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Testimony before the Senate Committee on Indian Affairs Oversight Hearing on Recommendations for Improving the Federal Acknowledgment Process

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Good morning Mr. Chairman and members of the Committee. My name is Patty Ferguson-Bohnee, and I am the Director of the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University. Thank you for the opportunity to present an analysis of and recommendations on the federal acknowledgment process.

Last semester, I was contacted by a staff member of the Committee requesting the Indian Legal Clinic to analyze the federal acknowledgment process. The student-attorneys in the Clinic have prepared a preliminary analysis and proposed recommendations, which I attach hereto. I would like to recognize those students who assisted in the preparation of the attached preliminary analysis: Alejandro Acosta, Jerome Clarke, Tana Fitzpatrick, Chia Halpern, Mary Modrich-Alvarado, and M. Sebastian Zavala.

The Clinic found that although the criteria for federal acknowledgment have not changed, the burden for the meeting the acknowledgment criteria has increased. This burden includes both the amount of evidence required to prepare a petition and the standards for interpreting the criteria. While the burden has always been on the petitioner, unrecognized tribes with few or little resources have little assistance in preparing a successful petition.

Another thing that has not changed since the inception of the process is that unrecognized tribes stuck in the system still lack resources, health care and the ability to participate in federal programs, one of the purposes behind creating a process for federal acknowledgment. In nearly thirty years, the OFA has decided only forty-one acknowledgment cases. The Department fails to issue decisions within its framework, and it is really unknown how long it will take to evaluate all of the petitions that may be presented to the Department. The backlog in petitions results partly from the lack of funding to fully staff an acknowledgment office, the lack of funding and assistance for petitioners to complete the process, and the increased evidentiary burdens on the process. There exist few resources to assist a petitioner in preparing a petition so that even if the OFA follows its framework, the quality of the petition and the future of the tribe could be impacted not by its lack of meeting the requirements, but by its inability to produce the required documentation and analysis. This lack of funding to petitioners also impacts the efficiency of the review process by OFA because of the additional time needed to review information that is not compiled, organized, and analyzed in a professional manner.

A reasonable solution for the process must be undertaken to ensure that petitions are processed more timely. Congress has options—(1) allow the current process to continue under a fully-funded staff; (2) create a commission/task force/peer review committee to either replace or assist the OFA in the evaluation process; (3) implement sunset provisions at various stages of the process to ensure that timeframes are respected; or (4) take no action and receive increased requests for federal acknowledgment from petitioners or potential petitioners. Any of the first three suggestions require substantial funding allocations. To improve productivity under the current process, researchers should be assigned to regions so that they can obtain familiarity and expertise to improve the efficiency of the process. More transparency and access to information without going through FOIA is also needed. Petitioners and third parties should be able to obtain copies

of the FAIR database in a timely manner without submitting FOIA requests. Once documents are uploaded onto the FAIR database, the nonprivate information should be segregated, and copies of the cd-roms should be able to be copied and provided at minimal cost. In one instance, a request for the FAIR database by a researcher was denied, though the Department provided an opportunity for the researcher to purchase the documents at a cost of approximately $5,000, not to mention the time required by OFA if the researcher pursues the request.

There are some unrecognized tribes that cannot participate in the FAP, and others that may have circumstances preventing them from ever meeting the FAP criteria. While Congress cannot spend all of its time evaluating whether a group is an Indian tribe, Congress has the power to extend recognition to Indian tribes and should step in and evaluate petitioners who cannot petition through the FAP.

Thank you for allowing the Clinic to review and provide comments on the federal acknowledgment process. I am happy to answer any questions that the Committee may have.

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PRELIMINARY ANALYSIS OF AND RECOMMENDATIONS
ON THE FEDERAL ACKNOWLEDGEMENT PROCESS

I. BACKGROUND

The Federal Acknowledgment Process provides one avenue for an unrecognized tribe to obtain federal status as a tribe eligible to receive services from the Bureau of Indian Affairs ("BIA").[1] Other avenues include federal court recognition and congressional legislation.[2] In the 1970s, the Department of Interior ("DOI" or "Department") identified that there were an increased number of tribes seeking to clarify their federal status and that it needed to implement a process to address these requests; this resulted in the creation of what is now referred to as the Federal Acknowledgment Process ("FAP"). Since its inception in 1978, only forty-one tribes have completed the FAP.

This preliminary analysis includes an overview of the American Indian Policy Review Commission's examination of unrecognized tribes and the development of the FAP. The analysis then focuses on four issues hindering the process: increased burdens, timeliness, lack of resources, and lack of transparency. The analysis also includes a

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[1] The Federal Acknowledgment Process refers to the administrative process by which unrecognized tribes can seek recognition from the Department of the Interior under 25 C.F.R. Part 83. Tribes receiving a positive final determination are placed on the list of tribes eligible to receive services from the BIA. This list should be published annually. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454 §§ 103-104, 108 Stat. 4791 (codified at 25 U.S.C. § 479a to 479a-1 (2008)).

[2] Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454 § 103, 108 Stat. 4791 (codified at 25 U.S.C. § 479a (2008)).

review of legislative proposals addressing these four issues with the FAP. The final section of the analysis includes recommendations on the process for federal acknowledgment.

A. THE AMERICAN INDIAN POLICY REVIEW COMMISSION

In 1975, Congress established the American Indian Policy Review Commission ("AIPRC") during the era of Indian Self-Determination, which followed the era of termination.[3] This was a time of Indian activism, with confrontations between American Indians and federal authorities at Wounded Knee, in Washington D.C. and in Washington State.[4] Although it was the era of Indian self-determination, corporations, uranium producers, coal companies, ranchers, oil and gas developers, and private developers lobbied Congress for control over Indian land and resources.[5] In 1974, when introducing the joint resolution in the House of Representatives that authorized the creation of the AIPRC, Representative Meeds stated that there was only "one Indian problem which is composed of lesser, specific problems which are interrelated, and which impact upon one another."[6] He believed that past legislation was "piece-meal" and future legislation needed to be comprehensive.[7] Congress agreed and found the need to conduct a comprehensive review of Indian affairs similar to the Meriam Report conducted in 1928.

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[3] Pub. L. No. 93-580, 88 Stat. 1910 (1975) (establishing the American Indian Policy Review Commission). Between the 1950s and 1960s, Congress terminated approximately 110 tribes. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 163 (Nell Jessup Newton et al. eds., 2005).
[4] UCLA AMERICAN INDIAN STUDIES CENTER, NEW DIRECTIONS IN FEDERAL INDIAN POLICY: A REVIEW OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION 115 (1979).
[5] Id. at 10.
[6] Id. at 8.
[7] Id.

Congress charged the AIPRC with conducting this comprehensive review of the federal-tribal relationship "in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians."[8] Included in the AIPRC's charge was the duty to examine "the statutes and procedures for granting federal recognition and extending services to Indian communities and individuals."[9]

The AIPRC was comprised of six members of Congress, three from the House of Representatives and three from the Senate, and five Native American leaders.[10] The House and Senate members of the AIPRC, through a majority vote, selected the Native American members of the AIPRC.[11] The AIPRC congressional members identified over 200 individuals who could be effective in lobbying Congress and had experience in Washington D.C. politics.[12] The AIPRC included one member from an urban area, one member from an unrecognized tribe, and three from federally recognized tribes.[13] The congressional members selected Ada Deer, John Borbridge, Louis Bruce, Adolph Dial, and Jake White Crow as the Native American commissioners.[14]

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[8] Pub. L. No. 93-580, Preamble, 88 Stat. 1910 (1975).
[9] Pub. L. No. 93-580, § 2(3), 88 Stat. 1910, 1911.
[10] 2 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT APPENDIXES AND INDEX 4 (1977). Earlier attempts to pass similar legislation called for a larger commission and more funding.
[11] Id. at 4-5; Pub. L. No. 93-580.
[12] UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 12-13; Pub. L. No. 93-580. Tribes received a memorandum requesting their input on the nominations' process. Controversy surrounded the selection of the five Native Americans who were to serve on the AIPRC. Id. at 12. Some Native Americans complained that the congressional appointments were not made with enough Native American input. Id. at 21.
[13] Pub. L. No. 93-580, 88 Stat. 1910-11.
[14] UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 13.

