**W. Ron Allen, Treasurer**
**National Congress of American Indians**
**Testimony**

**Oversight Hearing**
**On Indian Tribes and the Federal Election Campaign Act**
**February 8, 2006**
**Senate Committee on Indian Affairs**

Good morning Chairman McCain, Vice-Chairman Dorgan and members of the Committee. My name is W. Ron Allen, and I am the Treasurer and former President of the National Congress of American Indians and Chairman of the Jamestown S'Klallam Tribe in Washington State.

As you know, NCAI is the oldest and largest American Indian organization in the United States. I sit before you today representing over 275 tribal governments and hundreds of thousands of American Indian and Alaska Native people. Since NCAI was founded in 1944, we have fought to preserve the rights of Indian tribes and Indian people to participate fully in the political system. NCAI was instrumental, for example in securing the right to vote for Indian people in Arizona in 1948.[1] We remain as dedicated to protecting our right to participate today as we were then.

Thank you for giving me the opportunity to testify before you today. In the past few weeks, there have been several news articles riddled with factual inaccuracies and distortions about the participation of Indian tribes in the political system. I would like to thank the Federal Election Commission for the advisory it issued last week clarifying how tribes are treated under the Federal Election Campaign Act,[2] and I am happy to have the opportunity today to help set the record straight.

First, it is important to note what is driving the intense focus on the part of the media and some Members of Congress on this issue at this moment. Last year, this Committee's investigations revealed that Jack Abramoff and his associates defrauded, lied to, and personally disparaged his tribal clients. We want to thank you Mr. Chairman and Vice Chairman Dorgan for helping us bring these criminals to justice.

Other investigations showed that Abramoff violated the trust of not only Indian tribes, but also public officials, banks and major corporations, charitable organizations, a Federal territory, his own law firm and the public. He pled guilty to conspiracy to commit mail and wire fraud, tax evasion, and bribery and fraud of public officials. However, no Indian tribe, or other client, is accused of wrongdoing whatsoever.

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[1] Inter Tribal Council of Arizona, "The History of Indian Voting in Arizona," *available at* http://www.itcaonline.com/event001/historyofindianvotinginaz.pdf.
[2] Federal Election Commission, "Advisory on Indian Tribes," issued February 2, 2006 (attached).

None of the campaign finance related proposals that have been discussed recently in the media would have prevented the crime committed by Mr. Abramoff against his tribal clients. This is a distraction that prevents constructive reform in areas where it is needed and that is preventing us from talking about the real issues facing Indian Country.

With that said, I would like to share a few relevant facts that put tribal campaign donations in perspective:

- In the 2004 election cycle, tribes made 0.3% of the total federal campaign donations ($8.6 million of the nearly $3 billion in total donations), yet Indians represent about 4% of the total population—we are underrepresented in our campaign contributions.

- Another way to say this is that the $8.6 million given by tribes works out to about $2 per Indian in total contributions made. In contrast, if the total amount of contributions made in the 2004 cycle had been distributed evenly across the U.S. population as a whole, it would have been over $10 per person.

- In 2004, the South Dakota Senate race alone cost $36 million.[3] The $8.4 million given by tribes was for all federal races combined.

- Many industries are making significantly larger campaign contributions. The real estate industry, for example, donated over $95 million in the 2004 cycle, while lawyers and law firms gave more than $182 million. Contributions from Leadership PACs totaled $32 million in 2004. [4] Tribal contributions are miniscule in comparison.

- Like MANY others entities that are classified as "persons" under the FECA, tribes are limited to donations of $2100 per candidate per election cycle. The suggestion that tribes are flooding the system with unlimited campaign donations is simply not borne out by the facts. We are not buying the system $2100 at a time.

- Tribal donations are legal and transparent. I am aware of no action taken by the FEC that would suggest that tribes are violating the campaign finance laws.

Our adversaries have attempted to paint a picture of "newly-rich tribes buying influence." But this image is not consistent with the facts. And, it is important to remember that there are higher principles at stake here. This is about the fundamental right of Indian tribes to participate equally in the political process in all of the ways that are available to them.

## Indian Tribes in the Political Process

[3] Data from the Center for Responsive Politics website, www.opensecrets.org.
[4] Data from the Center for Responsive Politics website, www.opensecrets.org.

Whenever we are considering how federal policy should treat Indian tribes, historical context is important. I would like to take a few moments to talk about the place that tribes occupy in the federal system and the history of Indian participation in the political process.

