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FEDERAL GOVERNMENT'S RELATIONSHIP WITH AMERICAN INDIANS

HEARINGS

BEFORE THE

SPECIAL COMMITTEE ON INVESTIGATIONS

OF THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

JANUARY 30, 31, 1989 AND FEBRUARY 1, 1989
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FEDERAL GOVERNMENT'S RELATIONSHIP WITH AMERICAN INDIANS

MONDAY, JANUARY 30, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
SPECIAL COMMITTEE ON INVESTIGATIONS,
Washington, DC.

The special committee met, pursuant to notice, at 10:05 a.m. in room 216, Hart Senate Office Building, Hon. Dennis DeConcini (chairman of the special committee) presiding.

Present: Senators DeConcini, Inouye, McCain, and Daschle.

Staff present: Kenneth Ballen, Andrew Klingenstein, James H. Rowe, III, George Brent Mickum, III, Carl Mayer, Gretchen DeMar, and Percy Samuel.

Senator DECONCINI. The Special Committee on Investigations of the Select Committee on Indian Affairs will open its official hearings this morning. Before my opening statement I will yield to the distinguished chairman of the Select Committee on Indian Affairs, the Senator from Hawaii, Mr. Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Thank you very much, Mr. Chairman.

In the fall of 1987 the Arizona Republic came forward with a series of articles that literally startled the Select Committee on Indian Affairs. We began informal investigations on the allegations set forth but soon realized that the study ahead was too immense for just informal inquiries.

Accordingly the Senate of the United States, on October 23 of 1987, by resolution, authorized the Select Committee on Indian Affairs to establish a special investigating committee to look into these allegations.

I would like to remind one and all what these allegations were.

First, that the Department of the Interior has breached its fiduciary responsibilities as trustee for Indian lands and resources by its failure to adequately manage trust resources.

Second, that Indian resources have been taken from Indian lands under terms of leases without adequate compensation being paid to the Federal Government as trustee for Indian lands.

Third, that the responsibility to provide legal assistance to Indian people and Indian tribal governments for the protection of their rights and resources frequently places the agencies of the Federal Government in a conflict of interest position.

Fourth, that there are fraudulent actions and possible criminal liability associated with the administration of Indian housing programs.

Fifth, that there is a failure to coordinate law enforcement activities among those agencies responsible for the enforcement of laws on Indian reservations.

Sixth, that there is a significant problem of child abuse associated with the provision of educational services to Indian children.

Seventh, that the education programs provided to Indian students do not provide the quality of education available to other United States citizens.

Eighth, that there are obstacles in Federal laws and regulations to the economic development of Indian reservations.

Ninth, that there is no consistent Federal policy to guide the administration of Indian affairs by the agencies of the Federal Government.

And finally, that it has been documented that the status of health of Indian people continues to rank far below that of the rest of the U.S. population.

Accordingly, the Rules Committee recommended and the Senate approved the second-largest appropriation in the history of the Senate for investigation purposes. This should indicate to one and all the important nature of the proceedings which will unfold before us in the days to follow.

I wish to commend the chairman of the Special Committee on Investigations, Senator DeConcini, and members of the Special committee, Senator Daschle and the Cochairman of the Special Committee, Senator McCain from Arizona, for the work that they have done on this matter. It has been a thankless job. It has been time-consuming and I know that it has been most stressful at times.

With that, I once again thank you, Mr. Chairman and members of the Special Committee and your staffs, for the fine job.

Senator DECONCINI. Chairman Inouye, thank you very much.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator DECONCINI. For the last 8 months the Senate Special Committee on Investigations has been conducting a comprehensive investigation into all aspects of the Federal Government's relationship with American Indians. The investigation was prompted in large part by a series of articles which appeared in the Arizona Republic newspaper alleging widespread fraud, mismanagement, and corruption.

The distinguished chairman of the Select Committee on Indian Affairs has pointed out the purpose of this proceeding. I want at this time to pay my thanks and appreciation to him and his staff for their support and steadfastness with this very difficult investigation. It has not been easy and I know that he has had many other duties to contend with, along with the issues brought up in this investigation, and I thank him personally for his support and his continued insistence that we continue this investigation in the manner which we are following.

Thanks to the leadership displayed by Cochairman McCain, my colleague from Arizona, our committee has conducted this investigation in an entirely bipartisan fashion. Last spring Cochairman McCain and I assembled one unified, bipartisan staff, including natural resource specialists, accountants, several attorneys, and professional investigators.

The committee staff began by reviewing Congressional reports, Interior Department audits, and investigations that evaluated the various Indian programs under review.

We also began to interview, on a confidential basis, Federal employees, tribal members, and others in the private sector who deal with Indian tribes. Indeed, over the course of the last 8 months our staff conducted over 1,000 interviews by telephone and in person. The staff received briefings and documents from every Federal agency that administers Indian programs.

The committee also sought help and guidance from the tribes. When we first got underway we wrote the tribes to explain the committee's functions and to solicit views on problems confronting the Indian community.

I think we have continued to keep the Indian tribes apprised of our work. In fact, our opening testimony this morning will come from a distinguished panel of Indian leaders from different regions of this country.

After receiving briefings and interviewing witnesses, we entered into a more formal phase of the investigation, the subpoenaing of documents and the deposing of witnesses. We issued nearly 300 subpoenas to individuals, private contractors, and natural resource companies. Additionally, the committee has received and examined more than 900,000 pages of documents. We have also conducted dozens of depositions and will continue to take additional depositions in the future.

The record uncovered by our investigation is not encouraging. Many of the Federal Indian programs are fraught with corruption and fraud. Most of the others are marred by mismanagement, and some by incompetence. We have found evidence of these problems at all levels, from Washington, DC through the bureaucracy and down to the field. But wherever they exist, the results seem to be the same: American Indians and the Nation are being badly served by Federal programs that do not accomplish their goals, and by individuals more interested in lining their pockets than in helping American Indians.

As with other cases of governmental waste and abuse, all American taxpayers end up bearing the burden of these inefficient and ineffective programs. But unlike other, more widely-recognized cases, the abuses discovered by our committee are contributing directly to the impoverishment of one of our Nation's poorest minority groups.

Although the Federal Government spends $3 billion a year on Indian programs, the poverty rate for all American Indian families is two to three times the national average. For those on reservations, the poverty rate is four times the national average. According to the most recent Census Bureau statistics, 16 percent of Indian houses on reservations lack electric lighting; 21 percent lack an indoor toilet, and more than one-half have no telephone.

As our hearings unfold over the next few weeks we must remember that every tax dollar wasted by an incompetent administrator and every tax dollar diverted by a corrupt individual comes directly out of the living standard of an American Indian family. Not only are we wasting taxpayer dollars; we are wasting opportunities for American Indians.

On a personal note let me add that it is not always a pleasant task to try to conduct a vigorous, aggressive, and unbiased investigation. An investigation such as this one wins no friends; instead, at one time or another we have probably alienated all the groups under review during the investigations. Those Federal agencies who are put in a bad light and those Federal employees who have been shown to have engaged in wasteful or fraudulent activities are not going to like us. Certainly the oil and gas companies, who have produced hundreds of thousands of documents and submitted to countless interviews, are not going to be thrilled with us either. Doubtless, they will be even less enamored of the committee when they are subjected to depositions and further inquiries during our later proceedings.

And those in tribal governments who have abused their positions probably wish we simply would go away. We have always believed, however—and I know that Cochairman McCain and Senator Daschle join me in these remarks—that we are obliged to pursue fraud, waste, or corruption wherever it exists, even if it goes to tribal governments. To do less would be to betray the trust placed in us by the U.S. Senate and the American people and, most particularly, the Indians themselves who stand to lose the most by continuation of the status quo.

In our first round of hearings we will focus on the failure of the Federal Government, particularly the Bureau of Indian Affairs, to ensure integrity and accountability in the Federal Government's relationship with American Indians. We will specifically address the Federal Government's role and performance in representing Indians in court; the administration of Indian contracting programs; law enforcement on the reservations; tribal corruption; the infiltration of Indian gaming operations by organized crime; child sexual abuse in Indian schools and elsewhere; and some environmental issues. The committee will hear testimony on these subjects in no particular order of priority because we believe they are serious problems which all need to be addressed.

There may be other problems, perhaps equally compelling, which will be examined in the coming weeks and which may be presented in the committee's later round of hearings. We now expect to address problems in the Indian Health Service, Indian education, HUD Indian housing programs, and the natural resource area during the later round of hearings, along with recommendations for remedying those problems.

One final word about the oil and gas part of the investigation. The Arizona Republic series contained very serious allegations about the diversion of Indian oil royalties. To investigate the merits of these allegations fully, as well as others we developed ourselves, the committee has spent substantial resources in this area of the investigation. Due to the complexity of the task—made infinitely more difficult by the fact that no less than three Federal

agencies administer these programs—we have not yet completed our studies of this area. We are pursuing it vigorously.

At this point the media's earlier estimation of billions of dollars in underpayments of royalties appear to be overstated, but other significant issues remain to be reviewed and presented later this year. The complexity of the tripartite Federal bureaucracy—the Interior Department's Bureau of Indian Affairs, the Mineral Management Service, and the Bureau of Land Management—is paralleled only by their Byzantine accounting, auditing, and recordkeeping practices or lack thereof. Such complexity clearly frustrates even industry and certainly overwhelms the Indian mineral resource owners.

After we have conducted the numerous depositions and have examined additional documents necessary to finish the job, we will present our findings in the spring.

Let me now yield to my distinguished colleague from Arizona, the cochairman of this committee, Senator McCain.

[Prepared statement of Senator DeConcini appears in appendix.]

Senator McCain. Thank you, Mr. Chairman. I would like to express my appreciation to you for the very close relationship that we have enjoyed in working together over these many months on this very important committee and on these very important issues. I would also like to extend my appreciation to Chairman Inouye, who has given us the charter—indeed, the latitude—to try to address these issues in the most effective and helpful fashion.

Mr. Chairman, I have a prepared statement which I would like to have made a part of the record.

Senator DeConcini. Without objection, it will appear in the record.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, COCHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator McCain. I would like to make a few remarks.

The Special Committee on Investigations was established during the 100th Congress in response, as you said, Mr. Chairman, to public allegations of fraud and mismanagement of the Federal Government's trust responsibility for Indian people, their lands, and their resources.

I believe that Senator Inouye best described the purpose of this special committee when he stated that,

> I think that we would all agree that those who are charged with the responsibility of administering Indian programs and services, be they Federal instrumentalities, State agencies, or tribal governments, must be accountable; first, to those from whom a trust responsibility has been established, the Indian people, as well as accountable to the Congress and the American people. This accountability must be achieved, and I believe can best be realized, by Indian people working with the Congress and with Federal agencies to identify the need for change and to initiate reform where it may be necessary. The establishment of a Special Committee on Investigations, I believe, will provide us with a capacity to more effectively and expeditiously realize this objective.

