

ADVISORY OPINION 2005-01

DISSENTING OPINION OF VICE CHAIRMAN MICHAEL E. TONER AND COMMISSIONER DAVID M. MASON

Advisory Opinion (“AO”) 2005-01 arises from a request by the Mississippi Band of Choctaw Indians (“Tribe”), which owns and controls IKBI, Inc., a Tribal entity seeking to be a federal contractor. AO 2005-01 at 1. The issue is whether the Tribe’s relationship to IKBI will make the Tribe itself a federal contractor under the Federal Election Campaign Act (“FECA”) and Federal Election Commission (“Commission”) regulations. *Id.* at 4; *see* 2 U.S.C. § 441c (1980); *see also* 11 C.F.R. § 115 (1976).

The Commission’s Conclusion

In considering whether the Tribe’s relationship to IKBI will make the Tribe itself a federal contractor, the Commission cites AO 1993-12 and AO 1999-32, which considered federal-contractor status and Indian tribes. The Commission states that if the federal-contractor tribal enterprise – here, IKBI – is separate and distinct from the tribe itself, then the tribe itself is not a federal contractor and may make contributions. *See* AO 2005-01 at 5 (citing AO 1999-32). The Commission concludes that IKBI is separate and distinct from the Tribe, because:

- IKBI is separately incorporated.
- It separately leases and owns property.
- No Tribal council member may be on the IKBI board.
- IKBI has a separate legal counsel, bank account, tax-identification number, plus separate employees, personnel policies, and benefit policies, and
- IKBI money does not intermingle with other Tribal money.

Id. at 5-6. Accordingly, the Commission concludes the Tribe is not a federal contractor. Therefore, it may make contributions, *id.* at 6 (citing 2 U.S.C. § 441c), as long as it does not use IKBI revenues. *Id.* (citing AO 1999-32).

The Tribe as a Federal Contractor

Because the Commission's conclusion is mistaken, we respectfully dissent.

AO 1999-32 also considered federal-contractor status and Indian tribes, and concluded that a tribe was not a federal contractor. But AO 1999-32 is different from AO 2005-01, and the Commission should reach a different result.

First, the Commission should not overlook the background or the recent developments in the news. The tribe at issue in AO 1999-32 provided utility services to the federal Bureau of Indian Affairs ("BIA") and Indian Health Services ("IHS") offices on the tribe's reservation. While there is no scandal of which we are aware involving that tribe, recent developments in the news concern tribal political activity, including contributions by tribes. Most recently, for example, the Michigan Saginaws received a congressional appropriation for a school, and made contributions at about the same time Congress was considering the appropriations bill. *See* Susan Schmidt, *Tribal Grant Is Being Questioned*, WASH. POST, March 1, 2005, at A3. While many entities frequently make similarly timed contributions, one purpose of campaign-contribution limits in general and the federal contractor prohibition in particular is to reduce the opportunity for *quid pro quo* transactions. The reason is that if contributions are small enough, then the harm that comes from them can be reduced. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976) (discussing contribution limits). Given these news reports – plus the recent ones involving Jack Abramoff – tribal contributions, and the political role tribes play, have become a major and controversial issue that the Commission should not set aside in setting policy.

That is not to say, of course, that the Commission should punish the Mississippi Choctaws for the alleged sins of the Michigan Saginaws or of Mr. Abramoff. Nevertheless, one aspect of AOs is that while the Commission issues them to particular requestors, they apply to other similarly situated parties. *See* 2 U.S.C. § 437f (1986). Thus, it is appropriate to note that political activity of many tribes has been the subject of controversy. Moreover, the connection between contributions and the appropriations process has raised substantial questions.¹ The Commission should not ignore this background by referring generally to policy or historical reasons for liberal construction of statutes applied to tribes.² Rather, the Commission has compelling reason to tread carefully when construing statutes designed to limit inappropriate political activity as applied to Indian tribes, particularly those that enter into government contracts with the federal government.

¹ That the Mississippi Choctaws or other tribes are represented as victims in certain other controversies is no reason to restrict the application of statutes designed to prohibit inappropriate contributions. Similar to the Municipal Securities Rulemaking Board (and state) "pay-to-play" prohibitions, the federal-contractor prohibition serves as much to insulate contractors from inappropriate requests for contributions as to limit offers by contractors to politicians.

² The requestor asserts that the "Supreme Court has repeatedly articulated a principle for resolving issues in such circumstances: statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Letter of Bryant Rogers, Counsel for the Requestors, to Rosemary Smith, Associate General Counsel, at 5 (March 8, 2005) (citations omitted).