Two members of the AIPRC were personally involved in recognition efforts for their respective tribes. Ada Deer successfully lobbied to restore the Menominee Tribe's federal status.[15] Adolph Dial, a Lumbee, was considered the most representative of unrecognized tribes. He was known for constantly fighting for federal recognition and federal support, both for his tribe and in general.[16]

The AIPRC established eleven task forces to study major issues affecting tribes.[17] Each task force was composed of three members, two of whom had to be Native American.[18] The three task force members established the task force's basic plan. Each task force held hearings across the nation and had one year to investigate issues and to compile a report.[19]

One issue tackled by the AIPRC was the need for federal recognition of all unrecognized tribes. Prior to the 1970s, federal statutes authorizing services for Native American communities and reservations refer to "Indians" for eligibility.[20] These statutes were broad and did not place limits on which "Indians" were eligible for services.[21] In the 1970s, many statutes began requiring tribes to be recognized by the federal government before tribes and their members could receive services and participate in Indian programs.[22] During this time, the Department received an increased number of

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[15] Id.
[16] Id.
[17] Id. at 14. The authorizing legislation created nine of the eleven task forces. Pub. L. No. 93-580, § 4, 88 Stat. 1910, 1912.
[18] Id.
[19] UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 21.
[20] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 153.
[21] Id.
[22] Id. at 154.

requests to recognize tribes.[23] Issues related to federal recognition of tribes were included in Task Force Nine's Final Report, Task Force Ten's Final Report, and the AIPRC Final Report.

1. Task Force Ten Report

Task Force Ten was charged with the responsibility of addressing the issues affecting terminated and unrecognized tribes.[24] Chairman JoJo Hunt (Lumbee) and members John Stevens (Passamaquoddy) and Robert Bojorcas (Klamath) of Task Force Ten were all members of unrecognized or terminated tribes.[25] The task force identified its study as informational and noted that the study should be considered the beginning of an effort by Congress, the Executive Branch, and the American public to correct mistakes made against unrecognized and terminated Indians.[26] Task Force Ten conducted case studies of Oregon tribes, New England tribes, North Carolina tribes, Washington tribes, the Pascua Yaqui in Arizona, and the Tunica-Biloxi-Ofo-Avoyel community in Louisiana.[27] The task force conducted research through questionnaires that were distributed to Indian groups and tribes, as well as through hearings, interviews, and site visits.[28]

The task force stated that the concern over appropriations by both Congress and the Executive Branch had determined Indian affairs, and as a result, federal services,

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[23] Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39361 (1978); see also, Barbara Coen, Tribal Status Decision Making: A Federal Perspective on Acknowledgement, 37 NEW ENGLAND L. REV. 492 (2003).
[24] 2 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT APPENDIXES AND INDEX 8 (1977).
[25] Id. at 17.
[26] AIPRC, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS 4 (1976).
[27] Id. at 17-209.
[28] Id. at 1716-1722.

programs, and benefits were often denied to terminated and unrecognized Indians.[29] The task force recommended that Congress direct all federal departments and agencies to serve all Indians, regardless of their status.[30] Acknowledging that increased funding would be required to provide services to newly-recognized and restored tribes, Task Force Ten suggested that Congress appropriate enough money for the departments and agencies to provide services to all Indians.[31] The task force also proposed that Congress establish a fund for terminated and unrecognized tribes to obtain their choice of counsel in order to address any problems affecting them.[32]

2. Task Force Nine Report

Task Force Nine researched and made recommendations in the areas of revision, consolidation, and codification of laws.[33] The task force's goal was to provide recommendations for Congress to establish a special body to codify its recommendations, which would be headed and staffed by Indian attorneys.[34]

The Task Force Nine Report proposed that Congress devise statutory standards governing federal recognition.[35] The task force requested that Congress develop criteria for federal recognition for Indian groups that had been previously denied recognition.[36] The report suggested that Congress explain that there are a number of Indian groups who have been denied federal recognition because they lack treaties or other contact with

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[29] Id. at 1696.
[30] Id. at 1701.
[31] Id.
[32] Id. at 1702.
[33] Peter S. Taylor, Yvonne Knight and F. Browning Pipestem served as members of Task Force Nine. 1 AIPRC, FINAL REPORT TASK FORCE NO. 9 LAW CONSOLIDATION, REVISION, AND CODIFICATION (1976).
[34] Id. at IV.
[35] Id. at 100.
[36] Id. at 46.

federal authorities.[37] Some of these groups benefited from congressional funding in the areas of educational grants and manpower training programs even though they were not considered federally-recognized tribes.[38]

Task Force Nine proposed that Congress should acknowledge that its refusal to recognize tribes is based on a lack of resources and appropriations for tribes already recognized, as well as a lack of clear legislative guidelines for federal recognition. The task force suggested that Congress emphasize its commitment to provide a means for federal recognition along with adequate funds for the newly recognized tribes, while not reducing funding for tribes already recognized.[39]

Task Force Nine urged Congress to adopt "Congressional Findings and Declaration of Policy," which included certain findings regarding the clarification of federal, tribal, and state relations.[40] Task Force Nine recommended that Congress restate its plenary power over tribes, including its authority to withdraw federal recognition of tribes.[41] The task force also addressed the need for Congress to restore terminated tribes to federally-recognized status and to clarify that the termination policy was "an ill conceived policy."[42]

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[37] Id. at 30.
[38] Id. at 44.
[39] Id. at 30, 46.
[40] Id. at 27.
[41] Id. at 28.
[42] Id. at 27, 29.

3. AIPRC Final Report

The AIPRC issued its final report to Congress in 1977.[43] Anti-Indian sentiment was on the rise during this time period. Although Representative Meeds was the primary sponsor of the AIPRC legislation in the House, he wrote the dissent in the AIPRC Final Report.[44]

The AIPRC Final Report included a chapter on unrecognized and terminated tribes.[45] The AIPRC found that many tribes were terminated or not recognized because of past federal policies.[46] At the time of the report, the AIPRC identified that 130 tribes had not been recognized because of bureaucratic oversight.[47] The final report explained that all tribes should benefit from a relationship with the United States and that a tribe's lack of status was not based on equity or justice.[48]

The AIPRC proposed recommendations to resolve the status of unrecognized tribes. First, the AIPRC suggested that Congress clarify its intent by adopting a concurrent resolution that provided a policy to recognize all tribes as eligible for benefits and protections.[49] Second, the AIPRC recommended that Congress adopt the following seven criteria for determining recognition:

a) Evidence of historic continuance as an Indian tribal group from the time of European contact or from a time predating European contact.

