

## NOTE

# NATIVE AMERICAN FEDERAL CAMPAIGN CONTRIBUTIONS: RULES, RISKS, AND REMEDIES

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### I. INTRODUCTION

Until the late half of the Twentieth century, Native American tribes dedicated few economic resources to campaign contributions. However, in 1988, with the advent of federal regulation of Indian gaming through the Indian Gaming Regulatory Act (IGRA),<sup>1</sup> and the financial power gaming promised, tribes with gaming interests and those hoping to develop gaming interests realized they needed to become more politically involved in order to protect their newfound economic potential. This political involvement took the form of lobbying and donating money to politicians. This note addresses tribal contributions to federal candidates and the rules under which tribes can contribute funds. Ultimately, this Note suggests that the rules governing federal tribal contributions undermine the integrity of existing campaign finance law and threaten the integrity of tribal governments.

As Part II will discuss, tribal interests are different from any other participant in the federal system because as “domestic dependent nations,” Congress is the arbiter of their economic and political vitality. Moreover, the federal regulation of tribal gaming has created a level of dependence on the goodwill of federal lawmakers that is unique to gaming tribes. In response to the economic gains afforded by gaming and efforts to protect these gains, tribes have become significant contributors to federal campaigns. However, as Part III shows, the rules under which tribes contribute have never been statutorily defined by Congress. Rather, contributions from tribes are governed on an ad hoc basis through the Advisory Opinions of the Federal Election Commission (“FEC” or “the Commission”), which interprets existing federal election law.

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<sup>1</sup> The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, 18 U.S.C. § 1166.

As Part IV will discuss, these Opinions, coupled with tribal dependence on Congressional goodwill, have created a unique legal status for tribal campaign contributions that has two significant consequences. First, it undermines the effectiveness of federal campaign finance law and thereby undermines the integrity of the federal campaign finance system. Second, it undermines a tool through which tribal members could ensure the integrity of their tribal governments. While non-tribal U.S. citizens are merely exposed to the risks of corruption of their Congressperson or Senator, tribal members, as U.S. citizens *and* members of sovereign nations within the United States, risk the corruption of (1) the federal political system intended to represent them and (2) the tribal government intended to represent them. Ensuring that the relationship between tribal giving and federal lawmaking is honest and uncorrupted protects the tribal member's interests in both her tribe and her country.

The Note concludes with Part V, and does not provide a remedy for the problems posed throughout the Note. Instead, it suggests that to protect the integrity of the campaign finance system and the integrity of tribal governance, solutions must be achieved through policy-making rather than the ad hoc process of FEC Advisory Opinions.

## II. THE POLITICAL AND ECONOMIC ENVIRONMENT SUPPORTING TRIBAL CONTRIBUTIONS

Tribal members are citizens of the United States and are therefore represented by federal lawmakers as well as their tribe.<sup>2</sup> Tribes are "domestic dependent nations"<sup>3</sup> over which Congress has plenary power, meaning, the economic and political vitality of a tribe is largely dependent upon the actions of Congress.<sup>4</sup> One tribal chief has noted that because

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<sup>2</sup> See 1924 Indian Citizenship Act (also known as the Snyder Act) 43 Stat. 253 (1924) ("Be it enacted by the Senate and house of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.").

<sup>3</sup> See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (In rejecting the Cherokee Nation's claim to diversity jurisdiction in its suit against the State of Georgia, Chief Justice Marshall first determined that the Cherokee tribes successfully demonstrated that they were a "state" in that they were "a distinct political society, separated from others, capable of managing its own affairs and governing itself" and that treaties between the United States and the tribe had recognized this status. Marshall then wrote that tribes could not be considered "foreign" states but were "more correctly, perhaps, denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.").

<sup>4</sup> The most fundamental example is that tribes are dependent for federal recognition of their status as tribes on Acts of Congress or pre-existing treaties that are subject to termination by Congress. To become a federally recognized tribe, for purposes of existing as a tribe within the United States political and judicial system, tribes must go through an extensive acknowledgement process at the Department of Interior. 25 C.F.R. Part 83 (2006). See also 25 C.F.R. §83. Federal recognition is, however, a political decision not subject to judicial review. *United States v. Halliday*, 70 U.S. (3 Wall.) 407, 419 (1865). The courts are bound by recognition given by the Department of Interior, subject to the Executive or Congress acting to remove recognition. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 166-67 (2nd Cir. 2003). When a grant or denial of "acknowledgement" is reviewed by the courts, it is reviewed under the Administrative Procedure Act and is limited to assessing whether or not the

Congress has plenary power over tribes, “structurally, tribes are dependent on the goodwill of federal officeholders to protect their rights and interests. This is a precarious position.”<sup>5</sup> As this section will explain, tribal gaming, with its intense regulation by Congress and the opportunities it created for tribal economic growth, gave gaming tribes the motivation and the financial resources to become aggressive campaign contributors.<sup>6</sup>

#### A. THE INDIAN GAMING REGULATORY ACT OF 1988

Tribes initially pursued gaming operations on tribal reservations without approval from the state or regulation by the federal government. However, in 1987, in *California v. Cabazon Band of Mission Indians*, the United States Supreme Court considered whether a California state law prohibiting bingo games for profit throughout the state, and two county ordinances prohibiting bingo and poker games at all, also applied to operations on tribal lands.<sup>7</sup> The Court concluded in favor of the tribe, finding that the state was not permitted to regulate the activities of tribes on Indian land absent congressional authorization.<sup>8</sup> Foes of tribal gaming, including Las Vegas Casino interests and general anti-gambling interests, immediately protested the Court’s decision. In response, Congress passed the IGRA to limit tribal gaming operations to states in which the state and the tribe had agreed to compacts.<sup>9</sup>

IGRA made federal regulation and statutory control over tribal gaming more extensive than over non-tribal gaming enterprises.<sup>10</sup> The most basic distinction between the treatment of tribal gaming and non-tribal gaming is IGRA’s requirement that tribes negotiate compacts with states before they

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Department of Interior followed its own regulations and acted in accordance with due process. *See* *Miami Nation of Indians v. U.S. Dept. of Interior*, 255 F.3d 342, 347–49 (7th Cir. 2001); *Greene v. Babbitt*, 64 F.3d 1266, 1274–75 (9th Cir. 1995). For a group seeking recognition of the Department of Interior to seek relief in federal court, it must exhaust all administrative remedies. *United Tribe of Shawnee Indians v. U.S.* 253 F.3d 543, 550 (10th Cir. 2001). Exhaustion includes review of the Department of Interior’s decision by the Interior Board of Indian Appeals. 25 C.F.R. § 83.11. Those tribes who have been recognized through treaty can also lose their status through Congressional “termination” legislation. *See* *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

<sup>5</sup> *Oversight Hearing on Indian Tribes and the Federal Election Campaign Act Before the S. Comm. on Indian Affairs*, 109<sup>th</sup> Cong. (2006) (statement of W. Ron Allen, Chairman, Jamestown S’Klallam Tribe and Treasurer, National Cong. of American Indians) [hereinafter Allen].

<sup>6</sup> Steven Andrew Light & Kathryn R.L. Rand, *The “Tribal Loophole”: Federal Campaign Finance Law and Tribal Political Participation After Jack Abramoff*, 10 GAMING L. REV. 230 at 234 (2006) (“Congress’s exercise of its asserted plenary authority over tribes results in a wide array of federal statutes that apply to tribes and tribal members—laws passed through a process in which tribes do not have direct representation. Since federal law directly impacts tribes and their livelihoods, it should not be surprising that tribes strive to influence political outcomes. Indeed, with doors opened by gaming revenue, many tribes, for the first time, are meaningfully and effectively engaged in the American political process as real players, using public-relations campaigns, lobbying, and campaign contributions.”).

<sup>7</sup> *See* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>8</sup> *Id.*

<sup>9</sup> *See* IGRA, *supra* note 1.

<sup>10</sup> *Oversight Hearing on the Regulation of Indian Gaming*, 109th Cong. 50, Pt. 1 (2005) [hereinafter *Oversight Hearing* (2005)] (statement of Kathryn Rand, Associate Professor, University of North Dakota School of Law) (“Tribal gaming is the only form of legalized gambling in the United States that is regulated at three governmental levels: under the Indian Gaming Regulatory Act, tribal, federal and state agencies and actors determine the regulatory environment in which tribal gaming occurs.”).

pursue gaming enterprises.<sup>11</sup> IGRA also makes tribal gaming enterprises subject to regulation by a dedicated unit within the Department of the Interior, and subject to additional approval processes by the Bureau of Indian Affairs.<sup>12</sup> In addition to its regulatory requirements, IGRA was originally passed with a significant protection for tribal gaming. Specifically, it created judicial protections to ensure that states negotiated gaming contracts in good faith.<sup>13</sup> However, in 1996 the Court invalidated the good faith requirement in a challenge to IGRA brought by the State of Florida, finding that the state had sovereign immunity from judicial enforcement of the good faith requirement.<sup>14</sup> As a result, because there is no judicial check on the good-faith of state negotiations, tribes are additionally dependent upon the federal regulatory system when states fail to negotiate tribal gaming contracts in good faith.

### B. GROWTH OF TRIBAL CAMPAIGN CONTRIBUTIONS

Were it not for the development of Indian gaming, it is unlikely that tribal campaign contributions would be as substantial or cause as much controversy. Access to federal lawmakers by tribes became a necessity to protect and promote their tribal gaming interests, just as gaming provided certain tribes with the financial wherewithal to effectively become involved in campaigns and elections. As the Chairman of the National Gaming Commission explained to a Senate Committee examining tribal contributions under the Federal Election Campaign Act of 1971: “[t]ribal business generally, and tribal gaming businesses specifically, are dependent upon the statutory and regulatory basis within which they operate.”<sup>15</sup> Proponents of tribal gaming point out that because Indian gaming is significantly more regulated than “traditional” gaming enterprises, gaming tribes have a greater stake in political participation.<sup>16</sup>

Like other interests with a stake in the outcome of congressional decision-making, tribes “realize that the best way to protect [their] rights is through participation in the political system.”<sup>17</sup> In 1988, Indian gaming was

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<sup>11</sup> See IGRA, *supra* note 1.

<sup>12</sup> *Oversight Hearing on the Regulation of Indian Gaming*, 109th Cong. 50, Pt. 1 (2005) (statement of Thomas B. Heffelfinger, U.S. Attorney, District of Minnesota, DOJ). (“There are several different components, numerous components actually, within the Department of Justice responsible for issues related to regulation and enforcement in Indian gaming. First of all are the U.S. attorneys; second, the FBI, the Criminal Division; the Environmental and Natural Resources Division; and the Office of Tribal Justice.”).

<sup>13</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>14</sup> *Id.* at 72 (“Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the 11<sup>th</sup> Amendment prevents congressional authorization of suits by private parties against unconsenting states.”).

<sup>15</sup> Allen, *supra* note 5, at 5.

<sup>16</sup> *Oversight Hearing For The Process for Considering Gaming Applications, Before the S. Comm. on Indian Affairs*, 109th Cong. (2006) [hereinafter *Oversight Hearing* (2006)] (statement of Sen. Byron L. Dorgan, Vice Chairman, Comm. on Indian Affairs).

<sup>17</sup> Allen, *supra* note 5, at 5; See Jim Drinkard, *Tribes' Special Status a Product of Law and History*, USA TODAY, Jan. 30, 2006, at 1A (“As 2% of the population, it’s very easy to overlook tribes and tribal interests’ . . . Political giving ‘has definitely helped the tribes get noticed.’” (quoting Jason Giles, general counsel for the Natl. Indian Gaming Assoc.)).

a \$100 million a year industry.<sup>18</sup> Nearly twenty years later, Indian gaming has increased to \$18 billion in annual revenues for over two hundred participating tribes.<sup>19</sup> In California alone, revenues from tribal gaming are projected to grow at \$1 billion a year—soon to exceed the net gaming revenues of Nevada’s casinos.<sup>20</sup> By the 2000 and 2002 election cycles, seven of the top twenty federal contributors were Indian gaming tribes.<sup>21</sup> Tracking the contributions of over two hundred tribes between 1999 and 2005, PoliticalMoneyline.com found that tribes contributed almost \$26 million to national parties and individual lawmakers. This number outpaces the defense industry at \$21.9 million and manufacturers at \$18.9 million for the same period.<sup>22</sup>

In 2005 and 2006, federal lobbying and campaign contributions made on behalf of Native American tribes came under significant public, legal, and political scrutiny.<sup>23</sup> Six Native American tribes had hired Washington

<sup>18</sup> See *Oversight Hearing*, (2005), *supra* note 10 (statement of Sen. John McCain, Chairman, S. Comm. on Indian Affairs); see also *Oversight Hearing on Indian Tribes and the Federal Election Campaign Act Before the S. Committee on Indian Affairs*, 109th Cong. 1, 2nd Sess. (2006) (statement of Sen. John McCain, Chairman, S. Comm. on Indian Affairs) (“When the Indian Gaming Regulatory Act was enacted in 1988, nobody anticipated that any tribe would make enough profit that it could donate hundreds of thousands of dollars to political campaigns.”).

<sup>19</sup> *Id.*

<sup>20</sup> *Oversight Hearing on the Regulation of Indian Gaming*, 109th Cong. 50, Pt. 1 (2005) (statement of Thomas B. Heffelfinger, U.S. Attorney, District of Minnesota, DOJ).