***Status of Tribal Governments***

The laws of the United States recognize Indian tribes as "domestic dependent nations."[5] The Constitution, the Supreme Court, and numerous Acts of Congress affirm the tribal right to self-governance and the unique status of Indian tribes in the federal system. Although tribal members are citizens of the states in which they reside, the tribe itself is not subject to the sovereign authority of the state or states with whom it overlaps, but rather has its own sovereignty. At the same time, the sovereign authority of both state governments and tribes is subordinate to federal authority. The structure of the federal government, however, is intended to give state governments a voice in the federal system in a way that it does not for tribal governments. For example, the Constitution provides for direct representation of states in Congress, but there is no similar direct representation for Indian tribes. As a result, despite the fact that there are approximately as many Indians in the United States as the population of Kentucky (the 26th most populous state), we have no guaranteed representation in Congress.

In addition, the Constitution limits the authority of Congress vis-à-vis the state governments, but the Supreme Court has interpreted the Indian Commerce Clause as giving Congress plenary power over Indian affairs. As a consequence, tribes have a more limited ability to participate in federal governance than states, and at the same time, have more at stake. Some have argued that Congress' expansive authority over Indian tribes, coupled with the structural lack of representation of tribes in the federal governance structure, runs afoul of the fundamental democratic principles upon which this country was founded.[6] Be that what it may, structurally, tribes are dependent on the good-will of federal officeholders to protect their rights and interests. This is a precarious position.

Frequently, the interests of tribes and states coincide. At times, however, conflicts arise and federal policy-makers find themselves in the position of weighing the interests of one against the other. The federal trust responsibility and the government-to-government relationship are the fundamental principles that are intended to protect the interests of tribal governments in these situations. For this reason, it is critically important to Indian tribes and Indian people that those individuals elected to federal office are committed to these principles. Tribal members have a strong interest in participating in the democratic process and supporting candidates who they believe respect the relationship of tribes to the federal government. Historically, the avenues available to tribes to exercise this support have been limited.

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[5] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831).
[6] *See, e.g.*, Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002).

***History of Disenfranchisement***

Indian people have had to fight hard to secure the right to participate in the political process. We were the last group of people in our country to be granted the right to vote--it happened within living memory of some of our citizens.

Although African Americans were given the right to vote with the passage of the 15th Amendment in 1870, Indian people were not made citizens of the United States until 1924. And even after passage of the Indian Citizenship Act, it took nearly 40 years for all 50 states to give American Indians and Alaska Natives the right to vote. For years, a number of states denied Indians the right to vote because they were "under guardianship." In other places, Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties. New Mexico was the last State to remove all express legal impediments to voting for American Indians in 1962, three years before the passage of the Voting Rights Act.

In addition to this disenfranchisement as a matter of law, American Indians and Alaska Natives have experienced many of the discriminatory tactics that kept African-Americans in the South from exercising the franchise, including poll taxes, literacy tests, and intimidation. Native people continue to face ongoing struggles when trying to exercise their right to vote today. For example, many American Indian and Alaska Native people live in rural reservation communities and have to travel long distances to get to their polling places, which are more conveniently located for non-Indian voters. In addition, vote dilution continues to be a problem for many Native communities, and large numbers of Native voters continue to report intimidation and harassment at the polls. Overt hostility to Indians voting, unfortunately, also persists in some areas. For example, in 2002 a South Dakota State legislator stated on the floor of the Senate that he would be "leading the charge… to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty."[7]

And this disenfranchisement has had real consequences. History has shown that treaties and the federal trust responsibility are not always sufficient to protect Indian tribes from misguided or even hostile policies enacted by Congress. In the 1830's thousands of Cherokee citizens in Georgia signed a petition asking the federal government to protect their homes. But these people could not vote, and they were forced from their homeland. We will never know if the Cherokee's long walk on the Trail of Tears could have been prevented if the 80,000 Indians who were forced from their homelands and driven west at bayonet point after the passage of the Indian Removal Act had been able to vote in the 1830's. Likewise, in the 1880's the Dawes Act gave away two thirds of reservation land, and I believe it would have been much more difficult to pass if tribes had access to all the levers of power in our system of government at that time.

[7] *Boneshirt v. Hazeltine*, 200 F.Supp.2d 987, 1046 (quoting Rep. John Teupel).

During each session of Congress literally hundreds of bills are introduced that impact tribal governments and Indian people. An entire section of the United States Code is devoted to laws that impact Indian tribes. Tribal leaders have an obligation to utilize every legal means available to them to make sure that the individuals serving in Congress understand Indian issues, protect tribal rights, and live up to the obligations under treaties and the federal trust responsibility. With so much at stake, the suggestion that the federal election laws should be amended to limit the participation of tribes in the political process is troubling.

