

## PART FOUR—RECOMMENDATIONS

### A. INTRODUCTION

Over the past two years, the Committee on Indian Affairs (the “Committee”) has developed a robust legislative record on the facts and circumstances surrounding Jack Abramoff and Michael Scanlon’s relationship with and representation of the Mississippi Band of Choctaw Indians (“Choctaw”), the Coushatta Tribe of Louisiana (“Louisiana Coushatta”), the Saginaw Chippewa Indian Tribe (“Saginaw Chippewa”), the Agua Caliente Band of Cahuilla Indians (“Agua Caliente”), the Ysleta del Sur Pueblo of Texas (“Tigua”), and the Pueblo of Sandia (collectively, “Tribes”). After careful consideration of that record, the Committee makes the following observations and recommendations.

### B. CONTRACTING FOR LEGAL, LOBBYING AND OTHER PROFESSIONAL SERVICES

#### *1. No New or Revised Federal Legislation Needed*

The Committee has exhaustively examined Abramoff and Scanlon’s “gimme five” scheme, by which the two bilked the Tribes out of tens of millions of dollars. Without doubt, the depth and breadth of their misconduct was astonishing. Nevertheless, with respect solely to the kickbacks from Scanlon to Abramoff, the Committee concludes that existing federal criminal statutes are sufficient to deter and punish such misconduct.

Indeed, there is no better support for the Committee’s conclusion than Abramoff’s and Scanlon’s guilty pleas. On November 17, 2005, Scanlon pled guilty to, among other things, conspiracy (1) to defraud some of the Tribes under 18 U.S.C. §§ 1341 and 1343; and, (2) to defraud and deprive some of the Tribes of Abramoff’s honest services under 18 U.S.C. §§ 1341, 1343, and 1346. On January 3, 2006, Abramoff pled guilty to, among other things, (1) conspiracy to commit mail and wire fraud under 18 U.S.C. §§ 1341 and 1343; (2) conspiracy to commit honest services wire and mail fraud, under 18 U.S.C. §§ 1341, 1343, and 1346; (3) honest services mail fraud under 18 U.S.C. §§ 1341 and 1346.

That Abramoff and Scanlon perpetrated their kickback scheme against Indian tribes does not change the applicability or effectiveness of those statutes as tools to deter and punish such misconduct. The Committee sees no basis for treating Indian tribes differently than other similarly aggrieved parties in this respect. The Committee thus finds no reason or basis to carve out or create a special category for fraud against Indian tribes under federal law.

#### *2. Best Practices Recommendations*

Although the Committee does not believe that additional federal legislation is required to address Abramoff and Scanlon’s mis-

conduct, it does recommend that tribes consider adopting their own laws to help prevent a similar tragedy. Over many years and innumerable scandals, the federal and state governments learned difficult lessons regarding appropriate decision-making processes when contracting for services. From these lessons a consensus has developed around core good governance principles. These principles embody a philosophy that focuses on providing sufficient information to constituents regarding the basis for decisions made by government officials, thereby fostering trust and confidence that governmental decisions are being made based on the best interests of the government and not of the individual decisionmakers. Accordingly, the federal and state governments have enacted laws and regulations addressing issues relating to contracting for services and conflicts of interests.

Some Indian tribes have already adopted laws and regulations addressing some or all of these matters, while a significant number have not. The Committee strongly encourages those tribes that have not adopted such laws and regulations to enact laws and regulations that embrace the principles contained in the following recommendations. The Committee notes, however, that it is not recommending that Congress enact legislation mandating tribes to enact laws dealing with these subjects, but that the tribal governments themselves consider the following recommendations and determine for themselves whether enacting such laws might benefit the tribe and its members. Tribal governments, as the government closest and most responsive to tribal members, are best able to develop laws and regulations that appropriately take into account the unique history, cultural and legal authorities of a particular tribe.