Mr. Chairman, as we begin these public hearings I believe it is very important to reflect upon the purpose of the special committee and to bear it in mind as we proceed. In many respects, the work of this committee is a continuation of previous Federal efforts

to address the problems which confront Indian people. During this century there have been numerous task forces and commissions established by both the Congress and the President to examine the status of Indian affairs and to make recommendations for improvements. In some instances, these commissions have recommended beneficial reforms; in others, they provide only temporary attention to the issues and then the matter was quickly forgotten.

I would like to take a moment to place the work of this committee in some historic perspective.

Our Constitution confers on the Congress the ultimate authority and the responsibility for the relations between the Federal Government and the tribes. With this authority and responsibility comes the duty to ensure the fulfillment of the trust. These are not passing whims or fancies of the day. They are solemn, legal, and I believe moral, obligations which are deeply embedded in our history as a Nation.

The renowned scholar, Felix Cohen, perhaps said it best:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our political faith.

I believe we will hear from the witnesses this morning that there have been numerous rises and falls of our political faith as regards the moral and constitutional obligation that we have to Native Americans.

The Northwest Ordinance, as we know, was enacted in 1789 with the famous pledge that "the utmost good faith shall always be observed toward Indians." Many of the duties in the first Congress were devoted to work on Indian affairs. Secretary of War Knox believed that this policy was also necessary to distinguish the national character of the new American Government from the previous conduct of the British colonial government toward Indian nations. Secretary Knox stated,

> But, in future, the obligations of policy, humanity, and justice, together with that respect which every nation sacredly owes to its own reputation, unite in requiring a noble, liberal, and disinterested administration of Indian affairs.

Mr. Chairman, for the next 100 years this country became involved in varying policies, up to the 1880s, where the policy of allotment—the allotment era of the 1880s—was adopted. While the acts were intended to promote Indian agriculture and individual ownership, the results were disastrous. Indian land ownership shrank from 138 million acres in 1887 to 52 million acres in 1934. Tribal cultures and traditional governments were severely impacted.

The consequences of the allotment era linger to this day in the form of checkerboard jurisdictions and fractionated land ownership which makes effective government and resource management difficult and, in some cases, impossible. The allotment era ended in 1934 with the enactment of the Indian Reorganization Act, which was intended to revitalize and strengthen tribal governments. Then, in the 1950s in another violent swing, Congress authorized the termination policy which called for the abolition of Federally-recognized tribes. As noted by President Nixon in 1970, the termination policy was disastrous for all tribes. Indians from terminated

tribes suffered from worsened economic and social conditions. Tribes which weren't terminated became even more dependent on the Federal Government out of fear of termination.

The self-determination policy which was enacted in 1975 seeks to strengthen tribal governments and reduce Federal domination. It has generally been well received by the tribes, and during the 100th Congress I was proud that the threat of termination was finally removed by the repudiation and repeal of H. Con. Res. 108.

Mr. Chairman, I believe that this history is important. To ignore it is to condemn ourselves and the Indian people to repeating the mistakes of the past. It is also important because it helps us to understand better the current situation in which we find ourselves. We must make certain that the Indian people are receiving the full benefit to be derived from their trust lands and resources as well as the full benefits of programs and services which are intended for their assistance and well-being.

Our goal must be to strengthen and improve the accountability and the capacity of the Federal and tribal governments to provide necessary programs and services effectively and efficiently to the Indian people. I believe that as we exercise our authority and seek to discharge our responsibility, it is important that we avoid the mistakes of the past. It is abundantly clear that the abrupt swings in Federal policy toward Indians have always produced negative results.

I believe that many of the situations which we will examine in these hearings are the result of prior inconsistent Federal policies. Caution and careful deliberation are necessary if we are to formulate effective policies for the efficient administration of the Federal trust responsibility.

Mr. Chairman, as you mentioned in your statement, this investigation by this committee has led us into some areas which we had not anticipated previously, and in my view it has even made a more compelling case, in the 7 years that I have been involved in these issues, that we must not only get the attention of the Congress but of the American people; that indeed, if we are going to be a kinder and gentler Nation, we must go back and address the issues and the afflictions of the native Americans that are so prevalent across Indian country today which, in my view, we should view as a national disgrace and dishonor.

Thank you, Mr. Chairman.

[Prepared statement of Senator McCain appears in appendix.]

Senator DECONCINI. Thank you, Cochairman McCain.

Senator Daschle is delayed due to a flight. We understand that he will be here within the hour.

We are very pleased to have with us a most distinguished group of tribal leaders this morning. The group includes four tribal chairpersons and one Indian leader not in government, and they come virtually from every region of the country where Indians are concentrated. We have selected this group not only for their geographic diversity but also because each one is an independent and highly respected member of the American Indian community.

Also, like this committee itself, the group of tribal leaders is bipartisan in nature. We look forward to hearing the views of these various leaders. Unfortunately, as the panel understands from dis-

[Whereupon, at 12:25 p.m., the committee recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION—2 P.M.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator DECONCINI. The Special Committee on Investigations will come to order.

This afternoon we will examine the adequacy of Federal Government legal representation of American Indians. The United States acts as a trustee for the property rights of American Indians—rights to lands, water, hunting, fishing, and mineral resources.

The Supreme Court holds that the Federal Government's trusteeship for American Indian lands and resources "should be judged by the most exacting fiduciary standard," and that the Government is, again, "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

Whether our Government is fulfilling its trust obligations to American Indians is of central importance to this investigation. As part of its responsibility, the Federal Government, through the Departments of the Interior and Justice, must assure that American Indians are represented in litigation affecting their interests.

America's most noted advocate of American Indian rights, Felix Cohen, took the obligation of legal representation so seriously that he worked tirelessly for 14 years to champion American Indian causes as an attorney at Justice and Interior. Cohen, who wrote the leading handbook on American Indian law, always insisted on the high stakes involved in ensuring proper legal representation of the American Indians. He said, "Our treatment of American Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."

Ensuring adequate legal representation of the American Indian has been important not only to Roosevelt New Dealers, like Felix Cohen, but also to modern Republicans. President Nixon, in 1970, made this issue the central focus of his policy Statement on American Indians. President Nixon remains sufficiently concerned about legal representation that he has sent the committee a letter for today's hearings, and I'm going to ask, without objection, that the letter be included in the record.

[Letter of President Nixon appears in appendix.]

Senator DECONCINI. I'd like to take a moment and just read a couple of pertinent points. The letter is dated January 26, 1989, and is addressed to the Senators of this committee.

I write to commend you and your colleagues on the Special Committee on Investigation of the Senate Select Committee on Indian Affairs for readdressing the important question of whether the first Americans are coming in last as far as the priorities of the Federal Government are concerned.

The former President goes on and lays out some background, and then he says,

Many of the goals I enumerated in my Special Message to the Congress on Indian Affairs on July 8, 1970, were enacted. I hope your committee will consider one pro-

posal that was not: my call for the establishment of an Indian Trust Counsel Authority.

I felt then, and I still feel today, that only the creation of an independent legal body can rectify the inherent conflicts of interest facing the Government in representing Indian interests.

The letter is before us, and I will leave it for the record.

The former President goes on,

In the critical area of administration of their land and water rights, the Indian people deserve to have their interests stated and represented unequivocally. In this as in many other areas, when Washington bureaucrats feud with one another, the rest of the nation loses.

Our witnesses today will present their views on how the legal representation process has worked during the last 20 years. They will testify that the sixties and seventies were an active time of advocacy and affirmative litigation by the Federal Government for the American Indians, as compared to this decade, which saw little affirmative litigation filed on behalf of American Indian causes and even fewer legal accomplishments. The distinction between the two periods is undoubtedly due, at least in part, to the selection of officials for the top positions at the Departments of the Interior and Justice. Yet, many of the problems are also procedural and may well be systemic.

Our witnesses today are: Mr. Leonard Garment, formerly on the staff of the Nixon White House and now a partner at the Washington, DC, law firm of Dickerson, Shapiro, and Moren; Brad Patterson, formerly Assistant Cabinet Secretary in the Eisenhower administration and on the staff of the Nixon White House, and author of the recently published book, "The Rise of Power"; and Robert Robertson, former Assistant to the Secretary of the Interior between 1974 and 1976, currently vice president of the Occidental International Corporation here in Washington, DC. We will hear from these gentlemen in just a moment.

Messrs. Garment and Patterson will appear on our first panel, to present their views of the 1970 Nixon Policy Message on American Indians and to relive with us the highlights of that Administration's accomplishments on Federal Indian regulations.

We later will have Messrs. Chambers and Claiborne comprise the second panel later this afternoon. They will present their perspectives both on their Government experience in representing the Federal Government in its role as trustee for the American Indians, and their view on how the process of legal representation is working today.

Later in the hearings we hope to hear from a number of other individuals, including former Solicitor Generals Archibald Cox and Erwin Griswold, and former Deputy Attorney General and Federal District Court Judge Harold Tyler, Jr.

Today we have not asked for testimony from representatives of the Departments of the Interior and Justice because neither department has granted this committee access to documents involved in American Indian litigation. Despite months of discussion and negotiation, we have not been provided materials from any open or closed cases involving American Indians. Recently Cochairman McCain and myself wrote to Attorney General Thornburgh and Interior Secretary-Designee Lujan to request more expeditious han-

dling of our requests and the ability to examine some of these cases for the perspective, and as this committee will address it, and for no other reason. We are hopeful that that may change before these hearings are finished.

[Prepared statement of Senator DeConcini appears in appendix.]

Senator DECONCINI. I now yield to the Cochairman, Senator McCain.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, COCHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator MCCAIN. Thank you, Mr. Chairman.

Let me first state my profound disappointment, speaking as a member of the same party as this administration, at the failure of the Justice and Interior Departments to provide us with the documents that have been sought for these many months. I will explore that issue further if we continue to fail to get the kind of cooperation that I think is necessary.

Let me also say, Mr. Chairman, and to the witnesses: what we are discussing here in this hearing I think is perhaps one of the most important, if not the most important, aspect of Federal/Indian relationship. It should seem obvious to even the most casual observer that if certain Americans did not receive equal representation in their Government, it is virtually impossible for them to obtain equal opportunity.

I think one sentence that Mr. Garment has in his statement sums it up. He says, "What we are seeing is not Indian corruption; it is the corruption that occurs almost universally when Government has too much discretionary power and individuals too little."