Indian tribes realize that the best way to protect our rights is through participation in the political system. The very existence of the National Congress of American Indians, which was founded for the purpose of protecting and promoting the rights of Indian tribes during the Termination Era, is evidence of our recognition of this reality. Although years of disenfranchisement has caused voter participation rates to be low in Indian communities historically, this is beginning to change. Indian people are voting in greater and greater numbers and even running and winning elections for local, state, and federal office. In 1982 in South Dakota, only 9.9% of Indians were registered to vote. By the 2002 election, turnout on many reservations had increased dramatically and the Indian vote has made a difference in several close federal elections. Tribal members have become more politically active in recent years and one of the important ways that tribes participate is by supporting the candidates of their choice in federal elections.

In addition to encouraging tribal members to turn out to vote, one way tribes can choose to demonstrate this support is through campaign contributions. The Supreme Court has recognized that the First Amendment protects the fundamental right to political association in the form of campaign contributions. According to the Court, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals."[8] So long as the system continues to include financial support of the candidate of one's choice as a legitimate form of political expression, it is vital that Indian tribes have the option of participating on an equal footing. And, yes, as our financial resources have increased, so have our donations to the campaigns of the candidates of our choice.

The very nature and function of a tribal government necessitates that it speak for the members and resources of the tribe in a unique way. Allowing tribal campaign donations makes sense for tribal governments and their citizens and is consistent with the unique relationship of Indian tribes to the federal government. Tribes represent a class of people who have been constitutionally unrepresented, and whose only recourse is through the wider political process.

**Addressing Specific Concerns**

[8] *Buckley v. Valeo*, U.S. 1 (197_).

I'd like to turn now to some of the specific questions and concerns that have been raised about the way that Indian tribes are treated in the campaign finance system.

**Aggregate Caps**

The purpose of the aggregate cap when it was first applied to individuals was to prevent affluent individuals from having a disparate electoral impact. This cap was deliberately not applied to any group of individuals in order to foster and encourage collective action. Tribes, by definition, are groups of individuals and therefore, aggregate caps have never been applied to tribes, or to **any other group** representing more than one individual.

Because there has been so much confusion about this, let me say it again: There is no entity or group that is subject to an aggregate cap under the current campaign finance laws. Partnerships, law firms, limited liability corporations, political action committees -- none of them is subject to the aggregate cap. They can all make contributions to an unlimited number of candidates, and they do. Given this reality, proposals that suggest that aggregate caps should be applied only to tribes are both unfair and unnecessary.

**Disclosure**

Some have asked why tribes are not required to disclose their campaign contributions. First, it is important to remember that all campaign contributions made by tribes are disclosed and information about tribal campaign contributions is publicly available. For a number of reasons, however, the policy decision has been made that in the case of tribal contributions, the administrative burden of disclosure rests on the recipient of the donation rather than on the donor. This is also true for donations made by other unincorporated groups and individuals. Political Action Committees (PACs) are the exception. Because PACs are formed for the express purpose of engaging in political activity, the burden to disclose contributions falls on the PAC as well as on the recipient of a PAC contribution. In the case of tribal governments, placing the burden on the recipient rather than on the tribe may be the best way to ensure full transparency while still respecting the right of the tribe, as a sovereign government, to be free from unnecessary federal regulation.[9]

**Why the General Revenue Fund and not PACs?**

Some critics have asked why Indian tribes are permitted to make campaign contributions from their general revenue fund or why tribes are not required to form PACs and raise money from individual tribal members. This question is usually raised by those concerned about revenue generated from what they consider to be a commercial activity.

[9] "If the purpose of the [California law requiring disclosure of campaign contributions] is to ensure that voters are not misled in the election process by the hidden interests of a candidate or the invisible supporters of legislation, the source of the disclosure, whether tribe or candidate, is irrelevant. That the tribes themselves are not required to provide disclosures does not destroy these purposes; the dual disclosure requirements provide that all financial contributors to a candidate's campaign are disclosed by the candidate." Cameron Reese, *Tribal Immunity from California's Campaign Contribution Disclosure Requirements*, 2004 B.Y.U. L. Rev 793 (2004).

