NEW MEXICO LAW REVIEW

Volume 39
Issue 3 *Summer*

Summer 2009

Texas v. United States: Mind the Gap

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TEXAS V. UNITED STATES: MIND THE GAP

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INTRODUCTION

The ability of Indian tribes to own and operate casino-style gaming operations faces an uncertain future following the Fifth Circuit's decision in *Texas v. United States*.[1] The decision enables determined state governments to prevent tribes from ever engaging in certain lucrative gaming enterprises. The decision has the potential to dramatically alter the playing field in Indian gaming in states where Indian gaming does not currently exist, firmly placing the power in the hands of state governments and leaving tribes with virtually no hope of opening casinos.

Indian gaming has evolved as a core aspect of tribal self-determination and economic self-sufficiency. The combination of pressing tribal economic needs, inconsistent support and policies from the federal government, and evolving tribal sovereignty has enhanced the need for tribal economic development. Indian gaming has rapidly emerged as an integral element in tribal economies. In 2007, tribal casinos generated more than $26 billion in revenue, compared to only $200 million in 1998.[2] Of the 562 tribes recognized by the U.S. government, about 220 operate 382 total gaming operations across the United States.[3]

Indian gaming is regulated under the Federal Indian Gaming Regulatory Act (IGRA).[4] IGRA prescribes the process by which tribes and states reach agreements, called compacts, that authorize Las Vegas-style gaming.[5] Absent such a compact, this type of Indian gaming is prohibited.[6]

The process of negotiating compacts was designed to provide balance between tribes and states in the negotiating process, but with the ultimate objective being encouragement of the enactment of an agreement.[7] Congress sought to ensure this outcome by providing tribes with a remedy to sue states for failure to bargain a compact in good faith. However, the U.S. Supreme Court invalidated that remedy in *Seminole Tribe of Florida v. Florida*, citing state sovereign immunity under the Eleventh Amendment.[8] In response, the Secretary of the Interior promulgated new administrative procedures (Secretarial Procedures) governing compact negotiations that sought to preserve Congress's desire to enable successful compact negotiations without trampling upon the constitutional rights at bar in *Seminole*.[9]

Texas v. United States involves a challenge brought by the federally recognized Kickapoo Traditional Tribe (Tribe or Kickapoo) to compel the State of Texas to

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* Class of 2010, University of New Mexico School of Law. I would like to thank Professor Thomas Bird Bear for his insight and guidance, and my editors, Jackie McLean, Dave Gordon, and Neil Bell for their tireless and constructive efforts to better this article.

1. 497 F.3d 491 (5th Cir. 2007).
2. Press Release, Nat'l Indian Gaming Comm'n, NIGC Announces 2007 Indian Gaming Revenues (June 2008), http://www.nigc.gov/ReadingRoom/PressReleases/PR93062008/tabid/841/Default.aspx (last visited June 3, 2009).
3. *See id.* (stating there are 382 total gaming operations run by tribes in the United States).
4. 25 U.S.C. §§ 2701–2721 (1988).
5. Under IGRA, Las Vegas-style slot and table gaming is categorized as Class III. *Id.* § 2703(8).
6. *Id.* § 2710(d)(1)(C), *invalidated by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
7. KATHRYN R.L. RAND & STEVEN A. LIGHT, INDIAN GAMING LAW AND POLICY 58 (2006).
8. *Seminole*, 517 U.S. at 73 (1996).
9. 25 C.F.R. § 291 (2009).

negotiate a gaming compact with the Tribe under the Secretarial Procedures.[10] The Tribe first approached the State of Texas in 1995 to discuss the possibility of negotiating a compact.[11] Texas refused to negotiate, and the Tribe sued, alleging Texas's failure to negotiate in good faith as mandated by IGRA.[12] However, before that lawsuit was resolved, *Seminole* invalidated the good faith remedy, negating the basis for the Tribe's action. Following enactment of the Secretarial Procedures, the Kickapoo tried again—complying with the Secretarial Procedures, but again Texas resisted, giving rise to *Texas v. United States*.[13]

In *Texas*, the Fifth Circuit invalidated the Secretarial Procedures, concluding that the rules constituted an impermissible interpretation of congressional authority set forth in IGRA.[14] The court relied primarily upon the *Chevron* doctrine,[15] a test extracted from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[16] The *Chevron* test sets forth a standard for determining when deference to administrative agency rulemaking is appropriate.[17] As a result of its decision in *Texas*, the Fifth Circuit makes it nearly impossible for tribes within its jurisdiction to compel recalcitrant states to bargain gaming compacts in a good faith manner.[18]

This note will focus on the context surrounding the *Texas* decision and the court's rationale therein. It will include an appraisal of the arguments relied upon by the court and those it disregarded. In particular, it will scrutinize the court's application of the *Chevron* standard to the Secretarial Procedures. This note will also provide an analysis of the Secretary's authority to promulgate the disputed rules pursuant to general statutory authority derived from the agency's federal trust obligations to Indian tribes. This source of authority went largely disregarded in *Texas*. The analysis of the Fifth Circuit's actions provided in this note finds that the court failed to adequately consider the full range of issues present in the case, resulting in serious consequences for the Kickapoo and other tribes similarly situated. The article will conclude with an appraisal of what political and legal responses might be prompted by the court's actions in *Texas*.

I. HISTORICAL ANTECEDENTS

Before getting into an analysis of the Fifth Circuit's decision, it is useful to undertake a quick examination of the historical context of the *Texas* decision. The roots of the Fifth Circuit's actions can be traced back to the Marshall Court, where the Chief Justice famously declared that Indian tribes are entitled to the protection of the United States as "domestic, dependent nations."[19] Marshall's words created

10. 497 F.3d 491, 495 (5th Cir. 2007).
11. Texas v. United States, 362 F. Supp. 2d 765, 767 (W.D. Tex. 2004).
12. *Id.*
13. *Id.*
14. *Texas*, 497 F.3d at 493.
15. *Id.* at 500–10.
16. 467 U.S. 837 (1984).
17. *Id.* at 842–43.
18. However, there remain at least two possible remedies consistent with *Texas* and *Seminole*; a state may consent to being sued or the U.S. Attorney General may still sue states to enforce IGRA. The prospect of a federal suit is considered later in this article. *See infra* Part V.
19. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831). *Cherokee Nation* is part of the "Marshall trilogy," which includes three cases that provide the basis for modern American Indian Law. The other two cases that constitute the trilogy are *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that Indians

the basis for modern American Indian Law and the unique trust relationship between Indian tribes and the federal government.[20] In the intervening 178 years since Marshall penned *Cherokee Nation*, U.S. policy governing Indian relations has vacillated schizophrenically, ranging between efforts to assimilate, terminate, and empower tribal communities.[21]

Today, we are in an era of tribal empowerment through "self-determination." The period of self-determination began to take shape in the 1960s and is characterized by a renewed commitment to tribal sovereignty and control.[22] At the heart of this approach are tribal economic development, self-sufficiency, and self-government.[23]

Successful realization of self-determination and enhanced tribal sovereignty is predicated on the achievement of partial or total tribal economic self-sufficiency. Tribes that are better positioned economically are better able to exercise effective self-government, keep tribal communities intact, and solidify tribal sovereignty.[24] Indian gaming has proven to be one of the most reliable sources of economic development for tribes.[25] Tribes have become increasingly reliant on gaming operations to fund tribal programs and to provide employment for tribal members.[26]

The Kickapoo Tribe is among the tribes aspiring to enjoy the economic and other benefits of tribal gaming.[27] The Tribe occupies a small 125-acre reservation in the Rio Grande Valley, near the Mexico border and Eagle Pass, Texas.[28] The reservation is home to 420 tribal members.[29]

The history of the Kickapoo Tribe is characterized by a constant struggle to survive. At the time of first European contact, the Tribe occupied lands in current-day lower Michigan.[30] The incursions of European traders in the late 1700s forced

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have the right of occupancy but not fully alienable title to their lands) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that states' laws do not apply in Indian Country).