<sup>21</sup> Tobi Edwards Longwitz, *Indian Gaming: Making a New Bet on the Legislative and Executive Branches after IGRA’s Judicial Bust*, 7 GAMING L. REV. 197, 201 (2003); see also Center for Responsive Politics, *Jack Abramoff Lobbying and Political Contributions, 1999–2006*, CAPITAL EYE, 2006, [http://www.capitaleye.org/abramoff\\_donor.asp](http://www.capitaleye.org/abramoff_donor.asp) (Contribution data was derived by compiling the contributions of six Indian tribes (based on candidate committee and political action committee reports) who had previously employed Jack Abramoff as their lobbyist. These tribes included Agua Caliente Band of Cahuilla Indians, Cherokee Nation of Oklahoma, Chitimacha Tribe of Louisiana, Coushatta Tribe of Louisiana, Mississippi Band of Choctaw Indians, Saginaw Chippewa Indian Tribe, Pueblo of Sandia, Pueblo of Santa Clara, and Tigua Indian Reservation.)

<sup>22</sup> PoliticalMoneyline.Com, [www.politicalmoneyline.com](http://www.politicalmoneyline.com), go to “Donors” then go to “Indian Tribe \$”; see also John Cochran, *Indian Gambling: A Piece of the Action*, CONGRESSIONAL QUARTERLY WEEKLY, May 9, 2005 (“A Congressional Quarterly analysis of records found that Indian tribes contributed about \$10 million in the 2004 elections. More than 40 percent of those currently in Congress – 230 House members and senators – received some money from tribes in the 2004 elections, ranging from \$1,000 to \$150,000 or more for a few members. Some of the bigger recipients sit on the committees that oversee Indian affairs.”); certain candidates benefit disproportionately from tribal contributions. For example, in the first two quarters of 2005, Republican Congressman Richard Pombo’s leadership PAC raised three out of every four of its dollars from the contributions of fifteen tribes. See Michael Doyle, *Indian Tribes Contribute Heavily to Pombo’s PAC*, FRESNO BEE, July 14, 2005 at B4; Democratic Congressman Charles Rangel admitted that since 1997 he had raised over \$200,000 from just eighteen tribes. Press Release, Rep. Charles B. Rangel, D-NY (15<sup>th</sup> Cong. Dist.), Native American Tribal Contributions to Rangel Political Committee Jan. 1, 1997–Dec. 29, 2005 (Jan. 5, 2006) (on file with author and available at US Federal News 2006 WLNR 637040).

<sup>23</sup> After Senate Indian Affairs Committee’s oversight hearings in November 2005, there were no additional hearings scheduled by the Committee on the matter of Abramoff or lobbying. By early 2006 the Committee had shifted its focus away from Abramoff and the tribes themselves moved to the center of the Committee’s investigations. In February 2006 the Committee held an Oversight Hearing in which it considered re-opening IGRA. In response “the majority of tribes with casinos as well as the sector’s trade association have mounted a campaign to protect the status quo. Kate Ackley, *Betting on Reform?*, ROLL CALL, Feb. 6, 2006 (“Advocates for most tribes say that re-opening [IGRA], especially amid a scandal environment, could end up as a free-for-all for anti-gaming forces and hurt the one industry that has been a sure financial winner for American Indians.”); Cochran, *supra* note 22 (“Tribes are keenly aware of the risk of a backlash [against off-reservation gaming], and the prospect of lawmakers such as [Senator] Voinovich getting drawn into a debate over their industry worries them greatly. That’s one reason some of the tribes, such as [Senator] the prosperous Agua Caliente Band of the Cahuilla Indians in Palm Springs, have themselves raised objections to off-reservation gambling.”).

D.C. lobbyist, Jack Abramoff, to represent their interests before lawmakers and guide their campaign contributions.<sup>24</sup> As tribes with gaming interests, they hoped to influence Congress to both protect and advance their interests. However, Abramoff and the politicians whom he lobbied did more to line their own pockets than advance tribal interests. Abramoff was ultimately convicted on federal corruption charges,<sup>25</sup> but not before his relationship with tribal clients resulted in lengthy and controversial Congressional hearings on the IGRA and the status of tribal contributions under federal campaign finance law.<sup>26</sup>

By 2007, the Abramoff scandal had been largely resolved and the public, the press, and the politicians had moved on. Abramoff and the politicians involved in his conspiracies were tucked away in their prison cells,<sup>27</sup> while the politicians that dealt with the scandal through congressional hearings were now focused on the 2008 presidential race. All this left the status of Native American campaign contributions under federal law unchanged. The Abramoff scandal, however, brought to light a significant issue in campaign finance law: tribes contribute under legal rules unlike any other contributor to a federal candidate or campaign. The contribution histories of Abramoff's clients also suggested that as gaming revenues increased, so too did the political contributions of gaming tribes. The legal and regulatory environment in which tribal gaming operates suggests that gaming tribes have become aggressive campaign contributors in order to protect and promote the interests of their tribes. The unique legal status of tribes, however, has also influenced the parameters within which tribes make these campaign contributions. The following section discusses the regulatory framework under which tribes contribute to federal candidates and elections.

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<sup>24</sup> See Ackley, *supra* note 23. Center for Responsive Politics; Between 2001 and 2004, Washington D.C. lobbyist Jack Abramoff admitted that he received millions of dollars in fees from these Native American gaming tribes "to provide professional services and develop programs to limit market competition or to assist in opening casinos." An essential part of his services included directing tribes to make almost \$4 million in contributions to various candidates and campaign committees. Attachment A at 2-4, *United States v. Abramoff*, No. 1:06-cr-000001-ESH (D.D.C. Jan. 3, 2006).

<sup>25</sup> Abramoff was ultimately indicted and pleaded guilty to charges of fraud against his tribal clients, tax evasion and conspiracy to bribe public officials. The tribes included in the indictment included the Coushatta Tribe of Louisiana, Mississippi Band of Choctaw Indians, Saginaw Chippewa Indian Tribe, Pueblo of Sandia, and the Tigua Indian Reservation. Though these tribes were not identified by name, court documents and subsequent congressional testimony indicate that they were the tribes referred to in the plea agreement. Information at 1-13, *United States v. Abramoff*, No. 1:06-cr-000001-ESH (D.D.C. Jan. 3, 2006); former Congressman Bob Ney was sentenced to thirty months in prison for his involvement in the scandal surrounding Abramoff. Ney did not run for re-election in 2006. His Ohio congressional seat was won by a Democrat in the November 2006 election. Philip Shenon & John Holusha, *Ex-Congressman Sentenced to 30 Months in Prison*, N.Y. TIMES, Jan. 20, 2007 ("In his plea bargain last year, Mr. Ney admitted that he had essentially sold his office to Mr. Abramoff's lobbying operation and others in return for a series of lavish gifts. . . . include[ing] overseas trips, the use of skyboxes at Washington-area sports areas, meals, concert tickets and thousands of dollars worth of gambling chips in London casinos.").

<sup>26</sup> See *Oversight Hearing* (2005), *supra* note 10; *Oversight Hearing* (2006), *supra* note 16,

<sup>27</sup> Schmidt & Grimaldi, *Ney Pleads Guilty to Corruption Charges*, THE WASH. POST, Oct. 14, 2006. A United States Department of Justice investigation was begun that by the end of 2006 had resulted in the conviction of eight people, including one former federal lawmaker, Bob Ney. In addition to Ney, Senator Conrad Burns (R. Mont.) and Rep. John T. Doolittle (R. Cal.) were being investigated for their involvement with Abramoff.

### C. THE FEDERAL ELECTION CAMPAIGN ACT

Campaign contribution limits, disclosure requirements, and limits on the source of contributions, have formed the foundation of campaign finance law since campaign finance reform became a serious issue in the early 1970's. Since the passage of modern campaign finance reform in 1971, the regulation of political contributions has been recognized as an issue that "goes to the very heart of our democratic process...."<sup>28</sup> Campaign finance law was initially governed by the 1925 Corrupt Practices Act (the "1925 Act").<sup>29</sup> However, following the 1970 campaign season, it became clear that the 1925 Act did not sufficiently protect the campaign finance system from the public's perception that so-called special-interests were corrupting the political process.<sup>30</sup> Proponents of reform in 1971 argued that the 1925 Act was full of loopholes that "created an illusion of regulation of the Federal elective process... retard[ing] meaningful reform in an area that particularly needs reform. It has provided an easy excuse for preserving the status quo."<sup>31</sup> Through legislation that would require "complete and full disclosure" of campaign contributions and expenditures, the Federal Election Campaign Act of 1971 ("the 1971 Act") hoped to address the public perception of corruption and wrong-doing that had been resolved by the 1925 Act.<sup>32</sup>

By 1974, there was "broad and grave dissatisfaction with" the 1971 Act. Multiple measures were introduced to address spending and expenditure limits,<sup>33</sup> because the 1971 Act had failed to address this issue.<sup>34</sup>

<sup>28</sup> S. Rep. No. 92-229 (1971), as reprinted in U.S.C.C.A.N. 1821, 1853 (supplemental views of Senators Prouty, Cooper and Scott).

<sup>29</sup> *Id.* at 1841.

<sup>30</sup> *Id.* at 1851 (supplemental views of Senators Prouty, Cooper and Scott) (citing testimony from Sidney H. Scheuer, chairman of the National Committee for an Effective Congress, "In the 1970 campaign alone, countless newspapers and magazines appeared with such glaring headlines as: 'Unseen Fund Raisers, Financing Lobbyists,' 'False Front' Campaign Funds: How They Work,' 'Campaign Spending Violations Found,' 'Bank PAC Funds Data Surfaced After Vote,' 'Five Political Funds Don't Report Aid.'").

<sup>31</sup> *Id.* at 1852. See also *id.* at 1861 ("It makes little difference that not all these stories concern clear-cut violations of the law, that many only demonstrate the enormous size of the loopholes in that law. Each instance stokes the fires of public cynicism and the common suspicion of widespread wrongdoing. As a result, the reputation of politics and all politicians suffers.")

<sup>32</sup> *Id.* at 1861-62 ("In this modern age where mass communications have created an information rich public, the present ineffective disclosure laws have the effect of shrouding Federal campaign financing in unhealthy and unwarranted secrecy. The lack of complete and full disclosure erodes competence in the entire elective process and if allowed to continue would only serve to generate pressures against our democratic form of government."); full disclosure was also consistent with the recommendations of a 1970 report published by the "Twentieth Century Fund Task Force on Financing Congressional Campaigns," which concluded that "public disclosure and publication of all campaign contributions and expenditures are the best disciplines available to make campaigns honest and fair." *Id.*

<sup>33</sup> S. REP. NO. 93-689, as reprinted in 1974 U.S.C.C.A.N. 5587 to the Federal Election Campaign Act Amendments of 1974 Feb 21, 1974, 5588 (statement of S. Claiborne Pell, Chairman of the Subcommittee on Privileges and Elections); S. 372, The Federal Election Campaign Act Amendments of 1974.

<sup>34</sup> S. REP. NO. 92-229 (1971), as reprinted in 1971 U.S.C.C.A.N. 1821, 1859-60. To explain why contribution limits were unnecessary, the bill's proponents suggested that such limits would likely be found unconstitutional, would be "completely unworkable," and "disclosure makes such a limitation unnecessary." ("It was recognized that full and complete disclosure really solves the problem of large contributions. Under the new disclosure provisions contained in title II the public will know exactly how a candidate's campaign is financed. Since the disclosure provisions require reports 15 days and 5

Realizing that disclosure alone was not enough to prevent “misuse and corruption of power and a misguided dependence on the influence of large political contributors”<sup>35</sup> or the “scramble to raise political funds,”<sup>36</sup> lawmakers adopted significant contribution and expenditure limits.<sup>37</sup> However, the constitutionality of the 1971 Act, as amended by the Federal Election Campaign Act Amendments of 1974 (“the 1974 Amendments”), was soon challenged in the landmark case *Buckley v. Valeo*.<sup>38</sup>

While expenditure limits on independent expenditures and candidates were struck down, the Court in *Buckley* upheld the constitutionality of the 1971 Act and the 1974 Amendments’ disclosure requirements and contribution limits.<sup>39</sup> The FEC, however, has determined that tribal contributions may be made without the tribe reporting their contributions and with significant exceptions to existing contribution limits. The following Part discusses the unique contribution limits applied to tribes.

### III. THE RULES: HOW TRIBAL CONTRIBUTIONS ARE REGULATED

Tribal campaign contributions are made under rules unlike campaign contributions from any other source. Over the history of campaign finance reform, Congress has created rules for the campaign contributions of local and state governments, corporations and labor unions, foreign nations and

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days before an election, the voter will be in a position to make a judgment at the polls concerning the effect of large individual contributions to a political candidate. Recognizing that the present limitation on individual contributions is merely a sham, the committee adopted an amendment which would repeal 18 U.S.C. 608.”)

<sup>35</sup> See S. REP. NO. 93-689, as reprinted in 1974 U.S.C.C.A.N. 1587 to the Federal Election Campaign Act Amendments of 1974 Feb. 21, 1974, 5617 (statement of S. Claiborne Pell, Chairman of the Subcommittee on Privileges and Elections).

<sup>36</sup> *Id.* at 5588.

