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NOMINATION OF MATTHEW G. OLSEN TO BE DIRECTOR, NATIONAL COUNTERTERRORISM CENTER

HEARING

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

TUESDAY, JULY 26, 2011

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TUESDAY, JULY 26, 2011

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in Room SD–562, Dirksen Senate Office Building, the Honorable Dianne Feinstein (Chairman of the Committee) presiding.

Committee Members Present: Senators Feinstein, Wyden, Mikulski, Conrad, Udall of Colorado, Warner, Chambliss, Snowe, and Coats.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, CHAIRMAN, A U.S. SENATOR FROM CALIFORNIA

Chairman FEINSTEIN. The hearing will come to order.

The process will be as follows: I will make some remarks. The Vice Chairman will make some remarks. We will then call on the distinguished Senator from North Dakota for remarks. And then we will proceed. I trust that is agreeable with everybody.

The Committee meets today to consider the President's nomination of Matt Olsen to be the Director of the National Counterterrorism Center.

Mr. Olsen is currently the general counsel of the National Security Agency, and he's held a number of senior positions in the Department of Justice, including the National Security Division and the Federal Bureau of Investigation.

Mr. Olsen has appeared as a witness before this Committee previously, and he has frequently briefed members and staff over the last several years. I'd like to welcome him back to this Committee.

I'd like to begin today by discussing the current terrorist threat and the role of what we call NCTC, which Mr. Olsen will be leading, if confirmed.

The NCTC is the central agency within the United States government dealing with the identification, prevention, disruption and analysis of terrorist threats. It's very important. While it's best known for its role in consolidating and analyzing terrorism-related intelligence, it also plays an important role in conducting strategic planning for counterterrorism actions across our government.

The NCTC grew significantly in size, capability and maturity under the previous Director, Michael Leiter. Its successes and

those of the broader counterterrorism community include numerous terrorist plots that were thwarted, both here at home and abroad.

NCTC has also achieved less noticed but equally important advances in the sharing of threat information across the intelligence community—a streamlining, if you will, of intelligence, an improved watch-listing capability, and greatly improved analytic capability.

Despite improvements and reforms, especially in response to the findings and recommendations of this Committee and others after the Christmas Day attempted attack by Umar Farouk Abdulmutallab, I'm still very concerned about the possibility of terrorist attacks against the United States. I believe this is a very critical time.

The period leading up to the 10th anniversary of 9/11 is a period of heightened threat. Despite counterterrorism pressure against al-Qa'ida in Pakistan, including the successful strike against Usama bin Ladin in Abbottabad, the group remains dangerous and vengeful.

At the same time, the threat from al-Qa'ida's affiliates and adherents around the world has increased and presents particular challenges. I'm especially concerned about the threat to the United States homeland from al-Qa'ida in the Arabian Peninsula—AQAP, we call it—as well as threats emanating from terrorist safe havens in Somalia and elsewhere.

This means, at least to me, that this is a crucial time for our counterterrorism establishment to be at full strength and not to be leaderless. NCTC is a linchpin of this establishment. So I'm very pleased that the President has moved quickly to nominate Mr. Olsen, an individual serving in a senior intelligence community position today, to take the helm of this organization.

Let me take just a moment to read the first paragraph from a letter of support for Mr. Olsen's nomination, written by General Keith Alexander, the Director of the National Security Agency.

"I am writing to wholeheartedly endorse the nomination of Matthew G. Olsen to be the next Director of the NCTC. Matt has served as the National Security Agency's general counsel for the past year and has shown true leadership, outstanding judgment and decisionmaking ability. He's been a key part of the agency's efforts to provide intelligence that allows our government to counter terrorist threats. In my opinion, Matt is superbly qualified to hold this critical intelligence community position."

Before his current position at NSA, Mr. Olsen served in the Department of Justice for 18 years, including 12 years as a federal prosecutor. In a letter of support for Mr. Olsen's nomination, former Attorney General Michael Mukasey wrote of Mr. Olsen, "He was not only an excellent lawyer and manager, but also an exemplary person in dealing with his colleagues. Matt has, in abundance, every personal and professional quality and skill you could hope to find in a nominee to head the NCTC. His nomination has my unqualified support."

And finally, there is a letter from Mike McConnell in which he also offers his strongest possible support. "As a 44-year veteran serving the nation as a member of the intelligence community, I had many opportunities to work with professionals of the Depart-

ment of Justice. This was particularly true when serving as the Director of the National Security Agency and as the Director of National Intelligence. During those years of service, I never met or served with a more accomplished or dedicated professional than Matt Olsen. He understands the IC, its processes and procedures, and has served with distinction."

Well, I can go on and on, and I have many more pages here. I'm not going to do it. Suffice it to say that I believe that we have an extraordinarily qualified professional which can step into the leadership of NCTC and, at this very potentially vulnerable period, provide it with the leadership it really does deserve and merit.

So, with that, Mr. Vice Chairman, may I ask you to make your remarks? Thank you.

OPENING STATEMENT OF HON. SAXBY CHAMBLISS, VICE CHAIRMAN, A U.S. SENATOR FROM GEORGIA

Vice Chairman CHAMBLISS. Thank you very much, Madam Chair.

Mr. Olsen, congratulations on being nominated to be the Director of the National Counterterrorism Center. Thank you for your service to this country, especially in some very demanding roles over the last several years, and we also welcome your family and thank them for their great support to you and thus to our country. So we appreciate that very much.

I also want to just say a special word of thanks to Mike Leiter, who you're going to be succeeding. You and I talked about this the other day. You and Mike are good friends. You know the kind of leadership he's provided in some very difficult circumstances. And while we've still had some growing pains at NCTC, Mike has brought us through some very tough times and I think has kind of righted the ship at times when it headed in a wrong direction. And I'm very appreciative of Mike's service and of his leadership.

Mr. Olsen, your nomination comes at a critical point in our history in our fight against terrorism. While we've made considerable progress against al-Qa'ida in the FATA, we face growing threats as al-Qa'ida continues to spread.

In my view, AQAP in Yemen poses the biggest threat to our safety and I urge you to make dismantling that group your primary focus before they strike us successfully here at home.

This past spring brought immense changes to the Middle East, but it remains unclear what effect this may have on our long-term counterterrorism efforts. This uncertainty is further complicated by our own current fiscal condition, where resource constraints will undoubtedly impact our national defense and counterterrorism enterprise.

Amid these new threats it is critical to our national security that the NCTC fully perform its mission. You and I have talked about some of the failings leading up to the Christmas Day bombing attempt, especially NCTC's inability to connect the dots. While there has been much progress, a lot of work remains, including on information-sharing and detainee and data retention.

Whether it is an attack or an imminent threat like 12–25 or Times Square, you will often be the first point of contact with this Committee. We will expect your unvarnished analytic judgments, the facts and frank assessments. In the past, efforts to control the

message for political purposes have resulted in Congress being given little or inaccurate information. That's not pointing a finger at this administration; it's happened in other administrations. As the NCTC Director, you will be expected to be forthright with this Committee and to push back on any effort to keep information from us.

Along these same lines, I have shared with you some of my concerns about the recommendations made by the Guantanamo Review Task Force, which you directed. It disturbs me that under your leadership detainees were transferred or recommended for transfer to Yemen throughout 2009, even as the intelligence community warned the administration about the security situation there.

We already knew that former Gitmo detainees were in AQAP leadership in Yemen, but it was only after AQAP's failed Christmas Day attack that the transfers stopped. In my mind this was an unacceptable risk for us to take. You mentioned in my office the pressure on the task force, in part because you were guided by the executive order on closing Gitmo. I suspect that the one-year deadline for closing Gitmo affected task force analysis and decisions.

When the only original two options for each detainee were prosecution or transfer, it seems like there would have been significant pressure to lean towards transfer. I wonder if this explains why, after the initial task force review found 92 detainees suitable for transfer, a second review came up with 40 more transferable detainees and another 30 for conditional detention, which at the time was essentially delayed transfer.

Congressman Frank Wolf of Virginia has expressed similar concerns about transfer decisions in a letter to the Committee, and some of the interactions that he had with you regarding the potential transfer of Uighurs into the United States. I am concerned that a member of Congress thinks he has been misled so I think it would be helpful if you explained your interactions with Congressman Wolf, and you and I have talked about this and I want to give you the full opportunity to do that this morning.

But I urge you to be as forthcoming and direct about this, including information provided to or withheld from Congress on this issue. Ironically, in your new position one of your jobs will be tracking former detainees who have re-engaged, including some recommended for transfer by the task force. I urge you to take a fresh look at any intelligence on Gitmo detainees.

Given the threat from AQAP and a recidivism rate now over 26 percent, we are in no position to let any more dangerous detainees go. Unfortunately, the drive to close Gitmo has had the immediate and negative impact of leaving us with few options to detain terrorists outside of Afghanistan. As we draw down in Afghanistan, we will even lose that option.

I'm sure you have seen press stories noting that the United States may be killing terrorists but we are not trying very hard to capture them, mostly because Gitmo has been taken off the table. Yet capturing and interrogating terrorists remains one of the best ways to get actionable intelligence and to prevent future threats.

Again, Mr. Olsen, I congratulate you on your nomination and these issues need to be laid on the table and need to be fleshed out

because the direct point of contact with this Committee is going to be you in so many instances, and we need to certainly have that feeling of trust that we have developed and need to develop stronger over the coming years while you're in this position.

So thank you, Madam Chair.

Chairman FEINSTEIN. Thank you very much, Mr. Vice Chairman. And now I'd like to recognize the distinguished Senator from North Dakota, the Chairman of our Budget Committee on the Democratic side, Kent Conrad. Mr. Chairman, welcome.

STATEMENT OF THE HONORABLE KENT CONRAD, A U.S. SENATOR FROM NORTH DAKOTA

Senator CONRAD. I thank you, Chairman Feinstein. Thank you, Vice Chairman Chambliss. Senator Coats, good to see you, and Senator Wyden. Senator Udall, Senator Warner.

I am delighted to be able to introduce Matt Olsen. His parents are from North Dakota, people I've known a very long time. Matt's roots are deep in North Dakota. He returns there every chance he gets with his family, his wife, Fern, and his children, Ellie, Nate and Will. His sister Susan is with us as well.

As I said, I've known this family for a very long time, and they are the best that it gets. His father was the chief of staff to the man that I defeated for the United States Senate—and so I know how good he really is. Van passed away three years ago, but I know he's looking down with a twinkle in his eye today, proud of Matt and all that he has accomplished.

You know, after defeating Van's boss for the United States Senate, I came here with some trepidation of what my relationship might be like with Van and his wife Myrna. They treated me with the greatest courtesy and over time became very good friends—the highest quality people that our state has to offer, and I believe the highest quality of people in the country. These are Americans through and through.

Matt, your father would be so proud of you at this moment. I know he'd be looking down and saying, the boy's done good. And indeed you have. You've served your country with distinction at the Justice Department, the FBI and the National Security Agency, where you're currently the general counsel. Your public service has spanned three presidential administrations. That's a notable and impressive accomplishment and it speaks volumes about your competency and your professionalism.

Colleagues, Matt has already accomplished so much, and now the President has asked him to assume one of the most important and demanding jobs in the intelligence community, the Director of the National Counterterrorism Center. We all know that the NCTC's mission is vital to combat terrorism at home and abroad by analyzing the threat, sharing the information with our partners and integrating all instruments of national power to ensure unity of effort. There is no doubt in my mind that Matt has the experience and the character to lead the NCTC.

But don't just take my word for it. Admiral Mike McConnell served as Director of National Intelligence in President Bush's administration, and as Director of the NSA in the Clinton administration.

Here's what Admiral McConnell had to say about Matt. "Having known and worked with Mr. Olsen for over four years, I have observed him to be the utmost professional, dedicated to the security of the nation. He understands the intelligence community and the law and processes needed to keep us safe. He has great respect for the law, our values and the activities needed to ensure the safety of the nation. I have every confidence that, if confirmed, Mr. Olsen will serve the nation, the Congress, the administration and the intelligence community at the highest level of service and performance."

Colleagues, Matt is smart. He is honest and he is a true professional and an absolute patriot. I can't put it much better than Admiral McConnell did. I hope very much that this Committee will move quickly on his confirmation and that our colleagues in the Senate will follow suit. It is really my honor to be here with Matt Olsen.

Chairman FEINSTEIN. Thank you very much, Mr. Chairman. Appreciate the remarks. I know you have a busy day. Much is happening, so you feel free to stay or leave, whichever you wish.

Senator CONRAD. I'll join you.

Chairman FEINSTEIN. Thank you. Thank you very much.

Mr. Olsen, we will now turn to you. I was going to introduce your family. Senator Conrad did to some extent, but perhaps you'd go a little further and even ask them to stand up.

STATEMENT OF MATTHEW G. OLSEN, DIRECTOR-DESIGNATE, NATIONAL COUNTERTERRORISM CENTER

Mr. OLSEN. Thank you. Thank you very much, Madam Chairman, and thank you very much, Vice Chairman Chambliss.

I want to thank the entire Committee for taking the time to consider my nomination this morning. I especially want to thank Senator Conrad for that very warm and personal introduction. I really appreciate that.

And I am grateful to the many members of the Committee that have had the opportunity over the last two weeks to meet and have conversations with. I really appreciate the thoughtful consideration that the Committee is giving to my nomination.

At the outset, I want to thank the President for having the confidence to nominate me for this position and the Director of National Intelligence for supporting me. I am tremendously honored and humbled to be considered for this position.

Let me also, if I may, take a moment to express my condolences to the people of Norway in the aftermath of the tragic attacks in Oslo last week. My grandfather emigrated to North Dakota from Norway at the age of 16. I have extended family that was in Oslo. I think that these heartbreaking events serve as a reminder to all of us of the importance of working together as an international community to prevent these sorts of acts of terror.

And I appreciate very much, Madam Chairman, the opportunity to introduce my family. So I sit here today before you because of the support of my family and my friends and my colleagues, many of whom are here today. My wife, Fern, is directly behind me. My children—my daughter Elizabeth, my oldest son Nate, my youngest son, Will—are all here with me.

I especially want to acknowledge my mother, Myrna, who is sitting here on the end; my father, Van, who was warmly remembered in Senator Conrad's remarks. Along with their love and guidance, my parents, my mother and father, have provided my sisters Susan and Jennifer with an example of how to live, I believe, with honor and integrity and devotion to others, and I couldn't be more grateful for them being here today.

Madam Chairman and Vice Chairman Chambliss, members of the Committee, today, as we approach the 10th anniversary of al-Qa'ida's attacks on September 11th, it is appropriate to reflect on that day, the day that our nation suffered the single most devastating attack in our nation's history.

It was in the aftermath of that attack of that day that Congress established the National Counterterrorism Center. NCTC is the primary organization in the federal government for analyzing, integrating and sharing all-source intelligence information pertaining to terrorism and counterterrorism. In my view, no other organization is as singularly focused on preventing acts of terrorism.

A decade after the September 11th attacks, we remain at war with al-Qa'ida and its affiliates. Thanks to the leadership of this Committee and to Congress, and thanks to the work of thousands of dedicated men and women in the intelligence community, including, as well, our men and women in uniform across the globe, al-Qa'ida is weakened.

At the same time, al-Qa'ida and its adherents around the world, as well as other terrorist organizations, continue to pose a very significant threat to our country. Confronting this threat and working with focus and resolve to prevent a terrorist attack is NCTC's mission, first and foremost.

And to fulfill this solemn responsibility, NCTC brings together a wide array of dedicated and talented professionals. This diverse workforce is, in my view, NCTC's greatest asset.

In addition, NCTC embodies the principle that we all must serve as one team to protect the nation. We must work collaboratively and we must use every element of our national power to bring relentless and focused pressure against al-Qa'ida and its adherents, as well as other terrorist networks around the globe.

I've been privileged to serve—as a number of comments that were made this morning—in leadership positions dedicated to national security during my almost 20 years of career government service.

As the general counsel of the National Security Agency, I've guided it and supported NSA's intelligence operations and I've ensured that the agency's activities adhere to the Constitution and the laws that govern its activities and that protect civil liberties and privacy of Americans.

At the FBI, I was privileged to serve as counsel to Director Mueller, and in that role I was able to contribute to the transformation of the FBI into a world-class intelligence organization focused on preventing and disrupting potential terrorist plots.

As a career official of the Department of Justice, working closely with this Committee and with Congress, I helped stand up the new National Security Division at Justice, and I managed the imple-

mentation of the landmark changes to the Foreign Intelligence Surveillance Act that Congress passed in 2008.

I also supervised the Guantanamo Review Task Force, bringing together national security professionals from across the government to compile and analyze intelligence information on detainees.

And, finally, I served for about 10 years in the District of Columbia as a federal prosecutor. In that role I learned the value of working as a team with investigators and operators, and I learned the fundamental importance of finding and following the facts wherever they lead.

If I am honored to be confirmed to this position, I can assure you that I am committed to forging a strong and cooperative relationship with Congress. I believe, based on years of experience as a career government official, that congressional oversight is essential to NCTC and the effective conduct of intelligence activities.

Members of Congress and particularly members of this Committee bring a vital perspective to the difficult issues that the intelligence community faces. The role of Congress is critical to building the trust of the American people in NCTC and in the intelligence community. And if confirmed, I commit to providing full and timely communication and transparency with the Congressional oversight Committees.

NCTC's fundamental mission is to protect the nation from a terrorist attack. We must pursue this mission with vigilance and resolve. If confirmed, I pledge to do my very best to earn your trust and to give this effort my all.

Madam Chairman, Vice Chairman, thank you very much for the honor of appearing before you.

[The prepared statement of Mr. Olsen follows:]

Statement for the Record
Matthew G. Olsen
Nominee for Director, National Counterterrorism Center
Senate Select Committee on Intelligence
July 26, 2011

Chairman Feinstein, Vice Chairman Chambliss, and members of the Committee: Thank you for the opportunity to appear before you today as a nominee to serve as Director of the National Counterterrorism Center (NCTC). I am honored and humbled to be nominated for this position, and I very much appreciate the opportunity to be here today. NCTC and its highly motivated and dedicated work force play a vital role in protecting our nation from the threat of international terrorism. I consider it the highest privilege to be nominated to lead such an organization.

With the Committee's permission, I would like to begin by discussing the unique role that NCTC fulfills in our nation's efforts to combat terrorism. I then will identify some of challenges that I see for NCTC and my proposed areas of focus for NCTC going forward if I am given the opportunity to be confirmed to this position. Finally, I will discuss my experience and qualifications for this position.

Role of the National Counterterrorism Center

As we approach the tenth anniversary of al-Qa'ida's attacks on September 11, 2001, it is appropriate to reflect on the day that our nation suffered the single most devastating terrorist attack in our history. In the aftermath of those devastating attacks, the 9/11 Commission observed that, "the United States confronts a number of less visible challenges that surpass the boundaries of traditional nation-states and call for quick, imaginative and agile responses." That observation—as true today as it was when the 9/11 Commission issued its report—led the Commission to recommend the creation of a National Counterterrorism Center. As the 9/11 Commission proposed: "Breaking the mold of national government organization, this NCTC should be a center for joint operational planning *and* joint intelligence."

In 2004, Congress established NCTC. Its charter is to be the primary organization in the federal government for analyzing and integrating all-source intelligence pertaining to terrorism and counterterrorism, and sharing terrorism information with its partners. NCTC's responsibility is therefore to analyze and share information on international terrorism threats from around the globe. NCTC also serves as the federal government's shared knowledge bank on known and suspected terrorists and terrorist groups. In my view, no other organization in the country is as singularly focused on terrorism. Working to protect the nation from this threat is NCTC's foremost responsibility.

In its strategic operational planning role, NCTC also looks beyond individual department and agency missions toward the development of a single, unified counterterrorism effort across the federal government. This distinguishes NCTC from the rest of the intelligence community, permitting it to support, at a strategic level, all of the critically important work taking place across the intelligence community.

NCTC's mission statement captures its essential role: "Lead our nation's effort to combat terrorism at home and abroad by analyzing the threat, sharing that information with our partners, and integrating all instruments of national power to ensure unity of effort." In short, NCTC helps organize more effectively the nation's intelligence and strategic planning response to the threat of international terrorism and seeks to achieve this mission in a manner that provides greater security for our citizens while upholding our fundamental values.

NCTC Going Forward

Turning to the challenges NCTC faces today, we recognize that a decade after the September 11, 2001 terrorist attacks, we remain at war with al-Qa'ida and its affiliates. The death of Usama bin Laden eliminated al-Qa'ida's founder and most influential advocate for attacking the United States. At the same time, al-Qa'ida and its affiliates and adherents around the world continue to pose the most significant security threat to our country—a threat that has evolved and remains focused on striking the United States at home as well as our interests abroad. NCTC's mission is therefore to prevent another terrorist attack against the United States.

The laws enacted by Congress and policies carried out over the last ten years have been successful at putting al-Qa'ida on the defensive. Today, thanks to your leadership and the work of thousands of dedicated men and women across the intelligence community and our men and women in uniform around the globe, al-Qa'ida is significantly weakened.

However, let there be no question that the core leadership of al-Qa'ida and some of its key affiliates remain focused on striking the United States at home, as well as our interests abroad. Al-Qa'ida therefore continues to pose a direct, significant, and present danger to the United States. We must use every tool of national power to protect our citizens from this threat. In my view, we must not let up the pressure on al-Qa'ida and its affiliates around the globe. We must continue, now more than ever, to work with determination and focus to disrupt, dismantle, and ultimately defeat al-Qa'ida's terror network.

In addition to plotting and carrying out specific attacks, al-Qa'ida seeks to inspire a broader conflict against the United States. In doing so, al-Qa'ida draws on a distorted interpretation of Islam to justify murder. Countering this ideology—which has been rejected repeatedly and unequivocally by people of all faiths around the world—is an essential element of the nation's counterterrorism strategy.

As this Committee knows through its key role in overseeing the intelligence community, the United States faces an evolving threat from groups and individuals that accept al-Qa'ida's agenda, whether through formal alliance, loose affiliation, or inspiration. Affiliated movements have taken root beyond al-Qa'ida's core leadership in Afghanistan and Pakistan, including in the Middle East, East Africa, parts of northwest Africa, Central Asia, and Southeast Asia. These groups aspire to advance al-Qa'ida's agenda by destabilizing the countries in which they train and operate, attacking United States and other Western interests in the region, and in some cases, plotting to strike within the United States. Individuals who sympathize with or actively support al-Qa'ida may be inspired to violence and can pose an ongoing threat, even if they have no formal contact with al-Qa'ida. We know that individuals who have attempted attacks in the

United States have come from a wide range of backgrounds and origins, including American citizens and individuals with varying degrees of overseas connections.

In light of this complex and dynamic terrorist threat environment, NCTC and the rest of the counterterrorism community must remain vigilant and agile in our efforts to deter and disrupt terrorist attacks *before* they occur. In my view, three areas of focus warrant particular attention:

First, NCTC's dedicated and diverse workforce is its greatest strength. The talented men and women who work at NCTC perform a unique and vital service to the nation. I believe that NCTC has benefitted from the co-location of analysts and planners from across the intelligence community, the U.S. military, and other federal, state, and local partners. Maintaining this diversity through continued commitment from intelligence agencies and other organizations must remain a priority for NCTC. If confirmed, I will be committed to supporting this extraordinary workforce with the training, resources, and leadership necessary for the Center's success.

Second, last year NCTC established the Pursuit Group to focus exclusively on information that could lead to the discovery of threats aimed against the United States or U.S. interests abroad. The Pursuit Group's analytical teams work with our partners to identify and examine as early as possible leads that could reveal terrorist threats in their early stages. The teams pursue unresolved and non-obvious connections and provide leads to appropriate government entities for action. The role of the Pursuit Group in integrating tactical counterterrorism analytic efforts is enabled by its broad intelligence community makeup. With teams comprised of personnel from across the intelligence community—and with access to the broadest range of terrorism information available—Pursuit Group analysts are able to identify actionable leads that otherwise could remain disconnected or unknown. If confirmed, I will focus on this initiative and ensure it remains effective.

Third, NCTC continues to lead the counterterrorism community in the integration of threat information. NCTC long has had access to a wide variety of databases that span every aspect of terrorism information. Over the past year, in conjunction with other intelligence agencies, NCTC has developed an infrastructure to meet the demands of the evolving threat. This includes the enhancement of search capabilities across databases, and the development of a "CT Data Layer" to discover non-obvious terrorist relationships, so that analysts can examine potential threats more efficiently. All of these efforts are being pursued with careful consideration of legal, policy, and technical issues to protect privacy and civil liberties. This effort must remain a focus of NCTC.

Qualifications

Last, I would like to describe my experience and qualifications for this position. I have dedicated almost my entire professional career to government service. Having served in several career leadership positions in the national security field, I believe I have demonstrated my ability to lead people in demanding operational settings. I also have gained valuable experience working closely with and in the intelligence community, contributing to the achievement of important national security and counterterrorism goals.

In my current position as General Counsel of the National Security Agency (NSA), I serve as the chief legal officer for NSA and manage a legal office dedicated to providing support to

NSA's missions, including its counterterrorism efforts. As General Counsel, I fulfill a critical role in guiding and supporting NSA's operations and in ensuring that the agency's activities adhere to all applicable legal rules and policies. Over the course of the past year, for example, I have led efforts to address NSA's collection and analysis of intelligence, authority for its counterterrorism activities, and authority and policies for emerging cyber security efforts.

From 2009 to 2010, I served as the head of the Guantanamo Review Task Force and led the review of detainees at Guantanamo in accordance with the President's executive order. In this capacity, I was responsible for establishing and supervising an interagency task force of national security professionals from across the federal government and for managing the process for compiling and analyzing the relevant intelligence information on each detainee. The interagency nature of the review was designed to promote collaboration and exchange of information and to ensure that all relevant perspectives—including military, intelligence, homeland security, diplomatic, and law enforcement—contributed fully to the detainee review process. The task force assembled and sifted through large volumes of intelligence information and examined this information to assess the threat posed by the detainee in light of the national security interests of the United States.

From 2006 to 2009, as a senior career official in the Department of Justice's National Security Division—a newly formed division in the Department—I managed intelligence and surveillance operations and the oversight of these activities. Our mission was to ensure that intelligence community agencies—including the CIA, FBI, and NSA—had the tools necessary to conduct sensitive surveillance and other intelligence operations. In addition, I was responsible for managing the Department of Justice's implementation of landmark changes in the Foreign Intelligence Surveillance Act and worked in close collaboration with the intelligence community to interpret new statutory provisions, address policy and technical challenges, and adopt new oversight mechanisms to ensure the effective and lawful use of the government's new surveillance authority.

As Special Counsel to the FBI Director from 2004 to 2005, I handled a wide array of policy and operational matters in support of the FBI's national security and counterterrorism mission. I gained key insights into the role, capabilities and structure of the FBI, as well as other the intelligence agencies that comprise the government's combined counterterrorism community. In particular, I contributed to the reform of the FBI and—in response to a 2005 Presidential directive—the establishment of the FBI's National Security Branch, which combines the missions and resources of the Bureau's counterterrorism, counterintelligence, weapons of mass destruction, and intelligence elements.

I served as a federal prosecutor for over a decade, including in a supervisory position overseeing the investigation and prosecution of international terrorists. As a federal prosecutor, I learned first-hand the value of working as team with professionals in operational roles and the value of building coalitions with federal, state and local partners. In addition, this experience fostered an appreciation of the importance of rigorous and unbiased analysis of complex, sometimes fragmentary information. I also learned to present this information in a clear, concise and steadfast manner and gained a deep understanding of the laws and policies that define the government's actions in a domestic law enforcement setting and that protect the civil liberties and privacy of American citizens.

As a final note, I would like to add a few specific comments about my work on the Guantanamo Review Task Force. As the director of the task force, it was my responsibility to ensure that we conducted independent, professional and rigorous threat assessments of every detainee. In the course of this effort—which included more than 60 career intelligence analysts, law enforcement agents, and attorneys from across the government—we examined all available threat information, took full account of prior assessments, and issued impartial and objective analyses to senior decision makers, free from any improper influence. While in many cases the task force reached similar conclusions as prior assessments, in other cases the task force reached different conclusions based on an impartial and comprehensive review of a more complete set of information. In every case, this information was presented to senior officials from the Department of Defense, the intelligence community, the Joint Chiefs of Staff, the Department of State, the Department of Homeland Security, and the Department of Justice. Based on full, candid and open deliberations, these officials reached unanimous determinations on the appropriate status of each detainee.

Moreover, I have been committed to supporting Congress's vital oversight role with regard to the review of detainees and have briefed Congressional Members and staff in both the Senate and House on numerous occasions. In April 2009, I was part of a team of officials who provided a briefing about the initial stages of the process of reviewing detainees. As we explained at the time, we were authorized during the briefing to discuss the review process. We were not authorized to discuss deliberations or decisions on specific detainees. In accordance with those rules, we provided a full and candid briefing about the detainee review process.

In closing, I want to express my commitment, if confirmed, to ensure to the best of my abilities that Congress is fully informed of NCTC's analyses and activities. One way that NCTC meets this fundamental requirement is by providing daily intelligence to this Committee; this includes reports such as *Intelligence Community Terrorist Threat Assessments* and the *NCTC's Spotlight*.

I value the Congressional oversight process and commit to support fully NCTC's notification and reporting responsibilities to this Committee and the House Intelligence Committee. Keeping the congressional oversight committees currently and fully informed of intelligence activities is fundamental to our government's system of checks and balances and promotes the trust and confidence of Congress and the American people in NCTC and the rest of the intelligence community. Further, if confirmed, I will solicit your views, insights, and wisdom on NCTC and the performance of its mission.

I have been privileged to serve in leadership positions dedicated to national security during my almost twenty years of government service. I hope that the Committee will judge that my record of public service, experience, and judgment qualify me for this position. If confirmed, I pledge to do my very best to earn your faith and trust and to lead NCTC to fulfill its critical mission in defense of the nation.

Thank you again for the honor of appearing before you. I look forward to answering your questions.

Chairman FEINSTEIN. Thank you very much, Mr. Olsen.

I'd like the Members to know we have received the strongest and largest collection of letters on behalf of this nominee, certainly since I've been on this Committee, and it's from the heads and deputy heads of many different agencies. So those letters, along with the two letters from Congressman Frank Wolf and the addendums to those letters will be placed in the record.

[The information referred to follows:]

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

JUL 22 2011

The Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Madam Chairman:

I write in support of Matt Olsen's nomination by President Obama to serve as Director of the National Counterterrorism Center (NCTC).

Overall, having seen Mr. Olsen's work on national security and counterterrorism matters during his time at the Department of Justice and more recently at the National Security Agency, I have been greatly impressed by his leadership, judgment, and dedication. Mr. Olsen has extensive experience working on some of the most challenging national security issues facing our nation, and he is an excellent choice to lead NCTC. I have the utmost confidence that Mr. Olsen will serve NCTC with distinction, as he has in various other government positions over the past two decades.

As a senior Department of Defense official at the time of the Guantanamo review, I found Mr. Olsen's leadership of the Task Force to be professional, thorough, objective, independent, and non-political. As a result of the Task Force's thorough review, decision makers from the six responsible agencies reached unanimous agreement on the disposition of all 240 detainees. To be sure, these were difficult decisions. I attribute the ability of six diverse agencies to reach unanimous agreement in 240 individual cases—no small feat in our government—to the open, inclusive, and candid process that Mr. Olsen led.

I stand firmly behind Mr. Olsen, who took on the challenge of leading the Task Force as a service to the nation. That is precisely the type of leader that we would want as the next Director of NCTC.

[SIGNATURE]

cc:
The Honorable Saxby Chambliss
Vice Chairman

NATIONAL SECURITY AGENCY
FORT GEORGE G. MEADE, MARYLAND 20755-6000

22 July 2011

The Honorable Dianne Feinstein
Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Feinstein:

I am writing to wholeheartedly endorse the nomination of Matthew G. Olsen to be the next Director of the National Counterterrorism Center (NCTC). Matt has served as the National Security Agency's (NSA's) General Counsel for the past year and has shown true leadership and outstanding judgment and decisionmaking ability. He has been a key part of the Agency's efforts to provide intelligence that allows our government to counter terrorist threats. In my opinion, Matt is superbly qualified to hold this critical Intelligence Community position.

As the Committee knows, NSA provides valuable, and often unique, information that is critical to the Nation's counterterrorism efforts. As NSA General Counsel, Matt has recognized the essential role of signals intelligence (SIGINT) in the protection of the Nation. His guidance and counsel have been critical in helping to ensure both that the Nation's needs for intelligence are met and that the privacy of all Americans is protected as guaranteed under the Constitution.

Upon his arrival at NSA, Matt made an immediate and thoughtful assessment of NSA's legal posture with respect to supporting the Nation's counterterrorism efforts. He continued efforts to strengthen the lawyers' relationship with the counterterrorism client and meet the challenges associated with surveillance of terrorism targets. Moreover, in conjunction with operational personnel, he directed a comprehensive review of the legal constraints that potentially hinder NSA's counterterrorism efforts. This effort continues today, and Matt meets biweekly with top officials from NSA's counterterrorism office to discuss both the progress of the review and avenues for minimizing obstacles. He has also personally interacted with representatives of foreign governments to promote information sharing while ensuring it takes place in a manner that respects U.S. law, and he has ably represented NSA throughout the government. He is fully and personally engaged in helping to ensure that SIGINT meets its full potential to contribute to our security.

Matt is a wonderful individual, and I would be sorry to see him leave NSA. However, I acknowledge that great people are needed elsewhere, and the NCTC job is a critical one. Matt has an able legal mind, is thoughtful about the difficulties we face, and is fully committed to the success of the Intelligence Community. Given his understanding of intelligence and his commitment to the Nation's counterterrorism responsibilities, I am confident that, if confirmed, he will lead NCTC with distinction.

[SIGNATURE]

KEITH B. ALEXANDER
General, U.S. Army
Director, NSA

Copy Furnished:
The Honorable Saxby Chambliss
Vice Chairman, Senate Select
Committee on Intelligence

20 July 2011

To:
The Honorable Dianne Feinstein, Chair
The Honorable Saxby Chambliss, Vice Chair
Senate Select Committee on Intelligence
United State Senate
211 Hart Senate Office Building
Washington DC 20510

Subject: Letter of Recommendation for Mr. Matthew Olsen, the President's nominee to be Director of the National Counterterrorism Center

Dear Senators Feinstein and Chambliss,

As you may recall, I served as the Director of National Intelligence in President Bush's Administration and as the Director of the National Security Agency during President Clinton's Administration concluding 32 years of government service as a professional intelligence officer. In my private sector life, for the past 12 years, I have lead the business of Booz Allen Hamilton in support of the US Intelligence Community (IC).

The purpose of my letter is to offer my strongest possible recommendation in support of confirmation of Mr. Matthew Olsen as Director of the National Counterterrorism Center.

As a 44 year veteran serving the nation as a member of the intelligence community, I had many opportunities to work with the professionals of the Department of Justice. This was particularly true when serving as the Director of the National Security Agency and as the Director of National Intelligence. During those years of service, I never met or served with a more accomplished or dedicated professional than Matt Olsen. He understands the IC, its processes and procedures and has served with distinction.

As example of Mr. Olsen service is when the Administration was working with the Congress to update the Foreign Intelligence Surveillance Act (FISA) in 2007 and 2008, Mr. Olsen was the Department of Justice lead for coordinating in the Administration and with the Congress. During that time, we worked the issue over countless hours and with daily coordination calls often running late into the evening. Mr. Olsen was always engaged, supportive and fully committed to finding the path that would garner the support of the Congress and the Administration to bring this vital matter of national security to closure. The result was passage of the FISA Amendment Act in 2008 which significantly enhanced NSA's capabilities to protect the nation from terrorist attack. I can personally attest to Mr. Olsen's dedication, knowledge of the Intelligence community, and the laws and regulations governing the IC's activities. He was a strong leader and strong contributor to the content and the progress of the dialogue toward successful passage of amendments to FISA.

Currently, I am chairing a panel for the Director of the National Security Agency, General Keith Alexander, to review cyber security threats and the policy implications tor

the IC. As NSA's General Council, my panel, which includes former Secretary of Defense William Perry and former Secretary of Homeland Security Michael Chertoff, has had many occasions to interface with Mr. Olsen. We have asked detailed questions of the laws, the IC's authorities/activities and the potential paths ahead for adjustments needed toward mitigation the national security threats from cyber espionage and cyber terrorism. No one has been more knowledgeable in understanding the current issues and the IC's activities and processes than Mr. Olsen in mitigating this growing threat.

Having known and worked with Mr. Olsen for over four years, I have observed him to be the utmost professional dedicated to the security of the nation. He understands the IC, the law and processes needed to keep us safe. He has great respect for the law, our values and the activities needed to ensure the safety of the nation. I have every confidence that, if confirmed, Mr. Olsen will serve the nation, the Congress, the Administration and the IC at the highest level of service and performance.

Thank you for the opportunity to lend my strongest possible support to Mr. Olsen as you consider his nomination for confirmation.

With greatest respect,

/s/ Mike McConnell
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Vienna, Va 22182
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New York, NY 10022
Tel 212 909 6000
Fax 212 909 6836

July 20, 2011

The Hon. Dianne Feinstein
Chair, Senate Select Committee on Intelligence
United States Senate
211 Hart Senate Office Building
Washington, DC 20510

Matthew G. Olsen

Dear Senator Feinstein,

I write in support of the nomination of Matt Olsen to head the National Counter-terrorism Center (NCTC). Matt served as Deputy Assistant Attorney General in the National Security Division of the Justice Department when I served as Attorney General from 2007 to 2009, and I came to know him well as we met frequently to deal with issues relating to both foreign intelligence surveillance and military commissions.

From those meetings, I came to rely on his advice and judgment, which were informed not only by legal skill but also by candor and integrity. In numerous cases involving sensitive and urgent activities under the Foreign Intelligence Surveillance Act, Matt gave me and other senior Justice Department officials well-reasoned and objective counsel on law and policy. In short, there were and are many smart lawyers at the Justice Department, but Matt's qualities of mind and character put him in a select category.

Before I arrived, Matt was among those who set up the National Security Division (NSD) and was part of its initial leadership team under the supervision of Ken Wainstein, and later under the supervision of Pat Rowan. His skill, insight and dedication were both vital and apparent as he helped deal with making fundamental changes to the way the predecessor to NSD, the Office of Intelligence Policy and Review (OIPR), functioned in its new role as part of NSD. In

particular, he helped make certain that the government's representation before the Foreign Intelligence Surveillance Court was at the highest professional level and provided needed support for the intelligence community. During my tenure and before, he also worked diligently within the Justice Department to support the Department's assigned responsibilities in implementing military commissions, and worked as well on Foreign Intelligence Surveillance Act reform legislation.

In all of these activities, he was not only an excellent lawyer and manager, but also an exemplary person in dealing with his colleagues. Matt has in abundance every personal and professional quality and skill you could hope to find in a nominee to head NCTC. His nomination has my unqualified support.

[SIGNATURE]

Yours sincerely,

David S. Kris
3150 139th Ave SE
Building 4
Bellevue, WA 98005

July 14, 2011

The Honorable Dianne Feinstein, Chairman
The Honorable Saxby Chambliss, Vice Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Dear Madame Chairman and Vice Chairman Chambliss,

I write in support of Matthew Olsen's nomination as Director, National Counterterrorism Center (NCTC). Matt has worked in government during Republican and Democratic administrations, including during the period just after September 11, 2001. I got to know Matt well during the Transition period in 2008 and early 2009, and have worked with him frequently since then.

Matt is a very fine lawyer. But more importantly for NCTC, apart from his legal skills, Matt also has very strong analytic ability and excellent management experience, having served as Acting Assistant Attorney General for National Security, Director of the Guantanamo Review Task Force, and most recently as General Counsel of the National Security Agency.

I recommend Matt highly. Mike Leiter – another lawyer who served as D/NCTC – is an extraordinarily tough act to follow, but I am confident that Matt will be a worthy successor.

Sincerely,

[SIGNATURE]

David S. Kris

MICHAEL LEITER

July 15, 2011

United States Senate
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Feinstein, Vice Chairman Chambliss, and Members of the Select Committee:

I write to give my strong support to the nomination of Matthew Olsen to serve as the Director of the National Counterterrorism Center (NCTC).

As you know, I served as the Principal Deputy Director and Director of NCTC from January of 2007 until July 8, 2011. During this time, and earlier as the Deputy Chief of Staff of the Office of the Director of National Intelligence, I came to work closely with Matt while he served first at the Federal Bureau of Investigation, and then the National Security Division of the Department of Justice, and finally at the National Security Agency. Based on my close professional interaction with Matt, I believe that he has the experience, judgment, temperament, and integrity to lead the NCTC.

In my view Matt's extensive knowledge of counterterrorism law and domestic counterterrorism operations are critical to addressing current and future terrorism threats faced by the United States. In particular, Matt's thorough understanding of FBI capabilities, his unparalleled insight into the importance of FISA to counterterrorism efforts, and his past year as NSA's General Counsel combine to give Matt a "whole of government" understanding to how the United States can defend against terrorist attacks—potentially the single most vital asset for the Director of NCTC.

In working with Matt I also saw him bring impeccable judgment to a variety of difficult counterterrorism questions. Most significantly, I was consistently impressed with Matt's ability at the Department of Justice and NSA to ensure that counterterrorism operators had the ability to pursue fully critical terrorist targets. At the same time, Matt illustrated a healthy and I believe fully appropriate appreciation for how such operations could be shaped to simultaneously protect appropriate civil liberty and privacy interests.

Matt's temperament is also, I believe, extremely well-suited to serve as the Director of NCTC. As Director of NCTC, Matt will have to work with an incredible array of Federal, state and local, and foreign partners. Having seen Matt work within the interagency and with the Congress in the past, I am confident that he has all of the traits necessary to continue to improve on existing relationships and grow new ones where necessary.

Finally, during my time with Matt he always and without fail illustrated the highest levels of integrity no matter the situation or the audience. In this regard, I believe Matt is

highly qualified to "speak truth to power," an indispensible characteristic for NCTC's Director given the position's responsibility to advise the President, the Congress, and senior Executive Branch officials on terrorist threats. Matt has never in my experience shied from this weighty responsibility and I believe his integrity is beyond question.

In short, I believe that the nation and NCTC will be exceptionally well served should the Senate confirm Matt Olsen as the next Director of NCTC. I urge the Committee to recommend to the full Senate approval of his nomination at the earliest opportunity.

Sincerely,

/signed/

Michael Leiter

O'MELVENY & MYERS LLP

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July 21, 2011

VIA FEDEX

The Honorable Dianne Feinstein, Chairman
The Honorable Saxby Chambliss, Vice Chairman
Select Committee on Intelligence
United States Senate
211 Hart Senate Office Building
Washington, DC 20510

Re: *Letter of Recommendation for Matt Olsen*

Dear Chairman Feinstein and Vice Chairman Chambliss:

I submit this letter in support of the President's nomination of Matt Olsen for the position of Director of the National Counterterrorism Center (NCTC).

Matt and I have been friends and colleagues for thirty years -- as college classmates, fellow federal law clerks and federal prosecutors together in the U.S. Attorney's Office in Washington, D.C., and as Justice Department officials responsible for establishing the National Security Division in the Justice Department in 2006. I know Matt and his career as well as anybody, and I can say without reservation that there is no finer public servant or more worthy candidate for this important position.

Matt possesses a singular combination of personal attributes that make him uniquely qualified to serve as NCTC Director. First, he has a wealth of relevant counterterrorism experience that has prepared him for the various demands of the job. His years as a line trial prosecutor gave him an intuitive understanding of the criminal justice system and its role in our country's counterterrorism effort; his experience as Special Counsel to the FBI Director and as a leader in the National Security Section of the U.S. Attorney's Office and in the National Security Division afforded him a valuable insight into the intelligence dimensions of that effort; his handling of sensitive management challenges during his Justice Department career prepared him for the significant management responsibilities he will face as NCTC Director; his leadership of the Guantanamo Review Task Force gave him experience in managing an inter-agency process

and building multi-agency consensus in the highly-charged national security arena; and his stewardship of the NSA's legal office has provided him with an insider's view of Intelligence Community operations and priorities. This deep background in counterterrorism operations and management sets Matt apart and will equip him to handle the myriad challenges that confront the NCTC Director.

Second, Matt brings to the job an exemplary work ethic and a selfless dedication to public service. Matt has devoted virtually his entire career to government service, and at every turn he has sought out those assignments that are the most challenging, that demand the most hard work and effort on his part, and that mean the most for our country. Whether it was his prosecuting the longest federal criminal trial in the history of the District of Columbia, his taking on the multi-faceted problems in the government's FISA operations in 2006 or his volunteering for the difficult but important task of running the Guantanamo Review Task Force, Matt has consistently been the one to step forward for the most challenging assignment. His willingness to serve as NCTC Director is just one more example of this pattern.

Matt has also demonstrated another important quality throughout his career -- his ability to keep himself and his colleagues focused on a strategic vision for his organization. Many government managers can handle the daily crises that are a fact of life in the national security arena, but few are able to do so while at the same time effectively guiding their organization toward a long-term strategic objective. Matt has shown that he can do both. Nowhere was that ability so clearly demonstrated as when Matt assumed responsibility for the FISA operations in the new National Security Division in 2006. Not only did he maintain the historic pace of FISA approvals that were so critical to our counterterrorism efforts; he also immediately undertook both to thoroughly revamp and streamline the dated process for obtaining FISA approvals and to work with Congress to make the case for reforming the FISA statute -- reform that was secured with the passage of the FISA Amendments Act of 2008. That ability to think and act for both the short and long term is a critical quality for the leader of the NCTC, who has the responsibility both to address the immediate terrorist threats and to promote the continued development and integration of our government's counterterrorism program -- a long-term effort that is still a work in progress.

Finally, it is important to note that Matt has an exceptional reputation for absolute integrity and professionalism. Throughout his two decades of public service, Matt has shown himself to be a straight-shooter who makes decisions purely on the merits without regard to political or personal agenda. This reputation gives him and his decision making the credibility that is so important to the NCTC Director's ability to build cooperation and consensus among the various agencies in the counterterrorism effort. It is also the reputation that will help instill confidence in the American people that he, the NCTC and the government's counterterrorism program as a whole are making the right calls for the right reasons.

In sum, I believe that the President chose very wisely in nominating Matt, and that there is nobody better suited to shoulder the responsibility of leading the nerve center of our nation's

counterterrorism efforts. Please do not hesitate to contact me if I can provide any additional information that would be helpful to the Committee as it considers Matt's nomination.

Sincerely,

[SIGNATURE]

Kenneth L. Wainstein
O'MELVENY & MYERS LLP

U.S. Department of Justice

United States Attorney
Western District of Virginia

Timothy J. Heaphy
United States Attorney

United States Courthouse and Federal Building
255 West Main Street, Room 130
Charlottesville, Virginia 22902
Telephone: 434/293-4283 Fax: 434/293-4910

July 22, 2011

The Honorable Dianne Feinstein, Chairman
The Honorable Saxby Chambliss, Vice Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Matthew G. Olsen as Director, National Counterterrorism Center

Dear Madame Chairman and Vice Chairman Chambliss:

I write in support of Matthew G. Olsen's nomination to serve as Director of the National Counterterrorism Center (NCTC).

I worked closely with Mr. Olsen when we both served as Assistant United States Attorneys in the District of Columbia. Specifically, Mr. Olsen and I worked together on a gang investigation that culminated in the longest trial in the history of the United States District Court for the District of Columbia, United States v. Kevin Gray et al. Mr. Olsen's work on the Gray case was truly outstanding. He was organized, tenacious, and scrupulously fair. He consistently exercised good judgment and often inserted a calm voice of reason in contentious moments during our trial. Mr. Olsen frequently demonstrated considerable tact and diplomatic skill and was able to get people with disparate interests to find common ground.

Since the Gray trial concluded, Mr. Olsen has worked in increasingly consequential national security positions within and outside the Department of Justice. He has developed superior managerial skills. He has successfully navigated difficult competing interests and worked effectively with multiple agencies. He has earned his good reputation as an honest broker who puts principle ahead of politics.

Mr. Olsen's personal qualities are as outstanding as his professional qualifications. He is trustworthy and honest. He is always willing to help a colleague with matters large and small. He forges effective relationships with a wide array of personalities. He is widely respected and well liked by his current and former colleagues.

In short, I think the President has made a wise choice in nominating Mr. Olsen to be the new Director of the NCTC. He will bring his considerable experience and stellar personal qualities to this important job. If confirmed, I have no doubt that Mr. Olsen will fulfill his new responsibilities with the same level of excellence that has marked his career thus far.

Very truly yours,

[SIGNATURE]

TIMOTHY J. HEAPHY
United States Attorney
Western District of Virginia

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July 25, 2011

The Honorable Dianne Feinstein, Chairman
The Honorable Saxby Chambliss, Vice Chairman
Select Committee on Intelligence
United States Senate
211 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Matt Olsen

Dear Chairman Feinstein and Vice Chairman Chambliss:

I write to support the nomination of Matt Olsen to serve as the Director of the National Counterterrorism Center (NCTC).

I had the privilege of serving with Matt for many years, first in the U.S. Attorney's Office for the District of Columbia and then at the National Security Division (NSD) in the Department of Justice (DOJ). From 2006 to 2009, we worked together on a daily basis in the NSD, where I was first a Deputy Assistant Attorney General and then the Assistant Attorney General in charge of the Division. At the NSD, I worked with NCTC on a regular basis and gained an appreciation for the important role that it plays.

Over his long career, Matt has held a number of posts that have prepared him well to be Director of NCTC. As a federal prosecutor, Matt evaluated the credibility of witnesses and informants (including those who had themselves engaged in violent activities) on a daily basis. In addition to this first-hand exposure to the collection of human source information, Matt also has broad and deep experience in electronic surveillance as a result of his time supervising the Office of Intelligence at NSD and his service as General Counsel to the National Security Agency. He knows intelligence from the perspective of a collector as well as consumer. In several jobs, he has worked across agencies to resolve difficult national security issues; he therefore understands the importance of developing and sustaining strong relationships among these agencies.

As a result of his work, Matt has a solid understanding of the federal intelligence bureaucracy. From my observations of Matt's management skills, I have full confidence that he will be capable of effecting change within that bureaucracy. Matt came to the NSD after working directly for FBI Director Mueller. During his time at the FBI, Matt had the opportunity to learn from Director Mueller, an extraordinarily effective government manager, as he overhauled the FBI. At the NSD, Matt took on the task of re-structuring the Office of Intelligence Policy and Review into the Office of Intelligence (OI) and changing its management team. As this task was ongoing, Matt had the additional challenge of implementing the Protect America Act of 2007 and then the FISA Improvements Act of 2008 within OI. While he did all this, OI never lost a step in its work in support of the intelligence community, a substantial feat and a strong testament to Matt's talent as a supervisor.

After Matt left NSD in 2009, he led the Guantanamo Review Task Force. From my own experience working on Guantanamo detainee issues, I know that sifting through the sometimes-contradictory information concerning the detainees is an extremely challenging endeavor. Given the analytical and logistical challenges, along with the fact that detainee policy remains a very controversial issue, the job that Matt took on was the very definition of a thankless task. Knowing Matt's approach to government service, I am not surprised that he took it on. Although I had left government by the time Matt accepted this assignment, I am aware that he quickly assembled a first-rate staff and pushed them to complete rigorous assessments of the detainees in a short period of time. I hope that all the members of this Committee will appreciate that Matt's work to deliver objective assessments regarding the detainees to senior decision makers was excellent training for the NCTC.

During the time that I worked with him, Matt always demonstrated honesty, integrity and good judgment. He did his job and expressed his views without concern for political ramifications or personal impact upon his own career. I can think of no one else that I would prefer to have overseeing an organization that is focused on impartial intelligence analysis and strategic planning concerning terrorism. I am pleased to commend him to you without reservation.

Sincerely,

[SIGNATURE]

J. Patrick Rowan

5301 Wisconsin Ave. NW
8th Floor
Washington, DC 20015

July 25, 2011

The Honorable Dianne Feinstein, Chairman
The Honorable Saxby Chambliss, Vice Chairman
United States Senate
Select Committee on Intelligence
211 Hart Senate Office Building,
Washington, D.C. 20510

Dear Chairman Feinstein and Vice Chairman Chambliss:

I write in strong support of the nomination of Matt Olsen to serve as the Director of the National Counterterrorism Center (NCTC).

I have known Matt for over fifteen years, through my prior service with the Department of Justice. I have worked with Matt first-hand in several different contexts, most recently when he served as Deputy Assistant Attorney General in the National Security Division of the Justice Department and I was the Deputy Chief of Staff to Attorney General Mukasey.

Matt is a first-rate attorney with outstanding judgment. He is ideally suited by temperament, training, and ability, to serve as the head of NCTC. Matt is someone who manages by example. He rapidly earns the respect and admiration of those who serve under him-- a dynamic I observed when Matt was among those who led the National Security Division in its early months and years. Moreover, Matt has a stellar command of both the substance and law underlying the most pressing national security issues which face our nation.

Lastly, I can tell you that Matt had and has a well-deserved reputation for integrity and forthrightness. Matt is someone whose representations can be relied upon. He is honest to a fault.

I believe that, if confirmed, Matt Olsen will serve the NCTC with distinction. I am pleased to commend him without reservation.

Sincerely

[SIGNATURE]

Matthew W. Friedrich
Former Acting Assistant Attorney General,
Criminal Division
United States Department of Justice

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:
CHAIRMAN—COMMERCE-JUSTICE-SCIENCE
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STATE AND FOREIGN OPERATIONS

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

July 14, 2011

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wolf.house.gov

The Honorable Dianne Feinstein
Chairman
Senate Select Committee on Intelligence
331 Hart Senate Office Building
Washington DC 20510

Dear Senator Feinstein:

I write in opposition to Mr. Matthew Olsen's nomination to serve as director of the National Counterterrorism Center (NCTC), which is located in my congressional district. I believe Mr. Olsen exercised questionable judgment and made misleading statements while serving as the special counselor to the attorney general and executive director of the Obama Administration's Guantanamo Review Task Force, where he led the interagency process to implement the president's executive order that led to the release of a number of dangerous terrorist detainees held at the Guantanamo Bay Naval Base. Dozens of high risk terrorist detainees recommended for release by the task force led by Mr. Olsen were released abroad to dangerously unstable countries, including Yemen, Somalia and Afghanistan.

As then-ranking member and now chairman of the House Commerce-Justice-Science Appropriations subcommittee -- which funds the Justice Department, Federal Bureau of Investigations, Bureau of Prisons, U.S. Marshals Service and which helped fund the NCTC's predecessor, the Terrorist Threat Integration Center -- I was disturbed by decisions and statements made by Mr. Olsen in 2009 while he led the task force. These concerns have deepened based on new information that has come to light in recent articles from *Newsweek, The Washington Post, The National Journal* and *The Weekly Standard.* These reports have raised troubling questions about Mr. Olsen's leadership of the task force and his actions in response to White House influence.

Additionally, my personal interactions with Mr. Olsen, as well as these subsequent news reports, lead me to conclude that he was not forthright with the Congress and may have changed detainee assessments under political pressure from administration officials. I believe these are troubling concerns which deserve a thorough investigation and should give the Senate serious pause as it considers who should lead the NCTC. I have visited the NCTC on several occasions and have met with a number of its former directors, as well as the former and current directors of National Intelligence. I have seen firsthand the critical work that is done by the center and fully understand the need for an independent, capable and principled director to lead the operation.

There are three concerns that have led me to oppose Mr. Olsen's nomination. First, it is clear to me that in order to achieve the president's promise to close Guantanamo Bay during his first year in office, Mr. Olsen may have been susceptible to the immense political pressure placed on the interagency task force to re-classify detainee threat levels. Second, it has become clear that Mr. Olsen's task force may have altered some detainee assessments -- overturning Department of Defense assessments -- in order to clear and expedite the release of a large number of detainees. Third, I have recently learned that Mr. Olsen was not forthright me and my staff about the effort to release a number of Uighur detainees to northern Virginia in 2009. Attached is a white paper that addresses these concerns in greater detail.

Leading the NCTC is a serious responsibility and requires a director that is exceptionally experienced, forthcoming, trustworthy and has good judgment. The analyses and recommendations provided by the NCTC have direct bearing on the safety of the American people. The director must be able to withstand political pressure from all sides, facilitate the complete and straightforward sharing of information and ensure unbiased analysis. I do not question Mr. Olsen's professional qualifications for this position, but from my observations of his recent leadership positions, I believe that he lacks the judgment to lead the NCTC.

I am willing to testify about my concerns during your committee's upcoming confirmation hearing for Mr. Olsen. Please do not hesitate to contact me at 202-225-5136 to discuss any of this information.

Best wishes.

Sincerely,

[SIGNATURE]

Frank R. Wolf
Chairman
Commerce-Justice-Science Subcommittee
House Appropriations Committee

Summary of concerns regarding Mr. Olsen's leadership and actions as executive director of the Obama Administration's Guantanamo Review Task Force

1. Questionable altering of Guantanamo Bay detainee assessments

I am concerned about new information reported by *The Weekly Standard* about the assessments of detainees who were transferred abroad in 2009. Throughout that year, I repeatedly wrote the president and attorney general expressing concern over the release of certain detainees believed to be threats by the Department of Defense (DOD). I was also deeply concerned that detainees were being released to dangerously unstable countries, such as Yemen, Somalia and Afghanistan. Despite my warnings in the fall of 2009, detainees continued to be released to these countries until the administration was forced to halt releases to Yemen following the attempted attack by the Christmas Day bomber, who trained in Yemen with al Qaeda in the Arabian Peninsula.

According to a July 13, 2011, article in *The Weekly Standard*, "[Olsen's] task force approved most of the detainees remaining at Guantanamo for transfer, clearing the way for the Obama administration to empty most of the detention facility's cells. But a review of leaked detainee threat assessments reveals that many of the detainees approved for transfer [by Olsen's task force] were deemed "high" risks by Joint Task Force Guantanamo (JTF-GTMO), which oversees the detention and interrogation of detainees. Moreover, JTF-GTMO recommended that most of these detainees be retained in U.S. custody – precisely the opposite of the task force's recommendations."

The article continues, "In its final report, dated January 22, 2010, Olsen's task force reported that 126 detainees, out of a total of 240, were 'approved for transfer.' Olsen's task force approved roughly 2 out of every 3 (65 percent) Guantanamo detainees for transfer, JTF-GTMO recommended that approximately 1 out of every 4 (25 percent) be transferred."

There is one case in particular that serves as a good example of the troubling discrepancy between Olsen's recommend release of a detainee that JTF-GTMO considered to be "high" risk. In early 2010, I wrote White House counterterrorism adviser John Brennan about one detainee, Ayman Batarfi, whom the DOD believed to be closely connected to al Qaeda's anthrax program. Brennan forcefully rejected my concerns about Batarfi. However, as a recent *Weekly Standard* article notes:

> "A recently leaked threat assessment prepared at Guantanamo draws into question the Obama administration's analysis of a detainee [Batarfi] who was transferred to Yemen shortly before all future transfers to the unstable nation were suspended."
>
> "Brennan decided to answer Wolf's challenge by sending a letter on White House stationery to then-House speaker Nancy Pelosi on February 1, 2010. ABC News obtained a copy of the letter and published it online. Brennan wrote:
>
> > 'During the briefing on January 13, Representative Wolf made allegations that one detainee repatriated to Yemen had been involved in weapons of mass destruction. As it has done in every case, the task force thoroughly reviewed all information available to the government about this individual and concluded that there is no basis for the assertions Representative Wolf made during this session. I am attaching a classified addendum to this letter that addresses these concerns directly.'

"But a recently leaked April 29, 2008, threat assessment prepared by Joint Task Force Guantanamo (JTF-GTMO) contains numerous references to Batarfi's ties to al Qaeda's anthrax program. These connections were made through a known al Qaeda front named al Wafa, which employed Batarfi and provided cover for al Qaeda's pre-9/11 pursuit of an anthrax capability...

"For all of these reasons, and more, Batarfi was deemed a 'high risk' who is 'likely to pose a threat to the U.S., its interests, and allies' by the JTF-GTMO team. Batarfi was also considered to be of 'high intelligence value.'"

This newly leaked 2008 assessment raises serious questions about why t Olsen's task force didn't include the DOD's information about Batarfi's ties to the al Qaeda anthrax program as well as their judgment that Batarfi was, in fact, "likely to pose a threat to the US." This information raises questions about the integrity of the task force's review and whether undue political pressure to release more detainees led task force members to doctor detainee assessments.

The Weekly Standard's Thomas Jocelyn succinctly posits in the July 13, 2011, article, "It is clear that the Guantanamo Review Task Force, headed by Matthew Olsen, approved a large number of 'high' risk transfers. The senators presiding over Olsen's confirmation hearing may want to ask: Why?"

2. Political pressure on the Guantanamo Bay Detainee Task Force:

I am concerned about political pressure placed on Olsen and the task force by administration officials. Although the administration asserts that the task force was independent, it is clear that the task force reported directly to the White House and participated in meetings led by White House chief of staff Rahm Emanuel. According to the April 23, 2011, *Washington Post* article:

"In late April [2009], Obama heard some jarring news during a Situation Room meeting with the interagency task force reviewing the case of every detainee at Guantanamo.

"The president asked Matthew G. Olsen, the Justice Department lawyer heading the task force, approximately how many Guantanamo detainees could be prosecuted, according to administration officials.

"Probably fewer than 20, Olsen said.

"The president seemed peeved that the number was so small, in contrast with the optimistic predictions during his election campaign that nearly all of the remaining detainees could face trial or be transferred. The number would eventually rise to 36."

I am concerned that pressure from White House officials may have led Olsen and his task force to inflate the number of cases eligible for prosecution from "fewer than 20" to the 36 that were ultimately provided to the administration. The nearly 100 percent increase in the number of cases brought forward for prosecution following the president's comment merits a serious review of whether political pressure led the task force to alter its independent assessment of detainees.

The recent *Weekly Standard* analysis notes, "[Olsen's] task force approved only 35 percent of the detainees for indefinite detention or prosecution, whereas JTF-GTMO recommended that roughly 75 percent be retained in DoD custody." This dramatic shift in the number of cases recommended by Mr. Olsen raise serious questions about whether pressure from the president and other administration officials led him to inflate the number of detainees recommended for trial.

3. Misleading Congress about the transfer of Uighur detainees to the United States.

It has become clear that the administration was directing Mr. Olsen to intentionally withhold information from members of Congress and he willingly complied with their inappropriate direction. According to *Newsweek, The Washington Post* and *The National Journal*, the administration was planning a secret transfer and settlement of at least two Uighur detainees to northern Virginia in April 2009. Each of these reports indicates the degree to which the White House attempted to hide this effort from the Congress and the public.

According to a May 2009, article in *Newsweek*, White House officials are alleged to have been particularly concerned about Republican members of Congress being made aware of the secret transfer. *Newsweek* reported, "As part of their efforts to shut down the Guantánamo Bay detention center, Obama Administration officials were poised in late April to make a bold, stealthy move: they instructed the U.S. Marshals Service to prepare an aircraft and a Special Ops group to fly two Chinese Uighurs, and up to five more on subsequent flights, from Gitmo to northern Virginia for resettlement. In a conference call overseen by the National Security Council, Justice and Pentagon officials had been warned that any public statements about Gitmo transfers would inflame congressional Republicans, according to a law-enforcement official who asked not to be named discussing internal deliberations." (This operation appears similar to the administration's secret transfer of Somali terrorist Ahmed Abdulkadir Warsame to New York City for civilian trial on July 5 after spending two months on a U.S. Navy ship).

It has recently come to my attention that I was misled about the status of the transfer of the Uighur detainees in April 2009. This information confirms the *Newsweek* report that career federal employees were explicitly directed to hide this information from members of Congress, especially Republican members.

During an April 22, 2009, meeting in my office with members of the Guantanamo Bay Detainee Review Task Force, including Mr. Olsen, I inquired about the status of the potential transfer of Uighur detainees to the United States. Mr. Olsen indicated that a decision had not yet been reached on the transfer of the detainees. None of the other career or political officials in the meeting countered Mr. Olsen's assertion.

That is why I was deeply concerned to learn in an April 2011, *Washington Post* article, that the final decision on the transfer of the Uighur detainees had been made during a White House meeting eight days before my meeting with Mr. Olsen. According to *The Washington Post* article, "The first concrete step toward closing the detention center was agreed upon during an April 14, 2009, session at the White House. It was to be a stealth move... They were going to show up here, and we were going to announce it,' said one senior official, describing the swift, secretive operation that was designed by the administration to preempt any political outcry that could prevent the transfer."

Following the publication of this article in April, I personally called Mr. Olsen to ask whether he was aware at the time of my meeting with him on April 22, 2009, that a decision had already been made on the transfer of the detainees. He told me that the aware of the decision prior to our meeting.

I believe that I was intentionally misled by Mr. Olsen and other administration officials during my April 22 meeting with the task force. I also am concerned that the attorney general did not acknowledge that a decision had been made when he appeared before the House Commerce-Justice-Science Appropriations subcommittee the following day. That is why I was surprised when my office was notified by a career federal employee that the administration was misleading the Congress and planned to secretly transfer the detainees around May 1, 2009.

As *Newsweek* reported, "Then on May 1, Virginia GOP Rep. Frank Wolf got tipped off. Furious, he fired off a public letter to President Obama, charging that the release of the Uighurs -- Muslim separatists opposed to the Chinese government -- could 'directly threaten the security of the American people.' White House officials were not happy... The flight never took off."

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Questioning 'High' Risk Gitmo Detainee Transfers

Thomas Joscelyn

July 13, 2011 10:35 AM

On July 1, President Obama announced that he was nominating Matthew Olsen for the position of National Counterterrorism Center (NCTC) director. Olsen has served in a number of national security-related government positions, including as the head of Obama's Guantanamo Review Task Force.

As one of his first acts in office, Obama authorized the task force to review each Guantanamo detainee's case files as his administration prepared to close down the detention facility within one year – a goal that proved to be unattainable for a variety of reasons. The task force made recommendations as to which detainees should be prosecuted (either in military commission or federal court), held indefinitely, or transferred to another country. (No detainees were approved for outright release.)

The task force approved most of the detainees remaining at Guantanamo for transfer, clearing the way for the Obama administration to empty most of the detention facility's cells.

But a review of leaked detainee threat assessments reveals that many of the detainees approved for transfer by the task force were deemed "high" risks by Joint Task Force Guantanamo (JTF-GTMO), which oversees the detention and interrogation of detainees. Moreover, JTF-GTMO recommended that most of these detainees be retained in U.S. custody – precisely the opposite of the task force's recommendations.

The NCTC's director position requires Senate confirmation. So will senators question Olsen's role on the task force, and the task force's willingness to approve a large number of "high" risk detainees for transfer?