*a. Contracting for legal, lobbying and other services should follow a specific, open and competitive process*

Tribal governments should consider adopting laws applicable to contracting for legal, lobbying or other professional services, at least when the cost of the services will exceed, or has the potential of exceeding, a certain threshold amount. Contracting for these services should not be an ad hoc decision of the tribal council or a tribal official but instead should follow a process that requires decision-makers to assess what it is that the tribe needs; determine the kinds of skills, experience and expertise the contractor must have in order to meet those needs; solicit contracting proposals from the applicable community of contractors or providers, based on a clearly articulated set of requirements; evaluate the responsive proposals in light of the stated requirements; perform appropriate background checks on responding contractors and providers; and document the contracting decision in writing.

*b. Contracting rules should be structured to prevent conflicts of interest*

Even a fair and open contracting process can be abused. Accordingly, contracting rules should include provisions calculated to prevent improper considerations in the contracting process—such as prohibitions against contracting decision-makers from receiving anything of value from persons or firms seeking to obtain or renew contracts with the tribe; requirements that tribal campaign con-

tributions (including contributions of services or assistance) at or above a certain threshold dollar amount be publicly disclosed; or rules prohibiting tribal council members from voting on any measure relating to a contract where the contractor has contributed to his or her campaign for office. Tribes should consider examining whether, under any circumstances, a firm that provides legal, lobbying or other professional services to the tribe should ever be allowed to contribute money, services or anything of value to the campaign of anyone running for tribal office, or to provide professional services to a tribal official in his or her personal capacity apart from the services being provided to the tribe or to the official in his or her official capacity.

*c. Contracting and conflict of interests rules should include appropriate sanctions*

To ensure an adequate level of compliance with contracting and conflict of interests rules, there should be appropriate sanctions in place for violations of the rules. Apart from laws criminalizing the receipt of kickbacks and fraud (which many, if not most, tribes have already enacted), tribes should consider enacting laws that would render professional contracts awarded in violation of the contracting or conflict of interests rules to be void or voidable; subject a contractor found to have violated the rules to a contracting bar period or for egregious violations even a permanent bar; and make violation of the conflict of interests rules by a tribal official grounds for civil sanctions such as fines, suspension or even removal from office.

*d. Tribes should consider working with tribal organizations and educational institutions to develop model codes and education programs addressing contracting and conflicts of interests*

Tribes should consider working with their regional or national tribal organizations or with universities, colleges and law schools to develop model codes or laws to address contracting and conflict of interests issues, as well as “good government” education programs for elected and non-elected tribal officials designed to improve decision-making and avoid conflicts of interests in general but in the contracting process in particular.

### C. INTEGRITY OF TRIBAL ELECTIONS

In its investigation, the Committee determined that certain non-tribal members insinuated themselves into and influenced tribal governmental elections. These non-tribal members did so with the intent or understanding that should their allies prevail, they would receive lucrative lobbying contracts from the respective tribe. Examples of these egregious actions include recruiting candidates for tribal governmental positions, organizing and funding comprehensive electioneering efforts, and providing monetary and other assistance to recall successful candidates who were unfavorable to the non-tribal members.

Tribal elections are internal tribal governmental matters that are governed by the laws of each tribe. The Committee, however, is concerned that the economic success of certain tribes and the in-

creasing number of contracts tribes enter into with outside entities may lead to an increase in the efforts of non-tribal members to interfere with or influence tribal elections.

Based on these concerns, the Committee recommends that tribal governments should consider adopting or revising laws applicable to their elections that govern the scope of involvement by non-tribal members and entities. Tribal governments should consider adopting laws that address the following issues:

- Whether, and to what extent, non-members may contribute to campaigns for tribal office.
- Whether, and to what extent, non-members may provide non-monetary support in campaigns for tribal office.
- Limitations on the amount of monetary contributions any person or entity can make to a tribal campaign.
- Reporting requirements for donors and recipients of monetary contributions in tribal elections.
- Prohibiting persons or entities that make monetary contributions to candidates in tribal elections from entering into contracts with the tribe for a specific period of time after the election.

The Committee is aware that some tribes already have comprehensive election laws that address these issues, including prohibiting non-tribal members from making monetary contributions to tribal elections. The Committee commends these efforts as further examples of strong tribal governance and encourages tribes that have not yet adopted laws governing tribal elections to do so.