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[43] The AIPRC Final Report was to be issued in 1976, a congressional election year. The report was issued later because there was a split in the AIPRC between those who continued to support Indian self-determination and those who opposed increases in BIA funding and other improvements to Indian programs. UCLA, NEW DIRECTIONS IN FEDERAL INDIAN POLICY at 15-17.
[44] 1 AIPRC, FINAL REPORT 567-612 (1977).
[45] Id., ch. 11.
[46] Id. at 8.
[47] Id. at 8.
[48] Id. at 8, 37, 480.
[49] Id. at 37.

b) The Indian group has had treaty relations with the United States, individual states, or preexisting colonial/territorial government. "Treaty relations" include any formal relationship based on a government's acknowledgment of the group's separate or distinct status.

c) The group has been denominated as an Indian tribe or designated as "Indian" by an Act of Congress or executive order of state governments identifying the governmental structure, jurisdiction, or property of the group in a special relationship to the state government.

d) The Indian group has held collective rights in tribal lands or funds, whether or not it was expressly designated a tribe.

e) The group has been treated as Indian by other Indian tribes or groups. This can be proved by relationships established for crafts, sports, political affairs, social affairs, economic relations, or any intertribal activity.

f) The group has exercised political authority over its members through a tribal council or other such governmental structures which the group has defined as its form of government.

g) The group has been officially designated as an Indian tribe, group, or community by the federal government or by a state government, county government, township, or local municipality.[50]

Under the AIPRC's proposed process, the government had the burden of proving that the Indian group did not meet the one of the seven criteria.[51]

To evaluate the petitions, the AIPRC recommended that Congress develop an office independent from the BIA to assess petitions.[52] The office would contact all known unrecognized tribes, provide technical and legal assistance and review the petitions.[53] The office would decide if the group was eligible as a tribe for federal

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[50] Id. at 482.
[51] Id. at 39, 482-483. The criteria were similar to that "developed and applied" by federal officials after enactment of the Indian Reorganization Act. See id. at 477; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 155.
[52] 1 AIPRC, FINAL REPORT at 38, 481-482.
[53] Id. at 38.

services and programs.[54] The decision would "be decided on the definitional factors . . . intended to identify any group which has its roots in the general historical circumstances all aboriginal peoples on this continent have shared."[55] Within one year from the date of the tribe's petition, the office would hold hearings and investigations and issue a decision. The office would be required to provide a written explanation of a tribe's failure to establish one of the seven factors.[56] This decision could be appealed to a three-judge federal district court. If the tribe's status was affirmed, the government would be required to immediately provide benefits and services to the tribe, and Congress would need to provide the relevant agencies additional appropriations.[57]

The AIPRC attempted to formulate a process by which all unrecognized tribes could obtain recognition with little expense and burden. Congress did not adopt the AIPRC's recommended procedures for federal recognition. Approximately fifteen months after the AIPRC Final Report was issued, the Department finalized procedures for establishing that a group exists as an Indian tribe.

B. THE FEDERAL ACKNOWLEDGMENT PROCESS

1. Initial Regulations

During the mid to late 1970s, there was increased judicial pressure highlighting the need for the DOI to reexamine the role of the federal government in protecting "Indian Tribes."[58] This pressure came in the form of federal circuit courts recognizing

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[54] Id. at 38.
[55] Id. at 38.
[56] Id. at 38, 480-483.
[57] Id. at 40.
[58] Barbara Coen, Tribal Status Decision Making: A Federal Perspective on Acknowledgement, 37 NEW ENGLAND L. REV. 491, 492-493 (2003) (citing United States v. Washington, 385 F. Supp. 312, 379 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir.

that descendants of tribes possessed inherent and delegated rights.[59] DOI's position was that "a tribe is not a collection of persons of Indian ancestry, unless their ancestors are part of a continuously existing political entity," separating racial groups from political entities.[60] Prior to the development of agency regulations, the DOI evaluated requests on an ad hoc basis. The DOI began receiving an increased number of requests to recognize tribes, and it had no system to evaluate petitions.[61] Thus, the Department set out to promulgate rules with the essential requirement that, "the group has existed continuously as a community with retained powers."[62]

On August 24, 1978, after an extensive notice and comment period, the Department promulgated "Procedures for Establishing that an American Indian group exists as an Indian tribe" requiring a petitioner to meet the following seven mandatory criteria in order to obtain acknowledgment:[63]

a) Historical Continuity: A statement of facts establishing that the petitioner has been identified from historical times until the present times, on a substantially continuous basis.

b) Social Community: Evidence that a substantial number of petitioning group members live in an area/community that is viewed as Indian or distinct from other populations in the area and members of the petitioning group descend from an Indian tribe "which historically inhabited a specific area."

1975), cert denied, 423 U.S. 1086 (1976) (holding an unrecognized Indian group was entitled to usufructory rights because they were successors to a treaty tribe); Joint Tribal Council of Passamaquoddy v. Morton, 528 F.2d 370 (1st Cir. 1975) (holding the Indian Trade and Intercourse Act applied to all tribes regardless of federal recognition)).

[59] Id.

[60] Coen at 497.

[61] Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. Part 54.7, 43 Fed. Reg. 39361 (1978).

[62] Coen at 496.

[63] 25 C.F.R. Part 54.7, 43 Fed. Reg. 39361, 39363.

c) Political Community: A statement of facts establishing that the petitioner has maintained tribal political influence over its members as an autonomous entity throughout history until the present.

d) Government Structure: A copy of the group's present governing document, or statement describing the membership criteria, and also the groups governing procedures.

e) Membership List: A list of all known current members of the group and previous membership lists based on the tribe's own defined criteria.

f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

g) The petitioner is not, nor is its members, the subject of congressional legislation which has expressly terminated or forbidden the federal relationship.

The purpose of the regulations was to provide an "equitable solution to a longstanding and very difficult problem."[64] Barbara Coen, an Attorney-Advisor at the Department identified that "[t]he primary impetus for formalizing the decision-making process concerning tribal status was the increase in the number of petitions from groups throughout the United States requesting that the Secretary of the Interior officially acknowledge them as Indian tribes."[65]

2. 1994 Regulations

In 1994, sixteen years after the enactment of the initial FAP regulations, the Assistant Secretary of Indian Affairs ("AS-IA") took final action on a rule revising the procedures for establishing that an American Indian group exists as an Indian tribe ("1994 Regulations").[66] The 1994 Regulations sought to clarify the FAP requirements

[64] 43 Fed. Reg. 39361.
[65] Coen at 492.
[66] 59 Fed. Reg. 9280 (Feb. 25, 1994).

and define clearer standards of evidence.[67] One of the changes to the FAP made by the 1994 Regulations was a reduced burden of proof for petitioners demonstrating previous federal acknowledgment.[68]

Procedural improvements in the 1994 Regulations included an independent review of decisions, revised timeframes for actions, definition of access to records, and an opportunity for a formal hearing on proposed findings.[69] With the revisions, the Department attempted to improve the quality of materials submitted by petitioners, as well as to reduce the work required to develop petitions. The hope was to provide a faster and improved process of evaluation.[70]

II. THE CURRENT ADMINISTRATIVE PROCESS

A. ISSUE ONE: INCREASED BURDEN ON PETITIONERS

Since the time of its inception in 1978, the administrative criteria have not changed, but the burden on petitioners to establish the criteria has increased. While the petitioners' burden of proof, "reasonable likelihood," is a low evidentiary burden, the evidence necessary to meet the criteria has increased—requiring petitioners to exceed the "reasonable likelihood" standard provided in the FAP.