I think a case is going to be made here that in the last 10 to 15 years Native Americans have not received equal representation at the highest levels—and, in fact, at all levels—of the Federal Government. I think it is regrettable, but I think this issue has to be very well ventilated if we are going to correct the inequities which were outlined by the chairman and myself and the chairman of the Select Committee, Senator Inouye, at the beginning of these hearings.

I welcome the witnesses here.

Thank you, Mr. Chairman.

Senator DECONCINI. I thank you, Senator McCain.

I will now ask Mr. Patterson if he will proceed with his statement. Thank you very much for being with us, Mr. Patterson.

STATEMENT OF BRADLEY H. PATTERSON, JR., EXECUTIVE ASSISTANT TO LEONARD GARMENT IN THE NIXON WHITE HOUSE (1969-74)

Mr. PATTERSON. Mr. Chairman and members of the subcommittee, my name is Bradley Patterson, Jr. I am a recently retired member of the senior staff of the Brookings Institution. Previous to my 11½ years with Brookings I was a Federal career executive serving first in the Department of State, beginning in 1945, and then as the Deputy Cabinet Secretary at the White House, the Ex-

ecutive Secretary of the Peace Corps, and in various other assignments.

From September, 1969, until November 1974 I served again on the White House Staff, this time as the Executive Assistant to the Honorable Leonard Garment, Special Counsel to the President, and the unsung major actor who was the principal shaper of the progressive policies of that era in civil rights and in Indian affairs.

I stayed on under President Ford, who later formally designated me as the White House aide responsible for the coordination of Indian issues.

It is from the seven years' experience under Presidents Nixon and Ford that I appear before the subcommittee today.

In this effort, I was also a colleague of Ms. Bobbie Green Kilberg who was on John Ehrlichman's staff, and of Mr. Robert Robertson who was on the Vice President's staff. All of us whose names I have mentioned are very proud to have been involved with the initiatives that the President took in those years to improve both the legal and the economic status of American native peoples.

I can sum up my testimony in one sentence, however: presidential initiatives are nearly useless without surveillance and follow-through by the President's staff itself. Why? Because so-called bureaucrats drag their feet in opposition to the president? No, I am not saying that this afternoon. Because even some of the President's appointees are secretly trying to undermine his policies? I am not saying that, either. My assertion is that when the President—any president—does what presidents are uniquely expected to do; that is, enunciate precedent-breaking new solutions to old problems, the very newness, the abruptness of departure from past practice, come as a shock to other executive branch officials outside the perimeter of the White House. "But we've never done that before" is often the dazed and disbelieving reaction—from political as well as career executives.

It was just such a shock which President Nixon administered to his Executive Branch on July 8, 1970, when he issued his landmark Special Message on Indian Affairs. On the administrative Richter Scale it was 9.9. And now, nearly 19 years later, I think I still detect dusty plaster continuing to cascade from old ceilings.

In his 1970 message, for example, the President announced that the old policy of forced termination of Indian reservations was wrong—yet it was not until 4 years later that the Menominees got their reservation restored, and I believe it has taken 18 years before the Congress finally revoked the 1953 termination resolution.

The President declared that the Indian leaders should be "participating in policy development to the greatest possible degree." But it took unremitting White House staff pressure on both OMB and the Department of the Interior to reopen the Alaska Native Claims issue in 1971, to invite Alaska Native leaders, themselves, to give us their views and to re-write the proposed legislation to reflect those views. Incidentally, I salute the Congress for its thorough yet prompt action in approving the Alaska Native Claims Act within a year after the President sent it forward.

I want to pay special tribute to Messrs. Robertson and C.D. Ward of the then vice president's staff—they from their office, and we from ours, joined efforts to keep the president's proposals on track.

Perhaps the best example of the need for diligent surveillance and follow-through after a presidential initiative is found in the specific policy area in which this subcommittee today is interested: the measures to guarantee to Indian tribes the special protection of their treaty and trust rights.

What did the President say in his 1970 message? He quotes it in his letter in front of you.

Then the President proposed some special new machinery "to assure independent legal representation for the Indians' natural resources rights."

That special machinery—the idea of an Indian Trust Counsel Authority—was not then, and still has not been, instituted, but as soon as the message was issued, the duty fell, in the interim, on the group of us presidential and vice presidential staffers to find some way of guaranteeing that in any proceeding where Indian trust rights were under challenge, the voice of the Federal Government, as the Indians' legal trustee, would be heard clearly and directly.

The Yakima Tribe, for instance, complained that the long-ago Federal Government mistake of misfiling the treaty map of their reservation boundaries, and then compounding the mistake by creating a national forest where their lands had been, should be rectified. The Forest Service and Agriculture's General Counsel sputtered and shuddered at the thought of rectification, but we insisted that the Attorney General take another look, and on his advice President Nixon gave the land back to the tribe.

The Department of Justice lawyers hesitated at arguing in Judge Boldt's court that the tribes in the Northwest had treaty rights to much of the salmon in Puget Sound. Through some informal but direct conversations we stiffened their spines, and the resulting Boldt decision is one of the landmark monuments to the reaffirmation of treaty promises.

In 1971 the Internal Revenue Service had pursued an Indian named Bryan Stevens all the way to the Ninth Circuit on a tax evasion charge, which, Stevens argued, negated his trust rights. Only when a very quiet but very determined gentleman by the name of Leonard Garment directly reminded them of the president's policy did the Justice and Treasury lawyers reluctantly agree to append to their prosecution brief a statement by Interior giving the Federal arguments in the Indian's defense. That made the difference to the judges; they ruled in Stevens' favor.

That was the same Leonard Garment who drafted the letter John Ehrlichman signed to the Attorney General on February 15, 1972, reminding the Attorney General that the White House wanted any future Justice brief challenging an Indian natural resources trust interest to be accompanied by a parallel brief from Interior upholding those interests.

To his credit, Attorney General Mitchell promptly consummated a Justice/Interior understanding which incorporated the White House initiative. Within two months—and after an amicable luncheon with Special Counsel Garment in the White House mess—So-

licitor General Erwin Griswold agreed to apply the split brief procedure even to cases in the Supreme Court.

In 1974 a second Indian tax case with trust rights implications arose, and a split brief was filed, but only after President Ford's White House assistants—then Associate Counsel Ms. Kilberg, and myself—again firmly reminded Justice that the policy of 1970–72 still held.

In this case—*Critzer* v. *United States*—the Circuit Court chided the Justice representatives for what seemed to them the executive's inability to speak with one voice. Deputy Attorney General Harold Tyler thereupon, in July 1976, told the White House that he was going to abandon the earlier policy—a move which the Interior Solicitor, H. Gregory Austin, contested. The Ford Administration was nearing its end at that point, but I call the subcommittee's attention to Mr. Tyler's letter of last November 2 in which, now as a private citizen, he looks back at that controversy and comments: "In hindsight, I would regard Federal Government legal representation of Indian natural resource trust interests as a bit different than most of the types of bifurcated representation which concerned us in 1975 and 1976. Put differently, the peculiar interest of the U.S. Government in Indian affairs may well set this issue apart for special consideration."

I am sorry to note that President Carter's Attorney General, Griffin Bell, cancelled the 1972 understanding. To the best of my knowledge, there has been no officer in either the Carter or the Reagan White House to resist this relapse; apparently we are now back to the old, comfortable but to my mind improper pre-Nixon practice of hiding from any court's notice the trusteeship views of a Solicitor or Secretary of the Interior if they conflict with the Department of Justice's judgment.

Of course it may appear messy for a Justice Department lawyer to present a split brief to a court—messy to the barrister, messy to the bench. In my opinion, however, that is what courts are for: to judge. In Indian trust cases, the Federal trustee's voice must be heard as distinctly as any other Federal view coming from the Justice Department; judges should then not shirk from doing what they are appointed to do: deciding the tough issues.

Until a Trust Counsel Authority or some other mechanism is designed to meet the need of guaranteeing the representation of Indian trust rights, I believe that the 1972 understanding put in place by Attorney General Mitchell at Garment's and Ehrlichman's urging should be reinstated. And, as before, it will have to be policed by an alert White House staff.

One final point about Indian legal matters: just a few years ago a document was brought to my attention which I want to be sure the subcommittee knows about—I attach it at the end of my written statement.

The document is called a "Statement of Policy" and is, in effect, a compact, dated April 19, 1984, among the governors of the States of Arizona, New Mexico, and Utah, and the chairman of the Navajo Tribal Council. It promises government-to-government relationships among the four, provides for close and regular consultation among them, and sets forth their agreement that neither the Navajo Nation nor any of the three States will file lawsuits against

one another before they sit down with one another and consult to try to resolve issues of conflict without going to court. I applaud this refreshing departure from the State-tribal polarities of years past, and hope the subcommittee will urge other States and tribes to follow this example.

Let me simply conclude at this point by saying I have other observations in general about Indian affairs from my experience, particularly the fact, Mr. Chairman, that Indian affairs pay no attention to cabinet boundary lines. There are about 52—in a count I made in 1976—different offices in 17 different departments and agencies of the Federal Executive Branch which handled important aspects of Indian affairs. So one ends with the conclusion that you really do need central coordination at the White House, and a great deal of careful surveillance over Indian affairs.

My concluding comment is this: I have watched the morning hearings over C-Span and listened to the statements that you made, Mr. Chairman, and Senator Inouye, and others, and the witnesses this morning. I simply will say that all three of us this afternoon here are sitting here talking to you from the perspective of policy makers at the level of the White House and the vice president's office. But good policy isn't any good without good administration to follow it up. And if administration has been poor or ineffective—and it may be true from the Arizona Republic Series—insofar as that is true, anybody in the policy level, of course, is embarrassed and chagrined and frustrated at poor administration.

I feel confident that the work of this committee will help cast a light on both the good and the bad in administration so that we can correct it.

But from our point of view as policy-makers in the years of the 1970s, we are proud of what we did, and we very much hope not only that the policies will succeed that we began to set, but that good administration will keep them going.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Patterson appears in appendix.]

Senator DECONCINI. Mr. Patterson, thank you. That's very helpful to give us some of the history and the background here for the record for the purpose of this committee.

I do have some questions, but we're going to listen to the rest of the panel before we go to the questions.

Mr. Garment, do you have a statement for us, sir?

Mr. GARMENT. Yes, sir.

Senator DECONCINI. Please proceed.

STATEMENT OF LEONARD GARMENT, SPECIAL CONSULTANT TO PRESIDENT NIXON (1969-74)

Mr. GARMENT. Thank you, Senator.