Comparing the task force's decisions to JTF-GTMO's recommendations

In its final report, dated January 22, 2010, Olsen's task force reported that 126 detainees, out of a total of 240, were "approved for transfer." An additional 30 Yemeni detainees were "designated for 'conditional' detention based on the current security environment" in their home country. The 30 Yemenis were "not approved for repatriation to Yemen" at the time, "but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met." (Al Qaeda in the Arabian Peninsula attempted to blow up a Detroit-bound airliner on Christmas Day 2009, less than one month before the task force's report was finalized. The "moratorium on transfers to Yemen" was put in place only after the failed attack.)

Therefore, the task force approved a total of 156 Guantanamo detainees for transfer – or 65 percent of the total detainee population.

Compare the task force's results with JTF-GTMO's recommendations.

In late April, 765 JTF-GTMO detainee threat assessments were leaked online. THE WEEKLY STANDARD has been able to match 239 of these threat assessments to detainees that the *New York Times* has identified as being held at Guantanamo on Obama's inauguration day. The *Times*'s data is available online in its "Guantanamo Docket" – an online repository of declassified Guantanamo documents and other information. In all likelihood, the *Times*' list does not precisely match the detainees reviewed by the task force. But it is the best available list as the government does not publish a definitive list of detainees held at Guantanamo – and it is certainly a very close match.

JTF-GTMO determined that 179 of the 239 detainees (75 percent) were "high" security risks to the U.S. and its allies. JTF-GTMO also recommended that 173 of these detainees (72 percent) be retained in the Department of Defense's

custody.

The leaked JTF-GTMO documents do not contain a recommendation for an additional 9 detainees in our study. But in 8 of these 9 instances, JTF-GTMO identified the detainee as a "high" risk, making it likely that JTF-GTMO recommended these 8 detainees for continued detention. If we add these 8 detainees to the 173 detainees JTF-GTMO recommended for continued detention, then JTF-GTMO likely recommended a total of 181 detainees (76 percent) held at Guantanamo on Obama's first day in office be retained in DoD custody – and not transferred.

In sum, whereas Olsen's task force approved roughly 2 out of every 3 (65 percent) Guantanamo detainees for transfer, JTF-GTMO recommended that approximately 1 out of every 4 (25 percent) be transferred. The task force approved only 35 percent of the detainees for indefinite detention or prosecution, whereas JTF-GTMO recommended that roughly 75 percent be retained in DoD custody.

Guantanamo transfers are not risk free

To his credit, Olsen has been more candid than most when it comes to the risks involved in transferring Guantanamo detainees. When the U.S. government transfers a detainee, it does not mean that he has been deemed innocent or risk-free. Olsen explained the risks involved during an interview with BBC News. "No decision about any of these detainees is without some risk," Olsen said. "We need to be clear about the fact that we're making predicted judgments at some level about whether somebody is going to pose a risk to us in the future if they are released."

The task force's final report underscores this point. "It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism," the task force noted. "Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country."

In other words, the U.S. government is relying on foreign governments to mitigate the risks of transferred detainees. The problem is that the more we've learned over time, the clearer it has become that foreign governments are frequently unable or unwilling to mitigate these risks.

The Bush administration itself transferred a large number of "high" risk detainees, including many of the Saudis held at Guantanamo. JTF-GTMO recommended that a large number of the detainees transferred by the Bush administration be retained in DoD custody as well. An increasing number of these transferred detainees have returned to the terror network, according to the Obama administration's own estimates.

The bottom line is that the transfer of Guantanamo detainees entails, in many cases, "high" risks. The Guantanamo task force set up by President Obama was willing to accept far more of these risks than JTF-GTMO. It was also willing to accept more risk than the Bush administration with respect to the detainees remaining at Guantanamo in late January 2009. (The task force's final report notes that only 59 of the 240 detainees, or 25 percent, "were approved for transfer or release by the prior administration but remained at Guantanamo by the time the Executive Order was issued." Compare this to the 65 percent approved for transfer by the task force.)

It is clear that the Guantanamo Review Task Force, headed by Matthew Olsen, approved a large number of "high" risk transfers. The senators presiding over Olsen's confirmation hearing may want to ask: Why?

Thomas Joscelyn is a senior fellow at the Foundation for Defense of Democracies.

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John Brennan Is Still Wrong on Gitmo Detainee

Thomas Joscelyn

May 13, 2011 8:12 AM

A recently leaked threat assessment prepared at Guantanamo draws into question the Obama administration's analysis of a detainee who was transferred to Yemen shortly before all future transfers to the unstable nation were suspended.

On December 19, 2009, the Obama administration transferred six Guantanamo detainees to Yemen. One of them was a longtime confidante of Osama bin Laden named Ayman Batarfi. The decision to transfer Batarfi proved to be controversial.

Less than one month after the transfer, during a congressional briefing on January 13, 2010, Congressman Frank Wolf questioned President Obama's chief counterterrorism advisor, John Brennan, about the decision to transfer Batarfi. Wolf was especially perplexed since military and intelligence officials had concluded that in addition to being a longtime, committed jihadist with ties to the most senior al Qaeda leaders, including Osama bin Laden, Batarfi also had knowledge of al Qaeda's anthrax program.

Brennan decided to answer Wolf's challenge by sending a letter on White House stationary to then-House speaker Nancy Pelosi on February 1, 2010. ABC News obtained a copy of the letter and published it online. Brennan wrote:

> During the briefing on January 13, Representative Wolf made allegations that one detainee repatriated to Yemen had been involved in weapons of mass destruction. As it has done in every case, the task force thoroughly reviewed all information available to the government about this individual and concluded that there is no basis for the assertions Representative Wolf made during this session. I am attaching a classified addendum to this letter that addresses these concerns directly.

But a recently leaked April 29, 2008 threat assessment prepared by Joint Task Force Guantanamo (JTF-GTMO) contains numerous references to Batarfi's ties to al Qaeda's anthrax program. These connections were made through a known al Qaeda front named al Wafa, which employed Batarfi and provided cover for al Qaeda's pre-9/11 pursuit of an anthrax capability.

The leaked assessment contains these lines in its executive summary (note: "Detainee" refers to Batarfi):

> Detainee acknowledged associations with numerous senior al-Qaida members including Usama Bin Laden (UBL) and provided assistance to Yazid Sufaat, one of al-Qaida's anthrax researchers in Afghanistan who also has ties to the 11 September 2001 attack.

Yazid Sufaat was, in fact, al Qaeda's chief anthrax scientist. Another passage reads (emphasis added):

> Detainee was the chief medical advisor for the al-Wafa NGO. Detainee and al-Wafa **provided assistance to al-Qaida including assistance to personnel tied to the anthrax research program.** Detainee is associated with UBL and other senior al-Qaida leadership, and is listed on al-Qaida documents.

In still another passage, intelligence officials explained (emphasis added):

> Detainee and al-Wafa **provided support to al-Qaida including its anthrax research program.** ...While serving as al-Wafa's chief medical advisor, **detainee offered al-Wafa's services to one of**

> **al-Qaida's key anthrax researchers, Yazid Sufaat**, aka (Abu Malik). Detainee met Yazid Sufaat in August 2001, at the Hajji Habash Guesthouse in Kandahar. They proceeded to the al-Wafa office where they discussed Yazid Sufaat's request for assistance in purchasing laboratory equipment. **Detainee told Yazid Sufaat when he traveled to Karachi to contact the al-Wafa office there for assistance in purchasing these items. Detainee also stated he instructed Jamil Qasim in the Karachi office to allocate $4,000 to $5,000 US to assist Yazid Sufaat in purchasing these items.**

Batarfi "denied any knowledge al Wafa's involvement with biological weapons" during questioning at Guantanamo. But on at least one occasion, according to the leaked file, he slipped up. "I am not the only one who knows these *things*," Batarfi said, in reference to al Qaeda's anthrax program and other biological and chemical weapons efforts. (An astute analyst remarked in the file: "Detainee's statement that he is 'not the only one' who knows about the biological weapons is a contradiction to his statement that he had no knowledge of them.")

Other detainees at Guantanamo tied Batarfi to al Qaeda's anthrax scientist, Yazid Sufaat, as well. One told authorities that Batarfi gave Sufaat the telephone number of a "microbiology student" in Pakistan who Sufaat "was to contact for funding assistance."

Then there is Batarfi's mentor, Doctor Amer Aziz, who is said to have "personally treated" Osama bin Laden. (Batarfi himself was close to bin Laden during the battle of Tora Bora and attended to the wounded there.) Analysts at Guantanamo wrote:

> Doctor Aziz also stated that he and detainee attended a luncheon with UBL hosted by al Qaida military commander Abu Hafs al-Masri. Doctor Aziz is suspected of having connections to the al-Qaida chemical, biological, radiological, and nuclear (CBRN) programs.

The recently leaked assessment of Batarfi was written less than one year prior to President Obama's creation of the Guantanamo Review Task Force. It is this task force that Brennan said "concluded there is no basis" for Wolf's "allegations."

But even before the leaked April 29, 2008 threat assessment came to light, Brennan's response was curious, to say the least.

As explained here last year, three declassified memos prepared for Batarfi's case at Guantanamo – dated October 31, 2005, November 28, 2006, and December 28, 2007 – all contained allegations involving Batarfi's involvement with al Qaeda's anthrax operation. For example, the December 28, 2007 memo contains this sentence: "The detainee was identified as being a past participant in Al Qaeda's anthrax program and as having ties to al Qaeda."

During hearings at Guantanamo, Batarfi attempted to downplay these suspicious connections but nonetheless admitted he met with a "Malaysian microbiologist," who was in fact Yazid Sufaat. During one hearing at Gitmo, Batarfi admitted:

> ...I told the Malaysian microbiologist, if you want to purchase the $5000 worth of items for the lab it is better to purchase it through al Wafa and you give the money to Afghanistan to me and then send it to Pakistan because it is unsafe.

Returning to the leaked threat assessment we find that intelligence officials concluded Batarfi "interacted with individuals tied to the al-Qaida CBRN program." While providing a "vast amount of information about himself and others," JTF-GTMO's analysts and interrogators found, Batarfi "still has information yet to be exploited about himself, the individuals he has already reported on, and probably many others."

U.S. intelligence analysts suspected that Batarfi was withholding information about his contacts with 9/11 mastermind Khalid Sheikh Mohammed, his mentor Amer Aziz (who was suspected of ties to al Qaeda's chemical and biological weapons program), and "his involvement with the Ayman al Zawahiri directed anthrax program."

For all of these reasons, and more, Batarfi was deemed a "high risk" who is "likely to pose a threat to the US, its interests, and allies" by the JTF-GTMO team. Batarfi was also considered to be of "high intelligence value."

Regardless, Batarfi was transferred to Yemen just before the Christmas Day 2009 terror attack on Flight 253. Subsequently, the Obama administration suspended all transfers to Yemen, which is home to the most dangerous al Qaeda affiliate on the planet: al Qaeda in the Arabian Peninsula.

In justifying the transfer, John Brennan claimed that President Obama's Guantanamo Review Task Force "thoroughly reviewed all information available" on Batarfi and found no ties to al Qaeda's anthrax program. Four memos prepared at Guantanamo and Batarfi's own indicate otherwise.

Congressman Wolf was right to challenge Brennan on the intelligence surrounding Batarfi. We are left to ask: Did the Guantanamo Review Task Force rewrite the threat assessment on Batarfi such that it excluded the provocative details of his ties to al Qaeda's anthrax program? And if so, why?

Thomas Joscelyn is a senior fellow at the Foundation for Defense of Democracies.

Newsweek

Next Stop Nowhere

by Michael Isikoff (/authors/michael-isikoff.html) **May 23, 2009**

As part of their efforts to shut down the Guantánamo Bay detention center, Obama Administration officials were poised in late April to make a bold, stealthy move: they instructed the U.S. Marshals Service to prepare an aircraft and a Special Ops group to fly two Chinese Uighurs, and up to five more on subsequent flights, from Gitmo to northern Virginia for resettlement. In a conference call overseen by the National Security Council, Justice and Pentagon officials had been warned that any public statements about Gitmo transfers would inflame congressional Republicans, according to a law-enforcement official who asked not to be named discussing internal deliberations. Then on May 1, -Virginia GOP Rep. Frank Wolf got tipped off. Furious, he fired off a public letter to President Obama, charging that the release of the Uighurs—Muslim separatists opposed to the Chinese government—could "directly threaten the security of the American people." White House officials were not happy. One called Wolf's chief of staff and accused his boss of playing politics. "Now we know how you're going to play this," Jim Papa, chief Obama liaison to the House, said during the conversation, according to Wolf staffer Dan Scandling. (Papa did not comment; a White House official said there were multiple briefings for Wolf's office.) The flight never took off.

The blowup illustrates the challenge Obama faces to meet his goal of shuttering Gitmo—a problem that grew last week when the Senate voted 90-6 to strip money for the closure from a funding bill. "This may be harder than health care," said one senior official, who also requested anonymity. A federal court has ordered the release of Gitmo's 17 remaining Uighurs. But they can't be returned to China because they would likely be tortured or executed. Sending them to northern Virginia seemed to make sense: a -Uighur community is located there, and Wolf has been a critic of China's human-rights record and has championed the Uighur cause. But Wolf told NEWSWEEK he fears the detainees might attack Chinese diplomats in D.C. "Let them go to some other country," he said.

So far, there are no takers. Since Albania accepted five in 2006, the Pentagon has been rebuffed repeatedly by other countries. Last week the State Department asked Germany to resettle nine Uighurs. But its government is expected to stall until after a September election, if not longer, according to a European diplomat who asked not to be identified. The Germans, the official said, "want the U.S. to take Gitmo detainees first." That could be a long time coming.

The Washington Post

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Guantanamo Bay: Why Obama hasn't fulfilled his promise to close the facility

By Peter Finn and Anne E. Kornblut,
Published: April 23

The sputtering end of the Obama administration's plans to prosecute Khalid Sheik Mohammed in federal court came one day late last month in a conversation between the president and one of his top Cabinet members.

Attorney General Eric H. Holder Jr. had called President Obama to inform him that he would be returning the case to the Defense Department, a decision that would mark the effective abandonment of the president's promise to close the military detention center at Guantanamo Bay, Cuba.

During the call, Obama did not press Holder to find a way to resurrect the federal prosecution of Mohammed and four co-defendants, according to senior administration officials familiar with the conversation. He did not object. Instead, he called it a pragmatic decision.

It was a fittingly quiet coda to the effort to close the military detention center. For more than two years, the White House's plans had been undermined by political miscalculations, confusion and timidity in the face of mounting congressional opposition, according to some inside the administration as well as on Capitol Hill. Indeed, the failed effort to close Guantanamo was reflective of the aspects of Obama's leadership style that continue to distress his liberal base — a willingness to allow room for compromise and a passivity that at times permits opponents to set the agenda.

The president answered questions about his Guantanamo policy when asked, but only once in two years, other than in a major speech at the National Archives, did he raise the issue on his own. Guantanamo was competing with other legislative priorities, particularly health care, that consumed most of the administration's attention.

"During 2009 and early 2010, he is totally engaged in the struggle to get health-care reform," a White House participant said when asked about the president's engagement with the effort to close Guantanamo. "That occupies his mind, and his time."

Obama has conceded that Guantanamo will not close anytime soon. "Obviously I haven't been able to

make the case right now, and without Congress's cooperation, we can't do it," he said this month in an interview with the Associated Press. "That doesn't mean I stop making the case."

Administration officials lay blame for the failed initiative on Congress, including Democrats who deserted the president, sometimes in droves. The debate, they said, became suffused with fear — fear that transferring detainees to American soil would create a genuine security threat, fear that closing Guantanamo would be electoral suicide. Some Democratic lawmakers pleaded with the White House not to press too hard, according to administration officials.

The White House asserts it was fully engaged in the effort to close Guantanamo.

"Any claim that the White House didn't fight to close Guantanamo is just flat wrong," spokesman Tommy Vietor said.

This account of the unraveling of Obama's pledge to close Guantanamo is based on interviews with more than 30 current and former administration officials, as well as members of Congress and their staff, members of the George W. Bush administration, and activists. Many of them would speak about internal or sensitive deliberations only on the condition of anonymity.

The one theme that repeatedly emerged in interviews was a belief that the White House never pressed hard enough on what was supposed to be a signature goal. Although the closure of Guantanamo Bay was announced in an executive order, which Obama signed on Jan. 22, 2009, the fanfare never translated into the kind of political push necessary to sustain the policy.

"Vulnerable senators weren't going out on a limb and risk being Willie Hortonized on Gitmo when the White House, with the most to lose, wasn't even twisting arms," said a senior Democratic aide whose boss was one of 50 Democrats to vote in 2009 against funding to close Guantanamo. "They weren't breathing down our necks pushing the vote or demanding unified action."

"The one thing we could never figure out is who was in charge of it," said a senior Republican staffer on Capitol Hill, whose boss, a senator, was initially supportive of the goal of closing Guantanamo. "Everybody seemed to have a piece of it, but nobody was in charge of it."

It was often assumed on the Hill and elsewhere that White House counsel Gregory B. Craig was in charge, but he rejected that characterization in an interview and said he was pushing the boundaries of his office to be as involved as he was.

"There was a real serious problem of coordination in this whole thing," Craig said. "No one was coordinating."

The White House, often without much internal deliberation, retreated time and again in the face of political opposition.

"At each turn, when faced with congressional opposition, the instinct was to back off, and the result was not what the White House hoped," said a senior U.S. official involved in Guantanamo policy. "We kept retreating, and the result was more pressure to retreat more."

Executive order: One year till closure

On Obama's inauguration night, when the new administration instructed military prosecutors to seek the suspension of all proceedings at Guantanamo Bay, defense lawyers at the base formed a boisterous conga line.

"Rule of law, baby!" they shouted.

The celebrations, though, were short-lived.

While the Pentagon had plans to close the detention center on the books for several years, the logistics of finding a replacement facility were difficult, to say nothing of the politics. Additionally, the legal process by which Guantanamo would be emptied presented formidable challenges.

The executive order signed by Obama established a task force to review the case of every detainee — there were 241 when he took office — and recommend what should happen to them. But the issue proved highly controversial.

The president's liberal base, as well as civil liberties groups, had long pressed for a system by which detainees would be prosecuted or transferred out, ending indefinite military detention and jettisoning military commissions in favor of federal courts, also called Article III courts.

But the executive order did not rule out military commissions.

Anthony Romero, executive director of the American Civil Liberties Union, immediately wondered about "ambiguities . . . regarding the treatment of certain detainees that could either be the result of the swiftness with which these orders were issued or ambivalence within the Obama administration."

Indeed, within the administration, which had held extensive discussions during the transition with Bush administration officials about Guantanamo, there was uncertainty about the possible need for continued use of military detention or military commissions.

But what the administration took as something of a certainty was that there was bipartisan support to close Guantanamo.

Bush, after all, had expressed a desire to close Guantanamo. And Sen. John McCain (Ariz.), the Republican candidate for president, spoke during the 2008 campaign about closing the detention center in Cuba and moving the detainees to Fort Leavenworth in Kansas.

Just before Obama's inauguration, Craig briefed senior congressional leaders, including then-House Minority Leader John A. Boehner (R-Ohio), on the incoming president's plans.

"There were good questions, and I thought I answered the questions pretty well," Craig said. "I felt comfortable."

Under Obama's executive order, the administration had one year to close Guantanamo.

Hitting a roadblock in Northern Virginia

The first concrete step toward closing the detention center was agreed upon during an April 14, 2009, session at the White House. It was to be a stealth move.

With chief of staff Rahm Emanuel at the helm of the meeting, senior national security officials agreed that eight of the 17 Uighurs being held at the off-shore facility would be resettled in the United States, most in Virginia. The Chinese Muslims would be brought in two at a time; the first two to come were chosen, in part, because they could speak reasonably good English and were likely to make a good impression given the intense media attention they probably would draw.

The transfer seemed like an uncontroversial move. The Bush administration had concluded that the Uighurs, although accused of separatist activities by Beijing, were not enemies of the United States, and a federal judge had ordered their release the previous October. The FBI and the Department of Homeland Security had expressed some qualms about being able to monitor them fully in the United States, but those were quickly overcome.

Within the administration, the transfer was seen as critical to efforts to persuade European and other governments to resettle Guantanamo detainees. Indeed, some European governments, including Germany, said they wanted to see at least a symbolic resettlement in the United States before they would accept detainees.

"They were going to show up here, and we were going to announce it," said one senior official, describing the swift, secretive operation that was designed by the administration to preempt any political outcry that could prevent the transfer.

But before the plane could leave Cuba, word leaked to Rep. Frank R. Wolf that Guantanamo detainees were on their way to his district in Northern Virginia. Wolf, a Republican, had not been briefed on the matter by the White House, despite his history of defending the Uighur community in his district, and was infuriated by the move.

He faxed a letter to the Obama administration and released it to the news media, declaring that the "American people cannot afford to simply take your word that these detainees, who were captured training in terrorist camps, are not a threat if released into our communities."

The outrage from a single congressman was enough to spook the Obama administration, which quickly shelved its Uighur plan. Craig as well as a current senior official and a former senior official said they don't know who stopped the transfer.

"They did not reconvene the principals," Craig said. "They did not have a meeting in the Oval Office to discuss this and change the direction. It just happened: 'We're not doing it.' "

In fact, the transfer was stopped by Emanuel, according to officials familiar with Emanuel's thinking. They said he and other senior West Wing aides did not think they could overcome congressional opposition after hearing Wolf's outcry.

Others argued that the White House was simply not prepared to wage full battle with Congress over Guantanamo. Obama had been in office only four months, and he had too much else to do.

A definitive vote against funding

In late April, Obama heard some jarring news during a Situation Room meeting with the interagency task force reviewing the case of every detainee at Guantanamo.

The president asked Matthew G. Olsen, the Justice Department lawyer heading the task force, approximately how many Guantanamo detainees could be prosecuted, according to administration officials.

Probably fewer than 20, Olsen said.

The president seemed peeved that the number was so small, in contrast with the optimistic predictions during his election campaign that nearly all of the remaining detainees could face trial or be transferred. The number would eventually rise to 36, but even that low figure came as a shock to Obama aides who had been counting on a cleaner sweep.

White House officials were in such disbelief that they asked Justice Department participants to write up a memo explaining exactly why they couldn't bring more of the men to trial. In many cases, the intelligence gathered on the men was not court-worthy evidence.

But a bigger surprise was yet to come.

On May 20, 2009, as part of a war-funding request, the Senate voted 90 to 6 against appropriating $80 million to close Guantanamo. "Americans don't want some of the most dangerous men alive coming here," Senate Minority Leader Mitch McConnell (R-Ky.) said on the floor of the chamber, adding that he commended Senate Democrats for "fulfilling their oversight responsibilities."

Senior administration officials said they were stunned by the vote. In hindsight, officials said, they should have taken the budding Republican narrative more seriously. "We weren't very effective at rebutting it," one senior official said.

"I got calls all the time: 'Where are you guys?' 'Why aren't you up here working the issue?' " Craig said.

Obama had already been preparing to deliver a major address on Guantanamo the next day at the National Archives.

Inside the administration, there was some expectation that the speech could help change the story line away from the Senate vote — and put Obama on the offensive again. "We thought we could draft off of that," said one official, who hoped the momentum from the Archives address would help drive a strategy toward closing the facility in the months ahead.

But the Archives speech reflected the difficulty of the issue. In it, the president described a five-pronged approach to handle detainees and close Guantanamo: federal prosecutions, military commissions, court-ordered releases, transfers home or to third countries, and prolonged detention for those who could not be prosecuted but were too dangerous to release.

The embrace of military commissions irritated Obama's Democratic liberal base, and the acceptance of some indefinite detentions without trial was anathema to large sections of the human rights and civil liberties community.

On top of it all, the speech was quickly overshadowed.

Shortly after Obama finished speaking, former vice president Dick Cheney addressed the American

Enterprise Institute and launched a blistering attack on the administration's national security policies, blunting Obama's message.

"I think the president will find, upon reflection," Cheney said, "that to bring the worst of the worst terrorists inside the United States would be cause for great danger and regret in the years to come."

'The plan' never gets off the ground

Doubts were beginning to creep into the White House. In June 2009, Congress, as part of a supplemental war-funding bill, banned the transfer of Guantanamo detainees into the United States except for prosecution.

Without funding, and without the ability to immediately start the process of acquiring and refurbishing a prison, the one-year deadline was looking unachievable. "By the time he spoke at the National Archives, the prospect of getting it done by the end of the year was very slim," Craig said.

Moreover, the polling on Guantanamo was worrying some of Obama's political advisers. Public disapproval of Obama's decision to close the facility was creeping steadily up, and by June had reached 50 percent, up from 39 percent when he took office.

"They told Obama, 'You can fight this, and you'll lose, and it'll spill over into everything else,' " one administration official said, referring to the president's political advisers.

With Congress demanding a blueprint in order to release funds to close Guantanamo, the White House set about preparing what became known internally as "the plan."

The goal was not only to create a set of documents detailing the closure sequence but to roll out the effort with national security heavyweights such as Gen. David H. Petraeus, then commander of the U.S. Central Command.

"I am working seriously on it with folks," Craig said. "We thought there would be a moment some time in the fall where we could say: Here is how many people we are going to bring in, here's how many people we are going to try, here's where we think the military tribunals will be and here's how much money we need to do it."

The administration also worked with Congress to reform military commissions, and provide more due process to detainees, an effort that led to the passage of 2009 Military Commissions Act in October. Officials also zeroed in on a state prison in Illinois to hold the detainees.

In the end, however, the plan never emerged, lost in uncertainty about when and how to release it.

"It's as if the wind just dies away," an administration official said.

Efforts to bring a 9/11 figure to trial

There were still glimmers of fight. When the ability to use federal courts to try Guantanamo detainees was threatened by Congress, the White House political machine kicked into gear.

In fall 2009, Sen. Lindsey O. Graham (R-S.C.) led an effort designed to bar the administration from

putting Khalid Sheik Mohammed and four co-defendants on trial in federal court. With Holder on the brink of announcing just such a prosecution, the White House fought to kill the measure, and the Senate rejected it in a 55 to 45 vote.

"The administration engaged hard," said Chris Anders, senior legislative counsel for the ACLU, which opposed the Graham measure.

A second crippling amendment, proposed by Sen. James M. Inhofe (R-Okla.), was also defeated. "We thought we were darn close to closing Guantanamo," a senior administration official said.

On Nov. 13, Holder announced at the Justice Department that Mohammed and his co-conspirators would be tried in a Manhattan federal courthouse less than a mile from Ground Zero. It was the boldest act yet by the Obama administration. "Our nation has had no higher priority than bringing those who planned and plotted the attacks to justice," the attorney general said.

In New York, the decision was initially welcomed by the city's leadership. "It is fitting that 9/11 suspects face justice near the World Trade Center site where so many New Yorkers were murdered," Mayor Michael R. Bloomberg said.

But within just two months, the prosecution collapsed. At the Justice Department, officials thought they had been sandbagged by inflated security estimates made by the New York Police Department, and exaggerated concerns about disruption to the life of the city. NYPD Commissioner Ray Kelly spoke about creating security rings around the courthouse at an annual cost of approximately $200 million.

In New York, there was anger that when Bloomberg was facing increased local opposition to the trial, the administration was silent and did nothing to help him, despite pleas from City Hall that someone in Washington should speak up to ameliorate public concerns.

By the end of January 2010, the sense of dismay inside the administration was profound.

Emanuel turned to Graham to help resurrect the Guantanamo policy. In exchange, the senator — who supported closing Guantanamo and had met with Obama about it even before the inauguration — insisted on legislation creating an overarching detention framework for future captures.

Bob Bauer, brought in to replace Craig as White House counsel, led the negotiations alongside Emanuel, conducting a series of meetings at the White House and on Capitol Hill through the first part of 2010. Both sides talked about a "grand bargain"— a comprehensive piece of legislation that would close Guantanamo, give new legislative backing to law-of-war detention, allow some federal trials of Guantanamo detainees but send the prosecution of Mohammed back to a military commission.

"We negotiated very strongly and heavily about the pathway forward," said Graham, adding that he met with the president two or three times on the subject.

"I think what the president misunderstood is there was an anxiousness about these defendants in America," Graham continued. "Polls would ask, 'Should we close Guantanamo Bay?' and [support] got up to 60 percent. But underneath that, people still wanted to be reassured they would be safe."

The only way to fix that, Graham thought, was to create a framework in which terrorism suspects like

Mohammed would be tried by military commissions, something the administration would not sanction.

From the administration's perspective, negotiating with Graham was a long shot. Some Democrats were furious that the administration was now contemplating what they saw as an about-face.

And so, like so many previous efforts, the negotiations simply withered. By May, the discussions with Graham were over. "I was never told why," Graham said. "I guess it got to be too hard a sell."

Military commissions are revisited

In August 2010, the Defense Department began to advocate forcefully for a full resumption of military commissions. A handful of cases that had been charged and referred under the Bush administration had proceeded at Guantanamo, but Defense Secretary Robert M. Gates had put a hold on the swearing of new charges. Senior defense officials argued that unless commissions resumed, and quickly, the Pentagon would start to lose key military prosecutors who in some cases had devoted years to building cases that were now in limbo.

At an Aug. 10 meeting of the National Security Council, defense officials made their case. Secretary of State Hillary Rodham Clinton responded with what one official called a "fairly elaborate speech" arguing forcefully against any piecemeal return to military commissions. The Guantanamo policy, she said, needed a comprehensive approach that followed the road map set down by the president in the National Archives speech.

Any resumption of military commissions, she said, must be accompanied by federal trials. Otherwise, she said, it's going to look like "we're not closing Gitmo," one participant said.

To the surprise of some in the Situation Room, Gates seemed to relent, saying that commissions and federal trials should operate in tandem, like "two wheels on a bicycle."

But, Gates said, he wanted to be able to lift the hold on commissions in 90 days. What was needed, he said, was a plan.

Holder said he was working on a fresh one. The attorney general continued to study the possibility of bringing Mohammed to trial in the Southern District of New York, even if not in New York City. Surreptitiously, he sent his then chief of staff, Kevin Ohlson, to see if a federal prison in Otisville might work as a venue. Under the guise of a visit to his family in the area, Ohlson dropped by the prison as if it were a routine check on behalf of the Justice Department.

Ultimately, Holder and other Justice officials concluded that the politics of moving to Upstate New York would probably be no better than they were in Manhattan.

The administration began to consider what some called the "no name strategy." A number of detainees, through their lawyers, had expressed an interest in reaching plea agreements with the government. Of the six cases prosecuted in military commissions at Guantanamo, four had ended in pleas with relatively mild sentences.

Some in the administration began to advocate doing a series of deals in federal court in which detainees would be brought into New York or Virginia with a plea agreement already in hand.

"The idea was you could do five or six successful Article III cases, and then go to KSM," said an administration official, using the common abbreviation for Mohammed.

But the Justice Department was reluctant to start moving on other cases until the trial of the one Guantanamo Bay detainee who had already been brought into the United States was over.

Ahmed Ghailani, a former high-value detainee at Guantanamo Bay, was charged with multiple counts of murder and attempted murder for his alleged role in the 1998 bombings of U.S. embassies in East Africa. Ghailani was first moved to Manhattan in June 2009, and his trial began in October 2010.

"We were watching the trial like hawks," the administration official said. Prosecutors assured nervous officials in the administration that despite some setbacks in rulings by the judge, they would secure a conviction.

On Nov. 17, a jury found Ghailani guilty of conspiracy to damage or destroy U.S. property, but acquitted him of 284 other counts, including all the murder charges. Although Ghailani ended up getting a life sentence in January, the optics for the administration were terrible. Critics seized on the number of acquittals and said an al-Qaeda terrorist almost got off.

The only plan that remained viable was doomed.

Avoiding a showdown with Congress

In December, in the provisions of a major defense bill, Congress imposed the tightest restrictions yet on the handling of Guantanamo detainees, barring the administration from bringing any into the United States even for prosecution.

To some in the administration, by attempting to dictate prosecution decisions, Congress had clearly stepped on an executive prerogative, and they wanted the president to declare the provision unconstitutional in a signing statement in which he would indicate that he was not bound by certain provisions.

Another lively internal administration debate arose about the degree to which the administration should challenge Congress. Some officials were skittish about employing a maneuver — the signing statement — that the president had criticized the Bush administration for using to disregard the parts of laws it didn't like. Others argued that Congress's action was so clearly unconstitutional it had to be challenged, according to administration officials.

In the end, Obama called the restrictions a "dangerous and unprecedented challenge" to the executive branch, but he stopped short of saying he could lawfully ignore them.

There would be no standoff with Congress.

In March, Obama signed an executive order creating review procedures for detainees whom it planned to hold indefinitely and without trial.

Administration officials insisted that the president was still committed to closing the detention center, although Obama made no mention of that goal in a short statement. But he did endorse federal trials. "I strongly believe that the American system of justice is a key part of our arsenal in the war against

al-Qaeda and its affiliates, and we will continue to draw on all aspects of our justice system — including Article III courts," he said.

Inside the administration, there was much less confidence. Over several weeks in March, Holder informed Cabinet officials of his conclusion that congressional restrictions on bringing Guantanamo Bay detainees into the United States made a federal trial all but impossible for the 9/11 defendants. Holder decided that after years of delay, it would be politically untenable to wait any longer before bringing Mohammed to justice, especially with the 10th anniversary of the Sept. 11 attacks approaching.

Less than a month later, on the the day Obama announced that he would seek reelection, a clearly crestfallen Holder took to the lectern at the Justice Department to scuttle the federal prosecution of Mohammed, which he once expected would be the "defining event" of his time at the helm of the department.

Mohammed is to be tried at Guantanamo in a purpose-built courthouse, just a few miles from the camps that continue to hold 172 detainees.

Staff researcher Julie Tate contributed to this report.

COVER STORY

The Prisoners' Dilemma

Bowing to political reality, the Obama administration has abandoned its plans to close the detention facility at Guantanamo Bay. Surprisingly, many legal experts think that's a very good decision.

by **Vochi J. Dreazen**
Updated: March 7, 2011 | 3:21 p.m.
March 3, 2011 | 5:30 p.m.

JOHN MOORE/GETTY IMAGES

Never mind: Guantanamo is open for business two years after President Obama said it would be closed within a year.

GUANTANAMO BAY NAVAL BASE, Cuba—On a rainy morning in late February, Navy personnel escorted Noor Uthman Muhammed, accused of terrorism, into a heavily fortified military courtroom here. Muhammed's civilian defense attorney, a prominent corporate lawyer named Howard Cabot, walked over to his client to say hello. A few minutes later, Navy Capt. Moira Modzelewski, the judge hearing Muhammed's case, strode into the courtroom. Everyone stood, including Muhammed, a slight Sudanese man who has been held at Guantanamo Bay since he was captured in Pakistan nine years ago. "Good morning, everyone," Modzelewski said from the dais at the front of the windowless one-story building. "This military commission is called to order."

Those are seven words that the Obama administration once hoped would never be spoken again. Then-Sen. Barack Obama voted against the Military Commissions Act of 2006, which was designed to give formal sanction to such proceedings. During the 2008 election campaign, candidate Obama regularly denounced the existence of this detention facility and vowed to close it if elected president. Shortly after taking office, President Obama issued executive orders requiring an immediate case review for each of the detainees still held at Guantanamo Bay and formally

declaring that the camp would "be closed as soon as practicable, and no later than one year from the date of this order."

More than two years later, the Guantanamo Bay prison remains open for business, and administration officials have publicly conceded that the government will continue to use the facility well into the future. Speaking to the Senate Intelligence Committee in February, CIA Director Leon Panetta said that fugitive Qaida leaders Osama bin Laden and Ayman al-Zawahiri would be taken "to Guantanamo" if they were captured alive. Defense Secretary Robert Gates separately told lawmakers, "The prospects for closing Guantanamo, as best I can tell, are very, very low."

In fact, the pace of activity at Guantanamo will sharply accelerate in the months ahead.

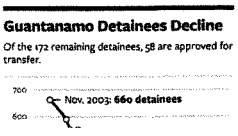
Gates issued a formal directive in early 2009 barring new military commission proceedings for any detainees except Muhammed and a handful of other "legacy cases." Senior Defense officials told *National Journal,* however, that the secretary will lift the ban in coming days, paving the way for military prosecutors to proceed with cases against dozens of Guantanamo detainees. The government could bring initial charges against a handful of high-profile inmates within weeks, according to Navy Capt. David Iglesias, one of the lead prosecutors in the Pentagon's Office of Military Commissions.

"We're moving ahead and would be prepared to open new commission proceedings quickly if the stand-down order is lifted," Iglesias said in an interview. "There wouldn't be much lag time."

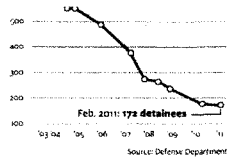
"THE LEAST-WORST PLACE"

Perhaps the only thing more surprising than the Obama administration's growing acceptance of Guantanamo Bay is the emerging consensus in legal circles that keeping the facility open—and holding new trials here—may well be the best available option for dealing with detainees from the ongoing war on terrorism.

A growing number of legal experts, including many who once advocated shuttering the facility, argue that procedural changes have made the military-tribunal process much fairer; it is now harder for prosecutors to introduce hearsay or evidence gathered from the brutal interrogation of other detainees. Analysts and advocates also point to a pivotal Supreme Court ruling in 2008 that gave Guantanamo detainees the right to challenge their continued incarceration before civilian judges.



Politically speaking, legal experts say, the administration has almost no chance of persuading lawmakers to provide the necessary funding for closing



Guantanamo. Legislation authorizing that spending failed to make it through Congress when the Democrats controlled both chambers, and the new Republican majority in the House is almost universally opposed to bringing Guantanamo's 172 detainees to the U.S. mainland. Earlier this month, House Republicans also pushed through a bill that would specifically eliminate the salary of Daniel Fried, the career diplomat who is traveling the world trying to find countries willing to accept freed Guantanamo detainees.

We won't be getting out of the detention business anytime soon." --Benjamin Wittes, Brookings Institution

"Guantanamo Bay circa 2011 is not remotely the same as Guantanamo Bay circa 2002-2004," said Robert Chesney, a law professor at the University of Texas who has written extensively about the detention facility. "In an ideal world, we'd close Guantanamo down because of all of the baggage associated with our prior mistakes there. But this isn't an ideal world, and it's not at all clear that there are any better solutions out there which have a realistic chance of being put into effect."

Benjamin Wittes, a senior fellow at the Brookings Institution and the author of *Detention and Denial: The Case for Candor After Guantanamo*, noted that the U.S. will probably need to hold about 120 of Guantanamo's detainees for the indefinite future, either because they are hardened militants who can't be safely released or because—as is the case with the facility's large population of Yemenis—they can't be returned to their home countries for logistical or security reasons.

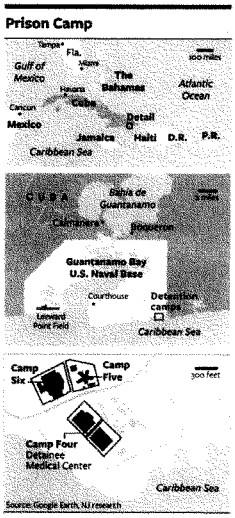
"When you're talking about those kinds of numbers, a place like Guantanamo starts to look a lot better," Wittes said in an interview. "It's stable. It's very professionally run at this point. And the truth is that we won't be getting out of the detention business anytime soon."

Wittes noted that former Defense Secretary Donald Rumsfeld once referred to Guantanamo as "the least-worst place" to hold detainees. "There was a lot of truth to that then," Wittes says, "and there's even more truth to it now."

A LITTLE BIT OF SUBURBIA

The United States has maintained a naval base at Guantanamo Bay, on Cuba's southeastern coast, since the early 1900s. The Navy leases the enormous facility—which extends over 45 square miles of land and water—for $4,085 a year. Washington has been dutifully writing a check in that amount, payable to the Cuban government, since 1934. But Cuban dictator Fidel Castro, who

argues that the lease is illegal under international law, has cashed only one of the checks and keeps the rest stashed in a drawer in his Havana office.



The detention facilities and courtrooms take up only a small portion of the sprawling base, which resembles an American suburb eerily transported to the middle of nowhere. A McDonald's restaurant, complete with drive-through window, sits barely a mile from the courtroom where Muhammed's trial was held. Guantanamo Bay has a golf course and an outdoor movie theater that shows films such as *Tron: Legacy*. The base, which houses about 2,600 troops and their families, also has O'Kelly's, which bills itself as the only Irish pub on Cuban soil.

The U.S. began to send captured Qaida and Taliban militants to Guantanamo Bay in early 2002, shortly after President Bush announced his global war on terrorism. With no place to incarcerate prisoners in Afghanistan, where American forces had dislodged the Taliban, the White House decided that Guantanamo Bay's remote location made it ideal for holding and interrogating detainees about possible future attacks. The base's uncertain legal status was also a plus: Many Bush administration officials believed that the United States could hold detainees there indefinitely without giving them the right to challenge their confinement or even to know what crimes they were accused of committing.

The rest of the world, of course, came to see Gitmo very differently. Photographs of shackled detainees in black-out goggles and orange jumpsuits stunned many foreign leaders and prompted waves of calls to close the facility.

In 2004, the International Committee of the Red Cross sent to the Bush administration a confidential report concluding that the physical and psychological treatment of detainees at the hands of their military interrogators was "tantamount to torture." At least five Guantanamo Bay detainees have killed themselves since 2002, and dozens of others have gone on hunger strikes. The prison's medical facility stockpiles cans of the nutritional supplement

Ensure—in chocolate, strawberry, and butter pecan—so that military doctors can forcibly feed detainees who refuse to eat.

By 2007, Bush and senior members of his administration were routinely speaking of their desire to close Guantanamo, which military and intelligence officials had come to acknowledge was a leading cause of anti-American sentiment throughout the Islamic world and one of al-Qaida's most effective recruiting tools. During the 2008 campaign, Obama's vow to shut the prison attracted virtually no Republican opposition for a very simple reason: The GOP nominee, Sen. John McCain of Arizona, had made the same promise.

After Obama's election, a team led by the Pentagon's top detainee official, Sandra Hodgkinson, was tasked with determining whether it would be possible to close Gitmo and move all detainees to military prisons in the U.S. A person familiar with the team's work said that it examined four possible locations: the Navy brig in Charleston, S.C.; the Army prison at Fort Leavenworth, Kan.; the Marine Corps Base at Camp Pendleton, Calif.; and the Marine Corps Air Station at Miramar, Calif. The team concluded that the incoming administration could meet its 12-month deadline for closing the facility if work got started immediately. The Pentagon conveyed the findings to Obama and his national-security team. Shortly after taking office, the president issued the executive order officially promising to close the prison within a year.

A person who has read the Hodgkinson team's report said, however, that it failed to adequately take into account the political and logistical challenges of closing the Guantanamo Bay detention facility. The group didn't consider whether Congress was likely to provide the necessary funding to build a new prison, and it didn't examine the sheer bureaucratic challenges of doing major construction on domestic military bases, a lengthy process that involves environmental-impact studies and other hurdles, this person said.

By the spring of 2009, the Obama administration was deeply involved in planning a secret effort to resettle a small number of Uighur detainees from Guantanamo in Northern Virginia. The Pentagon had concluded almost six years earlier that the Uighurs, Chinese Muslims locked in a fierce political dispute with Beijing, had no terrorist ties and could be released. But because they could not safely return home, they had been languishing at the detention facility ever since, a situation that the administration decided was unacceptable.

In late April of that year, Obama's national-security team told the U.S. Marshals Service and the Homeland Security Department that the military would soon fly several of the Uighurs to the U.S. The plan was supposed to be kept secret, but Republican Rep. Frank Wolf, whose district is in Northern Virginia, heard about it and went ballistic. In a letter to Obama, Wolf argued that releasing the Uighurs would "directly threaten the security of the American people." His letter was quickly picked up by Fox News and other

conservative media outlets, which used it to argue that Obama was soft on terrorism. The planned flight never left Guantanamo, and the Uighurs are still here.

BOWING TO REALITY

The firestorm over the Uighurs marked the beginning of the end of the White House's hopes of shuttering Guantanamo Bay. Opposition to Obama's plan to move detainees to the U.S. grew steadily in the weeks after Wolf's letter became public. On May 20, 2009, the Senate voted 90-6 to eliminate $80 million that had been budgeted for closing the detention facility. The House had stripped the funding from its own version of the spending bill less than a week earlier.

The Uighur controversy was a "turning point," Wittes said.

"Until the Uighurs, the administration had the wind to its back. The executive orders were well received, and there was a sense of momentum behind the idea of closing Guantanamo," he said. "But suddenly, you began to see Democratic opposition because of 'not-in-my-backyard' concerns and Republican opposition on ideological grounds. The administration started getting asked why they wanted to close down Guantanamo so badly, and they didn't have a compelling answer."

Military tribunals "are an affront to the Geneva Conventions." —Raha Wala, Human Rights First

At the end of that year, the Democratic-controlled House effectively killed the administration's last-ditch plan for a Guantanamo replacement. After months of scouting nonmilitary facilities, officials had settled on the nearly vacant Thomson Correctional Center in rural Illinois. The administration wanted to buy the maximum-security prison and upgrade its defenses so it could safely house Guantanamo's detainees. But when the White House asked the House Appropriations Committee for $200 million to fund the project, the panel summarily rejected the request.

Opposition to closing Guantanamo has continued to build, in part because of other administration missteps. In November 2009, Attorney General Eric Holder announced that the U.S. would try Khalid Shaikh Mohammed, accused of masterminding the September 11 terrorist attacks, in federal District Court in New York City. Republicans cried foul, arguing that the extensive security measures required would paralyze the city and cost as much as to $1 billion. With public opinion running strongly against the idea, Obama aides have indicated that the president is virtually certain to eventually order that Mohammed be tried before a military tribunal.

DISSENTING VOICES

Still, the legal community is not unanimous in thinking that Guantanamo is the best place for trying suspected terrorists. Raha

Wala is an expert with Human Rights First who has observed multiple commission hearings at Guantanamo. He believes that the military-tribunal system is "fundamentally flawed" and that federal criminal court would be a far better—and more effective —venue. Wala points out that civilian prosecutors can charge suspected militants with conspiracy, material support for terrorism, and a range of other related offenses. Military tribunals, by contrast, are typically reserved for serious violations of the laws of armed conflict. Conspiracy and material support for terrorism have never been considered war crimes, Wala says.

"Attempts to rewrite the laws of war now are not only an affront to the Geneva Conventions but also constitute ex post facto punishment (creating a crime to fit acts already committed), which is prohibited under international law and the U.S. Constitution," he wrote in an e-mail.

Wala noted that civilian prosecutors have won more than 400 convictions for terrorism-related offenses since the September 11 attacks; the military-tribunal system at Guantanamo has convicted only six detainees, including Muhammed.

"The numbers speak for themselves," Wala said while visiting Guantanamo last month.

Other legal experts say that the government should maintain Guantanamo Bay, just not in its current form. Eugene Sullivan, a former chief judge for the U.S. Court of Appeals for the Armed Forces, and former FBI Director Louis Freeh believe that the best solution would be for Congress to approve the creation of a new federal criminal court at Guantanamo; the government would fly civilian jurors in from the mainland for trials. Such a system, they contend, would give detainees access to the legal protections enshrined in the American judicial system while avoiding the disruptions and expenses that would come from holding terrorism trials in urban areas.

"You could give the detainees the benefit of a jury trial but do it in a safe, secure, and remote environment," Sullivan said in an interview. "There's no need to invent a new system of justice; the one we have can easily be adjusted to accommodate these kinds of cases."

But some Guantanamo critics do want to invent an entirely new way of trying terrorism suspects. In 2008, Neal Katyal, then a Harvard law professor best known for winning the Supreme Court case that struck down the military-commission system, and Jack Goldsmith, an assistant attorney general in the George W. Bush administration, proposed creating a "national-security court" in which federal judges with lifetime tenure would rule on whether the government could detain a suspected terrorist without a formal conviction.

Detainees would have defense lawyers with top-level security clearances and would be able to periodically challenge their

incarceration. But prosecutors would have more power than in existing civilian courts, including the ability to use some hearsay evidence and material gathered from interrogations that took place before a suspect was given a Miranda warning.

Katyal now serves as the Obama administration's acting solicitor general, the government's top lawyer. It's not clear what his Justice Department and White House bosses think of the Katyal-Goldsmith proposal. Many close observers of the military-commission process doubt that such a court is likely.

Sullivan said he received "several calls from people connected to the White House." He declined to detail whom he spoke to or how they responded to his proposal, however, and he acknowledged that the government shows no signs of moving toward creating a criminal court at Guantanamo.

Matthew Waxman, a Columbia law professor who was the first deputy assistant secretary of Defense for detainee affairs in 2004-05, said that the government probably won't close or substantially alter Guantanamo in the near term. He noted that the Supreme Court decision giving detainees the right to challenge their incarceration effectively blessed the continued operation of the military-tribunal system; Congress has blocked all efforts to close the prison; and even the White House has been steadily backing away from the idea.

"One could say that we've reached a point where all three branches of the U.S. government have now essentially signed off on Guantanamo, despite the continuing public controversy about the camp and the massive political opposition to it," Waxman said in an interview. "It's easy to say, 'Let's close Guantanamo.' It's hard to come up with a good, viable alternative."

GUILTY, GUILTY, GUILTY

For now, Guantanamo's detention system remains largely unchanged. The U.S. has spent nearly $2 billion since 2002 on the detention system here. Most detainees live in communal housing where they have access to PlayStation 3 video-game systems and Arabic translations of the Harry Potter books and *Don Quixote*. On a recent visit, a reporter witnessed a pair of thick-bearded detainees watching a large flat-screen TV with their feet up on the table. Both men wore wireless headsets. The camp's military physicians say that the most common injuries they see result from the detainees' spirited soccer games.

Noor Uthman Muhammed is in fairly poor health, and it seems unlikely that he takes part in the marathon soccer matches. In mid-February, rights activist Wala was among a large contingent of journalists and advocates who flew to Guantanamo Bay aboard a military plane to observe what was expected to be a full military trial for the Sudanese inmate. Shortly after, however, military officials said that Muhammed had decided to plead guilty to a pair

of terrorism-related charges, effectively short-circuiting the trial.

In the courtroom, Modzelewski asked Muhammed, frail in a loose-fitting white jumpsuit, if he understood the charges against him and was comfortable waiving his right to a full trial. Muhammed, whose leg was twitching beneath the wooden desk, quietly answered "na'am"—Arabic for "yes"—in response to each question.

"Your pleas of guilty are provident, and I accept them," Modzelewski said.

The following morning, Modzelewski summoned a 15-person pool of officers from the Army, Navy, Air Force, and Marine Corps who had been summoned to decide how much longer Muhammed would remain in prison. Their backgrounds offered thumbnail sketches of the past decade of war. An Army officer who served in the violent Iraqi city of Samarrah talked about how his roommate was severely burned while trying to pull a wounded soldier out of a burning vehicle. An officer who served in South Korea spoke about a close friend who had been killed in the Pentagon on September 11. In a halting voice, he said he remained in contact with his friend's daughter. "I still send her the occasional Christmas card, just to check in," he said.

Muhammed's military defense attorney asked Modzelewski to strike both officers from the jury, arguing that they had "implied bias" because each had close comrades who had been hurt or killed by al-Qaida, the organization that Muhammed had pleaded guilty to supporting. She did strike them. After a few hours of legal wrangling, nine jurors remained, and Muhammed's military prosecutors began presenting their case.

Navy Lt. Cmdr. Arthur Gaston, one of the lead military prosecutors, said that Muhammed helped create a generation of terrorists during his four years at the Khalder training camp in eastern Afghanistan. Muhammed served as the camp's deputy commander, Gaston said, teaching aspiring terrorists how to select targets and how to use weapons and explosives. He noted that Khalder produced prominent militants such as Ahmed Ressam, the so-called millennium bomber, who was convicted of trying to blow up Los Angeles International Airport on New Year's Eve 1999; Zacarias Moussaoui, who was supposed to be the 20th hijacker on September 11; and Mohamed Rashad Daoud al-Owhali, a terrorist connected to al-Qaida's 1998 attack on the U.S. Embassy in Kenya.

"Terrorists are not born—they are made," Gaston told the jury. "And the accused in this case, Noor Uthman Muhammed, has made hundreds of them."

Cabot, who has been working on the case pro bono for several years, began his defense by showing the courtroom an undated family photo of Muhammed as a young man in Sudan shortly before the deaths of his parents. Muhammed grew up as a destitute orphan, Cabot said, whose primary comfort came from

his deepening Islamic faith. He acknowledged that Muhammed spent several years at Khalder but described him as a "low-level functionary" whose main duties were cooking, cleaning, and running errands. He stressed that Muhammed had never joined the Taliban or al-Qaida and was on his way home to Sudan when a joint team of Pakistani and CIA operatives captured him in a safe house in Pakistan.

"He's not Osama bin Laden," Cabot said. "He's not the living embodiment of al-Qaida."

Cabot's defense did not sway the military jury. On February 19, they sentenced Muhammed, whose beard is flecked with gray and who is believed to be in his mid-40s, to 14 years of additional confinement at the prison. Fortunately for Muhammed, he won't end up serving nearly that much time. His plea deal with the military prosecutors calls for him to spend only 34 more months at Guantanamo Bay, provided that he cooperates with the government when it brings charges against higher-ranking militants such as Abu Zubaydah, who is accused of providing direct operational support to al-Qaida.

After the trial, Cabot told reporters that Muhammed finally had "some certainty in his life" about when he would be able to leave Guantanamo Bay. If everything goes according to plan, the militant will be released in December 2013, more than 11 years after he was first brought to Cuba. The Guantanamo Bay prison will almost certainly remain long after Muhammed returns home to Sudan.

HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

FRANK R. WOLF
TENTH DISTRICT, VIRGINIA

July 21, 2011

Dear Senator Feinstein:

I write to share some additional information for consideration in advance your committee's hearing on Matthew Olsen's nomination to lead the National Counterterrorism Center.

Please do not hesitate to contact me at 202-225-5136 if I can provide any additional information on these serious concerns.

Best wishes.

[SIGNATURE]

Frank R. Wolf
Member of Congress

The Honorable Dianne Feinstein
Chairman
Senate Select Committee on Intelligence
331 Hart Senate Office Building
Washington DC 20510

During a May 7, 2009, Senate hearing, Attorney General Eric Holder said, "With regard to those you would describe as terrorists, we would not bring them into this country and release them, anyone we would consider to be a terrorist."

It is now well known from numerous press accounts, including *Newsweek, The Washington Post,* and *National Journal,* that the Obama Administration's Guantanamo Review Task Force, led by Matthew Olsen, recommended the transfer and release of at least two Uyghur detainees, who were members of a recognized terrorist group, to the United States in April 2009. The secret transfer was to take place on or around May 1, 2009.

The Uyghur detainees held at Guantanamo Bay are trained terrorists and members or associates of the Eastern Turkistan Islamic Movement (ETIM), a designated terrorist group affiliated with al Qaeda, as designated by both the U.S. government and the United Nations. Whether their intended victims were Chinese or Americans, a trained terrorist is a terrorist, under U.S. immigration law.

According to testimony and government documents, many of the Uyghur detainees have admitted to training at ETIM camps in Tora Bora under the direction of ETIM leader Abdul Haq prior to their capture by Pakistani authorities in the Federally Administered Tribal Areas (FATA) of Pakistan.

By recommendation of the task force led by Mr. Olsen, the Uyghur detainees were to be secretly settled in an apartment in northern Virginia under an unknown immigration statute. The immigration status of these detainees remains one of the critical unknown questions surrounding this failed effort. A careful reading of U.S. immigration law shows a broad and strict ban on the entry of any member of a terrorist organization.

As a former special counselor to the attorney general, Mr. Olsen should have been well aware of the strict statutory restrictions that would bar the admission of any alien who is affiliated with a recognized terrorist organization into the U.S. As the Senate Select Committee on Intelligence considers Mr. Olsen's nomination to lead the National Counterterrorism Center, they should carefully consider his judgment in recommending the legally-questionable secret release of the Uyghur detainees into the U.S.

Under Title 8, Chapter 12 of U.S. Code on "Inadmissible Aliens," the law clearly and unconditionally bars a member, representative or associate of a recognized terrorist organization from receiving any sort of visa, refugee or asylum to the U.S. The law prohibits entry to the U.S. for any individual who has "engaged in a terrorist activity" or is "a representative of a terrorist organization," "a political, social, or other group that endorses or espouses terrorist activity," "is a member of a terrorist organization," "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization," or "has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization."

The only limited exception to this strict ban is for the attorney general to exercise "parole" status into the U.S. for a limited amount of time in the case of "significant public benefit." If this option were to be exercised, it would conflict with the administration's stated intent to permanently settle the Uyghur detainees in the U.S. It also would raise serious questions about whether the task force, led by Mr. Olsen, recommended the settlement of terrorist detainees would have "significant public benefit."

The ETIM is a terrorist group that uses violence against civilians for the creation of an independent, Islamic state – in the image of the Taliban's Afghanistan – in the Xinjiang region of China.[1] The group is linked to a number of terrorist attacks in China during the mid-1990s, including several bus bombings that killed dozens and injured hundreds of innocent civilians[2], as well as threats of attacks against the 2008 Olympics in Beijing. Over the past decade, the group has predominantly operated out of Afghanistan and Pakistan and has developed close links with al Qaeda and the Taliban.

On August 19, 2002, then Deputy Secretary of State Richard Armitage designated the ETIM as "a terrorist group that committed acts of violence against unarmed civilians."[3] The group was designated by the State Department under Executive Order 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," which defines terrorist as "activity that (1) involves a violent act or act dangerous to human life, property, or infrastructure; and (2) appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking."[4] In 2004, the State Department further added the ETIM to the "Terrorist Exclusion List" (TEL) under section 411 of the USA Patriot Act of 2001 (P.L. 107-56), which prohibits members of designated terrorist groups from entering into the U.S.[5]

Later in 2002, the U.S. Embassy in Beijing reported that two members of the ETIM were deported from Kyrgyzstan after allegedly plotting to attack the U.S. embassy there.[6] Following the attempted attack, the U.S., Peoples Republic of China, Afghanistan, and Kyrgyzstan asked the United Nations to designate the ETIM as a terrorist group under Security Council resolutions 1267 and 1390, which provide for the freezing of the group's assets.[7]

In April 2009 -- the same month the release of the Uyghur detainees was being planned -- the Obama Administration added the current leader of the ETIM (also recognized as the ETIP), Abdul Haq, to terrorist lists under Executive Order 13224, following U.N. recognition of Haq, under Security Council Resolution 1267, as an individual affiliated with Osama bin Laden, al Qaeda, or the Taliban. According to Stuart Levey, Treasury under secretary for Terrorism and Financial Intelligence, "Abdul Haq commands a terror group that sought to sow violence and fracture international unity at the 2008 Olympic Games in China."[8]

The ETIM's relationship with al Qaeda has grown since it was invited by the Taliban to conduct training in Afghanistan in the late 1990s, followed by the move of the ETIM headquarters from the Xianjang region to Kabul in September 1998.[9] By 2005, Abdul Haq had been admitted to al Qaeda's "Shura Council"[10] and on November 16, 2008, an al Qaeda spokesman "stated that a Chinese citizen named 'Abdul Haq Turkistani' was appointed by Osama bin Laden as the leader of two organizations – 'al Qaeda in China' and 'Hizbul Islam Li-Turkistan.'" This appointment was also confirmed by Abu Sulieman, a member of al Qaeda.[11]

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[1] CBS News Internet Terrorism Monitor. *"East Turkistan Islamic Party Appeals For New Recruits in New Video."* <http://www.cbsnews.com/blogs/2009/04/15/monitor/entry4948735.shtml?source=search_story>

[2] Gunaratna, Rohan and Acharya, Arabinda. *Islamic Terrorist Threats to China.* p. 42

[3] Congressional Research Service. *U.S.-China Counterterrorism Cooperation: Issues for U.S. Policy.* p. 5.

[4] CRS Report. P. 5

[5] CRS Report. P. 6

[6] CRS Report. P. 5

[7] CRS Report. P. 5

[8] U.S. Treasury Department. *Treasury Targets Leader of Group Tied to Al Qaida.* <<http://www.treas.gov/press/releases/tg92.htm>>

[9] Gunaratna. p. 60

[10] CRS Report p. 6

[11] Gunaratna p. 54

It is abundantly clear that the Uyghur detainees held at Guantanamo Bay are affiliated with the ETIM and trained under Abdul Haq in 2001. According to the detainees' sworn statement to U.S. authorities, many acknowledged that they had trained in an ETIM training camp in Tora Bora from June to November 2001 and at least one confirmed, "The person running the camp was named Abdul Haq."[12]

Following the U.S. invasion of Afghanistan in fall 2001 cooperation between the ETIM and the Taliban increased. It is reported that the ETIM's leader prior to Abdul Haq, Hasan Mahsum, "led his men to support Taliban and fight alongside them against U.S. and the coalition forces. On 2 October 2003, Hasan Mahsum was killed, along with 8 other Islamic militants, by a Pakistani army raid on an al Qaeda hideout in South Waziristan area in Parkistan."[13]

Additionally, a January 2008 al Qaeda in Afghanistan publication, "Martyrs in Time of Alienation," identified 120 "martyrs" – including five Uyghurs from Xianjiang and who trained in Tora Bora – who fought with the Taliban in Afghanistan against U.S. troops. One is reported to have been killed fighting U.S. forces during the invasion in 2001.[14] Hasan Mahsum confirmed, prior to his death in 2003, that ETIM members trained and fought with al Qaeda forces in Afghanistan.[15]

In addition to their affiliation in a designated terrorist organization and association with al Qaeda leader Abdul Haq, these detainees fervently believe in the creation of a Taliban-style Islamist state in northwestern China and do not share American values of respect, tolerance, and religious pluralism. In fact, one recent press account stated that, "Not long after being granted access to TV [at Guantanamo], some of the [Uighurs] were watching a soccer game. When a woman with bare arms was shown on the screen, one of the group grabbed the television and threw it to the ground, according to the officials."[16]

Reports indicate that the ETIM's philosophy has dramatically evolved as a result of their training and cooperation with al Qaeda and the Taliban over the last decade. According to two experts, Rohan Gunaratna and Arabinda Acharya, "In the post-9/11 era, ETIM began to believe in the global jihad agenda. Today, the group follows the philosophy of al-Qaeda and respects Osama bin Laden. Such groups that believe in the global jihad do not confine their targets to the territories that they seek to control… [The ETIM] is presenting a threat to Chinese as well as Western targets worldwide."[17]

Although the Uyghur detainees may not have been considered "enemy combatants" by the Obama Administration, U.S. immigration law clearly bars the admission of members of recognized terrorist groups. The Senate should carefully consider the legal steps that Mr. Olsen and his task force recommended be used to bring the ETIM detainees into the U.S. for permanent settlement. If his task force advocated exploiting limited "parole" entry for the detainees with the intended goal of permanent settlement, it would go against the letter and spirit of the law.

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[12] The Guantanamo Docket – The New York Times. << http://projects.nytimes.com/guantanamo/detainees/277-bahtiyar-mahnut#2>>
[13] Gunaratna p. 52
[14] CRS Report. P. 7
[15] Gunaratna. P. 61
[16] Hook, Janet. *"Democrats face hard time over Guantanamo."* Los Angeles Times. <http://www.latimes.com/news/nationworld/nation/la-na-gitmo-politics7-2009may07,0,3870315.story>
[17] Gunaratna. P. 65

Title 8. Chapter 12. Subchapter II. Part II. § 1182. Inadmissible aliens

(a) [redacted]
Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(B) [redacted]
(i) [redacted]

(I) [redacted];

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is [redacted] (as defined in clause (v)) of—

(aa) [redacted] (as defined in clause (vi)); or

(bb) [redacted];

(V) [redacted];

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) [redacted];

(VIII) [redacted]; or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116 (b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), except that the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization.

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit [redacted]

(aa) [redacted] for the commission of a terrorist activity;

(bb) [redacted] should know that [redacted] is committed or plans to commit a terrorist activity;

(cc) [redacted] any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "[redacted] defined As used in this section, the term "terrorist organization" means an organization—

(I) [redacted]

(II) [redacted] in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(F) **Association with terrorist organizations**

[redacted]

(5) (A) The Attorney General may, except as provided in subparagraph (B) or in section 1184 (f) of this title, in [redacted] have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. (B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

Chairman FEINSTEIN. A housekeeping duty, if I may. If you would answer the following questions yes or no, please: Do you agree to appear before the Committee here or in other venues when invited?

Mr. OLSEN. Yes.

Chairman FEINSTEIN. Do you agree to send officials from the NCTC and designated staff when invited?

Mr. OLSEN. Yes.

Chairman FEINSTEIN. Do you agree to provide documents or any other materials requested by the Committee in order for it to carry out its oversight and legislative responsibilities?

Mr. OLSEN. Yes.

Chairman FEINSTEIN. Will you ensure that the National Counterterrorism Center and its officials provide such material to the Committee when requested?

Mr. OLSEN. Yes.

Chairman FEINSTEIN. Do you agree to inform and fully brief, to the fullest extent possible, all members of this Committee of intelligence actions and covert actions rather than only the Chairman and Vice Chairman?

Mr. OLSEN. Yes.

Chairman FEINSTEIN. Thank you very much.

Mr. Olsen, the ranking member brought up the questions that have been raised by a Member of Congress. We discussed them in our meeting. And in your prepared testimony, on page five, you discuss them as well.

You indicate that in April of '09 you were part of a team of officials who provided a briefing about the initial stages of the process of reviewing detainees. And you were authorized during the briefing to discuss the review process. You were not authorized to discuss deliberations or decisions on specific detainees.

And so, in accordance with those rules, you state, on page five, "We provided a full and candid briefing about the detainee review process." So I would like you to address this issue—you have read Congressman Wolf's letter—and address it head on, if you will, for this Committee.

Mr. OLSEN. Yes. Thank you very much, Madam Chairman, and, as well, Vice Chairman Chambliss, for providing me with the opportunity to address those questions that were raised.

Let me just say at the outset that there were essentially, as I understand from Congressman Wolf's letter, two questions or concerns.

One was that we altered threat information—that that information was altered in the course of the task force review and that there was intentional misleading of him during a briefing. And I will say, just at the outset, that neither one of those things occurred. And I appreciate the opportunity to provide additional explanation of that.

First, the question of whether or not threat information was changed or altered over the course of the task force review—the job that I had as the executive Director of the Guantanamo review task force in 2009 was to bring together career professionals and compile all of the information that had been obtained over the course of several years about each detainee—something that hadn't

been done before—and to bring that information together in one place and to give that information a fresh and independent and objective review.

We took that information and under my leadership, and under guidelines that we adopted as part of an interagency effort, we looked at that information. It was my responsibility to ensure that that was done in an impartial and unbiased way, that all the information was reviewed, that it was done with an interagency approach, that every dissenting or disparate opinion or view was fully aired.

And then we took that information and presented it to a group of senior-level decisionmakers, along with our recommendations. And then the decisions were made based on that information by a senior-level group or review panel from six different agencies. The result of that work over the course of a year was that all 240 detainees were given a disposition, and in every single case, every detainee was determined on a unanimous basis on what the appropriate status was of that detainee.