20. The federal government owes a special fiduciary "trust" obligation to tribes and Congress exercises near absolute plenary authority to dispatch this duty. This unique federal–tribal relationship finds root in treaties, acts of Congress, the Constitution, and federal jurisprudence dating back to the Marshall trilogy. At its most basic, the relationship is a grant of federal guardianship and a promise to provide services in exchange for tribal cessions of land. The trust relationship involves a wide range of services, including education, healthcare, etc., provided to enrolled tribal members by the federal government. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 34–36 (West 2004).

21. STEPHEN CORNELL ET AL., ECONOMICS RESOURCE GROUP, INC., AMERICAN INDIAN GAMING POLICY AND ITS SOCIO-ECONOMIC EFFECTS 3 (1998).

22. *Id.*

23. This manifests clearly in IGRA itself. *See* 25 U.S.C. § 2701(4) (1988).

24. Kathryn R.L. Rand & Steven A. Light, *Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota*, 5 GAMING L. REV. & ECON. 329, 330 (2001).

25. CORNELL, *supra* note 21, at 24–40.

26. *Id.*

27. The tribe currently operates the Kickapoo Lucky Eagle Casino near Eagle Pass, Texas. It is a Class II (non-Las Vegas–style) facility, offering bingo, poker, and bingo machines. Kickapoo Lucky Eagle Casino, http://www.kickapooluckyeaglecasino.com/ english// (last visited June 3, 2009). Class II Indian gaming may be conducted without the consent of the state. 25 U.S.C. § 2710(a)–(c) (1988). For a discussion of the different Classes of gaming, see below, notes fifty-five to sixty-two and accompanying text. The *Texas* litigation involves the Tribe's efforts to conduct Las Vegas-style, Class III gaming.

28. *See* Petition for Writ of Certiorari at *6, Kickapoo Traditional Tribe of Tex. v. Texas, No. 07-1109 (U.S. 2008), 2008 WL 534792, *cert. denied*, 129 S. Ct. 32 (2008).

29. U.S. Census Bureau, 2000 Census, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=25000US1775&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-reg=DEC_2000_SFAIAN_DP3:08N—57N;&-redoLog=false&-format=&-_sse=on&-CONTEXT=qt (last visited June 3, 2009).

30. E. JOHN GESICK, JR., THE TEXAS KICKAPOO: KEEPERS OF TRADITION 5 (1996).

the Kickapoo to enter a pattern of warfare, migration, shifting alliances, and splintering into bands, all born out of a desire to preserve tribal culture and autonomy.[31] By 1833, the Tribe had lost all of its ancestral lands and Tribal members were dispersed throughout the south central United States and northern Mexico.[32]

The Texas Kickapoo first settled in the Eagle Pass area in the 1940s, fleeing difficult agricultural conditions in Mexico.[33] The Tribe's initial settlement of cardboard dwellings underneath the bridge connecting Mexico to the United States reflected their strained circumstances.[34] The Kickapoos turned to migrant farm labor for employment and began to send their children to local schools.[35] By 1989, the Tribe gained federal recognition and moved to a new reservation away from the bridge.[36]

Despite this progress, the economic circumstances of reservation occupants remain dire. Census data from 2000 revealed a deeply impoverished community: more than 68 percent of tribal families subsisted below the poverty level, compared to 12 percent statewide in Texas.[37] Additionally, unemployment was 16.1 percent on the reservation, but only 3.8 percent statewide.[38] Finally, median household income was $8,542 compared to $39,927 for Texas generally.[39]

The Kickapoo Tribe's interest in Indian gaming centers around the Tribe's pressing need for economic development. The Tribe intended to use gaming as a means of generating employment and revenue to fund services for tribal members.[40] However, the decision in *Texas* leaves the tribe without the ability to pursue its gaming aspirations and undertake much-needed economic development.

II. REGULATORY AND LEGAL BACKDROP

Indian gaming took root in the form of high-stakes bingo halls in the 1970s and 1980s.[41] The emergence of tribal gaming facilities adjacent to urban areas in California and Florida prompted state and local government officials to take notice. These officials sought to enforce state and local laws regulating gaming activities against the tribal gaming enterprises.

In California, the emergence of high-stakes tribal bingo operations near Palm Springs and Los Angeles prompted a showdown between the state and the Cabazon and Morongo Bands of Mission Indians.[42] The jackpot amounts at the tribal casinos exceeded those authorized under state law and applicable county

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31. *See id.* at 16.
32. *Id.* at 11.
33. *Id.* at 17–18.
34. *Id.* at 20.
35. *Id.*
36. *Id.* at 25.
37. *See* U.S. Census Factfinder, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=25000US1775&-qr_name=DEC_2000_SF3_U_DP3&-ds_name=DEC_2000_SF3_U&-reg=DEC_2000_SFAIAN_DP3:08N—57N;&-redoLog=false&-format=&-_sse=on&-CONTEXT=qt (last visited June 3, 2009).
38. *See id.*
39. *See id.*
40. Petition for Writ of Certiorari at *6, Kickapoo Traditional Tribe of Tex. v. Texas, No. 07-1109 (U.S. 2008), 2008 WL 534792, *cert. denied*, 129 S. Ct. 32 (2008).
41. *See* RAND, *supra* note 7, at 24.
42. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 205–06 (1983).

ordinances. When the state tried to enforce its laws, the tribe invoked its tribal sovereignty and sued in *California v. Cabazon Band of Mission Indians*.[43]

Cabazon rejected the state's efforts to impose jurisdiction on the tribal gaming operations. The state claimed that the bingo hall operations of the Cabazon and Morongo Bands exposed the state to organized crime risks.[44] The court rejected this argument, concluding that the "compelling" federal and tribal interests at issue outweighed the state's claims.[45] It concluded that the state already allowed a wide range of gaming activities and that there was no evidence that the casino operation had been infiltrated by organized crime.[46]

California's setback in *Cabazon* prompted a movement to pressure Congress to devise a regulatory scheme for the burgeoning tribal gaming industry. Both tribes and states made their competing cases to Congress.[47] States expressed their desire to enforce state criminal and gaming laws on tribal lands.[48] States also expressed concerns about preserving state policies toward gaming generally and preventing any influx of organized crime.[49] In particular, states were concerned about the introduction of Las Vegas-style Indian gaming.[50] Tribes also conceded the need for regulation, but from the federal rather than the state government,[51] citing longstanding concerns regarding incursions on tribal sovereignty by state governments.[52]

These myriad interests resulted in the promulgation of IGRA in 1988.[53] IGRA embodied a balance between the three sovereigns at play: authority over Indian gaming would be shared among tribal, state, and federal governments. Congress's findings upon enacting the legislation reflected the spirit of the self-determination era and the promise of gaming for tribal economic development. To wit, Congress affirmed that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[54]

The regulatory infrastructure implemented under IGRA took into account state concerns regarding oversight of Las Vegas-style gaming. IGRA segregated different types of gaming into three classes, with degrees of regulation corresponding to each class:

Class I: Traditional bingo games[55]

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43. *Id.* at 206.
44. *Id.* at 220–21.
45. The Court determined that the interests of the tribes and federal government were similar. For the federal government, as the guardian of tribes with longstanding fiduciary obligations to the tribes, its paramount concerns were furthering tribal sovereignty, self-government, self-sufficiency and economic development. For the tribes, the Court posited that the casinos were an important source of economic development and employment, without which tribal self-determination efforts would be undermined. *Id.* at 218–21.
46. *Id.* at 221–22.
47. Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 504–05 (1994).
48. RAND, *supra* note 7, at 30.
49. *Id.*
50. *Id.* at 32.
51. *Id.* at 31.
52. State governments generally may not exercise jurisdiction in Indian Country. Absent an explicit congressional decree, states must steer clear of tribal lands. This principle dates back to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the third case in the famous Marshall trilogy, which provides the foundation for American Indian Law.
53. 25 U.S.C. §§ 2701–2721 (1988).
54. *Id.* § 2701(4).
55. *Id.* § 2703(6).

