] 25 U.S.C. 331 et seq.

[18] Lonewolf v. Hitchcock, 187 U.S. 553 (1903).

[19] Id. at 565. The Court stated "Plenary authority over the tribal relations if the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

[20] See Readjustment of Indian Affairs: Hearings on H.R. 7902, House Committee on Indian Affairs, 73d Cong. 2d Sess. 16 (1934).

Section 5 provides that the Secretary "is hereby authorized, in his discretion, to acquire... any interest in lands...within or without existing reservations...for the purpose of providing land for Indians."[21] There are some who argue that the Secretary has too much discretion in deciding to accept land into trust for the benefit of Indians. While this may have been true at one point, it is far from the truth today. In effect, from the tribes' perspective, the opposite is true.

Earlier on, the Secretary took the position that his "discretion" on whether and when to take land into trust was absolute under the Act.[22] Under this view, judicial review to question the exercise of his authority was lacking under the Administrative Procedure Act (APA) which provides that judicial review is not allowed in cases where the decision is left to the discretion of the agency by law.[23] However, as a result of litigation challenging section 5 as a violation of the non-delegation doctrine,[24] the Department eventually revised its 1980 regulations in 1995.[25] An examination of the 1995 amendments revealed that, if anything, it became more difficult for tribes to have lands placed into trust.

Since the 1980 regulations did not distinguish between on and off reservation acquisitions, a controversial part of the current regulations is the 1995 decision to treat on-reservation trust acquisitions differently than off-reservation acquisitions. Another controversial area are the criteria adopted by the Department in making its determinations to take land into trust. For on-reservation tribal acquisitions, there are 7 criteria (a-c, e-h).[26] For off-reservation acquisition, the regulations add an additional 4 criteria, bringing the total to 11.

Some of these criteria are not controversial. For instance, concerning on-reservation (or contiguous) acquisition, the first 3 standards ((a)-(c) as well as (g) are completely appropriate.[27] Some other standards (e) and (f) may be more problematic. Under (e), the Secretary has to look at the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls, and under (f), at the jurisdictional problems and potential conflicts of land use which may arise.

For off reservation trust acquisitions, the most controversial factor is (b) under which the Secretary is supposed to give greater scrutiny to the tribe's justification of anticipated benefits

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[21] 25 U.S.C. 465.

[22] See Florida v. Department of Interior, 768 F.2d 1248 (11th Cir. 1985). For an overview of the regulatory framework see Mary Jane Sheppard, *Taking Land Into Trust*, 44 South Dakota L. Rev. 681 (1998-1999).

[23] See 5 U.S.C. 701 (a)(2) providing for no judicial review under the Act when "agency action is committed to agency discretion by law."

[24] See South Dakota v. United States, 69 F.3d 878 (8th Cir. 1995), vacated at 117 S. Ct. 286. Under the non-delegation doctrine, Congress cannot delegate its legislative power to an agency without intelligible principles. See Whitman v. American Trucking, 531 U.S. 457 (2001).

[25] See 45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23 1995, and further amended at 60 FR 48894, Sept 21, 1995. The regulations are codified at 25 C.F.R. part 151.1 to 151.15.

[26] Criterium (d) deals with trust acquisition for individual Indians which is not a topic of this paper.

[27] These standards are as follows: (a) The existence of statutory authority for the acquisition and any limitations contained in such authority; (b) The need of the individual Indians or the tribe for additional land; (c) The purpose for which the land will be used...(g) If the land to acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status."

and to the concern raised by state and local officials, the further the lands are from the reservation.

Finally it should be noted that some in the Department must have been aware that the regulations were not perfect since the Department went through the lengthy and time consuming process of amending its prior regulations, publishing a final rule to this effect on January 2001,[28] only to have its implementation delayed until the rule was finally withdrawn on November 9, 2001.[29] Among other things, the new regulation would have streamlined the process for on -reservation acquisitions while creating a strong presumption in favor of acquisition. The new regulation would also have created a procedure by which such presumption in favor of acquisition could be extended to tribes without reservations.

Should section 5 be amended to incorporate some standards curbing the discretion of the Secretary?

If there was no section 5 and we were enacting a new law today, I would support adding some standards controlling the discretion of the Secretary. However, we are here looking at more than 70 years of history implementing this section. In those 70 years, the Department has enacted comprehensive regulations curbing its discretion, and containing extensive procedures which guarantee that all concerned parties will be consulted before land is placed into trust under section 5.