I was frequently bemused during my years in the White House finding myself, a New York lawyer whose roots were on the streets of Brooklyn, attending to Indian affairs. But I did learn a political science lesson from all of that, which is that a person who is ignorant, but of essentially good will, combined with a colleague who is immensely competent and energetic, can frequently find his way through some novel political and governmental puzzles. I was the

Senator MCCAIN. Thank you, Mr. Chairman. And I want to thank the panel again for their very important contributions.

First I would like to comment on the very important document on tribal economies. I did read it at the time that it was completed, and I agreed with a substantial amount of it. I think it is important to point out that that report was not without controversy. There were several major tribal organizations which vehemently disagreed with certain parts of the report; but I also believe—and I disagreed with parts of it—but I think it is important to recognize that that report stimulated a great deal of thought and discussion and, indeed, changed some opinions throughout Indian Country. I think it did make a very important and significant contribution to the efforts that we are trying to make and all of us are interested in, and that is the improvement of tribal economies.

I just really have one question, Mr. Garment, for you or Mr. Patterson: my understanding from the history of this situation is that there was a recommendation made to you and/or Mr. Patterson and the President to establish a Trust Counsel Authority, someone who would speak for Indians when there were matters of dispute, which is also often true where the existing structure of government cannot adequately represent the Indian interests because of a conflict of interest. What happened?

Mr. GARMENT. Well, that's a fair question. Since I have been distracted by other things for the last several years, I asked that question. Whatever did happen?

That was the part of the reform package that fared worst and, in a sense, may have been the most important. To give a fair account, there were many in the Indian community who had divided feelings about the creation of this Indian Trust Counsel. I think they felt it might be too small, that it might be overwhelmed by the other, more powerful bureaucratic organizations, and I think there was a certain anxiety about how this new structure would operate and whether it would be helpful or hurtful.

Second, I think that there was considerable resistance of a professional nature on the part of lawyers. There is nothing like lawyers when it comes to wanting things done their own way, and the very notion of institutionalizing ambivalence by having a brief that presents two points of view was anathema to people in the Justice Department and elsewhere through the Government. I think many of the people in Congress felt that was a bad idea because no particular court is going to know quite what is happening.

And, indeed, that problem was aggravated by—I believe it was the Fourth Circuit Court of Appeals—the Critzer Case, which made some admonitory comment about the fact that the Government didn't seem to know what its own position was.

Well, you have to educate courts as well as the citizenry and the executive legislative branches, because it was complicated to try to institutionalize the way the Federal Government would handle its multiple responsibilities by presenting multiple points of view at the hands of people, each of whom would devote their energies and advocacy skills to presenting the best possible argument.

From the time that I began to think about law and practice law and work in the Government there has never been anything that seemed more important to me than providing adequate representa-

tion for people in trouble, and particularly people who were sort of outside the pale of normal society; and, second, providing devoted representation that was not hampered, weighed down, made uncertain by reason of some other interest.

Senator MCCAIN. And this is still your conviction?

Mr. GARMENT. Yes; indeed, Senator. I think I don't belittle the fact that there may be problems, but I think the principle is sound. There is no real alternative. Whether an Indian Trust Counsel Authority should exist as a separate entity or whether it should be part of the Department of Justice or the Department of Interior—those are matters for expert cognizance and for debate, but the seed should be planted and the work should go forward, and in the fullness of time there will be an entity that will not depend upon episodic and——

Senator MCCAIN. Periodic?

Mr. PATTERSON. Periodic interest on the part of a particular administration.

Senator MCCAIN. Thank you, Mr. Garment. I hope that this committee and the select committee will give the most serious consideration to this initiative, even if it is long overdue, because I feel it is also a very important one.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator McCain.

Senator Daschle.

Senator DASCHLE. Thank you, Mr. Chairman.

Mr. Garment, I'd be interesting in knowing: in retrospect, where did you find opposition? And to what parts to the policy statement? Where was the most resistance?

Mr. GARMENT. Overall?

Senator DASCHLE. Overall.

Mr. GARMENT. To the whole policy statement? Well, we did pretty well: Blue Lake was restored; the Indian contracting out of self-determination provisions were, in the first instance, implemented; additional funds were appropriated and made available for education and for health services; the policy of maintaining the trust relationship, while encouraging independence—that is, getting away from the notion of termination—that ultimately took some years, reaffirmed by concurrent resolution.

But there were two problems: one is the Indian Trust Counsel. When you get to that kind of vigorous, independent representation in connection with land and water and natural resources, there are very, very important interests that begin to be heard and to dig in their heels. And perhaps I can risk the generalization that this would not be the first time that resistance of that sort has been generated.

The other problem is a problem that Senator DeConcini and Senator McCain have adverted to, and that Brad Patterson has addressed himself to, and that is the problem—and it is a very universal problem—of implementation.

One can't expect the Congress—and even the Executive Branch—to go out into the field and make federalism work. They can have committees on intergovernmental relations, they can work with governors and mayors and all of that, but programs that have their real bite at a very local level—at almost a family level—

and particularly in an area of such complexity where the pathology is so tangled and the problems so historic as in the Indian word, requires something more than simply the enactment of good intentions in the form of legislation, as truly in all the poverty programs.

The Welfare Reform bill has been passed. It is a step forward, but it isn't going to go anywhere until the hard, day-by-day, step-by-step work in the field is undertaken and the idea of federalism is brought to light in some vivid fashion at the grass roots.

Senator DASCHLE. With regard to resistance within the Government, itself—and that's a pretty far-reaching, broad-ranged policy statement—you'd have to run into institutional impediments, bureaucratic impediments that, alone, would be major obstacles to satisfactory implementation. What was your experience in that regard?

Mr. GARMENT. It goes without saying, but it should be said and I appreciate your saying it, Senator Daschle. I referred to it in the briefest way in the page that I read, but the Bureau of Indian Affairs, like many bureaucracies, has its own internal self-interested, self-perpetuating dynamic, and perhaps in a way there is more of a case to be made for the problems encountered here because so large a proportion of the Bureau of Indian Affairs are, in fact, Indians, and they have managed to fight their way into employment and they don't want that to be dissipated. So the normal quotient of bureaucratic interest in exercising power may be even more intensely experienced in the Bureau of Indian Affairs.

Now, I'm not here to say the Bureau of Indian Affairs should be abolished. Some people say, "Off with their heads." I think it should have its role better defined. I think it should be more of a—as one of my colleagues here suggested—a service agency that serves a kind of function similar to that of lawyers: the clients come and ask for help, advice, assistance in arguing the case with other agencies of the Government rather than being what it is now, a vast, paternalistic organization which uses 90 cents out of every $1 for its own administrative purposes rather than getting that money out to the field where it is really needed.

Mr. PATTERSON. Senator, I can give an example. For instance, in Mr. Nixon's proposals was the idea of having teachers in Indian schools become tribal employees responsible to their tribal governments, respectively, rather than be Federal employees. Now, this is several thousand people whose employment status would change from being Federal employees with all the Federal benefits to being tribal employees responsible, as State and local governments are now, to the local school boards. This was a dramatic change.

I don't charge the bureaucracy, so to speak, for being apprehensive about such a change, but it was an important change and it should have been made.

Now I have lost track of how well it has been done, but I think I heard Chief Mankiller this morning say that the Cherokees have taken over their BIA schools. That means, if I am correct, that the teachers on that school faculty now are responsible to the tribe rather than to the BIA in Washington. Great. But that takes some change and makes people apprehensive.

Senator DASCHLE. Thank you all, and thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Daschle.

I would now ask counsel, Jim Rowe, to proceed with a few other questions, if you gentlemen don't mind.

Mr. ROWE. Thank you. In the recent letter from President Nixon, he reaffirms one statement in his special message, and let me just quote from his recent letter—the section that appears both in the Special Message and in his letter: "Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation.

No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet, the Federal Government has frequently found itself in precisely that position.

There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal Government is damaged whenever it appears that such a conflict of interest exists.

At this point in the committee's review we are hearing, not only from this panel, but from the second panel, an overview of the process and whether it is working. We are not asking you today specifically to endorse specific proposals, but I did want to raise one practice that the Nixon Administration implemented and get all of this panel's view on it: the split brief policy which some of you have mentioned in your opening statements. This was an agreement where the Justice Department was asked to state separately the views of the solicitor—the solicitor in the Department of Interior—when the Justice Department conflicted with the view of the solicitor with regard to the Indian rights to their natural resources.

This was done on six different occasions. Coincidentally or not—and there are very strong feelings that this was not coincidental—in each instance when this practice was utilized the originally nonprevailing Indian view at the Department of Interior that was not adopted by the Justice Department was, in fact, put in before the court for review. Six out of six times the Indian position prevailed.

I gather from the three of you that you do not find that coincidental; is that correct?

Mr. GARMENT. That's the kind of crap game you want to get into where the odds work that way. In other words, I don't think it was coincidental, just a roll of the dice. I'm not making any assertion of bad faith, but I do think that many of the people involved in the process of deciding what the position was, had their own predilections—a legal or ideological bias—and that entered into the way they wanted to handle or not handle the case.

When it found its way into the courts in the hands of people who were there to advocate, to present the evidence, to present arguments, those cases came out the way they did.

Mr. PATTERSON. This took very affirmative action from the White House. Mr. Garment is being too modest. There was a meeting that I will never forget in his office with the assistant attorney general for tax and the head of IRS, and they had to be reminded—too polite a word—to do what the President said he wanted done to put that split brief in there. They were just very reluctant because it was such a change from the past.

I don't blame them for being professionally interested in having the Government speak with one voice, but it wouldn't have happened without that intervention from the top.

Mr. GARMENT. This is really a very precise definition of paternalism in relation to Indians. When the Government says we are able, like the father of a family, to administer and sort out controversies among the kids, well, that's paternalism, and that's not law, and that's not proper government.

Mr. ROWE. Your administration, in approximately 1974, following a number of incidents—Alcatraz in late 1969, followed by a BIA takeover on the eve of the 1972 election, and then followed by the Wounded Knee situation—after all of that you still went out and you recruited an Indian advocate specifically to be brought into the Department of Interior to represent the American Indians, and that advocate, not surprisingly, is going to be on our second panel—Mr. Chambers. But, Mr. Patterson, do you recall the thinking in deciding that there was a need in mid 1970s to go out and get an advocate specifically in the Department of Interior to represent the American Indian interests?

Mr. PATTERSON. Well, of course, in the Department of Interior there was a central office, namely the Solicitor's office, which did all the legal work for all the bureaus of the department. BIA did not have its own counsel, as such, so that office was a key office in organizing the Indian representation. We were delighted to have Reid Chambers there, and others on his staff, who pioneered in this.