Class II: Bingo and nonbanked card games[56]

Class III: Casino-style games[57]

The higher the stakes, the higher the number of the class. As the classes ascend, so does the intensity of regulatory oversight. Class I activities are outside of the scope of IGRA altogether and entirely within the regulatory domain of tribal governments.[58] Class II gaming is subject to tribal regulation with federal oversight.[59]

Class III gaming is subject to the greatest regulatory scrutiny. As a predicate matter, such gaming activity is only allowed in states that already permit casino-style gaming.[60] Further, before Class III gaming may take place, a state–tribal compact must be negotiated between the state and tribal governments, subject to the approval of the U.S. Secretary of the Interior (Secretary).[61] The compact functions as an agreement between the two parties and sets forth the terms of Class III gaming between the particular state and tribe. Once a compact is in place, gaming is conducted pursuant to the terms of that agreement and is also subject to various IGRA regulations and federal oversight.[62]

IGRA sets forth a clearly delineated process by which compacts are negotiated. Congress created the process to ensure balanced input between states and tribes, but ultimately sought to ensure that the compacting process would result in successful agreements.[63] The process is as follows:

1. A tribe formally requests that the state enter into compact negotiations.[64]
2. The state has 180 days to negotiate.[65]
3. If the state fails to respond, or no compact results, then the tribe may sue in federal court, alleging bad faith bargaining on the part of the state.[66]
4. The tribe must establish a prima facie case,[67] then the burden shifts to the state to establish that it bargained in good faith.[68]
5. If a court determines that the state acted in bad faith, that court orders the state to complete a compact within sixty days.[69]
6. If no agreement is reached within sixty days, the court appoints a mediator and each side submits its "last best" proposal.[70]

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56. *Id.* § 2703(7). In a nonbanked card game, players compete against one another, not the casino dealer. Poker is a common example of a Class II nonbanked card game. RAND, *supra* note 7, at 48–49.

57. Class III games include slot machines, banked card games (baccarat, blackjack, etc.) and other games including roulette, craps, and keno. *See* 25 U.S.C. § 2703(8).

58. *Id.* § 2710(a)(1).

59. *Id.* §§ 2706(b), 2710(a)(2).

60. *Id.* § 2710(d)(1)(B). Texas permits a broad range of Class III-type gaming, including casino-style games. This matter was not at issue in the *Texas* litigation. Petition for Writ of Certiorari at *7 n.17, Kickapoo Traditional Tribe of Tex. v. Texas, No. 07-1109 (U.S. 2008), 2008 WL 534792, *cert. denied*, 129 S. Ct. 32 (2008).

61. 25 U.S.C. § 2710(d)(1), (8).

62. *Id.*

63. RAND, *supra* note 7, at 58.

64. 25 U.S.C. § 2710(d)(7)(B)(i), *invalidated by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

65. *Id.*

66. *Id.* § 2710(d)(7)(A)(i).

67. A tribe may establish the prima facie case in one of two ways. It may present evidence that: (1) the state never responded to the tribe's request to negotiate a compact, or (2) that the state and tribe failed to reach a compact. *Id.* § 2710(d)(7)(b)(ii).

68. *Id.*

69. *Id.* § 2710(d)(7)(B)(iii).

70. *Id.* § 2710(d)(7)(B)(iv).

7. The mediator selects the proposal that "best comports with the terms of [IGRA] and any other applicable federal law and with the findings and order of the court."[71]
8. The mediator then forwards the selection to both the tribe and the state. Both parties have sixty days to review the selected proposal. If the state accedes, then the compact is treated as though successfully negotiated and is forwarded to the Secretary for approval.[72]
9. If the state disapproves, then the Secretary and the tribe collaborate to draft a compact, taking into account the mediator's compact, IGRA's provisions, and state law. This compact then takes effect.[73]
10. Finally, the Secretary may reject any compact for any of three reasons set forth in IGRA:
    - The compact violates an IGRA provision
    - The compact violates federal law
    - The compact compromises the federal government's trust obligation to tribes[74]

The process set forth in IGRA clearly puts the onus on the states to bargain a compact in good faith.[75] The provision allowing tribes to sue states on a bad faith basis after the initial 180 day period of negotiations favors productive bargaining. A finding of bad faith puts tremendous pressure on the state to successfully bargain an agreement, or it runs the risk that one will be implemented through mediation or via the Secretary. The key ingredient that enhances the likelihood of successful negotiation in the face of a recalcitrant state is the good faith lawsuit provision. This provision is essential in ensuring that tribes are able to successfully enter into compact agreements and further their economic self-development goals through tribal gaming enterprises.

However, the Supreme Court invalidated the suit provision in a 1996 decision, *Seminole Tribe of Florida v. Florida*.[76] The Court found it to be inconsistent with states' Eleventh Amendment sovereign immunity rights.[77] The Eleventh Amendment states: "The juridical power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign state."[78] The Supreme Court has construed the Eleventh Amendment to generally bar suits against the states without state consent.[79]

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71. *Id.*
72. *Id.* § 2710(d)(7)(B)(vi).
73. *Id.* § 2710(d)(7)(B)(vii). The Secretary is authorized to sue the state in federal court to enforce a compact adopted under this mechanism. *Id.* § 2710(d)(7)(A)(iii).
74. *Id.* § 2710(d)(8)(B).
75. *See id.* § 2710(d).
76. 517 U.S. 44 (1996).
77. *Id.* at 47.
78. U.S. CONST. amend. XI.
79. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that a federal court may not entertain an action brought by a private party against a state); *see also* Wisc. Dep't of Corrections v. Schacht, 524 U.S. 381 (1998) (holding that it is within the powers of a state to assert a sovereign immunity defense).

In *Seminole*, the Seminole Tribe brought suit under IGRA claiming that the state had failed to negotiate a compact agreement with the Tribe.[80] The state invoked the Eleventh Amendment, claiming that Congress had unconstitutionally abrogated state sovereign immunity in IGRA.[81] The Court rejected arguments that Congress was entitled to abrogate state sovereign immunity pursuant to its far-reaching plenary powers to regulate Indian Commerce under Article I, Section 9.[82] As a consequence, the Court invalidated the good-faith suit provision in IGRA.

The decision in *Seminole* effectively removed the teeth from the good faith requirements imposed on states through IGRA.[83] It disrupted the balance between state, federal, and tribal interests in the compacting process, investing states with veto power over the compacting process. In fact, following *Seminole*, many states simply refused to negotiate with tribes, thus speaking to the centrality of the suit provision in enabling successful negotiations.[84]

The Secretary responded to *Seminole* by initiating a rulemaking process to implement the Secretarial Procedures and fill the gap left after *Seminole*.[85] The regulations took effect in 1999 and provide tribes with an alternate remedy to the suit provision, thereby eliminating the ability of states to avoid compact bargaining altogether. The Secretarial Procedures are as follows:

1. A tribe formally requests that the state enter into compact negotiations.[86]
2. The state has 180 days to negotiate.[87]
3. If the state fails to respond, or no compact results, then the tribe may sue in federal court.[88]
4. If the state successfully invokes sovereign immunity under the Eleventh Amendment (consistent with *Seminole*), then the tribe may appeal to the Secretary for redress by filing its compact proposal with the Secretary.[89]
5. The Secretary then has thirty days to determine if the tribe is eligible for Class III gaming.[90]
6. If the tribe is eligible, the Secretary then submits the tribe's proposal to the state's governor and attorney general.[91]
7. The governor and attorney general then have sixty days to comment on the proposal and may submit an alternate proposal to the Secretary.[92]

From this point forward, the remainder of the process is dictated by whether the state submits an alternate proposal. If it does not, then the process is as follows:

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80. *Seminole*, 517 U.S. at 51–52.
81. *Id.* at 52.
82. *Id.* at 47. The text of the clause: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.
83. RAND, *supra* note 7, at 94.
84. Kevin Washburn, *Recurring Problems in Indian Gaming*, 1 Wyo. L. Rev. 427, 430 (2001).
85. Texas v. United States, 362 F. Supp. 2d 765, 767 (W.D. Tex. 2004).
86. 25 C.F.R. § 291.3(a) (2009).
87. *Id.* § 291.3(b).
88. *Id.* § 291.3(c).
89. *Id.* § 291.3; *see also id.* § 291.4 (setting forth the requirements for a tribe's proposal).
90. *Id.* § 291.6(b).
91. *Id.* § 291.7(a).
92. *Id.* § 291.7(b).