Make no mistake, I do not think the existing regulations are perfect, but the way to amend them is through other regulations as was tried in 2001.[30] I am afraid that once we open the door to add more standards, the floodgates will open, the suggestions will pour in. There will be no end in sight. Some might even try to use this legislation to amend the Indian Gaming Regulatory Act of 1988. I think this *Carcieri* decision demands a quick and straight forward fix. There will be time, later, if it wishes to do so, for Congress to take a more comprehensive look at issues raised by the fee to trust program.

3. The need to ratify the previous land transfers.

Both bills have a retroactive provision which would ratify all the fee to trust land transfers made to tribes which may have not been "under federal supervision" as of 1934. Until this year, I would have thought that these provisions may not have been necessary. However on January 21, 2011, the D.C. Circuit issued its decision in *Patchak v. Salazar*,[31] where the court held, among other things, that the QTA (Quiet Title Act) did not preserve, in all circumstances, the sovereign immunity of the United States in a suit challenging a previous transfer from fee to trust

[28] 66 Fed. Reg. 3452.
[29] 66 Fed. Reg. 56608.
[30] For a summary of problems with the current regulations, mostly from a non-tribal perspective, see Amanda D. Hettler, Note, *Beyond a Carcieri Fix: The Need for Broader Reform of the Land-Into-Trust Process of the Indian Reorganization Act of 1934*, 96 Iowa L. Rev. 1377 (2011).
[31] 632 F.3d 702.

to an Indian tribe. Although other circuits have held otherwise, I read this decision as creating a possibility that many of these land transfers can now be challenged, at least if the law suit is filed within the jurisdiction of the D.C. Circuit. Of course there may be other legal defenses available to the United States and I am not taking the position that these challenges would end up being successful.

4. Connection between section 5 and off reservations gaming issues.

Many people these days are looking at transfer of land into trust for the benefit of Indian tribes through the prism of Indian gaming. The fear here is that Indian tribes will first obtain some trust land far from existing Indian reservations but in the midst of non-Indian communities and open up a casino in a previously quiet residential area.

Indian gaming is of course regulated pursuant to another law, IGRA. Under IGRA, gaming can only be conducted on Indian land. Indian land has a technical definition.[32] For present purpose, the relevant provision is section 2719 which contains a general prohibition for gaming on off-reservation lands acquired after enactment of IGRA in 1988. However, there are exceptions. For our purpose, I think the more controversial issue is that the prohibition on gaming does not apply to lands taken into trust if: 1) They are part of a settlement of a land claim, or 2) They are taken as part of the initial reservation of a newly acknowledged tribe, or 3) If the lands are part of the restoration of lands to a restored tribe.[33]

However, the fact that there is no outright gaming prohibition on such lands does not mean that gaming can be conducted on such lands. Any casino type gaming, part of Class III gaming, can only be conducted pursuant to a tribal state compact. These compacts are only valid if approved by the Secretary and the governor and/or legislature of the state. Gaming under such compacts is controversial and complex, however, it should play no role in this particular simple legislation which just attempts to fix a discrete problem created by the *Carcieri* decision. So the only meaningful issue left is the possibility of having what is known as Class II gaming conducted on such newly acquired trust lands by a newly recognized or restored tribe. Class II gaming consists of bingo, and bingo like games, and certain non bank card games. Class II gaming is regulated by the tribes and the National Indian Gaming Commission.

While I do not want to minimize the potential concerns relating to this issue, my view at this time is that any changes in the law concerning Class II gaming on newly acquired trust lands by newly recognized or restored tribes should more appropriately be dealt with by amending

[32] 2703 Defines Indian lands as land within Indian reservations and any trust lands over which an Indian tribes exercises governmental power.

[33] Gaming can also be conducted on newly acquired trust lands under the so-called two part Secretarial determination. Under this exception, the governor of the state has to agree with the determinations made by the Secretary of the Interior and these determinations can only be made after consultation with state and local officials. I think this exception is too far removed from the initial decision to take land into trust under section 5 because there are many other procedural hurdles and safeguards already in place under IGRA. It should not concern us here.

section 2719 of IGRA and not in a bill amending section 5 of the IRA. Besides, 25 CFR Part 292 already contains extensive standards interpreting all the exceptions mentioned in section 2719 (section 20 of IGRA).