There was never, at any time, any effort to change threat information, to hide from any fact. The explicit guidance—my particular responsibility, I believed, was to follow every fact and be as precise and specific and rigorous in analyzing those facts and then presenting that information to the policy-level decisionmakers.

There were occasions when we looked at facts and looked at them differently than prior assessments had done. In particular, JTF–GTMO—joint task force at Gitmo—had prepared assessments. We looked at those. Those were all part of our information. And in many cases—most cases, I believe—we agreed with those assessments. But there were instances when we looked at those facts and came to different conclusions. But there was never, on any occasion, an effort to change, alter or hide from those facts. Those were all fully aired.

On the second question, if I may—the question of whether or not I intentionally misled Congressman Wolf in a briefing—again, I did not. We met in April of 2009, in his office. I was part of a team from the Department of Justice and the White House that went to brief Congressman Wolf on not just the Guantanamo review task force but all three of the task forces that were set up under the three executive orders issued by President Obama in January of 2009.

This was at the very early stages of our review process. We had really just begun the effort to review the first set of detainees. And it was made clear to Congressman Wolf before that briefing and during that briefing that the ground rules would be that we could discuss the process that we were undertaking to conduct that review, but that we were not authorized to discuss any particular decisions or any specific detainees.

We did, in fact, lay out the process for him, and I understand that now he has expressed concern that he was not given full information about the actual decisionmaking status with respect to the group of detainees known as the Uighurs, the Chinese Uighurs, who were at Guantanamo. I did not discuss, because I was not authorized to discuss or make a unilateral decision as a career De-

partment of Justice official, what the status was of that decision-making process.

I certainly—as I've said to Congressman Wolf in a conversation I had with him on the telephone a few months ago, I understand his frustration and I very much, very much regret that he has the view that I intentionally misled him. And I do hope that if I'm confirmed, I would have the opportunity to regain his trust and work with him in a collaborative and cooperative way, moving forward.

I will say that as a general matter I have been candid, honest and direct in all of my interactions with Congress. I have met many times with staff and Members, particularly of this Committee, over the course of my career as a career government official, not only on the Guantanamo review but also on the FISA Amendments Act and other matters.

And I have taken it as a matter of pride and a deeply held view that I have been honest and candid and direct on all occasions. And as I said, I do hope I have the opportunity to regain the trust of Congressman Wolf and work with him.

Chairman FEINSTEIN. Thank you very much. Mr. Vice Chairman.

Vice Chairman CHAMBLISS. Thanks, Madam Chair.

Mr. Olsen, let me carry that question one step further because, obviously, it's a very, very serious issue when you have a member of Congress who thinks he's been misled. So I want you to have full opportunity to explain it. And I want to quote to you what Congressman Wolf's recollection of the scenario was. In the memorandum that he prepared within the last couple of weeks that I know you've had the opportunity to look at, here's what he says:

He said, "It has recently come to my attention that I was misled about the status of the transfer of the Uighur detainees in April, 2009. This information confirms the Newsweek report that career federal employees were explicitly directed to hide this information from Members of Congress, especially Republican Members. During an April 22nd, 2009, meeting in my office with members of the Guantanamo Bay detainee review task force, including Mr. Olsen, I inquired about the status of the potential transfer of Uighur detainees to the United States."

"Mr. Olsen indicated that a decision had not yet been reached on the transfer of the detainees. None of the other career or political officials in the meeting countered Mr. Olsen's assertion. That is why I was deeply concerned to learn, in an April, 2011, Washington Post article, that the final decision on the transfer of the Uighur detainees had been made during a White House meeting eight days before my meeting with Mr. Olsen.

"According to the Washington Post article, the first concrete step toward closing the detention center was agreed upon during an April 14, 2009, session at the White House. It was to be a stealth move. 'They were going to show up here and we were going to announce it,' said one senior official describing the swift, secretive operation that was designed by the administration to preempt any political outcry that could prevent the transfer.'"

Mr. Wolf goes on, "Following the publication of this article in April, I personally called Mr. Olsen to ask whether he was aware at the time of my meeting with him on April 22nd, 2009, that a decision had already been made on the transfer of the detainees.

He told me that he was aware of the decision prior to our meeting. I believe that I was intentionally misled by Mr. Olsen and other administration officials during my April 22nd meeting with the task force.

"I am also concerned that the Attorney General did not acknowledge that a decision had been made when he appeared before the House Commerce, Justice, Science Appropriations Subcommittee the following day. That's why I was surprised when my office was notified by a career federal employee that the administration was misleading the Congress and planned to secretly transfer the detainees around May 1, 2009."

Now, I understand, Mr. Olsen, you're saying you were not at liberty to discuss the details of any particular detainee, but this goes beyond that. His comments go beyond that. So I want to give you a full opportunity to address exactly what Congressman Wolf remembers about that meeting.

Mr. OLSEN. Yes, thank you very much, Vice Chairman. At the time that that briefing occurred of Congressman Wolf on April 21st or 22nd, there had, at that point, been a decision by senior-level members of the administration—again, our process was to make recommendations to a senior review group. In this case, this went to a very high-level group of senior officials.

And the decision at that point—I think April 14th is the right date; I've gone back and looked at my notes—there had been a decision to take, move, transfer a small number of detainees—Uighur detainees—to the United States. There was not, at that time, a decision on which detainees to move or, as I recall, no decision about where, exactly, they would go. But I remember, at the time of the briefing, that there had actually been, as I said, a decision to move, I think two, detainees—two Uighur detainees—to the United States, to transfer those detainees to the United States.

So at that time, there had been that decision.

The FBI and the Department of Homeland Security, as I recall, were given the responsibility—not my task force; not the Guantanamo task force—to determine which detainees were the right two to move, given a number of considerations, when to do that, under what circumstances, and where they would go. And those efforts were under way.

At no time did I say that there was no decision to Congressman Wolf. I just believe that that is a misrecollection or misperception. I did say that I was not—we were not authorized to talk about specific decisions that were then under way, and I was not authorized to talk about specific detainees.

Again, so I do understand his frustration. I don't—I did not mislead. I was not in a position to decide myself at that time that I was going to lay out exactly where that decisionmaking process was. We had met before that briefing and talked about what we were going to say and what we were going to talk about in terms of the review process. And I do very much regret that he has taken that view and I do understand his frustration with learning through the press later that that decisionmaking process was well under way.

But Senator, that is exactly where that stood on that day. When I briefed Congressman Wolf, there had been a decision to bring two

detainees. They had not been identified as to which ones. And, as I recall, there was no decision about exactly where they would go within the United States.

Vice Chairman CHAMBLISS. In Congressman Wolf's memo, he refers to other career political officials that were in that meeting. Did you go back and visit with those individuals to get their recollection of exactly what was said after Congressman Wolf came forward with this?

Mr. OLSEN. I've talked to others who were part of the preparation for that briefing. I have not talked to—I have talked to other members of that briefing team previously, so several months ago I talked to, because I talked to Congressman Wolf, I think, in April of this year. And around that time, I talked to a number of the individuals who were part of that briefing. And it was—and I think our recollections were the same as to how that briefing went.

Vice Chairman CHAMBLISS. Can you provide the Committee with the names of those other individuals that were in that meeting at that time, within the next 24 hours?

Mr. OLSEN. Absolutely. Absolutely. And the other step I took, Vice Chairman, was to talk to the Department of Justice legislative affairs office. And I believe that the Assistant Attorney General submitted a letter to the Committee along the same lines, that the ground rules for that briefing were that we would talk about the process, but not specific decisions or detainees.

And, in fact, a letter was sent to Congressman Wolf in July of 2009, so three months after the April 2009 briefing, which reaffirmed that decision, and that specific detainees were not the subject on which briefings would occur or had occurred, but that we were able to talk about the process. And so even at that time, in July of 2009, in a letter to Congressman Wolf, that was made clear and presented to Congressman Wolf in a letter from the Department of Justice.

Vice Chairman CHAMBLISS. Thanks, Madam Chair.

Mr. OLSEN. If I may, may I just add one other quick point on this?

Chairman FEINSTEIN. Please.

Mr. OLSEN. Because I really want to address what I understand is an understandable concern from the Committee if I'm confirmed and I'm in a position such as the Director of NCTC.

I believe wholeheartedly that, in that role, that I have an absolute obligation, to the best of my ability, to provide all intelligence information in a full and timely way to this Committee. And I believe, if I am in that position, my authority, my ability to make that judgment in an autonomous and unilateral way, greatly exceeds what it was in April of 2009. And the Committee has my full commitment that I will live up to that obligation.

Chairman FEINSTEIN. Mr. Vice Chairman, there is a letter dated July 22nd signed by Ron Weich, Assistant Attorney General, which clearly states the career officials who provided the briefing, including Mr. Olsen, were authorized by the Department to discuss the review process in general but were not authorized to discussion deliberations or decisions about any specific detainees.

And it goes on to say, "Consistent with the parameters set for the briefing, he did not"—he, being Matt Olsen—"did not discuss

internal decisionmaking or the status of specific detainees." This letter will go in the record and obviously be available.

[The information referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 22, 2010

The Honorable Dianne Feinstein
Chairman
The Honorable Saxby Chambliss
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Madam Chairman and Mr. Vice Chairman:

We understand that a question has been raised about whether Matthew Olsen, a former Justice Department official and the President's nominee to serve as Director of the National Counterterrorism Center (NCTC), provided accurate information during a congressional briefing in April 2009. We are confident that Mr. Olsen did so.

The briefing in question was provided to a Member of Congress in April 2009 in an effort to be forthcoming in the early stages of the Guantanamo Review Task Force process. The career officials, who provided the briefing, including Mr. Olsen, were authorized by the Department to discuss the review process in general but were not authorized to discuss deliberations or decisions about any specific detainees. These ground rules, which are common for matters involving ongoing Executive Branch deliberations, were made known before the briefing. During the briefing, Mr. Olsen adhered to these rules and provided a thorough description of the review process. Consistent with the parameters set for the briefing, he did not discuss internal decision-making or the status of specific detainees.

Three months after the briefing, in a letter dated July 9, 2009, we reaffirmed this point to the Member of Congress: "While we have not been in a position to brief Congress on ongoing Executive Branch deliberations with respect to individual detainees, we were pleased to make available to you and your staff the head of the Guantanamo Detainee Review Task Force to describe the process by which that Task Force is carrying out its work." Since it was clear both before and after the briefing that the career officials were not authorized to discuss internal deliberations or decisions on specific detainees, any assertion that Mr. Olsen lacked candor or was in any way misleading during the briefing is inaccurate and unfair.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance regarding this or any other matter.

Sincerely,

[SIGNATURE]

Ronald Weich
Assistant Attorney General

Chairman FEINSTEIN. The next one up was Senator Conrad and he's not here.

Senator Wyden.

Senator WYDEN. Thank you, Madam Chair.

And Mr. Olsen, thank you for our visit. I appreciated your candor and also your taking extra time to go over and meet in a secure facility so that we could discuss some sensitive matters.

I have been on this Committee for more than a decade now, and I believe this is the first time we've had the top lawyer at the National Security Agency before the Committee in an open session.

Now, I'm not going to get into any details of how the NSA does business. But since you are the chief legal officer at one of the country's largest intelligence agencies, it's safe to say that you are an expert on surveillance law.

So I'd like to begin by asking a few questions about several areas of surveillance law and about how you and your colleagues have interpreted the laws so that we can get some of this information on the public record.

The first question is, would you agree that key portions of the USA PATRIOT Act have been the subject of significant secret legal interpretations and that these interpretations are secret today?

Mr. OLSEN. Senator Wyden, thank you. If I may just say at the outset, I did appreciate the opportunity to talk to you in both your office and in the classified setting to talk about some of these matters. And I appreciate your ongoing interest and concern about them.

The direct answer to your question is that there are provisions of the PATRIOT Act that are the subject of matters before the Foreign Intelligence Surveillance Court, a court that, by design, meets in a classified setting. And some of the pleadings and opinions that relate to the PATRIOT Act that have been part of proceedings before the Foeign Intelligence Surveillance Court are classified.

Senator WYDEN. So it is fair to say that key provisions of the PATRIOT Act and how they're legally interpreted are being kept secret as of today.

Mr. OLSEN. It is certainly fair to say that there are opinions from the court that are classified. I do feel it's important to add that those opinions are part of what is provided to this Committee and that the activities that are undertaken in accordance with those orders of the court are subject to extensive oversight from across the government.

Senator WYDEN. Would you agree that key portions of the FISA Amendments Act of 2008 have been the subject of significant secret legal interpretations and that those are secret today?

Mr. OLSEN. Let me say yes, and then let me add that the answer is that, similar to the PATRIOT Act, there are particular provisions of the Foreign Intelligence Surveillance Act that, in the course of implementing those provisions, the government—and I was part of this effort—submits pleadings to the FISA court. And then, by design, again, under the statute, the FISA court issues—considers those pleadings in a classified setting and then issues opinions authorizing or not those activities.

And it is the case, if I may also add, that as we've reviewed those opinions, as we've looked at those opinions, working with you and

others, that it's very difficult at times to separate those portions of the opinions that are subject to—could be disclosed because they only contained legal information versus the linkage or intertwining of legal analysis and facts.

Senator WYDEN. So you have said that there are, in fact, secret legal interpretations with respect to both the PATRIOT Act and the FISA Amendments Act. And is there anything further that you can tell us about their subject matter?

Mr. OLSEN. I don't think there's anything further that I can discuss in an open setting. I know you appreciate that, Senator. I know you appreciate—obviously you do—the importance of protecting the sources and methods that are described in those opinions.

I would restate what I just said, that——

Senator WYDEN. Let's—my time is very short.

Mr. OLSEN [continuing]. Certainly.

Senator WYDEN. You've given thoughtful answers. As you know, we have a difference of opinion here. It's my view that we have to keep operations and methods secret, but we've got to also have public awareness of the laws on the books. We're going to continue this discussion, I'm sure.

I need to ask you one other question, and that is on a different legal topic. Do government agencies have the authority to use cell-site data to track the location of Americans inside the United States for intelligence purposes?

Mr. OLSEN. Senator, I know that that's a question that you've posed to the Director of National Intelligence, Director Clapper. It is a question that is a complicated and difficult question to answer, particularly in this setting.

I will say that the intelligence community is working as we speak—I know we've talked to your staff—in developing a comprehensive answer to that question, which will be provided to you in writing.

Senator WYDEN. Madam President, I know my time has expired, but just a quick follow-up on that. You seem to be suggesting, then, Mr. Olsen, that the executive branch has not yet settled that question. Is that accurate?

Mr. OLSEN. I think it's very important to be precise about exactly what the question is. And I——

Senator WYDEN. The question is, does the government have the authority to use sell-site data to track the location of Americans inside the country? I think you answered initially that it had not yet been settled by the executive branch with respect to whether or not there is that authority. I think this is an extremely important point, and I just want to make that clear, and I believe you're saying it has not yet been settled by the executive branch that it has that authority.

Mr. OLSEN [continuing]. I think there are certain circumstances where that authority may exist. I do think it's a very complicated and difficult question. And I would ask your indulgence to allow that question to be prepared in an unclassified setting in writing to you, Senator.

Senator WYDEN. Thank you, Madam Chair.

Chairman FEINSTEIN. And if I may, Senator, I well know of your concerns, and we have discussed them. And what I'd like to do in our first hearing, in September, when we come back—assuming there is an August break—I'd like to have that classified session, and would ask, Mr. Olsen, that you have that memo prepared, that the answer's in writing, that you and any authorities you wish to bring with you will attend the hearing. Do I have your agreement?

Mr. OLSEN. Yes, absolutely.

Chairman FEINSTEIN. Thank you very much.

Senator WYDEN. Madam Chair, just on this point, to wrap up, I would just like to say to you and to colleagues that you have been very fair in terms of handling this issue. As you know, Senator Udall and I and other colleagues have had concerns about it. We've been examining it in both classified and open session. And I want to thank you for the way you're handling it.

Chairman FEINSTEIN. Oh, you're very welcome. Happy to do it.

Senator Conrad.

Senator CONRAD. Madam Chair and Vice Chair and Members of the Committee, instead of asking questions, I'd like to make a further statement, if I could, Madam Chair, about this nominee. He comes from a family that I have known for 30 years, a family that was on the other side of the aisle from me. As I indicated before, his father was the chief of staff of the man I defeated for the United States Senate.

And yet he treated me with the greatest generosity of spirit that anybody could ask for.

Now, I just want to say, these are people of the highest quality, of the very highest quality, in every single way. The highest character—I would trust Matt Olsen with every penny that I've got, because of the character of this family.

And I know around here it's all demolition derby. My God, when does it end? If we can't take somebody who has, at every step, been endorsed with the strongest praise—people from the Republican side of the aisle, the Democratic side of the aisle—the highest performance standard, the highest quality standard, the highest character standard—and I understand we have an oversight responsibility, we have a responsibility to ask the tough questions.

But I just want to say to colleagues, I would put my entire reputation on the line for this nominee. That's how strongly I feel. So—you know, I've been here 25 years. I think I've conducted myself with character. And I hope it counts for something when we have a nominee of this quality.

Chairman FEINSTEIN. Thank you very much, Senator. I think those are very heartfelt remarks and very much appreciated. So thank you.

Senator Coats.

Senator COATS. Thank you, Madam Chairman.

Mr. Olsen, I appreciate the discussion we had in my office earlier, and your testimony today. Your educational background is superb, and your experience background is, if not unmatched, very impressive. And the recommendations that you've had from former Attorney General Mukasey, Mr. McConnell and General Alexander speak highly of you. And other people, very credible people, including Senator Conrad, have spoken about your character, your fam-

ily, the kind of person you are. And I think that's high recommendation, from my colleague as well as from a number of other people.

As you know, we discussed in my office the same concerns that Senator Chambliss discussed with you. I don't want to repeat all of that. I do want to state that it's disturbing that, assuming these new sources are credible about a secretive plan, a stealth plan—it's disturbing if those are true. These are reputable news organizations. I assume The Washington Post—which I don't always agree with everything they do, but they usually check very carefully before they make this type of allegation. This is a serious allegation, some kind of concocted White House stealthy, secret plan.

You've discussed and, for the record, explained your position relative to this, where you were and your relationship with Mr. Wolf and so forth.

But the larger question is, given the politics of the issue at the time, the fact that a decision was made by someone at the highest levels to bypass through a stealthy, secret plan is a serious, serious charge and, if true, a serious, serious offense.

My question to you is—and you made your pledge to us that you will not withhold any type of intelligence that is available to you from this Committee. And I take you at your word for that.

What I want to ask you is the reverse of that: If you become aware of some action, some policy decision, some piece of intelligence that this Committee ought to know about but that it is politically sensitive and perhaps there are concerns that you might be sharing information that people at policy levels don't want shared, are you willing to serve as an independent Director of NCTC and provide us with your independent opinion as to that? I just think it's critical that we are aware of that.

And so I would like to get your reaction to that on the reverse side of what you do know relative to intelligence, or what you don't know but have some concerns about not knowing—have something withheld from you that you've said, you know, I don't feel like I've been given full information relative to what this Committee ought to be aware of.

Mr. OLSEN. Yes, thank you very much, Senator. The answer is yes, I absolutely do pledge to the best of my ability to provide my unvarnished views to the Committee; as I said, I commit to providing full, timely intelligence information to the Committee at all times. I commit to being an advocate for providing as much information as possible to the Committee within the executive branch. I wholeheartedly believe in the essential role that the Committee plays, and that that role is a partnership, particularly when it comes to intelligence matters and national security; that there is no place for political considerations when it comes to counterterrorism and the fundamentally important mission of NCTC.

And so I would be both a person who would view that role as a partnership with this Committee, that I would provide that information and that I would be, as I said, an advocate for leaning as far forward as possible, as my abilities allow, into providing that type of information at all times to the Committee.

And if I could maybe just address, sir, the specific issue, I don't want the record to reflect that I view or had the understanding

that there was a stealthy or secret effort to move detainees into the United States. I don't believe—I was not aware that that was ever the case, and I don't believe that ever was the case.

In other words, there was a decision to move two detainees—two Uighur detainees to the United States. There was an effort undertaken then by the FBI and DHS to determine who and where.

But I never was under any impression—I never believed that that effort had progressed to the point that it was going to be a secret or stealthy move but rather that the time for disclosing that was being discussed and was not something that was my decision to make.

Senator COATS. Thank you for that answer. I just want to restate how critically important it is that we have a trust with each other——

Mr. OLSEN. Yes.

Senator COATS [continuing]. Because we are dealing with matters of incredible importance to the safety and security of the American people. And if we lose that element of trust in terms of how we communicate with each other within the intelligence community—and we have a responsibility to ensure that, you know, we live up to our part of the bargain on this also.

And I'm hoping that we can do that with you. And I think that perhaps this is a little warning sign here in terms of let's be diligent to make sure that that level of trust exists and that level of sharing of information with the Committee and us with you exists.

With that, Madam Chairman, I yield back my time.

Mr. OLSEN. I could not agree more, Senator. Thank you.

Chairman FEINSTEIN. Thank you, Senator Coats.

Senator Snowe.

Senator SNOWE. Thank you, Madam Chair.

And welcome, Mr. Olsen. You certainly come to this position with an impressive array of credentials, and I congratulate you. And certainly Senator Conrad's commendations on your behalf certainly speaks volumes about what you represent and what you bring to this position, which is obviously significant as we continue to face a growing threat.

I'd like to just explore with you for a moment in the aftermath of the assassination of Usama bin Ladin, how would you describe the al-Qa'ida threat and what it poses today? I know you have said it remains the most significant threat to the United States, in combination with regional affiliates that are dispersed.

And as you've mentioned, it's certainly a dynamic and complex environment and certainly an asymmetrical threat, hard to identify, hard to quantify. So where do you think we stand today in terms of, one, mitigating that threat, and certainly since the killing of Usama bin Ladin?

Mr. OLSEN. Thank you very much, Senator.

The threat I think today is as diffuse and as complex and challenging as it has been at any time. Certainly it is the case that, again through the leadership of the Congress and the hard work of thousands of men and women, both in the intelligence community and the military, we've made substantial progress against al-Qa'ida and its affiliates.

And the killing of Usama bin Ladin was a significant milestone in that effort. And it is clear, I think, from the threat information that I've seen, both beginning in 2004 when I started working with the FBI through my time at the Department of Justice and to my position now at the National Security Agency, that al-Qa'ida in many ways is weakened. It remains the case, however, that it is a more diffuse and dispersed threat, as you made reference to.

And in particular, I think the concern that the Vice Chairman made reference to with respect to al-Qa'ida's presence in Yemen and in places like Somalia makes it particularly challenging from a counterterrorism perspective.

I think that in some ways the opportunity that presents itself now to the counterterrorism community in the United States, as well as with our allies around the world, is that we must actually redouble our efforts, that, as the President has said, al-Qa'ida is on the path to defeat, but we have to look at that threat in all of its various forms, not only in the tribal regions of Yemen but in the FATA in Pakistan and also in parts of North Africa, and in Somalia.

Ultimately the NCTC's mission is to stop another terrorist attack. And if I may just say that the leadership of Mike Leiter and now, in acting capacity, of Andrew Liepman, I think NCTC has played a vital role in that effort. But it's a team approach and we face as challenging a time, I think, as we ever have.

Senator SNOWE. Are you confident that we have the ability to, you know, work across the agencies, as you—obviously the obligation of the NCTC is to coordinate and to integrate all of that analysis. Do you think we've got it?

Mr. OLSEN. I think that we've made a lot of progress. I do think as this Committee, in its report on the Abdulmutallab attack of December 25, 2009, demonstrated, we still face challenges. And particularly I reviewed the Vice Chairman's and Senator Burr's separate opinion, which was quite critical, and appropriately so I think, in certain ways, of NCTC.

Senator, if I may say, I think the greatest challenge facing NCTC is in some way its greatest strength—that it brings together analysts, planners, other professionals from across the intelligence community and the military to bring all these different viewpoints together.

How do we reconcile the different backgrounds and perspectives? That's really its greatest strength. We need to rely on the intelligence community to continue to provide those professionals and provide an atmosphere and environment where they are located together and collaborate.

So, in direct response to your question, I think that is one of the greatest strengths of NCTC. I think we have some progress to be made both with respect to the collaboration feature but also information sharing and breaking down barriers to sharing information not only within NCTC but with our partners.

Senator SNOWE. You mentioned that we've degraded the capability of al-Qa'ida in Pakistan. How would you compare that threat with respect to the regional affiliates? Which is greater?

Mr. OLSEN. It's difficult to answer a "which is greater?" I think I do agree with the Vice Chairman's observation that recent events

would suggest that the regional affiliates, particularly al-Qa'ida in the Arabian Peninsula and its presence in Yemen, have shown a willingness and a level of capability to strike in the United States. I think that it must be a primary focus of NCTC and of the counterterrorism community broadly.

Senator SNOWE. Do you think that that is the single greatest goal of al-Qa'ida, is to strike the United States? Is that their foremost goal?

Mr. OLSEN. It certainly remains a significant goal. I think that its goals are multivaried, and the threat—again, part of the challenge is that threat is not so much the senior leadership in Pakistan with one unified goal. It's now diffused in various regional locations under various leaders and with various goals. But it is certainly sufficiently a goal that it has to be NCTC's number one mission.

Senator SNOWE. How would you define the strategic defeat of al-Qa'ida leadership?

Mr. OLSEN. The strategic defeat of al-Qa'ida? I think I would define it as ending the threat that al-Qa'ida and all of its affiliates pose to the United States and its interests around the world.

Senator SNOWE. Okay, thank you.

Thank you, Madam Chair.

Mr. OLSEN. Thank you.

Chairman FEINSTEIN. Thank you very much, Senator Snowe.

Senator Wyden has some additional questions, and the Vice Chairman and I also. So, Senator Wyden, why don't you go ahead?

Senator WYDEN. Thank you, Madam Chair. And just two additional matters.

Following up on Senator Snowe's questions, Mr. Olsen, beyond al-Qa'ida's core leadership in Pakistan and the al-Qa'ida affiliate in Yemen, which terrorist group, in your view, poses the greatest threat to the country?

Mr. OLSEN. I would say that beyond al-Qa'ida senior leadership in Pakistan, its presence in Yemen, that probably the next most significant terrorist threat may emanate from the al-Qa'ida presence in Somalia in terms of the willingness and apparent ability, or at least the intent, to strike outside of that particular country.

We know that that country, that group, has successfully mounted an attack in Uganda, and the apparent ability of a regional affiliate such as that to move outside of the borders of that country I think poses a significant threat. But the threat goes beyond even just al-Qa'ida, of course, and its affiliates, to other groups such as Hezbollah.

So I think, again, I have to say that I'm not in a position at NCTC now so I approach these types of questions with some humility and some deference to the professionals who are looking at these questions on a daily basis.

Senator WYDEN. One last question, if I might.

Earlier this year Under Secretary Cohen from the Treasury Department told the Finance Committee, on which I serve, that Kuwait has become one of the most challenging countries to deal with when it comes to counterterrorism, and, in addition, that as other Gulf states have improved their cooperation with U.S. terrorist ac-

tivity in the Gulf we are seeing, in effect, Kuwait become more permissive—significantly more permissive.

Do you have an opinion on this yet?

Mr. OLSEN. My answer, Senator, if I may, is somewhat general, which—I would say that our relationships with countries such as Kuwait, other Gulf states, certainly countries like Pakistan are complex and have multiple dimensions. I do think that the counterterrorism effort is a central goal or central feature of those relationships. If I'm confirmed, I would look forward to the opportunity in the role of NCTC Director to provide my objective and unvarnished view about the counterterrorism threat to contribute to the overall discussion and development of a posture toward a country like Kuwait.

Senator WYDEN. Thank you, Madam Chair.

Chairman FEINSTEIN. Thank you very much.

Mr. Vice Chairman, why don't you go ahead, and I'll finish up.

Vice Chairman CHAMBLISS. Sure. Mr. Olsen, I want to ask you, on three or four different subjects here, to give us a general discussion and response to some questions that I'm going to lay out. But I'm more interested in your general discussion on the issues. But obviously I think the questions will throw out some ideas for you.

By December 2009, it had become clear that many transferred Gitmo detainees had joined AQAP in Yemen. Additionally, the IC and State Department took a dim view of the willingness or capability of the Yemeni government to monitor detainees. And I believe such assessments were made clear to the task force.

Yet in late 2009, the task force decided to transfer seven Yemeni detainees back to Yemen, only one of whom was ordered released by the court. And his case was not appealed. Now, my questions are, in December 2009, did you personally believe it was a good idea to transfer detainees to Yemen?

Secondly, you've told us before that you were trying to test the system by sending the group of detainees back in December of 2009. Do you think testing the system when the result of a failed test could be an attack on Americans was a good idea?

And lastly, in hindsight, in light of the fact that the government is winning all of its habeas appeals, would you have changed any of the task force transfer decisions? And do you think dangerous detainees were transferred as a result of the task force process?

Mr. OLSEN. Senator, thank you. And I do very much understand, of course, in our conversations—both my conversation with you as well as the ongoing discussions I've had with members of the Committee staff—the substantial concern about the detainees from Yemen and the transfer decisions that were made back in 2009. So if I may give you a relatively general, longer answer, I appreciate your indulgence.

The Yemen detainee population was a concern of the task force's from its onset. When we started this process under the President's executive order in February of 2009, there were 97 Yemeni detainees out of the 240 detainees at Guantanamo subject to the review. So by far the single largest nationality represented at Guantanamo were from Yemen. And this was a problem that existed before 2009. In other words, prior to 2009, government officials had strug-

gled with how handle the disposition of this substantial number of Yemen detainees.

Over the course of that year, through our task force effort, we were very aware of a number of different factors. One, that the security situation in Yemen was continuing to deteriorate over the course of that year, and by December of 2009 we were quite aware of the concerns that the intelligence community and our military leaders were expressing about Yemen.

We were also quite aware that our record of success in the habeas courts, that the number of Yemeni detainees as well as others were challenging the lawfulness of their detention, and we were being briefed by the Department of Justice about how those cases were going. At one point in September of 2009, I recall that we were approximately eight successful defenses versus 31 losses in the federal courts. And there was a real concern being expressed by the Department of Justice that not only were we losing these cases, but we were losing our credibility generally in a way that was affecting facts and legal rulings that might impact cases down the road.

I think the other factor that was a significant one for us with respect to Yemen was that there were no options that appeared to be available in terms of other countries willing to take detainees from Yemen, not countries that had rehabilitation programs and not countries in Europe that had been taking a number of detainees—I think over 50 over the course of the last couple years—who had humane-treatment concerns about being repatriated to their home country. So I know I've just laid out to you a problem that you're well familiar with. But those were the factors that were presented to us as we conducted this review.

Our job on the task force, I felt—and my responsibility as the executive Director—was to provide the best factual information in the most precise, specific and rigorous way possible to decisionmakers. We did that over the course of the review. The decision to send seven detainees in December—now I know an eighth Yemeni detainee has been repatriated to Yemen—those decisions have all been made at very senior levels, and all based on the unanimous judgment of representatives of six different agencies, including the Department of Defense, the intelligence community and the Joint Chiefs of Staff. Two of those eight detainees were ordered released by the court.

I think when I said in our conversation that the six or so that went in December—if that number's correct—or before, in the fall of 2009—I don't remember the exact timeframe—but the thought there—and I was present for some of the discussions, although I wasn't a voting member or a decisionmaker—the thought was we would never at any time send a significant number of Yemeni detainees back. The question was, could the Yemeni government and security forces handle the security measures that would be necessary to ensure that those transfers were handled responsibly?

Our process had a very strict standard. No detainee would be eligible for transfer unless any threat that detainee posed could be sufficiently mitigated through adequate and appropriate security measures in the host country—in the destination country. That standard never changed from the beginning to the end of our task

force review. And that was a standard that the decisionmakers who made that decision applied.

So if I may, in sum—I think those were very difficult decisions. And I want to address your question before I forget. It is true I cited the habeas record of eight and 31. We've done much better from the executive branch's point of view since that time. We've had a number of successful litigation victories in the D.C. Circuit Court of Appeals.

The question whether or not that would have changed our view or the view of the decisionmakers on a particular detainee I think is hard to answer, and somewhat speculative on my part. I do think that it would have lowered the significance of that factor as it pertained to a particular detainee. So it would have—you know, I suppose I could say it's possible that it may have affected a decision. But it would be speculative for me to say more about that.

Vice Chairman CHAMBLISS. You mentioned in my office with respect to the pressure on the task force that there was pressure in part because the task force was guided by the executive order on closing Gitmo. Can you explain now about how that pressure existed and what you did to try to make sure your decisions were not influenced by it? How many attorneys assigned to the task force had represented detainees before joining your staff? And did you feel pressure from any of those attorneys, others in DOJ or other parts of the administration to lean towards transferring as many detainees as possible?

Mr. OLSEN. As I mentioned to you, Senator, in our meeting, it certainly was the case that we had an executive order issued by the President in January of 2009 and that we were duty bound to follow that executive order. That executive order set forth three potential options for each detainee: transfer, if such a transfer could be accomplished consistent with the national security and foreign policy interests of the United States. That was the first option. If transfer was not available, prosecution, if feasible. And if neither transfer nor prosecution was an appropriate option, then select another appropriate option, undefined in the executive order.

I wouldn't necessarily say that that was pressure. That was guidance or direction from the President of the United States to follow that. And I felt my obligation was to ensure that everything that the task force did certainly followed that direction but did not respond to any of the what was obvious at the time, controversy from both sides about Guantanamo. It's been a subject of controversy for many years.

I felt it was my obligation to insulate the career professionals who worked on this review. Over the course of the year in 2009, over a hundred people worked on this review from the Department of Defense, from the intelligence community, CIA, NCTC, Homeland Security, State, Justice. And every single one of them was a career individual.

In response to your question, I don't believe that a single one of the attorneys who worked on the review had ever played a role in representing detainees. I know that's been a subject of controversy and been reported in the press in the past with respect to other Department of Justice attorneys. I don't believe that anyone on our task force had ever worked in that capacity.

Again, everyone who worked on my review came from the career ranks. As I said, I felt it was my responsibility to insulate that group from any of the types of controversy surrounding Guantanamo. And I think, if I may, Senator, say the results of the review, the recommendations and the analysis we did, resulting in unanimous decisions on 240 detainees, speak for themselves, I think, in this regard.

Out of those 240 detainees, there were 126 transfer decisions. But there were also 48 decisions to hold those detainees under the laws of war. When we started the review in January of 2009, that was not necessarily even considered an option. We pushed for that as the right option for 48 detainees—that they could not be tried, there was not evidence to try them. They could not be transferred safely. They needed to be held indefinitely under the laws of war.

That's 48 of those detainees; in addition, 36 detainees referred either to the military commission or to federal courts for prosecution, 36 in that category, and then 30 in the category Yemeni detainees of conditional detention. Those 30 detainees, the decision was that they would not be transferred. They would be detained until the security situation in Yemen substantially improved, something that obviously has not happened. So they are effectively in the same category as the 48 held under the laws of war.

Vice Chairman CHAMBLISS. The Chairman and I are both very concerned about the fact that we currently have no detention and interrogation policy going forward with respect to individuals who may be captured, high-value targets who may be captured outside of Afghanistan.

As Director of NCTC, you will be integrally involved in the deliberations relative to any proposal for a long-term plan on detention and interrogation. And my question to you is, are you prepared to give sound advice, number one, that you're going to be asked to give?

And secondly, if the administration appears to be headed down a road that you don't think is the right direction to go, will you say to this Committee now that you're going to express yourself in a very strong manner to help to try to develop the best possible policy for detention and interrogation of high-value targets, even though your opinion may be contrary to the folks at the White House who are nominating you today?

Mr. OLSEN. Yes, absolutely. And if I may, I do make that pledge. I think, in my prior positions, I have taken that position. In other words, I have given advice in an unvarnished, objective, independent way. As a career government official, I've made known my personal views and sought to move positions based on my objective and independent and non-political perspective.

I do think that these questions, Senator—if I may say, some of these questions are some of the most difficult ones that we face from a counterterrorism perspective, the question of detention policy. I absolutely agree that it would be my responsibility, if I'm honored to be confirmed, to give my unvarnished and objective views, share the intelligence with this Committee, and advocate for what I believe is the right thing, to the best of my abilities within the executive branch.

Vice Chairman CHAMBLISS. Some would argue that Gitmo should be closed because it is used as a recruiting tool for al-Qa'ida. And that may be true. But yet al-Qa'ida uses our Israel policy, the Afghan war, the death of bin Ladin and a host of other issues as recruiting tools, and no one suggests that we should change these policies.

In your current position or positions you have held, have you seen any evidence that we are safer or that recruits have fallen off as a result of the President's announcement of his intent to close Guantanamo?

Mr. OLSEN. I've not seen, from, again, my perspective, both on the task force and in a much more limited perspective in my current role at the National Security Agency, anything, in specific response to your question, to that effect, that there's a change in recruiting based on the current government policy.

Vice Chairman CHAMBLISS. All right. Lastly, let me tell you an issue that we've got that I know you're aware about and get your thoughts on. In the past, NCTC has raised a number of concerns about not having access to all the intelligence information it needs.

Of particular concern is access to information in the possession of the Department of Homeland Security. Generally, DHS is reluctant to provide information relating to an individual's asylum application or refugee status on the grounds that sharing that information would violate U.S. person restrictions. The specific legal basis for DHS's position is unclear.

Have you got any thoughts on how we can address that problem with DHS? And are asylum seekers U.S. persons or considered U.S. persons? Is that an issue in your mind?

Mr. OLSEN. Senator, I am generally familiar with this area or this issue. I don't have the specifics of the particular concern with DHS. I've had some briefings about this question.

If I may say, I do believe that, given my role at the Department of Justice and my role now, that I have both an understanding—actually, quite a deep understanding of the rules that apply to protect civil liberties and privacy of U.S. persons. But I also, I think, have a very strong view and a record of finding the appropriate ways to overcome legal, sometimes perceived legal, as well as the policy barriers to sharing information.

I don't believe that there is a strong basis for, as a policy matter, not allowing information to be shared when that information is necessary to protect the American people. And if I am honored to be confirmed, it will absolutely be my commitment to find a way to overcome expressed concerns about sharing information when that information is necessary to support NCTC's mission, and that is to prevent another terrorist attack. So the Committee certainly has my commitment to look very hard at that question.

Vice Chairman CHAMBLISS. Well, as you and I discussed in my office, the critical role that NCTC plays is, for the most part, centered around information sharing, both in its requirement that you, as Director of NCTC, share information you have, but you've got to get the information first.

And let me just say that the Chairman and I, I think, stand without question ready to make sure that you've got all the tools that you need. And from a policy standpoint, we're prepared to do

what's necessary to make sure that the information that you have to be shared is all of the intelligence information.

And let me just close by saying that, as the Chairman stated, we've gotten inundated with letters of recommendation, which you should feel very honored to be supported in that respect. And I know you are.

The letter from General Alexander was very complimentary. And not only did he write a letter, but he happens to be a good friend, a guy that I have the utmost respect for, and he called yesterday to reinforce that recommendation. And, because I have such respect for General Alexander, that means a lot.

So we'll look forward to moving down the road. And the only thing I would remind you of is if you could get us those names of those individuals in that briefing. And hopefully we'll get this nomination moved quickly.

Madam Chair, thank you.

Mr. OLSEN. Thank you very much.

Chairman FEINSTEIN. Thank you very much.

You know, I'd like to close off the briefing. I cannot imagine a more thankless task than being Director of the policy Committee of which you were Director, because you know, no matter what, it's thankless. And no matter what, there's going to be criticism, and particularly in those days, as I recall them, where it was so very, very difficult. So I just want to thank you for that. And in my book, you're a straight shooter. And I think that's what matters here.

I would like to just talk about the vision thing for a moment, if I might. One of NCTC's statutory responsibilities is to conduct strategic operational planning for counterterrorism activities and integrate all of the instruments of national power.

However, when it granted NCTC this responsibility, Congress didn't provide you with any authority to compel actions in these areas. So we may have to go back and look at that again.

But the question is, what is your vision of NCTC's role in conducting strategic operational planning for counterterrorism activities and integrating all the instruments of national so-called power into that planning?

Mr. OLSEN. Thank you very much, Senator.

As you point out, one of the critical missions of NCTC is the strategic operational planning mission. I do believe that NCTC is uniquely positioned to conduct that mission. And my vision for that is consistent with, I think, the effort and the progress that NCTC has made in that regard over the last couple years—that is, bringing together the various represented entities, whether it's military or intelligence community, combining those perspectives—and those perspectives vary—in a way that will allow us to make sure that the efforts that the U.S. government is undertaking to combat terrorism, whether it is on a regional level, focusing on a particular region or a particular problem or a particular topic such as countering violent extremism—conducting an all-of-government approach to address those issues, something that NCTC is, I think, as I said, uniquely positioned to do, both because it has members from all these different agencies brought together and because it has the mission granted to it by Congress.

So I would consider that to be one of the focuses that I would have. And I would also commit and I would not hesitate to return to this Committee with updates on that effort and to tell you if I think that there are authorities that are lacking or necessary.

Chairman FEINSTEIN. Good.

Now, you're also the national intelligence manager for counterterrorism. And in that regard, you're going to be responsible for evaluating the intelligence community's performance on terrorism and recommending budget allocations across agencies. In my book, this is a very important job. How do you see yourself carrying this part of your responsibility out?

Mr. OLSEN. Thank you for that question. I have had an opportunity to talk at least briefly with Director Clapper about this very important role, particularly under the leadership that he has for ODNI and the intelligence community in general. I think that NCTC has done a good job in its role as the NIM. It is, I think, a real focus because of the challenges that we face——

Chairman FEINSTEIN. I don't particularly like that acronym, the NIM.

Mr. OLSEN. It is not my favorite either, so I will——

Chairman FEINSTEIN. Because this is a big deal.

Mr. OLSEN. Yeah.

Chairman FEINSTEIN. I mean, I don't think it should be trivialized. And I think it's one area where not enough is done and there is not enough central administration of budget authority.

Mr. OLSEN. Right. So I will stick with "national intelligence manager."

Chairman FEINSTEIN. Thank you.

Mr. OLSEN. I think the challenge is that we do face a much more difficult budgetary environment than we did in the last few years. And I fully appreciate that reality. I've seen it in my role at NSA, where I've been part of senior leadership meetings about how NSA is going to react and respond to the budget constraints that we are likely to face, that we will face.

The question will be, how do we make sure that we are focusing on the right priorities as a counterterrorism community? And how do we achieve efficiencies where we can in order to meet the challenge that the current budget environment poses?

Chairman FEINSTEIN. Well, you see, from my point of view, counterterrorism is extraordinarily important. It is vital to the protection of the homeland. Therefore, having a strategy and an approach to it and a pattern and a practice that's well established and carried out across the government is very, very vital to have.

Candidly, I don't know whether we have that today. And so this question is meant with a view that I think it's really a prime mission of yours.

Mr. OLSEN. Well, I appreciate that. And again, I will, for that reason, make that a prime mission of mine and will, again, commit to come back and talk to you and the Committee and the staff and keep you apprised as often as necessary on the progress we're making.

Chairman FEINSTEIN. Right. One last thing. As you know, the defense bill has some language on detention in it, some of which is good and some of which we think is not good. We—you know, as

Chairman of the Committee—are trying to draft some legislation. I'd like to ask that you help us and work with us on that, if you will.

Mr. OLSEN. Of course. I will, yes.

Chairman FEINSTEIN. Okay. Thank you very much.

I see no other Member. So we would like to have the Director of the NCTC in place actually before going on the August recess. And I really think this is a very important matter that we're able to do that. So I would like to ask that any questions for the record be submitted by 5:00 on Wednesday—that's tomorrow afternoon—so we can get answers and vote on the nomination just as soon as possible. We do not want to leave this agency leaderless.

So I thank you for your service to our country. I've been watching the faces of your three children and your wife's supervision in her eyes as this hearing has gone on. And I just want you three to know how very proud we are of your father, that he has been just of enormous service to this country and has much more yet to do. And I hope you are very proud as well.

So, with that in mind, we'll conclude this hearing and move your nomination onward. Thank you very much.

[Whereupon, at 11:36 a.m., the Committee adjourned.]

Supplemental Material

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SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE

QUESTIONNAIRE FOR COMPLETION BY PRESIDENTIAL NOMINEES

SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE

QUESTIONNAIRE FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART A - BIOGRAPHICAL INFORMATION

1. NAME: Matthew Glen Olsen

2. DATE AND PLACE OF BIRTH: 2/21/1962, Fargo, North Dakota

3. MARITAL STATUS: Married

4. SPOUSE'S NAME: Fern Louise Shepard

5. SPOUSE'S MAIDEN NAME IF APPLICABLE: N/A

6. NAMES AND AGES OF CHILDREN:

NAME	AGE
[INFORMATION REDACTED]	

7. EDUCATION SINCE HIGH SCHOOL:

INSTITUTION	DATES ATTENDED	DEGREE RECEIVED	DATE OF DEGREE
Harvard Law School	September 1985 – May 1988	J.D.	May 1988
University of Virginia	September 1980 – May 1984	B.A.	May 1984

8. EMPLOYMENT RECORD (LIST ALL POSITIONS HELD SINCE COLLEGE, INCLUDING MILITARY SERVICE. INDICATE NAME OF EMPLOYER, POSITION, TITLE OR DESCRIPTION, LOCATION, AND DATES OF EMPLOYMENT.)

EMPLOYER	POSITION/TITLE	LOCATION	DATES
National Security Agency	General Counsel	Fort Meade, MD	7/2010 – present
U.S. Department of Justice	Associate Deputy Attorney General	Washington, D.C.	3/2010 – 7/2010
U.S. Department of Justice	Special Counselor to the Attorney General, Executive Director, Guantanamo Review Task Force	Washington, D.C.	3/2009 – 3/2010
U.S. Department of Justice	Acting Assistant Attorney General, National Security Division	Washington, D.C.	1/2009 – 3/2009
U.S. Department of Justice	Deputy Assistant Attorney General, National Security Division	Washington, D.C.	9/2006 – 1/2009
U.S. Department of Justice	Assistant United States Attorney for the District of Columbia	Washington, D.C.	12/1994 – 9/2006
U.S. Department of Justice	United States Attorney's Office for the District of Columbia, Chief, National Security Section	Washington, D.C.	2005 - 2006
U.S. Department of Justice	Special Counsel to the FBI Director (on detail)	Washington, D.C.	5/2004 – 9/2005
U.S. Department of Justice	United States Attorney's Office for the District of Columbia, Deputy Chief, Organized Crime and Narcotics Trafficking Section	Washington, D.C.	2003-2004
Georgetown University Law Center	Adjunct Professor	Washington, D.C.	2001(est.) - present
U.S. Department of Justice	Trial Attorney, Civil Rights Division	Washington, D.C.	11/1992 – 12/1994

Arnold & Porter	Associate	Denver, Colorado	1/1991 – 9/1992
Hon. Norma Holloway Johnson, U.S. District Court	Law Clerk	Washington, D.C.	9/1988 – 8/1990
Sierra Club Legal Defense Fund	Summer Associate	Juneau, AK	Summer 1987
McKenna, Connor & Cuneo	Summer Associate	Washington, D.C.	Summer 1987
Schwalb Donnenfeld, Bray & Silbert	Summer Associate	Washington, D.C.	Summer 1986
Washington Post (approximately one year between college and law school)	Copy Aide	Washington, D.C.	1984 – 1985

9. GOVERNMENT EXPERIENCE (INDICATE EXPERIENCE IN OR ASSOCIATION WITH FEDERAL, STATE, OR LOCAL GOVERNMENTS, INCLUDING ADVISORY, CONSULTATIVE, HONORARY, OR OTHER PART-TIME SERVICE OR POSITION. DO NOT REPEAT INFORMATION ALREADY PROVIDED IN QUESTION 8):

See response to Question 8.

10. INDICATE ANY SPECIALIZED INTELLIGENCE OR NATIONAL SECURITY EXPERTISE YOU HAVE ACQUIRED HAVING SERVED IN THE POSITIONS DESCRIBED IN QUESTIONS 8 AND/OR 9.

As detailed below, in the course of the positions in which I have served, I have gained extensive intelligence and national security experience from operational, strategic, and management perspectives.

National Security Agency – *General Counsel*

- Serve as the chief legal officer for NSA and principal legal advisor to the NSA Director, providing advice and representation on all of NSA's missions, including intelligence and counterterrorism operations and cyber security.

- Manage the Office of General Counsel, consisting of more than 80 attorneys and professional staff dedicated to providing legal support and advocacy on behalf of NSA's missions.

Office of the Deputy Attorney General, Department of Justice – *Associate Deputy Attorney General*

- Supervised and coordinated national security and criminal matters, including counterterrorism and espionage cases, and provided advice to the Department leadership on national security policy, intelligence matters, and prosecutions.

Office of the Attorney General, Department of Justice – *Special Counselor to the Attorney General; Executive Director, Guantanamo Review Task Force*

- Appointed by the Attorney General to lead the interagency effort to conduct a comprehensive review, in accordance with the President's Executive Order, of all individuals detained at the Guantanamo Bay Naval Base.

- Advised the Attorney General, White House and National Security Council officials, and other senior government leaders on the detention of terrorism suspects and the review of Guantanamo detainees.

National Security Division, Department of Justice
Acting Assistant Attorney General (January to March 2009)
Deputy Assistant Attorney General (2006-2009)

- Served as the acting Assistant Attorney General for National Security and managed the Department of Justice's efforts to combat terrorism, espionage, and other threats to national security through intelligence operations and criminal prosecution.

- Supervised the use of sensitive intelligence tools and surveillance activities and represented the government before the Foreign Intelligence Surveillance Court.

- Represented the Department of Justice before Congress and within the Executive Branch and advised senior federal officials on operational, legal, and policy matters relating to national security and intelligence, including the reform of the Foreign Intelligence Surveillance Act.

- Supervised the formation of the new National Security Division and the Office of Intelligence.

Federal Bureau of Investigation – *Special Counsel to the Director*

- Handled policy matters relating to the FBI's national security mission, including the establishment of the Bureau's National Security Branch, and represented the FBI in the interagency process.

United States Attorney's Office, District of Columbia
Chief, National Security Section (2005 to 2006)
Deputy Chief, Organized Crime and Narcotics Trafficking Section (2003 to 2004)

- Supervised the investigation and prosecution of international and domestic terrorism, espionage, and export violation matters and managed a unit of senior attorneys dedicated to national security cases.

- Prosecuted the longest criminal trial in the District of Columbia, culminating in the conviction of six defendants for RICO conspiracy, 27 murders, and other gang-related offenses.

- Conducted more than 35 jury trials involving a variety of offenses—including white collar, homicide, and narcotics cases—and argued several appeals in the D.C. Circuit and D.C. Court of Appeals.

11. HONORS AND AWARDS (PROVIDE INFORMATION ON SCHOLARSHIPS, FELLOWSHIPS, HONORARY DEGREES, MILITARY DECORATIONS, CIVILIAN SERVICE CITATIONS, OR ANY OTHER SPECIAL RECOGNITION FOR OUTSTANDING PERFORMANCE OR ACHIEVEMENT):

Attorney General Distinguished Service Award (2010)

Attorney General Award for Excellence in Furthering National Security (2008)

Assistant Attorney General for National Security Award for Special Initiative (2008)

John Marshall Award for Trial Advocacy (2006)

Executive Office of United States Attorneys Directors Award (2004 est.)

Special Achievement Awards, U.S. Attorney's Office for the District of Columbia (multiple)

Harvard Law School, *cum laude* graduate

University of Virginia, ***high distinction*** graduate Phi Beta Kappa

12. ORGANIZATIONAL AFFILIATIONS (LIST MEMBERSHIPS IN AND OFFICES HELD WITHIN THE LAST TEN YEARS IN ANY PROFESSIONAL, CIVIC, FRATERNAL, BUSINESS, SCHOLARLY, CULTURAL, CHARITABLE, OR OTHER SIMILAR ORGANIZATIONS):

ORGANIZATION	OFFICE HELD	DATES
Maryland Bar	N/A	1988 - present
District of Columbia Bar	N/A	1990 - present
American Inns of Court	N/A	1994 (est.) - present
University of Virginia Alumni Association	N/A	1984 - present
Chesapeake Bay Foundation	N/A	2008 (est.) - present
North Chevy Chase Swim Club	N/A	2003 - present

13. PUBLISHED WRITINGS AND SPEECHES (LIST THE TITLES, PUBLISHERS, AND PUBLICATION DATES OF ANY BOOKS, ARTICLES, REPORTS, OR OTHER PUBLISHED MATERIALS YOU HAVE AUTHORED. ALSO LIST ANY PUBLIC SPEECHES YOU HAVE MADE WITHIN THE LAST TEN YEARS FOR WHICH THERE IS A TEXT OR TRANSCRIPT. TO THE EXTENT POSSIBLE, PLEASE PROVIDE A COPY OF EACH SUCH PUBLICATION, TEXT, OR TRANSCRIPT):

I have done my best to identify all materials responsive to this question, although it is possible there are other materials I have been unable to recall. In addition to the information listed below, I have given many lectures and presentations in connection with my position as an Adjunct Professor at Georgetown University Law Center, primarily focusing on topics relating to white collar crime and trial advocacy. I also have given several training-related presentations to federal prosecutors and investigators in the District of Columbia. These are not listed separately.

Prepared remarks

National Security Agency Law Day, prepared remarks (Oct. 14, 2010) (copy attached).

Panelist at Georgetown University Law Center

Participant in a panel discussion titled "Moving Targets: Issues at the Intersection of National Security and American Criminal Law, sponsored by the Georgetown Center on National Security and the Law and The American Criminal Law Review (April 12, 2011) [webcast available; (http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=1397); no transcript available].

Participant in a panel discussion titled "Should Terrorists Be Prosecuted by Military Commissions," sponsored by the Georgetown Center on National Security (Sept. 10, 2009) (no webcast and no transcript available).

Presentations at Department of Justice training programs (no transcripts available)

Anti-Terrorism Advisory Council Coordinators' National Conference – September 30-October 2, 2009

National Security Prosecutors' Conference – August 19-22, 2008

National Security Division / FBI Training – March 19-21, 2008

Counterterrorism Training for Anti-Terrorism Prosecutors and JTTF Agents – August 1-3, 2007

Counterterrorism Training for Anti-Terrorism Prosecutors and JTTF Agents – June 13-15, 2007

Foreign Intelligence Training – March 29, 2007

Anti-Terrorism Advisory Council Coordinators' National Conference – March 14-16, 2007

United States Attorneys' National Security Conference – January 11-12, 2007

FBI Training: Office of Intelligence Policy and Review – November 6-8, 2006

Counterterrorism Training for Anti-Terrorism Prosecutors and JTTF Agents – October 11-13, 2006

Anti-Terrorism Advisory Council Coordinators Working Group Meeting – September 7, 2006

Working With Cooperators and Confidential Informants Seminar – July 12-14, 2006

National Security Prosecutors' Conference – March 1-3, 2006

National Security Conference OLE 06-125 January 4-6, 2006

Working With Cooperators and Confidential Informants Seminar – November 30-December 2, 2005

Structuring the Complex Criminal Case Seminar – November 2-4, 2005

Working With Cooperators and Confidential Informants Seminar – October 13-15, 2004

Law Review article (co-author)

Rachel San Kronowitz, Joanne Lichtman, Steven Paul McSloy, and Matthew G. Olsen, "Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations," 22 Harv. C.R.-C.L. L. Rev., No. 2 (Spring 1987) (copy attached).

PART B - QUALIFICATIONS

14. QUALIFICATIONS (DESCRIBE WHY YOU BELIEVE YOU ARE QUALIFIED TO SERVE IN THE POSITION FOR WHICH YOU HAVE BEEN NOMINATED):

I believe I am qualified to serve as the Director of NCTC based on my record of public service and leadership of people and organizations dedicated to protecting national security. In several career leadership positions in the national security field, I have demonstrated my ability to lead people in demanding operational settings, gained valuable experience working closely with the Intelligence Community, and contributed to the achievement of important national security and counterterrorism initiatives to protect the nation.

Specifically, in my current position as General Counsel for the National Security Agency, I serve as the chief legal officer for NSA and manage a large legal office dedicated to providing legal support and advocacy on behalf of NSA's missions, including its counterterrorism efforts. I also serve as a member of NSA's senior leadership team and as the principal legal advisor to the NSA Director. As General Counsel, I fulfill a critical role in guiding and supporting NSA's operations and in ensuring that the agency's activities adhere to all applicable legal rules and policies. It is the responsibility of the General Counsel's Office to identify, analyze and resolve the complex and novel legal and policy issues that these activities often present. Over the course of the past year, for example, I have led efforts on behalf of NSA to address significant issues involving the collection and analysis of intelligence, authority for its counterterrorism activities, and the agency's emerging cyber security efforts. In this role, I have sought to ensure that NSA has the authority necessary to carry out its missions in a manner consistent with the agency's bedrock commitment to the Constitution and the laws and policies that govern its actions.

From 2009 to 2010, I served as the head of the Guantanamo Review Task Force and led the review of detainees at Guantanamo in accordance with the President's executive order. In this capacity, I was responsible for establishing and supervising an interagency task force of national security professionals from across the federal government and for managing the process for compiling and analyzing the relevant intelligence information on each detainee. The interagency nature of the review was designed to promote collaboration and exchange of information and to ensure that all relevant perspectives—including military, intelligence, homeland security, diplomatic, and law enforcement—contributed fully to the detainee review process. Over 100 staff members served on the task force over the course of the one-year review, including senior military officers; intelligence analysts from CIA, NCTC, DIA, FBI, and DHS; FBI agents; military prosecutors and investigators; and federal prosecutors and national security lawyers. The task force assembled and sifted through large volumes of intelligence information and examined this information to assess the threat posed by the detainee in light of the national security interests of the United States. These task force assessments were presented to senior officials representing the federal agencies responsible for the

review and were considered by these officials in reaching decisions for each detainee consistent with the executive order.

From 2006 to 2009, as a senior career official in the Department of Justice's National Security Division—a newly formed division in the Department—I managed intelligence and surveillance operations and the oversight of these activities. During the 2009 Presidential transition, I served as the acting Assistant Attorney General for National Security, overseeing the work of the entire division. As the Deputy Assistant Attorney General with responsibility for intelligence activities, I managed over 125 attorneys and support staff members dedicated to the Department's intelligence operations and oversight units. Our mission was to ensure that Intelligence Community agencies—including CIA, FBI, and NSA—had the tools necessary to conduct sensitive surveillance and other intelligence operations. To accomplish this mission, we worked cooperatively with agents and analysts to develop and analyze facts necessary to ensure that intelligence activities could go forward consistent with legal requirements. In addition, I was responsible for managing the Department of Justice's implementation of landmark changes in the Foreign Intelligence Surveillance Act and worked in close collaboration with the Intelligence Community to interpret new statutory provisions, address policy and technical challenges, and adopt new oversight mechanisms to ensure the effective and lawful use of the government's new surveillance authority. I also implemented a comprehensive reorganization of the Department's intelligence components to align each organizational element with its core responsibilities to enhance management and accountability, and designed and implemented the first Department component dedicated to intelligence oversight.

As Special Counsel to the FBI Director from 2004 to 2005, I handled a wide array of policy and operational matters in support of the FBI's national security and counterterrorism mission. I gained key insights about the role, capabilities and structure of the FBI, as well as other intelligence agencies that comprise the government's combined counterterrorism community. In particular, I contributed to the reform of the FBI and—in response to a 2005 Presidential directive—the establishment of the FBI's National Security Branch, which combines the missions and resources of the Bureau's counterterrorism, counterintelligence, weapons of mass destruction, and intelligence elements.

I served as a federal prosecutor for over a decade, including in a supervisory position overseeing the investigation and prosecution of international terrorists. As a federal prosecutor, I learned first-hand the value of working as team with professionals in operational roles and of building coalitions with federal, state and local partners. In addition, this experience fostered an appreciation of the importance of rigorous and unbiased analysis of complex, sometimes fragmentary information. I also learned to present this information in a clear, concise and steadfast manner. Finally, I gained a deep understanding of the laws and policies that define and limit the government's actions in a domestic law enforcement setting and that protect the civil liberties and privacy of American citizens.

In each of these positions, I have tried to enable and support the people I have had the privilege of leading by providing the resources, guidance, and direction necessary to develop professionally and to be successful. I have endeavored to lead by example—to approach each challenge with integrity, fairness, and resolve—and to demonstrate the character, dedication, and judgment essential to achieving results.

I consider it an honor to have served in career government positions over the past 18 years and, in particular, in leadership positions dedicated to defending the nation. I hope that the Committee will judge that my record of public service and experience, as well as my academic background, qualify me to be confirmed for this critical position.

PART C - POLITICAL AND FOREIGN AFFILIATIONS

15. POLITICAL ACTIVITIES (LIST ANY MEMBERSHIPS OR OFFICES HELD IN OR FINANCIAL CONTRIBUTIONS OR SERVICES RENDERED TO, ANY POLITICAL PARTY, ELECTION COMMITTEE, POLITICAL ACTION COMMITTEE, OR INDIVIDUAL CANDIDATE DURING THE LAST TEN YEARS):

Obama for America	10/05/2008	$1,000
Doug Gansler for	06/01/2010	$50.00
Maryland State Attorney General	10/22/2009	$100.00
	10/02/2008	$100.00
	09/05/2005	$150.00

16. CANDIDACY FOR PUBLIC OFFICE (FURNISH DETAILS OF ANY CANDIDACY FOR ELECTIVE PUBLIC OFFICE):

None.

17. FOREIGN AFFILIATIONS

(NOTE: QUESTIONS 17A AND B ARE NOT LIMITED TO RELATIONSHIPS REQUIRING REGISTRATION UNDER THE FOREIGN AGENTS REGISTRATION ACT. QUESTIONS 17A, B, AND C DO NOT CALL FOR A POSITIVE RESPONSE IF THE REPRESENTATION OR TRANSACTION WAS AUTHORIZED BY THE UNITED STATES GOVERNMENT IN CONNECTION WITH YOUR OR YOUR SPOUSE'S EMPLOYMENT IN GOVERNMENT SERVICE.)

A. HAVE YOU OR YOUR SPOUSE EVER REPRESENTED IN ANY CAPACITY (E.G. EMPLOYEE, ATTORNEY, OR POLITICAL/BUSINESS CONSULTANT), WITH OR WITHOUT COMPENSATION, A FOREIGN GOVERNMENT OR AN ENTITY CONTROLLED BY A FOREIGN GOVERNMENT? IF SO, PLEASE FULLY DESCRIBE SUCH RELATIONSHIP.

No.

B. HAVE ANY OF YOUR OR YOUR SPOUSE'S ASSOCIATES REPRESENTED, IN ANY CAPACITY, WITH OR WITHOUT COMPENSATION, A FOREIGN GOVERNMENT OR AN

ENTITY CONTROLLED BY A FOREIGN GOVERNMENT? IF SO, PLEASE FULLY DESCRIBE SUCH RELATIONSHIP.

No.

C. DURING THE PAST TEN YEARS, HAVE YOU OR YOUR SPOUSE RECEIVED ANY COMPENSATION FROM, OR BEEN INVOLVED IN ANY FINANCIAL OR BUSINESS TRANSACTIONS WITH, A FOREIGN GOVERNMENT OR ANY ENTITY CONTROLLED BY A FOREIGN GOVERNMENT? IF SO, PLEASE PROVIDE DETAILS.

No.

D. HAVE YOU OR YOUR SPOUSE EVER REGISTERED UNDER THE FOREIGN AGENTS REGISTRATION ACT? IF SO, PLEASE PROVIDE DETAILS.

No.

18. DESCRIBE ANY LOBBYING ACTIVITY DURING THE PAST TEN YEARS, OTHER THAN IN AN OFFICIAL U.S. GOVERNMENT CAPACITY, IN WHICH YOU OR YOUR SPOUSE HAVE ENGAGED FOR THE PURPOSE OF DIRECTLY OR INDIRECTLY INFLUENCING THE PASSAGE, DEFEAT, OR MODIFICATION OF FEDERAL LEGISLATION, OR FOR THE PURPOSE OF AFFECTING THE ADMINISTRATION AND EXECUTION OF FEDERAL LAW OR PUBLIC POLICY.

None.

PART D - FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST

19. DESCRIBE ANY EMPLOYMENT, BUSINESS RELATIONSHIP, FINANCIAL TRANSACTION, INVESTMENT, ASSOCIATION, OR ACTIVITY (INCLUDING, BUT NOT LIMITED TO, DEALINGS WITH THE FEDERAL GOVERNMENT ON YOUR OWN BEHALF OR ON BEHALF OF A CLIENT), WHICH COULD CREATE, OR APPEAR TO CREATE, A CONFLICT OF INTEREST IN THE POSITION TO WHICH YOU HAVE BEEN NOMINATED.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the DNI's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the DNI's designated agency ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

20. DO YOU INTEND TO SEVER ALL BUSINESS CONNECTIONS WITH YOUR PRESENT EMPLOYERS, FIRMS, BUSINESS ASSOCIATES AND/OR PARTNERSHIPS, OR OTHER ORGANIZATIONS IN THE EVENT THAT YOU ARE CONFIRMED BY THE SENATE? IF NOT, PLEASE EXPLAIN.

Yes

21. DESCRIBE THE FINANCIAL ARRANGEMENTS YOU HAVE MADE OR PLAN TO MAKE, IF YOU ARE CONFIRMED, IN CONNECTION WITH SEVERANCE FROM YOUR CURRENT POSITION. PLEASE INCLUDE SEVERANCE PAY, PENSION RIGHTS, STOCK OPTIONS, DEFERRED INCOME ARRANGEMENTS, AND ANY AND ALL COMPENSATION THAT WILL OR MIGHT BE RECEIVED IN THE FUTURE AS A RESULT OF YOUR CURRENT BUSINESS OR PROFESSIONAL RELATIONSHIPS.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the DNI's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the DNI's designated agency ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

22. DO YOU HAVE ANY PLANS, COMMITMENTS, OR AGREEMENTS TO PURSUE OUTSIDE EMPLOYMENT, WITH OR WITHOUT COMPENSATION, DURING YOUR SERVICE WITH THE GOVERNMENT? IF SO, PLEASE PROVIDE DETAILS.

No.

23. AS FAR AS CAN BE FORESEEN, STATE YOUR PLANS AFTER COMPLETING GOVERNMENT SERVICE. PLEASE SPECIFICALLY DESCRIBE ANY AGREEMENTS OR UNDERSTANDINGS, WRITTEN OR UNWRITTEN, CONCERNING EMPLOYMENT AFTER LEAVING GOVERNMENT SERVICE. IN PARTICULAR, DESCRIBE ANY AGREEMENTS, UNDERSTANDINGS, OR OPTIONS TO RETURN TO YOUR CURRENT POSITION.

No.