First, PACs are not a good cultural fit for Indian country. The purpose of PACs is to encourage individuals with common interests to pool their resources and act collectively. In many ways, this is what the tribal government already does. Historically and culturally, resources are held collectively with the tribal government, which has a responsibility to provide for the best interests of the community.[10] Tribal members rely on their tribal governments to represent the interests of the tribe in interactions with the federal government. This is one reason why voter turnout has historically been low in Indian country. Tribal governments making donations on behalf of the tribe and its members is consistent with the relationship between a tribal government and its members.

In addition, treating tribes as corporations, as has been suggested in a bill currently pending in the House (HR 4696), is inconsistent with the status of tribes in the federal system. Tribes are constitutionally-recognized sovereigns with whom the government has a trust responsibility. The same cannot be said of corporations.

All governments, including Indian tribes, raise their revenue from a variety of sources. Many governments raise a large portion of their revenues through various forms of taxation: property, income, sales, etc. Other governmental revenue sources frequently include fees for services such as hospital and education fees or parks, income from real estate, fees and licenses, return on investments, or lottery income. Tribal governments, however, have a limited tax base because of the trust status of Indian land and the very low incomes of most tribal members. Unlike corporations, tribal business ventures are not privately-owned entities nor are they for profit. Rather income from tribal businesses generates governmental revenue to be used for the benefit of all tribal citizens.

Requiring tribes to form PACs would also likely have the practical impact of severely limiting the ability of tribes to support the candidates of their choice in a federal election. Real per-capita income of Indians living on reservations is $8000, still less than half of the national average. In many of the poorer tribes, tribal members simply do not have the resources to make individual campaign contributions.

## Conclusion

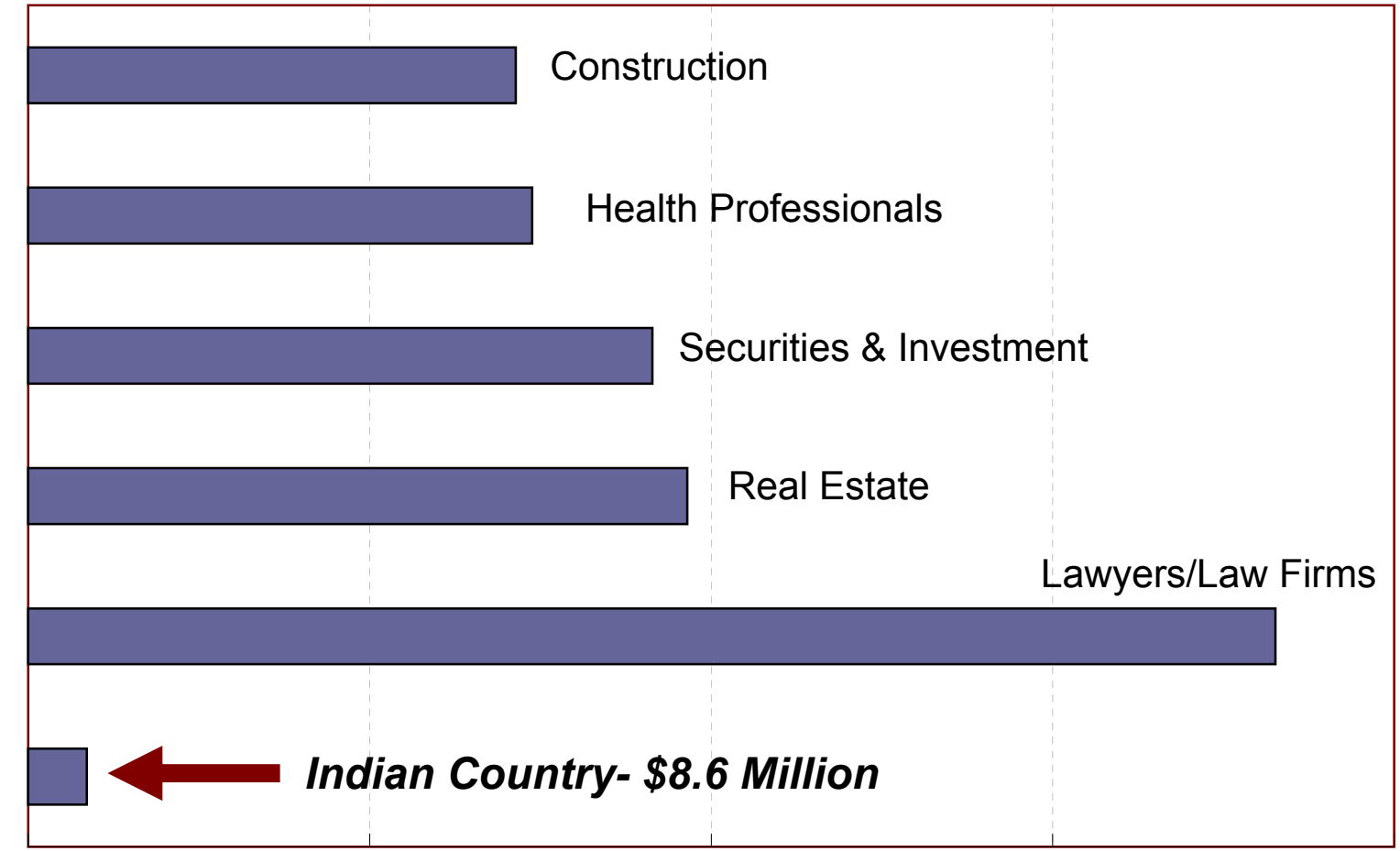
In closing, there is still tremendous need for many of our rural, remote tribes who are faced with limited opportunities for economic development, profound health care challenges, and persistently high unemployment rates. As Chairman Michael B. Jandreau of the Lower Brule Tribe in South Dakota wrote recently in the Wall Street Journal: "The world is changing at a rapid rate. This change, however, is bypassing the Indian reservations of America." Despite this reality, we are not here today talking about how to improve the lives of Indian people and this is not the story that has appeared on the front