Second, AO 1999-32 involved the establishment of utilities for the reservation itself. Although on-reservation BIA and IHS offices received utility services, that was incidental to the tribe's purpose in establishing an electric utility. While one court decision seemed to conclude that electric companies providing electricity to federal agencies were federal contractors, and thus were bound by civil-rights laws, there was no threat that the AO 1999-32 tribe's federal-contractor status would represent an incentive for the tribe to make, or politicians to seek, political contributions.

By contrast, in AO 2005-01, the Tribal ownership of the corporation is absolutely essential to its business, which may operate exclusively as a government contractor. IKBI maintains it is qualified as a "small" and "disadvantaged" business under the federal Small Business Administration ("SBA"). If the Tribe did not own IKBI, IKBI could not make that claim. As a result of its status, IKBI will compete for business throughout the country. Thus, the Tribal relationship is essential to the corporation's business plan, and the corporation will carry out its business plan far outside the reservation, far outside its immediate confines, and in ways having nothing to do with the welfare – other than economic development – of Tribe members.

The IKBI-Choctaw business plan bears directly on the reason for the federal-contractor ban, namely that Congress did not want federal contractors to take money from those contracts and plow it back into the political system to get even more federal contracts. *Cf.* 2 U.S.C. § 441c(a). Yet protecting and expanding its federal-contracting opportunities will be one of the primary interests behind Tribal contributions once IKBI becomes a federal contractor.

AO 1993-12 also bears on the main reason for the ban on federal-contractor contributions. AO 1993-12 considered three agreements between the federal government and, coincidentally, the Mississippi Band of Choctaw Indians, the same Tribe before the Commission in AO 2005-01. The Commission held that the first and second agreements were not contracts under 2 U.S.C. § 441c(a), but the third agreement was. Under the third, the Tribe itself provided posters and prints to the BIA. Had the Commission held that the Tribe was not a federal contractor, it could have taken money from its federal contracts and plowed it back into the political system to get even more federal contracts. *Cf.* 2 U.S.C. § 441c(a).

Finally, in finding that the contractor ban did not apply to the requesting tribe in AO 1999-32, the Commission held as an essential element of its analysis the absence of financial links between the Tribe and the Tribal Utility Authority. Here, the Choctaws' indemnification agreement represents a material linkage between the tribe and the corporation. Thus, in its desire to accommodate this request, the Commission is not following its prior AOs, but departing from them.

PAC Option

The law does allow federal contractors to establish separate segregated funds, *see* 2 U.S.C. § 441c(b), also known as political action committees ("PACs"). More importantly, there is a material difference between going to owners or executives – whether they are Tribal

members or IKBI employees – and asking them to take money out of *their own pockets* and contribute it to a PAC, and taking the money out of *the federal contractor's revenues* and using it to make contributions. The former is legal, *see, e.g., id.* § 441c(b), while the latter is not. *See id.* § 441c(a). Having a PAC, or even having two PACs – one for IKBI and one for the Tribe – would allow the Tribe to continue to play a role in the political process, yet the Tribe would not be able to fund its political activities out of the fisc of the contractor.

While the Commission does provide that the Tribe may not make contributions using IKBI revenue, *see* AO 2005-01 at 6, that separation may prove illusory because money is fungible. When IKBI profits go back to the Tribe, it will be able to use IKBI money for such items as schools and roads, which is commendable, but then the Tribe will be able to use money it otherwise would have used for schools and roads to make political contributions. The accounting separation will not have a material effect.

Business and Politics, Native Americans, and Consistency

Other Members of the Commission assert that the Tribe should not have to choose between being a business entity and being in the political arena. The Tribe need not choose between being a business entity and being in the political arena. However, it must choose between being a federal contractor and making federal contributions. *See* 2 U.S.C. § 441c(a). The issue in this AO is whether the Tribe as a business entity is a federal contractor. *See* AO 2005-01 at 4. As a federal contractor, it may not make contributions, *see* 2 U.S.C. § 441c(a), yet IKBI may establish a PAC, *see id.* § (b), through which others may make contributions. *See, e.g., id.* § 441b(b)(4).

Finally, one Member of the Commission is correct in urging the Commission to be sensitive to the fact that, by holding that the Tribe is a federal contractor, the Commission would reach a different result than it reached in AO 1999-32, and would reach a result more like the one in AO 1993-12. However, different facts can legitimately lead to different conclusions. Here they do. For the foregoing reasons, the Commission should distinguish AO 2005-01 from AO 1999-32 and hold that the Tribe will be a federal contractor under FECA.

Date

Michael E. Toner, Vice Chairman

Date

David M. Mason, Commissioner