I might add, incidentally, there was the greatest of ironies that in the very decade which began with the President's message and Bob and Leonard and Ms. Kilberg and myself in the White House taking the lead as we tried to do in Indian affairs, these three instances of Indian uprisings occurred—those guerilla—theatre-like takeovers. It was, in a certain sense, all unnecessary and most of it theatre and all rather unfortunate because it had the effect, of course, of galvanizing opposition and making people feel that there was violence involved.

At the very time that the President and the rest of us were pushing ahead with these new policies the Indian takeovers reflected frustration with the years before. But there was an overlap, so to speak, and the frustration boiled over. We tried to handle those instances with a great deal of restraint, and we were successful in that. But it was an irony to have those two things going on in the same decade.

Mr. GARMENT. The first item on which Brad and I disagree. I think they served a useful purpose because it was messy, but it drew attention—I wouldn't urge it upon anybody within the reach of my voice to do it again because I think it is not necessary, and I'm not sure that everybody would be quite as passive as Brad and I were then—well, I wouldn't say we were passive.

But, in any event, those were important incidents because they did focus attention on the nature of the problem.

Mr. ROWE. Two matters that I wanted to go to: one was the Blue Lake legislation. Could all three of you talk about that and the involvement of President Nixon and Vice President Agnew in that legislation?

STATEMENT OF LOUIS F. CLAIBORNE, DEPUTY SOLICITOR GENERAL (1964–70; 1978–85)

Mr. CLAIBORNE. Mr. Chairman, Senators, I am honored to be here. I am concerned sufficiently with the problem before you today to be grateful for the opportunity to appear.

During the many years that I was in the Solicitor General's office, with some years away as practicing barrister on the other side of the Atlantic, but still then returning from time to time, my one consistent jurisdiction was Indian affairs.

I was doing all of this in the name of the Solicitor General. As the committee knows, the role of that Solicitor General is to handle the Government's litigation in the Supreme Court on behalf of the United States and to screen appeals when the Government has lost its case in any lower court, State or Federal.

In principle, these Indian cases were a small part of my responsibility, and so it was at the beginning. But at the end, as I shall explain in a moment, they became a larger segment, consuming a disproportionate amount of time and effort—at least so it seemed to me necessary to handle those cases as they deserved to be handled in the Supreme Court.

Perhaps with this background I can help the committee in some small way on the question of legal representation of Indian claims by Federal attorneys. I appreciate that this is only one of the many areas under investigation by the committee, but in my view it is a most important one. You would expect me to take that position, having devoted so much time to it.

But I am concerned that all is not well on this score. The worst may be over for the moment with the departure of certain key lawyers at Interior and Justice. But, as I shall detail in a moment, I believe the problem is inherent in the current process and calls for remedies well beyond changes of personnel.

In my view, one way of stating the problem is that under the pervading system too much depends on officials who have only incidental responsibility for the Indian segment of their jurisdiction. As things are, these officials are not selected for their commitment to the vindication of Indian rights, nor is it expectable that they should be, given all the other responsibilities that they are burdened with. And the changes, accordingly, are that they will have no such special commitment.

Even in the best of climates it will be only by accident that the Secretary of the Interior or the Deputy Secretary or the Solicitor of the Department of the Interior or even the Deputy Solicitor or the Attorney General or the Assistant Attorney General in charge of the Lands Division or his deputies or the Solicitor General or his relevant deputy or any of his assistance will have any special knowledge or sympathy for Indian rights.

And in an administration like that just ended it is predictable that none of these officials will be committed to the Indian cause.

When that is the situation, Indian rights are not represented in the courts by the Federal Government, or are only partly or half-heatedly represented, and sometimes even are opposed by the Government.

Now, it is fair to ask why this matters much, especially when, as is usually true today, the Indian Tribes are separately represented by their own private counsel. Let me suggest why it does matter.

First, litigation is vital to the vindication of Indian rights. Perhaps it is unfortunate that this is so, but it is the reality.

It is so because of the minority status and political impotence of the Indian population and the persisting indifference, even often hostility, to Indian claims.

I need hardly tell the members of this subcommittee that Indian rights are not always conceded by State and local authorities, or even by the State courts, in much of the West. Nor was the attitude more acquiescent in the East or in the South when Indian rights rose up in the form of substantial land claims, whether in Maine, Connecticut, Massachusetts, New York, or South Carolina.

The intervention of the courts, accordingly—especially the Federal courts and the Supreme Court on review of State courts—remains essential to establishing and enforcing tribal rights.

Second, the Federal involvement in such litigation is often critical. In many cases, even today, a small tribe does not have its own lawyers and, indeed, is sometimes unaware of its full rights. But, in any event, it is impossible for any tribe, through its own lawyers, to match the advantages of Federal legal representation.

At their best, the Interior and Justice Department lawyers have the benefit of accumulated expertise, unique resources, and a generous purse—which cannot be matched. Unlike private lawyers, who must sometimes put forward grossly inflated claims, thereby losing credibility with the court, the Government lawyer is much freer to put forward a winnable case.

So, also, the Government lawyers enjoy a unique insulation when an unpopular claim must be asserted and the participation in the name of the United States gives added weight to the argument in court.

In the most controversial cases, of which there have been a substantial number, the courts are emboldened to vindicate the Indian claim by the assurance that the Federal Government will stand behind the decree. Occasionally, as in the Washington Fishery Case, the local opposition to the Indian claim is so virulent that Federal force is required to carry out the decision, just as it was in the desegregation context. Indeed, the court of appeal in that case made precisely that analogy.

Finally, such Federal involvement in Indian litigation is entirely appropriate. This is partly on the principle that Federal lawyers took up the vindication of black rights in the civil rights litigation of the last several decades. But here, in the Indian context, there are, in my view, additional reasons.

The fact is that, unfortunately, even today the United States enjoys unusually pervasive powers over Indian tribes and, correspondingly, owes them a special duty of protection. This is a consequence of historical events in which the United States played the leading, if not always noble, role.

As Cochairman McCain recited this morning, it is a consequence of that history, reflected in the Constitution, itself, in treaties with the tribes, in agreements between the United States and the tribes after the treaty period ended, and in Congressional legislation—

with some lapses—for 200 years, that this special trust relationship between the United States and the tribes persists. A part of that trust relationship is an obligation to vindicate Indian tribal claims before the courts.

This obligation of trust—or guardianship, as it has been called by the courts—is not an anachronism. All who study the matter know that the tribes still need Federal protection, and especially so in vindicating their rightful claim to exercise governmental powers over non-Indian residents within their territories, and in vindicating their claim to exemption from State taxation and control within those reservations, both for themselves and for those who engage in dealings with them.

Besides, in these and other matters the usual adversary is the State, and the tribe would have an ill-matched contest with the lawyers for the State if they were not supported by the United States.

Now, this duty of legal representation that government lawyers owe the tribe does not mean that they must assert any claim the tribe wishes to put forward. If Government lawyers did that, they would lose the special advantage of credibility they presently enjoy with the courts, thereby disserving the tribe they were purporting to represent.

And besides, Government lawyers advocating Indian rights remain attorneys for the United States. They are not tribal lawyers.

On the other hand, I suggest there is an obligation to put forward every reasonably arguable claim, even if, as a judge, one would reject it. Considerations of economy or administrative convenience cannot play a part in the decision, nor can conflicting governmental interests be permitted to affect the decision whether to initiate litigation to vindicate Indian rights, or defend a suit, or appeal an unfavorable judgment, or support the Tribe's case through intervention or amicus filings.

Nor certainly is it proper to compromise the Indian interest by reducing the claim or watering down the arguments so as to accommodate other Federal clients. Indeed, this is one of the most serious defaults since it may pass undetected, and the Supreme Court has long held and only recently re-affirmed that in such cases there is no remedy once the judgment has been entered.

The conflict problem is, of course, the problem that led President Nixon to propose the establishment of an independent Indian Trust Counsel. It is the problem that, for a time, spawned the divided brief practice of which you just heard.

The Supreme Court has stressed that the multiple, and sometimes conflicting, clientele of Government lawyers is a consequence of Congressional decisions to assign all Indian affairs to one Department of the Interior and to assign all litigation to a Department of Justice—the Department of the Interior having many other responsibilities assigned to it by Congress; the Department of Justice having responsibility to represent other Government interests beyond those of Indian tribes.

That, in my view, is the court saying to the Congress that the ball is in your court. It is not a matter which we can resolve.

Now, various remedies have been suggested, and no doubt others will be advanced in these hearings. What I want to stress immediately, however, is my view that the conflict problem is not satisfactorily solved by saying to the tribe, "We can't represent you, but here are the funds to hire yourself your own lawyer."

Congress moved in this direction starting in 1966 when it opened the door to the Federal courts to the tribes suing on their own, and implemented existing provisions of law by funding the hiring of private attorneys by individual tribes.

But, while important, this, I suggest, is not an adequate substitute for representation or support by Government lawyers. Self-representation, without a second from the United States, robs the tribes of all the advantages of Federal participation which I have just recited. And, indeed, in light of past practice it suggests to the court that the tribal claims, in the Government's eyes, is frivolous.

Here I should note the long-established practice of filing amicus curiae briefs in support of tribal claims, a practice which has existed in the appellate courts and in the Supreme Court over several decades. I daresay that those briefs have importantly shaped the development of Indian law over much of that time.

In many cases, the United States and the tribe are both parties because the case was initiated by the United States and the tribe intervened. And here, also, for the United States to drop out, even though the tribe is free to pursue the case, sends a signal which is bound to influence the court. Indeed, it will be a very rare case in which the tribe's lawyers are so good and the case is so obviously winnable that Government participation is entirely superfluous.

Under the prevailing arrangements, it is not difficult to see the many ways in which the Indian interests may suffer. One possibility is that the tribal claim may go unasserted because it never reaches the lawyers at all, having been administratively buried. This apparently happened in respect of the reserved water right of the Pyramid Lake Tribe of Nevada in respect of the water required to maintain their fishery.

Many years ago, when the United States was seeking an adjudication of water rights in the Truckee River and is the only source of water for the lake—which feeds Pyramid Lake—for the first Federal project under the Reclamation Act of 1902, the Newlands Project, a small amount of water was claimed for irrigation of the Indian reservation, but nothing to maintain the fishery, even though these Indians then and since depended for their livelihood upon the fishery. How could that default have occurred?

Even then, in 1922, as is almost always true, there was someone somewhere in the Federal bureaucracy who saw the right course, but he had a lonely and subordinate voice and he was overruled. According to some of the evidence, apparently accepted when the matter came before the Supreme Court some five years ago in an unsuccessful effort to re-open the matter, it was the Acting Commissioner of Indian Affairs, himself, who decided not to pursue the claim for fishery water. He was of the old school that believed that Indians should be civilized by being turned into farmers and weaned away from dependence on hunting and fishing.