To meet this increased burden of proof, petitioning groups must provide more documentation and analysis than required in the initial regulations. Former AS-IA Kevin Gover testified that the Office of Federal Acknowledgment ("OFA") seeks historical

[67] Id.
[68] Id.
[69] Id.
[70] Id.

truths when evaluating petitions, a more intense standard than what is called for in the FAP.[71]

Even though the AIPRC proposed regulations, the initial regulations, and the current regulations anticipate that a Proposed Finding would be issued one year after a petition was placed on active status,[72] the DOI took less time to evaluate petitions earlier in the process than the current administrative process. Tribes whose petitions were analyzed earlier in the process produced less documents, and it took fewer pages, i.e., less time, to evaluate petitions. This shift is demonstrated by comparing the evidentiary requirements and analysis of petitioners throughout the years.[73]

The Tunica-Biloxi Indian Tribe's experience, for example, differs from those of petitioners currently in the process. The Tunica-Biloxi first requested governmental assistance in protecting its rights, essentially the need for a trust relationship, in 1826.[74] The tribe filed a petition for acknowledgment in 1978, and its petition was placed on active status in February 1979.[75] In 1980, the Department issued a positive proposed finding and a technical report totaling seventy-eight pages.[76] The technical reports

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[71] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 64 (2004) (statement of Kevin Gover, former AS-IA).
[72] 25 C.F.R. Part 54.9(f), 43 Fed. Reg. 39361, 39364; 1 AIPRC, FINAL REPORT 38; 25 CFR Part 83.10(h).
[73] There is no explicit evidentiary burden of proof identified in the initial regulations. See 25 C.F.R. Part 54.7, 43 Fed. Reg. 39361.
[74] Letter of Intent from Tunica Biloxi Tribe, to United States Department of the Interior (September 7, 1826), available at http://www.indianz.com/adc20/Tbt/V001/D002.PDF.
[75] 44 Fed. Reg. 116 (1979); BUREAU OF INDIAN AFFAIRS, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 73 (1980), available at http://www.indianz.com/adc20/Tbt/ V001/D005.PDF.
[76] Memorandum from Comm'r of Indian Affairs, to Asst. Sec'y Indian Affairs (Dec. 4, 1980), available at http://www.indianz.com/adc20/Tbt/V001/D005.PDF; BIA,

included a history report, an anthropological report, a demographic report, and a genealogical report.[77]

The Tunica-Biloxi tribe was one of the first petitioners to go through the process after the BIA promulgated the acknowledgment regulations in 1978. The BIA recognized the Tunica-Biloxi through the FAP in July 1981.[78] It took the BIA three years to resolve the Tunica-Biloxi Indian Tribe's petition for federal acknowledgment. There were only four comments submitted, all in support of Tunica-Biloxi's recognition.[79]

Although the Tunica-Biloxi provided the necessary information to become federally recognized, the burden has become far more onerous for tribes. While the Tunica-Biloxi petition was relatively small and the technical report was only seventy-eight pages,[80] the United Houma Nation, Inc. submitted approximately 19,100 pages in non-private information, [81] and the technical report and proposed finding issued in 1994 totaled 448 pages.[82] Similarly, the earlier cases reviewed by the BIA resulted in less-extensive technical reports; the proposed finding documents issued in 1979 for the Grand Traverse Band of Ottawa Indians totaled seventy-three pages, and the Jamestown Band of

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TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA.

[77] BIA, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 7, 8, 28, 65, 73.

[78] Final Determination for Federal Acknowledgment of the Tunica-Biloxi Tribe of Louisiana, 46 Fed. Reg. 38411 (1981).

[79] Id.

[80] BIA, TECHNICAL REPORTS REGARDING THE TUNICA-BILOXI INDIAN TRIBE OF MARKSVILLE, LOUISIANA 7-85.

[81] Letter from Lee Fleming, Director OFA, to Patty Ferguson, attorney Sacks Tierney (Nov. 7, 2005) (on file with Sacks Tierney).

[82] BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST THE UNITED HOUMA NATION, INC. (1994), available at http://www.indianz.com/adc20/Uhn/V002/D007.PDF.

Clallam Indians' proposed finding documents issued in 1980 totaled eighty-four pages.[83] Later decisions, such as the Burt Lake Band of Indians proposed finding issued in 2004 and the Huron Potawatomi proposed finding issued in 1995, exceed 400 pages.[84] The BIA reported in 2002 that administrative records, at that time, ranged in excess of 30,000 pages to over 100,000 pages.[85]

Proposed Bills to Reduce the Substantive Burden

In 2003, Senator Campbell introduced S. 297 ("Campbell Bill"), which proposed changes to some of the substantive criteria.[86] The Campbell Bill required a showing of continued tribal existence from 1900 to the present, rather than from first sustained contact with the Europeans as provided in 25 C.F.R. Part 83.7(b) and (c).[87] Under the proposed bill, if an Indian group demonstrates by a reasonable likelihood that the group was, or is a successor in interest to a party to one or more treaties, that group must show their existence from when the government expressly denies services to the petitioner and its members.[88]

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[83] Memorandum from Acting Deputy Comm'r of Indian Affairs, to Asst. Sec'y (Oct. 3, 1979) (attaching technical reports supporting proposed finding of Ottawa and Chippewa Indians), available at http://www.indianz.com/adc20/GTB/V001/D005.PDF; Memorandum from Acting Deputy Comm'r of Indian Affairs, to Asst. Sec'y (May 16, 1980) (attaching technical reports supporting proposed finding of Jamestown Band of Clallam Indians), available at http://www.indianz.com/adc20/Jct/V001/D005.PDF.

[84] BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST ACKNOWLEDGMENT OF THE BURT LAKE BAND OF OTTAWA AND CHIPPEWA, INDIANS, INC. (2004), available at http://www.indianz.com/adc20/BLB/V001/D004.PDF; BUREAU OF INDIAN AFFAIRS, PROPOSED FINDING HURON POTAWATOMI, INC. (1995), available at http://www.indianz.com/adc20/Hpi/V001/D005.PDF.

[85] Coen at 495 (citation omitted).

[86] Federal Acknowledgment Process Reform Act of 2003, S. 297, 108th Cong. (2003).

[87] Id.

[88] Id.

Revising the date from which petitioners must prove the social and political requirements of 25 C.F.R. Part 83(b) and (c) from historical times to the present to a later date could be beneficial for both the OFA and the petitioners. Congress should consider moving the date to either 1850 or to the date the state in which petitioner descends becomes a member of the Union. 1900 may work for some petitioners, but as evidenced by proposed findings, some periods in the 1900s are unavailable and the extra fifty years could assist petitioners so that the proper inferences as to continuing social and political community can be made.

Changing the date from first sustained contact, which in some cases can be difficult to determine, could reduce the burden for both the DOI and the petitioner. Searching historical records of France, Spain, and England is extremely burdensome and in some cases unavailable. Some research requires the use of translators and the hope that the documents are accessible. While colonial research during periods of rule by other countries can still be used to prove descent from a historic tribe, it is not necessary to prove social and political community. It makes more sense to evaluate a tribe's social and political status from the date in which the United States would have begun to have relations with the tribe.

In 2007, Representative Faleomavaega introduced H.R. 2837 ("Faleomavaega Bill") to improve the recognition process.[89] The bill defines historical times as a period dating from 1900. The major concerns inspiring Representative Faleomavaega to propose the legislation readdressed the concerns addressed in the Campbell Bill: (1) petitioning tribes were stuck in the system without finality for more than 20 years; (2)

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[89] H.R. 2837, 110th Cong. (2007).

tribes must spend excessive sums of money to produce the documentation required by the process; (3) the criteria are too vague and overly subjective; (4) documentation accepted as proof for one tribe is not accepted for another; and (5) the system is inherently biased, leaning heavily towards denying recognition.[90]

The DOI voiced concerns about Faleomavaega Bill. AS-IA Carl Artman agreed with establishing the criteria for acknowledgment through legislation rather than regulation because it would affirm the Department's authority and give clear congressional direction as to what the criteria should be.[91] However, he testified that the bill would lower the standard for acknowledgment by requiring a showing of continued tribal existence from 1900 to present and that the legislation could result in more limited participation by parties such as states and localities.[92] He did not, however, provide an explanation in his written testimony as to why the proposed changes should not implemented other than that the changes deviate from the Department's current practices.