24. IF YOU ARE PRESENTLY IN GOVERNMENT SERVICE, DURING THE PAST FIVE YEARS OF SUCH SERVICE, HAVE YOU RECEIVED FROM A PERSON OUTSIDE OF GOVERNMENT AN OFFER OR EXPRESSION OF INTEREST TO EMPLOY YOUR SERVICES AFTER YOU LEAVE GOVERNMENT SERVICE? IF YES, PLEASE PROVIDE DETAILS.

No.

25. IS YOUR SPOUSE EMPLOYED? IF YES AND THE NATURE OF THIS EMPLOYMENT IS RELATED IN ANY WAY TO THE POSITION FOR WHICH YOU ARE SEEKING CONFIRMATION, PLEASE INDICATE YOUR SPOUSE'S EMPLOYER, THE POSITION, AND THE LENGTH OF TIME THE POSITION HAS BEEN HELD. IF YOUR SPOUSE'S EMPLOYMENT IS NOT RELATED TO THE POSITION TO WHICH YOU HAVE BEEN NOMINATED, PLEASE SO STATE.

My spouse is not employed. Since 2010, she has served as a trustee on the Earthjustice Board of Trustees. She receives no compensation for this service. This position is not related to the position to which I have been nominated.

26. LIST BELOW ALL CORPORATIONS, PARTNERSHIPS, FOUNDATIONS, TRUSTS, OR OTHER ENTITIES TOWARD WHICH YOU OR YOUR SPOUSE HAVE FIDUCIARY OBLIGATIONS OR IN WHICH YOU OR YOUR SPOUSE HAVE HELD DIRECTORSHIPS OR OTHER POSITIONS OF TRUST DURING THE PAST FIVE YEARS.

NAME OF ENTITY	POSITION	DATES HELD	SELF OR SPOUSE
Earthjustice	Trustee	11/2010 - present	spouse

27. LIST ALL GIFTS EXCEEDING $100 IN VALUE RECEIVED DURING THE PAST FIVE YEARS BY YOU, YOUR SPOUSE, OR YOUR DEPENDENTS. (NOTE: GIFTS RECEIVED FROM RELATIVES AND GIFTS GIVEN TO YOUR SPOUSE OR DEPENDENT NEED NOT BE INCLUDED UNLESS THE GIFT WAS GIVEN WITH YOUR KNOWLEDGE AND ACQUIESCENCE AND YOU HAD REASON TO BELIEVE THE GIFT WAS GIVEN BECAUSE OF YOUR OFFICIAL POSITION.)

None that I recall.

28. LIST ALL SECURITIES, REAL PROPERTY, PARTNERSHIP INTERESTS, OR OTHER INVESTMENTS OR RECEIVABLES WITH A CURRENT MARKET VALUE (OR, IF MARKET VALUE IS NOT ASCERTAINABLE, ESTIMATED CURRENT FAIR VALUE) IN EXCESS OF $1,000. (NOTE: THE INFORMATION PROVIDED IN RESPONSE TO SCHEDULE A OF THE DISCLOSURE FORMS OF THE OFFICE OF GOVERNMENT ETHICS MAY BE INCORPORATED BY REFERENCE, PROVIDED THAT CURRENT VALUATIONS ARE USED.)

DESCRIPTION OF PROPERTY	VALUE	METHOD OF VALUATION
I incorporate by reference my SF 278		
Primary residence – Kensington, MD	$812,800	State/County property tax assessment
53 minerals acres in Williams County, ND	$79,500	Estimate based on approximate current market value

29. LIST ALL LOANS OR OTHER INDEBTEDNESS (INCLUDING ANY CONTINGENT LIABILITIES) IN EXCESS OF $10,000. EXCLUDE A MORTGAGE ON YOUR PERSONAL RESIDENCE UNLESS IT IS RENTED OUT, AND LOANS SECURED BY AUTOMOBILES, HOUSEHOLD FURNITURE, OR APPLIANCES. (NOTE: THE INFORMATION PROVIDED IN RESPONSE TO SCHEDULE C OF THE DISCLOSURE FORM OF THE OFFICE OF GOVERNMENT ETHICS MAY BE INCORPORATED BY REFERENCE, PROVIDED THAT CONTINGENT LIABILITIES ARE ALSO INCLUDED.)

NATURE OF OBLIGATION	NAME OF OBLIGEE	AMOUNT
None.		

30. ARE YOU OR YOUR SPOUSE NOW IN DEFAULT ON ANY LOAN, DEBT, OR OTHER FINANCIAL OBLIGATION? HAVE YOU OR YOUR SPOUSE BEEN IN DEFAULT ON ANY LOAN, DEBT, OR OTHER FINANCIAL OBLIGATION IN THE PAST TEN YEARS? HAVE YOU OR YOUR SPOUSE EVER BEEN REFUSED CREDIT OR HAD A LOAN APPLICATION DENIED? IF THE ANSWER TO ANY OF THESE QUESTIONS IS YES, PLEASE PROVIDE DETAILS.

No.

31. LIST THE SPECIFIC SOURCES AND AMOUNTS OF ALL INCOME RECEIVED DURING THE LAST FIVE YEARS, INCLUDING ALL SALARIES, FEES, DIVIDENDS, INTEREST, GIFTS, RENTS, ROYALTIES, PATENTS, HONORARIA, AND OTHER ITEMS EXCEEDING $200. (COPIES OF U.S. INCOME TAX RETURNS FOR THESE YEARS MAY BE SUBSTITUTED HERE, BUT THEIR SUBMISSION IS NOT REQUIRED.)

[INFORMATION REDACTED]

32. IF ASKED, WILL YOU PROVIDE THE COMMITTEE WITH COPIES OF YOUR AND YOUR SPOUSE'S FEDERAL INCOME TAX RETURNS FOR THE PAST THREE YEARS?

Yes.

33. LIST ALL JURISDICTIONS IN WHICH YOU AND YOUR SPOUSE FILE ANNUAL INCOME TAX RETURNS.

We file federal and Maryland income tax returns.

34. HAVE YOUR FEDERAL OR STATE TAX RETURNS BEEN THE SUBJECT OF AN AUDIT, INVESTIGATION, OR INQUIRY AT ANY TIME? IF SO, PLEASE PROVIDE DETAILS, INCLUDING THE RESULT OF ANY SUCH PROCEEDING.

I am not aware that our federal or state tax returns have been the subject of an audit or investigation.

At various times, we have received letters from the IRS regarding our returns. I have examined our records dating back to 1992 and have identified the following:

2010 – Letter from the IRS dated March 21, 2011, requesting that we file a form 6251 (alternative minimum tax). No further action following our filing of the proper form.

2009 – Letter from the IRS dated May 3, 2010, increasing our refund based on a tax credit we did not claim.

2006 – Letter from the IRS dated May 22, 2007, requesting that we file a form 6251 (alternative minimum tax). No further action following the filing of the proper form.

2003 – Letter from the IRS dated May 24, 2004, increasing our refund based on an error in computing our child tax credit.

1992 – Letter from the IRS dated February 15, 1995, concluding that our 1992 tax return was accurate, based on records I provided to the IRS in 1994 regarding $3,961 I received in travel reimbursements.

35. IF YOU ARE AN ATTORNEY, ACCOUNTANT, OR OTHER PROFESSIONAL, PLEASE LIST ALL CLIENTS AND CUSTOMERS WHOM YOU BILLED MORE THAN $200 WORTH OF SERVICES DURING THE PAST FIVE YEARS. ALSO, LIST ALL JURISDICTIONS IN WHICH YOU ARE LICENSED TO PRACTICE.

None.

36. DO YOU INTEND TO PLACE YOUR FINANCIAL HOLDINGS AND THOSE OF YOUR SPOUSE AND DEPENDENT MEMBERS OF YOUR IMMEDIATE HOUSEHOLD IN A BLIND TRUST? IF YES, PLEASE FURNISH DETAILS. IF NO, DESCRIBE OTHER ARRANGEMENTS FOR AVOIDING ANY POTENTIAL CONFLICTS OF INTEREST.

No. I do not believe that the position for which I am nominated will present conflicts of interests with our financial holdings. I will consult with designated ethics officials and am prepared to take appropriate steps to avoid any potential conflicts of interest.

36. IF APPLICABLE, ATTACH THE LAST THREE YEARS OF ANNUAL FINANCIAL DISCLOSURE FORMS YOU HAVE BEEN REQUIRED TO FILE WITH YOUR AGENCY, DEPARTMENT, OR BRANCH OF GOVERNMENT.

Attached.

PART E - ETHICAL MATTERS

38. HAVE YOU EVER BEEN THE SUBJECT OF A DISCIPLINARY PROCEEDING OR CITED FOR A BREACH OF ETHICS OR UNPROFESSIONAL CONDUCT BY, OR BEEN THE SUBJECT OF A COMPLAINT TO, ANY COURT, ADMINISTRATIVE AGENCY, PROFESSIONAL ASSOCIATION, DISCIPLINARY COMMITTEE, OR OTHER PROFESSIONAL GROUP? IF SO, PROVIDE DETAILS.

I am aware of one professional complaint, detailed below:

In 2002, I was the subject of a complaint to the Department of Justice Office of Professional Responsibility (OPR) for professional misconduct in connection with a grand jury investigation in *United States v. Kevin Gray* (D.D.C). The matter was resolved in my favor with a finding that I did not commit professional misconduct or exercise poor judgment in seeking and compelling the production of documents and testimony from a defense attorney regarding his receipt of attorney's fees from a defendant. This determination was memorialized in a letter from OPR to me dated May 2, 2002.

39. HAVE YOU EVER BEEN INVESTIGATED, HELD, ARRESTED, OR CHARGED BY ANY FEDERAL, STATE, OR OTHER LAW ENFORCEMENT AUTHORITY FOR VIOLATION OF ANY FEDERAL STATE, COUNTY, OR MUNICIPAL LAW, REGULATION, OR ORDINANCE, OTHER THAN A MINOR TRAFFIC OFFENSE, OR NAMED AS A DEFENDANT OR OTHERWISE IN ANY INDICTMENT OR INFORMATION RELATING TO SUCH VIOLATION? IF SO, PROVIDE DETAILS.

No.

40. HAVE YOU EVER BEEN CONVICTED OF OR ENTERED A PLEA OF GUILTY OR NOLO CONTENDERE TO ANY CRIMINAL VIOLATION OTHER THAN A MINOR TRAFFIC OFFENSE? IF SO, PROVIDE DETAILS.

No.

41. ARE YOU PRESENTLY OR HAVE YOU EVER BEEN A PARTY IN INTEREST IN ANY ADMINISTRATIVE AGENCY PROCEEDING OR CIVIL LITIGATION? IF SO, PLEASE PROVIDE DETAILS.

No.

42. HAVE YOU BEEN INTERVIEWED OR ASKED TO SUPPLY ANY INFORMATION AS A WITNESS OR OTHERWISE IN CONNECTION WITH ANY CONGRESSIONAL

INVESTIGATION, FEDERAL, OR STATE AGENCY PROCEEDING, GRAND JURY INVESTIGATION, OR CRIMINAL OR CIVIL LITIGATION IN THE PAST TEN YEARS? IF SO, PROVIDE DETAILS.

In approximately 1978, I testified as a witness in a juvenile proceeding in Montgomery County, Maryland.

43. HAS ANY BUSINESS OF WHICH YOU ARE OR WERE AN OFFICER, DIRECTOR, OR PARTNER BEEN A PARTY TO ANY ADMINISTRATIVE AGENCY PROCEEDING OR CRIMINAL OR CIVIL LITIGATION RELEVANT TO THE POSITION TO WHICH YOU HAVE BEEN NOMINATED? IF SO, PROVIDE DETAILS. (WITH RESPECT TO A BUSINESS OF WHICH YOU ARE OR WERE AN OFFICER, YOU NEED ONLY CONSIDER PROCEEDINGS AND LITIGATION THAT OCCURRED WHILE YOU WERE AN OFFICER OF THAT BUSINESS.)

No.

44. HAVE YOU EVER BEEN THE SUBJECT OF ANY INSPECTOR GENERAL INVESTIGATION? IF SO, PROVIDE DETAILS.

No. During my time at the Department of Justice, I have been asked by the Department of Justice Office of Inspector General (OIG) to provide information related to my job responsibilities in connection with audits and reviews conducted by that Office. I have no reason to believe I was the subject of any investigation.

PART F - SECURITY INFORMATION

45. HAVE YOU EVER BEEN DENIED ANY SECURITY CLEARANCE OR ACCESS TO CLASSIFIED INFORMATION FOR ANY REASON? IF YES, PLEASE EXPLAIN IN DETAIL.

No.

46. HAVE YOU BEEN REQUIRED TO TAKE A POLYGRAPH EXAMINATION FOR ANY SECURITY CLEARANCE OR ACCESS TO CLASSIFIED INFORMATION? IF YES, PLEASE EXPLAIN.

Yes. In 2010, I took a polygraph examination in connection with my current position with the National Security Agency.

47. HAVE YOU EVER REFUSED TO SUBMIT TO A POLYGRAPH EXAMINATION? IF YES, PLEASE EXPLAIN.

No.

PART G - ADDITIONAL INFORMATION

48. DESCRIBE IN YOUR OWN WORDS THE CONCEPT OF CONGRESSIONAL OVERSIGHT OF U.S. INTELLIGENCE ACTIVITIES. IN PARTICULAR, CHARACTERIZE WHAT YOU BELIEVE TO BE THE OBLIGATIONS OF THE DIRECTOR OF THE NATIONAL COUNTERTERRORISM CENTER AND THE INTELLIGENCE COMMITTEES OF THE CONGRESS RESPECTIVELY IN THE OVERSIGHT PROCESS.

The obligation of the Intelligence Community to provide information to Congress is embodied in Title 5 of the National Security Act of 1947, which requires the Intelligence Community to keep the congressional intelligence committees "fully and currently informed" of significant intelligence activities, significant anticipated intelligence activities, and significant intelligence failures.

In my view, congressional oversight is essential to the effective conduct of intelligence activities, and the obligation of the Director of NCTC is to assist the Committee in carrying out its legitimate oversight duties and to foster a cooperative relationship with the intelligence community and oversight committees. Congressional oversight of intelligence activities is fundamental to the ability of NCTC to operate within the structure of our government. First, congressional oversight is essential to improving the quality of intelligence and the effective, efficient operation of NCTC and the rest of the Intelligence Community. Members of Congress bring an important and vital perspective to the difficult issues the Intelligence Community faces. In addition, oversight is critical in building the trust of both Congress and the American people that NCTC and the Intelligence Community exercise authority in a manner that is appropriately transparent and protects the civil liberties and privacy rights of U.S. citizens. In this way, I firmly believe the oversight process provides an essential check on the Intelligence Community, and I believe in and value the congressional oversight process. If I am confirmed as the Director of NCTC, I am committed to continuing the practice of open communication and transparency with the congressional oversight committees.

49. EXPLAIN YOUR UNDERSTANDING OF THE RESPONSIBILITIES OF THE DIRECTOR OF THE NATIONAL COUNTERTERRORISM CENTER.

The statutory responsibilities of NCTC and the Director of NCTC are described in Section 1021 of the Intelligence Reform and Terrorism Prevention Act of 2004. By law, NCTC is the primary organization in the federal government for analyzing and integrating all intelligence pertaining to terrorism and counterterrorism, excepting intelligence pertaining exclusively to domestic terrorism and domestic counterterrorism. NCTC thus has a unique responsibility to examine all international terrorism issues, regardless of where in the world they might be located.

NCTC's area of responsibility spans geographic boundaries, allowing for such intelligence to be analyzed regardless of whether it is collected inside or outside the United States. Further, the Center, by law, serves as the U.S. Government's central and shared knowledge bank on known and suspected terrorists and international terror groups. No other organization in the U.S. Government is as singularly focused on terrorism.

NCTC—in its Strategic Operational Planning role—is uniquely positioned to look beyond individual department and agency missions toward a single, unified counterterrorism effort. This distinguishes NCTC from other elements of the Intelligence Community and federal government and enables the Center to take a strategic, long term view of the counterterrorism mission. Through a single and joint planning process that integrates all instruments of national power, the Center ensures the effective integration of government counterterrorism plans and the synchronization of operations across more than 20 departments and agencies with counterterrorism responsibilities.

Thus, the Director of NCTC has two related but distinct areas of responsibility: intelligence and strategic operational planning. With respect to the first, the Director is responsible to the Director of National Intelligence (DNI) and is charged with a variety of specific responsibilities, to include acting as the DNI's principal adviser on intelligence operations pertaining to counterterrorism, being responsible for supporting DHS and FBI for the dissemination of counterterrorism information to a variety of federal, state and local officials and government entities through entities like the Interagency Threat Assessment and Coordination Group, and advising the DNI on the allocation of counterterrorism resources to elements of the Intelligence Community.

With respect to strategic operational planning, the Director of NCTC reports directly to the President. In this role, the Director is responsible for providing strategic operational plans—both short and long term policy planning which aims to bring all elements of national power to bear against terrorism—for all departments and agencies of the U.S. government

Finally, in accordance with the directive of the DNI, the Director of NCTC is the Counterterrorism National Intelligence Manager for the Intelligence Community. In this role, NCTC leads the counterterrorism community in identifying critical intelligence problems, key knowledge gaps, and major resource constraints.

TO THE CHAIRMAN, SELECT COMMITTEE ON INTELLIGENCE:

In connection with my nomination to be the Director of the National Counterterrorism Center, I hereby express my willingness to respond to requests to appear and testify before any duly constituted committee of the Senate.

[SIGNATURE]

Signature

Date: July 12, 2011

AFFIRMATION

I, MATTHEW G. OLSEN, DO SWEAR THAT THE ANSWERS I HAVE PROVIDED TO THIS QUESTIONNAIRE ARE ACCURATE AND COMPLETE.

July 12, 2011 [SIGNATURE]

(Date) (Name)

[SIGNATURE]

(Notary)

BETHANY MAUCK
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires January 8, 2012

Harvard Civil Rights

Civil Liberties Law Review

COMMENT

Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations -

Rachel San Kronowitz
Joanne Lichtman
Steven Paul McSloy
Matthew G. Olsen

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TOWARD CONSENT AND COOPERATION: RECONSIDERING THE POLITICAL STATUS OF INDIAN NATIONS

Table of Contents

Introduction*

The political relationship between the United States and Indian nations is legally anomalous: Indian nations are politically distinct peoples, possessing inherent rights of sovereignty, yet they reside within the physical boundaries of the United States. Treaties made with European nations, colonial governments, and the United States recognized the independent sovereign status of Indian nations. This status was expressed in the United States Constitution and affirmed in early Supreme Court cases. For the past century and a half, however, the federal and state governments have imposed extensive power over the Indian nations in violation of their independence. As a result, Indian nations are denied the right to self-government and to determine their own political status.

We decided to write this Comment to examine the role that law has played in the subjugation of Indian nations. We were compelled by the indifference of the United States to basic

* The authors wish to thank Howard Berman, Ankur Jay Goel, Steve Orr and Jill C. Owens for their contributions to this Comment.

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principles of political self-determination and respect for human dignity in its relationship with Indian nations. In this Comment we challenge and criticize the legal doctrines used by both the federal and state governments to justify the imposition of their authority. Our conclusions advocate a restructuring of the relations between Indian nations and the United States based upon mutual consent and cooperation.

In the first Part of this Comment we discuss the historical relationship between the federal government and the Indian nations. We examine the various legal concepts used to justify the gradual extension of federal power over Indian nations and argue that these concepts lack constitutional support.

Part II analyzes the relationship between the states and the Indian nations, demonstrating that the imposition of any state power over Indians and Indian territory is unconstitutional. While recognizing the need for cooperation between Indian and state governments, we argue that without consent, any attempt to extend state power over Indian nations is illegitimate.

We advocate the search for new legal doctrines on which to base relations between Indian nations and the federal and state governments. As we discuss in the third Part, our search led us to principles of international law, emphasizing a relationship based on negotiation and consent. Existing human rights law and developing principles for the protection of indigenous peoples support a restructuring of Indian-United States political relations that is founded on the right to self-determination for Indian nations. Such an approach is consistent with both the historical sovereignty of Indian nations and the establishment of a consent-based relationship between the Indian nations and the United States.

* * *

I. Limiting Federal Plenary Power: Indian Sovereignty and the Constitution

The Indian nations[1] of North America were recognized as independent sovereign powers by European monarchs and legal

[1] We believe the term "Indian nation" more accurately describes the political status of American Indian peoples than the term "tribe." Many Indian nations function as one

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scholars throughout the colonial era.[2] Recognition of this autonomy and of the international nature of the United States-Indian relationship is implicit in both the Constitution and the early history of the Republic. The Supreme Court under Chief Justice John Marshall articulated this view, and denied the legitimacy of the imposition of federal and state power over the Indian nations.[3]

Today, however, the federal government exercises far-reaching power over the lives of Indians and the internal affairs of Indian nations. Though in some respects bounded by the Bill of Rights,[4] this broad exercise of federal power has reduced the Indian nations to a status variously described as that of a special interest group,[5] a judicially-protected minority,[6] or "some new kind of federal municipalit[y]."[7] While the federal government often claims to act in furtherance of Indian "self-determination,"[8] both it and the governments of the states[9] continue to expand their jurisdiction and power over Indian peoples. This Part of the Comment examines the history and legal justifications of federal power over Indian nations, and challenges its legitimacy.

political unit though they are in fact composed of several different ethnic tribes. However, because judicial opinions often use the term "tribe," it will be used occasionally in this Comment for the sake of clarity when discussing such opinions.

[2] *See generally* F. Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest 15–31 (1975); F. de Victoria, De Indis et de Iure Belli Relectiones (Reflections On the Indians and On the Law of War) (E. Nys ed. & J. Bate trans. 1917) (J. Simon rev. ed. 1696), in Classics of International Law (J. Scott ed. 1917).

[3] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); discussed *infra* at notes 28–71 and accompanying text.

[4] As citizens, Indians are ostensibly protected by the Bill of Rights to the same extent as other Americans. *See* Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975) (three judge court), *aff'd without opinion sub nom* Apache County v. United States, 429 U.S. 876 (1976). While certain Indian rights, such as the right to vote, have been judicially enforced, *see, e.g., id.*, other rights, such as the right to just compensation under the fifth amendment for the taking of property, have not been nearly as well protected. *See infra* notes 143–51, 273 and accompanying text.

[5] *See* R. Barsh & J. Henderson, The Road: Indian Tribes and Political Liberty 243–44 (1980) (discussing the "ethnic Indian movement"); *id.* at 219 (discussing Indian lobbying).

[6] This approach is advocated in Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 245–46 (1984) and in *The Supreme Court, 1984 Term—Leading Cases*, 99 Harv. L. Rev. 120, 264 n.80 (1985).

[7] Indian Law Resource Center, *The Supreme Court: New Cause for Alarm*, in Rethinking Indian Law 74 (1982); *see* Colliflower v. Garland, 342 F.2d 369, 378–79 (9th Cir. 1965) (Fort Belknap Tribal Courts are "arms of the federal government"); *see also* Settler v. Yakima Tribal Court, 419 F.2d 486, 489 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970) (same analysis of Yakima Tribal Courts). *But see* United States v. Wheeler, 435 U.S. 313 (1978) (no double jeopardy in prosecution by both tribal and state courts).

[8] *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a (1982)("Congress hereby recognizes the obligation . . . to respond to the strong expression of the Indian people for self-determination"); President Reagan, Statement on Indian Policy, Pub. Papers of Ronald Reagan 96, 96 (Jan. 24, 1983) ("Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian Tribes"); Iowa Mutual Ins. Co. v. LaPlante, 55 U.S.L.W. 4170, 4171 (U.S. Feb. 24, 1987) ("[The Supreme Court has] repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government"). *See generally* F. Cohen, Handbook of Federal Indian Law 180–206 (1982 ed.) (discussing era of "self-determination" in United States Indian law, 1961 to present).

[9] *See infra* notes 279–429 and accompanying text.

[10] *See* American Indian Policy Review Commission [AIPRC], Task Force One: Trust Responsibilities and the Federal-Indian Relationship, Including Treaty Review, Final Report 53 (1976) (Committee Print) (relationship between Indian nations and the United States is "deeply rooted in international law").

[11] *See* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L. Rev. 1, 17 (1942); J. Scott, The Spanish Origin of International Law 11a (1928).

[12] *See* Cohen, *supra* note 11, at 17. *See also infra* note 14.

[13] *See* F. de Victoria, *supra* note 2, at 115–28. *See generally* Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 So. Cal. L. Rev. 1, 68–93 (1983).

[14] Cohen, *supra* note 11, at 11–12 (emphasis in original). Victoria's doctrine of racial equality was expressed in the Papal Bull *Sublimis Deus* in 1537:

> [T]he said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.

A. *Historical Recognition of Indian Sovereignty*

1. *International Law and the Colonial Period*

Until the mid-nineteenth century, relations between Indian nations and the United States were based on international law.[10] The theories of Francisco de Victoria, a sixteenth-century legal advisor to the Spanish Crown considered to be the founder of international law,[11] formed the basic framework of the relationship between the Indian peoples and the colonists of the New World.[12] Victoria argued that Indians were free and rational peoples who possessed inherent natural legal rights.[13] Central to his argument was the idea "that certain basic rights inhere in men *as men*, not by reason of their race, creed, or color, but by reason of their humanity."[14] Under Victoria's theory, the

rights held by the Indians under international law included the right to own property[15] and the right to be free of European authority so long as they did not provoke a "just war."[16]

The English derived their view of the extent of their power regarding the Indians from Victoria's ideas, and held that the Indians were independent nations whose territory could only be acquired by purchase or just war.[17] This policy was reflected in the 1743 ruling in *Mohegan Indians v. Governor of Connecticut*,[18] a case brought in 1703 by the Mohegans concerning a land dispute with the colony. Addressing the question of the political status of the Indian nations, the royal Court of Commissioners stated:

> The Indians, though living amongst the king's subjects in these countries, are a *separate and distinct people from them*, they are treated with as such, *they have a polity of their own*, they make peace and war with any nation of Indians when they think fit, *without controul*

Quoted in id. at 12. Cohen notes that this language was repeated in the Northwest Ordinance of July 13, 1787, reenacted August 7, 1789, 1 Stat. 50, 52 n.(a):

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Id. at 12.

[15] F. de Victoria, *supra* note 2, at 128 ("the aborigines . . . could [not] be despoiled of their property on the ground of their not being true owners").

[16] Victoria argued that power over the Indians could not be asserted as of right by either the Holy Roman Emperor or the Pope, the ultimate authorities in the temporal and spiritual worlds, respectively. F. de Victoria, *supra* note 2, at 129–37. However, Victoria did provide justification for the assertion of European power over Indians by arguing that international law imposed certain duties on all societies, including the Indian nations, among which was the requirement that the Indians permit free trade and travel over their land and allow the propagation of Christianity. *Id.* at 151–53, 156–57; *see also* Williams, *supra* note 13, at 79–83. Failure to meet these universally-binding obligations would permit the Europeans to wage "just war" to ensure their satisfaction. *See* F. de Victoria, *supra* note 2, at 154–58.

[17] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544–548 (1832); F. Prucha, American Indian Policy in the Formative Years 140 (1962).

[18] The case is discussed in J.H. Smith, Appeals to the Privy Council from the American Plantations 422–42 (1950); Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 Am. Indian L. Rev. 75, 97–99 (1977); Clinton, *Book Review*, 47 U. Chi. L. Rev. 846, 852 (1980). The case has been described as "the greatest cause that ever was heard at the [Privy] Council Board." J.H. Smith, *supra*, at 418.

> from the English. . . . [I]t is plain . . . that the crown looks upon the Indians as having, the *property of the soil* . . . and that their lands are not [colonial territory] till [the colonists] have made *fair and honest* purchases of the natives. . . . [This] matter of property in lands in dispute between the Indians as a *distinct people* . . . and the English subjects, cannot be determined by the law of our land, but by a law *equal to both parties*, which is the law of *nature* and *nations*.[19]

During the American Revolution, Indian nations joined forces with both sides. After the war, the Cherokees, one of the most powerful Indian nations to have allied with the British, refused to recognize the Treaty of Paris as ending its war with the colonies, demanding and receiving a separate treaty of peace at Hopewell in 1785.[20] The Delawares, who fought on the American side, concluded the first Indian treaty with the United States in 1778, which guaranteed the protection of Delaware territory and invited them to "join the present confederation, and to form a state . . . and have a representation in Congress."[21]

The American Republic had in fact been inspired in part by the governments of the Indian nations. Benjamin Franklin had written in 1751 that it was "a very strange thing" that the Six Nations of the Iroquois could form a democratic confederacy when the colonies were unable to do the same.[22] Thomas Jefferson also believed that the Iroquois provided a model for American government.[23]

[19] Majority opinion of Comm'r Horsmanden, Aug. 1, 1743, *quoted in* Henderson, *supra* note 18, at 98 (emphasis in original); *partially quoted in* Clinton, *supra* note 18 (same). The Court's ruling was finally affirmed in 1773 by the Privy Council. 5 Acts of the Privy Council (Colonial) § 133, at 218 (1773).

[20] R. Barsh & J. Henderson, *supra* note 5, at 32.

[21] Articles of Agreement and Confederation, Sept. 17, 1778, United States-Delaware Nation, art. V, 7 Stat. 13, 14; *see also* Treaty with the Cherokees at Hopewell, Nov. 28, 1785, art. XII, 7 Stat. 18, 20 (Cherokees "shall have the right to send a deputy . . . to Congress").

[22]

> It would be a very strange thing if Six Nations of ignorant Savages should be capable of forming a Scheme for such an Union and be able to execute it in such a manner, as that it has subsisted Ages, and appears indissoluble, and yet a like union should be impracticable for ten or a dozen English colonies.

Letter to James Parker, *quoted in* B. Johansen, Forgotten Founders 66 (1982).

[23] Evans & Boyte, *Political Participation: The People Shall Rule*, 287 Current 14, 15 (1986). *See generally* B. Johansen, *supra* note 22, at 98–118.

During the framing of the Articles of Confederation and the Constitution, the only real debate regarding Indians concerned the division of power between the state and federal governments in the conduct of Indian relations.[24] The lack of debate or consideration of the exercise of power over Indian nations reveals the Framers' acceptance of the idea that no federal or state authority over the Indians existed without their consent.[25] The Constitution, in providing for the negotiation of treaties with the Indians and the regulation of commerce with them, as with other foreign nations, incorporated the sovereign and independent conception of Indian nations held by the Framers.[26] The conduct of relations with Indian nations by treaty up until the late nineteenth century illustrates the continuing international character of the relationship between the sovereign nations of America.[27] The true intention of the Constitution was to serve as a framework for United States-Indian *relations*, and not as a source of United States power.

2. *The Marshall Court Cases*

The Supreme Court under Chief Justice John Marshall affirmed the concept of Indian sovereignty in its opinions concerning the relationship between the federal government and the Indians. Recent scholarship considering the seminal Marshall Court cases of *Johnson v. M'Intosh*,[28] *Cherokee Nation v. Georgia*[29] and *Worcester v. Georgia*[30] has argued that together

[24] *See* W. Mohr, Federal Indian Relations, 1774–1788, at 176–77, 182–84 (1933) (discussing the Articles of Confederation); F. Prucha, *supra* note 17, at 28–31 (same); *id.* at 41–43 (discussing the Constitution); 5 Debates on the Adoption of the Federal Constitution 439, 462, 507, 560 (J. Elliot ed. 1845) (same). The only other debate in the Constitutional Convention regarding Indians concerned the wording of the provision that Indians not taxed by the states would not be counted in the census. *Id.* at 181, 190, 192, 379, 559.

[25] *See* Newton, *supra* note 6, at 200.

[26] *See id.* ("The absence of a general power over Indian affairs in the Constitution is not surprising . . . [since] the framers regarded Indian tribes as sovereign nations").

[27] *See* F. Prucha, *supra* note 17, at 142 ("Treating with the Indians . . . gave foundation and strength to the doctrine that the Indian tribes were independent nations with their own rights and sovereignty").

[28] 21 U.S. (8 Wheat.) 543 (1823).

[29] 30 U.S. (5 Pet.) 1 (1831).

[30] 31 U.S. (6 Pet.) 515 (1832).

these cases articulate a conception of the independent political status of Indian nations that reflects the international character of the United States-Indian relationship and the lack of justification for the exercise of United States power over internal Indian affairs.[31]

Johnson concerned a title dispute. Speculators purchased land from Indians who subsequently ceded the same land to the United States as part of a treaty. The *Johnson* litigants were later settlers, one tracing his title to the speculators and the other to the United States. Chief Justice Marshall, writing for the Court, refused to recognize the legitimacy of the transfer of the Indian lands to the private speculators, holding that while the Indians had an unquestioned right to occupation of their land, only the United States could acquire the Indians' title and transfer it to a private individual.[32] The basis for this exclusive right was the international legal doctrine of discovery, a principle which had regulated the competing territorial claims of European nations in America for centuries.[33]

Marshall explained that discovery "gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments. . . . The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."[34] The doctrine bestowed "exclusive title" on the sovereign to acquire Indian lands through purchase or conquest,[35] and held that settlers could not purchase Indian lands without the consent of the discovering sovereign.[36] Unless the discoverer waged and won a war of

[31] *See* Coulter, *A History of Indian Jurisdiction*, and *Contemporary Indian Sovereignty*, in Rethinking Indian Law 5–8, 109–11 (1982); Berman, *The Concept of Aboriginal Title in the Early Legal History of the United States*, 27 Buffalo L. Rev. 637 (1978).

[32] 21 U.S. (8 Wheat.) at 603–05.

[33] *See Johnson*, 21 U.S. (8 Wheat.) at 572–84; Berman, *supra* note 31, at 644–45.

[34] 21 U.S. (8 Wheat.) at 573.

[35] *Id.* at 574. In 1789 Secretary of War Henry Knox, who was in charge of Indian affairs, wrote:

> [T]he Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature.

quoted in Documents of United States Indian Policy 12–13 (F. Prucha ed. 1975).

[36] 21 U.S. (8 Wheat.) at 587.

conquest, discovery provided no justification for the intrusion upon the Indians' possession of their land without their consent. The discovery doctrine was merely the internationally accepted standard by which the competing nations of Europe established and recognized spheres of influence in the New World, and it therefore "bound the European governments but not the Indian tribes."[37] Despite its de facto curtailment of their right to freely alienate their lands, the discovery doctrine was not premised upon restricting the sovereignty of Indian nations. This is illustrated by the fact that title to uninhabited lands also could not be acquired without the discoverer's consent.[38]

Marshall's adoption of the doctrine of discovery as a principle of American law was therefore not contrary to the conception of Indian sovereignty recognized by Victoria and the colonial powers. Indian nations retained possession of their land and the right "to use it according to their own discretion,"[39] and the power of their laws and government over their territory was unquestioned.[40] *Johnson* explicitly recognized that the authority of the United States did not extend to Indian land. The Court held that without the United States' consent, a purchase of land by a settler from an Indian nation did not incorporate that territory into that of the United States, and thus the settler held his land subject to Indian law, beyond the reach of federal power or protection.[41]

Unfortunately, Marshall's *dicta* discussing conquest as a means by which a discovering nation could acquire Indian title established a principle which later courts have used to justify restrictions on Indian sovereignty. Marshall stated that "[c]onquest gives a title which the Courts of the conqueror cannot deny,"[42] and he legitimated conquest by writing that it could "find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from

[37] F. Cohen, Handbook of Federal Indian Law 292 (1942 ed.), *quoted in* Indian Law Resource Center, *United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination*, in Rethinking Indian Law 16 (1982).

[38] *See Johnson*, 21 U.S. (8 Wheat.) at 595 (discussing this "principle of universal law").

[39] *Id.* at 574.

[40] *Id.* at 593.

[41] "The person who purchases lands from the Indians [without the discoverer's consent] holds [his] title under their protection and subject to their laws." *Id.*

[42] *Id.* at 588.

them."[43] This conception of the Indians as inferior has also been adopted as a justification for federal power.[44]

The *Johnson* opinion nonetheless gave Indian land holdings legitimacy under United States law. While restricting the Indians from alienating their lands without the discoverer's consent, a holding which both ensured federal control over the settlement of the frontier and confirmed older titles traced to European discoverers, the recognition of Indian rights to their land affirmed many treaty promises and showed the good faith of the United States. This was important to both the prevention of hostilities and to future treaty negotiations.[45] The power of Indian nations over their own affairs, their territory, and non-Indians who entered upon it was unquestioned, as was their status as sovereign nations capable of negotiating treaties and waging war.[46]

The *Cherokee Cases—Cherokee Nation v. Georgia*[47] and *Worcester v. Georgia*[48]—affirmed and expanded the recognition of Indian sovereignty made in *Johnson*, supporting the argument that Indian peoples are distinct nations with an inherent right to self-determination and rejecting the imposition of state and fed-

[43] *Id.* at 589. Marshall stated at the outset of the *Johnson* opinion that "the character and religion of [America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency." *Id.* at 573. Berman argues that "[t]he reality of a nation or community inhabiting territory cooperatively . . . was apparently beyond the scope of 17th century English thought. The result is an Anglo-American legal system with an inherent cultural bias that attributes an anomalous and inferior status to non-European forms of land tenure." Berman, *supra* note 31, at 644 n.31.

[44] *See generally* Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land-Related Cases, 1887–1924*, 4 Am. Indian L. Rev. 197 (1976); Note, *Constitutional Law: Congressional Plenary Power over Indian Affairs—A Doctrine Rooted in Prejudice*, 10 Am. Indian L. Rev. 117 (1982).

[45] Newton, *supra* note 6, at 208 n.69.

[46] *See* Berman, *supra* note 31, at 650 ("With the single exception of the right of alienability of land, the original, indeed aboriginal, sovereignty of the Indian nations is unimpaired by, and not included in, the concept of discovery"); *see also* Indian Law Resource Center, *supra note* 37. However, Marshall did note that Indian "rights to complete sovereignty, as independent nations, were necessarily diminished" by the inability to alienate their land freely. *Johnson*, 21 U.S. (8 Wheat.) at 574. Marshall also held that the *Mohegan* case had not asserted "that individuals might obtain a complete and valid title from the Indians." *Id.* at 598. Henderson argues that this "was an error," and that under *Mohegan* the Indians did have the right of free alienation, Henderson, *supra* note 18, at 132 n.121, despite Marshall's holding that such a conclusion was "contrary to the whole practice of the crown, and to the uniform opinions given on all other occasions by its great law officers." 21 U.S. (8 Wheat.) at 599.

[47] 30 U.S. (5 Pet.) 1 (1831).

[48] 31 U.S. (6 Pet.) 515 (1832).

eral power over them. The opinions also rejected the right of the United States to gain Indian territory by conquest outside of "just wars," and strictly defined United States power under the doctrine of discovery to be only the preemptive right to purchase Indian lands.

Cherokee Nation v. Georgia concerned the applicability of the laws of Georgia to Cherokee territory located within the state. The territory was pledged to the Cherokee Nation by treaties with the United States.[49] Georgia, motivated by the possibility of seizing the Cherokee's gold-rich land,[50] passed several statutes extending its laws to Cherokee territory in clear violation of the treaty provisions.[51] However, the Supreme Court did not reach the substantive issue of whether a state could assert such authority over Indian land. Considering only whether "the Cherokees constitute[d] a foreign state in the sense of the constitution,"[52] Marshall determined that they did not, and that they thus lacked standing to invoke the original jurisdiction of the Supreme Court.[53]

The Court acknowledged that the United States "plainly recognize[d] the Cherokee nation as a state,"[54] stating that the Cherokee nation had "been uniformly treated as a state from the settlement of our country."[55] However, Marshall went on to hold:

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be 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.[56]

In refusing to hear the Cherokee's claim, the Court avoided the politically volatile issue of the legitimacy of state authority over Indians. Despite his use of language of dependency and pupilage in describing the Cherokee, however, Marshall did not hold that such status might authorize the United States to limit Indian sovereignty in any manner other than to control the purchase of Indian land, as had been established in *Johnson*. To the contrary, Marshall affirmed the sovereign character of the Cherokee nation, holding it to be "a distinct political society, separated from others, capable of managing its own affairs and [of] governing itself."[57] *Cherokee Nation* clarified *Johnson*'s conception of the independent political status of Indian nations under United States law, but left unresolved the critical questions of state and federal jurisdiction and authority over Indian nations.

Worcester v. Georgia addressed this issue directly, resulting in an unambiguous assertion of the sovereignty of the Cherokee people. As in *Cherokee Nation*, the Court was confronted with the legitimacy of the application of Georgia law to Indian land. This time, however, the plaintiff was a citizen of Vermont convicted under Georgia law for "residing within the limits of the Cherokee nation without a license,"[58] and the Court found ju-

[49] Among the various treaties cited, the Treaty of Peace and Friendship, July 2, 1791, United States-Cherokee Nation, art. VII, 7 Stat. 39, 40, "solemnly guarantee[d] to the Cherokee Nation, all their lands not hereby ceded."

[50] *See* Newton, *supra* note 6, at 201 n.26; *Cherokee Nation*, 30 U.S. (5 Pet.) at 13–14, *quoting* the Georgia statute at issue ("an act . . . to provide a guard for the protection of the gold mines, and to enforce the laws of the state within [Cherokee] territory").

[51] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 7–14.

[52] *Id.* at 16. The Constitution provides that "[t]he judicial Power shall extend to . . . Controversies . . . between a State . . . and foreign States." U.S. Const. art. III, § 2.

[53] 30 U.S. (5 Pet.) at 20.

[54] *Id.* at 16. Marshall used the term "state" in the international sense, meaning nation-state.

[55] *Id.*

> The numerous treaties made with [the Cherokee] by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by an individual of their community.

Id.

[56] *Id.* at 17.

[57] *Id.* at 16. It has been argued that "[a]n overriding consequence of Marshall's guardianship concept was to integrate Indian occupancy and ownership of land into the system of American land tenure . . . . Since Indians were not citizens, the guardianship concept provided a way in which their ownership of real property could be acknowledged and protected." Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1219 (1975). Chambers explains the Court's need to find a legitimate theory of Indian landholding by noting that "[t]he prohibition against ownership of real property by non-citizens [i.e., Indians] survived in some states until well into this century." *Id.* at 1219 n.37.

[58] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 528 (1832).

risdiction to hear the case. The Court struck down the application of Georgia law to Cherokee land as "repugnant to the Constitution, treaties, and laws of the United States,"[59] and in so doing recognized the sovereignty of the Cherokee Nation.

Worcester rejected the legitimacy of the assertion of federal or state authority over Indian nations and refuted the idea that either discovery or conquest granted such powers. Marshall strictly defined the discovery doctrine to encompass only "the exclusive right to purchase" land from the Indians,[60] rejecting any implication in *Johnson* that might have permitted the United States to claim a greater property right as sovereign.[61] Marshall also reiterated the idea that the discovery doctrine was not a restriction on the powers of the Indians, stating that the sovereign's exclusive right to purchase was not founded "on a denial of the right of the possessor to sell,"[62] and that the doctrine "could not affect the rights of those already in possession."[63]

Marshall held that Indian nations' inherent sovereignty and powers of self-government were unaffected by the discovery doctrine: "The extravagant and absurd idea, that the feeble settlements made on the sea-coast, . . . acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man."[64] This holding affirmed the dominant rule in international law, adopted in *Johnson*, that discovery could support a claim of control only if the land was uninhabited.[65] Discovery therefore was not a tenable basis for the assertion of control over Indian nations, since their

[59] *Id.* at 562–63.
[60] *Id.* at 544.
[61] *See* Newton, *supra* note 6, at 209 n.70.
[62] 31 U.S. (6 Pet.) at 544.
[63] *Id.* In 1787, a committee on Indian affairs of the Continental Congress had declared that "it has long been the opinion of the country, supported by Justice and humanity, that the Indians have just claims to all lands occupied by and not fairly purchased from them." 33 J. Cont. Cong. 458 (1787). The last Marshall Court Indian case, Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835), held that Indian possession of land was "as sacred as the fee-simple of the whites." *See also* AIPRC, *supra* note 10, at 51, quoting the Assistant Solicitor for Indian Affairs: "A contrary notion, that Indians were mere tenants at will or sufferance of the United States and held no lawful claim to the lands possessed, was definitely rejected by the Supreme Court in the early Cherokee cases."
[64] *Worcester*, 31 U.S. (6 Pet.) at 544–45.
[65] *See supra* note 38 and accompanying text; Clinebell & Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans under International Law*, 27 Buffalo L. Rev. 669, 684–87 (1978).

rights of possession and use were recognized as valid under both United States and international law.[66]

In considering whether conquest was a legitimate source of authority over the Indians, Marshall stated that while the charters of the colonies conferred the power to engage in war, "*defensive* war alone seems to have been contemplated."[67] Thus, the colonies did not have the power to gain control of Indian nations or land through aggressive military action. This conformed to the international legal principle of "just war" articulated by Victoria and others throughout the colonial era, which prohibited unprovoked military aggression.[68]

Having rejected the discovery and conquest justifications for the extension of United States authority over Indian land, Marshall affirmatively asserted that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[69] Moreover, Marshall held that "[a] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state,"[70] concluding that the Cherokees had not surren-

[66] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17; *Johnson*, 21 U.S. (8 Wheat.) at 603. *See generally* F. de Victoria, *supra* note 2.
[67] 31 U.S. (6 Pet.) at 545 (emphasis in original).
[68] *See, e.g.*, F. de Victoria, *supra* note 2; H. Grotius, De Jure Belli Ac Pacis [The Law of War and Peace] 51–57 (F. Kelsey trans. London 1925) (1st ed. Amsterdam 1646), *supra* notes 14, 35 (adoption of "just war" principle by United States). *See also* Clinebell & Thomson, *supra* note 65. Despite international law and historical reality, the theory that the Indian nations were conquered peoples has frequently been offered to justify federal authority over Indians. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290 (1955); Powers of Indian Tribes, 55 I.D. 14 (Oct. 25, 1934), *reprinted in* 1 Opinions of the Solicitor 445, 449 ("Conquest renders the tribe subject to the legislative power of the United States").
[69] *Worcester*, 31 U.S. (6 Pet.) at 559. The Court also noted that treaties between the Cherokee Nation and the United States "recognize[d] the pre-existing power of the [Cherokee] nation to govern itself," *id.* at 562, and "the national character of the Cherokees, and their right to self-government." *Id.* at 556. The Court also stated:

> The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.

Id. at 559.
[70] *Id.* at 561. This holding was reiterated in United States v. Wheeler, 435 U.S. 313, 326 (1978).

dered their sovereignty either expressly or implicitly in their treaties with the United States.

Worcester repudiated the notion of conquest, strictly defined the doctrine of discovery put forth in *Johnson*, and strongly affirmed the principle of Indian sovereignty. The Court recognized that relations between Indian nations and the United States were conducted by treaties under the principles of international law, and held that the federal government had exclusive authority relative to the states to engage in political relations with Indian peoples.[71] The epitome of the Marshall Court's jurisprudence of Indian rights, *Worcester* exemplified the international legal perspective of United States-Indian relations dominant in the early Republic.

B. The Rise of Federal Plenary Power

1. The Property Power and the Beginnings of Federal Power over Indians

Despite the fact that the discovery doctrine adopted by the Marshall Court did not abrogate Indian property rights, the doctrine soon came to be seen as granting full title and ownership of Indian lands to the United States, leaving the Indians with a mere right of occupancy.[72] The first such reinterpretation took place in *Martin v. Waddell*,[73] decided only a decade after *Worcester* and seven years after the Marshall era ended with the Chief Justice's death. *Waddell*, like *Johnson*, concerned conflicting chains of title. One litigant asserted a title originating in a royal grant, and the other claimed the land pursuant to a state statute. Discussing the origin and extent of the power of the English Crown over lands in America, Chief Justice Taney, without citing any authority, stated:

[71] *Worcester*, 31 U.S. (6 Pet.) at 561 ("The whole intercourse between the United States and [the Indians] is, by our constitution and laws, vested in the government of the United States").

[72] This reinterpretation has become the modern understanding. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) ("discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained") (discussed *infra* at notes 143–51 and accompanying text); United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 347 (1941); Newton, *supra* note 6, at 209 n.70.

[73] 41 U.S. (16 Pet.) 367 (1842).

> [A]ccording to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. . . . The territory [the Indians] occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants.[74]

In holding that Indian land rights encompassed only occupancy, Taney ignored the history of European-Indian relations in America and contravened settled tenets of domestic and international law regarding respect for Indian sovereignty and rights to land.[75] The most significant result of Taney's reinterpretation of history and precedent, however, was that the Court viewed Indian land as territory of the United States. In 1846, Taney used this theory of federal ownership of Indian lands in *United States v. Rogers*[76] to uphold a statute which extended federal jurisdiction over crimes involving non-Indians occurring in Indian territory.[77] Specifically, Taney held, again without citation, that Indian territory was

> part of the territory of the United States. . . . The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land. . . .
>
> Indian tribes residing within the territorial limits of the United States are subject to their authority, and

[74] *Id.* at 409.

[75] *See supra* notes 60–71 and accompanying text; Indian Law Resource Center, *supra* note 37, at 17.

[76] 45 U.S. (4 How.) 567 (1846).

[77] *Rogers* upheld the Trade and Intercourse Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733, which extended federal criminal jurisdiction to Indian country but exempted crimes by Indians against Indians from prosecution.

> . . . Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.[78]

As in *Waddell*, Taney misread history and misinterpreted Marshall's conception of the doctrine of discovery.[79] The *Rogers* holding that Indian lands were United States territory made them subject to congressional control pursuant to the Congress' power to administer the property of the United States.[80] The *Rogers* Court also distorted Marshall's views on the legal status of Indian nations by holding that the Indians possessed no sovereign character.[81]

In *Rogers*, the Court "for the first time indicated that federal power over Indian tribes need not be tied to treaty-making and execution, or regulation of commerce between Indians and outsiders."[82] Thereafter, relations with the Indians were no longer clearly analogous to foreign relations, and Indian nations and their territory were not seen as wholly independent from United States control. Taney's reinterpretation of the discovery doctrine and the use of congressional power over United States property to uphold the first major intrusion of federal power into Indian territory initiated the pattern of unauthorized and steadily increasing federal intrusion upon Indian sovereignty[83] which was to culminate in the plenary power doctrine.

[78] 45 U.S. (4 How.) at 571–72.

[79] *See* Newton, *supra* note 6, at 210 (*Rogers* "was essentially a misinterpretation of the [discovery] doctrine"); Coulter, *A History of Indian Jurisdiction*, in Rethinking Indian Law 9 (1982). In his notorious opinion for the Court in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), Chief Justice Taney, needing to distinguish the relative freedom of the Indians from the slavery of the blacks, directly contradicted his *Rogers* holding, writing that "Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day." *Id.* at 404.

[80] The property clause is found at U.S. Const. art. IV, § 3, cl. 2: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." In its application, the property power has been held to be "without limitation." United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840). Several early 20th century cases used this rationale to justify Indian legislation. *See, e.g.*, Hallowell v. United States, 221 U.S. 317, 324 (1911); United States v. Celestine, 215 U.S. 278, 284 (1909).

[81] Compare *supra* note 69 and accompanying text.

[82] Newton, *supra* note 6, at 211.

[83] *See* Coulter, *supra* note 79, at 9–11.

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2. *The End of Treaty-making and the Establishment of Congressional Control over Indian Affairs*

Prior to 1871, the term "plenary power" in the Indian context referred to the *Worcester* holding that the federal government, and not the states, possessed the power under the Constitution to conduct relations with Indian nations.[84] During this period, relations between the federal government and Indian nations were conducted by treaty,[85] and most legislation concerning Indians was passed in order to carry out United States' treaty obligations.[86] As with foreign treaties, Indian treaties were negotiated by the Executive and ratified by the Senate.[87] In 1871, the House of Representatives, excluded from the treaty-making process, refused to appropriate money for the fulfillment of treaty obligations unless it received a greater role in formulating Indian policy.[88] As a compromise designed to enable the House to participate, Congress passed a rider to an appropriations act prohibiting the United States from recognizing any Indian nation as capable of making a treaty, though providing that existing treaties would remain intact.[89] The negotiation of "Indian agree-

[84] Indian Law Resource Center, *supra* note 37, at 24; *see also supra* note 59 and accompanying text.

[85] By 1871, the United States had entered into over 400 treaties with Indian nations. *See* Institute for the Development of Indian Law, A Chronological List of Treaties and Agreements Made by Indian Tribes with the United States (1973). Marks v. United States, 161 U.S. 297, 302 (1896), puts the number at 666.

[86] *See* Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 Am. Indian L. Rev. 239, 239 (1977); F. Prucha, *supra* note 17, at 45.

[87] *See* U.S. Const. art. II, § 2, cl. 2.

[88] *See* Antoine v. Washington, 420 U.S. 194, 202 (1974); Rice, *supra* note 86, at notes 23–28 and accompanying text.

[89]

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1982)); *see Antoine*, 420 U.S. at 201–04; Rice, *supra* note 86. It could be argued that the 1871 Act nullified the Indians' power to treat with the United States. However, the 1871 Act was a restraint on the executive branch, and not on the Indian nations. While the Act for all practical purposes ended the treaty-making power of the Indians, it formally only forbade the United States from *recognizing* Indian tribes, and thus was only "a self-limitation of contractual ability." *See* Rice, *supra* note 86.

ments," differing from treaties only in that they were ratified by both Houses of Congress, continued as before,[90] but the agreements were considered legislation, not treaties. Thus, while contractual relations between Indian nations and the United States did not cease, the 1871 Act did assert that Congress, and not the Executive, held primary authority for the conduct of Indian affairs.[91] The term "plenary power," at first only restating the *Worcester* holding of federal supremacy over the states, now also referred to this allocation to Congress of power regarding Indian relations. However, the term was merely descriptive and did not purport to be a doctrine or source of federal power over Indian nations.

3. United States v. Kagama

The modern conception of congressional plenary power as an unlimited authority to legislate over Indians began with the Court's departure in *United States v. Kagama*[92] from the term's previously narrow meaning. *Kagama* concerned the extension of federal criminal jurisdiction over crimes committed by Indians against Indians in Indian territory. Although held to reach Indian territory, prior to 1885 federal criminal statutes such as the act upheld in *Rogers*[93] had not provided for the punishment of crimes committed by Indians against Indians. As a result, in 1883 the Supreme Court held an Indian subject to only a lenient

[90] *See* American Indian Lawyer Training Program, Manual of Indian Law J-4 (3d ed. 1977); *see also* Rice, *supra* note 86, at 247.

[91] The 1871 Act arguably violated the separation of powers doctrine, for it eliminated a constitutionally enumerated power of the Executive by legislative act, rather than by constitutional amendment. *See* Rice, *supra* note 86, at 246. On the separation of powers doctrine generally, see INS v. Chadha, 462 U.S. 919 (1983). Supporters of the 1871 Act argued that they were only defining the term "foreign nation" as used in the Constitution. R. Barsh & J. Henderson, *supra* note 5, at 68. However, the Constitution specifically grants to the Executive the power to recognize foreign officials. U.S. Const. art. II, § 3. Thus, the Act contravened not only the Executive's treaty-making powers under *id.*, § 2, but also its prerogative of recognition under *id.* § 3. While the Supreme Court has discussed the Act several times, it has never questioned its constitutionality. Instead, the Court has held that it "meant no more . . . than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty." Antoine v. Washington, 420 U.S. 194, 203 (1974). *See generally* Rice, *supra* note 86, at 246.

[92] 118 U.S. 375 (1886); *see also* Comment, *Federal Plenary Power after* Weeks *and* Sioux Nation, 131 U. Pa. L. Rev. 235, 246 nn.67–70 and accompanying text (1982).

[93] *See supra* notes 76–78 and accompanying text; Coulter, *supra* note 79, at 6–9.

tribal sentence for the murder of another Indian.[94] The Court's sanction of "red man's revenge" caused popular outrage among Americans[95] and prompted the passage of the Major Crimes Act[96] in 1885, a federal criminal code which provided for the punishment of Indians committing certain crimes against other Indians in Indian territory.

Kagama, an Indian convicted in a federal court for the murder of another Indian on a reservation in California, challenged the constitutionality of his prosecution under the Major Crimes Act, arguing that passage of the Act was beyond the enumerated powers of Congress.[97] The United States argued that the history of gradually increasing federal control over Indians and their land warranted the upholding of this latest extension of federal jurisdiction.

The Supreme Court agreed with Kagama that there was no explicit constitutional justification for the Act's assertion of jurisdiction over the activity of Indians on their land.[98] However, after reasserting the *Cherokee Nation* holding that Indian tribes were not foreign nations, the Court stated that within the borders of the United States the "soil and the people . . . are under the political control of the Government of the United States, or of the States of the Union."[99] From this the Court concluded that Indians must be subject to the power of either the states or the Union, since "[t]here exist within the broad domain of sovereignty but these two."[100] This "it must be somewhere" analysis ignored the sovereignty of Indian nations and their inherent power over their people and lands.[101]

In examining the constitutionality of Kagama's prosecution, the Court first discussed federal power over Indian lands within

[94] *Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883), *discussed in Kagama*, 118 U.S. at 382–83.

[95] *See* Newton, *supra* note 6, at 212 nn.81–83.

[96] Act of March 3, 1885, ch. 341, 32 § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (1982)).

[97] Brief for the Defendants at 10, 19, United States v. Kagama, 118 U.S. 375 (1886).

[98] *Kagama*, 118 U.S. at 378–79.

[99] *Id.* at 379.

[100] *Id.*

[101] *See* Comment, *supra* note 92, at 247 n.74; Newton, *supra* note 6, at 215. The Court dismissed this possibility apparently in the belief that the 1871 Act ending treaty-making had either nullified Indian sovereignty or had forbidden any branch of the United States government, rather than just the Executive, from recognizing it. The Court stated that "after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern [Indians] by acts of Congress." 118 U.S. at 382.

the Territories. It held that federal power over such lands was not based upon the commerce clause,[102] the treaty power,[103] the property clause[104] or any other constitutional provision, but instead arose "from the *ownership* of the country in which the Territories are, and the right of exclusive sovereignty *which must exist* in the National Government, and can be found nowhere else."[105] In making this argument that control over Indian lands was inherent in the federal government, the Court relied on the misinterpretation of the discovery doctrine put forth by Chief Justice Taney's dictum in *Rogers*.[106]

Relying on *Worcester* and its progeny,[107] the Court then ruled that the extension of this inherent federal power to Indian lands located within the states was "within the competency of Congress."[108] This holding forms the cornerstone of modern plenary power:

> These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, . . . there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
>
> . . . .

[102] *See* 118 U.S. at 378–79 ("we think it would be a very strained construction . . . that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes.").

[103] The tribe to which Kagama belonged had never concluded any treaties with the United States, Newton, *supra* note 6, at 214 n.96, and the Court did not mention the treaty power.

[104] 118 U.S. at 380.

[105] *Id.* (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1884)) (emphasis added). The Court specifically stated that this ownership did not arise from the property clause. *Id.*

[106] The *Kagama* Court quoted heavily from the *Rogers* opinion, *see* 118 U.S. at 380–81, borrowing not only Chief Justice Taney's ownership theory but also the idea that congressional Indian policy was a "question for the law-making and political departments of the government, and not the judicial." *Id.* at 381 (quoting United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846)). The *Kagama* Court also quoted from Chief Justice Marshall's opinion in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828), stating that "[t]he right to govern may be the inevitable consequence of the right to acquire Territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." 118 U.S. at 380. Marshall's hint of inherent federal power in *Canter* may have provided precedent for the *Kagama* Court's holding that exclusive federal sovereignty "must exist."

[107] *See* 118 U.S. at 384.

[108] *Id.* at 383.

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[109]

It has been argued that "the narrow result of *Kagama*—the supremacy of federal over state power—was a just one,"[110] since the Framers intended the federal government to have exclusive authority regarding Indian affairs.[111] The holding in *Kagama*, however, grossly overstated the extent of that federal power. Because of the historical military and political position of the colonies, the Framers never conceived of exercising power *over* Indian nations, but instead provided a framework in the Constitution for conducting relations with them as equal sovereign nations.[112]

In establishing a theory of inherent federal power over internal Indian affairs, the *Kagama* court misinterpreted the discovery doctrine, disregarded Indian sovereignty, manipulated the federalism concepts embodied in *Worcester* and the 1871 Act, treated federal Indian policy as a nonjusticiable political matter, and relied on a historically inaccurate characterization of the Indian tribes as weak, helpless and diminished dependent wards in need of protection. The Court created a power in Congress over Indian nations which was unlimited, unconstitutional and unreviewable. The era of plenary power had arrived.

4. The Plenary Power Era

Congress moved quickly in exercising the broad plenary powers the *Kagama* Court had granted. One year after the *Kagama* decision, Congress passed the General Allotment Act

[109] 118 U.S. at 383–84 (emphasis in original).

[110] *See* Newton, *supra* note 6, at 215 n.103 and accompanying text.

[111] *See id.* at 215 n.103.

[112] *See supra* notes 24–27 and accompanying text.

of 1887.[113] Aimed at both satisfying the public demand for the opening of Indian lands for settlement[114] and at speeding the assimilation of the Indian nations into American society,[115] the Act divided tribal lands into individual parcels, with each member of the tribe receiving an allotment. Any remaining land was deemed "surplus," and was subject to purchase by the federal government and subsequent settlement by non-Indians.[116] The Act intentionally overrode treaties securing Indians in the possession of their land.[117] Allotted lands were to be held in trust by the federal government for twenty-five years, after which time title and full rights of ownership passed to the Indian owner, and the land became subject to state jurisdiction.[118] The Act also conferred United States and respective state citizenship on all allottees and on Indians not living on reservations who "adopted the habits of civilized life."[119] The Act's authority to distribute Indian lands and confer state jurisdiction over them was premised on the central assumption of the *Kagama* decision that the federal government owned all of the land within the borders of the United States that was not the territory of the states, and could legislate over it without hindrance.

The Allotment Act explicitly sought to undercut the political and cultural identity of Indian nations by destroying their common ownership of land.[120] The system of individual allotments created by the Act imposed the American ideal of private

[113] General Allotment (Dawes) Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–34, 339, 341–42, 348, 349, 381 (1982)).

[114] "[T]he most powerful force motivating the allotment policy was the pressure of the land-hungry western settlers." D. Otis, *History of the Allotment Policy, Hearings on H.R. 7902 before House Comm. on Indian Affairs*, 23d Cong., 2d Sess., pt. 9 (1934), *quoted in* D. Getches, D. Rosenfelt & C. Wilkinson, Federal Indian Law 71 (1979); American Indian Policy Review Commission [AIPRC], Task Force Two: Tribal Government, Final Report 78 (1976).

[115] Rep. Skinner, House sponsor of the Act, said that "tribal relations must be broken up" and that the "example of the white people" would provide a model for the Indians. Skinner argued that incorporation into American society would force the Indian to "abandon his thriftless habits . . . and finally rise to the level of the civilization that surrounds him." 18 Cong. Rec. 190–91 (1886).

[116] Allotment Act, § 5, 24 Stat. at 389–90.

[117] The first sentence of the Act stated that allotment was aimed at "all cases where any tribe or band of Indians has been, or shall thereafter be, located upon any reservation created for their use . . . by treaty stipulation." *Id.* at § 1, 24 Stat. at 388.

[118] *Id.* § 5, 24 Stat. at 389–90.

[119] *Id.* §§ 5, 6, 24 Stat. at 389–90.

[120] *See* Carter, *supra* note 44, at 227 ("To the white observer, the lack of proprietary interest generally displayed by tribal members was repulsive and backward. Removing the 'herd' instinct was deemed by some to be the key to civilizing the Indian.") (footnote omitted).

property ownership upon Indian nations, expressly disregarding the Indians' cultural values.[121] Even more damaging than the imposition of private ownership was the Act's provision allowing Indian lands to be acquired by non-Indians after the trust period expired. Because of this allowance, sales, bankruptcies, foreclosures and the opening of "surplus" lands caused total Indian land holdings in the United States to fall by over eighty percent by 1934.[122] The lands of the Indian nations became "checkerboards" comprised of separate tracts of white and Indian land.[123]

The next major step in the history of plenary power was the 1934 Indian Reorganization Act (IRA).[124] Sometimes referred to as "the Indians' New Deal,"[125] the IRA attempted to reverse the disastrous policies of the Allotment Era. It provided for the end of the allotment system, federal recognition of Indian governments, and the implementation of credit programs for Indian economic development.[126] Although the IRA's emphasis on Indian autonomy was a move away from the excesses of the allotment era, federal plenary power over the Indians was undiminished. The IRA viewed Indian self-government as something granted by the federal government at its discretion, and not as right derived from the Indians' own sovereignty. An important opinion of the Solicitor of the Indian Department stated at the time that an Indian nation's "powers of local self-government . . . are subject to be qualified . . . by express legislation of Congress."[127] Therefore, Congress was not required to recognize Indian governments; the fact that the IRA did so merely reflected a congressional policy decision made pursuant to its plenary powers.

[121] *See* K. Kickingbird, L. Kickingbird, C. Chibitty, & C. Berkey, Indian Sovereignty 21 (1977).

[122] F. Cohen, *supra* note 8, at 216; *Hearings on H.R. 7902 before the House Comm. on Indian Affairs*, 73d Cong., 2d. Sess., 16–18 (1934) (Memorandum of Commissioner of Indian Affairs), *quoted in* D. Getches, D. Rosenfelt & C. Wilkinson, *supra* note 114, at 74.

[123] Coulter, *supra* note 79, at 11.

[124] Indian Reorganization (Wheeler-Howard) Act of 1934, Pub. L. 73–383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 467–79 (1982)).

[125] *See, e.g.*, R. Barsh & J. Henderson, *supra* note 5, at 96; Barsh, *When Will Tribes Have a Choice?* in Rethinking Indian Law 43, 43 (1982).

[126] IRA, §§ 1, 10, 16, 48 Stat. at 984, 986, 987 (codified as amended at 25 U.S.C. §§ 461, 470, 476 (1982)).

[127] Powers of Indian Tribes, 55 I.D. 14 (Oct. 25, 1934), *reprinted in* 1 Opinions of the Solicitor 445, 449.

Federal control over the form of Indian government also illustrated the continuing presence of federal plenary power. In order to gain federal recognition of its government and the power to negotiate with the federal, state and local governments, an Indian tribe had to enact a constitution and secure its approval by the Secretary of the Interior.[128] Many of the constitutions adopted in order to gain this recognition were derived from a single federal "model constitution" that imposed an alien system of government upon the Indians without regard for their separate histories, cultures or previous forms of government.[129] In addition, neither the adoption of such constitutions nor federal recognition of tribal governments in any way limited Congress' power to revoke or limit Indian autonomy.[130] The IRA also allowed tribes to incorporate and operate as a business, giving Indians important access to the mainstream American economy. However, incorporation also made the tribe subject to federal and state laws.[131]

Despite the IRA's limited recognition of Indian autonomy, its ultimate goal was the "development of tribal governments such that they would become vehicles for facilitating the absorption of Indians into the Anglo world."[132] This was to be accomplished "by making tribal governments into the image and likeness of other American governmental institutions and by creating a means for economic development."[133] Though superficially not as drastic an exercise of plenary power as the Allotment Act, the IRA nonetheless demonstrated the extent to which Indian sovereignty had been reduced by the United States; it was now a gift, not a right.