One would not encounter quite that attitude today, but there are still some very paternalistic officials in both the Interior and Jus-

tice Departments who feel that they know best what is good for the Indian and, to some extent at least, shape the Indian claim accordingly.

A more serious continuing problem is the situation I have already mentioned in which the United States has conflicting interests. That was true in the litigation affecting Pyramid Lake. From the first, it was recognized that if all the water sought for irrigation by the farmers of the Newlands Project were recognized and were diverted for that end, there would not be much left over for the Indian fishery. And so it was decided, in the words spoken at that time in the 1920s, "to prefer the larger interests involved in the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." And so the Indian claim was laid aside.

But that attitude, unfortunately, is not confined to the 1920s. It was echoed as recently in my experience as 1981 in a letter from Senator Laxalt of Nevada to the Attorney General of the United States urging against an appeal in the same Pyramid Lake context which I was urging upon the Solicitor General partly in the interest of the Pyramid Lake Tribe.

The Senator was asking that the attorney general direct the solicitor general to give preference to the interest of, as he put it, "all those ranchers who are ours." I'm glad to report that the then solicitor general, Rex Lee, stood firm and, notwithstanding, appealed.

And, even more recently, I am told the solicitor of the Department of the Interior articulated the proposition that the United States has a trust obligation to the people of the Western States—the non-Indian people of the Western States—that overrides its duty to the Indian tribes—this in arguing against filing an amicus brief supporting a mineral lessee paying tribal severance taxes who was claiming exemption from duplicative State severance taxes. In this case it appears the subsequent solicitor general did not resist that suggestion.

But even more common than these instances of straightforward conflict of interest is the situation in which the official who makes the decision affecting Indian interest who is not hostile but simply unsympathetic to Indian rights. Now, the cause of that may simply be his ignorance of Indian law or of the special relationship owed to the tribes.

There is, for instance, a recurring tendency to treat a recommendation by the Indian Service as no more entitled to preference than one advanced by the Reclamation Service or the Park Service or the Bureau of Land Management. That attitude prevails, I am told, today, at the Interior Department.

But the same attitude has pervaded the Land and Natural Resources Division of the Department of Justice. It is no wonder, when Indians are labelled one more natural resource, the division in the Department of Justice being called, "The Division of Land and Natural Resources," on a par, but no higher than, land and minerals and trees. This, of course, ignores the special obligation due to Indian tribes as distinct human and political communities.

What is more, officials who indulge in that indifferent attitude towards Indian claims are disregarding policies laid down by this

Congress—a policy of promoting self-determination, a policy of continuing the trust relationship between the United States and the tribes, and a recognition of the continuing obligation to promote Indian rights through litigation and otherwise.

Now, often enough ignorance of the law accounts for this wrongheaded attitude, as I said. But sometimes it is a step beyond innocence. The official—and perhaps especially a lawyer—will be resistant to the idea that Indians should enjoy what is, after all, a very remarkable legal status. Many officials without experience of Indian affairs are tempted to invoke Justice Bradley's dictum about the black man: that he should "cease to be a special favorite of the laws and take the rank of a mere citizen." Needless to say, Bradley was premature in saying that in 1883, and so are those who quote him today in respect to the American Indian.

This is not a matter of political allegiance. It may be true that the championing of Indian rights by Federal lawyers is least likely in a very conservative political climate, but ever since Andrew Jackson on the one side, and Chief Justice Marshall on the other, were in opposition with respect to Indian claims, it has been clear that on either side of the aisle one can find those who support and those who ignore Indian rights, without preferring one time to another.

In my experience, Indian advocates are made, not to the manner born. It takes education to accept the propriety of recognizing the unique status of Indians and Indian tribes, and it takes time—frequent, intensive exposure over a fairly long span. In the nature of things, one cannot expect understanding of Indian law and commitment to Indian rights from officials who deal only very occasionally with Indian matters and remain in office only a relatively short time. I may say that I did not come to a commitment to Indian rights without having to be educated, and over some period of time.

But this is all the more true of an attorney general, secretary of the Interior, solicitor general, and, to a lesser degree, their principal assistants, who, by definition, are unlikely to have this special understanding and commitment, and whose role is such that Indian affairs will only play a very small part in their energies and efforts.

In practice, therefore, these officials at the head of the departments are likely either to defer somewhat blindly to the Indian experts in their respective departments or, on the contrary, to overrule them almost automatically. I have lived through both of these extremes.

There have been times when the Interior Department would endorse almost any Indian claim, however frivolous under settled law, and when the Lands Division of the Department of Justice was not sufficiently screening Interior's requests to initiate or support lawsuits on behalf of tribes. More recently, on the other hand, I have experienced the opposite problem: the Interior Department forwarding no recommendation for vindicating the Indian claims, the Lands Division reluctant to act in the absence of such a recommendation, and, if the case involved an appeal or Supreme Court litigation, the solicitor general concerned that his role was not to initiate filings which no agency was urging.

In my last years as deputy solicitor general I therefore found myself expending disproportionate energy first persuading the solicitor general to ignore the silence of others in the Government, myself soliciting advice under the table from the suppressed Indian advocates at Interior and Justice who still remained there but who were not officially permitted to communicate their views to us, and preparing Supreme Court briefs on my own, ultimately fighting all manner of sniping before they were eventually allowed to be filed. That is not how the system is supposed to work. Unsurprisingly, I have noticed, since my departure, that the filing of amicus briefs by the United States in support of Indian claims have measurably dropped off, and perhaps also that the support of appeals in the lower appellate courts has suffered.

To outline the problem naturally leads to the question: what, if anything, can be done to resolve it? I am very far from being sure what the right solutions might be. But very tentatively I do suggest that one possible solution is to establish two or three high-level positions within the Government with officials whose sole responsibility is the vindication of Indian rights. I am inclined to resist the creation of a wholly separate Department of Indian Affairs, but I would advocate the establishment of more prominent, more visible, more independent Indian rights divisions within both the Interior and Justice Departments.

One possible arrangement within the Interior Department would be to give the Indian Division—a perhaps streamlined, reshaped, and renamed Bureau of Indian Affairs—an autonomous status subject only to the secretary's presumably very occasional intervention, and to assign to that agency a lawyer wholly independent of the solicitor of the Interior Department who might be called an Indian Trust Counsel, but who, at all events, would be free to send his recommendations to the Justice Department without any supervision or screening from the solicitor's office.

So, also, within the Department of Justice, itself, I suggest it might be appropriate to create a new Division of Indian Affairs with its own assistant attorney general, quite separate from the Land and Natural Resources Division. That new assistant attorney general for Indian affairs would submit his views directly to the attorney general and to the solicitor general.

The object of the exercise, as I have suggested, is to create these high level offices dedicated solely to the vindication of Indian rights, which must be filled by knowledgeable persons committed to the Indian interest. Merely reorganizing the Government will not work unless the right people are chosen; but at least the modest restructuring I suggest would expose the nominees to these positions— nominees, I would suppose, requiring Senate confirmation—at the hearings on their confirmation to be tested as to their understanding and commitment to the Indian.

I would add only one further point, which is that, I think, rightly prominent among the reforms urged by the Indian tribes and their lawyers is the suggestion that even if one had separate lawyers within the Government who advocated the Indian interests there would come cases—and rightfully so — in which a Secretary of the Interior, an attorney general, or a solicitor general would determine that, in his view, the Indian claim was without merit and he

would, accordingly, instruct the Federal lawyer not to represent the tribal interest or even to advocate another conflicting claim.

Now, in those circumstances it seems only right that there be full and timely disclosure to the tribe and its lawyers, that time be afforded to the tribe to represent itself, whether by way of initiating litigation or intervening in litigation or pursuing an appeal that the Government had determined not to pursue, and, finally, to provide funds for that tribal representation to go forward. I'm not sure that this requires new legislation, but one way or another it seems to me the principle should be more firmly established.

Mr. Chairman, I would be happy to answer any questions the committee might have.

[Prepared statement of Mr. Claiborne appears in appendix.]

Senator DECONCINI. Thank you, Mr. Claiborne.

Let's hear from Mr. Chambers now, and then we do have some questions.

Mr. Chambers.

STATEMENT OF REID PEYTON CHAMBERS, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS (1973-76)

Mr. CHAMBERS. Thank you, Mr. Chairman. And thank you for the honor of inviting me here today.

Between 1973 and 1976 I served as the Associate Solicitor, which was the chief Indian legal officer within the Interior Department. Since then I have been in private practice here in Washington, DC, representing Indian tribes and tribal organizations. So my comments over this period of about two decades reflect both Government service and private practice.

I am convinced that lawyers within the Government agencies who have responsibility for Indian affairs should function solely as advocates for Indian rights.

I think that is both a legal imperative because of the trust responsibility, and I think it is a moral imperative. I think that it speaks of simple faith to the oldest of American values—fairness, decency, and honor in dealing with the American Indians.

The President put it well in his inaugural address. He used these words: "Great nations, like great men, should keep their word." Now, that was first said not by President Bush—although he may not have known that. It came from a Supreme Court opinion written by Justice Hugo Black in an Indian treaty case speaking about the performance of the United States. So I think protection of Indian rights echoes American values, as well as American legal traditions that go back two centuries.

Now, obviously the performance in the Indian field has not always—or even usually—matched that promise. Some of that is because of the conflict of interest that the committee is aware of, and that we have all been talking about this afternoon. You've got the Government agencies that represent both the Indians and conflicting public interests. Now, public policy normally consists of compromising interests and resolving them. But in the Indian trust field that is not a legal or a fair way to proceed because the United States is both representing public policies of various kinds and is a trustee for private property rights of the American Indians. So it is

odious for the United States to resolve those kinds of claims against the Indians.

Now, it also happens that promise is not matched by performance even if you don't have a conflict of interests—a Federal reclamation project, a national park, or something like that. You have one million Indians and you have 220 million non-Indian Americans. And so the power and the money in the country, when there is a political conflict, is often arrayed against the Indians.

That is why I think it is so very important to have institutional advocates within Justice, within Interior, and within the White House.

I think there could be no more eloquent testimony than the one given by the prior panel about the great importance of having White House support for Indian rights. That was common in the Nixon and Ford administrations, but since the Ford Administration we have not had a strong, well-placed Indian advocate within the White House to coordinate policy and to be someone that Indian tribes can go to with their needs and get responses within the Federal bureaucracy.

Now, in my prepared testimony—which I'll just summarize here—I tried to set forth the record of my administration, because it is the one that I am most familiar with, in the protection of Indian rights between 1973 and 1976. But I want to emphasize that that record, which I will summarize in a moment, wasn't just mine or that of my dedicated staff that I helped assemble—and some of them existed there before I got there. It predated me some. I think it started in the last year of the Johnson Administration under Secretary Udall. I think my predecessor, Bill Gershuny, carried it forth as an Associate Solicitor. It functioned under Leonard Garment, under Brad Patterson, under the Nixon policy message.