<sup>37</sup> *Id.* at 5604 (The original Senate Bill limited political contributions by *individuals* to federal candidates to a yearly maximum of \$3,000 for each primary and general election and \$25,000 in the aggregate “for all contributions to Federal candidates and to political committees that support them.”); Federal Election Campaign Act P.L. 93-443 (1974) (current version at Federal Election Campaign Act § 441a (2006)). Following extensive hearings and debate, the Senate also concluded that expenditure and contribution limits would not sufficiently fix the broken system. In addition to spending and expenditure limits, the final measure adopted public financing of elections to cure the perceived public dissatisfaction with the state of the federal electoral process. See S. REP. NO. 93-689, as reprinted in 1974 U.S.C.C.A.N. 5587 to the Federal Election Campaign Act Amendments of 1974 Feb 21, 1074, 5591 (“The only way in which Congress can eliminate reliance on large private contributions and still ensure adequate presentation to the electorate of opposing viewpoints of competing candidates is through comprehensive public financing. Modern campaigns are increasingly expensive and the necessary fundraising is a great drain on the time and energies of the candidates. Low contribution limits alone will compound that problem. Many candidates—incumbent and challenger alike—will find it exceedingly difficult to finance an adequate campaign to carry their message to the voters. Drastically reducing the amounts which may be expended by the candidate would ease this burden, but at the cost of increasing the present disadvantage for non-incumbent challengers and endangering the whole process of political competition.”); see also Subcommittee on Privileges and Elections, chaired by Senator Claiborne Pell, on the 18th, 19th, 20th, and 21st of September, 1973 where “[o]ver 40 witnesses appeared to testify in person and to submit lengthy statements in support of public financing.” S. REP. NO. 93-689, as reprinted in 1974 U.S.C.C.A.N. 5588 to the Federal Election Campaign Act Amendments of 1974 Feb. 21, 1974, 5588.

<sup>38</sup> 424 U.S. 1 (1976) (per curiam).

<sup>39</sup> *Id.*

foreign nationals, and even children.<sup>40</sup> However, Congress has never passed any laws establishing rules specifically addressing tribal political contributions. In 1971 and 1974, when Congress passed the Federal Election Campaign Act and its subsequent amendments (“FECA” or “the Act”), tribes were not mentioned in any published floor debates on the measures. Possibly Congress did not acknowledge tribes as contributors during these campaign finance reform efforts because tribes did not have the financial resources to contribute to campaigns.<sup>41</sup>

Even as tribes began making significant campaign contributions, Congress did not address the rules under which they could give. By 2002, when Congress was debating its most recent version of campaign finance reform, the McCain-Feingold Bill and its House companion measure, Shays-Meehan, tribes had become active contributors to federal political campaigns.<sup>42</sup> Despite obvious growth in tribal political activity, Congress continued to ignore the status of tribal contributions as it debated the measure that ultimately became the Bipartisan Campaign Finance Reform Act (“BCRA”).<sup>43</sup> While there were some weak attempts by a handful of congressmen to create rules for tribal contributions in BCRA,<sup>44</sup> these attempts died before reaching the House or Senate floor.<sup>45</sup> In fact, tribes were not even mentioned in the Committee Reports on the measure.<sup>46</sup> Despite limited public opposition demanding that the status of tribal giving be acknowledged,<sup>47</sup> ultimately BCRA was enacted into law without any mention of Indian tribes.<sup>48</sup>

<sup>40</sup> 2 U.S.C. §§ 441b, c, e (2006). The ban on contributions by minors (children under eighteen) was adopted as a means of preventing individuals from circumventing the individual contribution limit. However, *McConnell v. Federal Election Commission* rejected the ban noting that the government had not provided a sufficiently compelling justification for banning all political contributions by minors. 540 U.S. 93 at 108–09 (2003).

<sup>41</sup> See Hans A. von Spakovsky, *Congress, Not the FEC, Has to Fix the ‘Indian Loophole,’* ROLL CALL, Feb. 21, 2006 (addressing the “huge increase in tribal donations” von Spakovsky notes, “Congress probably did not contemplate this issue in 1971...”).

<sup>42</sup> See Center for Responsive Politics, *supra* note 21.

<sup>43</sup> Bipartisan Campaign Finance Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) [hereinafter *BCRA*].

<sup>44</sup> See Amanda B. Carpenter, *McCain’s Law Preserved Loophole for Tribal Contributions*, HUMAN EVENTS, Jan. 30, 2006, <http://www.humanevents.com/article.php?id=11961> (“Rep. Rob Simmons (R.-Conn.) developed an amendment that would have applied the aggregate caps to Indian tribes. But The Hill reported in July 2001 that the amendment had died in the Rules Committee, chaired by Rep. David Dreier (R.-Calif.)”); see also Brian Stockes, *Tribal Amendment Expected in Campaign Finance Reform Bill*, INDIAN COUNTRY TODAY, Feb. 17, 2002 at a1 (suggesting that there was an amendment proposed to the House measure, Shays-Meehan, after it passed the House on February 14<sup>th</sup>, 2002. However, the article does not identify who drafted the amendment or whether it was introduced.)

<sup>45</sup> Amanda B. Carpenter, *House Democrats Boasted of Saving Tribal-Contributions Loophole*, HUMAN EVENTS, Mar. 14, 2006, <http://www.humanevents.com/article.php?id=13183> (“A network of legislators, Indian advocates and tribal gaming lobbyists is taking credit for stopping the effort they suspect was an attempt to undermine reform by eroding support for Shays-Meehan among Indian-friendly representatives,” said the Desert Sun. “Kildee, who founded the Native American Caucus in 1997, said it wasn’t until February 13, just hours before the Shays-Meehan floor debate, that the effort to limit tribal contributions to federal candidates was defeated[.]” (citing “*Tribes: Reform Law*” *Early Draft Had Unfair Limits*, THE PALM SPRINGS DESERT SUN, Feb. 23, 2002)).

<sup>46</sup> H.R. REP. NO. 107-135 (2001) (Conf. Rep.); H.R. REP. NO. 107-131(I) (Leg. Hist.).

<sup>47</sup> See Patrick Basham & John Samples, *Campaign Finance Folly*, THE CATO INSTITUTE, Jan. 12, 2002, [www.cato.org/dailys/01-12-02.html](http://www.cato.org/dailys/01-12-02.html) (“[I]f [BCRA] is eventually passed, thereby banning soft money . . . tribes will possess a huge advantage over other Americans in exercising their right to political speech.”); see also Carpenter, *supra* note 44 (“The National Association of Convenience

Today, Advisory Opinions by the Federal Election Commission<sup>49</sup> interpreting FECA govern the application of campaign finance law to Indian tribes.<sup>50</sup> Although Advisory Opinions are the sole source of federal campaign finance law with respect to tribal giving, these Opinions have been largely ignored in discussions of current regulations and debates over the future status of tribal giving. However, these Opinions create exceptions for tribal contributions that allow tribes to contribute in ways unlike any other contributor. Specifically, these Opinions allow tribes to contribute as “persons.” As such, tribes may (1) contribute more than any individual can contribute in an entire election cycle;<sup>51</sup> (2) contribute under single-sided disclosure requirements where the tribe itself is not required to report the recipients of tribal contributions;<sup>52</sup> and; (3) contribute despite their position as government contractors.<sup>53</sup> The following subsections briefly outline rules these Opinions have created.

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Stores—whose members compete with Indian reservations that sell alcohol, cigarettes and gasoline tax-free—had planned to score the amendment as a ‘key vote.’ In a press release at that time, the NACS said: ‘This [Simmons] amendment would have closed the ability for tribal nations to give unlimited sums toward federal elections. While Congress and the Rules Committee were made aware of the situation prior to the committee vote, the committee chose to move forward without addressing this glaring loophole.’”). It is likely there was no amendment to change the status of tribal contributions under FECA because of significant opposition from tribes. *See* Stockes, *supra* note 44 (“Many tribes and organizations like the National Indian Gaming Association and the National Congress of American Indians see any amendment that would limit campaign contributions as an unfair attack on the tribes’ ability to participate in the political process. ‘An Indian amendment on campaign finance reform would treat Indian tribes as the only unincorporated group to be limited under the law...That would be mean that tribal governments would be used as political pawns.’” (citing Jacqueline Johnson, Exec. Dir., Natl. Congress of Am. Indians)).

<sup>48</sup> *See BCRA supra* note 43; *see also* von Spakovsky, *supra* note 41 (“Congress could have fixed this in 2002 when it passed the McCain-Feingold campaign reform law...but chose not to.”); it has been suggested that Senator John McCain, presently Chair of the Senate Committee on Indian Affairs and primary author of BCRA, was resistant to changing the status of tribal contributions because of the significant financial support he received from tribes. While BCRA was under consideration it was reported that McCain was the “number one recipient of political donations [from tribes]. In fact, McCain receives twice the amount given the second-highest recipient.” *See* Basham & Samples, *supra* note 47 (While the measure was awaiting a vote on the House Floor, McCain’s senior advisor on campaign finance reform noted “there may be flaws that need to be rectified, but they can be handled at a later time.”); it has also been suggested that Democrats hoping to reap more tribal political contributions quashed the amendment that would have limited aggregate tribal donations. *See* Carpenter, *supra* note 45 (“Today, Democrats are trying to make an issue of Republicans’ being influenced by contributions from Indian tribes, but four years ago at least one leading Democrat bragged about stopping Republicans from closing the campaign-finance-law loophole...”).

<sup>49</sup> The FEC was established pursuant to the Federal Election Campaign Act of 1971 as amended by the Federal Election Campaign Act Amendment of 1974. It was established to “administer, seek to obtain compliance with, and formulate policy with respect to [FECA].” It also has “exclusive jurisdiction with respect to the civil enforcement” of FECA. *See* 2 U.S.C. § 437c.

<sup>50</sup> *See* 51 Op. F.E.C. (1978); 12 Op. F.E.C. (1993); 32 Op. F.E.C. (2000); 05 Op. F.E.C. (2000); 01 Op. F.E.C. (2005). These Opinions are based on the facts of the particular issue presented. Much like judicial opinions, they have general application to similarly situated parties and have therefore been understood to apply to Indian tribes generally. *See* 2 U.S.C. § 437f (1986).

<sup>51</sup> 51 Op. F.E.C. (1978); 05 Op. F.E.C. (2000).

<sup>52</sup> 51 Op. F.E.C. (1978).

<sup>53</sup> 12 Op. F.E.C. (1993); 01 Op. F.E.C. (2005).

A. LARGER CONTRIBUTIONS ALLOWED FOR  
TRIBES THAN INDIVIDUALS

*Buckley* struck down limits on several types of contributions including, limits on spending by independent expenditures, limits on personal spending from a candidates own funds, and ceilings on overall campaign expenditures.<sup>54</sup> However, limits on individual contributions to a single candidate (\$1000 at the time) or political committee (\$5000 at the time) and the aggregate cap on total contributions by an individual in a single year (\$25,000 at the time) were held constitutionally valid.<sup>55</sup> Over the years, regulatory decisions have undermined these limits as they apply to tribal campaign contributions.

Two years after *Buckley*, Eldon Rudd, a first term Republican Congressman from Arizona, requested an opinion from the FEC to determine if FECA allowed a contribution for \$250 from the Ak-Chin Indian Community (“Ak-Chin”), if the contribution was subject to limits, and how the contribution should be reported.<sup>56</sup> In response to the Rudd campaign’s request, the FEC determined that Ak-Chin, a “non-corporate entity organized pursuant to [The Indian Reorganization Act of 1934],” with no members that are corporations, should be considered a “person” for purposes of the Act.<sup>57</sup> At the time, this decision allowed Ak-Chin to contribute up to \$1000 per federal candidate, per election.<sup>58</sup> The Opinion also clarified that contributions from Ak-Chin’s general funds “would not have to be attributed to individuals comprising the Community.”<sup>59</sup>

In 2000, the FEC upheld the 1978 Opinion and further clarified the Act’s application to tribes when it determined whether overall aggregate limits on campaign contributions applied to tribal contributions.<sup>60</sup> The Oneida Nation of New York (“Oneida”) was a gaming tribe making contributions to federal campaigns. While the Oneida had voluntarily limited its total contributions to federal political committees to \$25,000 annually (as required by law at the time for “individual” contributors), they queried whether the \$25,000 cap (or aggregate cap) applied solely to “individual” contributors or whether it also applied to “persons.”<sup>61</sup> The implication was that if they could contribute more than \$25,000 per election cycle, they would. The Commission’s two page Opinion concluded

<sup>54</sup> *Buckley*, *supra* note 38 at 58–59 (The Court deemed such limits “substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.”).

<sup>55</sup> *Buckley*, *supra* note 38 at 25–26.

<sup>56</sup> 51 Op. F.E.C. (1978); *see also* Letter from C.M. Brooks, Finance Chairman, Friends of Eldon Rudd, to Office of the General Counsel, F.E.C. (July 26, 1978) (on file with the F.E.C. Office of Public Records and with author).

<sup>57</sup> *See* Brooks, *supra* note 56 (citing 25 U.S.C. § 476 (1934)).

<sup>58</sup> 2 U.S.C. § 441a(a)(1)(A) (1976).

<sup>59</sup> 51 Op. F.E.C. 2 (1978).

<sup>60</sup> 05 Op. F.E.C. 1 (2000); *see also* Letter from Markham C. Erickson, on behalf of Oneida Nation of New York, to Bradley Litchfield, Associate General Counsel, F.E.C. (Mar. 30, 2000) (on file with the F.E.C. Office of Public Records and with author).