Resistance by the Indians to the IRA's imposition of governments and written constitutions, and congressional dissatisfaction with allowing Indian self-government and formally halting assimilation, soon led to the end of the reorganization era.[134] In 1953, Congress revoked federal recognition of the governments of several Indian nations, beginning the era of Indian "termination." House Concurrent Resolution 108[135] was the first statement of this policy, which was an assimilationist program of abolishing Indian reservations, severely limiting Indian governments, and forcing rapid assimilation through relocation. The resolution declared Congress' intent to free Indians from "Federal supervision and control" by ending federal recognition of the tribes.[136] Congress sought to remove the semi-autonomous status granted to the Indian nations by the IRA in order to completely assimilate them and treat Indians solely as individual citizens.[137]

When a tribe was "terminated," its government was no longer recognized by the United States, its federal services were withdrawn, and often its land was sold off.[138] A terminated tribe lost virtually all of its powers of government and jurisdiction, a loss that was damaging both legally and psychologically.[139] Often the tribe's members were forced to move to urban areas to find employment and housing,[140] and many Indians ended up on welfare.[141] Sponsors of the termination policy had argued that assimilation would ensure that Indians would enjoy full "social, political, economic, and cultural opportunity";[142] they failed,

[128] IRA, § 16, 48 Stat. at 987 (codified as amended at 25 U.S.C. § 476 (1982)).

[129] AIPRC, *supra* note 114, at 213. It was stated during the reorganization period that the requirement of tribal constitutions "may hasten the breakdown of the political structure [of the tribes] or may give the existing structure so much rigidity that it might survive to the disadvantage of the people it is supposed to serve." Mekeel, *An Appraisal of the Indian Reorganization Act*, 46 Am. Anthro. 209, 211 (1944).

[130] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 5 Notre Dame Law. 600, 615 (1976) ("tribal self-government exists through the authority of Congress").

[131] IRA, § 17, 48 Stat. at 988 (codified at 25 U.S.C. § 477 (1982)); *see* R. Coulter, *supra* note 79, at 13. This provision was intended to "permit increasing numbers of Indians to enter the white world on a footing of equal competition." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (*quoting* 78 Cong. Rec. 11,732 (1934) (Remarks of Rep. Howard)).

[132] AIPRC, *supra* note 114, at 210. Similarly, Rep. Howard, House sponsor of the IRA, stated that "[t]his program will pave the way for a real assimilation of the Indians into the American community on the level of economic independence and political self-respect." 78 Cong. Rec. 11,732 (1934).

[133] AIPRC, *supra* note 114, at 210.

16.

[134] *See* Note, *Terminating the Indian Termination Policy*, 35 Stan. L. Rev. 1181, 1184–85 (1983); D. Getches, D. Rosenfelt & C. Wilkinson, *supra* note 114, at 86.

[135] 67 Stat. B132 (1953).

[136] *Id.*

[137] *See* Note, *supra* note 134, at 1188.

[138] *Id.* at 1189 & n.38.

[139] *Id.* at 1190.

[140] *Id.* at 1189 & n.38. The federal government often deliberately implemented such relocation. *See* Annual Report of the Secretary of the Interior, 1954, at 242–43, *quoted in* Documents of United States Indian Policy, *supra* note 35, at 237–38.

[141] Note, *supra* note 134, at 1189–90; *see also* American Indian Policy Review Commission, 1 Final Report 452 (1977) ("termination transferred Indian people from a *de jure* trust relationship with the Federal Government to a *de facto* dependency on the public welfare system").

[142] Statement of Senator Watkins, May 1957, *quoted in* Documents of United States Indian Policy, *supra* note 35, at 238–39; American Indian Policy Review Commission.

however, to appreciate the obstacles that stood in the path of reaching this goal and the fact that assimilation was an American—not an Indian—ideal.

A further restriction of Indian rights came in the 1955 case of *Tee-Hit-Ton Indians v. United States*.[143] The Supreme Court held that Congress had the eminent domain power to take Indian lands without paying just compensation so long as those lands were not explicitly recognized by the federal government as belonging to Indians. The Court asserted that under the discovery doctrine Indian nations did not have a full property interest in their lands, but only a possessory right of occupancy that could be terminated by the sovereign at its will "without any legally enforceable obligation to compensate the Indians."[144] In refusing to extend the just compensation clause to Indian lands, the Court perpetuated the misinterpretation of the discovery doctrine, holding that discovery conferred legal title to Indian lands upon the federal government.[145] The *Tee-Hit-Ton* Court justified this view by stating that the Indian conception of property was inferior to that of the Western world, and that therefore taking Indian land did not require just compensation.[146] As a result, the Court left to Congress "the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle."[147]

The *Tee-Hit-Ton* Court also subscribed to a revisionist view of the history of United States-Indian relations, stating that "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror's will that deprived them of their land."[148] In stating this view the Court relied on the "great case" of *Johnson*

Task Force Ten, Terminated and Nonfederally Recognized Indians, Final Report 1634–35 (1976).

[143] 348 U.S. 272 (1955).

[144] *Id.* at 279. Had the Federal government recognized the Indians' permanent rights to the property by treaty or other means, just compensation would have been required. *See id.* at 278 n.9 and cases cited therein.

[145] *Id.* at 279–82; *see supra* notes 72–81 and accompanying text.

[146] 348 U.S. at 285–88; *see* Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 Hastings L.J. 1215 (1980); Newton, *supra* note 6, at 299–314.

[147] 348 U.S. at 291.

[148] *Id.* at 289–90. *Contra* Clinebell & Thomson, *supra* note 65, at 688.

v. M'Intosh,[149] despite the fact the Marshall had repudiated *Johnson*'s theory of conquest in his opinion in *Worcester*[150] and had also strictly defined the sovereign's powers under discovery to be only the preemptive right of purchase, and not of control or ownership.[151]

In the 123 years between *Worcester* and *Tee-Hit-Ton*, Indians lost their status as distinct, sovereign political entities.[152] While the termination policy has been discontinued[153] and the United States has allegedly embarked upon a policy of Indian "self-determination,"[154] there is no doubt in the mind of Congress and the courts that federal plenary power over Indian nations is very much in force, and that the powers of self-government and property ownership allowed to the Indians are only a question of policy and politics.[155]

C. Modern Plenary Power

In delineating the scope of modern congressional plenary power, the Supreme Court has stated that tribal autonomy exists "only at the sufferance of Congress and is subject to complete defeasance,"[156] and that Congress holds "paramount power over the property of the Indians."[157] This section argues that the plenary power doctrine lacks constitutional support and violates the sovereignty of Indian nations. In the final analysis, the In-

[149] *Id.* at 279–80.

[150] *See supra* notes 67–68 and accompanying text.

[151] *See supra* notes 60–66 and accompanying text.

[152] In sanctioning congressional plenary power, the Supreme Court has stated that "[w]e long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*,' . . . and have acknowledged certain limitations on tribal sovereignty." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983) (citation omitted); *see* Kake Village v. Egan, 369 U.S. 60, 72 (1962).

[153] *See, e.g.*, Menominee Restoration Act of December 22, 1973, Pub. L. 93–197, 87 Stat. 770 (1973) (codified as amended at 25 U.S.C. §§ 903–903f (1982)); Paiute Indian Tribe of Utah Restoration Act, Pub. L. 96–227, 94 Stat. 317 (1980)(codified as amended at 25 U.S.C. §§ 761–68)(1982)).

[154] *See supra* note 8 and accompanying text.

[155] *See* Newton, *supra* note 6, at 236. On February 24, 1987, eight Justices of the Supreme Court stated that "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess." Iowa Mutual Ins. Co. v. LaPlante, 55 U.S.L.W. 4170, 4172 n.9 (U.S. Feb. 24, 1987) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

[156] United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* Powers of Indian Tribes, 55 I.D. 14 (Oct. 25, 1934), *reprinted in* I Opinions of the Solicitor 445, 451.

[157] United States v. Sioux Nation, 448 U.S. 371, 408 (1980) (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)).

dians' inherent and historical status as wholly outside the federal system precludes the assertion of power over them.

A cardinal principle of constitutional law is that Congress cannot exercise power not specifically or implicitly enumerated in the Constitution.[158] Only recently, however, did the Supreme Court attempt to ground congressional plenary power over Indians in the Constitution.[159] In *Morton v. Mancari*,[160] the Court stated that plenary power is "drawn both explicitly and implicitly from the Constitution itself."[161] The Court noted the argument made in *United States v. Kagama* that federal power over Indians was based solely on their status as "helpless" and "dependent,"[162] but held that this was merely a statement of the "special relationship" between Indians and the United States, and not a source of federal power.[163] *Mancari* thus implicitly overruled *Kagama*'s legitimation of extraconstitutional federal power over Indians.[164] Arguably *Mancari* requires that any federal power exercised over Indians must have a constitutional basis; however, the case can be read as recharacterizing past

[158] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. *See* Kansas v. Colorado, 206 U.S. 46, 88 (1907); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); L. Tribe, American Constitutional Law § 5-2 (1978).

[159] Previously, the Court had not required a constitutional basis for upholding federal plenary power. *See supra* notes 102–09 and accompanying text; Newton, *supra* note 6, at 214 ("Acknowledging that no existing constitutional provision granted Congress [the] right to govern Indian affairs, the [Supreme] Court found [such power] to be inherent [in the federal government]") (discussing United States v. Kagama, 118 U.S. 375 (1886)). The United States had argued in *Kagama* that "the doctrine seems to have been settled that there is no limitation upon the power of Congress to enact whatever laws may be necessary to regulate the affairs of the Indian tribes." Brief for the United States at 14. *See also* Lone Wolf v. Hitchcock, 187 U.S. 553, 565–68 (1903).

[160] 417 U.S. 535 (1974).

[161] 417 U.S. at 551–52; *see also* Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83 (1977) (plenary power is "rooted in the Constitution"). In Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899), the Court had held that plenary power was subject to constitutional restraint, but did not hold that its existence was constitutionally based.

[162] *Kagama*, 118 U.S. at 383–84, discussed *supra* notes 102–09 and accompanying text.

[163] *Mancari*, 412 U.S. at 552.

[164] *See* Newton, *supra* note 6, at 228:

> In modern times, the Supreme Court has apparently repudiated both the ethnocentric overtones of the doctrine of plenary power and the doctrine itself, at least as far as the doctrine suggests it has an extra-constitutional source or is a power unlimited by constitutional provisions.

See also id. at notes 177–226 and accompanying text; F. Cohen, *supra* note 8, at 219.

exercises of federal power as having been enacted pursuant to a constitutional provision. Though *Mancari*'s failure to overrule *Kagama* explicitly may indicate that the Court did intend to "constitutionalize" past exercises of plenary power, this would be contrary to the doctrine of enumerated powers.

A longstanding obstacle to coherent constitutional analysis of the federal government's exercise of power over the Indians has been the judiciary's frequent invocation of the "political question" doctrine. This doctrine is a judicially created presumption that courts must defer to congressional and executive judgments regarding such "political questions" as the conduct of foreign relations or the choice of public policies.[165] Until the Supreme Court's repudiation of the doctrine's applicability to Indian cases in *Delaware Tribal Business Committee v. Weeks*,[166] deference to congressional and executive actions in Indian affairs had been widespread,[167] allowing the exercise of federal plenary power without constitutional constraint or judicial review.[168]

The Court in *Weeks* was confronted with the argument that the case presented "a nonjusticiable political question because of Congress' pervasive authority . . . to control tribal property."[169] The Court held that the 1903 holding in *Lone Wolf v. Hitchcock*,[170] which had ruled that "the power of Congress 'has always been deemed a political one, not subject to be controlled by the judicial department of the government,'"[171] had not deterred the Court, "particularly in this day," from scrutinizing Indian legislation.[172] The Court also held that while Congress possesses power "of a plenary nature . . . [,] it is not abso-

[165] *See* Baker v. Carr, 369 U.S. 186 (1962); L. Tribe, *supra* note 158, at § 3–16.

[166] 430 U.S. 73 (1977).

[167] *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846).

[168] Despite this, some Indian advocates have contended that the application of the political question doctrine to cases involving Indians is "an implicit categorization of Indian matters within the field of foreign relations," the result of which is that "Indian nations are treated in certain fundamental and critical respects just as other nations of the world in the United States courts." Coulter, *The Denial of Legal Remedies to Indian Nations under United States Law*, in Rethinking Indian Law 103, 104 (1982). They conclude that "fairness and consistency suggest that Indian nations be regarded as separate nations for other legal purposes." *Id.*

[169] 430 U.S. at 83.

[170] 187 U.S. 553 (1903).

[171] 430 U.S. at 84 (quoting *Lone Wolf*, 187 U.S. at 565).

[172] *Id.*

lute."[173] The repudiation in *Weeks* of the application of the political question doctrine to Indian legislation was a major step towards the curtailment of plenary power. Although this shift in judicial policy did not formally reduce federal power,[174] it did subject Indian legislation to judicial scrutiny, thereby tending to enforce greater conformity with the Constitution and protection of Indian rights.

In modern times the Supreme Court has increasingly sought to establish a constitutional basis for congressional plenary power over Indians[175] in order to provide a foundation other than historical circumstance or inherent power for its exercise. As a result, the Court in 1973 stated that "it is now generally recognized that [federal power over Indian affairs] derives from federal responsibility for regulating commerce with the Indian tribes and from treaty making."[176] Although they confer power upon the federal government, however, both the Indian commerce clause[177] and the treaty power[178] do so in specific and limited ways, and they cannot support, either alone or together, the doctrine of plenary power and the massive structure of federal Indian law and legislation.

[173] *Id.* (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946)). This curtailment of the applicability of the political question doctrine to Indian affairs was reaffirmed three years later in United States v. Sioux Nation, 448 U.S. 371, 413 (1980).

[174] It was merely a refutation of judicial deference, not of legislative or executive power. Since the executive and legislative branches cannot legally exercise power outside of the bounds of the Constitution, refutation of the political question doctrine only curtailed federal power to the extent that deference pursuant to the doctrine allowed the exercise of extra-constitutional power.

[175] *See* Newton, *supra* note 6, at 230.

[176] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); *see also* F. Cohen, *supra* note 8, at 211. The Court has occasionally relied on other constitutional provisions as bases for plenary power. The supremacy clause, U.S. Const. art. VI, cl. 2, has been cited for this purpose, see F. Cohen, *supra* note 8, at 211, despite the fact that the clause confers no independent power of its own upon the national government. The war powers, U.S. Const. art. I, § 8, cls. 1–16, which "underlay much of the federal exercise of authority over Indians during the early history of the Republic," F. Cohen, *supra* note 8, at 210, cannot provide a constitutional source of federal plenary power outside the context of hostilities or military occupation, and therefore is no longer applicable to Indians. *See also id.* at 210 nn.20–21.

[177] The Indian Commerce Clause is contained in U.S. Const. art. I, § 8, cl. 3: "Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[178] The treaty power is found at U.S. Const art. II, § 2, cl. 2: "[The Executive] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The supremacy clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* art. VI, cl. 2.

1. The Indian Commerce Clause

Chief Justice Marshall made clear in *Worcester* that the Indian commerce clause was primarily a function of the Framers' desire to vest exclusive power over Indian trade with Congress and not the states.[179] The *Kagama* Court, even while upholding broad federal power over Indians, followed this idea, and denied that the clause provided any basis for the exercise of power over Indian nations.[180] While the clause was therefore not seen as granting the power to regulate the internal affairs of the Indian nations for nearly a century, it has nonetheless emerged as a justification for federal plenary power through a gradual series of cases since the declared end of the treaty-making period.[181] It is, however, "a long, twisted path from the Framers' decision to give Congress the exclusive power to regulate commerce and other relations *with* the Indian tribes to the modern assertion of plenary power over them."[182]

The powers of Congress over the states pursuant to the interstate commerce clause have also been greatly expanded in the modern era, to the extent that congressional power is now virtually unlimited.[183] The following examination of the princi-

[179] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). Given the Framers' debates over the division of state and federal authority regarding Indian affairs and the final result in favor of exclusive federal power, *see supra* notes 24, 59 and accompanying text, the separate enumeration of "Indian tribes" in the commerce clause, as distinct from foreign nations, is probably most accurately seen as specifically including the Indian nations within the reach of federal foreign relations powers. The term "foreign nations" does not intuitively include Indian nations, and thus the omission of a separate mention of the Indian tribes might have left open the possibility of state exercise of power over them. Marshall, however, interpreted the separate enumeration of Indians as recognizing a third category of "domestic dependent nations," though the federal government nonetheless held exclusive authority to regulate commercial relations with them. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), discussed *supra* notes 49–57 and accompanying text.

[180] *See* United States v. Kagama, 118 U.S. 375, 378–79 (1886); *supra* note 102; *see also Worcester*, 31 U.S. (6 Pet.) at 592 (McLean, J., concurring).

[181] *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 45 (1913) (upholding liquor prohibition in Indian country); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 n.18 (1965) (State tax on Indian trader preempted); United States v. John, 437 U.S. 634, 652–53 (1978) (State jurisdiction over Indian country preempted).

[182] Clinton, *supra* note 18, at 859.

[183] *See* Hodel v. Virginia Surface Mining Association, 452 U.S. 264, 276 (1981) ("congressional finding that a regulated activity affects interstate commerce" requires only that "any rational basis for such a finding" exists); Wickard v. Filburn, 317 U.S. 111, 124 (1942) ("no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress"); *see also* Katzenbach v. McClung, 379 U.S. 294, 298 (1964) (ban on racial discrimination in restaurants "which serve food a substantial portion of which has moved in [interstate] commerce" upheld).

ples underlying the development of modern interstate commerce clause jurisprudence, however, shows that the broad construction of federal power under the interstate commerce clause is inapplicable to the Indian commerce clause because of the Indian nations' lack of political process protections. An expansive reading of the Indian commerce clause as granting power over Indian nations is therefore inappropriate.

James Madison argued in the Federalist Papers that although there were no enumerated limitations on the powers of Congress over the states pursuant to the commerce clause, the distribution of powers in the federal system imposed constraints on its unbridled exercise.[184] Specifically, Madison argued that the local character and constituency of each member of Congress,[185] the structure of elections for the Presidency[186] and for the Senate,[187] and the states' control over voting eligibility for representation in the House[188] all served to constrain federal power.[189]

Though several of these restraints are no longer viable,[190] the constituency of congressional delegations has been widely expanded through the implementation of universal suffrage,[191] creating greater accountability in the federal government to local interests. Thus, because the structural aspects of the national political system act as a check to protect state interests,[192] the

[184] The Federalist Nos. 45 & 46 (C. Rossiter ed. 1961) (J. Madison).

[185] The Federalist No. 46, *supra* note 184, at 296 ("[a] local spirit will infallibly prevail . . . in the members of Congress").

[186] The Federalist No. 45, *supra* note 184, at 291. The Electoral College, both a restriction on the popular vote and a forum for state interests, is established in U.S. Const. art. II, § 1, cl. 2–3.

[187] The Federalist No. 45, *supra* note 184, at 291. The Constitution originally provided for the indirect election of Senators by the state legislatures. U.S. Const. art. I, § 3, cl. 1. Article V forbids the divestment of a state's senatorial representation, even by constitutional amendment, without its consent.

[188] The Federalist No. 45, *supra* note 184, at 291; U.S. Const. art. I, § 2.

[189] "The powers delegated by the proposed Constitution to the federal government are few and defined." The Federalist No. 45, *supra* note 184, at 292.

[190] The indirect election of Senators was repealed in 1913. U.S. Const. amend. XVII. The President and Vice-President are now elected together, U.S. Const. amend. XII, from national political parties. Finally, the Electoral College, while still a partial restraint on direct popular election for the Presidency, has ceased to be a viable forum for state debate. *See* A. Paul, The Conservative Crisis and the Rule of Law 234 (1976 reprint).

[191] *See* U.S. Const. amend. XV (right to vote "shall not be denied or abridged . . . on account of race"); *id.*, amend. XIX (female suffrage); *id.*, amend. XXIV (poll taxes prohibited); *id.*, amend. XXVI (18 year old suffrage); *Reynolds v. Sims*, 377 U.S. 533, 554–61 (1964) (Constitution protects the suffrage of all qualified voters).

[192] *See, e.g.*, Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954); J. Choper, Judicial Review and the National Political Process 171–259 (1980). Both authors make this Madisonian argument as the basis for asserting, to different degrees, that judicial review of state challenges to federal acts made pursuant to Congress' enumerated powers is inappropriate, since the states should look to the national political process for a remedy.

Supreme Court has declined to impose any limits on congressional power pursuant to the interstate commerce clause.[193]

Indian nations, however, do not enjoy any of the political process protections available to the states. The Supreme Court's rationale for permitting unlimited federal power under the interstate commerce clause is therefore inapplicable to the Indian commerce clause. The constitutional provision that "Indians not taxed" were not to be counted by the census in determining legislative apportionment deliberately excluded Indians from the federal system.[194] Reenactment of this provision by the fourteenth amendment[195] illustrated the continuation of this policy of exclusion. In *Elk v. Wilkins*,[196] an 1884 decision denying Indians the right to vote, the Supreme Court relied on this "not taxed" language to find that Indians were not subject to the jurisdiction of the United States,[197] stating further that Indians "owed immediate allegiance to their several tribes, and were not part of the people of the United States."[198]

[193] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. *See also* United States v. Darby, 312 U.S. 100, 124 (1941) (tenth amendment is merely a "truism"); Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84 (1985). Conversely, the Court has limited federal power over individuals who do not enjoy the same procedural protections. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("prejudice against discrete and insular minorities may . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and [thus] may call for a correspondingly more searching judicial inquiry"). *See generally* J.H. Ely, Democracy and Distrust 75–183 (1980).

[194] U.S. Const. art. I, § 2, cl. 3. ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by . . . the whole Number of free persons . . . and excluding Indians not taxed").

[195] U.S. Const. amend. XIV, § 2 (1867) ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed").

[196] 112 U.S. 94 (1884).

[197] *See id.* at 99–103.

[198] *Id.* at 99; *see also McKay v. Campbell*, 16 F. Cas. 161, 166–67 (D. Ore. 1871) (No. 8,840). The Senate Judiciary Committee also decided that Indians were not subject to the United States' jurisdiction under the fourteenth amendment. Sen. Rep. No. 268, 41st Cong., 3d Sess. 9–10 (1870). However, the thirteenth amendment ("[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction," U.S. Const. amend. XIII, § 1), was held applicable to Alaskan Indians in In re Sah Quah, 31 F. Supp. 327 (D. Alaska 1886), *cited with approval in* Metlakatla Indian Community v. Egan, 369 U.S. 45, 51 (1962). *Sah Quah* was cited by

It might be argued that Indians are protected by the political process because as citizens they are now able to vote.[199] However, citizenship and suffrage protect only individual rights, which Indians enjoy equally with other American citizens. Indian *nations*, however, do not possess the political process protections enjoyed by the States.[200] Election districts cut across tribal and reservation lines,[201] and there are no Indian delegations to Congress.[202] Therefore, since the Indian nations as political entities are powerless within the American political system, the use of the Indian commerce clause as a means of justifying federal power over them is illegitimate, and the analogy to federal power over interstate commerce used to support such an extension is inapposite. The only power which the Indian commerce clause legitimately confers upon the federal government concerns the regulation of "commerce." This power should be interpreted narrowly in the Indian context, as it had been in early Supreme Court and federal cases[203] and by Congress,[204] which strictly limited federal power concerning Indian affairs to the regulation of commercial intercourse. Significantly, in *United States v. Kagama*,[205] the case which established the modern doctrine of plenary power, the Supreme Court explicitly denied the use of the Indian commerce clause as a basis for federal power,[206] thus rendering it "superfluous as a source of power over the Indian tribes."[207]

Since the Indians are neither included in nor protected by the national political process, it is the foreign commerce clause, and not the interstate commerce clause, which provides the best suggestion as to the proper reach of the Indian commerce clause. By analogy to Congress' constitutional power over foreign commerce, the broadest constitutional interpretation of the Indian commerce clause would allow federal control only over commercial interaction between United States citizens and Indians, and would grant no power over the internal affairs of Indian nations.[208] The exercise of federal power under this reading of the Indian commerce clause would resemble the familiar border and customs enforcement standards of international trade.[209] As in international relations, United States jurisdiction could not reach into Indian territory beyond the limits of power granted to the United States by the Indian nations through the treaty-making process.[210]

the Bureau of Indian Affairs for the proposition that "those provisions of the Federal Constitution which are completely general in scope, such as the Thirteenth Amendment, apply to members of Indian tribes as well as to all other inhabitants of the nation." Powers of Indian Tribes, 55 I.D. 14 (Oct. 25, 1934), *reprinted in* I Opinions of the Solicitor 445, 451; *see also* F. Cohen, *supra* note 8, at 665 nn.21–22. The modern reconciliation of these conflicting jurisdictional interpretations has been the expansion of fourteenth amendment protections to Indians through the grant of citizenship. *See, e.g.*, Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975) (three judge court), *aff'd without opinion sub nom* Apache County v. United States, 429 U.S. 876 (1976).

[199] Indians formally received the right to vote when they gained citizenship, which was granted to certain Indians under the General Allotment Act of 1887, *see supra* note 118 and accompanying text, and generally in 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1982)). However, the reality of suffrage did not arrive until later. *See, e.g.*, Porter v. Hall, 34 Ariz. 308, 271 P. 411 (1928), *overruled by* Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); Allen v. Merrel, 6 Utah 32, 305 P.2d 490, *vacated as moot*, 353 U.S. 932 (1956).

[200] The Supreme Court has not taken up this idea. Justice Stevens recently stated that it is an "anomalous suggestion that the sovereignty of an Indian tribe is in some respects greater than that of [a] State." Iowa Mutual Ins. Co. v. LaPlante, 55 U.S.L.W. 4170, 4173 (U.S. Feb. 24, 1987) (Stevens, J., concurring in part and dissenting in part).

[201] *See* F. Cohen, *supra* note 8, at 646 n.6. *But see* Klahr v. Williams, 339 F. Supp. 922, 927 (D. Ariz. 1972) *enforcing* Ely v. Klahr, 403 U.S. 108 (1971).

[202] Such delegations were often proposed in early Indian treaties. *See supra* note 21 and accompanying text. For a more recent proposal, see R. Barsh & J. Henderson, *supra* note 5, at 281–82. The District of Columbia, Puerto Rico, Guam, the Virgin Islands and American Samoa all send representatives to Congress who exercise all the privileges of membership except voting. *See* 2 U.S.C. § 25a, implementing U.S. Const. amend. XXIII (District of Columbia); 48 U.S.C. § 891(b) (Puerto Rico); 48 U.S.C. § 1711 (Guam and the Virgin Islands); 48 U.S.C. § 1731 (American Samoa).

[203] *See* United States v. Kagama, 118 U.S. 375, 378–79 (1886); United States v. Bailey, 24 F. Cas. 937, 939 (C.C.D. Tenn. 1834) (No. 14,495); United States v. Sa-Coo-Da-Cot (Yellow Sun), 27 F. Cas. 923, 925 (C.C.D. Neb. 1870) (No. 16,212) (dictum) and cases cited therein; Clinton, *supra* note 18, at 859; Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan. L. Rev. 979, 996–1001 (1981).

[204] In an 1834 Report of the Committee Regulating the Indian Department, it was stated that "Congress expresaly reserves the power . . . to legislate over the Indian country, so far as the Constitution requires them to do, viz. *for the regulation of commerce with the Indian tribes*." H.R. Rep. No. 474, 23d Cong., 1st Sess. 14 (1834) (emphasis added).

[205] 118 U.S. 375 (1886).

[206] *Id.* at 378–79; *see supra* note 102.

[207] The Constitution of the United States of America, Analysis and Interpretation, Sen. Doc. No. 82, 92d Cong., 2d Sess., 282 (1973).

[208] This was the interpretation of the clause in early American history. *See, e.g.*, the Trade and Intercourse Acts of 1790, 1 Stat. 136, of 1793, 1 Stat. 329, and of 1796, 1 Stat. 469 (regulating only American conduct); *see also* F. Cohen, *supra* note 8, at 212–13 nn.1–8 and accompanying text; F. Prucha, *supra* note 17, at 45–50.

[209] This position was advocated by Justice McLean, both on the Supreme Court bench, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 592 (McLean, J., concurring), and while riding circuit, see United States v. Cisna, 25 F. Cas. 422 (D. Ohio 1835) (No. 14,795). At the extreme, this power would permit the prohibition of commerce. *See* Regan v. Wald, 468 U.S. 222 (1984); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Whether such exercise would be consistent with the Indians' rights as citizens seems doubtful, since such restrictions might violate modern equal protection standards. Since Indians are citizens, singling them out for commerce prohibitions would be a facially invalid action. However, any inconsistency would only serve to limit congressional power in deference to the Indians' rights.

[210] *See* R. Barsh & J. Henderson, *supra* note 5, at 59 n.35 and accompanying text.

2. *The Treaty Power*

The power of the United States to conclude treaties with the Indians has been used as a justification for federal plenary authority over Indian affairs in and of itself, beyond the specific terms of actual treaties.[211] A prima facie argument against such a contention is that since Indian treaty-making ended in 1871,[212] the treaty power can no longer confer power on the federal government, even if it once could.[213] Despite this possibility, the use of the treaty power as a constitutional foundation for plenary power must be addressed. Indian treaties made prior to 1871 and which remain in force provide sources of federal authority and responsibility,[214] and any consent-based model of United States-Indian relations would require, if not formal treaties, agreements so similar that the limits of United States power concerning them need to be explored. This section argues that neither the existence of the power to make treaties nor the terms of an actual treaty can confer unenumerated powers on the federal government or authorize intrusions into internal Indian affairs that are not specifically permitted by a fairly negotiated treaty.

Historically, treaty-making was the dominant method of relation between the United States and Indian nations.[215] Indian treaties were drafted and concluded according to international legal standards, and were considered by the United States to be agreements between independent sovereigns.[216] However, Indian treaties were interpreted differently than international treaties by United States courts. Based on "an acknowledgement of the [Indians'] unequal bargaining position,"[217] treaty provisions were given the construction most sympathetic to the Indian parties.[218] Despite these canons of construction, however, Congress has always held unquestioned power under both international and United States law to abrogate treaties, whether Indian or otherwise.[219]

The traditional understanding of the treaty power has been that while its reach is broad and undefined, it remains subject to constitutional constraints.[220] The Supreme Court did not consider the precise constitutional restraints upon the treaty power until the 1920 case of *Missouri v. Holland*,[221] a case brought by the State of Missouri challenging the constitutionality of a federal statute enacted to fulfill the provisions of an international agreement. In dictum, Justice Holmes stated that it was "not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found,"[222] recognizing a power

[211] "The Treaty Clause . . . has been a principal foundation for federal power over Indian affairs." F. Cohen, *supra* note 8, at 207. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

[212] *See supra* notes 85–91 and accompanying text.

[213] F. Cohen, *supra* note 8, at 208; Rice, *The Position of the American Indian in the Law of the United States*, 16 Comp. Legis. & Int'l L. (3d. ser.) 78, 83 (1934) (Congress "struck down or admitted to be false the chief constitutional basis of [federal] power [over Indians]"). The Supreme Court has held that "[t]he change in no way affected Congress' plenary powers to *legislate* on problems of Indians," Antoine v. Washington, 420 U.S. 194, 203 (1975) (emphasis in original), but did not refer to the treaty power or to any other constitutional provision as the source of this legislative power, simply holding that the Court's own cases upheld such a reading. *See id.* at 203–04.

[214] *See supra* note 89. A major recent case premised upon treaty rights was United States v. Sioux Nation, 448 U.S. 371 (1980), in which the Sioux recovered $105,000,000 for a taking of their land in contravention of a treaty.

[215] *See supra* notes 85–86 and accompanying text.

[216] *See supra* note 27; R. Barsh & J. Henderson, *supra* note 5, at 33; *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832).

[217] F. Cohen, *supra* note 8, at 222 (citing Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979)).

[218] *See* Antoine v. Washington, 420 U.S. 194, 199–200 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice."); *see also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (treaties are to be interpreted as the Indians understood them). *See generally*, Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 Calif. L. Rev. 601, 623–34 (1975). Federal statutes concerning Indians are also interpreted sympathetically. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–65 (1978) (implication of private cause of action from federal statute would conflict with policy of tribal self-government).

[219] Under the international "last in time" rule, the most recent act of a nation, either legislatively or by treaty, abrogates any prior inconsistent statutes or treaties. *See* The Chinese Exclusion Case (Chae Chan Ping v. United States), 103 U.S. 581 (1889); L. Tribe, *supra* note 158 § 4-4 at 168. On the abrogation of Indian treaties, see United States v. Dion, 106 S.Ct. 2216, 2220 (1986); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Wilkinson and Volkman, *supra* note 218.

[220] *See* Geofroy v. Riggs, 133 U.S. 258, 267 (1890). In the Indian context, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620–21, held that "[i]t need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."

[221] 252 U.S. 416 (1920).

[222] *Id.* at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)). A similar inherent power argument was made by the *Kagama* Court. *See supra* notes 102–09 and accompanying text; *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (executive power in foreign affairs is inherent). Holmes added that it was "obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could." *Missouri*, 252 U.S. at 433.

pursuant to the treaty clause which existed outside of Congress' constitutionally enumerated powers.

The question of unenumerated congressional power pursuant to the treaty power was next considered in the 1957 case of *Reid v. Covert*.[223] In that case, a four-Justice plurality held that "[i]t would be manifestly contrary to the objectives of those who created the Constitution, . . . to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."[224] Justice Harlan, concurring in the result, provided the fifth vote on this point, writing that "[t]o say that the validity of [a] statute may be rested upon the inherent 'sovereign powers' of this country [is] no more than begging the question."[225] However, since the result in *Reid* was based on the Bill of Rights, the *Missouri v. Holland* dictum that a state cannot present a justiciable claim that a treaty violates the Constitution is apparently good law,[226] and was in fact adopted by the *Reid* plurality.[227]

Under the *Reid* holding, Indians as citizens are protected by the Bill of Rights from the exercise of extraconstitutional power by Congress pursuant to the treaty power. The real question, however, is whether federal plenary power over Indian nations can be justified on the basis of the treaty power.

The lack of participation by Indians in the American political process renders illegitimate any exercise of extraconstitutional power pursuant to the treaty clause. While under the *Missouri* holding states may have no justiciable claim for redress

[223] 354 U.S. 1 (1957). The case and its companions concerned the applicability of the Bill of Rights to American military trials in foreign countries.

[224] *Id.* at 17 (citation omitted).

[225] *Id.* at 66 (Harlan, J., concurring in the result). Lower federal courts have followed the plurality's holding. *See, e.g.*, Holmes v. Laird, 459 F.2d 1211, 1217 (D.C. Cir. 1972); Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966); Soucheray v. Corps of Eng'rs., 483 F. Supp. 352, 357 (W.D. Wis. 1979). The reluctance of a majority of the Court to join the plurality's holding is perhaps due to the fact that the case concerned military court martials, and thus implicated Congress' power "[t]o make Rules for the Government and Regulation of the land and naval forces," U.S. Const. art. I, § 8, cl. 14. Both concurrences dealt with this clause at length. *See* 354 U.S. at 41–64 (Frankfurter, J., concurring in the result); *id.* at 65–78 (Harlan, J., concurring in the result).

[226] *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. 1975).

[227] "To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." Reid v. Covert, 354 U.S. at 18 (plurality) (citing United States v. Darby, 312 U.S. 100, 124–25 (1941)).

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of such exercise, the Indian nations' existence outside the federal system precludes the exercise of any power over them pursuant to the treaty clause which was not granted by them in treaty negotiations. In addition, the use of sympathetic canons of construction for Indian treaties by the United States courts further demonstrates that neither Indian treaties themselves nor the United States power to make them are to be construed as creating federal power to the Indians' detriment.

Since the treaty clause cannot provide a source of extraconstitutional federal power over Indians, the only legitimate actions regarding Indians under the clause would be those taken pursuant to one of the federal government's other enumerated powers, such as the appropriations power.[228] Congress' enumerated powers only grant the authority necessary to implement the United States' relationship with the Indians; federal power over Indians could therefore extend only as far as an Indian nation's delegation of specific powers to the federal government in a freely and fairly negotiated treaty.[229] The interaction between Indian nations and the United States would thus be similar to foreign relations, with each party possessing its own goals, policies, history and record of dealings.[230] Indian affairs would be conducted in a manner analogous to the State Department's relationships with foreign nations, rather than as a function of the United States power over its "Interior."[231]

D. The Trust Relationship

In the absence of any constitutionally sound basis for the broad doctrine of federal plenary power over Indian nations,

[228] U.S. Const. art. I, § 8, cl. 1.

[229] *See* R. Barsh & J. Henderson, *supra* note 5, at 59 ("Beyond specific grants of tribal jurisdiction by treaty, Congress is limited to the regulation of 'commerce'"). Many treaties included such delegations. *See* Comment, *supra* note 92, at note 58 and accompanying text. Whether they were freely and fairly negotiated is another question. Before its recent repudiation, *see supra* notes 166–74 and accompanying text, the political question doctrine made it difficult to question the fairness of treaty negotiations. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[230] This would be a return to the original conception of American-Indian relations held by the Framers. "The early dominance of the Treaty Clause as a source of federal authority illustrates that—at least during the first century of America's national existence—Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law." F. Cohen, *supra* note 8, at 208 (footnotes omitted); *see supra* notes 26–27 and accompanying text.

[231] Responsibility within the federal government for dealing with Indians has been handled by the Department of the Interior since 1849. Act of March 3, 1849, ch. 108, § 5, 9 Stat. 395, 395 (current version at 25 U.S.C. § 1 (1982)). Prior to that, it was handled by the War Department. Act of August 7, 1789, ch. 7, § 1, 1 Stat. 49, 50.

the only permissible assertions of federal authority regarding Indians are the regulation of commercial intercourse,[232] treaties, and constitutionally sound statutes passed to fulfill treaty provisions.[233] Limiting the exercise of federal power to these constitutionally enumerated powers would recreate the historical consent-based treaty relationship between the United States and Indian nations as independent, self-determining powers. An important aspect of such a relationship, and also of the present United States-Indian relations, is the trust responsibility.

A trust relationship between the United States and the Indians exists pursuant to treaties, statutes and Supreme Court cases, from which arise responsibility and power on the part of the United States. Though it is often interpreted as creating extraconstitutional federal power over the Indians,[234] a properly reconceived trust relationship based solely upon treaties and administered according to strict fiduciary principles of private trust law would be both constitutional and protective of Indian property and sovereignty. This section begins by analyzing the development of the trust doctrine and its current contours. It then considers the relationship of the trust to the exercise of federal power, and proposes a theory of the trust doctrine which is consistent with the federal government's limited constitutional powers regarding Indians and with the inherent sovereignty of Indian nations.

1. The Nature and Source of the Trust Responsibility

The conception of Indians as wards or trust beneficiaries began with Chief Justice Marshall's statement in *Cherokee Nation v. Georgia* that the relation of the Indian nations to the United States "resembles that of a ward to his guardian."[235] Marshall did not indicate the source of the United States' guardianship, nor its exact nature.[236] The Court's explicit recognition of the powers of autonomy and self-government possessed by the Indians,[237] however, has been said to mean that "[i]n calling Indians wards of the nation, Marshall's intention was not to limit the tribes' autonomy, but to affirm the United States' duty to protect it."[238] It has also been argued that Marshall viewed the guardianship as being founded upon treaties.[239]

The guardian-ward concept was further developed in 1886 in *United States v. Kagama*.[240] There, the Supreme Court "recast the Marshallian guardianship, treating it as a source of federal power in addition to and apart from the express power in the Constitution to regulate commerce with the Indian tribes."[241] The Court stated specifically that federal power over Indians arose from the fact that "[t]hese Indian tribes *are* wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, . . . there arises the duty of protection, and with it the power."[242]

Kagama and other plenary power era cases[243] used the Indians' status as "dependent wards" to justify broad power of the federal government over Indians, though this was "frankly acknowledged to be extraconstitutional."[244] The duty of protection implied in a guardianship was seen as only a moral duty,[245] and not as one which had any legal significance or enforceability.

[232] *See supra* notes 194–210 and accompanying text.

[233] *See supra* notes 211–31 and accompanying text.

[234] *See* Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943); United States v. Kagama, 118 U.S. 375, 384 (1886); F. Cohen, *supra* note 8, at 220 (the trust relationship has been held to be a "separate and distinct basis for congressional power over Indians"). Newton, *supra* note 6, at 232 (source of plenary power is the guardian-ward relationship); Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 Harv. L. Rev. 422, 436 n.71 (1984) ("plenary power derives from the trust doctrine"). *But see* F. Cohen, *supra* note 8, at 220 n.31 ("[t]he trust responsibility has not been cited as an independent source of congressional power since *United States v. Candelaria*, 271 U.S. 432 (1926)").

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[235] 30 U.S. (5 Pet.) 1, 17 (1831). Earlier assertion of guardianship over the Indians can be seen in F. de Victoria, *supra* note 2, at 128 ("by defect of their nature they need to be ruled and governed by others . . . , just as sons need to be subject to their parents," relying on Aristotle, The Politics, bk. I).

[236] Note, *supra* note 234, at 424–25.

[237] *See* 30 U.S. (5 Pet.) at 16–17; *supra*, notes 54–57 and accompanying text.

[238] Note, *supra* note 234, at 435 (footnote omitted).

[239] *See* Chambers, *supra* note 57, at 1219; *see also id.* at 1220–21, 1246. In his position as Assistant Solicitor for Indian Affairs, Chambers in 1974 concluded that "the trust responsibility is basically derived from treaties with and statutes concerning the various Indians tribes, and (after the treaty making power was limited by Congress in 1871) from later executive orders and agreements with Indian tribes." Quoted in AIPRC, *supra* note 10, at 50–51.

[240] 118 U.S. 375, 384 (1886).

[241] Chambers, *supra* note 57, at 1223. Chambers notes, however, that this is a possible reading of the *Cherokee Nation* opinion. *See id.* at 1220–21.

[242] *Kagama*, 118 U.S. at 383–84.

[243] *See, e.g.*, Williams v. Johnson, 239 U.S. 414 (1915); Tiger v. Western Inv. Co., 221 U.S. 286 (1910).

[244] Newton, *supra* note 6, at 207.

[245] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Chambers, *supra* note 57, at 1227.

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More recently, however, the courts have reconnected the trust responsibility to treaties and federal statutes, and have recognized legally enforceable obligations against the United States.[246]

In *United States v. Creek Nation*,[247] one of the first cases to limit federal plenary power, the Court held that allowing the government to confiscate federally recognized Indian lands without paying just compensation "'would not be an exercise of guardianship, but an act of confiscation.'"[248] In the case of federal statutes, the courts have found the trust responsibility to arise in the form of an implied cause of action. An example is *United States v. Mitchell* (*Mitchell II*),[249] in which the Supreme Court found fiduciary obligations to an Indian tribe to arise from an assortment of federal statutes governing timber management, road building and rights of way, and Indian funds and government fees.[250] The United States was thus found liable for the mismanagement of lands it held in trust for the tribe.

The Supreme Court has more generally held that "[t]here is no doubt that the United States serves in a fiduciary capacity with respect to [the] Indians and that, as such, it is duty bound to exercise great care in administering its trust."[251] Moreover, in recognizing causes of action against the United States, courts have broadly interpreted the trust doctrine to be "an incident of federal recognition of any tribe. Thus it is not necessary to establish a breach of a specific provision in a treaty, executive

[246] This transformation has been implemented by congressional waivers of sovereign immunity, see, e.g., 28 U.S.C. § 1505 (1982), and by judicial recognition of breach of trust claims against the executive branch. *See, e.g.*, United States v. Creek Nation, 295 U.S. 103 (1935); Cramer v. United States, 261 U.S. 219 (1923); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Chambers, *supra* note 57, at 1230–32.

[247] 295 U.S. 103 (1935).

[248] *Id.* at 110, quoting Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919). *See also* Shoshone Tribe v. United States, 299 U.S. 476, 498 (1937) ("Spoliation is not management").

[249] 463 U.S. 206 (1983).

[250] *Id.* at 219–28. The First Circuit in Joint Tribal Council of the Passamoquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), held that a trust relationship arose from the Trade and Intercourse Act of 1790, which codified the discovery doctrine notion that Indians could not alienate land without the United States' consent. 1 Stat. 137 (1790). The court held that the Act imposed a trust relationship which required the United States to litigate Indian claims against anyone who acquired title to Indian lands without federal consent. 528 F.2d at 379–80. The case was later settled by the Maine Indian Claims Settlement Act of 1980, Pub. L. 96–420, 94 Stat. 1785 (codified at 25 U.S.C. § 1721 (1982)).

[251] United States v. Mason, 412 U.S. 391, 398 (1973) (citing Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942)); *see also* Chambers, *supra* note 57, at 1213 n.1 and cases cited therein.

order, or statute in order for the courts to find a federal liability to Indians."[252]

Other cases have interpreted the trust responsibility to directly limit congressional plenary power. In *Morton v. Mancari*,[253] the Supreme Court held that legislation concerning Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[254] Therefore, the trust responsibility apparently requires that federal "statutes be based on a determination that the Indians will be protected."[255] Modern cases concerning the trust doctrine have arguably returned to Marshall's notion that "the basic guarantee of the United States was the territorial and governmental integrity of the tribes."[256] Such protection, in Marshall's view, was not paternalistic but rather the protection by consent of a weaker power by a stronger.[257]

Despite its ad hoc judicial origin in *Cherokee Nation*[258] and its later development under theories of dependency and inferiority,[259] the modern trust doctrine has come to require that "where the federal government manages Indian property under congressional authority, a trust relationship presumptively exists."[260] This trust relationship imposes fiduciary duties upon the federal government in its conduct regarding Indians, and under *Mancari* conceivably requires that federal power be exercised only in the Indians' interest.

2. *The Trust Relationship and Plenary Power*

Throughout the history of United States-Indian relations, there has been a conflict of interest between the duties the

[252] American Indian Lawyer Training Program, *supra* note 90, at J-8; *see also* Chambers, *supra* note 57, at 1215, 1247.

[253] 417 U.S. 535 (1974).

[254] *Id.* at 555. This standard was restated in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977).

[255] F. Cohen, *supra* note 8, at 221.

[256] Chambers, *supra* note 57, at 1246; *see also* Note, *supra* note 234, at 423 ("development of a coherent trust doctrine . . . requires a principle of respect for the tribes' right to substantial self-government") (footnote omitted).

[257] *See supra* note 70 and accompanying text.

[258] *See* F. Cohen, *supra* note 8, at 220 (the "federal trust responsibility to Indians evolved judicially").

[259] *See* Note, *supra* note 234, at 426–27.

[260] Note, *Indians May Sue for Breach of Federal Trust Relationship:* United States v. Mitchell, 26 B.C.L. Rev. 809, 842 (1985).

United States has undertaken towards Indians, whether morally or legally imposed, and the exercise of its political, military and legal power over the Indians under the various guises of discoveror, conqueror and guardian. This conflict is crystallized in the tension between the federal government's fiduciary duties under the trust responsibility and its exercise of broad legislative power under the plenary power doctrine.[261]

The Supreme Court addressed this tension in *United States v. Sioux Nation*,[262] a case involving the taking of treaty-protected property.[263] The Court stated that "'Congress can own two hats, but it cannot wear them both at the same time,'"[264] and that the determination of the capacity in which Congress was acting in any given situation was a question of fact.[265] A finding that Congress was acting as a trustee depended on whether the particular measure enacted "was appropriate for protecting and advancing the tribe's interests."[266] If the action was appropriate, it would not be subject to "the constitutional command of the Just Compensation Clause."[267] Congress would, however, still be "'subject to limitations inhering in . . . a guardianship and to [other] pertinent constitutional restrictions,'"[268] the substance of which the Court did not elaborate. On the other hand, if Congress was found to have acted pursuant to its eminent domain power, just compensation would have to be paid.[269] The Court held that although there was no longer a "presumption of congressional good faith,"[270] proof of Congress' good faith in seeking to advance tribal interests would be sufficient to qualify its actions as that of a trustee.[271] It was not necessary

[261] *See* F. Cohen, *supra* note 8, at 207.

[262] 448 U.S. 371 (1980). *See* Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the* Sioux Nation *Rule*, 61 Or. L. Rev. 245 (1982); Hanson, *Special Recent Development:* United States v. Sioux Nation: *Political Questions, Moral Imperative, and the National Honor*, 8 Am. Indian L. Rev. 459 (1980). Earlier consideration of the question can be seen in the Court of Claims' decision in the case, 601 F.2d 1157 (Ct. Cl. 1979), and in Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691–94 (Ct. Cl. 1968).

[263] 448 U.S. at 415. Under Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277–78 (1955), just compensation must be paid for the taking of such property.

[264] 448 U.S. at 408 (quoting *Three Tribes of Fort Berthold Reservation*, 390 F.2d at 691).

[265] *Id.* at 416.

[266] *Id.* at 415.

[267] *Id.*

[268] *Id.* (quoting United States v. Creek Nation, 295 U.S. 103, 109–10 (1935)).

[269] 448 U.S. at 415 n.29.

[270] *Id.* at 416; *see also id.* at 410–15. The presumption extinguished by the *Sioux Nation* Court originated in Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

[271] Cases applying this good faith standard include Confederated Salish and Kootenai Tribes v. United States, 437 F.2d 458, 459–60 (Ct. Cl. 1971); Klamath and Modoc Tribes v. United States, 436 F.2d 1008, 1015 (Ct. Cl. 1971).

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to prove that the measure was in fact the best option open to Congress in pursuing the tribes' welfare.

The *Sioux Nation* standard of deferring to congressional judgment as to the interests of the Indians has been strongly criticized as insufficiently protective of Indian rights and violative of Indian sovereignty.[272] One commentator states that "[a]lthough the fifth amendment requires Congress to pay just compensation to all other Americans, the good faith effort test creates a special exemption for Indians."[273] A further criticism of the *Sioux Nation* rule is that a "good faith" standard is much less stringent than the fiduciary obligations required by the Court's other cases, and also less stringent than the "rationally tied" standard set forth in *Mancari*. The *Sioux Nation* standard also would freely permit post hoc characterizations of Congress' actions regarding the Indians as having been done in the Indians' interests.

Though *Sioux Nation* addressed only the narrow balance between the United States' responsibilities as a trustee over Indian lands and its powers of eminent domain, the Court's analysis is susceptible to a much broader application.[274] In holding that Congress cannot wear "two hats" simultaneously, the Court provided a framework for examining the fundamental tension in American Indian law between the United States' fiduciary duties under its trust responsibility and the powers Congress has arrogated to itself pursuant to the plenary power doctrine.[275] This framework provides a point of departure for reconceiving the trust relationship in light of the strict constitutional limits on plenary power demonstrated above.

On one side of the balance is the federal government's legislative and executive power under the plenary power doc-

[272] *See* Newton, *supra* note 262, at 260–65; Hanson, *supra* note 262, at 482–83; Comment, *supra* note 92, at 259.

[273] Newton, *supra* note 262, at 261. The Court specifically stated that while "there is no doubt that the Black Hills were 'taken' from the Sioux in a way that wholly deprived them of their property rights," a determination that the federal government was acting "pursuant to its unique powers to manage and control tribal property" would render the just compensation clause inapplicable. 448 U.S. at 409 n.26; *see also* Comment, *supra* note 92, at 265.

[274] Other commentators have similarly asserted that "[t]here is no principled reason to confine [the *Sioux Nation* analysis] to takings cases." Comment, *supra* note 92, at 255.

[275] This idea was suggested by the authors of Comment, *supra* note 92.

trine. This Part has demonstrated, however, that this broad plenary power is wholly without constitutional support, and that the enumerated powers of the federal government regarding Indians encompass only the regulation of commerce and the negotiation of treaties. These limits on federal power in the conduct of United States' relations with the Indians reveal the complete lack of constitutional support for the exercise of power over the internal affairs and territory of Indian nations.

The Indian commerce clause provides only for the regulation of the citizens and states of the United States in their interaction with Indian nations, just as the foreign commerce clause controls the field of foreign affairs and trade. Federal authority under the treaty power is confined within the bounds of the government's other enumerated powers. The only case in which a treaty could provide the federal government with power not enumerated in the Constitution would be one where a sovereign nation, Indian or otherwise, delegated to the United States certain of its national powers.[276] The scope of federal power regarding Indians is small, and presupposes a treaty-like consensual relationship. The constraints imposed by the Constitution and the inherent sovereignty of Indian nations forbid the exercise of federal control over Indian peoples.

On the other side of the balance, the federal government is a trustee over Indian lands and assets. This relationship should be narrowly drawn to exist only where explicitly provided for in treaties. However, a constructive trust should be imposed upon the United States in any situation where it undertakes to control Indian land, natural resources, or other assets, as was recognized in *Mitchell II*.[277] This constructive trust would remain in force until the property is formally conveyed by the Indians to the United States, either in trust or in fee, by treaty, or is returned to the Indian nations. The doctrine of aboriginal title adopted in *Tee-Hit-Ton* should be abolished, and legal title to all Indian lands, either in fee or in trust, should be recognized as belonging to the various Indian nations.

Along with the full recognition of Indian property rights, there should be no federal assertion of power over Indian property beyond the normal bounds of the eminent domain power and the proper powers of a trustee. Regarding the latter, the United States should be held to the strictest of fiduciary duties in its control and management of Indian land and resources,[278] and Indians should have an effective voice in the administration of their property. The trust responsibility would therefore not be a unitary source or doctrine of power over Indians, but rather a means of fulfilling the various obligations and duties the United States has undertaken and the powers it has received through treaties. The intention of the trust responsibility should be to return land and assets held in trust to the Indians as soon as economically and politically feasible.

Recognition of the limited constitutional powers of the federal government and of the Indians' rights of sovereignty and full ownership of their lands would create a large vacuum in United States-Indian relations where federal power currently encroaches on Indian autonomy and territory. This vacuum should be filled by the rightful and original sovereignty of the Indian nations, and United States-Indian relations would return to a contractual, consensual and treaty-like relationship. Past treaties between the Indians and the federal government, long subject to abrogation by the United States, should be recognized as being subject to abrogation by either party, thus providing a context for their bilateral renegotiation. Political considerations, international attention, and common morality should stay the hand of the United States from attempting to reassert the powers it had once exercised under the plenary power doctrine, and the Indians' newly recaptured sovereignty would be a spur to their political and economic advancement.

Thus, a properly conceived trust relationship, based solely upon treaties and mutual agreements and administered according to strict fiduciary principles, would provide a framework of federal-Indian relations which conforms with the constitutional limits on federal power and which would reinstate both the

[276] Delegation of sovereign powers by an Indian nation in trust to the United States pursuant to treaties or other agreements would confer power upon the United States, but the source of such power would be the Indians' own sovereignty.

[277] *See supra* note 260 and accompanying text.

[278] As is ostensibly the current state of the law. *See supra* notes 246–52 and accompanying text; F. Cohen, *supra* note 8, at 225 ("the federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies"); *see generally id.* at 225–28. The doctrine of plenary power has barred breach of trust claims or other enforcement of the fiduciary responsibility against Congress itself, *see id.*, except where by statute Congress has waived its immunity. *See, e.g.*, 28 U.S.C. § 1505 (1982). However, recognition of the plenary power doctrine's lack of constitutional foundation would remove this bar.

inherent sovereignty of the Indian nations and their original consent-based relationship with the United States.

Adoption of these principles would fulfill the constitutional design for United States-Indian relations and would reempower the Indian nations. However, the Supreme Court's jurisprudence with respect to federal power over Indians has accepted the doctrine of plenary power as settled law. The Court in recent years has instead focused on the scope of state power over the Indian nations. The next Part of this Comment argues that the recent Supreme Court's sanction of state power over the Indian nations is unconstitutional and violative of Indian sovereignty.

II. The Imposition of State Power on Indian Reservations: A Critique of Recent Supreme Court Doctrine

One of the most serious concerns of Indian nations is the expansion of jurisdictional authority of the states over Indians and Indian territory. The fundamental principle of American Indian law, established by the Supreme Court in *Worcester v. Georgia*[279] in 1832, is the inherent right of Indian nations to govern their own territory, independent of state law. This principle has been undermined by the United States Supreme Court in a series of decisions sanctioning state interference in Indian affairs.

This Part argues that the states have no jurisdiction over internal Indian affairs without express tribal consent. The first section shows that this understanding is the only approach to tribal-state jurisdictional disputes consistent with the historical and constitutional principles of American Indian law. The second section discusses the four major theories that the modern Supreme Court[280] has adopted in recharacterizing the political status of Indian nations: infringement,[281] federal pre-emption,[282]

[279] 31 U.S. (6 Pet.) 515 (1832).

[280] For the most part, the "modern" decisions discussed in this section are products of the Burger Court. However, the term is used in this section to encompass decisions since Williams v. Lee, 358 U.S. 217 (1959).

[281] Williams v. Lee, 358 U.S. 217 (1959).

[282] McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 688 (1965); *see also* Fisher v. District Court, 424 U.S. 382, 386–87 (1976).

implicit divestiture[283] and balancing.[284] The application of these theories has demonstrated the Court's willingness in the field of Indian law to create novel legal constructs in specific cases, and then to extend them to different, and inappropriate, factual circumstances.

A. Historical and Constitutional Support for the Preclusion of State Power

The recognition of Indian nations as independent political entities with the inherent right to govern their own affairs dates from the arrival of the first European settlers in the New World.[285] Before the American revolution, the British Crown was formally the exclusive authority in dealing with the Indian nations,[286] but, in practice, it left the actual management of Indian affairs to the colonies. In doing so, it left the Indians and Indian land unprotected from colonial authorities who alleged the right to appropriate uncultivated Indian land and to assert jurisdiction over the Indians who claimed to own it.[287] After the American Revolution, however, an explication of the relationship of the American Indians to the newly-formed federal and state governments was necessary. The first statement of this relationship was in Article IX of the Articles of Confederation. Article IX granted to the Continental Congress "the sole and exclusive right and power of . . . regulating the trade

[283] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see also* Montana v. United States, 450 U.S. 556 (1981); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 136, 152 (1980).

[284] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); *see* California v. Cabazon Band of Mission Indians, 55 U.S.L.W. 4225 (U.S. Feb. 24, 1987); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 136 (1980).

[285] *See supra* notes 10–19 and accompanying text.

[286] The Privy Council consistently rejected the colonies' assertions of jurisdiction over the Indians within colonies' territory. In 1718 the Council struck down three Virginia Acts that attempted to regulate trade with the Indians, declaring that the Acts required approval and confirmation by His Majesty before they could be given force. 2 Acts of the Privy Council (Colonial) § 1271, at 721 (1718). The Council also repealed a Massachusetts Bay Act, calling it "an example of the inconvenience caused by the interference of one colony with any general plan for the management of Indian Affairs in North America." 6 Acts of the Privy Council (Colonial) § 555, at 354 (1763). The Council objected to the Act, "1st That the Operation of the Act . . . would extend beyond the Limits of the Province itself. 2dly That so extensive a Power given to One Colony, may hereafter interfere with any general Plan Your Majesty may think it adviseable to pursue for the Management of Indian Affairs in North America. . . ." *Id.* at § 507, at 559 (1763).

[287] Clinton, *supra* note 18, at 851.

and managing all affairs with the Indians, not members of any of the States; provided, that the legislative right of any state within its own limits, be not infringed or violated."[288] By allowing states' interests to restrain federal-Indian relations, Article IX permitted land-hungry states to assert power over Indians in direct contravention of federal-Indian treaties.[289]

As a result, states often appropriated Indian lands and entered into treaties with the Indian nations without the knowledge or consent of the federal government.[290] For example, the New York State government claimed the exclusive right to treat with the Six Nations, and both North Carolina and Georgia regarded the Treaty of Hopewell, in which the Continental Congress guaranteed the territorial integrity of the Cherokee Nation, to be the federal government's "manifest and direct attempt to violate the retained sovereignty and legislative rights of this State."[291] A committee of the Continental Congress summarized the logical inconsistency of Article IX by declaring that, "[i]t cannot be supposed, the state has powers [to make war with Indians or buy land from them] without making [the Indian affairs clause of Article IX] useless."[292]

Because of the confusion resulting from allowing state interests to influence the formation of American Indian policy, the Framers of the Constitution explicitly rejected any concessions to states' interests when they confronted the issue of the recognition of the status of Indian nations in drafting the Constitution. In article I, section 8, the constitutional delegates vested in Congress the power "[to] regulate Commerce . . . with the

[288] Articles of Confederation, art IX, para. 4.

[289] Clinton, *supra* note 18, at 855 n.48. *See* The Federalist No. 42, *supra* note 184, at 268–69 (J. Madison):

> [Article IX is] obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. . . . And how the trade with Indians, though not yet members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

[290] Clinton, *supra* note 18, at 855.

[291] 4 American State Papers 38–39 (W. Lowrie and M. Clarke eds. 1832); Clinton, *supra* note 9, at 855.

[292] 33 J. Cont. Cong. 457–459 (1787); *see also* United States v. Oneida Nation of New York, 576 F.2d 870, 879–81 (Ct. Cl. 1978) (discussion of Article IX); Clinton, *supra* note 18, at 856.

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Indian tribes,"[293] amending Article IX by consciously rejecting any inclusion of state power or recognition of state interests in the area of Indian affairs. By making the relationship with the tribes a constitutional matter, the Framers created a policy of national uniformity, vesting exclusive, but limited, power in the federal government to regulate commerce and to make treaties with the Indian nations.[294]

This Indian commerce clause was deemed necessary both to foster orderly relations with the Indians and to maintain their independence from the states. It recognized the independent, sovereign status of the Indian nations by including them in the same clause as, but separate from, "foreign nations," and "the several states."[295] By distinguishing Indian nations from the states, the commerce clause affirmed that Indian governments were distinct political entities.[296] Thus, Indian nations are a puzzling anomaly in the United States; they exist within state borders, but they remain constitutionally and historically insulated from the state's jurisdictional reach.

The early Supreme Court explicitly recognized the preclusion of state jurisdiction over Indian territories.[297] In *Worcester v. Georgia*,[298] Justice Marshall declared that Indian nations are "distinct political communities" within which the laws of the states have no force without the consent of the Indians themselves. "The whole intercourse between the United States and

[293] U.S. Const., art. I, § 8, cl. 3.

[294] *See* Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S. Dak. L. Rev. 434, 436 (1981).

[295] Clinton, *supra* note 18, at 857.

[296] Recent Supreme Court decisions ignore the history of the Indian commerce clause (discussed *supra*, notes 24–26 and accompanying text) as a source of authority for leaving Indians and Indian territory free from state jurisdiction. In fact, in Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), the Court, in a footnote, summarily dismissed the commerce clause as irrelevant to the resolution of tribal-state jurisdictional disputes:

> It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with the existing federal statutes, is the Supremacy Clause . . . and not any automatic exemptions "as a matter of constitutional law" . . . under the Commerce Clause.

Moe at 481, n.17.

[297] The term "Indian reservation" or "Indian territory" will be used in this Comment to refer to all land within a reservation's physical boundaries even if parts of that area are owned by individual non-Indians.

[298] 31 U.S. (6 Pet.) 515 (1832).

[the Cherokee] nation," Marshall wrote, "[is] according to the settled principles of our constitution, . . . committed exclusively to the government of the union."[299] In explaining the status of Indian tribes, Marshall declared:

> [The Constitution] confers on congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.[300]

Marshall's conclusion in *Worcester* was the culmination of over a century of historical experience and constitutional debate.[301] Marshall rejected Georgia's assertion of jurisdiction over the Cherokee nation.[302] First, he recognized that the constitutional grant of power to the federal government over Indian affairs was exclusive, thereby concluding that the federal government's treaty with the Cherokee nation pre-empted Georgia law.[303] But, most importantly, Marshall deliberately and clearly articulated what became the central principle of Indian law: that even in the absence of any applicable federal treaty or statute, Indian nations retain the power to make and enforce the laws that govern their territory—free from state interference—by virtue of their sovereign status.[304]

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[299] *Id.* at 560–61.
[300] *Id.* at 558.
[301] *See supra* notes 10–71 and accompanying text.
[302] Even in a time of strong political opposition and hostility toward the Indian presence by the developing states, Chief Justice Marshall upheld the constitutional mandate vesting exclusive power in the federal government to deal with the Indian nations. In response to *Worcester*, President Jackson was quoted as saying, "John Marshall has made his law; now let *him* enforce it," and many Georgia officials announced that they did not accept Marshall's decision that Georgia lacked jurisdiction over the Cherokees. *See* F. Cohen, *supra* note 8, at 83.
[303] *Worcester*, 31 U.S. (6 Pet.) 515 (1832).
[304] F. Cohen, *supra* note 8, at 122.

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B. Supreme Court Tests Sanctioning State Authority

1. The Infringement Test: The Beginning of State Interests

As recently as 1945, the Supreme Court reaffirmed the *Worcester* principle, holding that, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history."[305] Nonetheless, many states have extended their jurisdictional authority over Indians and Indian reservations located within their borders. These states have found a willing ally in the judiciary, and in particular, in the United States Supreme Court.

In 1959, in the case of *Williams v. Lee*,[306] the Court began its steady erosion of the principle of inherent tribal sovereignty as an independent bulwark against state interference. *Williams* involved the attempt by a state to extend its jurisdiction over an action by a non-Indian against an Indian on a debt arising on the Navajo reservation. The Supreme Court held that the Navajo tribal courts had exclusive jurisdiction over the case.[307] Instead of upholding tribal jurisdiction on the basis of the Navajo's preexisting sovereign right to govern its own affairs, however, the Court held that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[308]

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[305] Rice v. Olson, 324 U.S. 786, 789 (1945).
[306] 358 U.S. 217 (1959).
[307] *Id.* at 220.
[308] In *Williams*, Justice Black, writing for the Court, acknowleged *Worcester*, but wrote:

> Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized.

358 U.S. at 219.

In suggesting this modification, Black relied on cases that did not stand for the proposition espoused in *Williams* that states have jurisdiction over Indian reservations absent infringement of tribal self-government. Instead, he relied in part on the case of Utah & Northern Railway v. Fisher, 116 U.S. 28 (1885), which held that a state tax levied on a railroad running through reservation territory would not interfere with the tribe's authority to govern the reservation. Critical to the *Fisher* decision, however, was an 1881 treaty between the United States and the Indians in which the Indians had agreed, for consideration, to cede title to a strip of land to the U.S. for use by the

This infringement test illustrated the beginnings of a shift in philosophy in the Court's resolution of tribal-state disputes. It signified a fundamental departure from the *Worcester* principle that state laws are excluded from Indian reservations, not only because a particular state law infringes on an Indian nation's self-government, but because all state laws do.[309] However, the Court's analysis in *Williams* barred the imposition of Arizona law because the Court determined that in this *particular* instance the state action infringed on the Indians' governance of their internal affairs; this analysis implicitly ignored the understanding in *Worcester* that the imposition of any state law on Indian territory would affect the sovereign power of the tribe. Nonetheless, the Court failed to identify what state actions would be considered to infringe on the right of Indians to self-government, and therefore failed to provide any principled legal analysis by which future conflicts could be determined. Ironically, while *Williams* recognized the concept of Indian self-government, the general, open-ended language of the infringement test provided the states with the opportunity to assert wide-ranging jurisdictional authority over Indians and Indian territory. The Supreme

railway. The land at issue, therefore, was within the states' jurisdiction, and became subject to the states' tax "by force of the cession thus made." *Id.* at 32. The determining factor in *Fisher* was the broad question of who held legal title to the land at issue and was not the jurisdictional power of the states over reservation land.