It was certainly carried on by my successor, Tom Fredericks, a Mandan Indian from North Dakota, former director of the Native American Rights Fund. And it was carried on by some of his successors. It has not been carried on, however, in the past few years, and therein lies the problem.

So while I'm going to talk about things I did, it is not intended to be self-serving. It is a long-standing, bipartisan policy, I suggest, Mr. Chairman, of both Democratic and Republican Administrations to protect Indian rights, a policy that spanned nearly two decades but has recently fallen into atrophy, and that creates the serious problems we are addressing here.

Now, in my 1973–76 period we greatly increased the number of cases brought by the United States as a trustee for Indian interests: for Indian hunting and fishing rights, for Indian water rights, to protect Indian land rights, to protect Indian freedom from State jurisdiction. We saw that as our mission and as our charge.

We brought so many cases that after I had been there about a year the Justice Department established a special section within the Lands Division solely to litigate cases brought by the United States for Indians, and that section still exists today. It has about a dozen lawyers working with it.

One way we dealt with the conflict of interest was the split brief, and that has been described. The White House worked out an arrangement with the Justice Department that when the Solicitor of

the Interior Department wanted to file a separate view in a court case from that being taken by the Justice Department, he could do so. We filed it six times; we won in six cases—the Indians won in six cases, and the Justice Department view against the Indians was rejected in each of those cases by the Supreme Court or by a lower federal court.

Then we also dealt with what I think of as administrative conflicts within the Department of the Interior, where the Bureau of Reclamation wanted one thing and the Indians wanted another thing—on water rights, let's say, or where the Bureau of Land Management drew a survey to include some lands under its jurisdiction that we thought were within an Indian reservation. Some of these were in your State, actually.

And those administrative conflicts were resolved. Now, we didn't win all of them. I have detailed some of them in my testimony where I think we didn't win; I have detailed some where I think we did win—but there are a couple of important lessons on it.

One is that we were, I guess, the chicken in the foxes' lair. I mean, you say, "Why put the Indians in there with all the foxes—those strong elements in the West that are going after their interest?" Well, if you are in the fox lair, you know what the fox is doing: you can appeal to the fox, you can argue with the fox, you can fight with the fox. We weren't sitting chickens or sitting ducks, we fought. And we usually won. I think we usually won because I think we had stronger cases, just like we won the six cases where we filed the split briefs, and just like most of the cases that we brought—and some of them are still being litigated—most of the cases have been won by the Indian interests in the past two decades when the United States has brought those cases. Not all of them. I guess if we won every case in a law reform area we wouldn't be bringing enough cases.

But most of them are won because I think the second lesson is that when you have an institutional advocate and the advocate is advocating for Indian rights within an institution—be it the Interior Department, be it the Justice Department, be it before the courts, be it before the Congress—usually the advocate is successful because the rights go back in history and are deeply prized in American law, and are ancient rights and are important rights, and they are usually vindicated.

The danger comes when those rights don't get advocated within the Federal Government, and I think that's the situation that we face today.

I want to make another point about being the chicken in the foxes' lair. Mr. Garment referred to this a little bit in his comments on the Indian Trust Counsel. I was a great supporter of the Indian Trust Counsel when I was a law professor in the early 1970s. I ceased to be one when I saw that you could effectively accomplish the same things within the Federal agencies. If you had strong advocates within Interior and within Justice you could accomplish those things, and you didn't have to be an Indian Trust Counsel on the sideline somewhere just bringing cases. So I think the important teaching about the conflict of interest is that sure it exists, and sure it is terrible, but often you can overcome it by strong advocacy and by winning.

PREPARED STATEMENT OF REID PEYTON CHAMBERS, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS (1973-76)

Mr. Chairman and members of the Committee, my name is Reid Peyton Chambers, and I am a partner in the law firm of Sonosky, Chambers & Sachse, Suite 1000, 1250 Eye Street, N.W., Washington, D.C. 20005. I served as Associate Solicitor for Indian Affairs at the Interior Department between 1973 and 1976. In 1976, I left federal service to establish my law firm with Marvin J. Sonosky, then a long-time single practioner in the Indian field, and Harry R. Sachse, at the time Assistant to the Solicitor General in the Justice Department.

Our firm represents principally Indian tribes and tribal organizations, so I have also observed the Executive Branch's handling of Indian policy as a private attorney for over twelve years since my Government service. I am pleased and honored to appear before this Committee to discuss the manner in which the United States has enforced its trust responsibility to protect Indian legal rights in the past two decades.

1. Introduction: the trust responsibility and conflict of interest.

In my view, attorneys with federal agencies who are responsible for Indian matters should function as advocates for Indian rights within those agencies. I think this is not simply a moral imperative or a desirable public policy.

Rather, I submit that it flows from the trust responsibility of the United States toward American Indians.

This trust responsibility is a legal obligation, binding on the United States. In general, the courts have held that, in its administration of Indian property, the United States should be judged at least by the standard and principles of law as would be applied to an ordinary fiduciary in its dealing with Indian property. This has been held to include a duty of care, 1/ a duty to make property productive, 2/ and a duty of loyalty. 3/

Of course, these duties have unfortunately not always been honored. A conflict of interest often arises between Indian rights to resources such as land, water, timber, minerals and rights to hunt and fish, and the claims and demands of other federal agencies - national parks, fish and wildlife refuges, the public lands, public dams and water projects, and the like. This kind of conflict compromises the trust responsibility when Indians are on one side of a controversy in a manner that does not occur in normal public

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1/ Menominee Tribe v. United States, 101 Ct. Cl. 10, 19-20 (1944).

2/ Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973).

3/ Navajo Tribe v. United States, 364 F.2d 320, 322-24 (Ct. Cl. 1966).

policy decisions. This is because where conflicts of interest between Indian rights and other public projects are presented, special obligations of trust should influence and control the decisions of the Executive Branch.

Let me illustrate: If the United States decides to build a dam which may injure fish resources, or to take public lands within a national park or protected wildlife refuge, that is of course a straight public policy decision. Private interests of various kinds will support or oppose the policy, but ultimately the Government as a policymaker must make the decision. But when Indian rights are involved, the United States is a trustee for invaluable Indian property interests. When the United States subordinates Indian rights to conflicting public policy responsibilities, a breach of trust occurs, at least where there is a reasonable and legitimate support for the Indian position. This is because a trustee should as part of its duty of loyalty subordinate its own interests to those of the trust beneficiary.

When the United States rules against Indian rights in this kind of situation, it is guilty of a conflict of interest. It is true that the Supreme Court ruled in the Pyramid Lake case [4/] that the Executive may sometimes have

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4/ Nevada v. United States, 463 U.S. 110 (1983).

the power to override a reasonable and legitimate Indian position - if, for example, Congress has specifically authorized the Executive to "wear two hats," and act in favor of the non-Indian project. However, this kind of action is morally odious, usually subjects the United States to legal liability to compensate Indians, and ought to be avoided by a reasonable policymaker.

I think the best way to ameliorate this problem is to establish institutional advocates within the Executive Branch for the Indian position. That was the role I was charged with during my years as Associate Solicitor at the Interior Department. I think it should be the institutional duty of the Associate Solicitor for Indian Affairs, irrespective of who is Secretary and Solicitor, and the role of other Government lawyers as well who deal exclusively or primarily in Indian matters.

I do not believe this role has been followed in the past few years within the federal agencies. Let me demonstrate this conclusion by first summarizing the Government's activities to enforce its trust responsibility in the mid-1970s when I was Associate Solicitor - activities which, I should add, basically continued in both Republican and Democratic Administrations on into the early 1980s. This I think demonstrates that legal enforcement of the Government's trust responsibility to Indians transcends any

issue of partisan politics and has, until very recent years, been a cornerstone of the policy of both Republican and Democratic Administrations, going back really to the last years of the Johnson Administration. Then I shall contrast this record with federal performance in the last few years.

2. Institutional advocacy of the trust responsibility:

A. Litigation in the 1970s.

I have supplied the Committee with the Annual Reports of the Solicitor's Office Division of Indian Affairs during my tenture, prepared in 1974, 1975 and 1976. The reports show a dramatic increase in the number of lawsuits that were filed by the United States as trustee for Indian interests against states and private parties. In those three years, we more than doubled the cases brought by the Government protecting Indian rights. Things became so active that the Department of Justice set up a separate Indian litigating section simply to prosecute these cases.

In most cases before the federal courts, at least at the appellate and Supreme Court levels, the Government also filed friend of the court briefs on behalf of Indian interests. In those years, this was mostly due to the work of Harry Sachse, who was then an Assistant to the

Solicitor General. Both before the mid-1970s and afterward, this was mostly because of Louis Claiborne's efforts. 5/

There was for example a dramatic increase in the number of cases filed by the United States to protect Indian hunting and fishing rights. The case filed to protect

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5/ For example, during the October 1975 Term of the Supreme Court, the Solicitor General filed a "friend of the court" brief in two important cases where it successfully persuaded the Court to limit the scope of jurisdiction conferred on states over Indians under "Public Law 280." The case decided by the Court was Bryan v. Itasca County, 426 U.S. 373 (1975), which held that this Act, although it allowed courts in "Public Law 280" states to adjudicate cases involving Indians on reservations, did not allow states to regulate Indian activities. We also filed a friend of the court brief in Fisher v. District Court, 424 U.S. 383 (1976), and persuaded the Court summarily to reverse a decision by the Montana Supreme Court and hold that the State had no jurisdiction over an adoption proceeding involving Indian residents of the Northern Cheyenne Reservation. Despite the Government's advocacy, however, the Supreme Court that Term rejected the Government's position favoring exclusive federal court jurisdiction over Indian water rights, in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

During the 1974 Term, the United States filed "friend of the court" briefs in Antoine v. Washington, 420 U.S. 194 (1975), which upheld Colville tribal hunting and fishing rights over lands ceded by the Tribes, and in DeCoteau v. District County Court, 420 U.S. 425 (1975), where we unsuccessfully urged the Supreme Court to construe an act of Congress as continuing the Lake Traverse Indian Reservation in South Dakota.