[10] COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, 2005 edition, pg. 966 (stating that "[t]ribal property is a form of ownership in common" and "tribal property interests are held in common for the benfit of all living members of the tribe.").

page of major newspapers. Instead, as a result of a lobbying scandal where a felon defrauded several tribal clients, some Members of Congress are calling for a change in campaign finance laws that does not relate to the lobbying abuses, but does relate to how tribes will be permitted to participate in the electoral process, or whether we will in effect be disenfranchised again.

Let me make clear that Indian tribes do not oppose reforms that will increase the integrity of elections and lobbying in the United States government. And I assure you, that as we always have, we will carefully comply with whatever system this Congress and the FEC devise for the financing of campaigns. I urge you, however, to look carefully at how tribes are currently treated under the law, how tribes are participating in the election process, and the unique place that tribes occupy in the federal system. I think you will find that the current system is functional, fair, and allows tribes to participate on equal footing in the political process. As you move forward, we hope to work with you to devise reform proposals that treat everyone in the system equitably.

# 2004 Campaign Contributions



# PROTECT LAW-ABIDING CITIZENS!

## DO NOT PUNISH NATIVE AMERICANS DEFRAUDED BY CORRUPT DC LOBBYISTS

Dear Colleague:

I would like to bring to your attention the attached letter by W. Ron Allen, Chairman of the Jamestown S'klallam Tribe and former president of the National Congress of American Indians. This letter appeared in *Roll Call* on January 30, 2006.

As you know, the Jack Abramoff scandal has heightened everyone's awareness of the need for lobbying reform, and rightfully so. The crimes Mr. Abramoff and his associates have admitted to in federal court are disgraceful and repugnant to us all.

One thing that has been lost in the coverage of this scandal has been the fact that a few Native American tribes were abused and misled by the very people they trusted to represent their interests here in Washington. It is very important to remember that no one has ever accused any tribe or tribal member of breaking the law or acting in an inappropriate manner.

Unfortunately, some proposals have emerged that have the effect of punishing tribes for the misdeeds of Washington, D.C. lobbyists. These proposals seek to either severely limit or eliminate altogether the ability of tribes to contribute to federal candidates and committees.

It is absolutely unjust to strip tribes of their ability to exercise their political rights through campaign contributions. As stated by Mr. Allen, "we were the last group of people in our country to be given the right to vote--it happened within living memory of some of our oldest citizens. The very nature and function of a tribal government necessitates that it speak for the members and property of the tribe in a unique way. That should not be overridden because of the illegal actions of a corrupt lobbyist or on the basis of factually inaccurate information." One way tribes have historically legally exercised this right is through contributions made from their general treasury.

The Federal Election Campaign Act of 1971 (FECA) defined both a "person" and an "individual" for regulating campaign contributions. A "person" includes corporations, unions, or "any other organization or group of persons." An "individual," not being defined in the act, holds the meaning as constituted in the dictionary. Based on the law, an "individual" is subject to the aggregate limit and a "person" is not. Consistent with the fact that a tribe is not considered an "individual" because a tribe is inherently not an individual, the Federal Elections Commission released an advisory opinion in 2000 stating a Native American tribe falls under the definition of a "person" as established in FECA, and therefore is not subject to the aggregate limit.

