CONCEPT PAPER

2003 LEGISLATIVE PROPOSAL
ON
TRIBAL GOVERNANCE AND ECONOMIC ENHANCEMENT

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TRIBAL GOVERNANCE AND ECONOMIC ENHANCEMENT INITIATIVE

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on
Tribal Governance and Economic Enhancement

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

Article I, Section 8, United States Constitution

Introduction

The Supreme Court, breaking from the established legal framework set by Congress and previous judicial opinions, has recently issued decisions directly threatening and limiting tribal governance and economic progress in Indian country. This comes at a time when tribes, through their own progressive and painstaking actions in the implementation of the federal policy of self-determination, have finally made significant inroads into the BIA domination and poverty that gripped reservations for 150 years.

Over the past year tribal leaders have held a series of meetings around the country to address the problems created by the Court's decisions. The tribal leaders have concluded that legislation will be necessary. This paper presents some of the concepts that such legislation could include.

The Traditional View of Tribal Governance

The Constitution recognizes that Indian tribes are independent governmental entities. Like state governments and foreign governments, Indian tribes have the inherent power to govern their people and their lands. A fundamental contract was created in the treaties. Indian tribes ceded millions of acres that make the United States what it is today; in return, tribes received the guarantee that the federal government would protect the tribes' right to govern their own people and their reservations as homelands for tribal cultures, religions, languages, and ways of life.

Since the time of the Constitution, the U.S. Supreme Court has repeatedly affirmed the fundamental principle that Indian tribes retain their government powers unless specifically limited by treaty or by federal law. Chief Justice John Marshall, whose decisions laid the foundation for Indian law, wrote that tribes were "distinct, independent political communities, retaining their original natural rights." Until very recently, the Supreme Court remained faithful to Chief Justice Marshall's principles, upholding inherent tribal governmental authority over their reservations.

Recent Supreme Court Decisions in Indian Law

In the past decade, the Court developed a trend in ruling against tribal interests, culminating in two major 2001 opinions. *Atkinson Trading Company v. Shirley* struck down a Navajo Nation hotel occupancy tax on a non-Indian establishment. The hotel, built on non-Indian land, is located within the boundaries of the Navajo Nation, which provides basic governmental services, including police and fire protection. The establishment is a former trading post, and many visitors are attracted there by Navajo culture. Yet the Court found that the Nation has no "interest" sufficient to warrant a tribal tax.

In *Nevada v. Hicks*, the Court found that a tribal court lacked jurisdiction to hear a case in which a state police officer allegedly conducted an illegal search on a tribal member's home located within the reservation. Again, the Court found that the tribe lacked a sufficient "interest" in the case. Justice Scalia's opinion in *Hicks* went far beyond the facts and included many propositions not supported by

previous decisions, including the sweeping statement that "ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State."

Congress, in its longstanding Tribal Self-Determination policy, and until very recently the Supreme Court, have consistently emphasized the right of tribes to govern comprehensively in Indian country and to have the ability to tax in order to support their governments. *Atkinson*, *Hicks*, and other decisions cripple the tribes' ability to govern their own homelands.

Impacts of Decisions

Indian tribes are full-service governments, offering Indians and non-Indians alike a broad range of recreational, economic, education, and health services. Yet this new direction in the Supreme Court's Indian law cases poses a very serious threat to the ability of tribal governments to provide needed governmental services on Indian lands. For example, the Tulalip Tribe of Washington has established Quil Ceda Village, which includes a business park, parkland, and watershed. The tribe provides comprehensive municipal services, but the state receives a windfall of $11 to $50 million each year in sales taxes while the Tribe—which has 25% unemployment—receives no tax revenue due to the economic impossibility of adding a tribal tax on top of the state tax. At the Wind River Reservation in Wyoming, an economic study has found that the state collects $185 million in severance and property taxes from the reservation, but returns only $85 million in services—on a reservation with 70% unemployment. As at Navajo, where the *Atkinson* case prevents the Navajo Nation from taxing non-members to support a reservation population in excess of 200,000 people, tribes nationally are now prohibited from raising revenues to provide residents with governmental services. Rather than the existing unfair system, tribes should be the primary taxing governments and states should instead be fairly compensated for the services they provide through the Payment In Lieu of Taxes statute and other federal programs.

The current jurisdictional structure promotes the inefficient provision of services in Indian country. The Federal Communications Commission recently interpreted the Supreme Court decisions to mean that tribes can regulate telephone service on the reservation only for tribal members. Similar confusion and inefficiency occurs with roads, sewers, drinking water, garbage collection, and other services. This legislative proposal would place clear responsibility with the tribes and ensure uniformity and fairness in the delivery of these and other basic services.