Black also relied on New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946), which upheld a New York State murder conviction of a non-Indian for the murder of another non-Indian on the Allegheny reservation. However, *Ray* also does not support the holding in *Williams*. The decision in *Ray* followed an earlier case, United States v. McBratney, 104 U.S. 621 (1882), where, in rejecting federal court jurisdiction, the Court recognized Colorado state court jurisdiction over an alleged murder of one non-Indian by another non-Indian on reservation territory. The Court's reasoning in *McBratney*, however, was itself problematic: upon admission to the Union, in some states' enabling acts, Congress reserved to the federal government "sole and exclusive jurisdiction" over Indian lands. *McBratney*, 104 U.S. 621, 623–24 (1881). Colorado's enabling act did not do so, so the Court negatively inferred that Congress had *intended* to allow Colorado to exercise jurisdiction over Indian territory. In *Ray*, there was no enabling act to examine because New York was one of the original thirteen states. Nevertheless, the *Ray* Court followed *McBratney*, reasoning that since Colorado's enabling act declared that Colorado was admitted to the Union "on an equal footing" with the original thirteen states, the original states must have the same jurisdictional powers as the Court gave to Colorado in *McBratney*. The Court failed to note that the "equal footing" language was part of *every* enabling act—even of those states that did reserve jurisdiction and control of Indian lands to the federal government—and that, therefore, such language could not be determinative of a state's jurisdictional power. *See* R. Barsh & J. Henderson, *supra* note 5, at 145–46.

[309] *Williams*, 358 U.S. at 223. *But see* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 Utah L. Rev. 206, 212, 214 (1973) (arguing that *Williams* and the infringement test is consistent with *Worcester*'s principle of the exclusion of state jurisdiction over Indians and Indian territory).

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Court suggested that there was now an area in which state jurisdiction over Indian affairs was valid; the extent of a tribe's right to govern its own affairs, free from state interference, now rested precariously on an undefined notion of state "infringement."

2. Congressional Intent and the Doctrine of Federal Pre-emption

In 1973, the Court fully relegated the principle of tribal sovereignty as a bar to state jurisdiction to a secondary status when it handed down its decision in *McClanahan v. Arizona State Tax Commission*.[310] The case involved an attempt by Arizona to impose its personal income tax on a Navajo Indian who lived on the Navajo reservation and whose entire income was derived from reservation sources.[311] This wholly Indian-related context provided the Court with a perfect opportunity to uphold the inherent rights of Indian tribes to govern their internal affairs free from state interference, but the Court refused to do so. Instead, it held that the state tax was invalid because it had been pre-empted by federal statutes and treaties that already controlled the field.[312]

The analysis in *McClanahan* changed again the legal framework that was to guide tribal-state jurisdictional relations. Indian sovereignty—once an independent bar to state jurisdiction—was now held to be a mere "backdrop" against which to read applicable treaties and statutes.[313] After *McClanahan*, *Worcester*'s principle of Indian nations' sovereignty is relevant not as a basis on which to resolve jurisdictional disputes, but only as an aid in interpreting the applicable treaties and federal statutes.[314] The Court discussed *Worcester* and the long-recognized status of

[310] 411 U.S. 164 (1973).
[311] *Id.* at 165.
[312] *Id.* at 173.
[313] The Court stated:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which applicable treaties and statutes must be read.

Id. at 172.
[314] *Id.*

Indian nations as distinct and independent political entities: "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."[315] But the Court ultimately concluded that the "Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law,"[316] was no longer a bar to state jurisdiction.

McClanahan replaced the doctrine of tribal sovereignty with an amorphous federal pre-emption analysis. It was not clear from the Court's opinion when it would continue to apply *Williams*' infringement test or whether the pre-emption test was the new rule in Indian law.[317] The Court's pre-emption analysis created a new starting point from which the Court would analyze tribal-state jurisdictional disputes. For two centuries, the Supreme Court had premised the Indian right of self-government on residual sovereignty and not on federally delegated powers, but the requirement of express federal pre-emption in order to preclude state jurisdiction drastically undermined the exclusive sphere of Indian jurisdiction. It is clear from the history of federal Indian legislation,[318] that the right of Indian nations to govern their internal affairs will not be protected if it rests simply on the unpredictable, changing will of a political majority. The vacillations of federal policies are an insufficient foundation on which to base judicial determinations of Indian nations' jurisdictional authority.

While insisting on the existence of federal control over a subject matter in order to pre-empt state jurisdiction, the Court ignored the federal government's explicitly stated policy of promoting and protecting the self-government and economic self-

[315] *Id.* at 171.

[316] *Id.*

[317] The Court held that the infringement test in *Williams* was not applicable to *McClanahan* because federal statutes had pre-empted Arizona's tax. The Court held that the activity of the Indian defendant in *McClanahan* was "totally within the sphere which the relevant treaties and statutes leave for the Federal government and for the Indians themselves." *Id.* at 179. Therefore, application of the infringement test was inappropriate because the state could not "fairly claim an interest." This limitation of *Williams* enunciated in *McClanahan* illustrates the Court's shift to a federal pre-emption analysis as the basis on which to resolve jurisdictional disputes: it was not the infringement on inherent tribal sovereignty, but was rather the relevant federal statutes that estopped the Court in *McClanahan* from considering the state interests. *Id.* at 179.

[318] *See supra* notes 113–142 and accompanying text; R. Barsh & J. Henderson, *supra* note 5, at 63–65; W. Washburn, The Historical Context of American Indian Legal Problems, in American Indians and the Law 21 (L. Rosen ed. 1978).

sufficiency of Indian nations.[319] This is perhaps most ironic in light of the Burger Court's stated deference to congressional prerogatives in virtually every other area of law.[320] In the field of Indian law, the Burger Court's decisions have served to widen the gap between the stated federal policy and its legal application.[321] By cloaking its decisions in general pre-emption language, the Court cleverly disguises its *ad hoc* approach to Indian cases;[322] by failing to articulate the scope of its pre-emption analysis, the Court allows federal statutes to be read loosely or strictly, depending on its desired result.

3. The Implicit Divestiture Test: The Court Discovers New Limitations on Tribal Powers

Federal, state and tribal criminal jurisdiction over Indian affairs are, for the most part, delineated by federal statute.[323] In

[319] The current federal Indian policy is formally one of tribal self-determination. *See* The Indian Financing Act of 1974, 25 U.S.C. § 1451 (1983); The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b) (1982).

> The Congress declares its commitment to the . . . establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of these programs and services.

The Act's practical implementation, however, has been effectively blunted by the seriously constraining bureaucratic necessities embodied within it, the reality of limited tribal resources, and the reduction in congressional budgetary allocations. *See* American Indian Policy in the Twentieth Century 28–29, 48–49, 177–80 (V. Deloria ed. 1985); *see generally* President Reagan, Statement on Indian Policy, Pub. Papers of Ronald Reagan 96 (Jan. 24, 1983); President Nixon, Special Message to Congress on Indian Affairs, Pub. Papers of Richard Nixon 564, 566 July 8, 1970 ("the goal of any new national policy toward the Indian people [must be] to strengthen [their] sense of autonomy.").

[320] Clinton, *supra* note 294, at 445.

[321] *See* Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. Kan. L. Rev. 713, 724 (1986).

[322] A clear example of the Supreme Court's ad hoc application of the pre-emption test is illustrated by the difference in the Court's approach to its decisions in *Williams* and *McClanahan*. In *Williams*, the Court relied on the general federal recognition of Navajo tribal self-government in the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 (1982), as the relevant federal statute even though nothing in the Act explicitly reserved civil jurisdiction to the Navajo nation. *McClanahan* also involved the Navajos, but the Court did not discuss the Rehabilitation Act in its analysis. One wonders why the Court did not rely on the Act to imply the preservation of tribal taxing power in *McClanahan* as it had done for civil jurisdiction generally in *Williams*. Instead, the *McClanahan* Court looked for other, more specific, evidence of federal pre-emption. *See* R. Barsh & J. Henderson, *supra* note 5, at 167–68.

[323] *See generally* American Indian Lawyer Training Program, *supra* note 90 (providing an overview of Indian law with chapters on tribal powers, civil and criminal jurisdiction, Pub. L. 280, taxation and other subjects). The major statutes pertaining to

most circumstances, states have exclusive criminal jurisdiction over all off-reservation crimes involving Indians as well as non-Indians.[324] It is also generally accepted that tribal governments have the exclusive power to make and enforce the criminal laws governing crimes committed by Indians against Indians occurring within the reservation.[325] The controversial issue is whether a tribe has criminal jurisdiction over non-Indians who commit crimes within the reservation. This question was addressed by the Court in 1978 in *Oliphant v. Suquamish Indian Tribe*.[326]

In *Oliphant*, the federal pre-emption analysis was not an available ground for decision, since no federal statute had been enacted either to divest the tribe of criminal jurisdiction over non-Indians on the reservation or to grant such jurisdiction to the states. Therefore, the Court in *Oliphant* had to address squarely a tribal government's inherent powers of criminal jurisdiction over criminal activity on its territory. In fact, the Suquamish tribe's claim to jurisdiction over non-Indian criminal defendants was based only on the tribe's inherent sovereign right to enforce the laws that govern its territory.[327] The Ninth Circuit Court of Appeals had agreed that the Suquamish tribe had the right to enforce their criminal laws within their territory and had affirmed the criminal jurisdiction of the tribal court. It held that "the power to preserve order on the reservation . . . by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish tribe originally possessed."[328] The Supreme Court reversed, holding that Indian

federal criminal jurisdiction over Indian affairs are: the General Crimes Act, 18 U.S.C. § 1152 (1982), which vests in the federal government, to the exclusion of the states, jurisdiction to punish offenses by non-Indians against the person or property of Indians, and offenses by Indians against the person or property of non-Indians; the Major Crimes Act, 18 U.S.C. § 1153 (1982) which vests criminal jurisdiction in the federal government over fourteen specific offenses committed by Indians within the reservation; and Pub. L. 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 and Supp. III) which is the major statute vesting criminal jurisdiction in states that have properly assumed jurisdiction under the statute. *But see supra* notes 156–231 and accompanying text (discussing the illegitimacy of federal plenary power). In the absence of federal plenary power there can be no delegation of power to the states. *See also* Goldberg, *Public Law 280: State Jurisdiction and Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 561 (1975).

[324] F. Cohen, *supra* note 8, at 348–49.

[325] This is true except for the 14 crimes listed in the Major Crimes Act over which the federal government has jurisdiction. The tribes can, and do, exercise concurrent jurisdiction over these crimes as well.

[326] 435 U.S. 191 (1978).

[327] *Id.* at 195.

[328] Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976). The Ninth Circuit held that the question "is not whether Congress has conferred jurisdiction upon the tribe.

tribal courts do not have inherent criminal jurisdiction over non-Indians who commit crimes on the reservation.[329]

In his opinion for the Court, then-Justice Rehnquist redefined the scope of the inherent powers of Indian tribes:

> The tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Nor are intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. . . . Indian powers are prohibited from exercising both those powers . . . that are expressly eliminated by Congress and those powers "*inconsistent with their dependent status*."[330]

With this holding, the Court articulated a third open-ended test for determining the scope of tribal jurisdiction: this test allows courts to "imply" the divestment of particular tribal powers by simply holding them to be "inconsistent with tribal status." This implicit divestiture test has no apparent historical or constitutional precedent, and the Court failed to establish any analytical framework to guide future courts in determining whether a particular assertion of jurisdiction is "inconsistent" with a tribe's "status." The Court did not limit the test to the area of criminal jurisdiction over non-Indians; the opinion suggested, in sweeping terms, that those exercises of tribal jurisdiction creating "unwarranted intrusions on [an American citizen's] personal liberty" may be considered inconsistent with tribal status.[331]

The Court seemed to be concerned with the delicate nature of criminal proceedings and the duty of the United States to protect its citizens from unconstitutional intrusions on their "personal liberty."[332] Without defining the scope of implicit divestiture, the Court can use this language to invalidate virtually any exercise of tribal jurisdiction over non-Indians.[333] In fact,

The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question therefore is, did Congress (or a treaty) take that jurisdiction away?" *Id.* at 1009 n.1.

[329] *Oliphant*, 435 U.S. at 208.

[330] *Id.*

[331] *Id.* at 210.

[332] *Id.* at 210.

[333] *See* Comment, 4 B. Y. U. L. Rev. 911, 927 n.83 (1978).

subsequent decisions have extended the implicit divestiture test to apply to cases outside the context of criminal jurisdiction, broadly declaring that tribes retain a right or power "unless divested of it by federal law or necessary implication of their dependent status."[334] At the very least, the holding in *Oliphant* should be limited to its unique factual context. Ninety-seven percent of the Suquamish reservation in the *Oliphant* case was owned by non-Indians.[335]

4. The Balancing Test: The Triumph of State Interests

The Court's erosion of the sovereignty of Indian nations continued in *White Mountain Apache Tribe v. Bracker*.[336] In that case, the Court held that a federal statute regulating the harvesting of Indian timber pre-empted state taxes that had been levied on a non-Indian construction company because the company engaged in business with the tribe on the reservation.[337] In reaching this decision, the Court did not rely solely on the federal pre-emption test; in addition to pre-emption, the Court balanced openly the state's interests against those of the tribe in order to determine the extent of the Indian nation's sphere of power. The Court determined that the imposition of the state taxes in *Bracker* would undermine the federal policy of ensuring that profits from the harvesting and sale of reservation timber inure to the tribe's benefit.[338] Although the Court concluded that the state taxes in *Bracker* were pre-empted because they would obstruct the federal regulatory scheme,[339] it held that "an equally important factor" in its decision was the state's inability to

[334] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980); *see* United States v. Wheeler, 435 U.S. 313, 323 (1978). *See also* Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 Wash. L. Rev. 863 (1984).

[335] *Oliphant*, 435 U.S. at 193 n.1.

[336] 448 U.S. 136 (1980).

[337] *Id.* at 139–40.

[338] The federal objective of guaranteeing Indians whatever profit they make from their timber sales is "part of the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.'" *Id.* at 149 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973)). The Court noted that the state taxes would also undermine the Secretary of the Interior's authority to determine the fees and rates for the harvesting and sale of reservation timber and would diminish the tribal revenues which are used to pay out federally required expenses with repect to forest maintenance. *Id.* at 149–50; *see also* California v. Cabazon Band of Mission Indians, 55 U.S.L.W. 4225, 4229 (U.S. Feb. 24, 1987).

[339] *Bracker*, 448 U.S. at 138.

identify regulatory interests of its own that could justify the assessment of the tax.[340] The Court's balancing test allowed state interests to carry great weight in the Court's decision as to whether the state taxes were valid. The Court suggested that it may, in some other context, hold a state's interests to be sufficiently strong to warrant their intrusion into a comprehensive federal regulatory scheme.[341] This balancing test provides a fourth means for the Court to destroy any effective sphere of meaningful tribal self-government. By "balancing in" state interests, the Court effectively "balances out" the historical, constitutional and federally-recognized right of Indian nations to govern the people, property and activities within their reservations.

In 1973, *McClanahan v. Arizona State Tax Commission* looked revolutionary. It replaced the well-established principle of internal tribal sovereignty with a federal pre-emption principle, relegating tribal sovereignty to a "backdrop" which courts could take into account in interpreting the relevant federal statutes.[342] Just seven years later, the *Bracker* Court held that even in the face of comprehensive federal law on the subject, courts must also weigh state interests when determining whether states have jurisdiction over reservations.

Although the Court consistently recognizes a realm of exclusive tribal jurisdiction, by failing to define its scope, the Court is able to apply one or a combination of its newly-created arsenal of tests to deprive the Indian nations of any reliable legal position on which to base their jurisdictional challenges against the states. The decisions in *Williams*, *McClanahan*, *Oliphant* and *Bracker* reverse the long-standing presumption of the exclusion of state jurisdiction over Indians and establish a presumption of state jurisdiction unless Congress has specifically pre-empted state law.[343] Taken together, they potentially leave no area of tribal jurisdiction untouched by the states. The Court's decisions necessitate Indian challenges to state action through expensive

[340] *Id.* at 148.

[341] The state alleged a "general desire to raise revenue," but the Court concluded that there was no service or governmental function that the state was performing for those on whom the taxes would be levied. The Court held that the state's "generalized interest in raising revenue *in this context*" was not sufficient to permit state obstruction of the comprehensive federal regulatory scheme. *Id.* at 150 (emphasis added).

[342] *McClanahan*, 411 U.S. at 173.

[343] *But see supra* notes 156–231 and accompanying text (discussing the illegitimacy of federal plenary power).

and time-consuming litigation, and provide strong incentives for states to assert their jurisdiction over Indians and Indian territory within their borders.

C. The Use of the Supreme Court's Tests to Justify the Intrusion of State Tax and Regulatory Power into Indian Territory

1. The Need for the Exclusive Tribal Power to Tax

Perhaps the most important jurisdictional issue in modern Indian law concerns the scope of the power of Indian nations to tax activities conducted on reservation land. This is one of the most frequently litigated issues between the tribes and the states, in part because no federal statutes exist to delineate the tax and regulatory jurisdiction of tribes and states, and in part because of the serious financial importance this power has for both governments.

An essential requirement of a functioning government is the power to raise revenue. Historically, Indian nations rarely exercised their power to levy taxes;[344] therefore, tribal jurisdiction to tax has not often been tested. Recently, tribal governments have begun to assert their power of taxation on the reservation, supported both by the legitimate powers of a sovereign government,[345] and the current federal policy of tribal self-government and economic development.[346] But recent Supreme Court decisions have severely undermined these principles,[347] sanctioning substantial incursions of state taxing jurisdiction over activities conducted on Indian reservations. Concurrent state taxation of

[344] Because land and resources were owned by the tribal entity, the revenue generated by tribal property was earned by the tribes directly, rather than through taxation. Under the General Allotment Act, tribal land and resources were transferred to individual ownership, making it necessary for the tribal government to tax those individuals in order to obtain revenue from the property. *See supra* notes 113–23 and accompanying text; F. Cohen, *supra* note 8, at 431.

[345] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); 71 Am. Jur. 2d State and Local Taxation § 71 (1973). The inherent power of tribal governments to tax has been upheld in three major cases: Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); and Morris v. Hitchcock, 194 U.S. 384 (1904).

[346] *See supra* note 319.

[347] *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976).

non-members of the reservation's tribe effectively limits the power of Indian governments to no more than the taxation of tribal members.[348] This is an insufficient source of revenue from which to pursue economic development and to provide social services.

The Supreme Court's recent tax decisions rely heavily on the language of *McClanahan*, applying a federal pre-emption test to determine whether the challenged state action conflicts with existing federal law. In cases where the Court has not been able to find that an area has been federally pre-empted, it has refused to even "fall back" on the principle of tribal self-government to invalidate state jurisdiction. Instead, the Court has used the *Bracker* "balancing" test which weighs the interests of the state against those of the tribe, in order to determine which government has jurisdiction in the particular case.[349] Taking account of state interests is unprecedented in Indian law; it violates the constitutional principles of tribal sovereignty and state exclusion, and renders meaningless the federal policy of tribal development and self-determination.

On the same day the Supreme Court decided *McClanahan*, it also handed down *Mescalero Apache Tribe v. Jones*.[350] *Mescalero* stood for the proposition that Indian persons and property located off-reservation could be taxed by the state.[351] The distinction seemed reasonable: absent any federal exemption, Indians are governed by the tribe's laws within its territory, but once they voluntarily leave the reservation, they become subject to state law. But the decision in *Mescalero* was puzzling because the facts of the case included a federal exemption. *Mescalero* illustrated the *ad hoc*, result-oriented nature of the *McClanahan* federal pre-emption test.[352]

In *Mescalero*, the tribe acquired certain off-reservation land pursuant to the Indian Reorganization Act (IRA)[353] to develop a ski resort.[354] The state imposed a gross receipts tax on the

[348] *Infra* notes 376–79 and accompanying text.

[349] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); California v. Cabazon Band of Mission Indians, 55 U.S.L.W. 4225, 4229 (U.S. Feb. 24, 1987), for the Supreme Court's most recent discussion of the "balancing test."

[350] 411 U.S. 145 (1973).

[351] "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state laws otherwise applicable to all citizens of the state." *Id.* at 148–49.

[352] *See* R. Barsh & J. Henderson, *supra* note 5, at 170.

[353] *See supra* notes 124–33 and accompanying text.

[354] *Mescalero*, 411 U.S. at 146.

business and a use tax on the equipment.[355] But, Congress provided in section 5 of the IRA that "any lands or rights" acquired for the Indian tribes "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which land is acquired and such lands or rights shall be exempt from state and local taxation."[356] In light of this legislative history, the Court rejected the state use tax, holding that the equipment had essentially become "part of the land," and therefore was exempted from taxation.[357]

Nonetheless, the Court upheld the state's gross receipts tax, ruling that the IRA tax exemption for "lands or rights acquired" would not be interpreted to include income derived from the tax-exempt land.[358] Both the majority and the dissent agreed that the purpose of the IRA was to promote tribal economic development and self-sufficiency. The majority held, however, that a federal income tax exemption must be explicitly expressed and could not be "implied" from the legislative history, and therefore, "absent clear statutory guidance courts . . . will not exempt off-reservation income simply because the land from which it is derived . . . is itself exempt from tax."[359] The ski resort at issue in *Mescalero* falls squarely within the purposes of the IRA. By holding to the contrary, the Court ignored the central canon of "sympathetic construction" in Indian law, mandating the interpretation of all statutory ambiguity in favor

[355] *Id.*
[356] IRA, § 5 (codified as amended at 25 U.S.C. § 465 (1982)).
[357] *Mescalero*, 411 U.S. at 158.
[358] *Id.* at 156.
[359] *Id.* at 156–57. The dissenters (Justices Douglas, Brennan and Stewart) reminded the majority of the Court's own previous proposition that the fact that the state tax is invalid is not because the activities occurred on a reservation, "but rather because Congress in the exercise of its power granted in [U.S. Const.] Art. I, § 8 has undertaken to regulate reservation trading in such a comprehensive way, that there is no room for the States to legislate on the subject." 411 U.S. at 161. The dissent then summed up clearly the essence of *Mescalero*:

> In the present case, Congress has attempted to give this tribe an economic base which offers job opportunities, a higher standard of living, community, stability, preservation of Indian culture, and the orientation of the tribe to commercial maturity. . . . State taxation of that enterprise interferes with the federal project. . . . Congress by § 5 of the Act has made the "lands or rights" acquired for the tribe exempt from state and local taxation. . . . There is no more convincing way to tax "rights" in land than to impose an income tax on the gross or net income from those rights. If § 5 be thought to be ambiguous, we should resolve the ambiguity in favor of the tribe.

Id. at 162.

of the Indians.[360] Although the Act had not expressly exempted the application of state income taxes to lands acquired pursuant to the Act, there is no better way to tax "rights" in land than to tax the income derived from that land.[361]

In *Mescalero*, the Court's application of the pre-emption test was inconsistent with its holding in *McClanahan*, handed down the same day. *Mescalero* applied a much stricter pre-emption analysis than *McClanahan* required, ignoring the Court's qualification in *McClanahan* that the federal pre-emption analysis in Indian law was to be applied with the "tradition of tribal sovereignty in mind."[362] In *Mescalero*, the Court looked only at the express language of the statute, and did not consider Congress' intent when it enacted the IRA to protect tribal self-government and economic development.

In *Moe v. Confederated Salish and Kootenai Tribes*,[363] the Supreme Court redefined again the contours of the pre-emption analysis. In *Moe*, the Indian nations were challenging the application of Montana's cigarette tax to Indian retailers on the reservation.[364] If the *Moe* Court had applied *McClanahan*'s liberal theory of federal pre-emption, it would have held that the Indians were a constitutional government, organized pursuant to the IRA, and were therefore empowered to exercise governmental powers of taxation.[365] But instead of applying the *McClanahan* test, the Court distinguished between a tribal government's powers over Indians and over non-Indians on the reservation.[366]

Relying on this new distinction, the Court held that states may not tax either reservation Indians operating a business for the tribe on reservation land or Indian customers of that busi-

[360] *See supra* notes 217–18 and accompanying text. This canon of construction reflects the fact that treaties and statutes are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." U.S. v. Winans, 198 U.S. 371, 381 (1905); *see* Squire v. Capoeman, 351 U.S. 1 (1956); Carpenter v. Shaw, 280 U.S. 363, 367 (1929) (federal government did not intend in the General Allotment Act to tax the proceeds of sale from timber from an Indian allotment as capital gains). *Squire* has been interpreted to underscore the rule of sympathetic construction that, while exemptions from tax laws should be clearly expressed, tax exemptions for Indians will be construed more easily even under ambiguous statutory language. *Mescalero*, 411 U.S. at 162 (Douglas, J. dissenting).
[361] *See Mescalero*, 411 U.S. at 162 (Douglas, J. dissenting).
[362] *McClanahan*, 411 U.S. at 172–73.
[363] 425 U.S. 463 (1976).
[364] *Id.* at 465.
[365] *See* R. Barsh & J. Henderson, *supra* note 5, at 189.
[366] *Id.*

ness, but that the state could assess a sales tax on items sold to non-Indians.[367] With this holding, the Court required the Indian proprietor not only to add the state tax to her sale price to a non-Indian, but to affirmatively aid the state in the recordkeeping, collection and enforcement of its tax.[368] The tribe argued that the state cannot impose its tax on sales by Indians to non-Indians because "[i]n simple terms, [the Indian retailer] has been taxed, and . . . has suffered a measurable out-of-pocket loss."[369] The Court rejected the tribe's argument that the burden of the tax effectively falls on the Indian retailer, who is legally exempt from state taxation. The Court was not concerned with the indirect effects of the state taxation on the Indian retailer or the tribal economy. Instead, it focused on the district court's finding that it would be the "'non-Indian consumer or user who saves the tax and reaps the benefits of the tax exemption.'"[370]

Four years later, in *Washington v. Confederated Tribes of the Colville Reservation*,[371] the Court extended its ruling in *Moe* to sanction state taxation of non-members of the reservation's tribe as well as non-Indians. The Court recognized in *Moe* that no federal statute divested the tribal government of its sovereign power to tax reservation sales, but then extended the implicit divestiture test—associated with Indian nations' criminal jurisdiction in *Oliphant*—to the area of taxing jurisdiction which was at issue in *Colville*.

The *Colville* Court began its analysis by stating:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or *necessary implication of their dependent status*.[372]

The Court's reasoning in *Colville* failed to recognize that often Indians living on a reservation are not members of the particular tribe which governs that reservation. For example, Indians who have parents from two different tribes may live on one parent's

[367] *Moe*, 425 U.S. at 483.
[368] *Id.* at 481–83.
[369] *Id.* at 481.
[370] *Id.* at 481–82 (quoting 392 F. Supp. 1297, 1308 (D. Mont. 1975)).
[371] 447 U.S. 134 (1980).
[372] *Id.* at 152 (emphasis added).

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reservation, but by tribal law, may be considered to be members of the other parent's tribe.[373] Similarly, if one Indian marries an Indian from a different tribe, he or she may live on the spouse's reservation, but would remain a legal member of his or her own tribe.[374] These non-members are often long term residents of the reservation and are accepted as part of the reservation community. Ignoring this reality, *Colville* held that such long term residents of a reservation are subject to state taxation in addition to tribal taxation. The Court stated that:

> Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them" merely because the result of imposing its taxes will be to deprive the Tribes of revenues. . . . The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other. . . .[375]

The Court's conclusion—that the tribe's power to tax can only pre-empt the additional state tax if Congress expressly confers that power to the tribe by statute—is unprecedented. Before *Colville*, a tribe had not been considered to be dependent on express congressional statements to exercise its inherent sovereign powers. *Colville* thus narrows considerably the judicially recognized sphere of effective tribal taxation.

The Court sanctions the imposition of state taxation and continues to erode Indian nations' inherent right of self-government, employing as its justification the impropriety of allowing tribes to "market" tax-free sales on the reservation. The use of particular tax schemes by political entities to gain a pecuniary advantage is a well-accepted means of generating revenue. States often reduce their tax rates in order to attract businesses

[373] *Cf.* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(on the basis of tribal laws, full-blooded Indian children of Santa Clara mother and Navajo father were ineligible for tribal membership in either tribe despite their residence at Santa Clara Pueblo and full participation in the cultural life of the pueblo); Clinton, *supra* note 294, at 442.
[374] Clinton, *supra* note 294, at 442.
[375] *Colville*, 447 U.S. at 156.

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and customers.[376] A reservation is a separate political entity and it must be accorded the jurisdictional integrity consistent with both its inherent sovereign rights and the federal policy of promoting tribal self-government and economic development.[377] Not only does the application of a state tax to reservation sales blunt the attractiveness of the reservation to potential non-Indian businesses or customers, but the additional tribal tax creates a competitive disadvantage for the tribe.[378] In fact, nonmember residents would now be more likely to leave the reservation to avoid "double taxation."

An understanding of the political relationships between the states and the Indian nations is crucial to analyzing the judicial opinions and doctrinal development in Indian law. In particular, it provides insight into the unprecedented judicial activism of the modern Court in restricting the exclusive power of Indian governments to tax on the reservation. In reducing a tribe's exclusive on-reservation taxing power to only its own members, the Court has attempted to restrict Indian nations to nothing more than powerless cultural enclaves.[379] Just as important as

[376] Las Vegas and Atlantic City, for example, "market" gambling, and many states have lotteries, designed specifically to raise revenue for the state. None of these activities require proof of state citizenship for participation. In fact, the dissent in California v. Cabazon Band of Mission Indians based its refusal to uphold tribal regulatory jurisdiction over bingo games partly on the assumption that reservation bingo games decreases participation in the California state lottery. *Cabazon*, 55 U.S.L.W. 4231 (U.S. Feb. 24, 1987) (citing *Colville*, 447 U.S. at 155). The dissent equated this situation with that in *Colville*, where state tax-exempt reservation sales to non-members were held invalid because they would diminish the receipts of the state tax collector.

[377] *See supra* note 319.

[378] This point is underscored by the dissent in *Colville*:

> For present purposes, two federal concerns seem especially important. One is the strong and oft-cited policy of encouraging tribal self-government. And the other is a complementary interest in stimulating Indian economic and commercial development. . . . Phrased differently, these Tribes are acting in federally sanctioned and encouraged ways—they are raising governmental revenues, establishing commercial enterprises and struggling to escape from "a century of oppression and paternalism." . . . In essence, [the] Tribes are put *to an unsatisfactory choice*. They are free to tax sales to non-Indians, but doing so will place a burden upon such sales which may well make it profitable for non-Indian buyers who are located on the reservation to journey to surrounding communities to purchase cigarettes. Or they can decide to remain competitive by not taxing such sales, and in the process forgo revenues urgently needed to fill governmental coffers. . . . And having to make that choice seriously intrudes on the Indians' right "to make their own laws and be ruled by them."

447 U.S. 168, 169–70 (Brennan and Marshall, JJ., dissenting).

[379] *See* Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40

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the tribe's exclusive right to tax within its territory, however, is the tribal government's right to decide not to levy certain taxes at all. The decisions to tax or not to tax are choices governments make to regulate business activity. These choices greatly affect the culture, economic development and quality of life of the community. Concurrent taxing power by the state is a potent tool for the destruction of such tribal interests.

2. The Unconstitutional Extension of State Regulatory Power over Indian Territory

In a 1975 case, *United States v. Mazurie*,[380] the Supreme Court upheld a tribal government's power to regulate non-Indians within reservation boundaries, even on non-Indian-owned land.[381] Tribal law required a tribal license for retailers selling liquor on the reservation; this law had been passed pursuant to congressional legislation giving the tribal government power to regulate the sale of alcohol on the reservation.[382] In this case, non-Indian defendants were convicted by the tribal government for selling liquor without a tribal license.[383] The Supreme Court held for the tribe, ruling that under the Indian commerce clause, Congress could grant the tribe power to regulate non-Indians within reservation territory, even on non-Indian-owned land.[384] Although the *Mazurie* Court did not need to address whether, absent the congressional delegation of power, the tribe could exercise such regulatory power solely by virtue of its inherent sovereignty, the Court's analysis elucidates this point:

> [L]imitations [on the authority of Congress to delegate its legislative power are] less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of

Law & Contemp. Probs. 166, 169 (1976); *but see* United States v. Mazurie, 419 U.S. 544 (1975) (Court describes Indian nations as "unique aggregations possessing attributes of sovereignty over both their members and their territory").

[380] 419 U.S. 544 (1975).

[381] *Id.* at 547–48.

[382] *Id.*

[383] *Id.* at 548.

[384] *Id.* at 554.

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> sovereignty over both their members and their territory.[385]

On this basis, the Court held that "'it is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.'"[386] This broad understanding of the supremacy of tribal self-government reaffirmed the sovereign powers of an Indian nation over both its people and its territory.

Unfortunately, the preservation of tribal regulatory jurisdiction was undermined in 1981 in *Montana v. United States*[387] in which the Court extended the implicit divestiture test of *Oliphant* to the field of civil regulatory jurisdiction. *Montana* concerned the power of a tribe to regulate fishing and hunting on non-Indian-owned land within the reservation.[388] Unsupported by precedent or principle, the Court declared sweeping limitations on the governmental functions of Indian nations, holding that:

> [E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes. . . . Though *Oliphant* only determined tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.[389]

The Court concluded that the regulation of non-members' hunting and fishing rights on the reservation bore "no clear relationship to tribal self-government or internal relations."[390]

Despite the factual dissimilarity of the two cases, the *Montana* Court used *Oliphant*'s implicit divestiture rationale as a general limitation on a tribe's inherent jurisdictional authority.

[385] *Id.* at 556–57.
[386] *Id.* at 558 (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 564–66).
[387] 450 U.S. 556 (1981).
[388] *Id.* at 556.
[389] *Id.* at 565.
[390] *Id.* at 564.

This ruling stripped the tribe of the territorial integrity that transforms a social "group" into a politically sovereign entity.

This judicial erosion of tribal regulatory jurisdiction continued in the 1983 case of *Rice v. Rehner*,[391] which concerned whether the State of California could require a federally-licensed Indian trader who operated a general store on the reservation to obtain a state liquor license.[392] The Court held that the state could so require, relying primarily on the assertion that the tribe had not historically regulated this area exclusively:

> [If] we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty. . . . [B]ecause of the lack of a tradition of self-government in the area of liquor regulation, it is not necessary that Congress indicate expressly that the State has jurisdiction to regulate. . . .[393]

In effect, Justice O'Connor, writing for the majority, invented yet another "test" for restricting the bounds of Indian jurisdiction by focusing on the question of whether there was an established, historical tradition of exclusive tribal authority over the subject matter. Since there was no "historical tradition" of concurrent state jurisdiction in the area of liquor regulation, the Court sanctioned California's assertion of power.[394]

The Supreme Court had never previously relied on whether the particular subject matter at issue in a jurisdictional dispute was one historically regulated by the tribe. In *Moe* and in *Colville*, the Court did not base its decision on whether tribes had traditionally regulated or taxed cigarette sales.[395] In *Mescalero*, the Court rejected the state's attempt to tax ski resort equipment, yet this could hardly have been based on a finding that the tribe had historically and traditionally operated ski resorts.[396] Justice Blackmun, dissenting in *Rice*, addressed this point:

[391] 463 U.S. 713 (1983).
[392] *Id.* at 715.
[393] *Id.* at 720, 731.
[394] *Id.* at 722.
[395] *See supra* notes 363–72 and accompanying text.
[396] *See supra* notes 350–62 and accompanying text.

> It is hardly surprising, given the once-prevalent view of Indians as a dependent people . . . that tribal authority until recent times has not extended to areas such as education, cigarette retailing, and development of resorts. State authority has been pre-empted in these areas not because they fall within the tribes' historic powers, but rather because federal policy favors leaving Indians free from state control, and because federal law is sufficiently comprehensive to bar the states' exercise of authority. And "[c]ontrol of liquor has historically been one of the most comprehensive federal activities in Indian affairs."[397]

As Justice Blackmun points out, the presumption in Indian law is that state laws are inapplicable to Indian reservations. The decision in *Rice* ignores this presumption, resting on the grounds that there was no traditionally recognized sovereign tribal interest in regulating liquor traffic on reservations. This conclusion is particularly puzzling since *Mazurie* suggested that a tribal government possesses the independent, pre-existing authority to regulate liquor.[398]

California v. Cabazon Band of Mission Indians[399] is the most recent Supreme Court case determining the validity of the regulatory jurisdiction of a state over an Indian reservation. In the past few years, many Indian nations have established bingo and other gaming enterprises on the reservation to provide jobs for Indians and to raise funds for social services.[400] *Cabazon* concerned the extent of a state's authority to impose its gambling laws on these Indian operations.[401] The Court rejected California's attempt at on-reservation regulation,[402] using a two-part test: first it asked whether Congress had delegated this regulatory power to the state; it then adopted a balancing test to determine whether, in the absence of congressional delegation, the state's interests were sufficiently strong to outweigh federal and tribal interests.[403]

[397] 463 U.S. at 739.
[398] 419 U.S at 545.
[399] 55 U.S.L.W. 4225 (U.S. Feb. 24, 1987), *aff'g* 783 F.2d 900 (9th Cir. 1985).
[400] *See id.* at 4229 n.21; *Las Vegas North: Buying Chips from the Chippewa*, U.S. News & World Report, Feb. 9, 1987, at 31.
[401] *Cabazon*, 55 U.S.L.W. at 4226.
[402] *Id.* at 4230.
[403] *Id.* at 4229; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

The majority held that Congress has the authority to delegate jurisdictional power over Indians and Indian reservations.[404] In particular, the Court focused on the congressional delegation of power to California under Public Law 280.[405] In *Bryan v. Itasca County*,[406] the Supreme Court had held that Public Law 280 granted full criminal jurisdiction to the states, but that it did not grant the states civil regulatory jurisdiction over Indians and Indian reservations.[407] The majority[408] in *Cabazon* disagreed with California's claim that the law was criminal in nature:

> In light of the fact that California permits a substantial amount of [off-reservation] gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular. . . . That an otherwise regulatory law is enforceable by criminal as well as civil means does not

[404] *Id.* at 4226. *But see supra* notes 156–231 and accompanying text (discussion of illegitimacy of federal plenary power doctrine) In the absence of federal plenary power there could be no delegation of power to the states.
[405] Pub. L. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 and Supp. III)). The Court also addressed California's claim that it had jurisdiction under the Organized Crime Control Act of 1970 (OCCA), 18 U.S.C. § 1955 (1982) but easily dismissed this theory. The OCCA makes certain violations of state and local gambling laws federal criminal violations. The Court noted that whether a tribal activity is a violation of state law depends on whether it violates the "public policy" of the state, and concluded that bingo does not violate the public policy of California, which expressly allows regulated gambling. The Court also declared that because enforcement of the OCCA is a federal power, there is no danger of state encroachment on tribal government. There is nothing in OCCA that gives states any power to make arrests or have any other role in enforcing the statute. This is particularly compelling in a situation where the federal government has not only made no attempts to use OCCA to prosecute tribal bingo games, but for the most part encourages these enterprises. *Cabazon*, 55 U.S.L.W. at 4226–27.
[406] 426 U.S. 373 (1976).
[407] Pub. L. 280 granted six states (including California) jurisdiction over Indian territory and provided for the assumption of jurisdiction by other states. In § 2, the states were granted broad criminal jurisdiction over offenses committed by or against Indians. *Bryan*, however, interpreted the § 4 grant of civil jurisdiction to be limited to private civil litigation in state courts, and not to grant broad tax or regulatory jurisdiction to the states. *Cabazon*, 55 U.S.L.W. at 4226 (citing *Bryan*, 426 U.S. at 385, 388–90); *see also* Santa Rosa Band of Indians v. King County, 532 F. 2d 655, 661–62 (9th Cir. 1976) (denying local governments regulatory jurisdiction over reservations under Pub. L. 280).
[408] Justice White wrote for the majority, joined by Chief Justice Rehnquist and Justices Brennan, Marshall, Blackmun, and Powell. Justice Stevens filed a dissenting opinion, in which Justices O'Connor and Scalia joined.

necessarily convert it into a criminal law within the meaning of Pub. L. 280.[409]

However, the *Cabazon* majority held that even in the absence of a congressional delegation of power to the states, state jurisdiction may be applied to Indians and reservation activities if the state interests are sufficiently strong.[410] The Court applied the *Bracker* balancing test, declaring that the relative weight of state interests must be balanced against federal and tribal interests in resolving jurisdictional disputes. The Court not only concluded that the federal government's interest in this case consists of its "'overriding goal of encouraging tribal self-sufficiency and economic development,'"[411] but also that it has actively promoted tribal bingo enterprises by lending tribes money to construct facilities and by approving tribal ordinances establishing and regulating the games.[412] The Court held that the tribal interests were as strong as the federal government's since the reservations contained no natural resources and bingo was the tribes' only source of revenue and employment.[413] The sole interest California asserted in prohibiting the bingo games was to prevent the infiltration of organized crime into the state, but it could not show any evidence of such criminal involvement.[414] In light of the fact that the state sought to prohibit all on-reservation games, while still allowing regulated games off-reservation, the state interests were deemed insufficient to outweigh those of the federal government and the tribes.[415]

The *Cabazon* decision, limiting states' attempts to regulate on-reservation bingo games, is a critical first step in protecting the ability of Indian governments to raise essential revenue.

[409] *Cabazon*, 55 U.S.L.W. at 4227.
[410] *Id.* at 4229.
[411] *Id.* (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983)).
[412] *Id.*
[413] *Id.* The majority distinguished *Colville*, where it had held that the State could tax cigarettes sold by tribal smokeshops to non-Indians because the tribe had no right to "market an exemption from state taxation to persons who would normally do their business elsewhere," even though this eliminated the tribes' competitive advantage and substantially reduced revenues used to provide tribal services. *Colville*, 447 U.S. at 155. "[T]he Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. . . . [T]heir patrons . . . do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide." *Cabazon*, 55 U.S.L.W. at 4229.
[414] *Cabazon*, 55 U.S.L.W. at 4230.
[415] *Id.*

Yet, although the Court held in favor of the Cabazon tribe in this case, its reasoning in fact further undermines judicial recognition of Indian self-government. First, the Court continues to sanction the plenary power of Congress over Indians.[416] Should Congress decide in the future to delegate regulatory jurisdiction over Indians to the states, *Cabazon* can be used to support this action since nothing in the Court's reasoning limits the power of states to obtain jurisdiction over Indians so long as there is congressional consent.

Even more dangerous to the future of tribal self-government, however, was the Court's deference to state interests. In *Cabazon*, the fact that bingo was the tribes' only source of revenue persuaded the Court that the tribal interests at stake outweighed those of the states.[417] What if an Indian nation has several possible sources of revenue? What if a tribe decides to raise funds by operating bingo games and chooses not to exploit valuable natural resources existing on its land? Would the availability of alternative sources of revenue weaken the Court's recognition of the tribal "interests" at stake, and consequently affect its determination of the jurisdictional "balance"? The Court refused to recognize that the critical interest at stake is the sovereign right of the tribes to govern reservation affairs free from state intrusion. In failing to do so, *Cabazon* illustrates the modern Court's continuing willingness to use unique factual situations to render general, open-ended opinions in Indian law. The rationale used by the Court, although granting a short-term victory for the Indian plaintiffs in *Cabazon*, may easily be applied to the detriment of other tribes seeking protection from state jurisdictional intrusion in the future.

D. Tribal-State Cooperation: A Relationship Based on Consent

The essence of self-determination is governmental power. The self-determination of Indian nations depends on the jurisdictional power of the tribal governments to make and enforce the laws that govern both their residents and their territory. The

[416] *Id.* at 4226; *but see supra* notes 156–231 and accompanying text on the illegitimacy of federal plenary power.
[417] *Cabazon*, 55 U.S.L.W. at 4229.

history of Indian law provides solid legal support for this position.

The Allotment Act[418] created a checkerboard pattern of Indian and non-Indian-owned land within reservation boundaries, thereby seriously impairing the territorial and political separation of the tribes from the states so vital to Indian nations' jurisdictional integrity.[419] One of the requirements necessary to ameliorate jurisdictional tension between the Indian nations and the states is the remedying of the checkerboard pattern of ownership within the reservations; Indian-controlled reservation land must be made contiguous and exclusively subject to tribal jurisdiction.

The sovereign jurisdiction of Indian nations over their territory need not be wholly incompatible with a state's legitimate interest in its own economy and development. Thoughtful, responsible and innovative responses are needed. Pragmatic solutions will require more than federal policies and plans handed down from "above"; both the tribes and the states must be included in the policymaking process. The greatest challenge will be to meet the needs of both the tribes and the states without depriving Indians of their legal rights and human dignity.

Tribal-state cooperation is a viable solution to many of these conflicts. The all-or-nothing outcome of judicial decisionmaking cannot address the diverse and localized needs of the individual states and Indian nations. There are many areas in which states and Indian nations have found their jurisdictional authority in conflict and they are discovering areas in which the mutual advantage of each is potentially served by entering into negotiated agreements. Such cooperative agreements between states and tribes have already been negotiated in an effort to address daily problems that both governments face such as law enforcement, delivery of social services, and hunting and fishing regulation.[420] For example, in the area of law enforcement,

[418] *See supra* notes 113–23.

[419] *See* American Indian Policy in the Twentieth Century, *supra* note 319 at 50, 87, 145–46.

[420] *See Tribal-State Compact Act of 1978: Hearings on S. 2502 before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 3–11 (1978). The Select Comm. on Indian Affairs recommended passage of the Act to authorize the states and the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and government operations in Indian country, subject to Interior Department approval and revocation by either party. The bill was passed by the Senate, but its companion bill, H.R. 11499, did not pass the House of Representatives. It was reintroduced in the 96th Cong. as S. 1181, 1st Sess. (1979). This bill was sent from the Senate Select Committee on Indian Affairs to the Senate floor, where it was again passed, but was not enacted by the House. Companion bills were revived again in the 97th Cong. as S. 563 and H.R. 5001. S. 563 was reported from the Senate Select Committee to the full Senate for a vote, but no final action was taken. Hearings were held on H.R. 5001 before the House Interior and Insular Affairs Committee on March 18, 1982, but the bill failed to pass there either. *See also* F. Cohen, *supra* note 8 at 380–81; D. Getches, D. Rosenfelt & C. Wilkinson, *supra* note 114, at 547 (1979); State v. Forge, 262 N.W. 2d 341 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978); Leech Lake Band of Chippewa Indians v. Herbst, United States v. Minnesota, 334 F. Supp. 1001 (D. Minn.) (1973) (consolidated consent judgment approving settlement agreement regarding Leech Lake Band of Indian's right to hunt, fish, trap and harvest on the reservation free from Minnesota game and fish laws, and its right to exercise jurisdiction over non-Indians on reservation).

cross-deputization of law officers has been used as an efficient and economical initiative in many areas.[421]

The legal authority of Indian nations and states to enter binding agreements without the consent of the federal government, however, is somewhat unclear.[422] Any actual transfer of jurisdiction between Indian nations and states would seem to require congressional consent,[423] but agreements that mandate the mutual or cooperative enforcement of laws and services probably do not require federal consent.[424] Nonetheless, because it is unclear whether federal consent would be necessary, Congress has noted a general unwillingness on the part of Indian nations and the states to enter into such inter-governmental agreements.[425] In an effort to encourage Indian nations and the states to shift their focus from litigation to cooperation, a Tribal-State Compact Act was introduced in Congress in 1978.[426] Though the Act did not become law, it provides a useful framework for tribal-state cooperation.

The Tribal-State Compact Act was intended to provide clear federal authorization to Indian nations and the states (and the states' political subdivisions) to enter into agreements which would apply civil, criminal and regulatory laws of the tribe or the state government over Indians or non-Indians as the parties saw fit to agree.[427] The Act provided for revocation of these

[421] *See Tribal-State Compact Act of 1978: Hearings on S. 2502 before the Senate Select Comm. on Indian Affairs*, *supra* note 420, at 15–16; F. Cohen, *supra* note 8, at 381.

[422] *Id.*

[423] *See* U.S. Const. art. I, § 10, cl. 3; *Tribal-State Compact Act of 1978: Hearings on S. 2502 before the Senate Select Comm. on Indian Affairs*, *supra* note 420, at 1; F. Cohen, *supra* note 8, at 381.

[424] F. Cohen, *supra* note 8, at 381.

[425] *Tribal-State Compact Act of 1978: Hearings on S. 2502 before the Senate Select Comm. on Indian Affairs*, *supra* note 420, at 1.

[426] *Id.* at 1–11.

[427] *Id.*

agreements by either party within a specified period of time to ensure the continuing consent of both, and it provided for federal financial assistance for up to 100 percent of costs incurred as a consequence of the agreement.[428]

The future of Indian law will test this country's avowed adherence to participatory, consent-based democratic principles and its resilience in adapting to unique contexts.[429] The Supreme Court must disavow its process of result-oriented decision-making; neither tribal nor state rights should be left to the mercy of systemic political pressures and social prejudice. As a fundamental starting point, the effective implementation of tribal self-determination depends on the tribes' constitutional and historically recognized right to be free from unconsented-to state jurisdiction over their residents and their territory.

III. International Law and Indigenous Peoples: Self-Determination for American Indians

The purpose of this Part of the Comment is to challenge traditional federal and state Indian law by suggesting the application of international law to the relationship between Indian nations and the United States. The political status and legal rights of American Indians are most appropriately examined within the framework of international law. This is not a radical or even a new proposition. Prior to the European invasion and colonization of America, Indian nations were sovereign, independent entities.[430] European international law during this period, articulated by theorists such as Francisco de Victoria,

[428] *Id.*; Pub. L. 280, as amended in 1968, attempted to provide for flexible transfers of jurisdiction to the state in particular subject areas with the consent of the Indian nation. The 1968 amendments failed to make these transfers of jurisdiction truly consensual: they did not provide for the retroactive consent of Indian nations over whom jurisdiction had been assumed by a state prior to 1968, nor did they allow the Indian nation to initiate the process of retroceding state jurisdiction; only the states could initiate the retrocession of jurisdiction. There were also serious financial disadvantages for a state in assuming jurisdiction under Pub. L. 280. The states incurred the added costs of administration and law enforcement, but the law did not provide for federal contribution, nor did it permit the states to tax the reservations in order to help defray the added costs. The Tribal-State Compact Act addressed the financial burdens of assuming jurisdictional responsibilities by allowing the states and the Indian nations to apply for any federal aid that may be necessary to implement the agreement.

[429] *See* American Indian Policy in the Twentieth Century, *supra* note 319 at 255–56.

[430] *See supra* note 2 and accompanying text.

recognized that Indian nations possessed inherent natural rights.[431] The United States Constitution and early decisions of the Marshall Court also recognized the sovereign status of Indian nations, explicitly placing the United States-Indian relationship in an international law context.[432] Until 1871, the dominant form of relations between the United States and Indian nations was the treaty, providing further evidence of the international nature of this relationship.[433] Thus, the recent and growing awareness of indigenous peoples[434] in international human rights law suggests that the legal conception of Indian nations has come full circle, recognizing once again their original and inherent sovereignty. International law therefore challenges the legitimacy of federal and state control over Indian nations within the United States.

Existing and developing sources of international human rights principles secure the right to self-determination[435] for indigenous peoples generally, and for American Indian nations specifically. The recognition and enforcement of Indian peoples' right to self-determination under international law will empower them to determine freely both their political relationship with the United States and their own economic, social and cultural development. Federal and state Indian policies and doctrines, motivated by racism, ignorance and greed, have resulted in the subjugation and domination of sovereign and independent Indian nations. Current domestic Indian law offers little recourse for Indian peoples seeking to exercise their collective and inherent right to self-determination. The international legal community,

[431] *See supra* notes 11–16 and accompanying text.

[432] *See supra* notes 24–71 and accompanying text.

[433] *See supra* note 27 and accompanying text.

[434] No definitive formulation of the term "indigenous" exists. *See infra* notes 587–88 and accompanying text. One general definition accepted by the United Nations Working Group on Indigenous Populations describes indigenous groups as "having a historical continuity with pre-invasion and pre-colonial societies." Indigenous groups "consider themselves distinct from other sectors of the society now prevailing in those territories." 1983 Report of the Working Group on Indigenous Populations [hereinafter 1983 Working Group Report], U.N. Doc. E/CN.4/Sub.2/AC.4/1983/CRP.2; *see also* Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 Am. J. Int'l. L. 369, 373–77 (1986).

[435] 'Self-determination' is a politically-charged concept. In international law, self-determination is the right of all peoples to determine freely their own political status and to pursue their own economic, social and cultural development, without external interference. *See* U.N. Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6546 (1966).

in contrast, has recently turned its attention to the struggles of indigenous peoples and is committed to the development of the collective indigenous right to self-determination.[436]

This Part of the Comment begins with a description of existing sources of general international human rights law and how it affects Indian nations, focusing on the development of the right to self-determination in the United Nations Charter and subsequent U.N. instruments. Second, human rights complaint procedures, providing a means for addressing violations of the rights of American Indians, are discussed. Using these procedures, the Hopi and Mohawk nations have challenged the policies of the United States before the United Nations. This Part then examines the development of international human rights standards specifically for indigenous peoples. This standard-setting process—oriented specifically to the interests and aspirations of indigenous peoples—is the current focus of the United Nations Working Group on Indigenous Populations. The final section considers the impact of international law, and specifically the right to self-determination, on the United States and the political status of American Indians.

A. The Right to Self-Determination in Existing Sources of International Human Rights Law

The right to self-determination is recognized in the United Nations Charter and the United Nations Human Rights Covenants, among other human rights instruments.[437] For indigenous groups, including Indian peoples, the exercise of the right to self-determination is essential to the transformation of their political status and their movement toward the goal of group empowerment.[438] Whether the internationally defined right to self-determination applies to American Indians, however, depends on the breadth of the definition of "self-determination" and on the conception of Indian peoples in the international community;

[436] The most significant development marking international recognition of indigenous peoples was the creation of a permanent Working Group on Indigenous Populations in the United Nations. *See infra* notes 565–81 and accompanying text.

[437] U.N. Charter arts. 1, 55, 56, and 73; International Covenant on Civil and Political Rights, *supra* note 435; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6546 (1966).

[438] *See* V. Deloria, Jr. & C. Lytle, The Nations Within: The Past and Future of American Indian Sovereignty 264 (1984).

both are highly contested issues. It also depends on the extent to which the United States recognizes its international law obligations.[439] Thus, forty years after the United Nations Charter was signed, the scope and applicability of the right to self-determination to American Indians remains unclear.[440]

1. The United Nations Charter

The expression of self-determination for "peoples"[441] marks the expansion of international concern "from nonagression among existing states to the liberation of colonies and emergence of new states."[442] The first article of the United Nations Charter states that one of the organization's primary purposes is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[443] The colonial relationship between the United States and Indian nations fits within this general context. Therefore, the effort by Indian nations to achieve self-determination can be viewed as part of the larger, global struggle for national liberation from colonial regimes.[444] From this perspective, human rights instruments developed by the United Nations and other international organizations are of particular relevance to Indian peoples.

[439] *See infra* notes 595–602 and accompanying text.

[440] *See* Barsh, *Indigenous North America and Contemporary International Law*, 62 Or. L. Rev. 73, 80 (1983).

[441] In this Comment, we presume that the definition of "peoples" is broad enough to include Indian nations. *See infra* notes 468–94 and accompanying text for a discussion of the conception of "peoples" in article 1 of the International Covenants on Human Rights.

The U.N. Charter does not provide a definition of the term "peoples." The term is a source of political controversy because the breadth of the definition determines the scope of the right to self-determination.

[442] Barsh, *supra* note 440, at 80.

[443] U.N. Charter art. 1, ¶ 2.

[444] *See generally* R. Ortiz, Indians of the Americas: Human Rights and Self-Determination 125–79 (1984). Ortiz writes:

> In conceptualizing the American Indian reality and struggle in the U.S., several considerations are needed to form the background.
>
> 1) Global history, that is the historical period of capitalist development through colonialism culminating in imperialism and national liberation on a world scale, should be the framework within which American Indian and U.S. history is studied. Isolating the North American reality from this context avoids and distorts reality.

Id. at 132–33.

The United Nations' commitment to self-determination is further demonstrated in articles 55 and 56 of the Charter, which provide an affirmative foundation for the promotion of self-determination:

> *Article 55.* With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . .
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> *Article 56.* All Members pledge themselves to take joint action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.[445]

These broad provisions outline the obligations of U.N. member nations. For example, in complaints to the United Nations Commission on Human Rights, Indian rights advocates have relied on the language of articles 1 and 55 of the Charter to support their claim that the United States is bound to recognize the Indian nations' right to self-determination.[446]

Article 73 of the Charter, which concerns non-self-governing territories,[447] is also dedicated to popular self-determination, but its efficacy has been limited. It requires that:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants are paramount, and accept as a sacred trust the obligation . . . to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstance of each territory and its peoples and their varying stages of advancement.[448]

Several factors limit the usefulness of article 73 for Indian peoples. First, the provision indirectly legitimizes the negative aspects of the present "trust" relationship between the United States and Indian peoples[449] by implying that subjugated peoples may not have reached a level of advancement enabling them to be fully self-governing. Second, the Charter allows the dominant society the discretion to "develop self-government" in colonized societies at any pace.

The most severe impediment to the effectiveness of article 73 is the so-called "blue water thesis," an argument proposed in the U.N. General Assembly in the early 1950's for limiting the scope of the provision to territories that are geographically separated from the dominant society by an ocean. The debate focused on the conflict between freedom for subjugated peoples and concern for the territorial integrity of a nation. The "blue water" interpretation of article 73, advocated largely by Latin American nations,[450] excludes most indigenous peoples from the rights outlined in the article, because they generally have been colonized within the borders of existing nations.

Other nations' representatives, however, most notably the 1953 Belgian U.N. delegation, have argued for a broad application of the Charter provision, criticizing the arbitrary distinc-

[445] U.N. Charter arts. 55, 56.

[446] *See, e.g.*, Indian Law Resource Center, Report on the Presentation of Human Rights Complaints by Indian Nations to the United Nations Commission on Human Rights (Sept. 1980) (on file with Harvard Civil Rights-Civil Liberties Law Review), *partially reprinted in* Rethinking Indian Law, 139–71 (1982); *see infra* notes 505–58 and accompanying text.

[447] "Non-self-governing territory" is an international term for areas subject to the authority of another state. E. Osmańczyk, Encyclopedia of the United Nations and International Agreements 568 (1985).

[448] U.N. Charter art. 73. This decolonization provision, contained in Chapter XI of the Charter, replaced article 23 of the League of Nations Covenant. Under the League Covenant, the decolonization principle was applied to indigenous peoples within independent states. League of Nations Covenant art. 23. In the absence of contrary evidence, therefore, it is argued that the obligations in article 73 of the United Nations Charter were also intended to apply to all indigenous peoples. *See* G. Bennett, Aboriginal Rights in International Law 10–12 (1978).

[449] *See supra* notes 234–60 and accompanying text.

[450] In support of the "blue water" interpretation, Latin American states have argued that article 73 should apply only to overseas possessions, because "otherwise no state in the world would be immune from dismemberment." Barsh, *supra* note 440, at 85.

"Latin American states argued that Indian groups in their countries, far from being 'non-self-governing,' were fully integrated politically. For example, the Ecuador delegation maintained that '[t]he Indian population of Ecuador formed an integral part of the nation.'" *Id.* (citing 7 U.N. GAOR C.4 (257th mtg.) at 55, U.N. Doc. A/2361 (1952)).

tion between overseas colonies and subjugated peoples within a nation's borders.[451] According to the Belgian interpretation, a population may be geographically contiguous with a dominant society, but remain politically and culturally distinct, and therefore worthy of protection under article 73.

The controversy over the scope of this provision is unresolved.[452] Subsequent United Nations instruments regarding decolonization and self-determination reveal a bias for the "blue water" interpretation.[453] This bias has limited the potential role of article 73 in protecting indigenous rights and the applicable scope of the right to self-determination.

2. United Nations Declarations and the Definition of Self-Determination

The articles of the United Nations Charter establish self-determination as a motivating ideal in international human rights law. The meaning and application of that ideal have evolved in three declarations adopted by the United Nations General Assembly in 1960, 1965 and 1970, respectively.[454] While these declarations have no legally binding force, they interpret the broad language of the Charter and define the obligations of member nations more specifically, focusing primarily on a people's right to self-determination. The declarations also reflect the continuing debate over the "blue water thesis."

[451] *See* G. Bennett, *supra* note 448, at 12–13.

[452] For instance, Bennett writes that the "blue water thesis" has been "a serious blow to the aboriginal cause," and that political forces, primarily in Latin America, have defeated the broad interpretation of the provision. *Id.*

On the other hand, Clinebell and Thomson argue that "the drafters of the various United Nations documents which bear on the subject did not intend that the principle would be so limited: 'A colony is a colony whether it is the product of overseas expansion or the product of overland expansion.'" Clinebell & Thomson, *supra* note 65, at 710 (citing 15 U.N. GAOR, (1145th plen. mtg.), U.N. Doc. A/P.V. 935 (1966)).

[453] *See generally* Barsh, *supra* note 440, at 84–90.

[454] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) at 66–67, U.N. Doc. A/4684 (1960).

Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) at 11–12, U.N. Doc. A/6014 (1965).

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970).

A declaration in the U.N. system is a unanimously approved legal statement. E. Osmańczyk, *supra* note 447, at 194. While it has no binding force, a declaration's unanimous approval is evidence of its general acceptability. Embodying broad legal principles, U.N. declarations are often considered transitional steps toward the adoption of binding international conventions.

The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[455] condemned alien subjugation of peoples and called for the immediate transfer of all power to dependent peoples "in order to enable them to enjoy complete independence and freedom." This Declaration provides a broad and assertive definition of self-determination:

> The subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
>
> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[456]

This right to self-determination applies without regard to "political, economic, social or educational preparedness,"[457] thereby overcoming any implication in article 73 that the subjugation of indigenous peoples may be justified by their state of "advancement."

The 1960 Declaration, however, also protects the territorial integrity of existing states:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.[458]

This constraint on the decolonization process is rooted in the "blue water thesis" interpretation of the Charter, thereby limiting decolonization to areas separated by ocean from administering states. This provision is inconsistent with the Declaration's emphasis on self-determination, since, in effect, it assumes that all populations within a given political boundary are legitimately subject to the rule of the politically dominant

[455] G.A. Res. 1514, *supra* note 454, at 66.

[456] *Id.* at 67.

[457] *Id.*

[458] *Id.*

population.[459] It may also prevent indigenous populations, who are "peoples" subject to "alien subjugation, domination, and exploitation,"[460] from exercising their right to self-determination under the Declaration.

Responding to controversy over the application of the 1960 Declaration and its territorial integrity provision, the United Nations General Assembly attempted to clarify the scope of self-determination five years later in the 1965 Declaration on the Inadmissiblity of Intervention in Domestic Affairs of States and the Protection of Their Independence and Sovereignty.[461] This instrument declares that:

> All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.[462]

Under this provision, all peoples—including indigenous peoples who may not be officially recognized as states—should be able to invoke the principle of territorial integrity to protect their right to self-determination. The concept of territorial integrity could therefore be turned around and used by an indigenous people to challenge external control by a dominant society. Guided by this Declaration, American Indian peoples can argue that since they are historically independent nations, federal intervention into their affairs violates the Declaration's requirement that all nations respect the right of self-determination of other peoples.

The General Assembly's third attempt to define self-determination and to reconcile decolonization and territorial integrity produced the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, stating that:[463]

[459] *See* Barsh, *supra* note 440, at 87.
[460] G.A. Res. 1514, *supra* note 454.
[461] G.A. Res. 2131, *supra* note 454, at 11.
[462] *Id.* at 12.
[463] G.A. Res. 2625, *supra* note 454, at 121.

> By virtue of the principles of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.[464]

In an attempt to diffuse the "blue water" controversy, the 1970 Declaration discourages any action that would impair the territorial integrity of "independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory."[465] Under these terms, no state can assert the defense of territorial integrity if it has acquired land unlawfully or if a people is not politically integrated. These considerations prevent the United States from justifying control over Indian peoples based on national or territorial integrity.[466]

The three United Nations declarations regarding decolonization have, in principle, broadened the scope of the right to self-determination, establishing it as a right of all peoples regardless of their political status or geographical location. Territorial integrity is not a compelling justification for a dominant society subjugating indigenous peoples who exist within the physical boundries of another nation.[467] Rather, the declarations support the claim of Indian peoples to the right to self-determination under international law.

3. Self-Determination for "Peoples": Article 1 of the International Covenants on Human Rights

The International Covenant on Civil and Political Rights[468] and the International Covenant on Economic, Social and Cul-

[464] *Id.* at 123.
[465] *Id.* at 124.
[466] *See generally* Clinebell & Thomson, *supra* note 65, at 712–13; Barsh, *supra* note 440, at 88–89.
[467] Barsh recently stated that the "distinction between 'indigenous' and 'colonized,' which stemmed in large part from the efforts of Asian states to distinguish their situations from those of the Americas, is clearly breaking down." Barsh, *supra* note 434, at 376.
[468] G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6546 (1966).

tural Rights[469] are important sources of human rights law for American Indians. They transform the values embodied in the Universal Declaration of Human Rights[470] into binding legal norms. Together these instruments form the basis of contemporary human rights law. The General Assembly approved the covenants in 1966, and they became legally binding in 1976. As international treaties, the covenants are legally binding on all ratifying nations. President Carter signed the covenants in 1977 and submitted them to the Senate, but the United States has yet to formally ratify them.[471] However, because some of the provisions have become part of customary international law, the covenants may still have binding force on the United States.[472]

The first article of each of those covenants secures the right to self-determination for all peoples, indicating the primary importance of this right in international law:

> 1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[473]

This is a bold and expansive statement of self-determination, but whether it, in principle, extends the right to American Indians is a controversial question. The answer depends on whether Indians are "peoples" under international law.