<sup>61</sup> *See* Erickson, *supra* note 60 (“While it is clear under FEC precedent that the Nation is a ‘person’ as defined under the Act, it is unclear whether the nation is an individual for purposes of 2 U.S.C. § 441a(a)(3).”); *See also* 2 U.S.C. § 441a(a)(3)(2006).

that while the tribe was subject to a per candidate, per election limit imposed on “persons” by the Act, as “persons” the tribe was not subject to the aggregate limit imposed on “individuals.”<sup>62</sup>

#### B. FEWER DISCLOSURE REQUIREMENTS FOR TRIBES THAN OTHER CONTRIBUTORS

Tribal contribution data is not subject to reporting by the tribe itself because it is made by the tribe as “persons.” As persons, tribes are not required to organize as a federal political committee subject to disclosure requirements.<sup>63</sup> Just as many of the original contribution limits adopted by FECA’s 1974 Amendments are the basis for current campaign contribution limits, the dual disclosure and recordkeeping requirements of the 1971 Act remain the basis for current campaign contribution and expenditure reporting. Ultimately, by allowing tribal contributions to remain unreported by the tribe, treating tribes as “persons” creates a system of single-sided reporting for tribal contributions where otherwise the system would require reporting by both the tribe (as contributor) and the candidate or committee (as recipient). As a result, tribal contribution data can only be found by combing the FEC records of candidate committees, leadership committees, state committees, and political action committees (“PACs”) and recording which committees have received tribal contributions.

#### C. FEC OPINIONS ALLOW TRIBES TO CONTRIBUTE AS GOVERNMENT CONTRACTORS

In addition to determining the limits and disclosure requirements under which a tribe may contribute to a political campaign, the FEC has also determined whether or not tribes are subject to any of the prohibitions imposed on “persons” contributing under the Act. Since passage of the Act in 1972, certain “persons” have been prohibited from making federal campaign contributions.<sup>64</sup> These prohibitions were intended to reflect the Act’s goal of preventing corruption or the appearance of corruption. Of

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<sup>62</sup> 05 Op. F.E.C. 1 (2000); see 2 U.S.C. § 441a(a)(1)(A)(2006) (limiting contributions from “persons” to \$1000 per federal candidate per election).

<sup>63</sup> FEC Chairman Michael E. Toner and Vice-Chairman Robert D. Lenhard explain tribal disclosure requirements in the following way: “Federal political committees are required to file disclosure reports with the FEC, 2 U.S.C. § 434. These reports contain information on the committees’ recipients and disbursements and are available to the public on the FECs website, www.fec.gov. Federal political committees include candidate committees, political party committees, and corporate and labor organization PACs. Tribes are not political committees because their major purpose is not to influence the election or defeat of candidates. See *Buckley*, supra note 38. See also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“MCFL”) (stating that if MCFL’s independent expenditures “become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.”). Consequently, tribes are not required to register and file reports with the FEC detailing their contributions.” *Hearing on Indian Tribes and the Federal Election Campaign Act: Before the S. Comm. on Indian Affairs*, 109<sup>th</sup> Cong. 2d. Sess. (Feb. 8, 2006) (statement of Michael E. Toner & Robert D. Lenhard, Chairman and Vice-Chairman of the Federal Election Commission).

<sup>64</sup> See 2 U.S.C. § 441(b) (2006) (prohibiting certain types of “persons” including corporations, labor unions, and national banks from contributing); 2 U.S.C. § 441e (prohibiting foreign nationals from contributing).

interest to some tribes was the prohibition on contributions from Federal government contractors.<sup>65</sup> This issue was first addressed by the FEC in 1993.<sup>66</sup> After changing course in 1999,<sup>67</sup> in 2005 the Commission returned to its 1993 position and found that tribes may make political contributions even when they maintain tribal enterprises with federal government contracts.<sup>68</sup>

#### IV. THE RISKS: TRIBAL CONTRIBUTION RULES MAY COMPROMISE THE INTEGRITY OF THE CAMPAIGN FINANCE SYSTEM, FEDERAL LAWMAKERS, & TRIBAL LEADERS

Critics of Indian gaming suggest that the FEC's Opinions have created a "loophole" allowing tribes to "get away with" contributing more than they otherwise would be able to.<sup>69</sup> Such criticisms are catchy in newspaper articles, but significantly understate the consequences of Congress's failure to address the unique status of tribes when it has undertaken campaign finance reform. The Opinions discussed in Part III are the basis for this Part. Here, the Note considers how these Opinions may undermine both the integrity of the campaign finance system and tribal governance.

##### A. THE RISKS OF HIGHER AGGREGATE CONTRIBUTION LEVELS

The Abramoff scandal led many to suggest that by treating tribes as "persons" they could contribute significantly more than they otherwise could, had they been subject to aggregate caps. However, it does not necessarily follow that higher contribution levels are at odds with the anti-corruption goals of campaign contribution limits. The Court upheld contribution limits on the basis that the public is aware "of the opportunities for abuse inherent in a regime of large individual financial contributions" and that only limits on contributions would promote the Act's primary purpose "to limit the actuality and appearance of corruption resulting from large individual financial contributions."<sup>70</sup>

In fact, estimates by the Center for Responsive Politics suggest that between 2000 and the end of 2005, Abramoff's tribal clients made political contributions totaling nearly \$4 million.<sup>71</sup> In 2002, BCRA replaced the annual \$25,000 contribution limit such that as of January 1, 2003

<sup>65</sup> Current version at 2 U.S.C. § 441c(a)(1). Federal regulations define a "Federal contractor" as a "person" who "enters into any contract with the United States or any department or agency thereof either for -- (i) The rendition of personal services; or (ii) Furnishing any material, supplies or equipment; or (iii) selling any land or buildings." 11 CFR 115.1(a).

<sup>66</sup> 12 Op. F.E.C. (1993).

<sup>67</sup> 32 Op. F.E.C. (2000).

<sup>68</sup> 01 Op. F.E.C. (2005).

<sup>69</sup> See Clela Mitchell, *Close the Tribal Loophole in McCain-Feingold*, ROLL CALL, Jan. 23, 2006 ("How exactly did Indian Tribes get away with spreading so much money around Washington?") (internal quotations omitted); Republican campaign finance lawyer, Jan. Baran, called tribal contributions under the current framework a "huge loophole through which Mr. Abramoff was able to drive a very large Brinks truck of campaign cash." Drinkard, *supra* note 17.

<sup>70</sup> S. REP. NO. 93-689, *supra* note 38 at 26, 27.

<sup>71</sup> See Center for Responsive Politics, *supra* note 21.

individuals were subject to an aggregate contribution limit of \$95,000, indexed for inflation.<sup>72</sup> To determine how the tribes' status as "persons" influenced the amount of their contributions, the table below shows how much Abramoff's four highest contributing tribal clients donated in excess of the aggregate limits during two election cycles.<sup>73</sup>

	<b>Amount Contributed <i>in Excess</i> of BCRA Aggregate Limits</b>			
<b>BCRA aggregate "Individual" contributor limit per 2 year election cycle</b>	Agua Caliente Band of Cahuilla Indians	Saginaw Chippewa Indian Tribe	Mississippi Band of Choctaw Indians	Coushatta Tribe of Louisiana
\$25,000 for 2002 cycle	<b>\$253,500</b>	<b>\$235,980</b>	<b>\$647,250</b>	<b>\$190,500</b>
\$95,000 for 2004 cycle	<b>\$253,308</b>	<b>\$147,096</b>	<b>\$260,350</b>	<b>Not in excess</b>

As the table shows, Abramoff's tribal clients far exceeded the aggregate contribution limits imposed on individual contributors. In the 2002 election cycle, all four tribes contributed in amounts so high, the limit was meaningless.<sup>74</sup>

Alone, these numbers suggest that these tribes did "get away with"<sup>75</sup> contributing more than they could have, had they been subject to the aggregate cap on "individual" contributors. But this conclusion is incorrect because contributions from tribes are not comparable to contributions from individuals. Equating tribes with individual contributors would be contrary to what tribes are: "obviously not individuals but groups of individuals."<sup>76</sup> As representatives of multiple individuals it would appear quite fair for tribes to contribute more than a single individual.

The suggestion that tribes contribute disproportionately high amounts compared to other individual contributors assumes that aggregate caps are

<sup>72</sup> 2 U.S.C. § 441a(a)(3) (2006).

<sup>73</sup> For data, see Center for Responsive Politics, *supra* note 21 (click on "Display: Detail by Donor" then to "Select Donor: Agua Caliente Band of Cahuilla Indians," then to "Select Donor: Saginaw Chippewa Indian Tribe," then to "Select donor: Mississippi Band of Choctaw Indians," then to "Select Donor: Coushatta Tribe of Louisiana").

<sup>74</sup> Abramoff's clients were not the only tribes to contribute in excess of the individual aggregate limits. In 2004 the Morongo Band of Mission Indians gave approximately \$485,000 more than the limit, or a total of \$580,000 in contributions to federal candidates. See *Oversight Hearing on Indian Tribes and the Federal Election Campaign Act Before the S. Committee on Indian Affairs*, 109<sup>th</sup> Cong. (2006) (statement of Lawrence Noble).

<sup>75</sup> See Mitchell, *supra* note 69.

<sup>76</sup> *Oversight Hearing on Indian Tribes and the Federal Election Campaign Act Before the S. Committee on Indian Affairs*, 109<sup>th</sup> Cong. at 5 (2006) (statement of James T. Thurber, Distinguished Professor and Dir. of Ctr. for Congressional and Presidential Studies at American University) [hereinafter Thurber].

properly applied to tribal contributions. Though tribal contributions may be four hundred times higher than the amount Bill Gates can personally contribute to the political system, tribal contributions represent the interests of tribal members, not just a single resident of one city. Contributing as “individuals” would “severely diminish [tribes’] ability to contribute and essentially hold them to limits so strict that they could not hope to have any influence as sovereign governments.”<sup>77</sup> The Commission’s 2000 Opinion regarding aggregate caps gave Indian tribes the same status as other governments internal to the United States, including state governments and municipal corporations, which are also treated as “persons” under the Act.<sup>78</sup> This decision is consistent with the view that aggregate caps prevent corruption or the appearance of it only insofar as they are applied to individual contributors. However, unlike states and municipal governments that rely on locally elected congressional representatives to represent them in Washington, some tribes believe that reliance on locally elected federal representatives is not enough. Instead these tribes make significant contributions to elected officials in order to have their interests represented in Washington.<sup>79</sup> However, as discussed in the next section, these contributions not reported by the tribe itself are therefore difficult to track and potentially give rise to abuse.

#### B. THE RISKS OF SINGLE-SIDED REPORTING OF TRIBAL CONTRIBUTIONS

As discussed in Part II, Congress and executive agencies wield significant influence over the economic prosperity of tribes. As discussed in Part III, because tribes contribute as “persons” they are not subject to reporting requirements. When politicians are aware of their disproportionate power over the economic success of tribes,<sup>80</sup> and tribes attempt to influence this power without full disclosure, the situation is ripe for corruption or, at the very least, the appearance of corruption. The Abramoff scandal exposed numerous instances of both proven quid pro quo

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<sup>77</sup> *Id.*

<sup>78</sup> See 05 Op. F.E.C. 2 (citing 07 Op. F.E.C. (1999), 26 Op. F.E.C. (1982), 32 Op. F.E.C. (1977)). The Commission also noted that “the only government that is specifically not construed to be a person, and therefore not subject to the limitations and prohibitions of the Act, is the Federal Government.” (citing 2 U.S.C. § 431(11): “person” includes an “individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons, *but such term does not include the Federal Government* or any authority of the Federal government.” (emphasis added)).

<sup>79</sup> Allen, *supra* note 5, at 7 (“Tribal leaders have an obligation to utilize every legal means available to them to make sure that . . . Congress understand[s] Indian issues, protects tribal rights, and live[s] up to the obligations under treaties and the federal trust responsibility . . . And, yes, as our financial resources have increases, so have our donations to the candidates of our choice.”); The recipients of tribal contributions span both sides of the political aisle. While Democrats were the initial beneficiaries of tribal contributions, almost half of federal tribal contributions now go to Republicans. Susan Schmidt, *A Jackpot From Indian Gaming Tribes*, WASH. POST, Feb. 22, 2004, at A01 (“Democrats were the first to make inroads in courting tribal leaders often unfamiliar with Washington politics. More recently, Republicans have tapped into growing tribal largess. In 1990, Indian tribes gave no money to Republicans; now tribes are giving much more overall, and almost half of it goes to Republicans.”).

<sup>80</sup> Jim Meyers, *Cole to Fight Limits on Tribes*, TUL. WORLD, Feb. 3, 2006, at A1 (“Tribes live or die with the relationship with the federal government’ . . . [noting] the amount of land and other assets held in trust for tribes by the government.” (citing U.S. Rep. Tom Cole R-OK)).

legislative activity in exchange for campaign contributions and suspect legislative activity followed by tribal contributions.<sup>81</sup> The risks of single-sided disclosure to the integrity of the campaign finance system are demonstrated by the difficulties that arise from tracking such contributions and the enforcement of campaign finance rules. In addition, this section suggests that single-sided reporting places the interests of tribal members at risk by undermining the anti-corruption and voter information possibilities that a dual-disclosure system would otherwise provide for tribal members to monitor the political activities of their tribes.