8. The Secretary has sixty days to evaluate the compact proposal.[93]
9. The Secretary then submits a recommendation either to implement the proposal or to invite the parties to consider unresolved issues.[94]
10. If there are unresolved issues, the parties must meet within thirty days to address the issues.[95]
11. Within thirty days of the conference to address unresolved issues, the Secretary either implements or rejects the proposal.[96]

If the state submits an alternate proposal, then the process is as follows:

12. The Secretary must appoint a mediator within thirty days.[97]
13. The mediator requests the last, best offers from each side.[98]
14. After hearing from both the state and the tribe, the mediator selects one proposal, based upon its conformance with IGRA and other federal law.[99]
15. Within sixty days, the Secretary may either implement or reject the mediator's proposed compact.[100]
16. If the Secretary rejects the proposal, the Secretary must notify each side within sixty days as to how the proposal should be altered to make it acceptable.[101]

The Secretarial Procedures are identical to the statutory procedures unless the state invokes Eleventh Amendment sovereign immunity in step three. Even then, the Secretarial Procedures feature many of the same ingredients as the statutory procedures under IGRA. The Secretarial Procedures include an opportunity for both the tribe and the state to submit proposals to a mediator. However, unlike the statutory procedures, the mediator is selected by the Secretary, not a federal judge, and a mediator may be appointed without a judicial finding of bad faith on the part of a state.[102]

The Secretarial Procedures restore the teeth to the good faith requirement set forth in IGRA. States may not simply refuse to bargain a compact with an eligible tribe. However, as the *Texas* litigation illustrates, some states were not inclined to accept the Secretary's decree without a fight.

III. THE ROUTE TO THE FIFTH CIRCUIT

The Kickapoo Tribe first sought to negotiate a Class III compact in 1995 under the original statutory provisions of IGRA. However, when the Tribe approached the state, Texas refused to negotiate.[103] The Tribe filed suit pursuant to the good

93. *Id.* § 291.8(a).
94. *Id.* § 291.8(b).
95. *Id.*
96. *Id.* § 291.8(c).
97. *Id.* § 291.9.
98. *Id.* § 291.10(a).
99. *Id.* § 291.10(b).
100. *Id.* § 291.11.
101. *Id.* § 291.11(c).
102. *See id*. § 291.9.
103. Texas v. United States, 362 F. Supp. 2d 765, 767 (W.D. Tex. 2004).

faith provisions in IGRA, but the intervening decision by the Supreme Court in *Seminole* prompted a dismissal of the claim in 1996.[104]

In 2003, following the enactment of the Secretarial Procedures, the Tribe submitted its Class III gaming application to the Secretary. After determining that the Tribe's application was complete and in compliance with IGRA regulations, the Secretary invited Texas to comment or submit an alternate proposal.[105]

Texas responded by filing suit in the United States District Court, Western District of Texas, seeking a preliminary injunction and a stay of the administrative proceedings of the United States.[106] The court denied Texas's application. Subsequently, Texas asked the court to invalidate the Secretarial Procedures on the basis that the rules constituted an impermissible delegation of legislative authority and that the gaming procedures were inconsistent with the Secretary's role as "trustee" of tribes under IGRA.[107] The Tribe and the United States responded with claims that Texas lacked standing to bring the action and that its claims were not ripe for adjudication.[108]

The court found against Texas on all counts. First, the court determined that Texas's claims were not ripe. It concluded that the state's injuries were just "conjectural" and that the state had failed to "show some hardship" in order to establish ripeness.[109] On the substantive issues, the court concluded that the Secretarial Procedures were a valid exercise of authority by the Secretary. The court upheld the Secretarial Procedures on two bases. First, the court found that the Secretary's actions were implicitly authorized under IGRA.[110] Second, the court concluded that general prescriptions of authority for Indian affairs delegated to the Secretary under federal law authorized the Secretary to act.[111] The court concluded that the Secretary was empowered to fill the gap left by *Seminole* in a manner consistent with Congress's intent. The court determined that the Secretarial Procedures constituted such an exercise of authority.[112]

IV. *TEXAS V. UNITED STATES*

Texas appealed the decision of the district court to the U.S. Court of Appeals for the Fifth Circuit. The court reversed the Western District on all counts in a 2–1 ruling.[113] The Tribe appealed to the United States Supreme Court, but certiorari was denied in October 2008.[114]

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104. *Id.*
105. *Id.* at 768.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 772.
110. *Id*. at 771.
111. *Id*. at 770. The statutes conveying general authority to the Secretary for Indian affairs are 25 U.S.C. §§ 2, 9 (2009).
112. *Texas*, 362 F. Supp.2d at 770.
113. Texas v. United States, 497 F.3d 491 (5th Cir. 2007).
114. Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008) (denial of cert.).

A. The Application of Chevron *to the Gaming Compact Process*

After dispensing with the justiciability questions in favor of Texas, the court moved to an analysis of the permissibility of the Secretary's actions.[115] The court considered whether the rulemaking was consistent with the Secretary's authority under federal law, primarily IGRA. The court focused extensively upon the permissibility of the Secretary's actions pursuant to the *Chevron* doctrine. The *Chevron* doctrine has evolved as the go-to mode of analysis in measuring the reasonableness of executive agency rulemaking.[116] The underlying principle that characterizes the *Chevron* approach is one of agency deference. As long as the agency's rules reflect a "reasonable connection between [agency] choices and Congressional instructions," agency rulemaking is afforded deference. The view of the *Chevron* Court was that the executive branch, being more in tune and accountable to political and policy matters, is better situated to make such judgments.[117]

Chevron prescribes a two-part test to determine the permissibility of administrative rules promulgated by federal executive agencies. First, the court must determine if there is an ambiguity present in the statute at bar. Second, the court must determine if the rules reasonably flow from congressional intent.[118] In *Texas*, the court determined that the Secretarial Procedures failed on both measures.[119]

B. Chevron *Step One*

In the first step, the court makes an assessment as to whether the relevant statute unambiguously allows or prohibits the agency's actions.[120] If the court determines the statute is ambiguous, then the first inquiry is satisfied. Courts either rely upon the "plain language" of statutes or apply the tools of statutory construction in making the ambiguity determination.[121] Step I involves the independent judgment of the court. It is often the determinative step in the *Chevron* inquiry, as the second step involves much greater deference to the agency that promulgated the rules in question.[122] Thus, if a court concludes that ambiguity is present, then the likelihood of judicial deference to the agency is great. A recent study found that 89 percent of challenged agency rules were upheld under federal judicial review in the second step of the *Chevron* analysis.[123]

Therefore, the focus of the *Chevron* analysis in *Texas* was whether ambiguity in the IGRA compacting provision enabled the resulting administrative rule. For the court in *Texas*, the answer was an unequivocal *no*. Writing for the majority, Chief Judge Edith Jones[124] determined that the plain language of the statute was unam-

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115. *Texas*, 497 F.3d at 496–500.

116. Cass S. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190 (2006).

117. *Id.*

118. *See* Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

119. *Texas*, 497 F.3d at 506.

120. *Chevron*, 467 U.S. at 842–43.

121. Kristine Kordier Carnezis, Annotation, *Construction and Application of* "Chevron *Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2d 25 (2005).

122. *Id.*

123. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Court of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (studying the application of the *Chevron* doctrine to cases filed in the U.S. Court of Appeals in 1995 and 1996).

