FEDERAL ELECTION COMMISSION
Washington, DC 20463

Tribal Alliance for Sovereignty
c/o Terri Springer
47 Timber Creek
Shawnee, OK 74801

December 11, 1998

RE: MUR 4867

Dear Ms. Springer:

On December 1, 1998, the Federal Election Commission ("Commission") found that there is reason to believe the Tribal Alliance for Sovereignty violated 2 U.S.C. § 441a(a)(1)(C), a provision of the Federal Election Campaign Act of 1971, as amended ("Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved.

If you are interested in expediting the resolution of this matter by pursuing preprobable cause conciliation and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

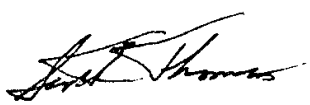
Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Thomas J. Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Acting Chairman

Enclosures
Factual and Legal Analysis
Procedures
Designation of Counsel Form
Conciliation Agreement

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

MUR 4867

RESPONDENT: Tribal Alliance for Sovereignty

## I. GENERATION OF MATTER

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2).

## II. FACTUAL AND LEGAL ANALYSIS

### A. Applicable Law

The Federal Election Campaign Act of 1971, as amended ("Act," "FECA"), defines a "political committee" to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5(a). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court included a purpose test to determine political committee status, *id.* at 79, which it reaffirmed in *FEC v. Massachusetts Citizens for Life* (*"MCFL"*), 479 U.S. 238, 252 n.6 (1986). The Court in *MCFL* stated that if MCFL's independent expenditures "become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. *See also* AOs 1996-13, 1996-3 (addressing unincorporated foundations), 1994-25. *But cf. Akins v. FEC*, 101 F.3d 731, 740-44 (D.C. Cir. 1996) (an organization may be deemed a "political committee" even if its major purpose is not

campaign-related activity), *vacated and remanded on other grounds*, 118 S.Ct. 1777 (June 1, 1998). *See also FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) (the "major purpose" of an organization may be shown by "its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates for federal office"). All political committees shall register with the Commission as required under 2 U.S.C. § 433, and thereafter shall file disclosure reports as required by 2 U.S.C. § 434.

The Act provides that no person shall make contributions to any political committee (excluding party and candidate committees) in any calendar year which in the aggregate exceed $5,000. 2 U.S.C. § 441a(a)(1)(C). The term "person" includes not only an individual, but also a "committee, association . . . or any other group of persons . . . ." 2 U.S.C. § 431(11).

The Act does not expressly mention Indian tribes. However, the Commission has determined in past advisory opinions and enforcement matters that unincorporated tribal entities can be considered "persons" under the Act and thus subject to the various contribution prohibitions and limitations. *See* AOs 1993-12 and 1978-51; MURs 2465 and 2302. Tribal sovereignty as a defense to the Commission's jurisdiction is more thoroughly discussed in Part II.C.

**B. Factual Background**

The term "Five Civilized Tribes" refers to a loose organization of five Native American tribal nations – Cherokee, Choctaw, Chickasaw, Creek and Seminole – whose populations are primarily located in eastern and southern Oklahoma. In 1996, the tribes, or members of them, apparently formed a political action committee, the Five Civilized Tribes Political Action Committee ("Five Committee").

In its 1996 30 Day Post-General Report, the Five Committee disclosed contributions totaling $25,000 received from the Tribal Alliance for Sovereignty ("Tribal Alliance," "Alliance"), an unregistered organization which respondent describes as an informal association of tribal leaders of the Five Civilized Tribes. These contributions were reported as made as follows:

| AMOUNT | DATE |
|---|---|
| $15,000 | March 22, 1996 |
| $5,000 | October 31, 1996 |
| $5,000 | November 1, 1996 |

On May 23, 1997, the Reports Analysis Division ("RAD") sent the Alliance a Registration Notice informing it that contributions in excess of $1,000 per year qualified it as a political committee. In addition, the Notice stated that the Act precludes a political committee from making contributions in excess of $5,000 per year to another political committee. The Notice included two options for the Alliance: either register with the Commission and file disclosure reports, and obtain a contribution refund of amounts in excess of the limitations; or receive a full contribution refund or direct the recipient committee to transfer the funds to an account not used to influence federal elections.