### 1. *Risk of Undermining the Campaign Finance System*

When Congress adopted FECA and its subsequent amendments it sent a message that *both* contribution limits and disclosure requirements were necessary “to establish that climate of public trust in elected officials which this country so earnestly desires.”<sup>82</sup> In upholding the disclosure requirements adopted by the 1971 Act and the 1974 Amendments, the Court in *Buckley* found that they “directly serve substantial governmental interests” by (1) deterring corruption or the appearance of corruption; (2) providing voters with candidate information; and, (3) improving enforcement.<sup>83</sup> With respect to the anti-corruption interest, the Court noted that “by exposing large contributions and expenditures to the light of publicity” disclosure “deter[s] actual corruption and avoid[s] the appearance of corruption.”<sup>84</sup> Ultimately the Court believed disclosure would discourage the use of contributions for “improper purposes.”<sup>85</sup>

<sup>81</sup> See Associated Press, *Records Detail Senator's Links to Abramoff's Clients*, L.A. TIMES, Feb. 15, 2006 (“Senate Minority Leader Harry Reid (D-Nev.) wrote at least four letters helpful to Indian tribes represented by Jack Abramoff...Reid also intervened on government matters at least five times in ways helpful to Abramoff’s tribal clients, once opposing legislation on the Senate floor and four times sending letters pressing the Bush Administration on tribal issues. Reid collected donations about the time of each action.”); Susan Schmidt & Jeffrey H. Birnbaum, *Tribal Money Linked to GOP Fundraising*, WASH. POST, Dec. 26, 2004 (“A Senate panel investigating Abramoff released e-mails last month showing that Abramoff directed a Texas tribe to contribute \$32,000 to New in 2002, days after Ney took steps to sponsor legislation sought by the tribe.”); James V. Grimaldi, *Alumni of Abramoff Team Still Working as Lobbyists*, WASH. POST, June 26, 2005 (“For the Choctaws, Ring [a former Abramoff associate] has tried to win support for an amendment by Rep. J.D. Hayworth (R-Ariz) that would exempt tribal casinos from labor laws . . . According to records, . . . Ting last month coordinated with Hayworth’s office on a letter to members of Congress from Choctaw Chief Phillip Martin seeking support for the tribal labor movement.”); Philip Shenon, *In Congress, a Lobbyists Legal Trouble Turn His Generosity Into a Burden*, N.Y. TIMES, Dec. 19, 2005, at A1 (“In announcing last week that they would return money from Mr. Abramoff’s clients and his lobbying partners, Senator Conrad Burns, Republican of Montana, and Byron Dorgan, Democrat of North Dakota, made clear that they were trying to distance themselves from accusations that they had done favors for Mr. Abramoff in exchange for the donations.”).

<sup>82</sup> See S. REP. NO. 93-689, as reprinted in 1974 U.S.C.C.A.N. 5587 to the Federal Election Campaign Act Amendments of 1974 Feb. 21, 1074, 5617 (statement of S. Claiborne Pell Chairman of the Subcommittee on Privileges and Elections) (In reporting the 1974 Amendments to a full vote of the Senate, the Chairman of the Subcommittee on Privileges and Elections suggested that limiting the amount of contributions that could be accepted and the amount of expenditures that could be made would “remove[] the temptation of seeking or of accepting the large compromising gift . . . return[ing] to our people, to our individual voters a rightful share and a rightful responsibility in the choosing of their candidates . . . [and] . . . serve to establish that climate of public trust in elected officials which this country so earnestly desires.”).

<sup>83</sup> *Buckley*, *supra* note 38, at 68.

<sup>84</sup> *Buckley*, *supra* note 38, at 67.

<sup>85</sup> *Buckley*, *supra* note 38, at 67.

Where political corruption did occur, such that an officeholder gave “special favors” in return for contributions, “[a] public armed with information about a candidate’s most generous donors” would be “better able to detect” such misconduct.<sup>86</sup>

When disclosure is single-sided, it is significantly more difficult for the public, law enforcement, regulators, or, in this case, tribal members to “follow the money.”<sup>87</sup> Single-sided reporting causes unique problems in tracking tribal campaign contributions because recipient committees do not always record a particular tribe’s donation under a consistent tribal name.<sup>88</sup> As a result, an FEC search for a particular tribe’s contributions often does not return a comprehensive list of all the contributions made by that tribe. For example, PoliticalMoneyline.com compiled a database of tribal contributions chronologically listing tribal political contributions to “track connections” between contributions and subsequent political activity.<sup>89</sup> In compiling their data, they found that one tribe’s contributions were disclosed by recipient committees under seventy-eight variations on the same name.<sup>90</sup>

By making it more difficult to “follow the money,” single-sided disclosure directly undermines the enforcement interests of campaign finance law. As Congress noted in 1971, “full and complete disclosure” of political contributions was intended to “restore the confidence of the American people” in the political system.<sup>91</sup> Where violation of contributions limits have occurred, “disclosure requirements are an essential means of gathering the necessary data to detect” them.<sup>92</sup> With respect to the enforcement interest underlying disclosure, single-sided reporting makes inaccurate disclosure by recipient committees more likely. Because there is no disclosure of contributions by contributors, regulators and the public must rely on the recipient report and FEC audits to ensure that both the contributor and the recipient are complying with contribution

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<sup>86</sup> Buckley, *supra* note 38, at 67.

<sup>87</sup> Thurber, *supra* note 76 (“When groups advocating good government, the media, or academics try to ‘connect the dots’ to see who is giving campaign contributions to whom and what issues they are lobbying on, [without reporting] it becomes very hard to follow the money.”).

<sup>88</sup> See PoliticalMoneyline.Com, *supra* note 22; see also Toner & Lenhard, *supra* note 63 (noting that individual political committees inconsistently record tribal names. “For example, contributions from the Morango Band of Mission Indians are recorded by the various political committees that received those contributions as coming from the ‘Morango Band of Mission Indians,’ ‘Morango Band Indians,’ ‘Morango Band-Mission Indians,’ and ‘Morango Band.’”).

<sup>89</sup> PoliticalMoneyline.Com, *supra* note 22 (“Donations often are suggested, coordinated or handled by lobbyists for their clients. To track connections, one may match the dates for various events, meetings, emails, or comments with the dates of subsequent Indian tribe donations.”).

<sup>90</sup> *Id.* (“[R]ecipients of tribal donations used over 1,976 variations of the 211 tribe names, including 78 for the Agua Caliente Band of Cahuilla Indians, and 57 for the Barona Group of Captain Grande Band of Mission Indians.”).

<sup>91</sup> S. REP. NO. 92-229 (1971), as reprinted in 1971 U.S.C.C.A.N. 1821, 1862 (supplemental views of Senators Winston Prouty, John Sherman Cooper and Hugh Scott) (“As things now stand, large segments of the educated public are losing faith in the too high cost of democracy. They suspect that the oil lobby, the labor lobby, the doctors’ lobby, the postal lobby, the people with the money and the clout again and again exercise undue influence upon the Nation’s legislators, confronting them time after time with a conflict of interest and an almost perennial debt of gratitude which must be paid off in special-interest legislation.”).

<sup>92</sup> Buckley, *supra* note 38, at 67–68.

limits and disclosure requirements. Without a public record of the contributions a government contractor has made, FEC audits and federal investigations are the only check on improper or inaccurate reporting. Unscrupulous politicians are more able to improperly report contributions without risk of exposure, in order to hide the relationship between the donation and their action. Even if such insidious acts never take place, the potential for such behavior is inconsistent with the Act's goal of removing the perception of corruption.

## 2. *Risk of Corrupting the Tribe*

As citizens, Native Americans are represented by the elected officials disclosure requirements are intended to regulate.<sup>93</sup> In addition, as members of sovereign nations, Native Americans are also represented by tribal representatives. Tribal funds are owned by tribal members and tribal council members are responsible for allocating those resources to promote the best interests of the tribe.<sup>94</sup> Tribal councils in turn, represent the interests of the tribe before federally elected officials. However, as the Abramoff scandal exposed, tribal council members are as capable of acting as "improperly" as the federal lawmakers in *Buckley*.

Abramoff ran campaigns that successfully replaced tribal council members with members who would approve his fees and contribution recommendations.<sup>95</sup> In one tribe, the "Abramoff elected" tribal council took funds dedicated to social services within the tribe to use for political contributions to federal lawmakers.<sup>96</sup> Once federal investigators and Senate Hearings made the tribes fully aware of the amount they had spent on political contributions, some acted quickly to replace the tribal council members who had approved the contributions.<sup>97</sup>

Independent disclosure by the tribe of its political contributions would have allowed tribal members to track the tribe's political expenditures long before an investigation became necessary. Instead, because recipient committee disclosure reports are the only means to determine the amount of contributions coming from a particular source, the single-sided reporting

<sup>93</sup> See 1924 Indian Citizenship Act, *supra* note 2.

<sup>94</sup> Allen, *supra* note 5, at 5 ("Historically and culturally, resources are held collectively with the tribal government, which has a responsibility to provide for the best interests of the community.")

<sup>95</sup> After replacing a quorum of the Coushatta tribe's tribal council with members sympathetic to Abramoff's proposals, the tribe wrote sixty-one contribution checks to various congressional campaign committees, some as large as \$25,000. Susan Schmidt, *Casino Bid Prompted High-Stakes Lobbying*, WASH. POST, Mar. 13, 2005, at A01. After running a successful campaign to replace all but the chief of the Agua Caliente Band of Cauilla Indians, they approved over \$300,000 in contributions to various committees. *Oversight Hearing Regarding Tribal Lobbying Matters Before the S. Indian Affairs Comm.*, 108<sup>th</sup> Cong. 720 (2004) (statement of Richard Milanovich, Chairman, Agua Caliente Band of Cauilla Indians).

<sup>96</sup> See Schmidt, *supra* note 79 ("[The Louisiana's Coushatta] tribe has spent \$32 million on unspecified "lobbying" costs since 2001, according to an internal memo prepared in May by outgoing tribe comptroller Erick LaRocque. Complaining that "documentation of the nature of these expenditures is very limited," LaRocque's memo said that "approximately \$24 million of these funds were taken from the funds designated for health, housing and education of tribal members," and that the council had obtained a \$10 million line of credit to cover other expenditures.")

<sup>97</sup> Editorial, *Abramoff Effect; The Smell of Casino Money*, N.Y. TIMES, Jan. 16, 2006, at A14 ("The Coushattas have thrown out all tribal council members who took part in the Abramoff deal.")

system utilized here make it virtually impossible for tribal members to track where the tribal money is being spent.<sup>98</sup>

Had the Abramoff tribes been subject to full disclosure, tribal members might have known that shortly after changing their leadership hundreds of thousands of dollars in political contributions were approved, and they might have asked their new leaders to explain and justify the contributions. Such inquiries might have made the tribes take a second look at Abramoff's plan.<sup>99</sup> Second, full disclosure might also have been a deterrent to misappropriation of tribal funds. Had tribal members known how much their tribes were contributing and to whom, they might have asked their council members to account for where the money came from, explain why it was going to certain candidates, and explain the amount. By increasing the involvement of tribal members in the expenditures of their tribe, an internal check is placed on the soundness of tribal contributions to discourage suspect political behavior and to protect the assets of the tribe.

### 3. Risk of Under-Informed Native American Voters

In addition to the anti-corruption interest found by Congress and validated by the Court, *Buckley* also articulated a "voter information" interests in disclosure. Disclosure tells voters who is contributing and how contributions are spent.<sup>100</sup> This information helps voters evaluate candidates by placing "each candidate in the political spectrum more precisely than is often possible, solely on the basis of party labels and campaign speeches."<sup>101</sup> This information also helps voters predict "future performances in office" by alerting them "to the interests to which a candidate is most likely to be responsive."<sup>102</sup>

To fulfill the voter information interest articulated in *Buckley*, a voter can simply look up the FEC filings of the candidate or federal officeholder.<sup>103</sup> These disclosures tell the voter both who supports the candidate and, if the candidate has made expenditures in support of another

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<sup>98</sup> When the public interest group, Common Cause, attempted to track tribal contributions in California state elections, they had to review the recipient reports of over 500 candidates. This effort took over two years to complete. Amicus Brief for Common Cause at 12, *Agua Caliente Band of Cahuilla Indians v. Superior Court of Sacramento County*, No. 02AS04545, 2005 WL 2236911 (Sup. Ct. Cal. 2005).

<sup>99</sup> In fact, where it is documented that tribal leaders did confer with tribal members about Abramoff's proposal, tribal members resistance quashed the proposal. Abramoff proposed that one tribe borrow against the life insurance policies of the elder tribal members in order to raise the funds to pay Abramoff's fees and make the political contributions he recommended. When the matter was discussed with the elders, they rejected it, requiring the tribal council to find alternative funding sources. See *Oversight Hearing on In Re Tribal Lobbying Matters, Parts 1, 2, & 3 Before the S. Comm. on Indian Affairs*, 109<sup>th</sup> Cong. 135 (2005); Once the Choctaw tribe's relationship with Abramoff was exposed, fifteen of the tribes sixteen members attempted to convince their tribal chief to end the tribe's relationship with Abramoff. See Ana Radelat, *Choctaws Press Chief to End Dealings with Lobbyists*, CLARION-LEDGER, Apr. 4, 2004.

<sup>100</sup> *Buckley*, supra note 38, at 66.

<sup>101</sup> *Buckley*, supra note 38, at 66-67.

<sup>102</sup> *Buckley*, supra note 38, at 67.