B. ISSUE TWO: THE CURRENT PROCESS IS NOT TIMELY

The current process does not adhere to the timeframes set forth in the regulations, nor do petitioners with completed petitions have a clear indication of when their petitions will be considered. Many have criticized the process for the delay in reviewing a petition, evaluating a petition, and issuing a decision.

The backlog resulting in delays of several years for petitions concerned the AS-IA.[93] In 2000, the AS-IA changed its internal procedures for processing petitions for

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[90] Id.
[91] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 5 (2007) (statement of Carl J. Artman, AS-IA).
[92] Id.
[93] 65 Fed. Reg. 7052 (Feb. 11, 2000).

federal acknowledgment as an Indian tribe, and clarified other procedures in order to reduce the delays in reviewing petitions.[94] The revised procedures did not change the acknowledgment regulations but provided a different means of implementing the existing regulations.[95]

The AS-IA found the demands on the OFA's time continued to reduce the proportion of available time to evaluate petitions.[96] Examples of the demand on the OFA included: (1) petitioners and third parties frequently requesting an independent review of final determinations by the Interior Board of Indian Appeals ("IBIA"), requiring the OFA to prepare the record and to respond to issues referred by the IBIA; (2) the OFA responding to litigation in at least five lawsuits concerning acknowledgment decisions; and (3) the substantial number of Freedom of Information Act ("FOIA") requests requiring the OFA to copy the voluminous records of current and completed cases.[97]

During a hearing on the Campbell Bill in 2004, the BIA supported a more timely decision-making process, but objected to a lessening of the factual basis required to render a favorable decision.[98] At the hearing, two former AS-IAs, Neal McCaleb and Kevin Gover, testified.[99] They identified three problems in the current process: (1) the length of time and duplicative research required of petitioners to participate in the process have slowed the process considerably; (2) the exclusive reliance of the AS-IA on the

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[94] Id.
[95] Id.
[96] Id.
[97] Id.
[98] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 48-51, 56 (2004) (statement of Aurene Martin, Deputy AS-IA).
[99] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 52-56 (2004) (statements of Neal McCaleb, former AS-IA, and Kevin Gover, former AS-IA).

OFA staff, due to the complexity and volume of research required of petitioners, has resulting in unnecessary friction and perceived irrationality in recognition decisions; and (3) the extent, frequency, and duplicative nature of FOIA requests to the BIA for documents submitted to or accumulated by the BIA pursuant to petitions resulted in a "churning" of document submissions and redistributions by way of FOIA requests; this churning, in turn, resulted in a diversion of key, technical staff from their intended roles as analysts.[100] Former AS-IA McCaleb and former AS-IA Gover expressed frustration with relying solely on OFA's recommendations for acknowledgment decisions and supported the creation of a independent body to offer a second opinion on controversial matters.[101]

The Muwekma Ohlone ("Ohlone") case exemplifies the need for clarity in the time frames. The Ohlone have occupied the San Francisco Bay Area since pre-Columbian times. The DOI recognized the Ohlone in the early Twentieth Century, but the tribe has been unable to achieve federal recognition. It took DOI over a decade to conclude its review of the Ohlone petition.[102]

The Ohlone filed a letter of intent to file a petition for federal acknowledgment in 1989.[103] In 1995, the Ohlone submitted a petition for acknowledgment as a federally recognized tribe.[104] The following year, the Bureau of Acknowledgment and Research ("BAR")[105] notified the Ohlone that the DOI had previously recognized the tribe as the

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[100] Id.
[101] Id. at 53, 55.
[102] Muwekma Tribe v. Babbitt, 133 F. Supp.2d 42 (D.D.C. 2001).
[103] Id.
[104] Id. at 44.
[105] The Bureau of Acknowledgment and Research is the predecessor to the Office of Federal Acknowledgment.

Pleasanton or Verona Band. The tribe then wrote to AS-IA Ada Deer requesting "clear and concise time tables and responses" for the petition process.[106] In 1996, 1997 and 1998, the BAR continued to request additional information from the Ohlone, and the tribe complied. In 1998, the Ohlone was placed on the "ready for active consideration list," and was notified that it would be evaluated after the South Sierra Miwok Nation petition.[107] Another year passed, and the petition was not reviewed. In 1999, AS-IA Kevin Gover identified that there were ten tribes ahead of the Ohlone on the "ready" list, and fifteen tribes under "active consideration."[108] While the government claimed the petition would be heard within two to four years, the Ohlone estimated that it could have been twenty years before its petition was adjudicated.[109]

Frustrated with the timeliness of the FAP, the Ohlone filed suit against the Secretary of the Interior and the AS-IA to compel the Department to set a date by which consideration of its petition must be concluded.[110] The court granted summary judgment to the Ohlone and "directed the defendant to propose . . . a schedule for 'resolving' the plaintiff's petition."[111] On appeal, the D.C. Circuit Court found that the ruling did not, "intend to mandate that the agency act within a prescribed time frame at this point."[112]

Following the court order, the BIA submitted a "fast-track" policy for tribes like the Ohlone.[113] Under the fast-track policy, tribes with prior federal recognition after

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[106] Muwekma Tribe, 133 F. Supp.2d at 45.
[107] Id.
[108] Id.
[109] Id.
[110] Id. at 43.
[111] Id. at 46.
[112] Id.; see also Muwekma Tribe v. Babbitt, 133 F.Supp.2d 30, 41 (D.C. Cir. 2000).
[113] "[T]he BIA would agree to place promptly on active consideration any petitioner on the Ready list which establishes . . . under 25 C.F.R. Part 83.8 that is had prior or Federal

1900 are placed on an expedited path for consideration. The policy did not guarantee that the expedited process would end any sooner than the process for those who lacked previous acknowledgment.[114]

The court directed the DOI to issue a final determination of the Ohlone petition by March 2002.[115] In September 2002, the Department issued a determination denying the Muwekma Ohlone federal recognition. Because of the court order in the Muwekma case, the OFA was required reprioritize its caseload to address the Ohlone petition. Other litigation also results in similar reprioritization, which affects petitioners awaiting acknowledgment decisions.

The Ohlone case shines light on the need for timeliness in the recognition process. First, when a tribe will be placed on the active consideration list is not apparent. Second, the actual time period that a tribe will spend on the active list is undetermined. Any redrafting of the federal recognition process may eliminate costly lawsuits if the redraft includes clear timelines for the OFA to follow.

In November 2001, the General Accounting Office ("GAO") prepared a report analyzing the FAP, including the inability of the BIA to provide timely evaluations of completed petitions.[116] The GAO found that "the process does not impose effective

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recognition after 1900 and that its current members are representative of and descend from that previously recognized tribal entity . . ." Id.

[114] The Ohlone pointed to the cases pending in 2001, like the United Houma Nation who had been waiting nine years on active consideration, the Duwamish Indian Tribe who had been waiting eight years, and the Chinook Indian Tribe who had been waiting six years. Id.

[115] Id. at 51.

