**TESTIMONY OF DONALD CRAIG MITCHELL ON THE RAMIFICATIONS OF THE UNITED STATES SUPREME COURT DECISION IN CARCIERI V. SALAZAR**

---

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 Ginsberg - 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 Cheveron 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]

---

[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

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").

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

---

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).

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:

---

[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).

> 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.
>
> . . .
>
> [T]he Commission's staff interpreted the enabling legislation as a charter to produce a document in favor of tribal positions.
>
> . . .
>
> 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 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.

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:

---

[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).

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.