<sup>103</sup> Where candidates state virtually indistinguishable positions and ballot measures are unclear to the voter, "[s]imple, undeniable information about what interests have contributed money to particular campaigns and how much they have contributed can and does help voters sift through the rhetoric and make sense of contemporary political debate." *Buckley*, supranote 38, at 87.

candidates, who the candidate supports. Just as the federal voter can learn about the interests and preferences of a federal candidate by checking their campaign filings, so too should a tribal member be able to learn about the interests and preferences of the tribal council that represents them. However, if a member of a tribe wishes to know which candidates the tribal council has contributed to on behalf of the tribe, they must go through the cumbersome process of checking every candidate and committee report. As discussed above, this is both time consuming and often inaccurate. This section suggests that voter information interests should be understood as interests shared by both voters for federal office and voters for tribal offices.

The tribal member voter justification for dual-sided disclosure of tribal contributions may be analogized to recent efforts by shareholder advocacy groups to pressure corporations to independently disclose their political contributions to shareholders.<sup>104</sup> Although corporations cannot contribute directly to a candidate or political committee (including the treasury of the corporate PAC), they can contribute unlimited amounts to “527” groups that attempt to influence candidates.<sup>105</sup> Although website reporting of corporate campaign contributions is arguably duplicative because there is reporting of PAC contributions and 527 contributions, it is still supported by shareholder activists because it provides “a complete picture of a company’s giving” that is otherwise “difficult because the donations can be scattered over scores of individual campaign finance reports at the local, state and federal levels.”<sup>106</sup>

Just as corporate contributions come from the assets of the corporation and reflect on the corporation, tribal political contributions come from the assets of the tribe and represent the perceived interests of the tribe.<sup>107</sup> One tribal leader has argued that tribes should not be regulated like corporations because “[u]nlike corporations, tribal business ventures are not privately-owned entities nor are they for profit. Rather, income from tribal businesses generates governmental revenue to be used for the benefit of all tribal citizens.”<sup>108</sup> However, because tribal revenues are supposed to be used to benefit the entire tribe this is exactly why tribal members themselves should have access to tribal contribution information in order to monitor the activities of their tribe.

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<sup>104</sup> In fact, the Abramoff scandal has been pointed to as the impetus for the effort. *See* Jonathan Petersen, *More Firms’ Political Ties Put Online*, L.A. TIMES, Mar. 20, 2006, at B1 (“The legal travails of lobbyist Jack Abramoff, former House Majority Leader Tom DeLay . . . and former U.S. Rep. Randy ‘Duke’ Cunningham . . . are a reminder that the political arena can be tainted by scandal that potentially can reflect on donor corporations. . . . Under pressure from shareholder activists, a small but growing number of major U.S. companies have agreed to disclose their political donations on their corporate websites.”).

<sup>105</sup> BCRA § 302 (although 527s may not endorse candidates, they are allowed to mobilize voters through advertisements and outreach).

<sup>106</sup> Petersen, *supra* note 104.

<sup>107</sup> *See* Allen, *supra* note 5.

<sup>108</sup> Allen, *supra* note 5.

C. THE RISKS OF CONTRIBUTIONS FROM TRIBAL  
GOVERNMENT CONTRACTORS

The FEC's decision to allow tribes to contribute to federal lawmakers while maintaining federal contracts directly undermines the prohibition on such activities and thereby directly risks actual or perceived political corruption. In addition, as this Section will discuss, the availability of contributions from tribal government contractors is a means for non-tribal entities to circumvent the prohibition by partnering with tribal enterprises. This Section begins with a detailed discussion of the opinions that led to the FEC's current position. It then considers how these opinions 1) directly undermine the government contractor prohibition and 2) indirectly threaten the integrity of tribal enterprises.

1. *Laying the Groundwork of Tribal Government  
Contractor Contributions*

a. *1993 Choctaw Opinion*

In 1993, the Mississippi Band of Choctaw Indians ("Choctaw") requested a Commission opinion on whether its several economic agreements<sup>109</sup> with the Federal government would prevent it from pursuing "an active program of making contributions to federal candidates."<sup>110</sup> The Choctaw's concern was that these agreements might be considered "Federal contracts," making it a "Federal contractor" subject to additional federal campaign finance restrictions.<sup>111</sup>

Having been defined as "persons" by the 1978 Commission opinion, the Commission found that the Tribe was also a "person" for purposes of the Federal Contractor regulation.<sup>112</sup> The Commission then assessed the contractual relationship between the Choctaw Tribe and the federal government.<sup>113</sup> Although the Choctaws described three different agreements with the federal government, the Commission's Opinion only found one agreement a "Federal contract."<sup>114</sup>

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<sup>109</sup> The first agreement was the disbursement of federal funds provided pursuant to the Indian Self Determination and Education Assistance Act to the Tribe such that the Tribe could "plan, conduct, and administer programs that would otherwise be provided by an agency of the federal Government for the benefit of the Tribe." The second agreement was the Tribe's administration of discretionary grants from the Department of Labor and Department of Education. The FEC found that these two categories of agreements were for services delivered to the Tribe or Tribal members, and not the "furnishing of personal property, real property or personal services" by the Tribe to "the United States or any of its departments or agencies." As such, the FEC found that the agreements that led to the provision of funds to the Tribes were "statutory creations unique to Indian Tribes" and "not contemplated as subject to the prohibitions of section 441c." 12 Op. F.E.C. 1 (1993).

<sup>110</sup> *See id.*

<sup>111</sup> *See id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 2 ("In past advisory opinions and enforcement cases, the Commission has determined that an unincorporated tribal entity can be considered a 'person' under the Act and thus subject to the various contribution prohibitions and limitations . . . The tribe is therefore subject to the provisions of 2 U.S.C. s 441c") (citing 51 Op. F.E.C. 1 (1978)).

<sup>114</sup> *Id.* at 4.

First American Printing & Direct Mail was an “unincorporated economic enterprise of the [Choctaw] Tribe,” which sold posters and prints to the Bureau of Indian Affairs (“BIA”).<sup>115</sup> The Commission determined that a contract between this tribal enterprise and the BIA fell “squarely within the definition of contract in section 115.1 of the prohibitions of section 441c.”<sup>116</sup> As a result, the Commission concluded that “the Tribe, as a Federal contractor” was prohibited from “making contributions to a Federal candidate during the term of the agreement.”<sup>117</sup>

*b. 1999 Tohono Opinion*

Six years later, the Commission again faced the question of whether a tribe was a federal contractor subject to the contribution limits imposed by the Act. This time, however, the Commission came to the opposite conclusion as the 1993 opinion.<sup>118</sup>

In 1999, the Tohono O’odham Nation (“Tohono”) requested an advisory opinion on whether its Utility Authority (“TOUA”), as the provider of utility services to federal agencies, meant the tribe itself was a federal contractor subject to the federal contribution limits of 2 U.S.C. section 441c.<sup>119</sup> The Tribe represented TOUA as a “tribally chartered unincorporated entity, which operates as a subordinate commercial enterprise of the [Tohono] Nation.”<sup>120</sup> Among its purposes was to provide electric, gas and telephone service to “all areas and persons within the Nation . . . at the lowest possible cost, and [for] the improvement of the health and welfare of Nation residents.”<sup>121</sup> As the sole provider of such service on the Reservation, TOUA contracted with the federal government to provide utility service to federal agencies with offices on the Reservation (including the BIA and the Indian Health Service).<sup>122</sup>

The Commission’s Opinion did not consider the limited purpose of the Utility Authority or the limited customer base. Rather, it found that TOUA was a federal contractor but because of various characteristics it did not share with the tribe, it could be considered a “separate entity.” Therefore TOUA’s status as a federal contractor did not confer the same status on the Tribe.<sup>123</sup> Moreover, in a footnote, the opinion noted that the 1993 decision regarding the Choctaw printing plant was “superseded” by this opinion.<sup>124</sup>

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 3.

<sup>117</sup> *Id.*; see also 2 U.S.C. § 441c(a)(1) (the statute specifies that the prohibition is from “any time between the commencement of negotiations for [the contract] and the later of (A) the completion of performance under; or (B) the termination of negotiations . . .”).

<sup>118</sup> 32 Op. F.E.C. 1, 4 n.8 (2000).

<sup>119</sup> Letters from William C. Oldaker, on behalf of Tohono O’odham Nation, to Bradley Litchfield, Associate General Counsel, F.E.C. (Sept. 4 and 29, Oct. 29, Dec. 8 and 16, 1999 and Jan. 6, 2000) (on file with the F.E.C. Office of Public Records and with author).

<sup>120</sup> 32 Op. F.E.C. 1 (2000).

<sup>121</sup> *Id.* at 4 n.8 (citing TOUA Plan, Section 4, Part A1 and A2).

<sup>122</sup> *Id.* at 1.

<sup>123</sup> *Id.* at 3.

<sup>124</sup> *Id.* at 4 n.8.

As discussed below, the independent characteristics relied upon in this opinion became the basis for an opinion six years later that significantly expanded the types of tribal enterprises that could be pursued without conferring federal government contractor status on the tribe.

*c. 2005 Choctaw Opinion*

In January 2005, with the TOUA decision as its starting point, counsel for the Choctaw returned to the Commission with another request.<sup>125</sup> The tribe sought advice on whether its relationship with a recently formed tribal enterprise “would impair the Tribe’s ability to continue to make contributions to Federal elections.”<sup>126</sup> The tribal enterprise that was the subject of this letter was not the print and poster company from the 1993 opinion. This time, the enterprise was IKBI, Inc. (“IKBI”), a construction company which planned to “engage in construction projects for the United States and its agencies.”<sup>127</sup> For its construction projects, IKBI would have to obtain a performance bond for which the Tribe, as the sole stockholder in IKBI, would be obligated to act as the co-indemnitor.<sup>128</sup>

Prior to issuing this opinion, the Commission considered two Draft Opinions, one of which reached the opposite conclusion of the opinion ultimately adopted. While Draft Opinion B (“the adopted Draft”) came to the same conclusion as the Final Opinion, Draft Opinion A (“the recommended Draft”), which was recommended for adoption by the Commission’s counsel, found the Tribe and IKBI were *not* separate entities and that IKBI conferred federal contractor status on the tribe.<sup>129</sup>

Consistent with its analysis in the 1993 opinion and the 1999 opinion, the Commission began both Draft Opinions by re-asserting the Tribe’s status as a “person” under the Act.<sup>130</sup> Both Draft Opinions then found that there was in fact a contract between TOUA and the federal government consistent with the definition of “contract” under 2 U.S.C. Section 441c.<sup>131</sup> Just as the 1993 opinion found that First American Printing & Direct Mail was a federal contractor, so too the Commission concluded that TOUA was a federal contractor subject to limits on campaign contributions pursuant to the Act.<sup>132</sup> The Commission then continued its analysis and considered whether the Nation and TOUA could be “treated as separate entities thereby permitting a distinction between the political contributions of the Nation

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<sup>125</sup> Letter from C. Bryant Rogers, of Roth VanAmberg, Rogers, Ortiz, and Yepa, LLP, on behalf of the Mississippi Band of Choctaw Indians, to Lawrence Norton, General Counsel, F.E.C. (Jan. 6, 2005) (on file with the F.E.C. Office of Public Records and with author).

<sup>126</sup> 01 Op. F.E.C. 1 (2005); Rogers, *supra* note 125, at 4.

<sup>127</sup> Rogers, *supra* note 125, at 3.

<sup>128</sup> Rogers, *supra* note 125, at 3.

<sup>129</sup> 01 Op. F.E.C. 1 (2005) (Draft Op. B) (on file with the F.E.C. Office of Public Records and with author); 01 Op. F.E.C. 1 (2005) (Draft Op. B) (on file with the F.E.C. Office of Public Records and with author).

<sup>130</sup> 01 Op. F.E.C. 4 (2005) (Draft Op. B); 01 Op. F.E.C. 4 (2005) (Draft Op. A).

<sup>131</sup> 01 Op. F.E.C. 2 (2005) (Draft Op. B); 01 Op. F.E.C. 2 (2005) (Draft Op. A) (citing 11 CFR 115.2(a)).

<sup>132</sup> 01 Op. F.E.C. 3 (2005) (Draft Op. A).

and the possible Federal contractor status of TOUA.”<sup>133</sup> The Draft Opinions came to two different conclusions on this issue.

The staff recommended Draft considered the same similarities between IKBI and TOUA that were ultimately relied upon in the final adopted opinion (such as separate bank accounts, counsel, tax ID number, etc.). However, the recommended Draft put less emphasis on these similarities by noting that “nothing in [the 1999] advisory opinion indicated that these were the only relevant factors.”<sup>134</sup> Discussing other factors, Commission counsel noted that the Tribe “created IKBI, provided IKBI’s entire initial and supplemental capitalization, elects all members of IKBI’s board of directors through another entity, shares sovereign immunity with IKBI, and will indemnify the performance of IKBI on bonds it must obtain to *demonstrate that IKBI is not a separate and distinct entity from the Tribe.*”<sup>135</sup> Ultimately the recommended Draft found that “many more substantial factors” than the “separate corporate structure” “support the conclusion that the tribe and IKBI are *inextricably linked.*”<sup>136</sup>

Five days after the Draft Opinions were produced, Choctaw lawyers sent a five page letter urging the Commission to adopt Draft B over the staff recommended Draft.<sup>137</sup> The letter argued there were “strong policy reasons” for finding that IKBI does not make the tribe a federal contractor.<sup>138</sup> Counsel cited both congressional support and presidential support for “measures that would enable tribes to improve through their own economic development efforts.”<sup>139</sup> Counsel argued the “underlying principal behind this well-established Indian policy is that the problems faced in Indian country can be best addressed by authorizing and facilitating business efforts that promote long term self sufficiency” and that the creation of IKBI is consistent with that policy.<sup>140</sup>

The letter also argued that the recommended Draft would create a “Hobson’s choice” where the Tribe would have to “[e]ither give up a significant component of [its] right to participate in the political process (that is, [its] right to make contributions to federal candidates, political parties, and committees), or give up [its] right to charter and support

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 5 n.3.