[116] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49 (Nov. 2001).

timelines that create a sense of urgency."[117] The GAO noted that only 55 of the 250 petitions for recognition contained sufficient documentation to allow them to be considered and reviewed by the OFA staff.[118] The GAO indicated that it may take up to fifteen years to resolve the completed petitions awaiting active consideration based on the OFA's past record of issuing final determinations.[119] The regulations assume a final decision will be issued approximately two years from the point of active consideration, but the GAO found that at least two of the thirteen active petitions had been on the active consideration list for over ten years.[120] Ten additional petitions were completed and awaiting placement on the active consideration list.[121] The GAO reported that the BIA experienced an increased workload and backlog from the large amounts of documentation submitted by the petitioners, but the number of staff to evaluate petitions had decreased.[122] The GAO found that petitions under review are becoming more detailed and complex as petitioners and interested parties commit more resources to the process.[123]

In 2005, Representative Pombo introduced a bill in the House of Representatives to require prompt review by the Secretary of the Interior of the long-standing petitions for federal recognition of certain Indian tribes.[124] The bill tried to reform the FAP by setting forth a process for potentially eligible tribes to opt into expedited procedures so they

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[117] Id. at 3.
[118] Id. at 17.
[119] Id. at 15-16.
[120] Id. at 17.
[121] Id.
[122] Id. at 3, 16.
[123] Id. at 16.
[124] H.R. 512, 109th Cong. (February 2, 2005).

could be considered eligible for recognition.[125] To date, no progress has been made on identifying realistic time frames for petitioners.

C. Issue Three: Lack of Resources

A major obstacle to any resolution of the current backlog in the FAP is the lack of resources allocated to both the OFA and petitioning tribal groups. Funding is essential to carry out the provisions of the FAP. The lack of funding impacts all aspects of the process. Without funding for the petitioners, petitioners are unable to meet the increased burden required under the FAP. Without sufficient funding for the OFA or some other regulatory body, researchers are unable to focus on the substantive analysis of petitions preventing review within the specified time frames.

1. Funding for the OFA

For fiscal year 2008, the DOI operates on a $15.8 billion annual budget.[126] For fiscal year 2009, the President requested $2.3 billion for Indian Affairs, a net decrease of $105.4 million from fiscal year 2008.[127] About ninety-five percent of the budget authority is provided through current appropriations for discretionary programs.[128] In addition, the President requested $311,000 for new tribes, i.e., recently federally acknowledged tribes. These funds are used by the new tribes for efforts such as tribal enrollment, tribal government activities, and developing governing documents.[129]

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[125] Id.
[126] Department of the Interior Quick Facts, available at http://mits.doi.gov/quickfacts/facts2.cfm.
[127] The United States Department of the Interior Budget Justifications and Performance Information, Fiscal Year 2009, Indian Affairs at 13, available at http://www.doi.gov/budget/2009/data/greenbook/FY2009_IA_Greenbook.pdf.
[128] Id.
[129] Id.

In 2001, the GAO reported that the "BIA's tribal recognition process was ill equipped to provide timely responses to tribal petitions for federal recognition."[130] In addition to the backlog of petitions, the technical staff had an increased burden of administrative responsibilities which reduced their availability to evaluate petitions.[131] The staff had an increased burden of responding to FOIA requests related to petitions.[132] In response to the GAO Report, the DOI adopted a strategic plan.[133] Even with the implementation of the strategic plan, in 2005, the GAO estimated that it will take "years to work through the existing backlog of tribal recognition petitions."[134]

Additional appropriations have assisted in reducing the burden on technical staff in responding to administrative matters. Additional appropriations in fiscal years 2003 and 2004 provided OFA with resources to hire two FOIA specialists/record managers and three research assistants who work with a computer database system.[135] The GAO found that the contractors freed the professional staff of administrative duties resulting in greater productivity.[136]

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[130] Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (statement of Robin M. Nazarro) (2005); INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49 (2001).
[131] Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. (2005) (statement of Robin M. Nazarro).
[132] Id. at 6.
[133] See DEP'T OF INTERIOR, STRATEGIC PLAN: RESPONSE TO THE NOVEMBER 2001 GAO REPORT 2-3 (2002).
[134] Hearing on H.R. 512 Before the House Comm. on Resources, 109th Cong. 9 (2005) (statement of Robin M. Nazarro).
[135] Id. at 8.
[136] Id.

As of April 18, 2008, the OFA staff consists of twenty-two individuals, but has the funding capacity to employ three additional researchers.[137] There are currently three fully-staffed research teams; each team includes a cultural anthropologist, a genealogical researcher, and an historian. The three vacancies would comprise an additional research team when hired.[138] In addition to these research teams, OFA employs eight independent contractors who primarily deal with data processing, one computer programmer, one Senior Federal Acknowledgment Specialist, two FOIA managers, and three researchers who enter data into the Federal Acknowledgment Information Resource ("FAIR") system.[139]

Despite these changes, the process needs additional funding. This funding need is acknowledged in GAO Reports, by former AS-IAs,[140] and by at least two former BAR researchers. Former BAR researchers testified that the lack of resources is a fundamental problem in the process.[141] In October 2007, Dr. Steven Austin, a former anthropologist in the BAR, testified before the House Committee on Natural Resources that the OFA lacks efficiency due to inadequate funding and resources.

> The Executive [Branch] did not plan well or adjust to changing realities as the number of petitioners increased beyond its ability to respond to them, and the Legislative [Branch] failed to appropriate enough resources (money and personnel) to get the job done. I remember how difficult it was for our Branch Chief to give testimony in Congress about the acknowledgment process, primarily to respond to concerns about why the process was moving so slowly.

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[137] Telephone Interview with Linda Clifford, Secretary, Office of Federal Acknowledgement, in Washington, D.C. (April 18, 2008).
[138] Id.
[139] Id.
[140] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 52-64 (2004) (statements of Neal McCaleb, former AS-IA, and Kevin Gover, former AS-IA).
[141] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. (2007) (statements of Steven L. Austin, PhD, and Michael L. Lawson, PhD).

> Her superiors at the BIA always told her that she could not ask for, or even imply the need for, additional money for the acknowledgment program. The one investment that could have made a difference in the speed with which petitions were resolved was more money to hire an adequate number of researchers and support staff, and to provide more technical assistance to petitioners and interested parties. Even when asked directly by members of Congress if the BAR needed more funding she was not allowed to reply in the affirmative. I do not know if the OFA's Director is still under instructions not to be direct about the need for more resources, but it is something the Congress should be sensitive to as it determines what to do next.[142]

Former AS-IA Kevin Gover also acknowledged that the Department was advised not to disclose its funding needs with regards to OFA.[143]

In 2004, former AS-IAs Neal McCaleb and Kevin Gover testified about the lack of resources dedicated to the OFA and the overall lack of resources for the BIA.[144] McCaleb explained that the lack of resources for the BIA creates a tension because the tribal advisory committee making recommendations to the BIA on funding priorities do not want to sacrifice funding for programs operated by the BIA for federally-recognized tribes in exchange for more funding for the OFA.[145] Funding for OFA is, therefore, a low priority for the BIA.[146]

Hiring additional staff to analyze petitions could increase the overall efficiency of the process. Additional funding is needed for more research teams. Creating more research teams would allow teams to develop expertise in a region resulting in greater efficiency and reducing the backlog of petitioners. Due to the number of petitioners and

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[142] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 4 (2007) (statement of Steven L. Austin, PhD).
[143] Interview with Kevin Gover, Professor of Law, Sandra Day O'Connor School of Law, in Tempe, AZ (Oct. 23, 2007).
[144] Federal Acknowledgment Process Reform Act: Hearing on S. 297 Before the Senate Committee on Indian Affairs, 108th Cong., S. HRG. 108-534, at 61-62, 64 (2004) (statements of Neal McCaleb, former AS-IA, and Kevin Gover, former AS-IA).
[145] Id. at 61-62
[146] Id. at 64

lack of available staff, the same research team was simultaneously assigned to petitioning tribes in Michigan, California, and Louisiana who were in various stages of the process.