#### D. TRIBAL POLITICAL CONTRIBUTIONS

Integral to Jack Abramoff's lobbying practice were the substantial political contributions that he requested or directed his Tribal clients to make, and for which he and his team members attempted to take credit. Whenever he pitched his services, he would discuss the need for the Tribe to make substantial political contributions.

Whether following Abramoff's advice or not, Abramoff's tribal clients made substantial political contributions during the time he represented them. The sizeable aggregate campaign contributions by some of Abramoff's tribal clients has focused attention on the treatment of Indian tribes under campaign finance law. This has resulted in calls to restrict tribal campaign contributions. Proposals to limit contributions range from treating Indian tribes like "individuals" for purposes of imposing aggregate caps on their contributions from tribal funds, to treating tribes like corporations, which cannot use treasury funds for contributions but can instead establish separate segregated funds, also known as political action committees ("PACs"), to receive limited voluntary contributions.

Many tribes object to these proposed restrictions on their political contributions, arguing that they are truly unique entities that should not be equated to individuals or corporations. They further argue that they are particularly impacted by Congressional actions, and must be afforded the opportunity to participate in the political process by using tribal funds for political contributions.

On February 8, 2006, the Committee held an Oversight Hearing on Indian Tribes and the Federal Election Campaign Act to exam-

ine this issue. The Federal Election Commission (“FEC”) testified at this hearing that Indian tribes are subject to the same contribution limitations and prohibitions in the federal campaign law as are other unincorporated associations. In instances where a tribe is acting through a corporation or federal government contractor, those tribal entities are governed by the same rules generally applicable to corporations and federal government contractors. Additionally, the FEC informed the Committee that political committees, including candidate and general party committees, must report contributions from Indian tribes.

Concerns were raised by many of the witnesses testifying before the Committee about difficulties in researching and monitoring tribal political contributions. These difficulties do not appear to be unique to Indian tribes, but also exist with respect to researching and monitoring contributions from individual donors and other entities.

The Committee believes that it is prudent to increase the level of transparency with regards to all political contributions, including those from Indian tribes. Thus, after considering the record before it, the Committee recommends, at a minimum, the following either be implemented by rule by the Federal Election Commission or law enacted by Congress.

- Tribes should be required to register with the FEC, which will assign each tribe a unique identifier, for the purpose of better tracking tribal campaign contributions.
- Contributions should be made only in the tribe’s name as it appears on its registration on file with the FEC.
- The contributions must be reported by the recipient in the Tribe’s name.

In the opinion of the Committee, based on the extensive legislative record and the February 8, 2006, hearing, these public disclosure recommendations adequately protect the public trust and confidence in the Federal election system, without unduly excluding Indian tribes from participating in that system.

#### E. REFERRALS TO OTHER COMMITTEES

##### *1. Possible Misuse of Tax Exempt Organizations*

In the course of its investigation, this Committee uncovered numerous instances of nonprofit organizations that appeared to be involved in activities unrelated to their mission as described to the Internal Revenue Service. In addition, the Committee observed that a number of nonprofit organizations were used as instruments to channel money from one entity to another in an effort to obscure the source of funds, the eventual use of funds, and to evade tax liability on funds. Finally, the Committee also observed tax exempt organizations apparently serving as or being used as extensions of for-profit lobbying operations.

Recognizing that oversight of nonprofit organizations under the Internal Revenue Code is not within the jurisdiction of the Senate Committee on Indian Affairs, the Committee, at the request of the Senate Committee on Finance, transmitted a number of relevant documents pertaining to this issue to the Senate Committee on Finance on February 9, 2006. Those documents are included in this

Report in the supporting documents following the text of the Report.

The Committee believes that the evidence it uncovered raises serious issues involving nonprofit organizations, not only with regard to compliance with existing federal revenue laws, but also with regard to whether existing federal revenue laws should be altered to prevent or discourage such activity. The Committee therefore recommends that the Senate Committee on Finance investigate, hold hearings, and report to the Senate on its findings and recommendations on these issues.