



**Testimony of Lawrence Noble
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**Oversight Hearing Before the
Senate Committee on Indian Affairs
on
Indian Tribes and the Federal Election Campaign Act
February 8, 2006**

I. Introduction

Mr. Chairman, Mr. Vice-Chairman and members of the Committee, my name is Larry Noble. I am executive director and general counsel of the Center for Responsive Politics, a non-partisan, non-profit research organization that studies money in politics and its impact on elections and public policy. I am also an Adjunct Professor at George Washington University Law School, where I teach campaign finance law. Prior to joining the Center in 2001, I was general counsel of the Federal Election Commission for 13 years. I appreciate the invitation to address the committee today on the regulation of Indian tribes under the Federal election campaign finance laws.

The Center for Responsive Politics was founded in 1983 by two U.S. Senators who wanted to make Congress more responsive to the public, Democrat Frank Church of Idaho and Republican Hugh Scott of Pennsylvania. As part of its mandate, the Center began to examine the relationship between money and politics during the 1984 presidential elections, when it first studied contribution patterns to Federal candidates. Since 1989, we have systematically monitored contributions to Federal candidates and political parties, both from political action committees and from individuals. Today, we publish the results of our work on our award-winning Web site, *OpenSecrets.org*. A *New York Times* editorial referred to the Center as “a research group dedicatedly nonpartisan in publicizing the power of money in politics.”

The reason for our existence is simple: to inform citizens about who’s paying for Federal elections and who is in a position to exercise influence over the elected officials who represent the public in our nation’s capital. It is with this mission in mind that I offer these comments.

We are now in the midst of a potentially far-reaching influence-buying scandal that was, in large part, triggered by the activities of lobbyist Jack Abramoff and his Indian tribe clients. This, in turn, has resulted in intense interest in the political giving of Indian tribes. As I will discuss in a few moments, there are a number of ways to count tribal political giving. But, it is safe to say that the total amount of money contributed to Federal candidates, political parties and leadership PACs since 1989 by Indian tribes, their political action committees and individuals working for the tribes—almost \$30 million according to our latest count—has surprised many. This has led to discussion of what is now being called a “loophole” in the Federal Election Campaign Act (FECA) that allows the tribes to avoid the overall aggregate limit on what an individual can contribute in an election cycle to Federal political parties, candidates and other committees. As always in these situations, there is a fair amount of confusion and some misinformation about the law and its impact.

As a research group, the Center does not generally endorse or propose legislative changes. I offer my testimony today with the goal of trying to explain the legal landscape and the facts surrounding the amount of money Indian tribes contribute to Federal elections.

II. The Application of FECA to Indian Tribes

a. Contribution Limits

The best way to begin is to examine the campaign finance law as it has been applied to unincorporated Indian tribes. FECA established a campaign finance system involving disclosure, limits and source prohibitions on contributions to influence Federal elections. In general, Federal contributions must be disclosed, certain entities are prohibited from giving, and those who can give are subject to limits on how much they can give. Those who cannot give directly in Federal elections include corporations, labor unions and Federal contractors. However, even these entities can establish political action committees that can solicit contributions from those who are permitted to give. These committees can, in turn, make contributions to candidates and political parties.¹

Those who can give are subject to a variety of contribution limits. For the 2006 cycle, a person may now contribute up to \$2,100 per election to a Federal candidate, \$5,000 per year to a political action committee (PAC), \$10,000 per year to the Federal accounts of state party committees and \$26,700 to national party committees. In addition, there is an overall aggregate limit of \$101,400 on the total amount that an individual can give over a two-year election cycle.

As the law is now written and interpreted, Indian tribes are subject to each of these limits, *except* the overall aggregate limit. This means that an Indian tribe can give,

¹ Foreign nationals are prohibited from giving in any U.S. election, and foreign national corporations cannot establish PACs. U.S. subsidiaries of foreign national corporations may establish PACs under certain conditions.

in the aggregate, hundreds of thousands of dollars to Federal candidates, political parties and committees in a two-year cycle. For example, in the 2004 cycle, when the aggregate cycle limit was \$95,000, the Morongo Band of Mission Indians gave in the aggregate almost \$580,000—approximately \$485,000 more than they would have been able to give if the tribe was subject to the aggregate limit. Given this, it is fair to ask why the aggregate limit does not apply to Indian tribes? The answer is in the wording of FECA.

The sections of FECA—2 U.S.C. §441a(a)(1) and (2)—that set the limits on the amount that can be contributed to individual candidates, parties and PACs refers to giving by “persons” and “multicandidate political committees.” The section—2 U.S.C. §441a(a)(3)—that sets the biennial aggregate limit on overall giving (which is \$101,400 for the 2006 cycle) applies that limit to “individuals.” The word “person” is defined by FECA to mean,

an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

There is no definition in FECA of the term “individual,” and Indian tribes are not mentioned in the Act.