No definitive formulation of the term "people" exists in international law.[474] As illustrated by the three U.N. declarations discussed above, it might not be possible to formulate a single definition of self-determination since any attempt encounters complex political conflicts. On one hand, some existing states fear that a broad definition of peoples entitled to self-determination would encourage secessionist movements, threatening their territorial integrity.[475] On the other hand, the right to self-determination as embodied in the covenants is a "right of all peoples whether or not they have attained independence and the status of a State,"[476] and therefore should be applied broadly. The far-reaching political implications of the concept of a people, then, complicate any effort to formulate a generally accepted and universally applicable definition.[477]

Within the context of the international right to self-determination, however, the term "people" has been analyzed on several occasions. The following discussion examines three authoritative definitions. The definition of a "people" cited most often is found in a decision of the International Court of Justice,[478] which employed the following language:

> a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and tradition, in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.[479]

[469] *Id.* at 49.
[470] G.A. Res. 217(A)III, Dec. 10, 1948, U.N. Doc. A/810, at 71.
[471] President Carter signed the covenants on Oct. 5, 1977, pledging to "seek ratification of these covenants by the Congress of the United States at the earliest possible date." 13 Weekly Comp. Pres. Doc. 1488 (Oct. 5, 1977).
[472] According to Bennett, the right to self-determination as expressed in the covenants, "has become an integral part of customary international law." G. Bennett, *supra* note 448, at 51.
In general, the existence and definition of a customary norm are determined by international consensus. For evidence of custom, courts frequently rely on convention, state actions and statements, decisions by the International Court of Justice and national courts, general principles of law, writing by publicists on international law, and other documents such as United Nations resolutions and studies. *See* A. D'Amato, The Concept of Custom in International Law 44 (1971).
[473] G.A. Res. 2200A, *supra* note 468, at 53. The rest of article 1 states:

> 2. All people may, for their own ends, freely dispose of their national wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the Covenant, including those having responsibilities for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[474] *See* A. Cristescu, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments ¶ 269, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981).
[475] *Id.* at ¶ 275.
[476] *Id.* at ¶ 268.
[477] *Id.* at ¶ 278.
[478] The Greco-Roman "Communities," Collection of Advisory Opinions (Greece v. Bulgaria), 1930 P.C.I.J. (ser. B) No. 17, at 21 (July 31).
[479] *Id.*

A second definition employing various elements that have emerged from discussion in the United Nations has been formulated by Aureliu Cristescu, a United Nations special rapporteur. Cristescu argues that the term people denotes "a social entity possessing a clear identity and its own characteristics," and it implies a close "relationship with a territory."[480]

A third definition of "people" was adopted by the International Commission of Jurists, a non-governmental organization (NGO)[481] with consultative status at the United Nations.[482] This definition identifies the following characteristics of a people:

1. a common history;
2. racial or ethnic ties;
3. cultural or linguistic ties;
4. religious or ideological ties;
5. a common territory or geographical location;
6. a common economic base;
7. a sufficient number of people.[483]

Most Indian groups qualify for status as a people under the three definitions offered above.[484]

It is important from an international legal perspective to distinguish peoples from minorities, since they are granted different political status. A minority does not have the right to self-determination under international law, although some minority groups could conceivably fulfill the criteria of cultural and territorial ties set out in the definitions of a people discussed above. One way to distinguish peoples from minorities was suggested by the Mikmaq Nation in a 1982 submission to the U.N. Commission on Human Rights:[485]

[480] A. Cristescu, *supra* note 474, at ¶ 279.

[481] A non-governmental organization (NGO), according to the U.N., is any international organization not established by intergovernmental agreement. To qualify for consultative status at the U.N., an NGO must be of service in the Economic and Social Council's field of interest, act in the spirit of the U.N., be non-profit and possess the means to implement its objectives. E. Osmańczyk, *supra* note 447, at 565.

[482] International Commission of Jurists, The Events in East Pakistan, 1971 (A Report by the Secretariat) 70 (1972).

[483] *Id.*

[484] *See* Clinebell & Thomson, *supra* note 65, at 410. "Each native nation, either individually or as part of a larger group . . . fulfills the requirements of the definitions given by the International Court of Justice and the International Commission of Jurists."

[485] U.N. Doc. E/CN.4/1982/NGO/30/Rev.1; *see also* Barsh, *supra* note 440, at 94–95.

> The distinction therefore between a minority and a people, in our conception flows from the quality of *consent*. A people can become a minority, if it chooses. Minorities cannot be made by violence or oppression, however.[486]

The Mikmaq analysis of this issue focuses on whether a people has freely consented to incorporation into a state.[487] If a people has been involuntarily subjected to alien political control, they retain their inherent right to self-determination as mandated by the U.N. declarations discussed above. The Mikmaq Nation's argument to the Human Rights Commission supports a definition of people that would include most American Indian nations since it emphasizes the importance of voluntary consent.

This legal distinction between peoples and minorities affects the status of American Indians, since categorization is a threshold issue in the argument that the right to self-determination should apply to Indians.[488] While most Indian populations meet the criteria for a people, no formal international agreement or declaration specifically defines Indians as peoples.[489] But, according to the Indian Law Resource Center, a United Nations NGO, "[a]lmost all Indian representatives who have addressed international organizations during the past few years have urged the recognition of Indians as peoples and as nations, and some

[486] U.N. Doc. E/CN.4/1982/NGO/30/Rev.1. (emphasis supplied).

[487] Bennett also makes this argument, asserting that indigenous people should be accorded the right to self-determination because "they were forced to submit to alien laws and institutions imposed upon them in their own homeland." G. Bennett, *supra* note 448, at 51.

[488] *See generally* Indian Law Resource Center, Handbook for Indians on International Human Rights Complaint Procedures 12–15 (1984). "The resolution of the question of whether Indians are minorities or whether they are peoples and nations will help determine whether international law will finally guarantee the right of self-determination for Indians." *Id.* at 14.

[489] *Id.* at 14. For example, in a recent study of indigenous rights in Nicaragua, the Organization of American States Inter-American Commission on Human Rights concluded that "at least under current international law" the Miskito Indians did not qualify as a people. Rather, they were defined as a Nicaraguan ethnic group. The Commission noted that "the right of self-determination was a limited one and needs to be harmonized with other principles such as equality under the law, sovereignty, territorial integrity, and political independence." S. Davis, Indigenous Peoples and Human Rights: The Emerging Role of the Inter-American Commission on Human Rights 19 (1984) (unpublished paper on file with Harvard Civil Rights-Civil Liberties Law Review).

This argument demonstrates the continuing influence of the "blue water thesis" and the concern for territorial integrity, particularly among Latin American nations. *See supra* notes 450–53 and accompanying text.

countries and non-governmental organizations have begun to give serious attention to this question of definition."[490]

In the final analysis, however, Indian efforts to assert their self-determination may be more important than legal definitions for promoting recognition of their status as distinct peoples. According to the Indian Law Resource Center:

> History suggests that those who maintain and assert their self-government, their freedom from outside domination, and their own economic, social and cultural development are most likely to eventually gain international recognition as peoples who have the right to self-determination, regardless of formal rules.[491]

Cristescu makes the same point: "[W]henever in the course of history a people has become aware of being a people, all definitions have proved superfluous."[492] While existing international instruments also provide some limited protection specifically for minority groups,[493] American Indians historically are distinct peoples who have never fully consented to the intrusive authority of the United States;[494] therefore, they possess the broad right to self-determination enunciated in article 1 of the Human Rights Covenants.

[490] Indian Law Resource Center, *supra* note 488, at 14.
According to Robert T. Coulter of the Indian Law Resource Center:

> Treatment as "minorities" has been widely rejected by Indian representatives and many other indigenous groups as incompatible with their history of self-government or aspirations for self-government and with the maintenance of their distinct cultures and religious and social organizations. Representatives of the Houdenosaunee or Six Nation Iroquois Confederacy and other Indian nations made this point in oral interventions in February 1980 before the Working Group of the U.N. Commission on Human Rights preparing the draft Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities.

R. Coulter, The Evolution of International Human Rights Standards: Implications for Indigenous Populations of the Americas 64 (1984) (unpublished paper on file with Harvard Civil Rights-Civil Liberties Law Review).

[491] Indian Law Resource Center, *supra* note 488, at 15.

[492] A. Cristescu, *supra* note 474, at ¶ 274.

[493] *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 468, art. 27; United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, U.N. GAOR (1260th plen. mtg.) Vol. IV, U.N. Doc. A/5603 and Corr.1 (1963).

[494] *See supra* notes 10–71 and accompanying text.

4. The International Labour Organisation Convention 107

The only existing international instrument related specifically to indigenous peoples is the International Labour Organisation's (ILO) Convention 107.[495] In its present form, the Convention is not a useful instrument for protecting indigenous rights, since its primary purpose is the assimilation of indigenous peoples into the dominant society. The ILO is, however, currently revising Convention 107 to make it more consistent with the interests and aspirations of indigenous peoples.[496]

In revising Convention 107, the ILO faces two obstacles: the problems in the existing instrument and the limited role of the ILO in the area of indigenous rights. First, in its present form, Convention 107 is considered to be "an out-of-date document based on the discredited idea that Indians must be assimilated into non-Indian societies."[497] The Convention encourages governments to seek the "progressive integration" of indigenous peoples "into the life of their respective countries."[498] Indigenous peoples are "allowed to retain their own customs and institutions" only when they "are not incompatible with the national legal system or the objectives of integration programmes."[499] The Convention contains no protection of indige-

[495] United Nations International Labour Organisation (ILO), Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, art. 2, 328 UNTS 247 (1959) [hereinafter Convention 107].
The ILO is a specialized agency of the United Nations. The United States is currently a member of the ILO.

[496] According to the ILO, the Convention's basic approach—integration of indigenous populations into the dominant culture—is inconsistent with the interests of almost all indigenous groups. Integration "is in basic conflict with recent trends in action taken by many States, and with the conclusions expressed by other international organisations, by organisations of indigenous peoples at all levels, and by every independent commentator who has examined the instrument in the last decade or more." International Labour Organisation, Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) 33, Sept. 1–10, 1986 [hereinafter ILO, Meeting of Experts (1986)] (working document on file with Harvard Civil Rights-Civil Liberties Law Review).

[497] Indian Law Resource Center, *supra* note 488, at 17.

[498] Convention 107, *supra* note 495, art. 2, ¶ 1. The other primary goal of the convention is the protection of indigenous populations "whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community." *Id.* art. 1, ¶ 1(a).

[499] Convention 107, *supra* note 495, art. 7, ¶ 2. This provision essentially restates the United States doctrine of plenary power. *See supra* notes 156–57 and accompanying text. Under this doctrine, Indian nations retain only those sovereign powers that have not been abrogated by treaty or congressional legislation and that "would not be inconsistent with the overriding interests of the National Government." Washington v. Con-

nous political self-determination or self-government. Moreover, the Convention allows countries to remove indigenous peoples from their lands "for reasons relating to national security, or in the interest of national economic development or of the health of the said populations."[500]

A second fundamental problem with Convention 107 involves the limited capacity of the ILO to set standards for indigenous peoples. The ILO is a specialized organization interested primarily in international labor issues, and the Organisation itself recognizes that the issue of political self-determination is beyond the scope of any ILO instrument.[501] As a result of the organization's limited role, its ability to produce a comprehensive instrument protecting indigenous rights is constrained.[502] Further, because Convention 107 is an international treaty with binding legal force, ILO member nations may be unwilling to adopt or ratify a revised Convention granting indigenous peoples the right to political self-determination.

The report from a recent ILO meeting of experts considering the Convention's revision indicates that the ILO is opposed to the basic assimilationist thrust of the Convention.[503] Still, the ILO does not seem committed to extending recognition of the right to self-determination to indigenous peoples, even in the area of economic practices, which is the Organisation's specialized field.[504] It is unlikely, therefore, that the ILO will revise the standards in the exisiting Convention to address adequately the interests of Indian peoples.

B. Human Rights Complaint Procedures and American Indians

American Indians have employed the general human rights principles discussed above to press their claims to the right to

federated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) (authorizing the State of Washington to extend broad state taxing power into the Colville Indian reservation). *See* Barsh, *supra* note 440, at 82.

[500] Convention 107, *supra* note 495, art. 12, ¶ 1. This article does provide for just compensation for any loss, however. *Id.* art. 12, ¶ 3.

[501] ILO, Meeting of Experts (1986), *supra* note 496, at 1–2.

[502] R. Coulter, *supra* note 490, at 22–23 ("Because of the limited mandate of the ILO, it is not an appropriate forum for advancing general standards not related to labor matters").

[503] ILO, Meeting of Experts (1986), *supra* note 496, at 1.

[504] *See id.*

self-determination before international forums. Recourse to international procedures may be the only option available to indigenous groups when they have exhausted domestic remedies or when national governments refuse to recognize the rights of indigenous peoples under international law. The Indian struggle for recognition and enforcement of the right to self-determination can be advanced through existing international human rights complaint procedures addressing problems that domestic courts cannot or will not resolve. These international forums help to define the meaning of indigenous rights to self-determination through the application of institutional definitions to real problems.[505] International complaint procedures also help to provide a factual foundation for the development and adoption of international standards protecting indigenous peoples.[506] By using these U.N. procedures, indigenous peoples increase international awareness of their struggles against dominant societies. As a result, the political pressure of world opinion applied to nations that violate recognized principles enforces human rights. This pressure is enhanced when international organizations, such as the United Nations, publish reports of human rights violations and publicly condemn offending governments.[507]

The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,[508] composed of experts on human rights serving in their individual capacities, is empowered to hear human rights complaints.[509] All written communications demonstrating violations of human rights are handled by

[505] Indian Law Resource Center, *International Human Rights Procedures*, in Rethinking Indian Law 133 (1982).

[506] R. Coulter, *supra* note 490, at 56.

[507] *Id.* ("Complaints of human rights violations dramatize the need for better protection of the rights at issue and can help to develop sympathy, understanding, and support for more effective human rights measures").

[508] The Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission), meets annually in August or September and submits an annual report to the Commission on Human Rights (Commission).

The Commission consists of 43 member nations elected to terms of three years. It meets for five or six weeks in February and March of each year. *See* R. Coulter, *supra* note 490, at 19.

[509] Other international organizations have established procedures for dealing with alleged violations of human rights. These include the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the Organization of American States Inter-American Commission on Human Rights, and the International Labour Organisation. The specific procedures for bringing human rights claims to these bodies are detailed in the Indian Law Resource Center's Complaint Procedures Handbook, *supra* note 488, at 24–48. *See generally* L. Sohn & T. Buergenthal, International Protection of Human Rights (1973).

the Sub-Commission under a procedure established in U.N. Resolution 1503.[510] The 1503 procedure is confidential;[511] its primary goal is to encourage nations to alter their policies, rather than to expose human rights violations to the world. The secrecy of the 1503 procedure makes it difficult to assess its efficacy.[512]

A second procedure, established by U.N. Resolution 1235,[513] authorizes the Sub-Commission to hear oral complaints of human rights violations. In contrast to the 1503 procedure for written communications, the purpose of this process is to provide a forum for the public exposure of human rights violations.[514] Oral complaints, or "interventions," by Indian leaders have been effective in taking advantage of the publicizing function of the Sub-Commission.[515]

1. Hopi and Mohawk Communications to the United Nations Commission on Human Rights

In 1980, the traditional Hopi people[516] and the Mohawk Nation filed complaints with the United Nations Human Rights Commission, charging the United States with violations of the right to self-determination.[517] Both Communications relied on existing international human rights instruments to support their allegations, arguing that under "Articles 1 and 55 of the U.N.

[510] ECOSOC Res. 1503 (XLVIII), 48 ECSOR Supp. (No. 1A) at 8–9, U.N. Doc. E/4832/Add.1 (1970).

[511] Indian Law Resource Center, *supra* note 488, at 32.

[512] *Id.* at 33.

[513] ECOSOC Res. 1235 (XLII), 42 ESCOR Supp. (No. 1) at 17–18, U.N. Doc. E/4393 (1967).

[514] Indian Law Resource Center, *supra* note 505, at 134.

[515] "Oral statements attract the most immediate attention of the delegates and experts attending the session as well as observers or members of the public. Statements by Indian leaders who are clearly identified as such have sometimes brought on hushed attention in the usually noisy and bustling sessions." Indian Law Resource Center, *supra* note 488, at 28.

[516] The "traditional" Hopi reject the legitimacy of United States-imposed tribal council. *See infra* notes 520–30 and accompanying text.

[517] *Complaint Concerning Violations of the Human Rights of the Hopi People by the United States of America: The Right of Self-Determination and the Right To Own Land* [hereinafter Hopi Complaint], and *Complaint Concerning Violations of the the Human Rights of the Mohawk People by the United States of America: The Right to Self-Determination* [hereinafter Mohawk Complaint], in Report on the Presentation of Human Rights Complaints by Indian Nations to the United Nations Commission on Human Rights, *supra* note 446, at 55–73, 75–103.

The report also contains a joint communication on behalf of the traditional Seminoles, the Houdenosaunee, the Hopi, the Western Shoshone and the Lakota Nation. This communication alleges violations of the rights to own land and to be free from racial discrimination.

Charter and Principles VIII and X of the Final Act, Helsinki Declaration,[518] the United States has committed itself to promote the right of a people to determine its internal and external political status without external interference."[519]

Alleging that the United States has subjected the Hopi to colonial rule, the Communication[520] describes federal legislation that has imposed illegitimate "tribal councils" on the Hopi people in an effort to supplant the traditional Hopi government.[521] The Hopi Communication begins by asserting the historic independence of the Hopi people:

> The Hopi people have never surrendered or abandoned their historic sovereign rights. They have never signed a treaty with the United States, never ceded any of their lands to the United States, and never consented to the severe limitations on Hopi self-determination which the United States has imposed on them.[522]

The complaint also alleged that the Hopi Tribal Council, originally established by the United States under the Indian Reor-

[518] As a signatory of the Helsinki Final Act, the United States is one of 35 nations bound "to respect the equal rights of peoples and their self-determination." Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 73 Dep't of State Bull. 323, 325 (1975) (art. 1(a)(VIII)).

[519] *Id.* at 84–85. *See generally supra* notes 441–94 and accompanying text.

[520] The Hopi People brought their complaint pursuant to the 1503 procedure, alleging that United States actions revealed a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms and a consistent pattern of racial discrimination. . . ." Hopi Communication, *supra* note 517, at 56.

Two specific violations were alleged:

> 1. The subjection of the Hopi people by the United States to alien control, domination and exploitation constitutes a denial of the fundamental right of self-determination;
>
> 2. The extinguishment of Hopi land rights by the United States in arbitrary and unfair legal proceedings and the policy of the United States which provides inadequate legal protection for Hopi land rights constitutes a violation of the right to own property, the right to equal protection of the law and the right to be free from racial discrimination.

Id. at 60, 65–66.

The discussion in the text focuses on the first allegation, involving self-determination.

[521] *Id.* at 59.

[522] *Id.*

ganization Act,[523] was most recently imposed on the Hopi people in the early 1950's without "even the pretense of a referendum."[524] The Council has approved leases authorizing the massive strip mining of Hopi land and the loss of irreplaceable Hopi water.[525] "Many Hopis and others are convinced that the mining effort jeopardizes the future survival of the Hopi Nation."[526] United States courts have refused to hear the traditional Hopi government's allegations that the Hopi Tribal Council is an illegitimate political entity.[527]

According to the Communication, the traditional Hopi leaders, despite the interference of this Council, represent a "strong and growing presence in the Hopi Nation,"[528] pressing for international recognition of their struggles:

> The United States has continually denied the Hopi people their right to have and participate in their own form of government, and the United States must be called upon by the Sub-Commission to explain and answer for its actions. It is hoped that such international attention may move the United States to desist from its actions and to reconsider its policies.[529]

The Hopi claim to international recognition of their right to self-determination is particularly strong because they have never entered into any agreement with the United States surrendering or abandoning their sovereign rights.[530]

The Mohawk Nation filed a similar complaint[531] with the United Nations, prompted by a series of events that led to the

[523] Indian Reorganization (Wheeler-Howard) Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 467–79 (1982)) (authorizing the establishment of tribal governments, subject to the authority of the U.S. Department of the Interior); *see supra* notes 124–33 and accompanying text.

[524] Hopi Communication, *supra* note 517, at 63.

[525] *Id.*

[526] *Id.*

[527] *Id.* at 63–64.

[528] *Id.* at 65.

[529] *Id.*

[530] *Id.* at 59.

[531] Mohawk Communication, *supra* note 517, at 77. Specifically, the complaint alleges:

> 1. The United States of America and its political subdivision, New York State, have imposed, and continue to maintain in power, an alien form of government in the territory of the Mohawk Nation at Akwesasne known as the "St. Regis Mohawk Tribal Council."
>
> 2. The United States of America and New York State fund an Akwesasne Police force under the joint authority of New York and the St. Regis Mohawk Tribal Council to enforce the New York laws in the Mohawk territory.

Id. at 83–84 (references omitted).

The rest of the allegations involve the events described *infra* notes 537–43 and accompanying text.

[532] *Id.* at 77–79. To support this fact, the complaint cites the Treaty of Fort Stanwix, Oct. 22, 1784, United States-Six Nations, 7 Stat. 15, and the Treaty of Koo-on-daigua, Nov. 11, 1794, United States-Six Nations, 7 Stat. 44, which "were sought by the United States to make and preserve peace with the Confederacy." *Id.* at 79.

[533] *Id.* at 81.

[534] *Id.* at 85.

[535] *Id.* at 82–83.

criminal indictment of twenty-three Mohawk nationals, including four of the traditional chiefs, by the State of New York. The Communication describes the Mohawk Nation as a member of the Houdenosaunee or Six Nation Iroquois Confederacy, which has possessed all of the attributes of sovereignty since ancient times, having "never been conquered nor militarily subjugated by the United States."[532] The Mohawks currently inhabit a territory known as Akwesasne (St. Regis), a four square-mile tract on the United States-Canadian border. The Akwesasne represents a fraction of the originial Mohawk national territory which consisted of nine and one-half million acres in what are now New York and Vermont.[533]

Similar to the experience of the Hopi people, the Mohawks have been subjected to the imposition of an alien government—the St. Regis Mohawk Tribal Council or "elective system." This government, established by the New York legislature in 1892, is the only Mohawk Indian government recognized by New York and the United States. New York has also unilaterally extended state criminal jurisdiction over the Akwesasne, without the consent of the Mohawk government.[534] In spite of the unauthorized governmental imposition, the members of the Council of Chiefs, which is the traditional Mokawk government, continue to function as the leaders of their people.[535]

The Mohawk Communication focuses on federal and state interference with the Mohawk Nation's right to self-determination. According to the Communication:

> The crisis at Akwesasne is a contemporary example of the power of New York to prevent the people of the

> Mohawk Nation from exercising their basic human right to live on their own land in their own way, under their own form of government.[536]

The Communication to the Commission describes in detail a 1979 crisis at the Akwesasne, sparked by the authority of the New York imposed "elective system" and its police force over the Mohawk people.

The crisis was initiated when New York and "elective system" police arrested a traditional Mohawk chief for activity relating to an internal Mohawk dispute.[537] To protest the expansion of unauthorized state intervention in Mohawk internal affairs, the Council of Chiefs refused to surrender the Mohawk Chief to New York State,[538] and gathered with many supporters in an encampment in the Akwesasne.[539] During the summer of 1979, the traditional Mohawk government attempted to negotiate with New York and the United States to resolve the dispute peacefully,[540] but the failure of those negotiations led to a standoff between New York state troopers and the Mohawk people. During this confrontation, the New York troopers "entered the homes of the indicted Chiefs and questioned their families at gunpoint."[541] The police withdrew after arresting three Mohawks outside the encampment.[542] When the Communication was filed, the Akwesasne territory was still being heavily patrolled by New York police.[543]

2. *The United States' Response*

The United States' official reply[544] to the Hopi and Mohawk Communications indicates that U.S. policy toward Indian peoples today is based on the same legal fictions and misconceptions that informed Indian policy in the nineteenth century. The United States' response denies the Hopi and Mohawk allegations, basing its arguments largely on the plenary power doctrine.[545]

Regarding the Hopi complaint, the United States asserts that the Hopi people adopted a congressionally-organized government under the Indian Reorganization Act (IRA), and that the traditional Hopi government and its supporters "are a minority faction of the Hopi tribe who are simply unhappy with the system of government chosen by a majority of the Hopi people."[546] The United States makes this argument despite conceding that only fifty percent of the eligible Hopi voters participated in the 1936 decision to adopt an IRA government. The actual percentage of eligible Hopis that voted was probably closer to thirty percent.[547]

Moreover, it is well-documented that Hopi people traditionally demonstrate opposition by abstention.[548] Hopis do not resolve disputes by majority-rule elections, but rather through group consensus.[549] The one person-one vote referendum orga-

[536] *Id.* at 101.

[537] On May 22, 1979, Chief Loran Thompson, a traditional leader, encountered a public works crew of the St. Regis Mohawk Tribal Council cutting down trees on his family property to install a boundary fence around the Akwesasne. Claiming that the work crew had damaged his property, Chief Thompson and another Mohawk national, Joseph Swamp, peacefully took possession of the crew's tools as security for the damage. Within hours of the work crew's departure, officers of the Akwesasne Police and New York State Police arrested Chief Thompson. *Id.* at 86–87.

[538] *Id.* at 87.

[539] *Id.* at 90.

[540] *Id.* at 88–93.

[541] *Id.* at 91.

[542] *Id.*

[543] *Id.* at 92.

[544] Reply of the Government of the United States of America to Three Communications Submitted by the Indian Law Resource Center on Behalf of the Traditional Seminoles, the Houdenosaunee (Six Nation Iroquois Confederacy), the Mohawk, the Hopi, the Western Shoshone, and the Lakota Nation [hereinafter United States Reply], classified confidential by Acting Secretary of State Wm. Clark, Dec. 11, 1981 (on file with Harvard Civil Rights-Civil Liberties Law Review).

The State Department classified its reply "confidential" under the "national defense or foreign policy" exemption to the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552(b)(1) (1982). In a suit brought by the Indian Law Resource Center to obtain the document, the State Department argued that the reply was confidential because it was submitted under the Resolution 1503 procedure. *See supra* notes 508–15 and accompanying text.

The State Department released the document after both sides filed motions for summary judgment. *See* Indian Law Resource Center v. Department of State, Civil No. 82-0424 (D.D.C. 1982). Indian Law Resource Memorandum, Aug. 2, 1982 (on file with Harvard Civil Rights-Civil Liberties Law Review).

[545] *See supra* notes 156–57 and accompanying text.

In the introduction to its reply, the United States openly adopts the plenary power doctrine in its broadest interpretation. The United States asserts: "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty, or statute, or by implication as a necessary result of their dependent status. *See Oliphant v. Squamish Indian Tribe*, [435 U.S. 191 (1977)]." United States Reply, *supra* note 544, at 6 (citing F. Cohen, Handbook of Federal Indian Law 122–23 (U.N.M. ed. 1971).

[546] United States Reply, *supra* note 544, at 13.

[547] R. Clemmer, Continuities of Hopi Culture Change 60–61 (1978), *cited in* Tullberg, *The Creation and Decline of the Hopi Tribal Council*, in Rethinking Indian Law 29, 37 (1982). Clemmer analyzed the available statistics on the number of eligible Hopi voters in 1936, and concluded that the Department of Interior's 50% figure is misleading.

[548] Tullberg, *supra* note 547, at 35.

[549] *Id.*

nized by the federal government conflicted with traditional Hopi political processes, and as a result, most Hopis expressed their opposition to the IRA-imposed government by simply refusing to participate in the vote. Therefore, "there is little doubt among serious students of the Hopis that the recorded votes regarding the [IRA] Constitution and Hopi Tribal Council in no way reflected the preponderant opposition which existed in Hopi society at that time, for the opposition was not recorded on ballots but by abstention."[550]

The United States supports the validity of the IRA elections by quoting the statements of Oliver LaFarge, an anthropologist hired by the Bureau of Indian Affairs to campaign among the Hopi for the acceptance of the IRA constitution and the creation of the Hopi Tribal Council.[551] The United States fails, however, to represent fairly his views. In his *Running Narrative* journal, LaFarge included this self-indictment:

> The Hopi have been operated on by everyone, official and unofficial, from Coronado through Kit Carson and General Scott to Oliver LaFarge. In almost every case they have suffered for it. They still stand almost where they did, but they are slightly cracking. Why they would trust any white man is a mystery to me.[552]

These considerations indicate that the current Hopi demand for self-government is consistent with its past relations with the United States, rather than, as the United States argues, the complaints of a "minority faction of the Hopi Tribe."[553] The United States response demonstrates that the government continues to base its policy toward Indian nations on the same discriminatory attitudes and justifications that were used to rationalize the IRA and similar assimilationist policies over fifty years ago.[554]

In its reply to the Mohawk Communication, the United States did not dispute the Mohawk account of the crisis at the

[550] *Id.*

[551] The United States Reply states: "LaFarge sums it up by saying that 'on the whole no tribe of Indians has been better treated by the United States [than the Hopis].'" United States Reply, *supra* note 544, at 12.

[552] O. LaFarge, Running Narrative of the Organization of the Hopi Tribe of Indians 5 (1936) (unpublished journal) *quoted in* Tullberg, *supra* note 547, at 35.

[553] United States Reply, *supra* note 544, at 13.

[554] *See supra* notes 124–42 and accompanying text.

Akwesasne. Rather, the United States argued that the traditional Mohawk leaders have no legal status because the government elected under New York State law is the only "legitimate representative" of the Mohawk Nation.[555] To support its argument, the United States invoked the political question doctrine,[556] stating that courts could not alter the determination of the executive and legislative branches to recognize the "elective system" government. The United States response relies heavily on a 1942 New York probate court decision stating that "there was nothing to indicate the existence of any tribal council other than that as was [sic] elected pursuant to the [New York] Indian Law."[557] To determine the legitimate government of a politically distinct people, however, the United States should look to the expressed desires of the people themselves, and not to the decisions of state courts.

The United States responded in a similarly discriminatory and insensitive manner to both the Hopi and Mohawk complaints. While the rhetoric of U.S. policy recognizes Indian self-determination, U.S. policy, in practice, is still rooted in the nineteenth century doctrine of "manifest destiny," as demonstrated in its reply. To date, however, the United Nations Human Rights Commission has taken no apparent action on the Communication filed by the Indian nations in 1980.[558] As a result

[555] United States Reply, *supra* note 544, at 35.

[556] *Id.* at 31; *see supra* notes 165–74 and accompanying text.

[557] *Id.* at 32–33 (citing In re Terrance's Estate, 32 N.Y.S.2d 540, 547 (Franklin County Sur. Ct. 1942):

> The legislature of the State of New York, speaking in Article 8 of the Indian Law, makes clear and definite provisions for the election of Chiefs for the St. Regis Tribe. The fact that the legislature made such provisions negatives the existence, "by custom and usage from time immemorial," as claimed by the respondents, of a tribunal of life chiefs. . . .

[558] The Human Rights Commission's apparent lack of action on the Hopi and Mohawk Communications has prompted the Indian Law Resource Center to conclude that: "The 1503 procedure is therefore not the way to get Indian human rights concerns before the highest United Nations bodies." Indian Law Resource Center, *supra* note 488, at 34.

Nevertheless, other Indian representatives believe that the United Nations procedures provide an effective means of airing human rights complaints. *See, e.g.*, Decision of the U.N. Human Rights Commission in the Matter of Lovelace v. Canada, Communication No. R.6/24 (July 31, 1981), U.N. Doc. CCPR/C/DR(XIII), R.6/24. Sandra Lovelace, a Maliseet Indian living in New Brunswick, Canada, challenged a provision of Canada's Indian Act that revoked her Indian status because she married a non-Indian. Indian Act R.S.C., c. I-6, 2.12(1)(1970). The Human Rights Commission held that the Canadian law violated the right to freedom of association, protected in the International Covenant on Civil and Political Rights, *supra* note 468, at art. 27.

of U.S. policies and U.N. inaction, the Hopi and Mohawk peoples are denied the right to self-determination, and instead must suffer from the unjustifiable extension of United States control into their affairs.

C. *Toward International Standards for Indigenous Peoples*

While the general sources of existing human rights law and procedures discussed above provide some protection for the rights of indigenous peoples, the increased international focus specifically on indigenous peoples is an important recent development.[559] The current emphasis in the international community is on setting international standards for indigenous peoples.[560] Among these standards, the indigenous right to self-determination is fundamental.[561] This section surveys developments that have advanced this process.

International conferences devoted to indigenous issues and including the participation of indigenous representatives and NGOs prompted the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission)[562] to recommend the creation of a Working Group on In-

[559] The United Nations first considered indigenous issues briefly in 1949. The General Assembly requested that an ad hoc sub-commission of the Economic and Social Council study indigenous populations in the Americas. G.A. Res. 275 (III), U.N. Doc. A/900, at 19 (1949). The purpose of the study was to encourage the "material and cultural development of [indigenous] populations, which would result in a more profitable utilization of the natural resources of America to the advantage of the world." 11 U.N. ESCOR (397th mtg.) at 191, U.N. Doc. E/SR/397 (1950).

The United States objected to the sub-commission's work when the Soviet Union used the study to condemn United States policy toward minorities and indigenous peoples. The study was then suspended indefinitely. According to Barsh, "this initiative was prompted more by the Cold War and the prospective development of the South American interior than by studied concern for the welfare of indigenous communities." Barsh, *supra* note 434, at 370.

[560] *In 1985*, the Working Group decided to emphasize in its future sessions "the part of its mandate relating to standard-setting activities," with the "aim of producing, in due course, and as a first formal step, a declaration on indigenous rights, which may be proclaimed by the General Assembly." 1985 Working Group Report, U.N. Doc. E/CN.4/Sub.2/1985/22, Annex at 1, ¶ (1985).

Also, the International Labour Organisation is working to revise Convention 107. ILO, Meeting of Experts, *supra* note 496, at 1; *see also supra* notes 495–507 and accompanying text.

[561] *See, e.g.*, J. Martínez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, Ch. XXI *Conclusions, Proposals, and Recommendations* (1983), U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, ¶ 580.

[562] Sub-Commission Res. 2 (XXXIV) (Sept. 8, 1981), U.N. Doc. E/CN.4/1512, ch. XX. The Commission on Human Rights and the Economic and Social Council approved the recommendation. Commission Res. 1982/19 (March 10, 1982), U.N. Doc. E/CN.4/1070 and Corr.1, ch. XII; ECOSOC Res. 1982/34 (May 7, 1982), U.N. Doc. E/1982/82/Supp.1.

digenous Populations in 1982, providing a permanent forum for the protection and evolution of indigenous rights. In 1983, Mexican Ambassador José R. Martínez Cobo, a Sub-Commission special rapporteur, completed an in-depth study of "discrimination against indigenous populations,"[563] including conclusions and recommendations for international protection of indigenous rights. Significantly, American Indians have been instrumental in directing the attention of the United Nations and other international bodies to the problems of indigenous peoples. For example, the Hopi and Mohawk Communications were among the first human rights complaints on behalf of indigenous peoples to the United Nations.[564] The process of setting standards to express and protect indigenous rights, however, faces difficult political obstacles.

1. *Indigenous Peoples Conferences and the Formation of the U.N. Working Group*

The U.N. Working Group on Indigenous Populations is the most important body for the development of standards for indigenous rights. The creation of the Working Group represents the culmination of a concerted effort by indigenous groups to direct the attention of the international legal community to the struggles of indigenous peoples.[565] For instance, representatives of indigenous groups met in Geneva in 1977 at an NGO conference on Discrimination against Indigenous Peoples of the Americas in 1977.[566] For the first time, indigenous peoples had the

[563] J. Martínez Cobo, *supra* note 561, at ¶¶ 624–28. The entire study was completed and released in installments over a twelve year period. B. Roy and D. Miller, The Rights of Indigenous Peoples in International Law: An Annotated Bibliography 81–94 (1985).

Many speakers at the 1985 meeting of the Working Group on Indigenous Populations stated that the report "should be taken into account in the process of formulating new standards." 1985 Working Group Report, *supra* note 560, at 16.

[564] *See supra* notes 516–58 and accompanying text.

[565] Other international conferences involving NGOs have advanced the interests of indigenous peoples. These conferences have helped to educate the international community regarding the struggles of indigenous groups and have initiated the preparation of drafts of international instruments that will contribute to the evolution of a definitive set of standards for indigenous peoples.

The World Council of Indigenous Peoples, established in 1975, has held several assemblies. At a conference in 1981 in Melbourne, Australia, the organization drafted an international convention on the rights of indigenous peoples. *See* Ortiz, *supra* note 444, at 66.

[566] A second NGO conference in Geneva was held in 1981 to discuss "Indigenous Peoples and the Land." The conference included representatives of indigenous peoples from five continents. Barsh, *supra* note 440, at 100.

opportunity to express their views in an international forum.[567] The final report of the conference included a "Declaration on Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere."[568]

This NGO Declaration asserts that indigenous peoples should be recognized as nations under international law provided they meet the following criteria:

> 1. Having a permanent population;
> 2. Having a defined territory;
> 3. Having a government;
> 4. Having the ability to enter into relations with other states.[569]

Indigenous groups that do not meet these criteria are still recognized by international law, "provided they are identifiable groups having bonds of language, heritage, tradition, or other common identity."[570] As a political entity with international legal recognition, an indigenous group would be entitled to protection of its right to self-determination.[571] Thus, the primary purpose of the 1977 indigenous peoples conference and this Declaration was to advocate the international recognition of indigenous peoples.

The U.N. Working Group is now the principal forum for airing indigenous complaints and for the development of standards for indigenous rights.[572] The Working Group has a dual mandate:

> (a) to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations . . . and to submit its conclusions to the Sub-Commission. . . .
>
> (b) to give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and the differences in the situations and aspirations of indigenous peoples throughout the world.[573]

The Working Group consists of five members, one from each of five geographical regions, who are appointed by the Sub-Commission or its Chairman. Significantly, the Working Group decided in its first session in 1982 to adopt liberal rules allowing practically anyone to speak and to submit information.[574] The Working Group provides indigenous peoples, who are not in consultative status with the United Nations, an opportunity to express their interests, permitting "a very full presentation of facts and views."[575]

The Working Group has met on four occasions since 1982. The last two Working Group sessions, in 1984 and 1985, have focused on the preparation of standards governing the rights of indigenous peoples. This emphasis reflects the concern of most indigenous representatives that the Working Group should apply its fact-finding function to the development of new international principles protecting the indigenous.[576] Both purposes of the Working Group—fact-finding and standard-setting—remain critical to promoting support in the international community for indigenous rights.

The Working Group's most recent session in 1985 attracted more than 150 participants, including forty indigenous organizations from eighteen countries.[577] At the close of this session, the Working Group adopted a set of relatively uncontroversial draft principles for discussion. These rights of indigenous peoples are designed to reflect the generally accepted views of the

[567] *Id.* at 99.
[568] *Reprinted in* Rethinking Indian Law 137 (1982) (Report of the International NGO Conference on Discrimination Against Indigenous Populations in the Americas (Geneva) (Sept. 20–24, 1977)).
[569] *Id.*
[570] *Id.*
[571] The NGO Declaration holds: "All actions on the part of any state which derogate from the indigenous nations' or groups' right to exercise self-determination shall be the proper concern of existing international bodies." *Id.*
[572] The final reports of the four Working Group sessions are contained in the following United Nations documents:
1982 Working Group Report, E/CN.4/Sub.2/1982/33;
1983 Working Group Report, E/CN.4/Sub.2/1983/22;
1984 Working Group Report, E/CN.4/Sub.2/1984/20;
1985 Working Group Report, E/CN.4/Sub.2/1985/22.

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[573] 1983 Working Group Report, *supra* note 572, at 3.
[574] 1982 Working Group Report, *supra* note 572, at 5–6.
[575] R. Coulter, *supra* note 490, at 68.
[576] *See* 1985 Working Group Report, *supra* note 572, at Annex I.
According to Barsh: "It is now clear that the Working Group's immediate goal will be a declaration, and that the group will become more like a drafting committee, its data-gathering function serving as an aid to drafting rather than an end in itself." Barsh, *supra* note 434, at 373.
[577] Barsh, *supra* note 434, at 384.

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members of the Working Group at the 1985 session. They are as follows:

> Draft Principles
>
> 1. The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights.
>
> 2. The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.
>
> 3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of person.
>
> 4. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect, and have access to sites for these purposes.
>
> 5. The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions.
>
> . . .
>
> 6. The right to preserve their cultural identity and traditions, and to pursue their own cultural development.
>
> 7. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures.[578]

These seven, fairly conservative, draft principles should help to initiate the difficult process of formulating more aggressive and far-reaching standards for indigenous peoples.

Indigenous organizations submitted more ambitious draft declarations to the 1985 session of the Working Group.[579] These

[578] 1985 Working Group Report, *supra* note 572, at Annex II.

[579] The World Council of Indigenous Peoples submitted a draft declaration that was adopted at an assembly in 1984. *Id.* at Annex III.

Also, the following group of six indigenous NGOs proposed a draft set of principles: Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Services, National Indian Youth Council, Inuit Circumpolar Conference and International Indian Treaty Council. *Id.* at Annex IV.

proposals emphasize the right to political self-determination, adopting the language of the Human Rights Covenants.[580] In particular, a broad consensus of indigenous representatives and groups at the session proposed a draft including the following provisions:

> 2. All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. . . .
>
> 3. No State shall assert any jurisdiction over an indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned. . . .
>
> 6. Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.[581]

These drafts are viable proposals guiding the future efforts of the Working Group. While U.N. adoption of a declaration oriented specifically toward indigenous rights may be several years away, indigenous representatives appear committed to a broad international instrument, founded on the principle of self-determination.

2. The Martínez Cobo Report, the Working Group and Self-Determination

Completed in 1983, the report of the Sub-Commission's special rapporteur, José Martínez Cobo, on discrimination against indigenous populations, concludes that existing human rights law is inadequate to protect indigenous peoples, underscoring the Working Group's standard-setting efforts.[582] Significantly, the report endorses the right to self-determination "as the basic precondition for the enjoyment by indigenous peoples

[580] *Id.* at Annex III, ¶ 1; *id.* at Annex IV, ¶ 2.

[581] 1985 Working Group Report, *supra* note 572, at Annex IV.

[582] J. Martínez Cobo, *supra* note 561, at ¶¶ 624–28; *see also* Barsh, *supra* note 434, at 371.

of their fundamental rights and the determination of their own future."[583] Self-determination, according to the report:

> constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State, including the individual and collective right to be considered different. . . .[584]

The Martínez Cobo report is a detailed study of the status of indigenous groups, examining a wide range of issues—from cultural and linguistic concerns to land and political issues. The report may be criticized, however, since most of the information was solicited and received from governments, rather than from indigenous groups; it therefore may not accurately reflect the political problems indigenous peoples face in dominant societies.[585] In any case, it is likely to have an important influence on the Working Group's effort to draft a declaration on indigenous rights.

The 1987 session of the Working Group is scheduled to focus on "the right to autonomy, self-government, and self-determination."[586] It seems likely that any Working Group proposal for a declaration of standards will include the right of self-determination, since the NGO draft declarations and the Martínez Cobo report emphasize self-determination as a prerequisite to the realization of political and social rights for indigenous peoples.

Any provision securing the right to political self-determination for indigenous peoples, however, will face several obstacles. First, as noted above, problems of definition exist. For example, the Working Group's attempts to define the term "in-

[583] J. Martínez Cobo, *supra* note 561, at ¶ 580.
[584] *Id.* at ¶ 581.
[585] *See e.g.*, *supra* notes 544–88 and accompanying text.
[586] 1985 Working Group Report, *supra* note 572, at Annex I.

digenous" have been controversial.[587] A recurring problem with the proposed definitions has been differentiating "indigenous" peoples from "minorities" under international law.[588] The definition of the term "indigenous" has significant implications, as illustrated by the difference in protection afforded peoples and minorities under international law.

Second, the right to political self-determination can be expressed in many different ways, ranging from limited self-government to secession. Current international conceptions of self-determination may be too narrow to satisfy the goals of indigenous groups.[589] For this reason, many indigenous representatives at the Working Group have opposed possible definitions in order to avoid political confrontations among states, which could frustrate progress in the Working Group.[590] It is possible that the aspirations of indigenous peoples require a broad definition of the right to self-determination that is not supported in many nations, including the United States. For this reason, the drafting of a U.N. declaration broadly asserting that indigenous peoples possess the right to self-determination would further establish this principle in international law, leading potentially to a binding international convention on indigenous rights.[591]

Underlying the obstacles encountered in defining the terms "indigenous" and "self-determination" is the problem of the traditional orientation of human rights law toward individual rather than collective rights.[592] The basic thrust of human rights standards toward protection of individual rights creates a bias toward the integration of distinct groups into the dominant political culture. This is especially true in the United States where

[587] At its first session in 1982, the Working Group decided to postpone formulating a definition of "indigenous." The Group only noted that any definition would include both objective criteria, such as historical continuity, and subjective criteria, such as self-identification. 1982 Working Group Report, *supra* note 572, at ¶ 42.

A draft definition of indigenous, based on the Martínez Cobo study, was proposed in 1983. This draft defines as indigenous any group "having a historical continuity with pre-invasion and pre-colonial societies" and who "consider themselves distinct from other sectors of the societies now prevailing in those territories." 1983 Working Group Report, *supra* note 572. *See generally* Barsh, *supra* note 434, at 370–76.

[588] Barsh, *supra* note 434, at 375–76; *see supra* notes 474–94 and accompanying text.

[589] Indeed, the "blue water" interpretation of article 73 of the U.N. Charter is an example of a restrictive definition of self-determination in the context of decolonization.

[590] *See* R. Coulter, *supra* note 490, at 72.

[591] *Id.* at 13–16, 71.

[592] *See id.* at 64–65. *See generally* V. Van Dyke, Human Rights, Ethnicity, and Discrimination 79–110 (1985).

the protection of Indian individual rights is claimed to justify the violation of collective rights.[593] Thus, it is significant that "international law has evolved without the involvement of indigenous peoples and consequently reflects concepts and interests that are in some way quite foreign or actually adverse to the thinking and interests of indigenous peoples."[594] This assimilationist bias is hostile to the recognition of indigenous peoples' rights to exist separately and to determine their own political status. These fundamental concerns will have to be addressed at future sessions of the Working Group as it struggles to develop effective and far-reaching standards for indigenous rights.

D. The Impact of Self-Determination on the United States and Indian Nations

The United States violates international law when it fails to respect Indian peoples' right to self-determination. Self-determination is firmly established in existing instruments of international law as the right of all peoples.[595] The United States, as a member of the United Nations, must recognize and promote the human rights principles set forth in the United Nations Charter.[596] By signing international instruments such as the Universal Declaration of Human Rights and the Human Rights Covenants, the United States has reaffirmed its committment to the basic political right of self-determination.[597] Further, the United States is one of thirty-five nations bound under the Helsinki Final Act to "respect the equal rights of peoples and their right to self-determination."[598] Finally, the principles of any fu-

[593] *See, e.g.*, Indian Civil Rights Act, 25 U.S.C. §§ 1301–41 (1983). The Act was designed to regulate the internal governance of Indian nations by imposing the protections of the Bill of Rights in order to limit the power of Indian governments in dealing with individual Indians.

[594] R. Coulter, *supra* note 490, at 63.

[595] A. Cristescu, *supra* note 474, at ¶¶ 629–713.

[596] While the U.N. Charter is a treaty and is legally binding on the United States, domestic courts have held that the Charter is not self-executing. *See, e.g.*, Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952). As a result, the treaty does not supersede domestic laws that are inconsistent with it. However, the Charter is recognized as a "moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs." 38 Cal.2d at 724, 242 P.2d at 622; *see* Restatement of the Foreign Relations Law of the United States § 131(3) (1979); R. Lillich, Invoking International Human Rights Law in Domestic Courts (1985).

[597] R. Lillich, *supra* note 596, at 2.

[598] Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 73 Dep't of State Bull. 323, 325–26 (1975) (art. 1(a)(VIII)).

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ture United Nations instrument protecting indigenous peoples should assume special importance to the United States because of the integral role that American Indian representatives have played in developing international standards.

The enforcement of international law, however, often depends more on political than legal considerations,[599] because political interests and pressures often determine the effectiveness of international legal norms.[600] The effort to produce international indigenous standards will increase international awareness of United States policies toward Indian peoples, thereby bringing pressure to bear on the United States to recognize Indian peoples' right to self-determination. This international attention will also reveal that current United States policies toward Indian nations, ostensibly supporting self-determination,[601] are actually promoting the further subjugation and assimilation of American Indian peoples.

As international human rights norms are applied to American Indian nations, Indian peoples will again have the right to determine freely their own political status, including their relationship with the United States. Whether a certain Indian society will, under international law, meet the requisite criteria for exercising the right to self-determination is a question that must be determined cooperatively by international bodies, Indian groups and the United States. Given the original sovereignty and historic experience of Indian nations, however, all Indian peoples should be presumed to possess the right to self-determination.

Self-determination, then, is a vehicle to empower Indian peoples to assert and develop their political, social and cultural identity. From an historic perspective, self-determination will promote the restoration of the inherent sovereign status of Indian peoples. Under international law, recognition and enforcement of the right to self-determination for indigenous peoples will enable American Indians to transform their political relationship with the United States.

* * *

[599] Alfredsson, *International Law, International Organizations, and Indigenous Peoples*, 36 J. of Int'l. Affairs 113, 123–24 (1982).

[600] *Id.* at 124.

[601] *See supra* note 8 and accompanying text.

Conclusion

This Comment challenges the United States' legal conception of the political status of Indian nations. The subjugation of Indian nations to the control of the United States is the result of a determined effort to assimilate Indian peoples into the dominant culture. The Supreme Court has redefined the historically sovereign status of Indian nations and has created a legal framework that refuses to recognize Indian political independence. This legal framework is based on the conception that Indian peoples were "uncivilized," and it is largely responsible for the political disempowerment of Indian nations. While ostensibly acknowledging the principle of Indian self-government, the Court has accepted the doctrine of federal plenary power and has sanctioned the imposition of state control over Indian territory.

We advocate a change in the philosophy of United States-Indian relations. Our approach rejects policies of assimilation and embraces the principles of consent and cooperation. In the federal context, the United States must recognize that the inherent political rights of Indian nations limit its authority over Indian peoples. Similarly, Indian-state relations must be based on negotiated agreements that recognize Indian self-government. Finally, Indian nations must be accepted as distinct peoples under international law, with the right to self-determination. Current efforts to establish international standards for indigenous peoples will advance and protect this goal.

Together, these criticisms and proposals provide a point of departure for the transformation of the political status of Indian nations, and suggest new goals for restructuring the relationship between Indian nations and the United States. The United States legal system must recognize Indian peoples' right to self-determination and support a consent-based relationship between Indian nations and the United States. Consent and cooperation will enable Indian nations to develop institutions consistent with their own political values and aspirations.

—Rachel San Kronowitz
Joanne Lichtman
Steven Paul McSloy
Matthew G. Olsen

NSA LAW DAY REMARKS

Good afternoon Director, Admiral McConnell, distinguished guests, colleagues and friends. I would like to join General Alexander in welcoming you to NSA.

To begin, I want to recognize Mike McConnell, the recipient of our annual Intelligence Under Law award. As you all know, in a remarkable career dedicated to national security work, Admiral McConnell has served as a career Navy intelligence officer, as the Director of NSA, and as the Director of National Intelligence. As DNI, Admiral McConnell led the groundbreaking effort to reform FISA. Through his vision and determination, he—along with General Alexander and others who are here today—dramatically enhanced NSA's ability to collect vital intelligence.

It was during the FISA reform effort that I had the chance to work with Mr. McConnell. And that's when I first heard him – in describing this effort – use the term "*goatrope.*" As in, "Changing FISA is going to be a real "goatrope." Now, even though I'd never heard the word before, I was pretty sure at the time that "goatrope" was not a term I would use in public—sounding, as it does, vaguely indecent. As it turns out—and maybe you all know this—"goatrope" simply means: "A confusing situation often marked by human error." And that's a

fairly apt description of the situation we faced—until Mr. McConnell led us through it.

We're here to celebrate Law Day, so I would like to spend a few minutes talking about the role of the national security lawyer. I thought I would share some thoughts about the challenges we all face and some of the ways I think we should try to meet those challenges.

So, what challenges do we all face?

First, and foremost, the stakes could not be higher. In our daily work, we confront questions of law and policy that are the most important questions we face as a nation. How can we defend the country from terrorists and other determined adversaries? How can we do so in ways that also protect our freedoms and uphold the rule of law? Every day, we wrestle with issues that implicate these fundamental questions.

And, as national security lawyers, we have demanding clients—and rightly so. The leaders and decision makers, analysts and war fighters, who we represent, carry the burden of securing the nation. Because of that responsibility, General Hayden has famously stated: He would always play in fair territory, but "there would be chalk dust on my cleats." Another former director of NSA, Admiral William Studeman, has

said essentially the same thing: "We have to be at the edge of legality all the time. Otherwise we can't do our job." This approach—taking full advantage of all lawful authority—may well be necessary to protect the nation. But it also makes our jobs as lawyers difficult—because we are called upon to discern and describe legal limits with precision, clarity and decisiveness.

To complicate matters, the legal rules in this area often are unclear or not well-adapted to the questions we face. The Constitution does not define the limits of executive power, and statutes typically speak in general terms and do not provide clear answers.

Even where there are laws on point, the rules may be ill-suited to address the facts at hand. For example, as Mr. McConnell explained to Congress during the FISA debate, the laws governing surveillance—the laws that we all work with every day—were enacted before the advent of the Internet. When Mr. McConnell was NSA Director, the World Wide Web simply did not exist. Similarly, the array of rules governing detention and trial were developed well before the onset of the current, open-ended threat we face from al Qaeda and other terrorist groups. And then there's the cyber realm. As General Alexander has recently pointed out—and as Mr. McConnell has noted, as well—there is a lack of authority for what the government can and cannot do to protect the

country from cyber threats. And while everyone recognizes these problems, changing and updating the laws in this area has proven exceedingly difficult.

So, to put this in terms of General Hayden's metaphor, it's one thing to say we should go right up to the line—that "We should have chalk marks on our cleats." But what if the out-of-bounds line is really hard to see or doesn't exist at all? What if the line is moving or open to interpretation? How do we make sure—as we absolutely must—that we stay inbounds and don't cross the line into foul territory?

As if these challenges weren't enough, we all know that the advice we give may be second-guessed down the road. And this second-guessing will not take place late at night in a command center. But rather our actions will be viewed with what Jim Comey called "the perfect, and brutally unfair, vision of hindsight."

This is not to suggest that our work should be beyond scrutiny. To the contrary, our work must be transparent and subject to supervision and responsible oversight. And to be sure, some legal advice quite properly has not withstood further review. But when this scrutiny degenerates into uninformed criticism or overheated rhetoric, it has the potential to undercut our willingness

and ability to provide advice on difficult questions of grave importance.

So, given all of these challenges, what can we do to make sure we are doing our jobs well? I would offer these three suggestions.

First, we—as national security lawyers—have to establish partnerships with those on the front lines. Here at NSA, that means we have to be partners with the engineers and analysts who harness the technology and make sense of the information we gather. And it means we have to be partners with the war fighters who collect and rely on intelligence in dangerous places around the world. Similarly, at FBI and CIA and every intelligence agency, as well as at the Department of Justice—my former home—national security lawyers have to *strive* to be essential members of the teams that carry out the missions of each agency.

By "strive" I mean to suggest that this requires effort. As I said earlier, our agencies are right to be demanding of us. We, as lawyers, have to understand the specific needs of operators and then translate the language of legal rules and procedures to meet those needs. We have to demonstrate that we can be effective advisors and advocates; that our role primarily is to facilitate, not to oversee; that we can be trusted to find ways to get the job

done. At the same time, this requires that the analysts, agents, and engineers at our agencies engage with us when they have a question or a new project or objective. It requires that they communicate with us—particularly at the early stages of a problem. It requires that they understand that, at times, our job will be to say no.

This is a lesson I learned years ago as a prosecutor working with homicide detectives. The detectives were skilled investigators, but when we—investigator and prosecutor—worked together from the beginning of a case, we were able to anticipate factual and legal issues and put together cases that were much more likely to lead to convictions.

The same is true in the national security field, where the law matters more now than it ever has. As we all know, just about every operational issue has a legal dimension. As Jack Goldsmith observed, "[N]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11." Sometimes the legal issues are straightforward, other times, they're complicated. But the bottom line is that only when lawyers and operators work together as trusted partners can we be an effective team to resolve the legal questions that increasingly are so critical to our work.

Next, we have to provide advice on the law. And that means distinguishing between questions of law and questions of policy. Again, going back to General Hayden's chalk lines, we have to be committed to providing clear advice on precisely what the law permits—where the boundary lines are—and that includes being steadfast and resolute in saying what the law *does not* permit. This is especially true where there are compelling arguments in favor of a particular course of action that runs contrary to law

This is not to say that we have no role in questions of policy. In fact, we often are able to provide sound advice on the wisdom of a particular decision. But we must be precise in explaining legal rules and transparent in describing our views of good policy choices. As Justice Jackson stated, "Fundamental things in our American way of life depend on the intellectual integrity, courage and straight thinking of our government lawyers."

At times, this will mean that we will counsel against a lawful action because of the risks involved. Other times, we may push operators to go further—particularly where practices and procedures artificially limit the government where the law is more permissive. In this way, we can avoid imposing what the WMD Commission criticized as legal restrictions that were "either myths that

overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications."

This interplay between law and policy was critical to the success of the effort to reform FISA. Again, led by then-DNI McConnell and General Alexander, we were able to describe the legal rules that impeded our intelligence collection. We then were able to make the policy arguments—arguments that ultimately prevailed—about why these rules no longer made sense and had to be changed.

And this brings me to my last point: we have to be advocates. Once a decision is made to pursue an action or policy, our role as national security lawyers shifts from providing advice to being advocates. Our duty then is to argue for the government's position—forcefully within the bounds of our ethical obligations. Our job, in other words, is to persuade and to win.

Our role as advocates, of course, depends on the context. We prosecute suspected terrorists and spies and litigate civil cases. We advocate for the government before the FISA Court to obtain surveillance orders. We represent the Executive Branch in our interaction with Congress in support of legislative initiatives. And we advocate for our own agencies within the Executive Branch.

In fulfilling these advocacy roles, we are bound by the rules and customs of the particular forum and by our ethical obligations as attorneys. And, importantly, we have sworn an oath—the same oath that binds everyone in government—to "support and defend the Constitution of the United States." Consistent with this special responsibility, we should embrace our role as advocates—in the words of the Supreme Court, "strike hard blows" when it is the fair and right thing to do—and then see that justice is done.

In my first few months here at NSA, I have been enormously impressed and gratified to see first-hand our agency's commitment to the law. For, as the Attorney General has recently stated, as a nation "our strength derives . . . from the enlightened principle of the rule of law." Beginning with General Alexander, Chris Inglis and the agency's leaders, the NSA workforce—here and in places around the world—has shown a deep and abiding dedication to the letter and spirit of the Constitution and the laws and policies that govern our operations. This also is a tribute to all the lawyers in the general counsel's office, as well as past leaders of the office—Patrick Reynolds, Vito Potenza, Bob Dietz, Stewart Baker, Ron Lee, Paul Brady and others.

No doubt, there's a lot of work ahead—many more "goatropes" await us. But I look forward to joining with all of you to find ways to meet these challenges as we strive to uphold the rule of law and protect the nation.

SECOND DECLARATION OF MATTHEW G. OLSEN

Pursuant to 28 U.S.C. § 1746, I, Matthew G. Olsen, hereby declare:

1. I am the Executive Director of the Guantanamo Review Task Force ("Task Force") and Special Counselor to the Attorney General. I was appointed to these positions by the Attorney General on February 20, 2009. Prior to this appointment, I served as the Deputy Assistant Attorney General for the Office of Intelligence in the Department of Justice's National Security Division and, more recently, as Acting Assistant Attorney General for National Security. The statements made herein are based upon my personal knowledge and information made available to me in my official capacity.

2. The Task Force was created by the Attorney General, pursuant to an executive order of the President requiring a comprehensive interagency review of the status of each individual detained at the Guantanamo Bay Naval Base and the closure of the detention facilities at Guantanamo by January 22, 2010. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) ("Executive Order"). As stated in the Executive Order, the President determined that the "prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice." Executive Order § 2(b). The sole purpose of the Task Force is to implement the President's order by conducting the interagency review and providing recommendations to designated Executive Branch officials regarding the appropriate disposition of each detainee held at Guantanamo.

3. I previously submitted a declaration on April 16, 2009, in response to orders issued by the Court in a number of the Guantanamo *habeas* cases inquiring whether the Task Force has gathered information about individual detainees and, in some cases, directing the Government to make certain information available to the detainees' counsel if possessed by the Task Force. That declaration provided general information about the status of the Task Force's efforts to assemble information pertaining to the detainees at Guantanamo.

4. The purpose of this second declaration is to: (1) provide further information about the nature of the information that has been made available to the Task Force; (2) describe how the Task Force has structured its operations in order to carry out its mandate from the President; and (3) explain why the Task Force's ability to perform that mandate would be jeopardized were Task Force resources diverted to reviewing and identifying information for purposes of the *habeas* litigation.

Nature of the Detainee-Related Information Made Available to the Task Force

5. As discussed in my prior declaration, since my appointment to serve as Executive Director, one of my goals has been to ensure that the Task Force has access to a collection of information that is as comprehensive as reasonably practicable pertaining to the detainees at Guantanamo.

6. To date, in response to taskings disseminated across the intelligence community, as well as to various non-intelligence agencies believed to have pertinent information, the Task Force has received significant information from the following entities:

- Central Intelligence Agency ("CIA")
- Department of Defense ("DOD")
- Department of Justice ("DOJ")
- Federal Bureau of Investigation ("FBI")
- National Security Agency ("NSA")
- Department of State

- National Counter-Terrorism Center ("NCTC")

7. In my prior declaration, I explained that the Task Force's information gathering effort is ongoing and is expected to remain ongoing for the foreseeable future. We have made substantial progress since my prior declaration toward obtaining a complete response from each of the agencies listed above. While we are continuing to receive information from these agencies on a rolling or as-needed basis, all of these agencies have now completed the bulk of their expected production to the Task Force.

8. As of April 20, 2009, the total amount of data loaded onto the Task Force's stand-alone network ("TF network") was estimated to consist of approximately 1.8 million pages, for a total of approximately 400,000 unique documents. The documents contained in this collection vary widely, but generally speaking the agencies above provided the following:

- CIA:
    - the results of records searches (*i.e.*, searches based on a detainee's name(s), aliases, and other identifying information) run for each individual detainee on CIA intelligence databases; and
    - finished intelligence products (*i.e.*, reports and analyses, as opposed to raw intelligence information) regarding various general topics of interest to the Task Force's work;
- *DOD*:
    - records of detainee-related administrative proceedings, such as Combatant Status Review Tribunals ("CSRT") and Administrative Review Board ("ARB") proceedings (which I understand were previously provided to DOJ for purposes of the *habeas* litigation), as well as documents pertaining to detainees gathered in preparation for those proceedings by DOD's Office for the Administrative Review of Detained Enemy Combatants ("OARDEC");
    - Detainee Assessment Briefs ("DABs") and summaries of biographic and capture information pertaining to the detainee prepared by the Joint Intelligence Group ("JIG") of Joint Task Force Guantanamo (which I

understand were previously provided to DOJ for purposes of the *habeas* litigation);

- files maintained on various detainees by the Office of Military Commissions ("OMC"), including files of the Criminal Investigative Task Force ("CITF") (established to investigate cases for prosecution in the military commission system); and

- finished intelligence products prepared by, and select material gathered by, the Defense Intelligence Agency on the Guantanamo detainee population as a whole or particular subgroups of the population;

- FBI:

  - the results of name traces on various detainees on FBI law-enforcement databases that were previously run for DOJ in connection with the Guantanamo *habeas* litigation;

  - the results of FBI name traces on detainees that were previously run in connection with military commission investigations or CSRT and ARB proceedings; and

  - records of FBI interviews of detainees (known as "302s" and "letterhead memoranda") provided to the DOJ *habeas* team, OMC, and OARDEC;

- DOJ:

  - the contents of the DOJ *habeas* team's consolidated database of files from the Joint Intelligence Group ("JIG") of Joint Task Force Guantanamo and the Office for Administrative Review of Detained Enemy Combatants ("OARDEC"); and

  - litigation-related documents pertaining to various *habeas* cases;

- NSA: the results of name traces on each detainee run on relevant NSA databases of disseminated NSA intelligence reports;

- NCTC: finished intelligence products on various topics of interest to the Task Force and other materials described in the NCTC declaration submitted herewith; and

- Department of State: information concerning potential destination countries for detainees approved for transfer or release.

9. Most of the documents reviewed by the Task Force reside on the TF network. The TF network, however, does not define the complete universe of documents available to the Task Force. As noted in my prior declaration, Task Force members also have access to certain external networks through which they can obtain additional information as needed. In particular, Task Force members have access to the Joint Detainee Information Management System (JDIMS), a dedicated database of Guantanamo-detainee information maintained by the Department of Defense, and the database of detainee information previously maintained for OMC. Also, Task Force members have access to more general intelligence databases based on members' respective agency affiliations. For example, CIA analysts on the Task Force are able to access certain intelligence databases generally available to them in their capacity as CIA analysts; and the same is true for members on the Task Force from the FBI, NCTC, and the Defense Intelligence Agency. Task Force members use these external agency databases to conduct targeted searches for specific items of information that, for a variety of reasons, may not be available on the TF network itself.

Structure of the Task Force's Operations

10. To date, the Task Force has assembled a staff of approximately 56 persons (excluding administrative staff). They are currently grouped into two types of teams for purposes of conducting the reviews of individual detainees: (1) transfer/release teams, responsible for determining whether detainees should be recommended for transfer or release; and (2) prosecution teams, responsible for determining whether the government should seek to prosecute detainees, including whether it is feasible to prosecute detainees in Article III courts. These teams prepare written recommendations in consultation with the Executive Director of the Task Force, who submits the recommendations to a Review Panel

composed of senior-level officials. The Review Panel members are authorized to decide the disposition of Guantanamo detainees.

11. Transfer/Release Teams. The Task Force's transfer/release teams are composed of persons drawn from a broad variety of agency backgrounds. They include intelligence analysts, FBI agents, military personnel, representatives from the Departments of Defense, State, and Homeland Security, and attorneys from the Department of Justice.

12. Transfer/release teams generally evaluate detainees in groups, with detainees typically grouped by country of origin, in light of various country-specific considerations that can be relevant to their disposition. The teams strive within the time available to cull and review the information available to the Task Force on each detainee in the group. The focus of the team's evaluation is on the degree of threat the detainee poses to the national security of the United States, as well as potential destination countries where it may be possible to transfer or release the detainee in the event that such disposition is deemed appropriate. Transfer/release teams are instructed to base their evaluation on the totality of available information regarding each detainee – including the credibility and reliability of the information – and to carefully scrutinize the basis for conclusions set forth in prior threat assessments, intelligence reporting, and other information related to the detainee.