124. A graduate of the University of Texas School of Law, Judge Jones was appointed to the Fifth Circuit by President Ronald Reagan in 1985 and confirmed by the U.S. Senate the same year. She has served

biguous. She concluded that "the plain language of IGRA permits limited secretarial intervention only as a last resort . . ."[125] In rejecting the United States' argument that the statute conferred implicit authority upon the Secretary, the court asserted that "IGRA's meticulous description"[126] of the remedial processes and the role of the Secretary make clear when and how the Secretary may intervene.[127] The court also dismissed the argument that Congress's failure to explicitly withhold the Secretary's authority constituted implicit consent. The court admonished that agency authority "may not be lightly presumed."[128]

The court also took up another potential source of ambiguity: a statutory gap, created as a result of *Seminole*.[129] Under this theory, an ambiguity results ex post facto when a court acts to invalidate a portion of an existing statute. When remaining parts of the law that functioned in concert with the invalidated portions remain, the statute may operate in an ambiguous fashion. The agency may then act to rectify any such ambiguity through rulemaking. In the context of the *Texas* litigation, the *Seminole* Court created a gap by invalidating the suit provision in IGRA. The Secretary sought to address the resulting ambiguity via promulgation of the Secretarial Procedures.

The majority in *Texas* rejected the *Seminole* gap as a basis to justify the Secretary's actions.[130] It argued that a statutory ambiguity justifying an administrative fix may only be created by Congress, not as the result of a judicial decision that invalidates a portion of a statute. According to the court, "delegation is a matter of legislative intent, not judicial interpretation."[131]

The dissent in the case, authored by Judge James L. Dennis,[132] takes a markedly different tack. He argued that in circumstances where a gap has been created, implicit congressional authority exists to enact gap-filling rules. He contended that judicial interpretation is the *only* way to identify a statutory gap. When the court identifies a gap, it is a gap *created* by Congress and only later *discovered* by the courts. In other words, judicial recognition does not constitute judicial creation. As Judge Dennis articulated, "the Supreme Court [in *Seminole*] did not create the gap . . . but merely declared its existence."[133]

As such, the court has only identified a failure on the part of Congress to draft a constitutionally compliant law. In effect, when a court makes a determination akin to that in *Seminole*, its interpretation of the law takes retroactive effect, as if the

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as Chief Judge since 2006. Federal Judicial Center, Judges of the United States Courts, Jones, Edith Hollan, http://www.fjc.gov/servlet/tGetInfo?jid=1194 (last visited Sept. 21, 2009). Prior to her appointment to the court, she was in private practice in Houston, Texas, at the firm Andrews Kurth. John Council, *Edith Jones Takes Over as Chief Judge of the Fifth Circuit*, TEX. LAW., Jan. 23, 2006.

125. Texas v. United States, 497 F.3d 491, 501 (5th Cir. 2007).

126. *Id*. at 502.

127. *Id.*

128. *Id.* (quoting Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001)).

129. *Id.* at 505.

130. *Id.*

131. *Id.*

132. Judge Dennis graduated from Louisiana State University Law School in 1962. He was appointed to the Fifth Circuit by President William J. Clinton in 1995 and confirmed by the U.S. Senate the same year. Prior to his appointment to the Fifth Circuit bench, Judge Dennis served for twenty years as an Associate Justice on the Supreme Court of Louisiana. Federal Judicial Center, Judges of the United States Courts, Dennis, James L., http://www.fjc.gov/servlet/tGetInfo?jid=605 (last visited Sept. 22, 2009).

133. *Texas*, 497 F.3d at 516–17 (Dennis, J., dissenting).

law had been created by Congress in the judicially severed form.[134] Under this view, the ambiguity-causing gap in IGRA was created when Congress passed a bill that included an unconstitutional remedial scheme.

The approach articulated by Judge Dennis finds support in previous federal court decisions. In *Pittston Co. v. United States*, the Fourth Circuit considered a highly analogous circumstance: the Supreme Court had created a statutory gap by declaring a portion of the Coal Industry Retiree Health Benefits Act (Coal Act) unconstitutional in *Eastern Enterprises v. Apfel*.[135] The Coal Act created a multi-employer retiree benefit fund for workers in the U. S. coal industry.[136] In *Eastern Enterprises*, the Supreme Court determined that a provision of the Coal Act requiring certain employers to make retroactive contributions to the fund was unconstitutional.[137] Those employers could no longer be required to contribute to the fund, leaving some workers without an employer to fund their benefits.[138]

Under the Coal Act, the Commissioner of Social Security (Commissioner) is responsible for assigning employees to the contributing employers.[139] When the Court eliminated some employers from the fund in *Eastern Enterprises*, the Commissioner took steps to fill the resulting gap, enacting new administrative procedures based upon the Coal Act and *Eastern Enterprises*.[140] *Pittston* involved a challenge to this exercise of administrative discretion by the Commissioner.

In assessing the Commissioner's actions in *Pittston*, the Fourth Circuit found the situation warranted agency "gap-filling,"[141] since the Coal Act created a circumstance "unprovided for"[142] by Congress in the legislation. Namely, the court concluded that Congress did not provide for part of the Coal Act to be invalidated as occurred in *Eastern Enterprises*, so the Commissioner had to step in and fill the resulting gap in the regulatory apparatus.[143] In *A.T. Massey Coal Co. v. Holland*, the Fourth Circuit assessed its action in *Pittston* this way: "Once that gap was created [by the Supreme Court], the agency was left with an open policy space, which was the *quintessence* of legislative-type action to which *Chevron* deference was due."[144]

Pittston also hints at another of Chief Judge Jones's arguments: that Congress anticipate future gaps in statutes and explicitly empower agencies to make rules accordingly. The notion that Congress can see into the future seems optimistic at best. Further, imposing such a stringent limitation on administrative agencies would compromise their very purpose. Agencies exist to implement and regulate laws passed by Congress, in a manner that is flexible and responsive to constituents while still embodying the intent of Congress. As Judge Dennis stated in his dissent: "It is inherent in the policymaking process that some unforeseen event, or 'case

134. *See* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993).
135. Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004).
136. Eastern Enters. v. Apfel, 524 U.S. 498, 514 (1998).
137. *Id.* at 500.
138. *Pittston*, 368 F.3d at 400.
139. *Id.* at 401–02.
140. *Id.*
141. *Id.* at 403.
142. *Id.*
143. *See id.* at 402.
144. A.T. Massey Coal Co. v. Holland, 472 F.3d 148, 168 (4th Cir. 2006) (emphasis added).

unprovided for' could render a portion of a statute ambiguous or meaningless."[145] It is vital that agencies have the latitude to step in and fill the gap in a manner that enables the regulated constituency to function consistent with Congress's intent.

The courts—beginning with *Chevron*, have taken a similar view. *Chevron* stated that Congress may leave a "gap" that implicitly empowers the agency to act.[146] The Ninth Circuit is perhaps most on point in the Indian gaming context. It considered a suit brought by the Spokane Tribe of Indians against the State of Washington. Washington, like Texas in the Kickapoo dispute, invoked its Eleventh Amendment sovereign immunity in response to a tribal request to bargain a gaming compact.[147] In assessing the position of the Spokane Tribe, the court offered,

> We are left, then, with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that allegedly hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known what we know now.[148]

Mindful of this "unintentionally" created situation, the Ninth Circuit endorsed the Department of the Interior undertaking rulemaking to repair the gutted compacting remedy provision post-*Seminole*.[149]

Thus, despite the absence of an explicit congressional charge in IGRA to the Secretary to circumvent an invalidated good faith provision, the agency may nevertheless act to fill the gap. The ambiguity in IGRA's remedial scheme resulting from *Seminole* is precisely the type of instance where the courts have found administrative rulemaking justified. A gap has been created due to an oversight on the part of Congress. That gap has been revealed by the courts. Now, it is the agency's job to promulgate rules that fill the gap and preserve Congress's intent. The presence of the gap is enough to satisfy the "ambiguity" step in the *Chevron* analysis, despite the Fifth Circuit's decision in *Texas*.