After sending a Second Notice to the Tribal Alliance and contacting it by phone, RAD received a response from an Oklahoma law firm, apparently submitted on behalf of the Alliance. The response, dated July 29, 1997, admits that the $25,000 in contributions were made, but claims that the Tribal Alliance is not a "political committee" as defined in the Act:

> The [Tribal Alliance] is an informal association of the leaders of the Five Civilized Tribes located in Oklahoma. They are associated in their representative capacities for the Cherokee, Choctaw, Chickasaw, Creek

> and Seminole Nations. The purpose of the association is to promote tribal sovereignty through public awareness and perception. It is not now nor was it ever intended to be a political action committee as defined by federal law.

The response further argues that Congress has not explicitly declared that American Indian tribes are covered by the Act, and thus contributions made by the Tribal Alliance cannot be regulated as it is "made up solely of American Indian tribes."

**C. Analysis**

1. Tribal Sovereignty and the FECA

No federal court has ever ruled on the applicability of the Act to Indian tribes or their members.[1] However, the Supreme Court and lower courts have generally taken a narrow view of tribal sovereignty such that it would not appear to prevent the Commission from asserting jurisdiction over respondent.

The Supreme Court has repeatedly affirmed the "plenary power" – full and complete power – of Congress over Indian affairs, which includes the power to modify or eliminate tribal rights. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789, 798 (Jan. 26, 1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). While the Court has acknowledged the existence of tribal sovereignty, it has emphasized its limited nature. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978), the Court noted that Indian tribes retained elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal government.

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[1] The Commission has previously addressed this issue in MURs 2465 and 2302. In MUR 2465, tribal sovereignty was raised as a defense in a subpoena enforcement action involving the Seminole Tribe of Florida, but the court never ruled on this issue.

However, "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments." *Id.* The Court explained that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*,' . . . . Upon incorporation into territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty" (citation omitted). *Id.* at 208-09.

Where Congress explicitly indicates that tribes are subject to a Federal law or that treaty rights are terminated, no tribal sovereignty exists to bar application or enforcement of any such legislation. *See United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968). The Supreme Court has also addressed the question of tribal sovereignty in situations where a federal statute is silent as to Indian tribes, as in the FECA. In *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), the Court stated in dictum that "it is now well settled that a general statute in terms applying to all persons includes Indians and their property interests . . . . The intent to exclude must be definitely expressed." *See also Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 fn. 30 (1984) ("it is highly questionable whether [Indian tribes] have inherent authority to prevent a federal agency from carrying out its statutory responsibility since such authority would seem to be inconsistent with their [dependent] status"). Therefore, contrary to respondent's view of the implications of statutory silence, the determining factor for the Supreme Court apparently lies not in whether a general Federal statute expressly covers Indian tribes, but in whether it clearly excludes them.

Lower courts have generally recognized three exceptions to the *Tuscarora* rule:

> A Federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if (1) the law touches on "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

*Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *U.S. v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980), *cert. denied* 449 U.S. 1111 (1981). In *Coeur d'Alene*, the Occupational Safety and Health Act ("OSHA"), a statute of general applicability without reference to Indians or Indian tribes, was held to apply to commercial activities on a tribal farm run by the Coeur d'Alene tribe. The farm employed some non-Indian workers and was similar in its operation and activities to other farms in the area. The *Coeur d'Alene* court concluded that the operation of a farm selling produce on the open market and in interstate commerce is not an aspect of tribal self-government. 751 F.2d at 1116-17. The court further explained that the other exemptions also did not apply because there was no treaty between the Couer d'Alene tribe and the United States, and the legislative history of the OSHA did not indicate any congressional desire to exclude tribal enterprises from the scope of its coverage. *Id.* at 1117-18. In *Farris*, the Ninth Circuit found that the portion of the Organized Crime Control Act of 1970 that involved syndicated gambling applied to Indian defendants indicted for operating gambling casinos on a reservation. Although the statute was silent as to Indians or Indian tribes, the court stated that "federal laws generally applicable throughout the United States apply with equal force to Indians on a reservation." 624 F.2d at 893.