<sup>135</sup> *Id.* at 1 (emphasis added).

<sup>136</sup> *Id.* at 6 (emphasis added) One of these factors was the indemnification agreement between IKBI and the Tribe. The financial relationship between the Tribe and the company raised an issue not considered in either the 1993 or 1999 Opinions: “whether an Indian tribe’s assumption of financial liability for the Federal contracts of its subordinate tribal entities defeats a distinct and separate identity for purposes of the prohibitions of section 441c.” The recommended Draft concluded that the indemnification agreement is of “particular significance” because “the Tribe is involved in the contractual obligations that lie at the heart of the Federal contractor prohibitions.” 01 Op. F.E.C. 7 (2005) (Draft Op. A). The adopted Opinion, on the other hand, did not separately consider the implications of the indemnification agreement. Instead, it merely concludes that the “facts in this request are substantially similar to the facts considered in” the TOUA advisory opinion. 01 Op. F.E.C. 5 (2005) (Draft Op. B).

<sup>137</sup> Letter from C. Bryant Rogers, of Roth VanAmberg, Rogers, Ortiz, and Yepa, LLP, on behalf of the Mississippi Band of Choctaw Indians, to Rosemary C. Smith, Associate General Counsel, Federal Election Commission (Mar. 8, 2005) (on file with the F.E.C. Office of Public Records and with author).

<sup>138</sup> *Id.* at 3.

<sup>139</sup> *Id.*; see also Rogers, *supra* note 125, at 9.

<sup>140</sup> Rogers, *supra* note 137.

separate corporations to facilitate economic progress through federal programs.”<sup>141</sup> Counsel for the Choctaw concluded that the two Draft Opinions demonstrated there is a “close question which ultimately involves ambiguity in the federal law underlying this matter.”<sup>142</sup> Rather than suggesting Commission rule-making or recommendation to Congress, as was offered by Gila River’s counsel in opposition to the Oneida Draft Opinion, counsel here noted that the “Supreme Court has repeatedly articulated a principle for resolving issues in such circumstances: statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. This principle clearly supports a determination that would preserve, not restrict or eliminate, opportunities for tribal economic development.”<sup>143</sup>

In a 4-2 decision, the Commission rejected the staff recommended Draft Opinion and adopted Draft B without any changes to its content. There was no suggestion that it was a close case resolved consistent with the Indian canon of construction, as suggested by the Choctaw attorney’s letter. There was also no discussion of the policy reasons behind the Commission’s decision. Rather, in adopting Draft B, it found that IKBI did not confer federal contractor status on the tribe consistent with the principles set forth in the 1999 TOUA Opinion. “[C]ircumstances indicate that IKBI is a separate and distinct entity from the Tribe” and therefore the Choctaw are not prohibited from making federal political contributions.<sup>144</sup> The “circumstances” cited by the Commission in the 1999 opinion included the fact that TOUA had its “own bank account, employees, personnel policies, employee benefits and legal counsel.”<sup>145</sup> The Commission, in finding that IKBI was a separate entity from the tribe, found that like TOUA, IKBI had separate “legal counsel, bank account, tax identification number and separate employees, personnel and benefit policies from the Tribe” and was separately incorporated, had a separate leasing and ownership of property, and members of the tribal council could not serve on the corporation’s board.<sup>146</sup>

Though this Opinion used the same “separate entity” analysis as the previous TOUA Opinion, by failing to address the purpose of the tribal enterprise, the IKBI Opinion opened the doors to tribal enterprises pursuing any and all federal government contracts regardless of whether the enterprise directly benefits the tribe or remains within the limits of tribal lands. As the following Part will discuss, this decision coupled with the Opinions that allow tribes to contribute without disclosing their contributions have compromised the integrity of the federal contractor prohibition and the effectiveness of FECA’s disclosure requirements.

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<sup>141</sup> Rogers, *supra* note 137.

<sup>142</sup> Rogers, *supra* note 137, at 5.

<sup>143</sup> Rogers, *supra* note 137, at 5 (citing *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 174, 174 (1973), *Choate v. Trapp*, 224 U.S. 665, 675 (1912), *Mont. V. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

<sup>144</sup> 01 Op. F.E.C. 3 (2005).

<sup>145</sup> 32 Op. F.E.C. 4 (1978).

<sup>146</sup> 01 Op. F.E.C. 3 (2005).

## 2. *Anti-Corruption Interests of the Government Contractor Prohibition*

The prohibition on contributions from government contractors to candidates was first adopted in the 1974 Amendments to FECA.<sup>147</sup> There is no legislative history that specifically addresses the government contractor prohibition and *Buckley* did not specifically address the prohibition when it upheld contribution limits.<sup>148</sup> This may be because the prohibition on government contractor contributions is a logical extension of the Act's prohibition on corporate contributions.<sup>149</sup> In 1982, the government argued that one of the purposes of limitations on corporate contributions was to ensure that corporations do not use their wealth to create "war chests which could be used to incur political debts from legislators who are aided by the contributions."<sup>150</sup> In 1978, the Court upheld the ban on direct corporate contributions to political campaigns in order to "preven[t] corruption or the appearance of corruption" and has continued to uphold for that purpose.<sup>151</sup> Although only one federal court has addressed the federal contractor prohibition, in upholding the prohibition it found that "(1) there is a greater likelihood that the public will perceive corrupt relationships between elected officials and corporations when those corporations have previously received Government contracts."<sup>152</sup>

### a. *Directly Undermining the Integrity of the Prohibition*

By allowing tribes to continue to contribute to federal lawmakers while also pursuing government contracts, the Commission's "separate entity" analysis (that assesses whether or not the tribe itself was truly separate from the tribal enterprise with the government contract) is so liberal it is virtually meaningless. As a result, it directly undermines the anti-corruption interests of the prohibition. As applied to the Choctaw Tribe and its tribal enterprise, IKBI, the Commission found that the two were separate entities even though Choctaw had financially underwritten the company<sup>153</sup> and IKBI was organized for the purpose of creating federal contracts.<sup>154</sup> In

<sup>147</sup> Federal Election Campaign Act of 1971, § 321, amended by 2 U.S.C. § 441b; 18 U.S.C. § 610 (repealed 1976).

<sup>148</sup> *Buckley*, supra note 38, at 22.

<sup>149</sup> The only federal case that has specifically addressed the government contractor prohibition found that the justifications that underlie the corporate contribution prohibition also address the government contractor prohibition. See *F.E.C. v. Weinstein*, 426 F.Supp. 243, 249 (D.C.N.Y. 1978) ("Defendants next assert that § 441c, which prohibits certain political contributions by government contractors, abridges their First Amendment rights. The considerations set forth above with respect to § 441b are controlling on this issue. Therefore, the court holds that § 441c does not violate the free speech guarantees of the First Amendment.")

<sup>150</sup> *F.E.C. v. Nat'l. Right to Work Comm.*, 459 U.S. 197, 207 (1982).

<sup>151</sup> See *F.E.C. v. Beaumont*, 539 U.S. 146, 154 (2003) (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.28 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted."))

<sup>152</sup> *Weinsten*, supra note 149.

<sup>153</sup> In explaining the indemnification agreement, the Opinion notes that the agreement "obligates the Tribe . . . to act as co-indemnitor (along with IKBI) for any losses and liabilities on the bonds. As a startup company, IKBI has neither sufficient in-house financial resources nor a sufficient construction track record to enable it to obtain the requisite bond on its own." 01 Op. F.E.C. 3 (2005).

<sup>154</sup> *Id.*

addition, by merely listing IKBI's "anonymous attributes" without assessing why they are sufficient to confer a separate status on the tribal enterprise relative to the tribe, the Commission failed to provide a useful standard for assessing which attributes distinguish the separate tribal enterprise from the fully dependent tribal enterprise. In the future, even where there is significant financial interdependence between the tribe and the tribal enterprise and governance of the tribe overlaps the governance of the tribal enterprise, as long as the tribal enterprise has separate counsel, bank account, tax number, employees and policies, it will not confer federal contractor status on the tribe. This liberal treatment of tribes and their tribal enterprises will create numerous opportunities for actual political corruption or the appearance of political corruption to arise whenever a tribe is granted a government contract.

The dissent to the Commission's 4-2 decision suggested that a separate entity analysis did not sufficiently address the underlying concerns of the statute. Comparing the TOUA Opinion to this one, the dissent noted that the federal entities that received utility services were "incidental to the tribe's purpose in establishing an electric utility... there was no threat that the tribe's federal- contractor status would represent an incentive for the tribe to make, or politicians to seek political contributions."<sup>155</sup> IKBI, on the other hand, was created with the purpose of seeking contracts with federal agencies.<sup>156</sup> In light of the recent controversies over "tribal contributions and the political role tribes play," the dissent argued that "the Commission has compelling reason to tread carefully when construing statutes designed to limit inappropriate political activity as applied to Indian tribes, particularly those that enter into government contracts with the federal government."<sup>157</sup> Specifically, the commission cited the unfolding Abramoff scandal,<sup>158</sup> and a Washington Post article that suggested tribal contributions were aimed at influencing the outcomes of an Appropriations bill.<sup>159</sup> The dissent also noted that "the federal contractor prohibition serves as much to insulate contractors from inappropriate requests for contributions as to limit offers by contractors to politicians."<sup>160</sup>

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<sup>155</sup> 01 Op. F.E.C. 4-5 (2005).

<sup>156</sup> See Rogers, *supra* note 137 at 3 ("IKBI, Inc. is a construction company and most of its planned work is to engage in construction projects with the United States or its agencies. IKBI intends to seek both sole source and competitive bid contracts with various federal agencies, including General Services Administration and the Federal Aviation Administration. These contracts will be funded with federally appropriated funds.")

<sup>157</sup> 01 Op. F.E.C. 4-5 (2005).

<sup>158</sup> *Id.* at 5 ("[I]t is appropriate to note that political activity of many tribes has been the subject of controversy . . . The Commission should not ignore this background by referring generally to policy or historical reasons for liberal construction of statutes applied to tribes." (Dissent of Vice-Chairman Michael Toner and Commissioner David M. Mason)); see also Susan Schmidt, *Probe is Sought on Potential Corruption*, WASH. POST, Feb. 25, 2004 at A23 ("A member of Congress has asked the FBI and the Justice Department to investigate two instances of what he characterized as potential corruption involving Indian tribes and casino gambling. In letters . . . Rep. Frank R. Wolf (R-Va.) cited an article . . . that detailed how a Washington lobbyist and a public relations executive with ties to House Majority Leader Tom DeLay (R-Tex.) have charged a handful of tribes more than \$45 million in the past three years to influence public policy.")

<sup>159</sup> Susan Schmidt, *Tribal Grant is Being Questioned*, WASH. POST, Mar. 1, 2005, at A3.

<sup>160</sup> 01 Op. F.E.C. 7 n.2 (2005).

Such warnings coming almost a full year before Abramoff was indicted might be considered prescient. In 2006, Abramoff pled guilty to federal charges that he and his partners directed tribal campaign contributions to certain lawmakers, and in exchange members of Congress agreed to support and pass legislation, place statements in the congressional record, and attempt to influence the Department of the Interior.<sup>161</sup> At this time no indictments have been forthcoming against lawmakers or their staff, however it appears from court documents and press reports that agency staff and elected officials may have in fact demanded certain monetary contributions in exchange for political acts.<sup>162</sup> Whether indictments are brought forward or not, the allegations create the impression of corruption—one of the government interests contribution prohibitions and limits were intended to address.

b. *Threatening the Integrity of Tribal Enterprises*

The Court has also upheld corporate contribution prohibitions on the basis that corporate contributions may be used to circumvent individual contribution limits.<sup>163</sup> In 2003, the Court found that as long as individuals can contribute through a corporation, those “who created it, who own it, or whom it employs,”<sup>164</sup> could use such contributions to “exceed the bounds imposed on their own contributions by diverting money through the corporation.”<sup>165</sup> The Court affirmed that the justification for limiting such contributions is political corruption, “not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.”<sup>166</sup>

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<sup>161</sup> Attachment A, *supra* note 24, at 9 (“Abramoff . . . engaged in a course of conduct through which [they] offered and provided a stream of things of value to public officials in exchange for a series of official acts and influence and agreement to provide official action and influence.” These “things of value” included trips to the Commonwealth of the Northern Marianas Islands, a trip to the Super Bowl, a lavish golf trip to Scotland, meals and drinks at restaurants and “[c]ampaign contributions to campaign committees and to political action committees and organizations, including, but not limited to, the following: i. \$4,000 in contributions to Representative #1’s campaign committee in 2000; and ii. a \$10,000 contribution to the National Republican Campaign Committee in 2000 at Representative #1’s request.”).

