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EXHIBIT 1

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SPEECH OF ACTING SOLICITOR GENERAL NEAL KATYAL

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FEDERAL BAR ASSOCIATION

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INDIAN LAW CONFERENCE

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April 8, 2011

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

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

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

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

22 And I want to talk to you about a few of

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

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

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

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

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1 defense reflected many of the prejudices of the times.

2 To justify federal jurisdiction, the government

3 employed gross stereotypes to disparage the

4 intelligence and competency of the Pueblo Indians.

5 This is how the government described the Pueblo

6 Indians to the Supreme Court: "Although somewhat more

7 civilized than the average Indian they are not the

8 equal of their white neighbors and have never been in

9 a position to deal with them upon an equality." The

10 brief then added that the Pueblo civilization had not

11 achieved "a very advanced stage." "Their whole thought

12 and creed is permeated with superstition, and many of

13 their religious rights and observances are

14 characterized by barbarous and obscene practices.

15 Industrially they are in the transition stage from

16 stone to metal of three centuries ago. Their

17 enlightenment scarcely seems equal to that of the

18 Cherokee Nation even before its removal to Indian

19 Territory and yet the later have always been subject

20 to federal control."

21 To justify the necessity of barring alcohol

22 sales to Pueblo Indians the government made the

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

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

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

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1 earlier the Court had approvingly quoted a lower
2 court's description of the Pueblo Indians as a
3 "peaceable, industrious, intelligent, honest and
4 virtuous people." That was in the Joseph case from
5 1876. The Court's disparagement of the Pueblo
6 Indians in Sandoval thus marked something of a
7 turnaround from its previous views in 1876. And it is
8 quite disturbing to me in particular that the SG's
9 office may have played a role in moving the Court to a
10 different direction.

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

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

22 The question presented was whether the

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

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

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

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

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

11 As it turned out, the Court shared the
12 government's views about protecting the right of the
13 conqueror and held that no just compensation was
14 required. It explained in one particularly harsh
15 passage: "every American schoolboy knows that the
16 savage tribes of this continent were deprived of their
17 ancestral ranges by force and that, even when the
18 Indians ceded millions of acres by treaty in return
19 for blankets, food, and trinkets, it was not a sale
20 but the conquerors' will that deprived them of their
21 land."

22 As you can see from these two cases, the

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

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

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

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

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

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

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

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

22 Now the question presented before the Court

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

3 The government took the view that Section
4 1500 bars the Plaintiffs from pursuing simultaneous
5 "claims." The Nation maintained that the word "claim"
6 in Section 1500 refers to "a demand for particular
7 relief" so the Plaintiffs may proceed in both Courts
8 so long as they are seeking different relief in both
9 fora. As you would expect in a statutory
10 interpretation case, the parties spent many pages of
11 their briefs devoted to the text. But they also cited
12 precedent, history, policy arguments in favor of their
13 particular views.

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

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

22 The next Indian law case that the Court will

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1 hear is United States v. Jicarilla Apache Nation.

2 Here the tribe sued the government for alleged
3 breaches of fiduciary duties managing the tribe trust
4 assets. During the course of discovery the government
5 withheld a number of documents on the basis of
6 attorney-client privilege, including memoranda between
7 agency personnel and government attorneys.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Date

CHERYL LaSELLE

Transcriptionist