Unfortunately, a misperception has arisen that because tribes are not subject to an aggregate limit, they are taking advantage of some sort of loophole in the system. This is absolutely incorrect. First, we must remember that tribes have been operating within the law as established and intended by Congress. Secondly, no one has ever accused any tribe or tribal member of breaking the law or acting in an inappropriate manner. Thirdly, tribes are not the only unincorporated association or organization not subject to the aggregate contribution limit for individuals. Other examples include community homeowner associations, agricultural

cooperatives, and limited liability corporations. And lastly, it should be noted that tribes contributed a minute 0.3% of the total campaign contributions made in 2004.

As we move forward with lobbying reform, we must work in a bipartisan fashion to protect Native Americans and their full rights to participate in the democratic process. It is the duty of Congress to protect law-abiding citizens, and not attack them because of an inaccurate view that they have somehow taken advantage of the law. I respectfully call on members of Congress to work in concert to protect tribes who have done no wrong and yet still face the threat of being stripped of some of their political rights.

Sincerely,

Tom Cole
Member of Congress

# Letter to the Editor in Roll Call

January 30, 2006

I read, with some alarm, Cleta Mitchell's Jan. 23 Guest Observer, "Close the Tribal Loophole in McCain-Feingold," regarding the aggregate contribution caps as applied to American Indian tribes. As the tribal chairman of the Jamestown S'klallam Tribe, I followed with some concern the scandal surrounding Jack Abramoff and Michael Scanlon. It outraged me, the entire American Indian and Alaska Native community, and many other Americans.

I was heartened when I saw the concrete steps that the Justice Department took to address this issue and the proper oversight conducted by Sen. John McCain's Indian Affairs Committee. However, I am genuinely mystified by what I am now witnessing. In response to the actions of corrupt lobbyists, Mitchell suggests that Congress should strip away tribal First Amendment rights.

Indian tribes were not responsible for Abramoff's illegal actions and have not been accused of any wrongdoing in the scandal. So, rather than blaming the tribes, let's put the blame where it counts, on Abramoff and Scanlon, two self-confessed felons. It amazes me that the basis of their confessions is now used to justify punishing those who were defrauded.

Mitchell is right; aggregate caps have never applied to any tribal nation, nor was it ever intended that they should. Just like they do not apply to political action committees, such as the one operated by Mitchell's law firm. When the Federal Election Campaign Act of 1971 was amended in 1974 to create aggregate caps, Congress chose not to apply these caps to the tribes. Nor did Congress apply them to states (a sovereign entity), localities (a sovereign entity), certain limited liability corporations, agriculture cooperatives, community homeowners associations and other unincorporated associations.

Is this preferential treatment? Is this a McCain-Feingold loophole? I think not. It was the way the law was written. The purpose of the aggregate cap was to prevent affluent individuals from having a disparate electoral impact. But tribes are not individuals and the simple reason that tribes should not be covered by the aggregate caps is that they are different.

Inherently, tribes are not individuals, we are governments that occupy a unique place in the federal system. To compare tribes to foreign countries as if both were equivalent sovereign entities, as Mitchell does, is an assault on reason. Everyone knows that the tribes are inherently American. In fact, they pre-date the settlement of the United States. Insofar as they are sovereign, tribes and their citizens are also American. Tribes represent a class of people who have been constitutionally unrepresented, and whose only recourse is through the wider political process.

American Indians and Alaska Natives are proud to be citizens of the United States and we guard our right to express ourselves and to participate in elections. We were the last group of people in our country to be given the right to vote--it happened within living memory of some of our oldest citizens. The very nature and function of a tribal government necessitates that it speak for the members and property of the tribe in a unique way. That should not be overridden because of the illegal actions of a corrupt lobbyist or on the basis of factually inaccurate information.

If it were a different time in our country, I would consider this situation quite differently. One would assume discrimination as a root motive. I don't believe that to be the case. However, when American Indians and Alaska Natives are coming into their own for the very first time, it's hard not to at least consider this possibility when the first reaction is to restrict our First Amendment rights on the basis of inaccurate information. Using the lies and deceits of corrupt Washington lobbyists as a smokescreen for unjustly stripping tribes and their members of their ability to be fully enfranchised citizens of this country... is a disservice to us all.

W. Ron Allen
*Chairman*
*Jamestown S'klallam Tribe*
*Former president*
*National Congress of American Indians*