By dividing researchers into regions, a researcher will develop an expertise in a certain region thereby improving the overall efficiency of the process. For each petition, a researcher will have to become familiar with each region or locality to understand and grasp the political, social, and cultural influences that may have impacted a tribe during a particular time period. For example, the terms "mulatto," "griffe," or "free person of color," may have different meanings in each region during different time periods. By focusing research, analysis, and review in certain regions, researchers may become more familiar with the types of research available and conduct a faster and more efficient review because of their expertise within the region.

We understand that the annual budget processes ultimately determine the amount of funding for all agencies, and the funding of OFA. Certainly, we also know that the funding amounts are not acceptable given the backlog of petitions. There needs to be more disclosure of what is truly needed by OFA since it conducts the day-to-day operations of the FAP. Because the OFA is not a funding priority, and the BIA has not made a commitment to allocate sufficient funds from its budget to the OFA, creating an independent commission with sufficient appropriations to handle the petition requests may result in an efficient resolution of the problems associated with the FAP.

2. Funding for Petitioners

In order to increase efficiency, funding is required for both the OFA and for petitioners throughout the entire process. While a few petitioning tribes have obtained funding from developers, not all petitioners have this option nor would some petitioners

relinquish control over the submission process. Status clarification grants from the Administration for Native Americans under the Department of Health and Human Services are no longer available to petitioning entities, and there are no other sources of federal monies available for petitioning tribes.

In 2007, Dr. Michael Lawson, a former historian in the BAR, testified before the House Committee on Natural Resources that the vast majority of unrecognized tribes lack the physical and financial capability to fully prepare a petition to be submitted under the FAP.[147] He noted that unrecognized tribes tend to be small with few resources.[148]

> No petitioner has ever been successful in gaining acknowledgment without significant professional help from scholarly researchers, lawyers, and others. Yet, it has become increasingly difficult for petitioners to obtain the funding necessary to sustain professional help.[149]

The criteria, as implemented, require that a petitioning tribe obtain expert analysis by genealogists, historians, and anthropologists. In addition to lawyers, some tribes need archaeologists, demographers, linguists, or other experts to prepare a comprehensive petition. Petitioners lacking financial resources have few options. The lack of financial resources and availability to pay professionals is not a consideration of the FAP.

The current scheme rests the entire research and preparatory process on mostly poor, unfunded tribal groups. Prior to 2000, the BAR staff were allowed to conduct research on petitions and did conduct substantial additional research on petitions.[150] In 2000, the AS-IA revised the internal procedures for processing petitions by advising OFA

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147 Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 3 (2007) (statement of Michael Lawson, PhD).
148 Id.
149 Id.
150 Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052 (Feb. 11, 2000).

that it is neither expected nor required to locate new data in any substantial way.[151] Further, the revised internal procedures prohibited the OFA from requesting additional information from the petitioner or third party after a petitioner was placed on active consideration, and the OFA was directed not to consider any material submitted by any party once the petitioner's case went on active status.[152] Put another way, the AS-IA wanted to ensure that the OFA merely evaluated the arguments presented by the petitioner and third parties to make a determination as to whether the evidence submitted demonstrated that the petitioner met the criteria.[153] The revised internal procedures also noted that petitioners had the burden to analyze the data submitted on their behalf and that the OFA did not bear the burden to analyze such data, even if the data supported the criteria. The changes attempted to ensure that the petitioner and third party submissions during the comment period, not additional OFA research, addressed any deficiencies in the petition.[154]

In 2005, the BIA issued revised internal regulations superseding the 2000 internal procedures for processing petitions.[155] Three revisions address potential funding burdens of the petitioner. First, the 2005 regulations removed the limitation on research by the OFA staff imposed by the 2000 internal procedures.[156] The 2005 notice allowed flexibility for the OFA staff to undertake some research beyond the arguments and

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[151] Id.
[152] Id. at 7053.
[153] Id. at 7052.
[154] Id.
[155] Office of Federal Acknowledgment; Reports and Guidance Documents, 70 Fed. Reg. 16513 (March 31, 2005).
[156] Id.

evidence presented by the petitioner or third parties at the discretion of the Department.[157] This change may have limited benefits to the process if the OFA's timelines are not followed because the provision is applicable "only when consistent with producing a decision within the regulatory time period."[158]

Another key change in the 2005 internal regulations is the opportunity for petitioners to submit materials within a sixty-day time period once a petition is placed on active status. The reality of this provision is that petitioners whose comment period has been closed for some years will need to spend the two months updating membership rolls and data between the time period in which the comment period was closed and when the petition was placed on active status. This process includes printing the necessary two copies for OFA and mailing them to Washington D.C. within the two-month period. For petitioners who rely on volunteers and lack adequate resources, two months may be insufficient to update and copy a decade of information.

3. Federal Acknowledgment Bills Addressing Resources

Representative Faleomavaega recognized the severe financial burden on petitioners as a factor in introducing H.R. 2837, "The Indian Tribal Recognition Administrative Procedures Act", in the 110th Congress.[159] Some tribes must spend "huge sums of money – as much as $8 million – to produce the mountains of documentation required by the process."[160] In response to this burden, the Faleomavaega Bill proposes monetary assistance to tribal petitioners through grants funded by the Department of

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[157] Id.
[158] OFA Reports and Guidance Document, 70 Fed. Reg. at 16514.
[159] H.R. 2837, 110th Cong. (2007).
[160] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. (2007) (statement of Representative Nick J. Rahall, II, Chairman, House Comm. on Natural Resources).

Health and Human Services.[161] These grants would assist petitioners in (1) conducting the research necessary to substantiate documented petitions; and (2) preparing documentation necessary for the submission of a documented petition. No specific amount is enumerated in this section. The bill authorizes appropriations to the Secretary of the Department of Health and Human Services to fund petitioners in researching and documenting petitions in the amount necessary for each fiscal year between 2008 and 2017.[162]

In 2001, Senator Dodd introduced two bills to address the funding concerns highlighted in the 2001 GAO Report, Senate Bill 1392[163] and Senate Bill 1393.[164] Both bills were referred to the Senate Committee on Indian Affairs. Senate Bill 1393 provided more resources for all participants in the FAP, including funds for local governments that have an interest in a petition.[165] Under Senate Bill 1393, grants of up to $500,000 per fiscal year could be awarded to a tribe or local government.[166]

Similar efforts to include grant funding for petitioners were included in bills sponsored by Senators Campbell and McCain.[167] In the "Tribal Acknowledgment and Indian Bureau Enhancement Act of 2005" sponsored by Senator McCain ("McCain Bill"), $10 million was contemplated for fiscal year 2006 and each fiscal year

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[161] H.R. 2837, 110th Cong. § 17 (2007).
[162] Id. § 19.
[163] Tribal Recognition and Indian Bureau Enhancement Act of 2001, S. 1392, 107th Cong. (2001).
[164] A bill to provide grants to ensure full and fair participation in certain decisionmaking processes at the Bureau of Indian Affairs, S. 1393, 107th Cong. (2001).
[165] S. 1393, 107th Cong. § 1 (2001).
[166] S. 1393, 107th Cong. § 1 (2001).
[167] S. 297, 108th Cong. § 6(b) (2003).