<sup>162</sup> Susan Schmidt, *Paper Show Tribe Paid to Try to Sway Bill*, WASH. POST, Nov. 18, 2004 at A01 (“The [Tiguas] tribe also was asked to pay \$50,000 for Ney and several others to accompany Abramoff on a golfing trip to St. Andrews, Scotland. According to testimony yesterday, however, two other tribes ultimately paid \$50,000 each for that trip.”); Jonathan Weisman, *Abramoff Probe Turns Focus on DeLay Aide*, WASH. POST, Jan. 8, 2006, at A1.

<sup>163</sup> See *Beaumont*, *supra* note 151, at 155 (“Quite aside from war-chest corruption and the interests of contributors and owners, however, another reason for regulating corporate electoral involvement has emerged with restrictions on individual contributions, and recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for ‘circumvention of [valid] contribution limits.’” (Citing *F.E.C. v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456, and n.18 (2001)).

<sup>164</sup> See *Beaumont*, *supra* note 151, at 155 (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)).

<sup>165</sup> See *Beaumont*, *supra* note 151, at 155.

<sup>166</sup> See *Beaumont*, *supra* note 151, at 155–56 (citing *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 440–41).

Just as corporate contributions could be used to circumvent the individual contributor limits, the Commission's Opinion creates a means by which non-tribal enterprises can circumvent the government contractor prohibition by coordinating with tribal enterprises to reap the benefits of their political influence. Non-tribal companies have an incentive to coordinate with tribes that pre-exist the Commission's Opinion. Tribal corporations may register as minority enterprises to receive preferential status when bidding for government contracts.<sup>167</sup> The Choctaw tribe, in fact, specifically promotes its status as an 8(a) participant to entice non-tribal businesses to coordinate efforts with the Tribe. Just three months after the Commission's decision, IKBI was certified by the Small Business Administration to participate in the 8(a) program.<sup>168</sup> Roll Call noted in February 2005 that the Choctaws had "already paired up with AAI Corp. of Hunt Valley, Md. to win a contract with the U.S. Army worth as much as \$29 million to provide ground support equipment for Army helicopters."<sup>169</sup> Though it is not clear that AAI and IKBI will coordinate efforts,<sup>170</sup> AAI is already certified as a federal government contractor.<sup>171</sup> If AAI were to pair up with IKBI, or another tribal enterprise managed by the Choctaws,<sup>172</sup> it would reap the benefits of both 8(a) status and the tribe's significant political participation, thereby circumventing the intent of the contribution prohibition.

To preserve the effectiveness and original purpose of the federal contractor prohibition on contributions, Congress will have to legislate its own separate entity analysis or statutorily clarify what types of tribal enterprises do and do not confer government contractor status on tribes.

## V. REMEDIES

The final Part of this Note is entitled "Remedies," but may be unsatisfying to some because it does not offer a tangible remedy to the problems discussed above. Rather, through the example of the FECs decision-making process for its 2000 Opinion that solidified the status of tribes as "persons," this section merely show that the current process for regulating tribal contributions is unsustainable.

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<sup>167</sup> Registration is through the federal minority set-aside program for small business administered through the United States Small Business Administration. See *Frequently Asked Questions*, 8(a) Business Development, SMALL BUSINESS ASSOCIATION, available at <http://sba.gov/8abd/indexfaqs.html>.

<sup>168</sup> *Newly Certified 8(a)s*, Set-Aside Alert, Vol. 13, Issue 13, (June 24, 2005).

<sup>169</sup> Amy Keller & John Bresnahan, *Choctaws Query FEC on Giving*, ROLL CALL, Feb. 7, 2005.

<sup>170</sup> The Opinion request only specified that IKBI was a construction company which planned to "engage in construction projects for the United States and its agencies." See Rogers, *supra* note 125, at 3.

<sup>171</sup> See 32 C.F.R. § 40a.1 (2006) (listing Department of Defense contractors receiving awards of \$10 million or more and including AAI Corp.).

<sup>172</sup> See *Overview of Tribal Business*, CHOCTAW VISION (2005), available at [http://www.choctaw.org/economic/tribal\\_business\\_overview.htm](http://www.choctaw.org/economic/tribal_business_overview.htm) (illustrating that the Choctaw tribes have numerous tribal enterprises, including a multi-million dollar publicly traded resort and casino, a multi-million dollar greeting card company, a multi-million dollar printing company, a multi-million dollar automotive speaker company that coordinates with Ford Motor Company, a multi-million dollar automotive firing company that coordinates with Ford Motor Company, General Motors, Caterpillar, and numerous other business).

## A. ONEIDA 2000 DRAFT OPINION

In 2000, when the Commission considered whether or not to continue treating tribes as “persons,” it issued a Draft Opinion that considered the source of tribal contributions. Like the final opinion, the Commission’s 2000 Draft Opinion concluded that the \$25,000 annual contribution limit did not apply to Oneida because the Act and its regulations only limit “individual” contributions to \$25,000 per calendar year.<sup>173</sup> However, the Draft Opinion hypothesized that the contributions would come from the “revenues and profits derived from the Nation’s various business ventures.”<sup>174</sup> The Draft Opinion then noted that if these businesses were corporations, the tribes would be prohibited from contributing revenues derived from them.<sup>175</sup> To contribute, the Commission noted, the tribe could either (1) “establish a separate account to which only funds subject to the prohibitions and limits of the Act shall be deposited and from which its contributions shall be made,” or (2) “demonstrate through ‘a reasonable accounting method’ that, whenever the organization makes a contribution, it has received ‘sufficient funds subject to the limitations and prohibitions of the Act’ to make the contribution.”<sup>176</sup>

The Draft Opinion also noted that its finding with respect to corporate contributions made through the tribe’s general funds were consistent with the Commission’s 1978 Opinion regarding the community.<sup>177</sup> The 1978 Opinion stated that “[t]he community may make a contribution *only if* its general funds do not include monies from entities or persons that could not make contributions directly under the Act.”<sup>178</sup> Since corporate contributions were prohibited by the Act, contributions from the tribes’ general funds would have to segregate revenues collected from tribal corporate enterprises.<sup>179</sup>

In practice, this Draft Opinion would have meant that tribes would have to contribute through PACs. However, just as tribes are resistant to aggregate caps on their contributions, they are also resistant to contributing through PACs. One tribal leader has suggested that the “practical impact” of requiring tribes to form PACs would “severely limit[] the ability of tribes to support the candidates of their choice in a federal election.”<sup>180</sup> This concern may be well founded. Because the PAC could not use *any* tribal funds, contributions to the PAC could only come from individual members

<sup>173</sup> 05 Op. F.E.C 2 (2000) (Draft Op.) (on file with the F.E.C. Office of Public Records and with author) (citing 2 U.S.C. § 441a(a)(3)(2000); 11 C.F.R. § 110.5(b) (2000)).

<sup>174</sup> *Id.* at 2.

<sup>175</sup> *Id.* at 2–3 (citing 2 U.S.C. § 441b(a)).

<sup>176</sup> *Id.* at 3 (citing 11 CFR 102.5(b)(1)(i) and (b)(1)(ii)).

<sup>177</sup> *See id.* at 3 n.5 (citing 51 Op. F.E.C. 1 (1978)) (“Alluding to the broad prohibition on direct or indirect corporate contributions, the Commission concluded in Advisory Opinion 1978-51 that, while the Act permitted a tribal entity to make limited contributions to a Federal candidate, such contributions could only be made ‘if its general funds do not include monies from entities or persons that could not make contributions directly under the Act.’”).

<sup>178</sup> 51 Op. F.E.C. 1 (1978) (emphasis added).

<sup>179</sup> *See* 2 U.S.C. § 441(b) (2006) (prohibiting certain types of “persons” including corporations, labor unions, and national banks from contributing).

<sup>180</sup> Allen, *supra* note 5.

of the tribe. Accommodations would likely have to be made for the fact that tribal governments maintain significant control over tribal revenue. In many tribes, individual tribal members could not be the sole source of contributions to the PAC without significantly reducing the amount the tribe could contribute. Also, the fact that most tribal members receive income through revenue generated by the tribe would have to be addressed. When tribal members did contribute to the tribe's PAC, there would have to be a statutory recognition that such contributions were not attempts to launder tribal money.<sup>181</sup> Otherwise, where members of gaming tribes have enough personal wealth to contribute to the tribe's PAC, they might be prohibited from doing so because their income came from the tribal enterprise. Should those individuals write checks to the tribe's PAC, they would be effectively laundering tribal funds through their own accounts into the PAC. This would be a violation of numerous provisions of the BCRA that attempt to address potential opportunities to launder political contributions through other sources in order to avoid contribution limits.

Likely anticipating that such an opinion would open the doors to requiring tribes to contribute through PACs, lawyers representing the Gila River Indian Community immediately responded to the Draft Opinion, opposing any discussion of the origins of Oneida's contributions. They argued that the Commission should refrain from addressing any questions of law not specifically presented by the Opinion request: "If the Commission believes it is prudent to address these complex legal issues, it should do so by utilizing one of the two methods appropriate for promulgating rules of general applicability – either through annual legislative recommendations to Congress or a rulemaking subject to the provisions of the Administrative Procedure Act....These methods would provide notice and elicit comments from interested parties and the public in a manner that does not fully occur in the truncated advisory opinion process."<sup>182</sup> The Commission undertook no such efforts. Rather, it issued a truncated opinion that did not raise the concerns of the Draft Opinion.<sup>183</sup>

#### B. AD HOC DECISION-MAKING MUST BE REPLACED WITH DELIBERATE POLICY-MAKING

Such behavior on the Commission's part is consistent with the manner in which tribal campaign contributions have been treated again and again. Tribal campaign contributions are ignored; when they are addressed, the Commission's decisions are merely ad hoc.<sup>184</sup> Moreover, proponents of

<sup>181</sup> Letter from Steven R. Ross & Janis M. Crum, counsel for Gila River Indian Community, Akin Gump, Strauss, Hauer, & Feld, LLP, to N. Bradley Litchfield, Associate General Counsel, Federal Election Commission (Apr. 26, 2000) (on file with the F.E.C. Office of Public Records and with author).

<sup>182</sup> *Id.*

<sup>183</sup> 05 Op. F.E.C. (2000).

<sup>184</sup> The FEC is widely criticized for undermining the effectiveness of campaign finance reform in general. Where they are the sole determiners of federal election policy with respect to tribal contributions, effective enforcement of campaign finance laws is particularly in peril. See Donald J. Simon, *Current Regulation and Future Challenges for Campaign Financing in the United States*, 4 ELECTION L.J. 474, 485-6 (2004) (suggesting in a section entitled "FEC reform" that the FEC's failures

tribal political participation view reform efforts as unfair attacks on tribes that distract attention from more important tribal issues.<sup>185</sup> Some fear that reform will “close the doors of Congress to gambling and non-gambling tribes that want their issues heard.”<sup>186</sup> Considering the history of United States tribal relations and, as discussed in Part II, the economic dependence of tribes on Congress, this is not an unreasonable concern.

Despite political resistance from lawmakers and tribes, campaign contribution reform that recognizes the unique interests of tribal members and the unique position of tribes in the American political system is absolutely necessary. Such an effort may conclude that dual-sided disclosure is the best means of protecting the integrity of tribal governance and the political system. Alternatively, it may conclude that contribution limits need to be placed on tribes. Whatever the outcome, congressional policy-making, rather than regulatory decision-making, is the only forum available through which all sides will be heard, all outcomes will be considered, and parties will be fairly treated.

Ultimately, there is no simple remedy to the problem of the unique status of tribal contributions. As is often true with public policy-making, this process will create winners and losers. However, if regulation of tribal contributions continues to be determined on an ad-hoc basis through FEC Advisory Opinions, honest and accountable regulation of the federal campaign finance system and tribal governance will be compromised. With assistance from tribes, Congress must make its own difficult choices about the future of tribal political contributions.

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are related, in part to the structure of the agency with three Democratic and three Republican members and the manner in which Commissioners are chosen by congressional leadership); *Overhauling the FEC*, Editorial, THE WASH. POST, July 11, 2003, at A20 (“The Federal Election Commission is an agency that was designed to fail, and at that task, at least, it has succeeded brilliantly...The most recent and egregious example involves the toothless regulations the FEC issued to implement – or, more accurately, undermine – the new campaign finance law.”).

<sup>185</sup> Allen, *supra* note 5 at 7 (“None of the campaign finance related proposals that have been discussed recently in the media would have prevented the crime committed by Mr. Abramoff against his tribal clients. This is a distraction that prevents constructive reform in areas where it is needed and that is preventing us from talking about the real issues facing Indian Country.”); see also Meyers, *supra* note 80 (“Putting new limits on the amount of money that tribes can contribute . . . would be punishing tribes for crimes committed by the lobbyists who manipulated them on the first place.”) (citing the concerns of U.S. Rep. Tom Cole)); Drinkard, *supra* note 17 (““What troubles me is, all of the sudden they arrive with political muscle, and everybody is questioning why they have a particular status under the law[.]”” (quoting Stan Brand, attorney representing the Nat’l. Indian Gaming Assoc.)).

<sup>186</sup> Peter Hecht, *Tribal Leaders Fear Abramoff Scandal Fallout*, THE SACRAMENTO BEE, Jan. 12, 2006 at A1 (noting the concerns of Anthony Miranda, chairman of the California Nations Indian Gaming Association and member of the Pechanga Band of Luiseno Indians).