Other statutes of general application found to overcome tribal sovereignty include the

Employment Retirement Income Security Act ("ERISA") (*Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989)) and the National Labor Relations Act ("NLRA") (*Navajo Tribe v. National Labor Relations Board*, 288 F.2d 162 (D.C. Cir.), *cert. denied* 366 U.S. 928 (1961)). The *Navajo Tribe* court held that the NLRA applies to employers located on reservation lands, despite the existence of a 19th century treaty granting the Navajo tribe broad powers of self-government, including the right to exclude outsiders. The court cited *Tuscarora* and noted that the NRLA "is a general statute. Its jurisdictional provisions and its definitions of 'employer,' 'employee,' and 'commerce' are of broad and comprehensive scope." *Id.* at 165, fn. 4. The court reasoned that the adoption of a national labor policy by Congress superseded any such local policies of the tribe. *Id.* at 164.

None of the three *Farris* exemptions listed above would appear to prevent the Commission from asserting jurisdiction over respondent. First, the Act would not appear to infringe upon any "intramural matter" of the Five Civilized Tribes because involvement in Federal elections is an aspect of the Tribes' external relations, in contrast to such internal matters as "tribal membership, inheritance rules and domestic relations." *See Couer d'Alene* at 1116. With regard to the second exemption, the 19th century treaties signed by the U.S. Government and each of the Five Civilized Tribes, do not appear to contain any provision even remotely touching on tribal involvement in the Federal election process.[2] Therefore, the enforcement of the Act would not appear to infringe upon any treaty right granted to respondent. Finally,

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[2] Between 1785 and 1868, the Cherokee, Choctaw, Chickasaw, Creek and Seminole tribes signed numerous treaties with the Federal government (usually as separate tribes), the texts of which can be found in Volume II of Charles J. Kappler's *Indian Affairs: Law and Treaties* (1904). In general, these treaties delineate the boundaries of each tribe's reservation, provide compensation for lost land and deal with the obligation of the tribes to the federal government in such matters as surrendering fugitives and applying temperance and trading laws.

concerning the third exemption, the legislative history of the FECA and its amendments contains no evidence of a desire on the part of Congress to exclude Indians or Indian tribes from its coverage.[3] *See* MURs 2465 and 2302.

The lands of the Five Civilized Tribes fall mainly within the boundaries of the Tenth Circuit. Although the majority of circuit courts have read the right to self-governance and other treaty rights narrowly, the Tenth Circuit has taken a rather expansive view of the *Farris* exemptions. In fact, the Tenth Circuit has rendered decisions which appear to be in direct conflict with previously cited cases. For example, the court in *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709 (10th Cir. 1982), in contrast to the Ninth Circuit's decision in *Couer d'Alene*, ruled that the OSHA did *not* apply to a tribal business enterprise operating on the reservation, even though, as in *Couer d'Alene*, the business enterprise employed some non-Indians and engaged in interstate commerce. The Secretary of Labor's compliance officers had visited the enterprise's facilities and issued various citations charging workplace violations under the OSHA. The court barred the OSHA's jurisdiction over the tribe in light of a treaty provision recognizing the tribe's right to bar non-tribal members from the reservation, and also because enforcement of the statute's provisions would "dilute the principles of tribal sovereignty and self-government recognized in the treaty." *Navajo Forest*, 692 F.2d at 712.