The recent opinions have narrowed tribal court and law enforcement jurisdiction, especially with respect to non-Indians. Recent statistics from the Department of Justice show that the rate of violent crime against American Indians is more than twice the rate for the nation—critically, however, non-Indians commit 70% of the violent crimes experienced by American Indians. Among American Indian domestic violence victims, 75% of the victimizations involved a non-Indian offender. Domestic violence is a particularly difficult issue on Indian reservations because federal and state authorities most often decline to investigate or prosecute, and tribal governments have no authority to exercise jurisdiction over non-Indians. Given the well-documented failure of federal and state officers to prosecute reservation crimes, the court decisions curtailing tribal authority have left a law enforcement void. Visitors, as well as reservation residents, will benefit from improved tribal justice systems where tribal governments are the primary authority and tribal, state, and federal officials work cooperatively under clearly established guidelines. The tribal proposal calls for federal court review to ensure protection of the civil rights of persons brought into tribal courts.

The Role of Congress

One of the most remarkable aspects of the recent Supreme Court decisions in Indian law is that they have been rendered by the Court while the Congress and the Executive Branch have worked so effectively and consistently with the tribes over the last 30 years to develop and implement the policy of Tribal Self-Determination. Self-Determination has shown its value in the form of improved tribal economies, health and governance, with profound benefits for the tribes and their neighbors. The American public also recognizes and supports the role of tribal governments and the importance of the Self-Determination policy. More than 70% of all registered voters support Self-Determination for tribes and the comprehensive exercise of tribal authority on the reservations.

In ruling on tribal jurisdiction over non-Indians, the Court has adopted its own new tests—whether particular tribal powers would be "inconsistent with their status" as domestic dependent nations and whether there is a "tribal interest" in regulation. As Supreme Court Justices have observed, the field would benefit from the certainty resulting from clear congressional guidelines on these critical issues. Indeed, under the constitution, the Congress is the only forum with the authority to provide the tribes and the courts with the necessary direction.

Tribal Proposal

The Tribes have developed a response to this crisis that calls upon Congress, as trustee for Indian tribes, to address the situation by asserting its primary constitutional authority in Indian affairs and setting forth clear guidelines for jurisdiction in Indian country. We believe that unless Congress steps forward and acts to protect the gains made under the Self-Determination policy, the Court will continue to erode the foundations of Tribal Self-Determination. Importantly, this proposal acknowledges the legitimate interests of the states and non-tribal members by providing for federal review of tribal court decisions and by providing for compensation to the states for the educational and other services that they will continue to provide. The following are the core principles that, when put into a statute, would provide the courts with direction consistent with the authority conferred on the Congress under the Constitution.

1. <u>Tribal governmental authority</u>. Congress should reaffirm the fundamental principle that Indian tribes retain their inherent right to govern all people and places within Indian country unless that power has been specifically limited by treaty or federal statute. Indian tribes, therefore, would be squarely recognized as the primary governments within Indian country with broad civil and criminal court jurisdiction and broad regulatory authority, including taxation. Most existing federal laws (including, for example, the Major Crimes Act, which sends most reservation felonies to federal court) would remain in place. Nothing would limit Congress' existing broad authority over Indian affairs.

2. Federal judicial review of tribal court decisions. Legislation should provide for federal judicial review of tribal court decisions that will guard the civil rights of non-Indians, while also protecting the right of tribes to create and maintain their own forms of government and their traditions, religions, cultures, languages and ways of life.

3. Tribal right to opt in or out of legislation. Every tribe should have the right to choose whether or not to exercise any or all of the jurisdiction over non-Indians and to subject itself to federal judicial review for the exercise of that jurisdiction.

4. Tribal right to opt out of Public Law 280 and similar laws. Over the years, some congressional statutes, notably "Public Law 280," passed in 1953 during the termination era, have allowed state jurisdiction in Indian country to varying degrees. Each tribe subject to such a law should have the right to opt out of its coverage.

5. Tribal enhancement fund. A Tribal Government Enhancement Fund should be established, perhaps by dedicating a small percentage of federal mineral leasing receipts, for the development of tribal courts, other tribal institutions, and infrastructure.

6. Compensation to states. In addition to continuing the existing federal programs that provide funds to states for Indian programs, the Payment In Lieu of Taxes Act should be amended to include all lands within Indian country so that states will be fairly compensated for the services they provide to Indian reservations.

7. Intergovernmental agreements. Jurisdiction in Indian country has always been complicated to implement. In many cases, intergovernmental agreements—tailored to meet particular needs—have been highly successful. The new legislation should authorize and encourage such negotiated agreements among tribal, state, local, and federal entities as appropriate.

Conclusion

Many people have referred to the recent Supreme Court decisions as "judicial termination" and we agree with that assessment. But termination has never worked. Congress adopted that policy in 1953 but then repudiated it and replaced it with Self-Determination. We believe that Congress must now repudiate this new form of termination.

We recognize that these are extraordinarily difficult matters. Correcting this situation will take hard work and time. Yet the judicial action has cut to the heart of the inspiring tribal progress that is taking place all across the country. This is the time for the tribes' ultimate trustee to act. We hope that members of Congress and state officials will work closely with us in making this conceptual approach a reality.

For more information, please contact the National Congress of American Indians at 202-466-7767, www.ncai.org, or the Native American Rights Fund at 303-447-8760, www.narf.org.