EXHIBIT 1

SPEECH OF ACTING SOLICITOR GENERAL NEAL KATYAL

FEDERAL BAR ASSOCIATION

INDIAN LAW CONFERENCE

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MR. KATYAL: Thank you. It is a real honor to speak to the Indian Law Conference of the FBA. I am sorry I can't be with you in person. But as you may know the Supreme Court term is ongoing and we are in the midst of oral arguments.

Indian Law and the Solicitor General's office share a lot of history, 140 years to be exact. In October of 1870 Benjamin Bristow was appointed the nation's first Solicitor General.

And one of his first cases as SG was The Cherokee Tobacco case, an Indian Law case about whether Congress could supersede treaty obligations to the Indian tribes by statute. Ever since, Indian law has been a regular part of the Supreme Court's docket and that of the Solicitor General's office.

Looking back over these 140 years there are certainly cases in which the office should be proud of the role it has played in this area. But it is also important to remember that we in the SG's office have made mistakes.

And I want to talk to you about a few of

those mistakes today before talking about the cases that are before the Court right now.

The first case I want to mention is United States v. Sandoval, a Supreme Court case from 1913. This criminal case arose when the federal government prosecuted Mr. Sandoval for introducing alcohol into "Indian country" in violation of federal law. Sandoval committed the offense on land belonging to the Pueblo Indians, and Congress had passed a law specifically designating that land "Indian country." However, the Defendant challenged the extension of law to that land as unconstitutional.

Sandoval argued that the Pueblo Indians could not be considered an "Indian Tribe" for constitutional purposes and, therefore, Congress lacked power over the land. The Pueblo Indians were different from most tribes, he argued, because they had agricultural rather than nomadic lifestyles and many owned the lands in fee simple under grants from Spain.

The SG was responsible for defending the law before the Supreme Court. Ultimately the government's

defense reflected many of the prejudices of the times. To justify federal jurisdiction, the government employed gross stereotypes to disparage the intelligence and competency of the Pueblo Indians. This is how the government described the Pueblo Indians to the Supreme Court: "Although somewhat more civilized than the average Indian they are not the equal of their white neighbors and have never been in a position to deal with them upon an equality." The brief then added that the Pueblo civilization had not achieved "a very advanced stage." "Their whole thought and creed is permeated with superstition, and many of their religious rights and observances are characterized by barbarous and obscene practices. Industrially they are in the transition stage from stone to metal of three centuries ago. Their enlightenment scarcely seems equal to that of the Cherokee Nation even before its removal to Indian Territory and yet the later have always been subject to federal control."

To justify the necessity of barring alcohol sales to Pueblo Indians the government made the

following argument: "the Pueblo Indians stands in need of this protection; for being an Indian by race he is susceptible to the evil effects of intoxicants and unless protected is likely to be deprived of all of his possessions and himself eliminated." The brief went on: "the Indian's susceptibility to alcohol and its injurious consequences is a racial and not a political fact and for that reason the Pueblo Indian by nature stands in need of protection equally with other Indians."

These arguments were unfortunately adopted by the Supreme Court. The Court ultimately upheld the indictment, ruling that the government's constitutional powers extended to this area, and the Court called the Pueblo Indians a "simple, uniformed, and inferior people" who are easily "victims to the evils and debasing influence of intoxicants." The opinion goes on to cite several pages of government reports describing the Pueblo Indians as immoral, superstitious, and resistant to education.

And one particularly jarring aspect of this opinion is that in a different case a few decades

earlier the Court had approvingly quoted a lower court's description of the Pueblo Indians as a "peaceable, industrious, intelligent, honest and virtuous people." That was in the Joseph case from 1876. The Court's disparagement of the Pueblo Indians in Sandoval thus marked something of a turnaround from its previous views in 1876. And it is quite disturbing to me in particular that the SG's office may have played a role in moving the Court to a different direction.

The second case I want to turn to is Tee-Hit-Ton Indians v. the United States from 1955. The language here was obviously less inflammatory, but the arguments were disturbing nonetheless, all the more so because the case is, as I say, more recent.

In this case the Secretary of Agriculture with Congressional authorization sold to commercial interests all the timber in an area of Alaska that had been historically occupied by the Tee-Hit-Ton Indians. The Indians sued the United States for the loss of that timber.

The question presented was whether the

tribe's "original Indian title," its right of occupancy over its ancestral lands, was a property interest, the taking of which required just compensation under the Fifth Amendment.

The SG's office took the position that no compensation was required for the taking of these property interests unless the government had explicitly recognized the property claim. In support of this position, the brief provided a long discourse on the doctrines of conquest that gave the European nations title to land in the new world. It explained "the concept of title by discovery was based upon the idea that lands occupied by heathens and infidels were open to acquisition by the Christian nations."

The brief argued that, to the extent that the European nations had accorded certain privileges to Indians, they were merely "a reflection of the practical necessities of the situation at that time. The Indians were warlike and numerically superior to the whites and it was important that the sovereign's hand in the execution of its power to extinguish the Indian right of occupancy should not be forced by

third persons." And the brief explained "the chief reason" the Russians who initially occupied the land did not establish a system of land ownership was the "savage character of the native inhabitants."

The brief concluded that the Fifth Amendment right of compensation be inconsistent with the rights of the conqueror. The government wrote, one of the more egregious statements, that "to make compensation to the conquered mandatory is a denial of the conqueror's title."

As it turned out, the Court shared the government's views about protecting the right of the conqueror and held that no just compensation was required. It explained in one particularly harsh passage: "every 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 conquerors' will that deprived them of their land."