13. Transfer/release team leaders work with their teams to prepare a package of written recommendations for the detainees in the group, to be submitted to the Review Panel by the Executive Director. Given the compressed schedule in which we must make these transfer/release evaluations, we do not prepare a formal administrative record encompassing all the information reviewed by the teams in making their recommendations. However, the

written recommendations prepared for the Review Panel do include citations to the sources of information referenced in those documents.

14. Based on our experience to date, it takes approximately three to four weeks for a transfer/release team to assemble a package of approximately 6-10 recommendations for submission to the Review Panel. These packages are prepared and submitted to the Review Panel on a staggered, rolling basis. As the Attorney General explained during his recent trip to Europe, as of April 29, 2009, approximately 30 detainees had been approved for transfer as a result of the Task Force's review. Other recommendations are scheduled to be made to the Review Panel in the coming weeks. Of course, the length of time required for the Review Panel's consideration varies depending on the complexities and circumstances of the case, as it also does for the Task Force's review. Also, once a favorable decision is issued by the Review Panel, it takes additional time to implement and often depends on the outcome of diplomatic efforts.

15. Prosecution teams. The Task Force's prosecution teams are staffed predominantly by federal prosecutors, but also include military prosecutors, investigative agents, and intelligence analysts. The prosecution teams review detainees who have not been or are unlikely to be approved for transfer or release, in order to determine whether the government should seek to prosecute the detainee and whether prosecution in an Article III court is feasible.

16. Given the distinct focus of the prosecution teams, they operate on a separate track from the transfer/release teams. Their current review priorities encompass those detainees who have already been charged in the military commission system at Guantanamo, as well as a larger group of detainees for whom the possibility of charges were still under consideration

by military commission prosecutors at the time the Executive Order was issued. As the work of the Task Force proceeds, prosecution teams also will review other detainees identified as unsuitable for transfer or release.

17. The recommendations of the prosecution teams are, like those of the transfer/review teams, being prepared on a rolling basis. Evaluating the potential for prosecuting these detainees involves novel and complex legal and evidentiary questions and, as a result, the prosecution teams generally take longer than the transfer/review teams to complete their recommendations.

The Task Force Review Process Should Remain Separate from the *Habeas* Litigation

18. As Executive Director of the Task Force I respectfully submit that the Task Force does not have the resources or capabilities to identify and collect discoverable and exculpatory information for litigation purposes. Further, subjecting Task Force information to discovery may divert the Task Force to litigation-related tasks and undermine our ability to carry out the mandate assigned to us by the Attorney General and the President. I also understand that a number of agencies that have produced information to the Task Force are submitting declarations to the Court, contemporaneous with this declaration, explaining how the exposure of their information to discovery in the Guantanamo *habeas* litigation would impose severe burdens on them given the sensitivity of the information and the difficulty of clearing its release, in any form, for litigation purposes.

19. **The Task Force's mandate.** As explained above, the sole mandate of the Task Force is to implement the President's order to close the Guantanamo detention facilities, by conducting an interagency review to determine the most appropriate disposition for each Guantanamo detainee. In contrast to the Guantanamo *habeas* litigation, the Task Force's

mandate is not limited to making a legal determination as to whether there is lawful authority to continue holding each detainee. Rather, pursuant to the Executive Order, our mandate is to recommend appropriate dispositions for each detainee based on broad, discretionary considerations of national security and foreign policy, as well as the interests of justice.

20. Importantly, the Task Force must carry out this mandate under significant time constraints. The Executive Order directs the closure of detention facilities at Guantanamo "as soon as practicable, and no later than 1 year from the date of this order" – *i.e.*, by January 22, 2010. *Id.* § 3. Further, it provides that "[i]f any individuals covered by this order remain in detention at Guantanamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States." *Id.*

21. At present, there are approximately 240 individuals who remain in detention at Guantanamo. An essential part of the Task Force's charge is to review the facts critically and independently for each detainee; we cannot simply rely on prior Executive determinations made concerning the detainee. Therefore, Task Force review teams must conduct a painstaking effort to assemble and sift through the intelligence reporting on each detainee and to scrutinize the available information about the detainee and the basis for his detention. These factual examinations are complex and time-consuming and must each be completed in a matter of weeks, on a rolling basis, in order for decisions to be reached on all of the detainees within the time frame established by the President.

22. **The Task Force teams are not in a position to conduct litigation-related discovery.** Transfer/review team members strive to review all material relating to a detainee in the Task Force's possession; however, due to time constraints they are not always able to review every available document. Further, the Task Force's transfer/release teams consist mostly of non-lawyers. While the teams take exculpatory information into consideration in making their evaluations, they are in no position to evaluate what information is discoverable or exculpatory for purposes of the *habeas* litigation. Most team members are not trained in the rules of civil discovery, they generally lack familiarity with the procedural history of individual *habeas* cases, and they cannot be expected to keep track of the varying discovery orders and definitions of exculpatory evidence issued in each one. By the same token, team members generally lack knowledge of what exculpatory materials have already been produced to detainee counsel in each case.

23. Requiring transfer/review team members to conduct comprehensive searches for information subject to discovery for litigation purposes would likely generate constant questions and confusion regarding the nature and extent of this obligation and overwhelm our resources – all to the detriment of the review teams' ability to complete their evaluations on time. Before they could begin an evaluation of a detainee for the Task Force's purposes, team members would have to familiarize themselves with the details of the detainee's *habeas* case, including the course of the litigation to date, the scope of any outstanding orders for discovery, and the nature of the materials already produced to detainee counsel through discovery. Each document reviewed by the review teams would have to be evaluated not only through the prism of national security and foreign policy concerns as required of the Task Force under the Executive Order, but also through the legal prism of *habeas* discovery.

Documents that might not be deemed sufficiently pertinent to be reviewed for the Task Force's purposes – because, for example, they are cumulative, or deal with ancillary issues – would nevertheless have to be scrutinized and perhaps set aside for further review for purposes of the *habeas* case. Frequent, if not daily, consultation with *habeas* litigators in the Department of Justice would be needed to answer any questions that arise and to ascertain whether particular documents fall within the scope of the government's discovery and disclosure obligations and have not been previously produced to detainee's *habeas* counsel. Given that the process would have to be repeated hundreds of times as the review teams complete their reviews of nearly 200 remaining detainees, the result would be a recurring, systemic imposition on the ability of the transfer/release teams to accomplish the mission assigned to the Task Force by the Attorney General within the time frame established by the President.

24. Similarly, the prosecution teams on the Task Force are ill-equipped to identify exculpatory and other discoverable information for litigation purposes As an initial matter, the prosecution teams are not charged with reviewing all of the Guantanamo detainees, but instead are reviewing only the subset of detainees disapproved (or likely to be disapproved) for transfer or release. Thus, the prosecution teams are by no means reviewing information on all of the detainees who have pending *habeas* cases.

25. Moreover, even as to those detainees who are being reviewed by the prosecution teams, the prosecution teams generally do not conduct a comprehensive review of all the raw evidence in the Government's possession concerning the detainees. Instead, their review tends to focus on key pieces of evidence identified in case files compiled by criminal investigators, in order to determine how that evidence could be used to build a viable

prosecution. While, like the transfer/release teams, the prosecution teams take into account exculpatory information in making their recommendations, they are in no position to conduct a full-scale search for all information that may be deemed exculpatory or discoverable for purposes of the *habeas* litigation. They lack the time and resources for conducting such a search, and in any event their review is taking place at a more nascent stage of the criminal process. The prosecution teams are merely recommending which detainees the government should seek to prosecute and whether prosecution is feasible in Article III courts. The Task Force prosecution teams are not initiating prosecutions, which can only be done by the Department of Justice (for a prosecution in an Article III court) or an appropriate military authority (for a prosecution brought in a military commission or other military forum). In the event that such prosecutions are ultimately authorized, it would be the responsibility of the prosecuting attorneys to do a complete search for exculpatory information pursuant to the rules applicable in the chosen prosecution forum.

26. A further reason why it would be inappropriate for the Task Force to conduct litigation-related searches is that the Task Force cannot be expected to conform the timing of its reviews to the various discovery schedules set in individual *habeas* cases. The Task Force must have the ability to structure its own review in the manner that best enables us to complete our review in a timely and orderly fashion. For example, the Task Force to date has focused on reviewing detainees in country-specific groups in part because there may be fact patterns or foreign policy issues common to each group, making it more efficient for all of the detainees in the group to be reviewed together.

27. Further, it is important for the Task Force to coordinate its review with ongoing diplomatic efforts by the Department of State. For every detainee determined to be eligible

for transfer or release, the Department of State must identify an appropriate destination country that is willing to accept the detainee. The Executive Order directs that the "Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate" to implement such arrangements. Executive Order § 5. These diplomatic efforts must be conducted in a coordinated rather than piecemeal or *ad hoc* fashion. Accordingly, the Department of State needs to be able to pursue a carefully coordinated diplomatic strategy in order to maximize the number of potential destination countries available for detainees approved for transfer or release. For this reason, the Task Force is coordinating its review with diplomatic priorities identified by the Department of State, and our schedule must be flexible to meet the demands of these diplomatic and other priorities. For example, a diplomatic urgency could suddenly arise, causing us to reshuffle our entire schedule and place cases that were at the back of the line to the front in the interest of the overall mission.. I am therefore concerned about any habeas-related obligations that would require the Task Force to reorient its review according to *litigation* timetables generated by discovery or other deadlines in the detainee *habeas* cases as opposed to the *diplomatic* timetables that are currently driving our review process.

28. **The Task Force's Written Evaluations and Recommendations.** I understand that there may be certain practical benefits to an approach that limits discovery of the information that the Task Force has assembled in each case to the documents that are cited in the Task Force's recommendation for that particular detainee. It is important to understand, however, that such an approach also has inherent limitations, as explained further below.

29. Most significantly, for the same reasons that the Task Force is not in a position to conduct civil discovery searches in the course of its review, the Task Force's

recommendations are not written with the purpose of identifying the catalog of information that may be deemed exculpatory or otherwise discoverable for purposes of the *habeas* litigation. Rather, as described above, our recommendations are focused primarily on the distinct policy question of whether a detainee can be transferred or released consistent with the national security and foreign policy interests of the United States (for the transfer/release teams) and on the mixed legal and factual question of whether a detainee should be prosecuted and whether it would be feasible to prosecute the detainee in an Article III court (for the prosecution teams).

30. While the facts that we deem material in evaluating these questions may overlap with the facts deemed material in the *habeas* cases, the degree of overlap may vary. For instance, a transfer/release team may determine that a detainee is appropriate for transfer based on an assessment of the detainee's potential threat, and therefore it may not be necessary for a review team to explore in full the facts underlying the legal basis for detention. Even where the review teams are focused on the same factual questions at issue in the *habeas* cases, our recommendations typically do not take pains to cite each piece of information that a petitioner might deem exculpatory or otherwise discoverable in litigation. Rather, our recommendations are intended to be summaries for senior-level officials, not line-by-line accounts of all the information at issue. Moreover, as explained above, the recommendations are written under time constraints and by staff members who are not in a position to evaluate what information is discoverable or exculpatory for purposes of a particular *habeas* case.

31. Accordingly, if a judgment is made to produce documents cited in the Task Force's recommendations for purposes of the habeas litigation, the Court and the litigants

should appreciate that it is not a substitute for exhaustive searches of information available to the Task Force, and that the Task Force's review schedule and priorities must remain coordinated with diplomatic strategies essential to closing Guantanamo.

* * *

32. In sum, the Task Force is focused exclusively on completing the review required by the President in the Executive Order. Completing that review presents significant challenges. The diversion of Task Force time and resources for litigation purposes would have a detrimental effect on the Task Force's ability to conduct its mission. In particular, requiring the Task Force to conduct searches for exculpatory or otherwise discoverable information for purposes of the *habeas* litigation, relying on the Task Force to identify such information in its recommendations anymore than it would in its ordinary course of business, or requiring the Task Force to organize its review pursuant to litigation-driven deadlines, would significantly undermine the Task Force's ability to complete its review in the time required by the President. The Task Force was not designed to be an arm of the Department of Justice *habeas* litigation team, and it cannot be pressed into service for such a role without compromising its ability to carry out the prompt and comprehensive interagency review of the status of all Guantanamo detainees that is required by the Executive Order.

33. I hereby declare that the foregoing is true and accurate to the best of my knowledge.

Dated: May 12, 2009
Washington, D.C.

[SIGNATURE]

MATTHEW G. OLSEN

SELECT COMMITTEE ON
INTELLIGENCE

UNITED STATES SENATE

Additional Prehearing Questions
for
Mr. Matthew Olsen
upon his nomination to be
the Director of the
National Counterterrorism Center

Responsibilities of the Director of the National Counterterrorism Center

QUESTION 1: The National Security Intelligence Reform Act of 2004 created the National Counterterrorism Center (NCTC) and the position of Director of the NCTC.

- **What is your understanding of the unique role of the NCTC within the Intelligence Community (IC)?**

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) serves as the statutory basis for NCTC's unique role within the Intelligence Community. Among other provisions, this law directs that NCTC:

- Serve as the primary organization of the U.S. Government (USG) for ***analyzing and integrating*** all intelligence possessed or acquired by the USG pertaining to terrorism and counterterrorism (CT), excepting exclusively domestic terrorists and domestic CT.
- Conduct ***strategic operational planning*** for CT activities, integrating all instruments of national power, including diplomatic, financial, military, intelligence, homeland security, and law enforcement activities within and among agencies.
- Ensure agencies have appropriate access to and receive all-source ***intelligence support*** necessary to execute CT plans or perform independent alternative analysis.
- Serve as ***central and shared knowledge bank*** on known and suspected terrorists and international terror groups, as well as their goals, strategies, capabilities, and networks of contacts and support.

The law also directs the NCTC Director to ***advise the Director of National Intelligence (DNI) on the extent to which the CT program recommendations and budget proposals*** of the departments, agencies, and elements of the U.S. Government conform to the priorities established by the President.

No other CT component of the Intelligence Community has this range of responsibilities. In conducting all-source analysis and maintaining the database that underpins all government watchlisting, NCTC has access to all terrorism–related information, both foreign and domestic. NCTC's cross-government role in strategic operational planning is also unique and results in a dual reporting relationship of the Director to the DNI for intelligence functions and to the President for strategic operational planning.

- **What is your understanding of the specific statutory responsibilities of the Director?**

The statutory responsibilities of NCTC and the Director of NCTC are described in Section 1021 of IRTPA. By law, NCTC is the primary organization in the federal government for analyzing and integrating all intelligence pertaining to terrorism and CT. NCTC thus has a unique responsibility to examine all international terrorism issues, regardless of where in the world they might be located.

NCTC's area of responsibility spans geographic boundaries, allowing for such intelligence to be analyzed regardless of whether it is collected inside or outside the United States. Further, the Center, by law, serves as the U.S. Government's central and shared knowledge bank on known and suspected terrorists and international terror groups. No other organization in the U.S. Government is as singularly focused on terrorism.

NCTC—in its Strategic Operational Planning role—is uniquely positioned to look beyond individual department and agency missions toward a single, unified CT effort. This distinguishes NCTC from other elements of the Intelligence Community and federal government and enables the Center to take a strategic, long term view of the counterterrorism mission. Through a single and joint planning process that integrates all instruments of national power, the Center ensures the effective integration of government CT plans and the synchronization of operations across more than 20 departments and agencies with CT responsibilities.

Thus, the Director of NCTC has two related but distinct areas of responsibility: intelligence and strategic operational planning. With respect to the first, the Director is responsible to the DNI and is charged with a variety of specific responsibilities, to include acting as the DNI's principal adviser on intelligence operations pertaining to CT, being responsible for supporting DHS and FBI for the dissemination of CT information to a variety of federal, state and local officials and government entities through entities like the Interagency Threat Assessment and Coordination Group (ITACG), and advising the DNI on the allocation of counterterrorism resources to elements of the Intelligence Community.

With respect to strategic operational planning, the Director of NCTC reports directly to the President. In this role, the Director is responsible for providing strategic operational plans—both short and long term policy planning which aims to bring all elements of national power to bear against terrorism—for all departments and agencies of the U.S. government

- **Have you discussed with Director Clapper his specific expectations of you, if confirmed as Director, and his expectations of the NCTC as a whole? If so, please describe these expectations.**

I have met with Director Clapper and have generally discussed his expectations of me, if confirmed as Director, and his expectations for NCTC. Based on these discussions, I believe he

would expect me to continue the tremendous work of former NCTC Director Mike Leiter and to work tirelessly to ensure that NCTC fulfills its mission of leading the nation's effort to combat terrorism at home and abroad. He would expect me to carry out the responsibilities of the NCTC Director in a manner consistent with the highest standards of the Intelligence Community and in strict adherence to the Constitution and all applicable laws. I also believe he would expect me to lead the workforce of NCTC with integrity and courage and to provide objective, independent advice to him and to other senior policy makers in the government.

NCTC Mission

QUESTION 2: The NCTC was designed to serve as the primary organization in the U.S. Government for integrating and analyzing all intelligence pertaining to terrorism and counterterrorism and to conduct strategic operational planning by integrating all instruments of national power.

- **What is your assessment of the NCTC's current strengths and weaknesses?**

If confirmed, I expect to fully assess on an ongoing basis NCTC's strengths and weaknesses as I guide and direct its future course. From my current perspective, NCTC's dedicated and diverse work force is its most important strength in confronting CT issues across the U.S. government. Following the failed attack on December 25, 2009, NCTC led the implementation of a number of reforms in response to the President's guidance that built upon its role as the primary CT organization of the U.S. government, as envisioned by the IRTPA. Nevertheless, there is still room for improvement in analyzing and integrating intelligence, conducting strategic operational planning, and serving as the central knowledge bank on known and suspected terrorists.

- **What do you believe are the greatest challenges facing the NCTC?**

NCTC faces the challenge of an evolving and adaptive threat both within the homeland and abroad. As I explain more fully below, the terrorist threat to the United States has become more complex and diverse. While sustained counterterrorism pressure on al-Qa'ida in Pakistan has degraded the group's capabilities, al-Qa'ida remains focused on conducting terrorist attacks, particularly in the United States and in Europe. In addition, I believe al-Qa'ida's regional affiliates, particularly al-Qa'ida in the Arabian Peninsula (AQAP), constitute a growing threat to the United States.

In addition, as I indicated above, I believe NCTC's dedicated and diverse workforce is its greatest strength. As such, I believe maintaining this diversity through continued commitment from Intelligence Community departments and agencies will remain one of its greatest challenges.

I also believe NCTC must continue to pursue its ongoing efforts to gain access to critical data sets in accordance with applicable privacy standards and laws. As the Center gains access to data, it will face the challenge of what has been called in one study, "separating the signal from the noise"—the problem of information overload.

- **Please explain your vision for the NCTC, including your views on its current and future priorities and what the organization should look like five years from now.**

If confirmed, I will strive to build upon the successes of my predecessors and fulfill the promise of NCTC as envisioned by Congress in the IRTPA. I believe NCTC has achieved a solid foundation in analysis and greatly improved national watchlisting capabilities. The Intelligence Community as a whole has made great strides in information sharing, and NCTC continues to gain increased access to the information it needs to identify potential terrorist threats. Additional challenges remain both for information sharing and the technical challenges of analyzing the increasing amount of data. NCTC has also matured in both its National Intelligence Management and Strategic Operational Planning roles. If confirmed, I will reinforce what I find to be NCTC's strengths and review the current priorities in detail. As I identify areas for improvement, if confirmed, I will share my judgments regarding necessary changes and future priorities.

- **What specific benchmarks should be used to assess the NCTC's performance?**

The Counterterrorism Intelligence Plan (CTIP) serves as a useful tool to assess the Intelligence Community's performance against the terrorism problem and by extension the performance of NCTC. For the Intelligence Community, the CTIP outlines the mission objectives against which analytic gaps are identified. Progress is assessed on a quarterly basis against those gaps through analysis of hundreds of intelligence products. This provides a specific outcome measure that is reported to OMB and to Congress. I understand that NCTC also reviews customer satisfaction as a means to determine if it is meeting their needs. This measure is also reported annually to Congress in the Congressional Budget Justification Book.

Current Terrorist Threat

QUESTION 3: In light of the tenth anniversary of the September 11th terrorist attacks and the recent strike on Usama bin Ladin:

- **How do you characterize the terrorist threat that is confronting the United States at this time?**

I believe the terrorist threat to the United States has become more complex and diverse than at any point in the last decade. Sustained CT pressure on al-Qa'ida in Pakistan has degraded the group's capabilities, leaving it at one of its weakest points in the past decade. Usama bin Ladin's death probably has accelerated this trend by eliminating the group's most important decision maker and source of authority. However, al-Qa'ida remains focused on conducting terrorist attacks, particularly in the U.S., in Europe, and against our Coalition allies. We must remain vigilant in continuing our efforts to deter and dismantle the group's capabilities to conduct a homeland attack.

I believe al-Qa'ida's regional affiliates, particularly AQAP, constitute a growing threat to the homeland. As the affiliates continue to develop and evolve, the threat posed by many of these groups to U.S. interests abroad and the homeland has grown.

Yemen and North and East Africa have emerged as the primary areas from which al-Qa'ida's affiliates can plan attacks, train recruits, and facilitate the movement of operatives. AQAP remains intent on conducting attacks targeting the homeland and U.S. interests overseas while furthering propaganda efforts designed to inspire like-minded Western Muslim extremists to conduct attacks in their home countries. The Somalia-based al-Shabaab, al-Qa'ida in Iraq, and Al-Qa'ida in the Islamic Maghreb continue to pose a threat to U.S. and other Western interests.

Beyond al-Qa'ida and its affiliates, al-Qa'ida's key allies in the Federally Administered Tribal Areas (FATA), in particular Tehrik-e-Taliban Pakistan (TTP), continue to pose a threat to the homeland. TTP leaders maintain close ties to senior al-Qa'ida leaders, providing critical support to al-Qa'ida in the FATA and sharing some of the same global violent extremist goals. Other al-Qa'ida allies in Pakistan have demonstrated the intent and capability to conduct attacks against US persons and targets in Afghanistan.

Lebanese Hizballah remains capable of conducting terrorist attacks on U.S. and Western interests, particularly in the Middle East if it perceived a direct threat from the United States to itself or Iran, its primary state sponsor.

Finally, in addition to threats emanating from outside the United States, homegrown violent extremists continue to pose an elevated threat to the homeland. Although they have yet to demonstrate the capability to conduct sophisticated attacks, individuals like Fort Hood shooter Major Nidal Hasan demonstrate that attacks need not be sophisticated to be deadly. Al-Qa'ida and its affiliates have publicly supported and promoted the narrative of individual extremism and the potentially anonymous and individualized nature of individual terrorists complicates efforts to detect and disrupt their plotting.

- **If confirmed, what would be your top priorities in terms of the terrorist threats facing the United States?**

I believe that the President's new National Strategy for Counterterrorism conveys clear priorities for NCTC in terms of the terrorist threat we face. If confirmed, my top priority at NCTC will be to identify and analyze those threats and thereby assist in the prevention of terrorist attacks on the homeland, our allies, and our interests abroad. Those terrorist threats may originate from al Qa'ida core or its affiliates and adherents in South Asia, the Arabian Peninsula, the Horn of Africa, and North Africa. In addition to our efforts to counter these threats, an important and challenging priority will be to work with our partners to identify al Qa'ida inspired homegrown violent extremists.

- **In your opinion, what terrorist threats, if any, have been overlooked or underestimated?**

From my perspective, the Intelligence Community has taken numerous steps to evaluate and prioritize which terrorist groups pose the most severe threats to the homeland and U.S. interests, and has allocated appropriate resources to combat those threats. The National Intelligence Priorities Framework provides a comprehensive, community-coordinated tool to evaluate the threat and dictate where resources are needed.

If confirmed, I will direct the NCTC workforce and our partners to continue analyzing information critically, to constantly evaluate information and assumptions, and to always keep in mind alternative possibilities, which I believe will help mitigate the potential for strategic surprise.

- **In your opinion, is the NCTC adequately staffed to address your priorities identified above?**

Based on my understanding, I believe that NCTC is staffed adequately to meet the priorities above, and its resources are aligned appropriately with the President's Strategy for Counterterrorism. Over the past several years, NCTC has conducted various reviews of its resources and has worked closely with Congress to ensure resources are adjusted to address the evolving threat environment. If confirmed, I look forward to working with Congress in order to ensure NCTC remains adequately staffed.

- **What actions will you take, if confirmed as Director, to ensure that each of your identified priorities is satisfied?**

If confirmed, my approach—in accordance with the National Strategy for Counterterrorism and the President's directives following the failed attack in December 2009—will be to ensure that NCTC remains agile and adaptive and continues to fulfill its unique role in the government-wide

effort to disrupt, dismantle and eventually defeat al-Qa'ida, its affiliates and adherents.

Intelligence reform and counterterrorism

QUESTION 4: What do you see as the most important outstanding priorities in the ongoing intelligence reform effort, as it relates to counterterrorism?

I believe that some of the most important priorities for NCTC in the ongoing intelligence reform effort are those identified as a result of the review ordered by the President as a result of the failed terrorist attack on Northwest Airlines Flight 253 in December 2009. The review of that incident led to community-wide resource and implementation initiatives dealing with such issues as accelerating technology enhancements (including the CT Datalayer), strengthening watchlisting, enhancing analytic rigor and raising tradecraft standards, establishing a pursuit capability within NCTC, and improving the Intelligence Community's collection and analysis regarding the threat posed by homegrown violent extremism. It is my understanding that there has been significant progress in implementing these initiatives, and if confirmed I will continue to lead and support these efforts.

- **What recommendations made by the 9/11 Commission have not been fully implemented, and how should those issues be addressed?**

With respect to those 9/11 Commission recommendations that fall within NCTC's purview, I believe substantial steps have been taken to address the recommendations through the implementation of the IRTPA the Implementing Recommendations of the 9/11 Commission Act of 2007, and Executive Orders, policies, and practices. If confirmed, I look forward to further advancing Intelligence Community and NCTC mission and enterprise performance, and will review NCTC's activities to assess whether additional steps are needed to continue to implement the recommendations by the 9/11 Commission. If confirmed, I look forward to working with Congress during this process.

- **Do you see any need for modifications to the statutory role or authorities of the Director of the NCTC? If so, please explain.**

I am not aware of any such statutory modifications that are necessary at this time. If confirmed, I will work with the Director of National Intelligence and others to ensure that I have sufficient authorities to accomplish NCTC's statutory responsibilities and ensure the continued success of our CT mission. If confirmed, I will also keep this committee fully informed if I identify a need for legislative modifications to my authorities.

Pursuit groups

QUESTION 5: Following the failed terrorist attack of December 25, 2009, NCTC created the "Pursuit Group" to help track down tactical leads that could lead to the discovery of threats aimed against the U.S. Homeland or U.S. interests abroad. Public testimony from NCTC states that the Group has "repeatedly identified key leads that would have otherwise been missed amidst a sea of uncorrelated data."

- **To what extent has the creation of this Group succeeded in ensuring that tactical leads are identified and tracked?**

I believe that the creation of the Pursuit Group has provided the CT community with a group of co-located analysts that have unparalleled data access and expertise, which enables Pursuit Group to focus exclusively on information that could lead to the discovery of threats aimed against the homeland or U.S. interests abroad. While the majority of the Intelligence Community understandably follows current threats, Pursuit Group analysts can ensure that terrorism cases are examined as thoroughly as possible by pursuing non-obvious and unresolved connections, identifying unknown, known or suspected terrorists, and focusing on seemingly unimportant details that could yield relevant information.

- **How are the priorities of the Pursuit Group established?**

Although I have not had an opportunity to work directly with the Pursuit Group in my present position, it is my understanding that Pursuit Group's priorities include intelligence reporting with a clear homeland connection, or with only partial identifying data. Pursuit Group also focuses on identifying members of terrorist networks overseas, or individuals who are part of a broader threat stream.

- **What is the role of the Director of the NCTC in establishing those priorities?**

I believe that the Director of NCTC plays a key role in ensuring that Pursuit Group's priorities are closely aligned with overarching NCTC and U.S. government CT priorities. If confirmed, I will continue to ensure that this is the case.

- **What is the role of the Pursuit Group in integrating the tactical counterterrorism analytical efforts of the various components of the Intelligence Community?**

I understand that Pursuit Group provides investigative leads, collection requirements, and potential source candidates to its Intelligence Community partners in support of tactical Intelligence Community efforts. The role of the Pursuit Group in integrating tactical counterterrorism analytic efforts is enabled by its broad Intelligence Community makeup. With teams comprised of personnel from across the Intelligence Community, with access to the broadest range of terrorism information available, Pursuit Group analysts are able to identify actionable leads that could otherwise remain disconnected or unknown.

- **If confirmed, will you make any changes in the roles and responsibilities of the Pursuit Group?**

If confirmed, I will continue to make community participation and collaboration in Pursuit Group a priority and will work to strengthen existing interagency partnerships.

NCTC analysis

QUESTION 6: With the creation of the Pursuit Group, what do you see as the proper balance between tactical and strategic intelligence at the NCTC?

The IRTPA gave NCTC the responsibility to "serve as the primary organization in the U.S. Government for analyzing and integrating all intelligence possessed or acquired by the United States Government pertaining to terrorism and counterterrorism, excepting intelligence pertaining exclusively to domestic terrorists and domestic counterterrorism."

Pursuant to this statutory responsibility, NCTC includes elements that cover both tactical and strategic issues, and the Center's unique access to data makes it highly capable of performing its mission at both the tactical and strategic levels. I understand that this mission was reoriented in light of a series of plots targeting the United States, culminating in the December 2009 plot, when Nigerian national Umar Farouk Abdulmutallab attempted to detonate an explosive device aboard a Northwest Airlines flight. As a result, NCTC established the Pursuit Group to focus exclusively on information that could lead to the discovery of threats aimed against the homeland or U.S. interests abroad.

In addition to the creation of the Pursuit Group, former Director of National Intelligence Dennis Blair clarified in April 2010 that NCTC also would continue to produce strategic analysis on the full range of terrorist organizations with an overseas nexus and a special focus on threats within and to the homeland. If confirmed, I will continue to seek the proper balance between tactical and strategic intelligence problems, both in the types of analysis NCTC will produce and in the application of resources against these missions.

QUESTION 7: What unique role does strategic counterterrorism analysis conducted at NCTC play, as compared to the analysis produced by other components of the Intelligence Community?

Individual Intelligence Community agencies have strong analytic programs that emphasize building core tradecraft skills that reflect the highest standards for research, critical thinking, and writing, utilization of structured analytic techniques, and exploitation of diverse collection platforms. I believe what makes the strategic analysis conducted at NCTC unique is that all of its products are vetted and coordinated throughout the Intelligence Community, which adds multiple analytic perspectives. Though the National Intelligence Council (NIC) also produces fully coordinated analysis of key terrorism-related topics, only NCTC can produce a large number of analyses against such a broad range of strategic terrorism topics. In addition, NCTC's strong analytic cadre, which consists of detailees and assignees from across the Intelligence Community, also means that NCTC products reflect the diversity of the entire Intelligence Community and not the analytic view of one group or agency. NCTC remains the only organization in the Intelligence Community that has access to the entire catalogue of reporting—both foreign and domestic—on terrorism issues.

Moreover, NCTC produces Community-coordinated assessments of a truly strategic nature on such critical terrorism issues as terrorist safe havens, state sponsors of terrorism, CT cooperation worldwide, and regional terrorism issues and groups. NCTC's analytic cadre also regularly prepares intelligence assessments that are integrated into NCTC's Directorate of Strategic Operational Planning to inform policymakers on the progress of U.S. CT efforts.

QUESTION 8: What is the role of the NCTC, including through the Interagency Intelligence Committee on Terrorism (IICT), in coordinating and publishing the Intelligence Community's assessments on terrorism?

NCTC plays a critical role in coordinating and publishing the Intelligence Community's assessments on terrorism. Virtually all of NCTC's finished intelligence production is coordinated across the IC, and every product with the NCTC seal or name on it is coordinated with its partner agencies, thereby ensuring a community-wide approach to analysis. In addition to NCTC's own production, its analysts also participate in projects undertaken by the National Intelligence Council, including all National Intelligence Estimates that focus on terrorism-related issues, as well as with the various National Intelligence Managers on their issues and products.

If confirmed as the Director of NCTC, I would serve as the Chairman of the Interagency Intelligence Committee on Terrorism (IICT). The IICT Executive Secretariat, which resides in the NCTC's Directorate of Intelligence, is the key mechanism for providing Community-coordinated threat warning products and assessments to the U.S. Government, as well as state, local, and tribal officials. The IICT staff manages the Intelligence Community Terrorist Threat Warning System and coordinates all products with the warning agencies, including the National

Security Agency, Central Intelligence Agency, Federal Bureau of Investigation, Defense Intelligence Agency and the Department of Homeland Security.

Watchlisting

QUESTION 9: How do you assess the improvements to the Terrorist Identities Datamart Environment (TIDE) following the failed terrorist attack of December 25, 2009?

It is my understanding that there have been a number of important improvements to the TIDE database that have improved NCTC's receipt, processing, and quality of information sharing in support of watchlisting and screening. Given TIDE's importance in our country's layered CT defenses, if confirmed I intend to give watchlisting processes a thorough review. I look forward to working with Congress in order to ensure TIDE continues to proactively improve the U.S. Government's watchlisting and screening capabilities.

QUESTION 10: According to public testimony, NCTC has developed a comprehensive training program for the counterterrorism community involved in watchlisting and screening "to ensure consistent application of watchlisting standards across the U.S. Government."

- **To what extent has this training and any related policy changes succeeded in establishing consistent standards across the government?**

Policy updates following the December 2009 failed attack are reflected in the July 2010 Watchlisting guidance. NCTC, in collaboration with the FBI's Terrorist Screening Center (TSC) and with feedback from nominator and screener agencies, developed a Watchlisting Overview Course. The course provides standardized training across the watchlisting community and helps ensure a collective understanding of the watchlisting business process and guidance, and consistent application of the standards laid out in the guidance across the government. If confirmed, I will be in a better position to assess to what extent these training and policy changes have succeeded in establishing consistent standards across the government.

- **What improvements, if any, remain to be made?**

I understand that improvements are ongoing and are critical to the training program. Updates and modifications to the Watchlisting Overview Course are based on participant feedback, current terrorism trends, and policy changes. If confirmed, I will assess if additional improvements are needed.

QUESTION 11: According to the Committee's report on the failed attack of December 25, 2009, while the NCTC processed watchlisting information it had received, its standard practice did not include conducting additional analysis or enhancing existing records with more derogatory information. To what extent has this problem been addressed?

It is my understanding that there have been a number of important improvements to the way that NCTC's Directorate of Terrorist Identities conducts analysis to enhance existing records. This includes persistent and periodic checks to obtain additional data on TIDE subjects. The TIDE enhancement mission continues to expand and evolve, enabling NCTC to construct more comprehensive terrorist identities based on a steady increase of accesses to diverse databases. Thorough and timely information sharing across the counterterrorism community continues to be a cornerstone requirement for NCTC's successful performance of this critical mission. If confirmed, I work closely with Congress and will assess to what extent this problem has been addressed.

Database integration

QUESTION 12: According to the former director's February 9, 2011 public testimony, NCTC has developed a new information technology infrastructure to integrate the databases of components of the counterterrorism community. Recent steps include the enhancement of a "Google-like" search across the databases, and the development of a "CT Data Layer" to "discover non-obvious terrorist relationships." According to the testimony, "[a]ll these efforts are being pursued vehemently, but they also require careful consideration of complex legal, policy, and technical issues as well as the implementation of appropriate privacy, civil liberty, and security protections."

- **What is the status of the development and implementation of these efforts?**

Although I currently do not have detailed knowledge of the CT Data Layer, it is my understanding that NCTC has begun to automate and mature processes to manage the wide variety of data that its CT partners provide to support this important initiative. Similarly, I believe NCTC has taken a number of steps to improve its ability to notify its CT partners when it discovers derogatory information through its ability to find non-obvious terrorist relationships. If confirmed, I look forward to working with Congress as NCTC continues to develop and implement the CT Data Layer.

- **How, and to what extent, have privacy, civil liberty and security issues been addressed in the development of this infrastructure? What is the role of the Director of the NCTC in addressing these issues, relative to the Director of National Intelligence, other components of the Intelligence Community, and the Department of Justice?**

Through my time at the Department of Justice and the NSA, I have come to know NCTC's deep commitment to the protection of privacy and civil liberties. In general, I understand that NCTC, as a member of the Intelligence Community, must, like NSA, implement protections for United States persons through procedures approved by the Attorney General, under Executive Order 12333. These protections are interpreted, applied, and overseen by NCTC and ODNI legal counsel, as well as by the NCTC and ODNI Civil Liberties and Privacy Officers and the ODNI Office of Inspector General.

An important set of protections are embodied in Attorney General Guidelines that are applicable to NCTC's activities in identifying terrorism information in U.S. Government datasets that also contain non-terrorism information. NCTC may only retain U.S. person information in such datasets if there is a reasonable belief that such information is terrorism information. It must also enter into and comply with appropriate protective arrangements with departments and agencies that are consistent with all applicable legal and privacy requirements pertaining to such data. I understand NCTC has included other safeguards for the CT Data Layer, based on sound security measures and community best practices such as training, access controls, and compliance monitoring. Finally, I understand that NCTC also complies with Privacy Act requirements, such a publishing system of records notices, and data mining reporting requirements.

State and local governments

QUESTION 13: What is the role of the NCTC in producing and disseminating intelligence for state, local and tribal partners?

Although I have not yet been involved in NCTC's production process, it is my understanding that the Center collaborates closely with FBI and DHS to ensure terrorism intelligence is disseminated to state, local and tribal partners. For example, I understand that NCTC has coordinated with DHS to ensure that NCTC CURRENT—the CT Community's premier classified website for terrorism-related information—is available to state and local fusion centers. In addition, the ITACG, located at NCTC, collaborates with DHS and FBI to ensure there is a seamless bridge between traditional intelligence agencies and state, local and tribal partners.

- **How is that role different than that of the FBI and the Department of Homeland Security?**

The FBI and DHS have independent statutory missions to provide terrorism information directly to state, local and tribal governments. In compliance with its statutory charter, the IRTPA, and consistent with the statute that created the ITACG (the Implementing Recommendations of the 9/11 Commission Act of 2007), NCTC supports FBI and DHS in carrying out their missions.

- **What is your understanding of the amount and nature of cooperation among NCTC, FBI, and DHS?**

I believe that NCTC works closely on a daily basis with FBI and DHS. NCTC leads three daily secure video conferences to discuss current threats. This regular cooperation continues with informal and formal analytic exchanges that support the development of intelligence products that are specifically tailored for state, local and tribal partners. It is also my understanding that NCTC has deployed seven representatives throughout the United States who work hand-in-hand with DHS and FBI field elements. I understand that DHS and FBI also have senior representatives assigned to NCTC who provide close coordination.

- **If confirmed, what priority would you give this issue?**

If confirmed, one of my top priorities will be to ensure that state, local and tribal governments continue to receive timely and accurate information about terrorism threats that will enhance their capabilities to recognize and effectively respond to suspected terrorism and radicalization activities, while simultaneously protecting our privacy and preserving our civil liberties.

Strategic Operational Planning

QUESTION 14: Please describe the activities of the NCTC in carrying out its strategic operational planning responsibilities pursuant to the Intelligence Reform and Terrorism Prevention Act (IRTPA).

The responsibilities of NCTC's Directorate of Strategic Operational Planning (DSOP) are outlined in the IRTPA, which provides that NCTC will "conduct strategic operational planning for counterterrorism activities, integrating all instruments of national power, including diplomatic, financial, military, intelligence, homeland security, and law enforcement activities within and among agencies." The IRTPA goes on to define strategic operational planning as including "the mission, objectives to be achieved, tasks to be performed, interagency coordination of operational activities, and the assignment of roles and responsibilities." In practice, it is my understanding that DSOP views strategic operational planning as a process that develops interagency CT plans to help translate high level strategies and policy direction into coordinated department and agency activities to advance the President's objectives in the National Strategy for Counterterrorism and the overall National Security Strategy objectives.

This process integrates all elements of national power by involving the appropriate department and agency representatives in the development, monitoring, and assessment processes, to include those not traditionally associated with the CT mission.

Although I have not had extensive exposure to DSOP in my current and past positions, it is my understanding that DSOP has evolved alongside the needs of the CT community and has enhanced its support to the National Security Council. If confirmed, I look forward to continuing to develop DSOP's strategic operational planning capabilities in support of the President and our nation's counterterrorism objectives.

- **To what extent does the Directorate of Strategic Operational Planning develop interagency plans for counterterrorism operations?**

I believe that DSOP's focus remains on conducting strategic operational planning, using its mandate to develop whole of government CT plans to engage in cross-agency collaboration as directed by the National Security Council to support policy implementation. These plans address a variety of CT objectives, to include regional issues, weapons of mass destruction-terrorism, and countering violent extremism. It is my understanding that the strategic operational planning process integrates all phases of the planning cycle—developing a plan, monitoring its implementation, and assessing its effectiveness and resource allocations—and creates communities of interest to coordinate and integrate implementation. Negotiation, facilitation and mediation are also components of this interagency planning process.

- **To what extent does the Directorate coordinate or integrate the strategic planning of components of the Intelligence Community, the Department of Defense, and other components of the U.S. Government?**

It is my understanding that DSOP has engaged and involved more than 20 departments and agencies as it developed strategic operational plans over the last six years. These organizations include Intelligence Community agencies, the Department of Defense, as well as many organizations that are not traditionally thought of as national security entities, such as the Department of Education and the Department of Health and Human Services. Through its efforts, DSOP ensures there are representatives from all departments and agencies that provide the elements of national power that are necessary to achieve the objectives for a particular planning effort. If confirmed, I will continue this vital outreach so we are certain that NCTC's strategic operational plans are able to leverage all elements of national power against the terrorist adversary.

- **Please describe your assessment of the challenge presented by this responsibility and what should be done to improve NCTC's performance of it.**

DSOP benefits from the fact that it is viewed as an honest broker and can therefore help to coordinate issues among departments and agencies. If confirmed, I will ensure that DSOP continues to be seen by the interagency as an honest and willing partner that can effectively coordinate and integrate all elements of national power in support of our nation's CT objectives. To the extent that I identify any challenges in this effort, or ways to improve NCTC's strategic operational performance, if confirmed, I will work to expeditiously resolve these issues.

QUESTION 15: NCTC produces the National Implementation Plan for the War on Terror (NIP), first approved by the President in June 2006 and then again in September 2008.

- **To what extent does the NIP need to be updated in light of the new National Strategy for Counterterrorism announced on June 29, 2011?**

It is my understanding that with the new National Strategy for Counterterrorism, the past approach taken by the National Implementation Plan may no longer be the most effective way to address the President's counterterrorism objectives. Instead of the National Implementation Plan's single unified plan for the entire globe, the focus of the new strategy is on a series of overarching goals and areas of priority focus that provide objectives that are specific to various regions. If confirmed, I look forward to working with the National Security Council and our partners to play a key role in the implementation of the new strategy.

QUESTION 16: The NCTC also creates the Counterterrorism Intelligence Plan (CTIP) to translate the National Implementation Plan (NIP) and the National Intelligence Strategy into a common set of priority activities for the Intelligence Community, and to establish procedures for assessing how the IC is performing against those objectives. Should the NCTC establish a new CTIP in light of the new National Strategy for Counterterrorism announced on June 29, 2011?

It is my understanding that the CTIP will require adjustments to bring it in line with both the new National Strategy for Counterterrorism and the DNI's approach to Unifying Intelligence Strategies (UIS). The CTIP serves as a strategic framework that outlines our approach to managing and assessing the mission area. From a mission perspective, it seeks to build the requisite capabilities to support the needs of our customers, and its objectives are designed to cover the full range of the terrorist problem.

The CT Unifying Intelligence Strategy is an extension of the CTIP in that it will lay out our priorities, key gaps, mission and enterprise challenges, and the initiatives we will undertake in the coming year to address them.

QUESTION 17: What is the role of the Director of the NCTC in developing the National Intelligence Priorities Framework (NIPF) with regard to counterterrorism?

I understand that the Director of NCTC serves as the Chairman of the IICT. In that position, the NCTC Director has the responsibility for overseeing the work of the IICT Requirements Subcommittee, which administers the NIPF CT Priorities. The NIPF-CT feeds directly into the overall NIPF.

QUESTION 18: As the threat from regional al Qaeda affiliates increases, what is the role of the Director of the NCTC in developing regional counterterrorism strategies? How are those counterterrorism strategies related to broader U.S. policies, particularly in Yemen, the Horn of Africa and the Sahel?

As part of its statutory responsibilities under the IRTPA, NCTC conducts "strategic operational planning for counterterrorism activities, integrating all instruments of national power, including diplomatic, financial, military, intelligence, homeland security, and law enforcement activities within and among agencies." Similarly, NCTC is given the statutory responsibility to "assign roles and responsibilities as part of its strategic operational planning duties." It is my understanding that, consistent with these responsibilities, NCTC conducts regional counterterrorism planning and coordination in support of the President and the National Security Council. With the new National Strategy for Counterterrorism, NCTC will continue to play a key role in this process.

The National Strategy for Counterterrorism outlines a number of areas of focus, including the Arabian Peninsula, East Africa, and the Maghreb and Sahel. As part of its strategic operational planning responsibilities, I expect NCTC to continue to play a key role in the development of strategies that will help to counter the terrorist threats in each of these areas. If confirmed, I look forward to continuing NCTC's vital strategic operational planning responsibilities in support of our nation's CT objectives.

QUESTION 19: What is your view of the proper role of Congress in overseeing the activities of the Directorate of Strategic Operational Planning?

Congress has an important oversight role for all of the NCTC's activities, including those activities undertaken by the DSOP. Pursuant to the IRTPA, the Director of NCTC is given the statutory responsibility to "provide strategic operational plans for the civilian and military counterterrorism efforts of the U.S. Government and for the effective integration of counterterrorism intelligence and operations across agency boundaries, both inside and outside the United States." In this strategic operational planning role, the Director of NCTC reports to the President and DSOP supports the Director by responding to direction from the Executive Office of the President for planning support on CT initiatives. If confirmed as Director of NCTC, I will work closely with Congress and continue to provide to Congress the information it needs to perform its oversight duties.

National Intelligence Manager

QUESTION 20: As the Counterterrorism Mission Manager for the Intelligence Community, the Director of the NCTC identifies intelligence gaps and resource constraints and sets collection and analytic priorities.

- **What is your vision of the Director of the NCTC in the role of mission manager? Should the Director provide broad, strategic guidance, for example by prioritizing emerging regional terrorist threats? Should the Director provide guidance on the allocation of resources with regard to particular CT capabilities and platforms?**

Through my association with the Department of Justice, FBI, and NSA, I have experience in the work of intelligence and law enforcement officials who are directly engaged in the daily tasks of identifying, disrupting and defeating terrorist threats. I view the job of the mission manager, now called a National Intelligence Manager (NIM), to be one of collaboration with community partners to identify gaps and areas where the NIM can facilitate integration and thereby contribute to the counterterrorism community's overall effort. Our priorities and overall strategy are set by the National Strategy for Counterterrorism, the National Intelligence Strategy, and the NIPF. If confirmed, I would serve the DNI as his NIM for CT. In that capacity, I would participate in the development and assessment of these strategic plans and would lead the process that provides quarterly updates to the terrorist topic area under the NIPF. As the NIM, in collaboration with the CT community, I would issue a Unifying Intelligence Strategy that, in effect, sets my understanding of the key CT issues and the initiatives I believe are needed to address them. As the NIM for CT, I would also participate in the development of recommendations to the DNI that serve as the basis for his resource guidance to the community.

- **What is the role of the Director of the NCTC in providing guidance with regard to the allocation of resources among, and within elements of the Intelligence Community?**

Under the Intelligence Reform and Terrorism Prevention Act of 2004, one of the responsibilities of the Director of the NCTC is to advise the DNI on government programs and budgets that support national counterterrorism priorities. I believe it is the Director of the NCTC's job to understand how government resources are allocated against key CT objectives and, through collaboration with the program managers, to understand where there are shortfalls or potential redundancies. If confirmed, I will serve as an advocate for the CT mission in the IC budget build processes and I will provide my recommendations to the DNI.

- **Given resource constraints, how should the Director of the NCTC identify unnecessary or less critical programs and seek to reallocate funding?**

I believe one of the responsibilities of the Director of the NCTC is to provide the DNI with an assessment of the state of our nation's CT efforts, including how our resources are aligned to meet the needs of the CT mission. I recognize that the challenging resource environment we face requires us to ensure that the nation is protected within our resources. If confirmed, this will be one of my priority tasks.

- **What are the most important counterterrorism gaps or shortfalls across the Intelligence Community?**

From my experience with CT issues, I believe we must address:

- A dynamic and adaptive threat that challenges our collectors and analysts.
- The need to sort and connect critical bits of information across disparate data sets and to avoid the potential for information overload.
- Rapid change and proliferation in communications technologies used by terrorists.
- The need to protect the privacy and civil liberties of all Americans and protect intelligence sources and methods, while also ensuring intelligence information is shared responsibly.

If confirmed, I will collaborate with the CT Community to address these issues and advocate for community-wide solutions, as appropriate.

Strategic intelligence

QUESTION 21: In the role of mission manager, the Director of the NCTC is responsible for understanding the full range of customer requirements with regard to counterterrorism. Customers of intelligence are often focused on current threats.

- **What is the role of the Director of the NCTC in balancing the "tyranny of the immediate" with the need to direct resources toward global coverage and strategic warning, as it applies to counterterrorism?**

I believe that the Director of the NCTC, in close partnership with the heads of the CT analytic organizations, plays a critical role in balancing the need to focus on immediate threat issues with the need to maintain a focus on terrorism worldwide, especially with respect to strategic warning. Achieving the proper balance between understanding the immediate threat and forecasting the future unknown terrorist threat is vitally important to protecting against terrorist attacks. This is especially true due to the diversified nature of the threats facing the United States and our partners.

If confirmed, I will work collaboratively with the CT community, through organizations such as the IICT, to ensure we strike the most effective balance between important tactical and strategic priorities. One way of doing so is to use the IICT as a vehicle through which the community can develop appropriate CT priority rankings in the NIPF. If confirmed, I look forward to playing an active role with our partners as we continue to identify and implement the best mechanisms to ensure we adequately address both tactical and strategic CT issues.

- **What priority do you place on the IC's understanding of the strategic context for the terrorist threat? What level and what type of resources should be allocated for collection and analysis on the conditions that create terrorist safe havens and the counterterrorism capabilities of partner nations?**

It is critically important to understand the strategic context of the terrorist threat. The new National Strategy for Counterterrorism outlines a number of these important strategic considerations that inform both our understanding of the terrorist threat and our approach to countering this threat. One strategic consideration, which the National Strategy for Counterterrorism highlights, is the fact that al-Qa'ida and its affiliates and adherents rely on the physical sanctuary of ungoverned or poorly governed territories. The absence of state control in these areas permits terrorists to travel, train, and engage in attack plotting. I believe that recent terrorist incidents, including the November 2008 attacks in Mumbai, India and the attempted airliner bombing on December 25, 2009, demonstrate the dangers emanating from terrorist safe

havens.

As a result, I believe that it is important to have both comprehensive information concerning, and accurate assessments of, terrorist safe havens. If confirmed, I would use my position as the National Intelligence Manager for Counterterrorism to prioritize analysis and collection against terrorist safe havens. I would also seek to identify the most appropriate way to align the community's resources so that NCTC and its partners continue to understand the strategic context for the terrorist threat and in so doing help to enable our customers' missions.

The establishment of NCTC and the deployment of counterterrorism analysts

QUESTION 22: In the early years of NCTC, there were issues related to the co-location of NCTC, Central Intelligence Agency (CIA), and Federal Bureau of Investigation (FBI) counterterrorism analysts and to the proper mix within NCTC of permanent cadre NCTC personnel and detailee personnel from other agencies.

- **Do you believe the issue of co-location of counterterrorism personnel has been appropriately resolved? If not, what changes would you advocate?**

In the early days of NCTC's predecessor organization, the Terrorist Threat Integration Center, the Intelligence Community struggled to identify qualified analysts and planners who were familiar with the counterterrorism mission. In recent years, as I can attest from my time at the NSA, the Intelligence Community—including NCTC—has benefitted from qualified analysts and planners dedicated to the counterterrorism mission. I believe that NCTC has benefitted from the co-location of many of these analysts and planners and, if confirmed, I look forward to further strengthening NCTC's partnerships across the U.S. Government.

- **Do you believe there is now at NCTC the appropriate mix of permanent NCTC analysts and rotational personnel from other IC agencies?**

I believe that NCTC has the appropriate workforce mix at this time. I understand that Congress has supported recent enhancements to the CT workforce at the NCTC and throughout the Intelligence Community. The Center has detailees and assignees from various other departments and agencies, including CIA, FBI, DHS, and NSA. It also has military officers in the joint military duty program. Moreover, the ITACG includes members from the state and local law enforcement community. I can assure you that, if confirmed, I will monitor the NCTC workforce mix to ensure there is the right blend of skills and perspectives.

- **In your opinion, are there enough qualified counterterrorism analysts in the IC to meet the needs of the NCTC and other intelligence agencies?**

It is my understanding that following the failed attack on December 25, 2009, the President tasked the DNI to ensure the Intelligence Community's CT analytic resources were properly aligned with clear lines of responsibilities. As a result, former DNI Blair issued an analytic framework in April 2010 to address roles and responsibilities across the Intelligence Community. He also established a panel to review the IC's performance, and it concluded that CT analysts within the Intelligence Community were appropriately balanced and qualified to cover the threat.

If confirmed, I will work tirelessly to ensure that our CT analytic cadre has access to the best training, the most comprehensive data sets, and the most advanced analytic tools to support the counterterrorism mission.

- **If you do not believe that there are enough qualified counterterrorism analysts within the United States Government, what steps will you take to address this shortage, if you are confirmed as Director?**

If confirmed, I will continue to monitor closely the status of our CT analytic cadre to ensure that it continues to support our customers. If I identify any analytic shortfalls, I will bring it to the attention of the DNI as part of my responsibilities as both the Director of NCTC and the National Intelligence Manager for CT.

Congressional Oversight

QUESTION 23: The Intelligence Reform Act (Section 102A of the National Security Act) provides that the DNI shall ensure compliance with the Constitution and laws of the United States by elements of the IC through the host executive departments that manage the programs and activities that are part of the National Intelligence Program.

- **What are the principal matters to which this obligation relates, and what specific functions of the NCTC are of particular significance with regard to these matters?**

One of the critical responsibilities of the DNI is to ensure compliance by the Intelligence Community with the Constitution and other laws of the United States. The Intelligence Community has the duty to collect, analyze, produce, and disseminate critical intelligence to protect America. NCTC has the additional obligation to conduct strategic operational planning for counterterrorism activities. In carrying out all of its responsibilities, NCTC, like the

Intelligence Community as a whole, must always act in a way that complies with the constitutional and other legal requirements that protect the freedoms and liberties of the American people.

Based on my prior experience, I recognize the value of close involvement by the Offices of General Counsel, Inspectors General, and Civil Liberties Protection Offices in the operations of government, and I intend, if confirmed, to rely heavily on the ODNI General Counsel, the Inspector General, and the Civil Liberties Protection Officer to ensure that the NCTC fulfills its mission in a manner that complies with the Constitution and all applicable laws.

- **What do you understand to be the obligation of the DNI, and the Director of the NCTC in support of the DNI, to keep the congressional intelligence committees fully and currently informed about matters relating to compliance with the Constitution and laws?**

It is my belief, formed by years of experience in government, that congressional oversight is an essential part of our constitutional system of checks and balances. Because most of the activities of the Intelligence Community must remain outside of the public eye, the oversight relationship takes on even greater consequence. It is, therefore, the responsibility of all components of the Intelligence Community, including the ODNI and the NCTC, to be responsive to the congressional oversight process.

Communication, on a regular and continuing basis, is critical for Congress to effectively perform its oversight function. Regular and continuing exchanges of information, in my view, are the best way to work with the Congress to address the threats of today, to be most effective in preventing another terrorist attack and to do so consistent with American laws and values. If confirmed as the Director of NCTC, I will continue to abide by the responsibility to keep Congress fully and currently informed, as I have in my present position.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

JUL 1 1 2011

The Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Madam Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Matthew G. Olsen, who has been nominated by President Obama for the position of Director, National Counterterrorism Center, Office of the Director of National Intelligence.

We have reviewed the report and have also obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely

[SIGNATURE]

Don W. Fox
Acting Director

Enclosures

7 July 2011

Christopher Thuma
Designated Agency Ethics Official
Office of the Director of National Intelligence
2B-200, LX2
Washington, DC 20511

Dear Mr. Thuma:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest if confirmed for the position of Director, National Counterterrorism Center, Office of the Director of National Intelligence.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: my spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as an officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my position with Georgetown University. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which Georgetown University is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

If I rely on a de minimis exemption under 5 C.F.R. § 2640.202 with regard to any of my financial interests, I will monitor the value of those interests. If the aggregate value of any interest(s) affected by a particular matter increases and exceeds the de minimis threshold, I will not participate in the particular matter, unless I first obtain a written waiver under 18 U.S.C. § 208(b)(1).

Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Sincerely,

[SIGNATURE]
Matthew G. Olsen

OGE Form 278 (Rev. 09/2010)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved:
OMB No. 3209 - 0001

Date of Appointment, Candidacy, Election, or Nomination (Month, Day, Year)	Reporting Status (Check Appropriate Boxes)	Incumbent	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate	Termination Filer	Termination Date (If Applicable) (Month, Day, Year)
		☐		☒	☐	

	Last Name	First Name and Middle Initial
Reporting Individual's Name	Olsen	Matthew G.
Position for Which Filing	Title of Position	Department or Agency (If Applicable)
	Director	National Counterterrorism Center / ODNI
Location of Present Office (for forwarding address)	Address (Number, Street, City, State, and ZIP Code)	Telephone No. (Include Area Code)
	9800 Savage Road, Suite 6250, Fort Meade, Maryland, 20755	301-688-6705
Positions Held with the Federal Government during the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held General Counsel, National Security Agency, July 2010 to present Associate Deputy Attorney General, March 2010 to July 2010	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
	Select Committee on Intelligence	☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	[SIGNATURE]	July 7, 2011
Other Review (If desired by agency)	Signature of Other Reviewer	Date (Month, Day, Year)
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date (Month, Day, Year)
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).	[SIGNATURE]	July 7, 2011
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)
	[SIGNATURE]	7/11/11

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Supersedes SF 278 Editions.

Fee for Late Filing

Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Agency Use Only

OGE Use Only

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Reporting Individual's Name: Olsen, Matthew G.

SCHEDULE A

Page Number: 2 of

Assets and Income — BLOCK A

For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding $1,000 at the close of the reporting period, or which generated more than $200 in income during the reporting period, together with such income.

For yourself, also report the source and actual amount of earned income exceeding $200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than $1,000 (except report the actual amount of any honoraria over $200 of your spouse).

None ☐

Valuation of Assets at close of reporting period — BLOCK B

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. — BLOCK C

		Valuation of Assets (BLOCK B)														Type (BLOCK C)				Amount (BLOCK C)											
		None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
Examples	Central Airlines Common				x												x						x								
	Doe Jones & Smith, Hometown, State			x																											Law Partnership Income $130,000	
	Kempstone Equity Fund					x								x										x								
	IRA: Heartland 500 Index Fund							x						x											x							
1	Justice Federal Credit Union checking account		x																		x											
2	Wells Fargo Money Market account - Cash			x																	x											
3	American Funds New Perspective 529C Plan - Virginia College Savings Plan			x										x							x											
4	American Funds Growth America 529C Plan - Virginia College Savings Plan			x										x							x											
5	General American Universal Life Insurance Policy			x													x					x										
6	Fidelity Blue Chip Growth UTMA Fund		x											x							x											

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name: Olsen, Matthew G.

SCHEDULE A continued
(Use only if needed)

Page Number: 3 of

Assets and Income

Valuation of Assets at close of reporting period — BLOCK B

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.

BLOCK C

BLOCK A	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Type: Dividends	Type: Rent and Royalties	Type: Interest	Type: Capital Gains	Amount: None (or less than $201)	Amount: $201 - $1,000	Amount: $1,001 - $2,500	Amount: $2,501 - $5,000	Amount: $5,001 - $15,000	Amount: $15,001 - $50,000	Amount: $50,001 - $100,000	Amount: $100,001 - $1,000,000	Amount: Over $1,000,000*	Amount: $1,000,001 - $5,000,000	Amount: Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Mineral rights to 53 acres of property in Williams County, ND		X																		X												
2 Georgetown University Law Center																															Salary - $1045	
3 AXA Equitable: EQ/International Cor Plus			X										X							X												
4 AXA Equitable: EQ/Capital Guardian Research				X									X							X												
5																																	
6 Wells Fargo IRA:																																	
7 William Blair FDS Small Cap Growth F CL I (WBSIX)	X												X							X													
8 Buffalo Small Cap FD (BUFSX)	X												X							X												
9 Goldman Sachs TR FINL Square MM FD INSTL Class (FSMXX)		X											X							X												

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Reporting Individual's Name: Olsen, Matthew G.

SCHEDULE A continued
(Use only if needed)

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Assets and Income

BLOCK A

BLOCK B — Valuation of Assets at close of reporting period

BLOCK C — Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.

	BLOCK A	BLOCK B: None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	BLOCK C: Type — Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	Amount: None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1	Harbor Funt INTL FD INSTL Class (HAINX)		X											X							X												
2	Hotchkis & Wiley FDS Diversified Value Fund I (HWCIX)		X											X							X												
3	Janus IVT FD FLexible BD FD Class I (JFLEX)		X											X							X												
4	Artio Global INVT FDS Intl Equity FD II CL I (JETIX)		X											X							X												
5	Lazard FDS Inc Emerging Mkts PORT INSTL SHS (LZEMX)		X											X							X												
6	MFS SER TR I Value FD CL ME(IX)		X											X							X												
7	Oppenheimer Intl Growth Fund FD CL Y SHS (OIGYX)		X											X							X												
8	Pimco FDS PAC Invt Mgmt SER Total Return FD Instl Cl (PTTRX)		X											X							X												
9	Pimco FDS PAC INVT MGMT SER-Com Real RTN STRAT FD Instl CL (PCRIX)		X											X							X												

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Reporting Individual's Name: Olsen, Matthew G.

SCHEDULE A continued
(Use only if needed)

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Assets and Income	Valuation of Assets at close of reporting period														Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																								
	BLOCK B														BLOCK C																								
															Type																								
BLOCK A	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Pioneer Fund CI-Y (PYODX)		X											X							X																
2 Rainier Funds Mid Cap Equity Portfolio (RIMMX)		X											X							X																
3 T Rowe Price Real Est Fund Inc (TRREX)	X												X							X																
4 Sentinel Mut Funds Small Co Class I (SIGWX)	X												X							X																
5 Stratton Fds Inc Small Cap Value Fund (STSCX)		X											X							X																
6 Touchstone Instl Fds TR Sands Cap Instl Growth (CISGX)		X											X							X																
7 Victory Portfolios Small Co Oppty FD CL I SHS (VSOIX)		X											X							X																
8 WT Mut Fd CRM Mid Cap Value FD INSTL CL (CRIMX)		X											X							X																
9 Wells Fargo Advantage Endeavor FD (WFCIX)		X											X							X																

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
Olsen, Matthew G.		6 of

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.

#	Assets and Income (BLOCK A)	Valuation of Assets at close of reporting period (BLOCK B): None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Income Type (BLOCK C): Dividends	Rent and Royalties	Interest	Capital Gains	Income Amount: None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1																																		
2	Wells Fargo IRA (Spouse)																																	
3	Abbot Labs		X														X					X												
4	American Tow Copr CLA A		X																		X													
5	Apple Inc		X																		X													
6	Cisco Systems		X																		X													
7	Coca Cola		X																		X													
8	Colgate Palmolive		X														X					X												
9	Cons Tomako Land Co		X																		X													

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Reporting Individual's Name: Olsen, Matthew G.

SCHEDULE A continued
(Use only if needed)

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Assets and Income

BLOCK A

Valuation of Assets at close of reporting period — **BLOCK B**

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. — **BLOCK C**

	BLOCK A	Valuation of Assets at close of reporting period (BLOCK B)												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. (BLOCK C)													
		None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Type: Dividends	Type: Rent and Royalties	Type: Interest	Type: Capital Gains	Amount: None (or less than $201)	Amount: $201 - $1,000	Amount: $1,001 - $2,500	Amount: $2,501 - $5,000	Amount: $5,001 - $15,000	Amount: $15,001 - $50,000	Amount: $50,001 - $100,000	Amount: $100,001 - $1,000,000	Amount: Over $1,000,000*	Amount: $1,000,001 - $5,000,000	Amount: Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1	CVS Caremark Corp		X																		X												
2	Everest RE Group LTD Bermuda RE		X																		X												
3	General Electric Company		X														X					X											
4	Gilead Science Inc		X																		X												
5	Goldman Sachs Group		X																		X												
6	Google Inc Cl A		X																		X												
7	Intel Corp		X																		X												
8	International Business Machines		X																		X												
9	JP Morgan Chase & Co		X																		X												

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Reporting Individual's Name: Olsen, Matthew G.

SCHEDULE A continued
(Use only if needed)

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Assets and Income

Valuation of Assets at close of reporting period

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.

BLOCK A	BLOCK B													BLOCK C														
														Type				Amount										
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 McDonalds Corp		X													X					X										
2 Medtronic Inc		X																	X											
3 Microsoft Corp		X																	X											
4 Proctor & Gamble Co		X														X				X										
5 Research in Motion		X																	X											
6 SIGMA Designs Inc		X																	X											
7 United Health Group		X																	X											
8 Well Point Inc		X																	X											
9 Gladstone Investment Corp		X														X				X										

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate

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Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

	Identification of Assets	Transaction Type (x)			Date (Mo., Day, Yr.)	Amount of Transaction (x)												
		Purchase	Sale	Exchange		$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Certificate of divestiture
	Example: Central Airlines Common	x			2/1/99			x									
1																	
2																	
3																	
4																	
5																	

*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $335 and (2) travel-related cash reimbursements received from one source totaling more than $335. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. **Exclude** anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth $134 or less. See instructions for other exclusions.

None ☐

	Source (Name and Address)	Brief Description	Value
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	$350
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Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at **any time** during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. **Exclude** a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None ☒

	Creditors (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (x) $10,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000
Examples	First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.			x								
	John Jones, Washington, DC	Promissory note	1999	10%	on demand					x						
1																
2																
3																
4																
5																

*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None ☒

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Doe Jones & Smith, Hometown, State	7/85
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Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	Georgetown University Law Center	Law School	Adjunct Professor	01/2010	present
2					
3					
4					
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6					

Part II: Compensation in Excess of $5,000 Paid by One Source

Do not complete this part if you are an incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

None ☒

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1		
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