The first time the FEC addressed the application of the law to an Indian tribe was in a 1978 advisory opinion. In Advisory Opinion 1978-51, the Commission ruled that an Indian tribe was a “person” under FECA and was subject to what was then the \$1,000 per election contribution limit. The FEC reached the same conclusion in 1999, when it held that an Indian tribe met the definition of “person” because it fit within the statutory phrase “any other organization or group of persons.” (Advisory Opinion 1999-32. See also AO 1993-12 and AO2005-1.)

The issue of the application of the overall aggregate limit to Indian tribes was addressed by the FEC in 2000. In Advisory Opinion 2000-5, the FEC noted that the aggregate limit applied only to “individuals” and “[a]lthough the Nation is a person under the Act, it is not an individual and is therefore not subject” to the overall aggregate limit on contributions.²

It is clear, therefore, that the FEC considers Indian tribes as falling within the definition of “persons” subject to the individual contribution limits, but not “individuals” subject to the aggregate limit. This means that the present biennial aggregate limit of \$101,400 does not apply to an Indian tribe. The result is that a tribe can lawfully give an unlimited amount in the aggregate, as long as each contribution stays within the limit of

² Prior to the Bipartisan Campaign Reform Act of 2002, the aggregate limit was \$25,000 per year. BCRA changed the aggregate limit to a total of \$95,000 over a two-year period, beginning on January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year. 2 U.S.C. §441a(a)(3). That limit is adjusted for inflation and is \$101,400 for the 2006 election cycle.

what a person can give to each recipient, and as long as the money is not from a prohibited source.

It is important to keep in mind that this statutory construction issue only affects hard money contributions coming directly from the tribes. If an individual associated with a tribe makes a contribution, that contribution does apply to his or her individual aggregate limit. Conversely, if a tribe's PAC makes a contribution, it is not under an aggregate limit because no PAC is under an aggregate limit.

Also, this issue has nothing to do with Indian tribe contributions made to 527 organizations or to influence state elections. Moreover, whether or not the individual aggregate limit applied to tribal contributions had no bearing on the soft money contributions made by the tribes prior to the enactment of Bipartisan Campaign Reform Act of 2002, since these contributions were not subject to any limits. Between 1992 and 2002 election cycles, Indian tribes gave a total of approximately \$8.2 million in soft money. While BCRA stopped the soft money contributions from the tribes and raised hard money limits, including the aggregate hard money limit, it did not change the groups to which the aggregate limit applies.

b. Source of the Money Being Contributed

While there has been a lot of focus on the contribution limits that apply to money being contributed by Indian tribes, there is another question that has received less attention: what is the source of the funds they are contributing? As I noted earlier, the Federal election campaign finance laws have long imposed limits on how much can be given, as well as who can give those limited contributions. This is also part of the well-traveled world of hard and soft money. To put it simply, corporations, labor unions and government contractors cannot use their general treasury funds (soft money) to make Federal political contributions, and individuals are subject to contribution limits. Only individuals and unincorporated associations, either directly or through political action committees, can make limited contributions to influence Federal elections (hard money).

Nevertheless, as we all know, prior to the enactment of BCRA in 2002, a tremendous amount of corporate, labor and unlimited individual soft money was being given to party committees and leadership PACs to influence Federal elections. BCRA banned the national party committees and Federal candidates from soliciting or using soft money and tightened the use of soft money by state party committees. In so doing, it also stopped contributions from Indian tribes to national party committees and certain political action committees in excess of the contribution limits or from funds derived from prohibited sources.

While BCRA stopped everyone, including the Indian tribes, from making soft money contributions to national parties committees and Federal candidates, even prior to BCRA the money going to the hard money accounts of the party committees and Federal candidates could not come from a prohibited source. In fact, the central issue in AO

1999-32 and AO 2005-1 was whether a tribe was a Federal contractor and therefore prohibited from making contributions to Federal candidates, political parties and political committees. The FEC's answer in each case was that the tribe could make contributions because the commercial enterprise that contracted with the government (and was prohibited from making contributions) had a sufficiently separate identity from the tribe. Nevertheless, in both of these opinions, as well as in the others dealing with tribal contributions, the FEC issued a caution about the source of the money contributed.

In AO 1978-51, the FEC said that “[t]he community may make a contribution only if its general funds do not include monies from entities or persons that could not make contributions directly under the Act.” Likewise, in AO 1999-32 and AO 2005-1, the FEC warned that the tribes could not use revenues from their Federal contractor commercial enterprises to make contributions.³

The FEC advisory opinions appear to make it clear that the money being contributed by Indian tribes to Federal candidates and parties cannot come directly from a prohibited source. That means that Indian tribe contributions cannot be made with money passed through the tribes from incorporated gaming casinos that could not make political contributions directly. Of course, if a tribe is using prohibited source money for contributions, the FEC already has the power, authority and responsibility to enforce the law. Nevertheless, I raise this issue because there has not been much public discussion of the source of the money being used by the tribes for their political contributions.