C. Chevron *Step Two*

Progressing to *Chevron* Step II is conditioned on a finding of statutory ambiguity in Step I. In *Texas*, the court undertook a Step II analysis, despite a failure to find ambiguity in Step I. Step II is where the courts observe heightened deference to agency rulemaking actions. Under *Chevron*, when a delegation of authority to an agency is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency."[150] Thus, in the second step, the inquiry is one of reasonableness. Or, as the court articulated in *Texas*, whether the agency action "reasonably effectuate[s]" Congress's intent.[151]

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145. Texas v. United States, 497 F.3d 491, 516 (5th Cir. 2007) (Dennis, J., dissenting) (citing Barnhardt v. Peabody Coal Co., 537 U.S. 149, 169 (2003)).

146. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

147. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1298 (9th Cir. 1998).

148. *Id.* at 1302.

149. *Id.*

150. *Chevron*, 467 U.S. at 844.

151. Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007).

Courts may consider a wide range of sources to make this determination, including the "language, policies and legislative history of the Act."[152]

In *Texas*, the court began its analysis of the reasonableness of the Secretary's actions by conducting a review of Congress's intent in enacting IGRA generally, and the state compacting provisions specifically. It remarked that Congress endeavored to strike a "finely tuned balance" between state and tribal interests in drafting IGRA.[153] In the context of Class III gaming, Congress carefully arrived at the conclusion that the compacts would protect the interests of states, and a judicial remedy would protect the interests of tribes. The Senate Report on the bill characterized these offsetting tenets as the "best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises."[154] The court emphasized that, under IGRA, gaming may not take place absent an in-force state and tribal compact.

The court's analysis then compared the compacting procedure set forth in IGRA to the Secretarial Procedures. The court concluded that the role of the Secretary under the Secretarial Procedures "bear[s] no resemblance" to the power delegated the Secretary under IGRA.[155] The court focused on four concerns regarding the Secretarial Procedures:

1. The absence of a judicial finding of good faith before secretarial involvement;[156]
2. Providing the Secretary with the authority to select a mediator, rather than a federal district court;[157]
3. The right of the Secretary to implement a proposal at the end of the process, apparently without respect to the proposals of the mediator, tribe, or state;[158]
4. That the Secretarial Procedures "contemplate" gaming in the absence of a tribal–state compact.[159]

In short, the majority was concerned that far too much power is placed in the Secretary. It characterized the Secretary's authority as "unbridled power to prescribe Class III regulations."[160] The court raised concerns that this concentration of power in the Secretary might be unwise, given the "Secretary's statutory trust obligation to protect the interests of Indian tribes,"[161] suggesting that the Secretary may be unable to act impartially in light of Interior's obligation to further tribal well-being. Even when viewed in the context of "their place in the overall statutory scheme,"[162] Chief Judge Jones wrote that the Secretarial Procedures run too far afoul of what "Congress enacted into law."[163]

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152. United States v. Riverside Bayview Homes, 474 U.S. 121, 131 (1985).
153. *Texas*, 497 F.3d at 506.
154. S. Rep. No. 100-446, at 13 (1988).
155. *Texas*, 497 F.3d at 508.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 509 (citations omitted).
163. *Id*.

The court's concerns constitute a narrow view of Congress's intent under IGRA. While it is clear that Congress intended to appease the concerns of states in the wake of the *Cabazon* decision, it is just as clear that tribal economic development and successful compacting were central goals of Congress in enacting IGRA.[164] As the U.S. Court of Appeals for the District of Columbia Circuit recently opined, IGRA was enacted "in large part to 'provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'"[165] In a partial rebuttal of the *Texas* court's contentions, the D.C. Circuit also contended, "IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency, *not* to respond to community concerns about casinos."[166]

Much of the debate about congressional intent may be moot, however, because there seems to be consensus that Congress did desire at least *some* degree of balance between states and tribes. While it may be disputed how even that balance was meant to be, it is beyond dispute that post-*Seminole*, IGRA is completely devoid of balance—"finely-tuned" or otherwise. The elimination of the sole remedy available to tribes to enforce the compacting protocol effectively guts the statute, placing veto control in the hands of states. As the Ninth Circuit noted in *Spokane Tribe*, the "tribe's right to sue the state is a key part of the . . . balancing"[167] inherent in Congress's intent.

Given this state of affairs, *Chevron* deference seems especially appropriate. As Judge Dennis points out in the dissent, it is not the court's role to intensely scrutinize the agency's actions in Step II of *Chevron*.[168] The pertinent inquiry for the court is whether Congress would have sanctioned the administrative rules.[169]

Interestingly, it is within the power of the states to avoid the Secretarial Procedures altogether by simply waiving sovereign immunity and enabling a judicial inquiry into the good faith question. If states want the benefit of the balanced approach in the IGRA statute, then waiving sovereign immunity guarantees access to those procedures. It is only when states want to contravene Congress's intent and refuse to bargain with tribes that the Secretarial Procedures are applied. As Judge Dennis notes, even if a state invokes its Eleventh Amendment rights, the Secretarial Procedures supply ample opportunity for state participation long before the Secretary is empowered to implement any compact unilaterally. In fact, the dissent suggests that a state meeting its obligation to bargain in good faith is likely to reach an agreement long before the Secretary has the authority to issue any dictates.[170]

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164. *See* 25 U.S.C. § 2702(1) (1988).

165. *Texas*, 497 F.3d at 521–22 (Dennis, J., dissenting) (quoting TOMAC, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 865 (D.C. Cir. 2006)).

166. *Id.* at 522 (emphasis added) (quoting Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 469 (D.C. Cir. 2007)).

167. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300 (9th Cir. 1998).

168. *Texas*, 497 F.3d at 522 (Dennis, J., dissenting) ("We do not ask whether the Procedures . . . are ideal, or whether there is some way they can be improved." (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001))).

169. *Id.* at 523 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).

170. *Id.* at 524 ("It seems unlikely that a state, negotiating in good faith, would fully proceed through this process without coming to some agreement with the tribe.").

The majority in *Texas* also expressed concern that the Secretary cannot be entrusted with the responsibility to appoint a neutral mediator.[171] However, under IGRA, Congress broadly authorized the Secretary to implement and regulate tribal gaming. The court's contention that the Secretary can't be trusted to appoint a mediator is at odds with the wide range of responsibilities dedicated to the Secretary in IGRA. Most notably, the power to cancel an agreed upon compact.[172] Congress made the Secretary a focal point of IGRA, with considerable power. Granting the Secretary the authority under the Secretarial Procedures to appoint a mediator seems consistent with that statutory grant.

The final shortcoming of the majority's argument lies in its contention that the Secretarial Procedures invest too much authority in the Secretary generally. This ignores the plain language of the Secretarial Procedures. Assuming the state submits an alternate proposal, then the Secretary is substantially bound by the mediator's proposal. While it is true that the Secretary can reject a mediator's offering, that authority is confined.[173] In fact, the Secretary's actions must "comport with the mediator's selected proposal as much as possible."[174] Judge Dennis, in comparing the procedure under IGRA to the Secretarial Procedures went so far as to argue that "it is unclear which of the two is the more restrictive on the Secretary—and the regulations certainly do not grant 'unbridled power to prescribe Class III regulations.'"[175]

Ultimately, the *Chevron* Step II analysis inquires as to whether Congress would sanction the rulemaking of the agency. Given its desire to provide tribes with a remedy that ensured good faith bargaining and heightened the likelihood of successful compact negotiations, it seems reasonable to conclude that Congress would approve of the Secretarial Procedures. Had Congress been prescient about the outcome in *Seminole*, it would have almost certainly adopted an alternate remedy to achieve balance in compact negotiations. While it may not have been a carbon copy of the Secretarial Procedures, it likely would have effected the same outcome: a remedy to force states to the table to negotiate or face the imposition of a compact by the federal government.

D. The General Statutory Authority of the Secretary to Implement Acts of Congress Relating to Indian Affairs

The Secretary enjoys wide-ranging general statutory authority to implement acts of Congress related to Indian affairs through administrative rulemaking.[176] This authority derives from the general Indian trust statutes and is rooted in the

171. *Id.* at 508 (majority opinion). The Secretarial Procedures empower the Secretary to appoint a mediator when both the tribe and state submit compact proposals. Under IGRA, a mediator is appointed by the court if the tribe and the state are unable to reach an agreement sixty days after a judicial determination of bad faith on the part of the state. *See supra* Part II.