The Tenth Circuit, in distinguishing *Navajo Forest* from the *Tuscarora* dictum that Indian tribes are covered by statutes of general application unless expressly exempted, noted that

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[3] In the 1979 Amendments to the FECA, Congress added the current language to the definition of "person" at 2 U.S.C. § 431(11) that explicitly excludes the "Federal Government or any authority of the Federal Government." The only discussion in the legislative history of this particular amendment simply reiterates the exclusion of the Federal government with no further explanation. House Report No. 96-422, 96th Cong., 1st Sess. 11 (1979). There is no indication in the legislative history of the statute that Congress intended this exemption to extend to other levels of government or to any other entities.

*Tuscarora* did not involve an Indian treaty.[4] The court stated that the "*Tuscarora* rule does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights." *Id.* at 711. The court then endorsed the Supreme Court's observation in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), that an Indian tribe's power to exclude non-Indians from tribal lands "is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management."[5] *Navajo Forest*, 692 F.2d at 712. The court also favorably noted a footnote in *Merrion* quoting a revision of an authoritative treatise on Indian law, Felix Cohen's *Handbook of Federal Indian Law* (1982): "[O]ver all the land of the [tribal] reservation . . . the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws . . . ." *Navajo Forest*, 692 F.2d at 709 (quoting *Merrion*, 455 U.S. at 146, fn. 12). Although the court did not cite any of the *Farris* exemptions, its reliance on *Merrion* – which did not involve a treaty – suggests that it would have barred enforcement of the OSHA based solely on the "inherent attribute[s]" of sovereignty necessary for tribal self-government.[6] 692 F.2d at 712.

Even when read broadly, however, the doctrine of tribal sovereignty enunciated by the Tenth Circuit in *Navajo Forest* would appear to be limited to issues affecting internal tribal

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[4] The Supreme Court in *Tuscarora* determined that the Federal Power Commission was entitled to take Indian lands with just compensation because "the lands in question [were] not subject to any treaty between the United States and the Tuscaroras." 362 U.S. at 123.

[5] *Merrion* concerned an Indian tribe's authority to tax non-Indians who conducted business on the tribe's reservation. The Court ruled that the tribe had the inherent power to impose a severance tax on oil and gas production on the lands of the reservation.

[6] In a footnote, the Ninth Circuit in *Couer d'Alene* expressed its confusion as to the breadth of the court's tribal sovereignty doctrine in *Navajo Forest*: "To the extent that the Tenth Circuit's decision is not tied to the existence of an express treaty right, we disagree with it." 751 F.2d at 1117, fn. 3.

autonomy. Because it deals only with an Indian tribe's relations to the larger society, the FECA in no way impinges upon the Five Civilized Tribes' ability to set "conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." 692 F.2d at 709. In contrast, the Secretary of Labor, in urging application of the OSHA to the Navajo tribe, was attempting to regulate workplace conditions at a tribal enterprise, which, *inter alia*, necessitated the entry of OSHA inspectors on the reservation to verify compliance. The Commission's jurisdiction over respondents in this matter would not involve any such interference in the Five Civilized Tribes' internal matters. Further, as previously stated, none of the treaties between the Tribes and the Federal government deal with tribal activities related to Federal elections. Accordingly, there are no treaty rights or inherent sovereign powers of the Tribes that could possibly be affected by the regulation of their involvement in the Federal election process.[7]

In the single case cited by respondents, *Equal Employment Opportunity Commission* ("EEOC") *v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), the Tenth Circuit ruled that the EEOC had no jurisdiction over Cherokee tribal employers because the application of the

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[7] *In a recent case involving internal tribal elections on a* Chippewa reservation, the Eighth Circuit held that tribal council officials' conspiracy to commit voter fraud in connection with council elections encompassed a violation of the Indian Civil Rights Act ("ICRA"). *United States v. Wadena*, 152 F.3d 831 (8th Cir. Aug. 11, 1998), *reh'g en banc denied* (Aug. 27, 1998). The court noted that the ICRA was passed for the purpose of securing for American Indians the "broad constitutional rights afforded to other Americans," including the right to be free from fraud in a tribal election. *Id.* at 843-45. Although *Wadena* did not involve a Federal election, the court's rejection of defenses based on tribal sovereignty is instructive:

> No . . . treaty right – to be free to conduct fraudulent elections against their people – is asserted here by the defendants. Contrary to [the defendants'] argument, we find there is no reason why federal criminal jurisdiction over election fraud would work to undermine the sovereignty of the [Chippewa] tribe or its political integrity. . . . [N]o tribal custom or tradition is being threatened by the enforcement of criminal conspiracy laws. There is no tribal custom or tradition of the [tribe] of fraudulently using the election system to maintain positions of power for a few corrupt individuals.