III. Political Contributions from Indian Tribes

Finally, I would like to address the question of how much money the Indian tribes have actually given in political contributions. Several different numbers have been reported, which is not surprising considering that the answer depends on the specific question and the methodology used. For example, do you want to include contributions that come directly from a tribe, a tribe's PAC or individuals identified as members of the tribe? Do you look only at tribes with gaming casinos or broaden it to all tribes making contributions? What about soft money and money going to 527 organizations? Obviously, you will get a higher or lower figure depending on what you include.⁴ In order to get an accurate picture of the situation, the Center for Responsive Politics has analyzed the latest contribution data.

³ In AO 2000-5, where the Indian tribe asked about the application of the aggregate limit, the FEC made the following disclaimer:

Since you have not requested an advisory opinion on the sources of funds that may be lawfully used by the Nation in making its contributions in Federal elections, the Commission does not issue an opinion at this time on that issue.

⁴ In addition, the FEC is not consistent in how it categorizes Indian tribal contributions, sometimes counting them as individual contributions and other times as PAC contributions. An additional problem is that there is a variation in how an Indian tribe's name is reported by recipients of contributions.

a. The Big Picture

Since 1989, Indian tribes have contributed almost \$29.9 million dollars in hard and soft money,⁵ including money directly from the tribes, their PACs and individuals employed by the tribes. Of this, only \$339,000 (1.1%) has come from Indian tribes without gaming casinos. \$18.3 million of the overall total went to party committees, \$8.6 million went to candidates and \$3 million went to Leadership PACs.

Breaking down contributions by Indian tribes, their PACs and employees since 1989 by political party, we find that about \$19.5 million (65%) has been contributed to Democrats and \$10.4 million (35%) has gone to Republicans. Looking at just the 2006 cycle, however, the Indian tribes have so far given about \$1.7 million (52%) of their money to Republicans and \$1.6 million (48%) to Democrats.⁶

By comparison, contributions to candidates, parties and leadership PACs from gaming interests not affiliated with an Indian tribe have totaled approximately \$36.5 million since 1989, with almost \$22 million (60%) going to Republicans and \$14.5 million (40%) going to Democrats.

The partisan giving pattern of Indian tribes who were clients of Jack Abramoff is also different from the overall pattern of tribal giving. Contributions made by Indian tribes after they became clients of Abramoff totaled approximately \$3.4 million, with 67% (\$2.3 million) going to Republicans and 33% (\$1.1 million) going to Democrats.⁷

b. Direct Hard Money Giving by Indian Tribes

Since it is only direct tribal-related giving that would be affected if the aggregate limit applied to Indian tribes, we need to look at the hard money contributions that have come directly from Indian tribes. Between 1989 and 2006, Indian tribes have directly given approximately \$26.9 million dollars in Federal contributions. Of this, only about \$130,000 (0.5%) came from Indian tribes without gaming casinos.

In 2004, Indian tribes directly gave \$8.3 million in hard money. Of this, the total given in excess of what would be allowed if the aggregate limits applied is over \$3.4 million. This money is from 26 tribes that gave more than the \$95,000 aggregate limit, with the amount in excess of the aggregate ranging from about \$485,000 for the Morongo Band of Mission Indians to \$500 from the Seneca Nation of Indians.

⁵ Soft money has only been tracked since 1991.

⁶ All 2006 election cycle figures are from data downloaded from the FEC on January 23, 2006.

⁷ These figures only include contributions from Indian tribes made after they became clients of Mr. Abramoff. They do not include tribes who were clients of Mr. Abramoff's associates, but not clients of Abramoff.

So far, in the 2006 election cycle, Indian tribes have directly given a total of about \$3.1 million in hard money. Of this, the total given in excess of what would be allowed if the aggregate limits applied is more than \$533,000. This money is from eight tribes that have given more than the \$101,400 aggregate limit for this cycle. The amount in excess of the aggregate amount ranges from about \$158,400 for the Morongo Band of Mission Indians to \$17,600 for the Eastern Band of Cherokee Indians.

c. Soft Money Giving by Indian Tribes

Between 1989 and the banning of soft money in 2002, Indian tribes gave a total of \$8.3 million in soft money contributions. Unlike some industries, the Indian tribes did not slow down their giving after soft money was banned. Tribal giving, including money coming directly from tribes, their PACs and those associated with the tribes, totaled \$7.7 million in the pre-soft money ban 2002 election cycle and \$9 million in the post-ban 2004 election cycle. For corporations, the soft money ban meant that they could no longer turn to their general treasury funds for any contributions. The Indian tribes, however, could continue to use their general treasury funds for contributions as long as they stayed within the contribution limits for each recipient.

IV. Conclusion

Indian tribes have become relatively big political contributors, with virtually all of the contributions coming from tribes with gaming casinos. In large part, they have been able to make these contributions because of two distinct features of the tribes. First, as unincorporated entities, they are not directly subject to the corporate ban on the use of general treasury funds in Federal elections. That is, in part, why \$26.9 million in contributions since 1989 has come directly from the tribes, while only \$2.4 million has come from individuals and \$667,000 has come from PACs. Second, because the tribes are not subject to the overall individual aggregate limit, some tribes are able to give far more in an election cycle than they would be allowed to give if they were subject to the aggregate limit.

Thank you for this opportunity to testify and I will try to answer any questions you have.