172. *Supra* Part II.

173. The Secretary may only disapprove the mediator's proposal if it violates federal or state law, federal trust obligations to the tribe, or if it fails to comport with the technical requirements for a proposal. 25 C.F.R. § 291.11(b)(2009).

174. *Id.* § 291.11(c).

175. *Texas*, 497 F.3d at 524 (Dennis, J., dissenting).

176. 25 U.S.C. §§ 2, 9 (2009).

Marshall trilogy from the 1830s.[177] Ever since this grant of statutory authority came into effect, it has served as the basis for the Secretary's administrative authority in implementing the federal government's trust responsibilities to tribes.[178]

The *Texas* court was dismissive of this statutory grant of authority as a basis for the Secretary's action in promulgating the Secretarial Procedures.[179] In a brief assessment, Chief Judge Jones argued that the Secretary's general rulemaking authority for Indian affairs is only triggered pursuant to an affirmative statutory directive. The court took the position that without a particularized grant of statutory authority, the Secretary is not authorized to act under his general powers. It posited that the general Indian trust statutory rulemaking authority does not confer on the Secretary a "general power to make rules governing Indian conduct."[180]

The court relied primarily on a case with circumstances not analogous to those in *Texas*, casting doubt on its conclusions. In that case, the Secretary issued fishing regulations in Alaska without *any underlying* statutory grant of authority.[181] His regulations were without statutory antecedent and essentially constituted unilateral legislating on his part.[182] What's more, Congress had expressly *limited* the Secretary's general rulemaking authority for the subject matter affected by the new regulations.[183] This stands in stark contrast to the situation in *Texas*, where IGRA provides a clear statutory basis for the Secretary's actions and there are no limits set forth by Congress on the exercise of the Secretary's general Indian trust statutory rulemaking powers.

The majority in *Texas* also relied upon *United States v. Eberhardt* for its view that a particular statutory antecedent must be in place to justify the exercise of the general authority.[184] As Judge Dennis points out, *Eberhardt* does just the opposite. That court held that "the general trust statutes in Title 25 do furnish Interior with broad authority to supervise and manage Indian affairs and property commensurate with the trust obligations of the United States."[185] The *Eberhardt* court added, "Congress must be assumed to have given Interior reasonable power to discharge its broad responsibilities for the management of Indian affairs effectively."[186]

The court also questioned whether the Secretary's general authority is limited to the management of natural trust resources, like land, water, and minerals.[187] Some

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177. The general trust statutes "authorize the adoption and promulgation of suitable rules and regulations for the carrying into effect of the various provisions of the acts of Congress relating to Indian affairs." United States v. Van Wert, 195 F. 974, 978 (N.D. Iowa 1912). Section Two states: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2 (2009). Section Nine states: "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." 25 U.S.C. § 9 (2009).

178. Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of* Seminole Tribe v. Florida, 29 Ariz. St. L.J. 121, 143 (1997).

179. *Texas*, 497 F.3d at 509–10.

180. *Id.* at 509 (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 63 (1962)).

181. *Organized Vill. of Kake*, 369 U.S. at 63.

182. *Texas*, 497 F.3d at 518 (Dennis, J., dissenting).

183. *Id.*

184. *Id.* at 510 (majority opinion) (citing United States v. Eberhardt, 789 F.2d 1354, 1360 (9th Cir. 1986)).

185. *Id.* at 518 (Dennis, J., dissenting) (citation omitted).

186. *Id.* (citation omitted).

187. *Id.* at 510 n.19.

scholars, including Professor Alex Skibine, have argued that the trust responsibility should apply more generally to tribal interests and sovereignty, including tribal economic matters.[188] In some recent cases, courts have signaled an expanded scope of the trust responsibility to policy areas like healthcare and education.[189] Professor Skibine also suggested that perhaps IGRA itself confers trust status on Indian gaming revenues, due to the language in the law[190]—namely, the reference in the congressional findings of IGRA to tribal self-sufficiency, strong tribal government, and tribal economic development.[191]

The issue may well come down to what exactly the Secretarial Procedures are intended to accomplish. It is undeniable that IGRA authorizes a regulatory regime that imposes a good faith requirement on states to bargain with tribes. Since there is a considerable basis to conclude that the Secretarial Procedures enforce this statutory requirement, there is little wiggle room to contest the Secretary's actions under the general authority statutes.

V. LIFE AFTER *TEXAS*

For tribes like the Kickapoo, *Texas* is a dead end. When states act to invoke sovereign immunity, tribes have little recourse in the post-*Texas* world. Tribes must now hope for outside intervention, either in the form of a congressional fix to IGRA, or a willingness on the part of the U.S. Department of Justice to sue states to enforce the good faith provisions in IGRA.[192]

Given the current political landscape, both of these avenues seem unlikely to bear fruit. The proliferation of Indian gaming has resulted in a backlash against tribes that has found refuge in the halls of Congress. The scandal involving former tribal lobbyist Jack Abramoff,[193] the push for off-reservation casinos,[194] and the

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188. *See* Skibine, *supra* note 178, at 145; *see also* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1242–46 (1975); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 109.

189. Skibine, *supra* note 178, at 145–46 (citing White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978); Meyers v. Bd. of Educ. of the San Juan Sch. Dist., 23 Indian L. Rep. 3045 (D. Utah 1995)).

190. *Id.* at 146.

191. *Id.* (citing 25 U.S.C. § 2701 (1994) ("[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government . . . .")).

192. The Tribe actually has reason for renewed hope at the state level. There is a movement afoot in the 2009 session of the Texas legislature (Senate Bill 1084 and Senate Joint Resolution 31) to legalize casino gaming in the state, including on tribal lands. Among other things, the legislation would authorize twelve full-service destination casinos. Alan Sayre, *Analysis: In Texas, Will Gambling Raise Its Head?*, ASSOCIATED PRESS, Feb. 27, 2009, http://www.timesrecordnews.com/news/2009/feb27/analysis-texts-will-gambling-raise-its-head/. In order to be enacted, the measure must first be passed by the legislature and then by Texas voters. In a recent survey, the Texas Gaming Association found that sixty-eight percent of Texas voters would support the amendment. Press Release, Texas Gaming Association (Feb. 23, 2009) (on file with author).

193. Jack Abramoff worked as a lobbyist representing tribal interests on gaming issues, mostly between 2002 and 2003. During that period, he accrued more than eighty million dollars in fees from tribal clients. Susan Schmidt & James V. Grimaldi, *The Fast Rise and Steep Fall of Jack Abramoff*, WASH. POST, Dec. 29, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/28/AR2005122801588.html (last visited June 12, 2009). Concerns about exorbitant fees and public corruption prompted an investigation by the U.S. Department of Justice in 2004. *Id.* In 2006, Abramoff struck a deal with the United States, pleading guilty to fraud, tax evasion, and conspiracy to bribe public officials. Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to Three Counts*, WASH. POST, Jan. 4, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html (last visited June 12, 2009). He admitted in the plea that he had defrauded four tribes, and he was required to pay those tribes

emergence of highly profitable tribal casinos in the Northeast, California, and elsewhere, have resulted in considerable antipathy being directed at tribes.[195] Even traditional tribal allies, like Republican Senator John McCain, have called for greater scrutiny of tribal economic decisions in the wake of the Abramoff affair.[196] McCain also sponsored amendments to IGRA that would have effectively eliminated a provision enabling off-reservation casinos.[197] Democrats in Congress have also demonstrated opposition to tribal positions on issues like off-reservation gaming. In a recent vote that would have authorized off-reservation gaming for two Michigan tribes, the House of Representatives rejected the measure 298 to 121.[198] This vote marked the first occasion since the Abramoff scandal where Congress considered a major Indian gaming measure.[199] Clearly, the environment did not prove hospitable.