*Id.* at 846.

Age Discrimination in Employment Act ("ADEA") would infringe on the treaty rights of tribal self-governance.[8] In a footnote, the court included the pertinent treaty language:

> The United States hereby covenant and agree . . . [to] secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them . . . .

*Id.* at 938, fn. 3 (quoting from the Treaty of New Echota, December 29, 1835, 7 Stat. 478). The court stated that "in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no clear indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of [statutory] construction to the benefit of Indian interests." *Cherokee Nation*, 871 F.2d at 939.

As in *Navajo Forest*, the Tenth Circuit's view of statutory silence in *Cherokee Nation* cuts against the *Tuscarora* rule favoring express exclusions of Indian tribes in statutes of general application. The court was apparently unwilling to extend the reach of the term "employer" in the ADEA to cover tribal employers, in contrast with the *Navajo Tribe* court's broader reading of the same term in the NLRA. However, the FECA is distinguishable from both the ADEA and the NLRA in that it does not regulate conduct with a close nexus to internal tribal affairs, such as general business activities of tribal employers on Indian reservations, and thus would not infringe

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[8] The litigation in *Cherokee Nation* was precipitated by the EEOC's attempt to judicially enforce an administrative subpoena directing the tribe to produce documents concerning several former tribal employees. The subpoena was issued as part of an EEOC investigation of an age discrimination charge filed by a complainant against the tribe's Director of Health and Human Services. 871 F.2d at 937-38.

upon the treaty-granted right to "govern[] and protect[] . . . persons and property within the tribe's own country . . . ." *Cherokee Nation*, 871 F.2d at 938, fn. 3.

Accordingly, because enforcement of the Act would not directly interfere with any aspect of the Five Civilized Tribes' rights of self-government, the Tenth Circuit presumably would not challenge the Commission's authority to assert jurisdiction over them or their members.

2. Contributions to the Five Committee from the Tribal Alliance

By making $25,000 in contributions to the Five Committee in 1996, the Tribal Alliance has exceeded the threshold for political committee status under 2 U.S.C. § 431(4)(A). However, in determining political committee status, the Commission has also focused on whether a committee's "major purpose" is campaign activity; *i.e.*, making payments or donations to influence any election to public office. AOs 1996-13, 1996-3, 1994-25. Here, the Tribal Alliance claims that its purpose "is to promote tribal sovereignty through public awareness and perception." Although it is not clear what other activities the Alliance engages in aside from the making of Federal contributions, given that its contributions have apparently been made only to one political committee during one brief period in 1996, and in light of its subsequent inactivity (Commission records show no contributions by the Alliance to any political committee since November 1, 1996), the Tribal Alliance should not be considered a "political committee" subject to the Act's registration and reporting requirements.

Even if the Tribal Alliance is not considered a "political committee" it is nevertheless a "person" under 2 U.S.C. § 431(11), based on the jurisdictional analysis above. *See also* AOs 1993-12 and 1978-51; MURs 2465 and 2302. Accordingly, the Alliance could not contribute more than $5,000 to any political committee in any calendar year. *See* 2 U.S.C. § 441a(a)(1)(C). The Alliance exceeded this limit by $20,000 when it contributed a total of

$25,000 to the Five Committee in 1996. Therefore, there is reason to believe that the Tribal Alliance for Sovereignty violated 2 U.S.C. § 441a(a)(1)(C).