As you can see from these two cases, the

SG's office has not always played an optimal role in the development of Indian law. Luckily the news is not all bad.

For the Santa Clara Pueblo, Federal guardianship came with costs but also benefits, including protection from state interference and eventually greater tribal sovereignty. The Tee-Hit-Ton Indians, along with other Alaskan Indians, eventually received some compensation for their losses through a second lawsuit and ultimately a much larger settlement fund created by Congress.

For our office, these cases serve as a reminder that there are limits to the extent of our advocacy for the government and that we must never cross the line into prejudice and racism.

Now, having discussed the past, let me move to the present. I would like to spend a few minutes discussing the Indian law cases currently before the Court. And it is quite notable because the Court granted review in three cases this term, whereas in the previous five terms the Court averaged about one Indian law case per term.

Now although we started with three granted cases, one went away without oral argument because the tribe changed its litigating position, so only two remaining cases exist.

As it happens, both of those remaining cases started with similar claims by Indian tribes. In both the tribes sue the United States for breaches of fiduciary duty, claiming that the government mismanaged assets held in trust for the tribes.

However, the two cases reached the Court on very different issues: one about jurisdiction; the other about the attorney-client privilege.

The first of these cases is United States v. Tohono O'odham Nation. In this case the Nation filed two breach of fiduciary duty complaints against the government: one in the Court of Federal Claims and one in the D.C. District Court. The Court of Federal Claims threw out the complaint because 28 U.S.C. 1500 deprives the Court of jurisdiction over any claim for or in respect to which the plaintiff has pending any suit in any other Court.

Now the question presented before the Court

is whether under Section 1500 the Nation can proceed with lawsuits in both Courts simultaneously.

The government took the view that Section 1500 bars the Plaintiffs from pursuing simultaneous "claims." The Nation maintained that the word "claim" in Section 1500 refers to "a demand for particular relief" so the Plaintiffs may proceed in both Courts so long as they are seeking different relief in both fora. As you would expect in a statutory interpretation case, the parties spent many pages of their briefs devoted to the text. But they also cited precedent, history, policy arguments in favor of their particular views.

The Nation focused on the unfairness of forcing Plaintiffs to choose between different forms of relief, while the government emphasized that Congress intended to put Plaintiffs to such a choice and that it was Congress's role to do so.

Tohono is now the Court's oldest currently pending case before the Court and so we expect a decision fairly soon.

The next Indian law case that the Court will

hear is United States v. Jicarilla Apache Nation. Here the tribe sued the government for alleged breaches of fiduciary duties managing the tribe trust assets. During the course of discovery the government withheld a number of documents on the basis of attorney-client privilege, including memoranda between agency personnel and government attorneys.

The tribe moved to compel production of the documents arguing that the production fell within the fiduciary exception to the attorney-client privilege, which bars a trustee from withholding documents concerning trust management from the trust beneficiary.

The question presented is whether the government is entitled to withhold those documents under the attorney-client privilege.

In its brief, the tribe argued that the government should be bound by the obligations of a private fiduciary and by common law rules governing evidentiary privileges. It claimed that the tribe is the real client when government attorneys give advice about the management of Indian assets and that the

government has a duty to disclose the documents regarding trust management.

The government took the position that no fiduciary duty applies. We argued that the tribes are not the real clients of government attorneys, that the government's obligations to the tribes are different from those of a common law trustee and that the government's legal duties to the tribes are only those specified by statutes and regulations.

The Court is going to hear oral argument in that case in a matter of weeks, in the end of April.

The Court scheduled one other Indian law case this term but as I mentioned that case went away. In Madison County v. Oneida Indian Nation, the question presented was whether sovereign immunity barred certain foreclosure proceedings and whether the Oneida Nation's Reservation had been disestablished or diminished by a prior treaty. Before the Court could hear the case, the Nation filed a letter with the Court indicating it was waiving its sovereign immunity to the enforcement of property tax through foreclosure.

The Court, therefore, vacated the judgment and remanded the case to the 2nd Circuit to revisit its decision in light of the waiver.

We've now covered the cases the Court has decided to hear this term. And it is worth noting that the Court has also been active this term on another front, one that has unique ties to the Solicitor General's office.

As you may know, the Supreme Court sometimes invites the Solicitor General to provide her or his views on a case that is pending before the Court and asks whether or not the Court should grant certiorari in the matter. The office has a very good record when it comes to such requests. Indeed it is said according to one recent study that the Supreme Court follows our recommendation approximately 80 percent of the time.

In a typical term, we get anywhere from zero to two invitations by the Court to file briefs in Indian law cases. This term, the Court has called for our views roughly 20 times. And four of those -- four have been in Indian law cases. So I think the

invitation practice this term also reflects the Court's increasing interest in Indian law cases.

Well, that concludes my brief review of what is happening in Indian law for this term in the Supreme Court. In part because the Court appears to be devoting so much time and energy to Indian law, it is a tremendously exciting time to be practicing in the area. And I look forward to seeing how the Court clarifies and develops the doctrine.

And I wish each of you the best in your practice and your study of Indian law.

And again I thank you for letting me speak with you all today.

CERTIFICATE OF TRANSCRIPTION

I, CHERYL LaSELLE, hereby certify that I have typed the transcript of this speech from the video recording posted online at https://www.youtube.com/watch?v=ag3EzAYeXTc. The foregoing/attached transcript is a true, correct, and complete transcription of said video recording.

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Date CHERYL LaSELLE

Transcriptionist