During the 1973 Supreme Court Term, the Government filed a "friend of the court" brief in Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973), urging that the State of Washington lacked power to prohibit Indian net fishing on off-Reservation treaty fishing sites. And the Government supported the Oneida Indian Nation's petition for a writ of certiorari and federal court jurisdiction in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

off-reservation fishing rights in the State of Washington [6] was brought before I joined the Department, and successfully prosecuted while I was there, despite heavy opposition from the Fish and Wildlife Service and political interests in the State.We brought similar cases in Minnesota and Michigan. [7] The Government also filed cases to protect Crow hunting and fishing rights in Montana and to protect the fishing rights of various tribes in Wisconsin. These were "hot" political cases. Governors, Congressmen - sometimes even Senators - on occasion telephoned or met with the Secretary of the Interior and other Department officials to remonstrate about these cases. The cases nonetheless were prosecuted and were invariably successful in protecting the treaty hunting and/or fishing rights involved.

We also greatly increased the number of cases filed by the United States to protect Indian water rights. Many of the cases we brought more than a decade ago are still ongoing, and now form the major workload of the special Indian litigating section Justice established in 1975 - since relatively few new cases have been referred to it by Interior in the past several years.

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[6] United States v. Washington, 520 F.2d 676 (9th Cir. 1976).

[7] E.g., United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd, 653 F.2d 277 (6th Cir. 1981).

We were not as uniformly successful in the water cases as in hunting and fishing. For example, the Government had been for decades throttling Pyramid Lake in Nevada, virtually drying it up with a federal reclamation project supplying non-Indian users. This was a vicious and longstanding conflict of interest. In the early 1970s, Government policy was entirely reversed, and the Government finally brought suit on behalf of the Pyramid Lake Paiute Tribe against those non-Indian water users. The Department of the Interior began to limit water use by the project, and defended suits against it by the non-Indian irrigators. There are many chapters to this ongoing Pyramid Lake saga, and there have been some losses in the cases, but there have been victories, too; I know the Committee staff is studying the handling of these cases in depth.

The Government also began vigorously to prosecute the Pueblo water rights cases on the Rio Grande during my term as Associate Solicitor, and this case, too, is still ongoing. The Government brought the Papago groundwater case in Arizona, which was successfully settled by legislation. It filed cases in Colorado and in Montana arguing that federal courts rather than state courts are the appropriate forum for Indian water rights. This position was rejected by the Supreme Court in 1976, and again in 1983, so most Indian water rights cases are now adjudicated in state court. We reopened Arizona v. California on the Colorado

River in the Supreme Court, and that controversy, too, is still ongoing. We supported Indian water rights in a number of hearings before the Federal Power Commission (now the Federal Energy Regulatory Commission) as against federally licensed hydroelectric projects.

These water cases, some of which were started even before my tenure began in 1973, were often also strongly resisted by political interests within those states and in many cases by the state congressional delegations and political leaders. Sometimes, of course, the position we took in these cases conflicted with other federal projects such as reclamation projects or fish and wildlife resources. But the determination was made by the Executive Branch to present these cases in the courts and to prosecute them resolutely throughout the 1970s.

The same is true of land cases. One case we brought despite the Government's conflict of interest was the Government support for a claim by the Walker River Tribe in Nevada against Southern Pacific Railroad, urging that Southern Pacific's right-of-way was invalid even though it had been approved by a Secretary of the Interior and even though the railroad line was used by the Navy Department to supply munitions. The United States also resolved land claims of the Salt River and Colorado River Tribes against the Bureau of

Land Management, and then brought suit against various permittees of the Bureau to quiet the Tribes' title.

B. Split briefs.

Another way we dealt with the conflict of interest was by filing "split briefs." This was done pursuant to a written agreement between the Attorney General and the White House, by which the Justice Department agreed to advise any court of a legal position in favor of Indian rights developed by the Solicitor of the Interior Department if the Solicitor believed those rights were infringed by a position being taken by Justice before the court.

I believe the first split brief was filed in Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971), before I became Associate Solicitor. The Internal Revenue Service sought to tax income received by an Indian from cattle and farming operations on his allotments. The Government filed the separate views of the Solicitor of the Interior Department that the income was not taxable, and the court agreed with the Solicitor's pro-Indian position.

After I joined the Solicitor's office, the Government filed a split brief in United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974), where the Internal Revenue Service was criminally prosecuting an Indian for failing to report income earned from operation of a motel and restaurant

on tribal lands assigned to her. The court reversed her criminal conviction for tax evasion for nonpayment of these taxes in Critzer, on the basis of the Solicitor's view in the split brief that the tax was not owing.

We also successfully filed split briefs in two cases where the United States Army Corps of Engineers was seeking to condemn Indian lands without explicit authority from Congress. In both cases, the court held that the Indian lands could not be condemned. 8/

A final "split brief" case involved a controversy between the Tribe and some of its allottees over ownership to minerals on the Northern Cheyenne Reservation. The Ninth Circuit had ruled in favor of the allottees and the Tribe petitioned the Supreme Court to review the case. The Justice Department did not file a brief in the Supreme Court on the merits because it had represented an allottee in the district courts against the tribal claim to ownership of the mineral interest. But in its memorandum to the Court on the petition for certiorari, the Department filed a separate statement by the Solicitor of the Interior Department supporting the Tribe's ownership. This was a particularly important

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8/ United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976); Confederated Tribes of Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Ore. 1977).

issue, because the Department had earlier administratively granted the Tribe's petition to arrest corrosive strip mining on that Reservation, and we feared that individual allottees might leasse to the coal companies and upset that decision if they were determined to own individual mineral interests. This position was ultimately adopted by the United States Supreme Court. 9/

In each of these cases where a split brief was filed, then, the Indian interest asserted by the Solicitor was vindicated in court. To me, this demonstrates the high value of unblemished Indian advocacy within the federal agencies. When a federal agency dealing with Indian matters has an office of institutional Indian advocates, that office's position usually prevails. (I illustrate this in Part 2.C. below.) The same is usually true when a reasonable and well-articulated Indian viewpoint is presented to Congress or the courts. Without this kind of vigorous institutional advocacy, Indian interests most often languish or are buried in an agency. This happens, I think, because of the relatively small size of Indian populations; even in smaller western states, majority non-Indian sentiment is very much stronger numerically.

9/ Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976).

C. Intra-agency controversies.

Within the Department of the Interior, while I was Associate Solicitor and afterward, the BIA and the Indian Division of the Solicitor's Office also did constant battle with other department agencies over department projects that conflicted with Indian rights. We were successful sometimes, and unsuccessful other times. For example, we persuaded Solicitor Frizzell to hold that the Colville and Spokane Tribes in the State of Washington had hunting, fishing and jurisdictional rights within Lake Roosevelt despite opposition by the National Park Service, Fish & Wildlife Service and Bureau of Reclamation. We persuaded Secretary of the Interior Morton that a boundary dispute between the Mohave Tribe in Arizona and the Bureau of Land Management should be resolved in favor of the Tribe. Similarly, lands in California were determined by Undersecretary Whittaker to be owned by the Chemehuevi Tribe rather than by the Fish & Wildlife Service.

There were also some bitter losses. We were, for example, unsuccessful in persuading Solicitor Austin to rule that the Quechan Tribe owned lands in California that were claimed by the Bureau of Land Management, in large part because the water rights to those lands would have interfered with federal reclamation contracts. However, in the Carter Administration, Solicitor Krulitz reversed this decision, and the Tribe is now treated as owning the lands (subject, however, to a suit now pending against the Government by non-Indian

water districts). And I felt recurrently unable fully to protect Indian water rights that conflicted with the construction of the Central Arizona and Central Utah Projects by the Bureau of Reclamation. My successors had better luck, at least concerning the Central Arizona Project.

The win-loss record aside, my role was always as the institutional advocate for Indian rights. This, I believe, is essential as a component of the Government's trust responsibility. This role was performed by my successors until the past few years. It has been tellingly absent, however, recently.

3. Failure of performance in recent years.

First, there is a telling absence of new affirmative litigation to protect Indian rights filed in the last few years by the Department of Justice. This is because Interior does not refer such cases to Justice. I know of this change in policy from my personal experience. For example, at a hearing before the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations on October 27, 1987, the Solicitor of the Interior Department, Mr. Tarr, was questioned about the lack of affirmative Indian litigation. Solicitor Tarr responded that his Department was not being asked by tribal attorneys and Indian tribes to support their position. This seemed a lame excuse, for I see

nothing preventing the Solicitor from exercising initiative and seeking ways to further Indian rights. In any event, in the fall of 1987 I wrote to the Solicitor asking the Department to support the position of the Assiniboine and Sioux Tribes of the Fort Peck Reservation in two cases. One case was a claim on behalf of a tribal member for an easement of necessity to reach a landlocked tract being blocked by a non-Indian, and the second involved defending a tribal tax on utility property within the Reservation. Both cases were then in litigation before the federal District Court for the District of Montana.

It took Mr. Tarr almost a year to respond to my request in the land case, and he turned it down. In the meantime, the Tribes had successfully settled this case. I have still not heard whether the Department will support the Tribes in their tax case, although the tribal right to tax has clearly been vindicated by controlling Supreme Court precedent. 10/ In the meantime, the Tribes have prevailed in defending the tax before the federal district court without the Government's support, and this case is now on appeal to the Ninth Circuit.

10/ E.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

Moreover, the Government has not been filing amicus briefs in Indian cases to support the Indian position in appellate litigation or in the Supreme Court in the past several terms. This is a clear change from the prior practice of nearly two decades. The Government's silence at the Supreme Court level, where its support could always be counted upon in the 1970s and early 1980s, has been particularly harmful to Indian rights.

I cannot say how many other attorneys and tribal leaders have, like myself, sought the Government's assistance in Indian cases in recent years and been turned down or ignored. There is certainly the feeling in the tribal bar that there is no point in asking; indeed, there is even a concern that if the Interior Department learns about a case, it may come out against or otherwise act detrimentally to the tribal position.

There is clearly no institutional advocate within the Interior Department to present the Indian position as there was throughout the 1970s - in three Administrations under Presidents Nixon, Ford and Carter - and also in the last years of the Johnson Administration. In this period, Presidents were personally supportive of Indian interests. They appointed Secretaries of the Interior like Stewart Udall, Rogers Morton, Cecil Andrus and others (as well as lesser Interior policymakers, such as the Solicitors Frizzell, Austin

and Krulitz and various Assistant Secretaries), who were usually supportive of Indian rights. Perhaps most importantly, during the Nixon and Ford Administrations there was always at least one high-ranking official within the White House - first Leonard Garment together with Brad Patterson, then Dr. Ted Marrs and finally Bobbie Green Kilberg - who was specifically charged by the President with the responsibility to be an expediter for Indian rights. Indian tribal leaders and their attorneys, and in-house Indian advocates within government, could go to those White House officials and secure effective action. These White House officials played a vital coordinating role respecting actions by federal agencies impacting on the trust responsibility to Indians.

Mr. Chairman, thank you for the opportunity to present this testimony. I would be happy to answer any questions, and to work with you and the Committee on this important issue.

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