Despite these difficulties in Congress, the election of Barack Obama has renewed optimisim among tribal interests. During the campaign and since the election, President Obama has repeatedly sent positive signals to tribal interests. He visited tribes throughout the country during the campaign, emphasizing his commitment to a strong government-to-government relationship between the federal government and the tribes, with both parties enjoying the status of "equals."[200] This outward recognition and elevation of tribal sovereignty is an encouraging sign for tribal leaders. It remains to be seen how Obama's campaign gestures will translate into Indian gaming policy.

If Congress does signal an interest in fixing IGRA, it may find an effective and politically viable solution elusive. Given the problem that has arisen in the wake of *Seminole* and *Texas*—namely, states unwilling to negotiate compacts in good faith—the best fix is to remove states from the process and impose a federal regu-

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millions of dollars in restitution. *Id.* Abramoff is currently in federal prison. It is ironic that Abramoff's victimization of tribes has resulted in a less hospitable environment for tribes in Washington, perhaps driven by the view that the sudden influx of gaming revenues have resulted in sudden largesse that tribes are unprepared to manage. *See* Susan Schmidt, *A Jackpot from Indian Gaming Tribes*, WASH. POST, Feb. 22, 2004, at A01, *available at* http:www.washingtonpost.com/ac2/wp-dyn//A60906-1004Feb21?language=printer (last visited June 12, 2009).

194. 25 U.S.C. § 2719 (1988). Under IGRA, tribes are generally only allowed to operate tribal gaming facilities on existing tribal lands. IGRA does prescribe a very rigorous process for tribes seeking permission to build off-reservation. This process almost never results in success for tribes.

195. Tribal gaming revenues tend to be concentrated among a few large casinos. For instance, in 2007, just 18.1 percent of tribal gaming establishments accounted for 72.3 percent of the revenue generated by Indian gaming in the United States. National Indian Gaming Association, NIGC Tribal Gaming Revenues 2007, http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/gamingrevenues2007.pdf. (last visited Dec. 22, 2008).

196. *Paternalism or Protection? Federal Review of Tribal Economic Decisions in Indian Gaming*, 12 GAMING L. REV. & ECON. 435, 435 (2008) (panel discussion).

197. *See* Matthew D. All, *John McCain and the Indian Gaming "Backlash": The Unfortunate Irony of S. 2078*, 15 KAN. J.L. & PUB. POL'Y 295, 295–96 (2005).

198. Dennis J. Whittlesey, *Washington's Newest Battle: Indian Gaming v. Indian Gaming*, 12 GAMING L. REV. & ECON. 408, 410 (2008).

199. *Id.*

200. *Chairman Ron His Horse Is Thunder, Is Obama's Election a "New Day" for Native Americans?*, INDIAN COUNTRY TODAY, http://www.indiancountrytoday.com/opinion/columnists/39907672.html (last visited June 16, 2009).

latory scheme instead.[201] This approach is also more in line with the traditional roles of the state and federal governments in Indian Country.[202]

However, since IGRA reflects Congress's effort to balance state and tribal interests, it is likely to insist upon continued state and tribal power-sharing. Moreover, a solution that precludes the states would probably be dead on arrival politically. By now, too many states have become too accustomed to playing a regulatory role in Indian gaming to assume they will cede their role without concerted resistance.

To avoid upsetting the state role under IGRA, it has been persistently advocated that Congress enact a fix that leaves IGRA intact but restores its bite by requiring the Department of Justice to sue states to enforce the good faith provision in IGRA. This idea has been advocated by a variety of sources—from academics, to federal tribal gaming regulators, to the federal courts.[203] It is based on the theory that the special responsibility owed by the federal government to tribes includes an obligation to sue to enforce tribal rights.[204] Of course, the attorney general also has the "inherent duty" to uphold federal law generally.[205]

In at least one instance, a court has found an obligation on the part of a U.S. Attorney to sue a state pursuant to the IGRA good faith provision. In *Chemehuevi Indian Tribe v. Wilson*, the court found that IGRA imposed an implied duty on the U.S. Attorney to act.[206] The court reasoned that absent action by the U.S. Attorney, the balance between the state and tribe intended by Congress in IGRA would be contravened.[207] Only the U.S. Attorney can reach a state that refuses to bargain in good faith.[208]

However, there are also compelling reasons to believe that this approach is not a slam-dunk solution. For instance, other courts have reached a different conclusion than *Chemehuevi*. In *United States v. 1020 Electronic Gaming Machines*, the court concluded that there was no basis to read an implied duty into IGRA and that the court's remedy in *Chemehuevi* did not dovetail with Congress's intent in IGRA.[209] It left the decision to sue up to the U.S. Attorney, demurring to impose a duty under IGRA.[210] One commentator has also pointed out that the scheme would put the United States in a difficult position, litigating against the states.[211] Thus, *Chemehuevi*, now more than ten years decided, appears to stand more as an exception than as the standard practice. Whether a new Congress and a new President change this state of affairs remains to be seen. What seems beyond dispute,

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201. *See, e.g.*, Chris Rausch, *The Problem with Good Faith: The Indian Gaming Regulatory Act a Decade After* Seminole, 11 GAMING L. REV. & ECON. 423, 430 (2007).

202. Namely, Congress's plenary power. *See supra* text accompanying note 20.

203. Rausch, *supra* note 201, at 431.

204. There is also a statutory basis to support the theory. To wit: "In all states and territories where there are reservations or allotted Indians the United States District Attorney shall represent them in all suits at law and equity." 25 U.S.C. § 175 (2009).

205. *See* Rausch, *supra* note 201, at 431.

206. 987 F. Supp. 804, 808 (N.D. Cal. 1997).

207. *Id.*

208. Rausch, *supra* note 201, at 431.

209. 38 F. Supp. 2d 1213, 1216–17 (E.D. Wash. 1998).

210. *Id.* at 1218.

211. Rausch, *supra* note 201, at 432.

however, is that tribes, the states, and the federal courts all look to Congress to end its post-*Seminole* silence.

VI. CONCLUSION

The decision in *Texas v. United States* has upset the delicate balance envisioned by Congress in the state–tribal compact provisions of IGRA. States are no longer bound by the good faith requirement set forth in IGRA and may refuse to bargain with tribes at all. This was precisely the approach undertaken by the State of Texas when it was approached by the Kickapoo Tribe to negotiate a gaming compact. The ruling in *Texas v. United States* validates this action and leaves the Kickapoo without a remedy to get Texas to the bargaining table.

The reasoning set forth by the majority in *Texas* has a number of shortcomings. The court failed to find any ambiguity in the IGRA statute despite it being fundamentally altered by the U.S. Supreme Court in *Seminole*. The court also failed to see a link between Congress's desire to enable tribal Class III gaming and the Secretarial Procedures. Finally, the court refused to accept the general authority conferred to the Secretary of the Interior under U.S. law as a basis for the Secretary's post-*Seminole* rulemaking.

There are substantial flaws in the court's reasoning, and the consequences are serious. The state compacting provisions in IGRA are essentially moot in the face of a recalcitrant state within the Fifth Circuit's jurisdiction. Tribes like the Kickapoo are left with few alternatives.

The likelihood that a tribe can look to the federal government for assistance also appears remote. More than a decade has passed since the Supreme Court decided *Seminole*, and Congress has demonstrated little inclination to promulgate a fix. Growing antipathy toward Indian gaming in Congress suggests that the status quo will persist. It also seems unlikely that tribes can rely upon the Department of Justice to sue to enforce the good faith provision in IGRA absent a major change in policy. However, the election of President Barack Obama has inspired some optimism among tribal leaders.

The net result of this state of affairs is impotence for the Kickapoo and others seeking to negotiate gaming compacts with unwilling states. Tribes will be relegated to two tiers: one for tribes fortunate enough to enter into gaming compacts before *Seminole* and *Texas*, and those who had the misfortune to come later. This hierarchy promises to undermine Congress's high-minded objectives in IGRA to advance tribal economic development, self-sufficiency, and sovereignty.