thereafter.[168] Senator Campbell introduced S. 297 during the 108th Congress ("Campbell Bill"). The Campbell Bill included a funding authorization to carry out the provisions of the bill for each of the fiscal years 2004 through 2013.[169] The Congressional Budget Office ("CBO") estimated that implementing the Campbell Bill would cost $44 million over the 2005 to 2009 budget periods, subject to the appropriation of the necessary amounts.[170] The CBO estimated that ten new petitions would be filed each year, and assumed that grants of $200,000 would be awarded per petition for petitioners and third-parties. Under this assumption, the CBO estimated a total cost of $1 million in 2005 and $2 million annually thereafter for an estimated cost of $9 million over the 2005 to 2009 budget periods.[171]

In addition to ensuring financial support for petitioners, interested parties, and the regulatory body, the Campbell Bill proposed to create and fund the Federal Acknowledgment Research Pilot Project.[172] The project would have made available additional research resources for researching, reviewing, and analyzing petitions for acknowledgment received by the AS-IA.[173] This project would have authorized the appropriation of $3 million each year for fiscal years 2004 through 2006 to provide grants to institutions that participate in a pilot project designed to help DOI review tribal

[168] S. 630, 109th Cong. (2005)
[169] S. 297, 108th Cong. § 6(b)(4).
[170] S. REP. NO. 108-403 (2004).
[171] Id.
[172] S. 297, 108th § 6(c)(1) (2003).
[173] Id.

recognition petitions.[174] The CBO estimated that it would cost $6 million between 2005 and 2006 to implement this provision.[175]

D. ISSUE FOUR: LACK OF TRANSPARENCY

The FAP lacks transparency, leaving petitioners unaware as to how the criteria may be applied to their petitions. The 2001 GAO Report found that the "basis for BIA's recognition decisions is not always clear."[176] The GAO explained that

> [W]hile there are set criteria that petitioners must meet to be granted recognition, there is no clear guidance that explains how to interpret key aspects of the criteria. For example, it is not always clear what level of evidence is sufficient to demonstrate a tribe's continued existence over a period of time—one of the key aspects of the criteria. As a result, there is less certainty about the basis of recognition decisions.[177]

The GAO found that the guidelines provided petitioners a basic understanding of the FAP, not constructive notice of how the evidence would be applied to the criteria.[178]

Petitioners lack guidance as to how the OFA interprets the regulations. Dr. Steven Austin identified that the OFA does not always apply the scholarly standards of the disciplines in evaluating petitions. For example, the method to calculate endogamy rates in analyzing petitions by the OFA were not based on the social scientists who had written extensively in this area; instead, the OFA informed Dr. Austin in a technical assistance meeting that it would use an entirely different method that was not supported by the profession.[179] If the OFA does not rely on standards in the profession, it should

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[174] S. REP. NO. 108-403 (2004).
[175] Id.
[176] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49, 2 (Nov. 2001).
[177] Id. at 2-3.
[178] Id. at 10.
[179] Hearing on HR 2837 Before the House Comm. on Natural Resources, 110th Cong. 6-8 (2007) (statement of Steven L. Austin, PhD).

inform petitioners of this diversion and have a basis for the selection of the alternative method.

The AS-IA has disagreed with the acknowledgment recommendations made by the OFA staff. The disagreements and the claims that the recommendations are based on past precedent are unclear to petitioners.[180] Further, review of the proposed findings and final determinations indicate that the standard of proof for issuing a decision shifts based on who is presiding as the AS-IA.[181]

In February 2000, the BIA published notice of internal changes of processing FAP petitions. In the 2000 internal changes, the AS-IA indicated that the OFA would rely on past decisions as "precedents" because the "existence of a substantial body of established precedents now makes possible this more streamlined review process."[182] In July 2000, five months after the internal procedures were issued, this notion was rejected in the Proposed Finding for Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana when the BIA stated that it is not bound by its previous decisions because, "departures from previous practice on these matters are permissible and within the scope of the existing acknowledgment regulations."[183] While the regulations provide for discretion, such conflicting statements as to how evidence will be interpreted can be confusing to petitioners.

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[180] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 11.
[181] Compare RECONSIDERED FINAL DETERMINATION FOR FEDERAL ACKNOWLEDGEMENT OF THE COWLITZ INDIAN TRIBE, 67 Fed. Reg. 607 (Jan. 4, 2002) (explaining that tribe met the criteria of 83.7(a) as modified by 83.8 by showing federal recognition in 1878 and 1880) and PROPOSED FINDING AGAINST FEDERAL ACKNOWLEDGEMENT OF THE STEILACOOM TRIBE OF INDIANS, 65 Fed. Reg. 5880 (Feb. 7, 2000).
[182] CHANGES IN THE INTERNAL PROCESSING OF FEDERAL ACKNOWLEDGMENT PETITIONS, 65 Fed. Reg. 7052, 7053 (Feb. 11, 2000).
[183] PROPOSED FINDING FOR FEDERAL ACKNOWLEDGMENT OF THE LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA, 65 Fed. Reg. 45394, 45395 (July 21, 2000).

In response the 2001 GAO Report, the BIA compiled a database of completed petitions. This database is now accessible and was last updated in August 2004. Indianz.com has posted a link to the database on its website.[184]

Although the database is accessible, some petitioners lack access to the documents being considered by the OFA in making its determinations. Any party can submit comments or documents for the OFA to review, and the OFA can conduct its own independent research. The petitioner, however, must submit a FOIA request to obtain copies of the documents submitted. In the event the OFA is considering "splinter" group petitions, those groups must also submit FOIA requests to obtain copies of the information that the OFA is evaluating.

The BIA has implemented the FAIR system, "a computer database system that provides on-screen access to all [of] the documents in the administrative record in a case."[185] While these databases may have been made available to some petitioners and third parties, not all petitioners or third parties have obtained access to these databases.[186] Even tribes with active petitions have been denied access to the FAIR database in their cases.[187] The current FAIR database does not allow for redaction of information protected under the FOIA and privacy acts, but the OFA plans to revise the database to

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[184] BIA Federal Acknowledgment Decision Compilation v 2.0 (2004), available at http://www.indianz.com/adc20/adc20.html.
[185] Hearing on H.R. 4213 Before the House Committee on Gov't Reform, 108th Cong. 3 (2004) (statement of Theresa Rosier, Counselor to AS-IA).
[186] Id.
[187] Letter from Lee Fleming, Director OFA, to Patty Ferguson, attorney Sacks Tierney (Nov. 7, 2005) (on file with Sacks Tierney).

allow for such redaction.[188] To create more transparency, the OFA should not require petitioners to submit FOIA requests for documents submitted by third parties, and the OFA should provide a copy of the FAIR database on cd-rom to petitioners.

Senator Campbell also sought to address issues related to the transparency of the FAP when he introduced S. 297. The Campbell Bill proposed to (1) provide a statutory basis for the acknowledgment criteria that have been used by the DOI since 1978; (2) provide additional and independent resources to the AS-IA for research, analysis, and peer review of petitions; (3) provide additional resources to the process by inviting academic and research institutions to participate in reviewing petitions; and (4) provide much-needed discipline into the mechanics of the process by requiring more effective notice and information to interested parties.[189]

E. INDEPENDENT COMMISSION PROPOSALS

The process for unrecognized Indian tribes to gain federal recognition is problematic as perceived by interested parties, petitioners, and third parties. Current issues with the process include the length of the process, the possibility of duplicative research, and the "exclusive reliance on the Assistant Secretary."[190] The FAP needs "greater transparency, consistency and integrity," in addition to "funding and technical expertise."[191]

Independent commissions have been proposed to potentially cure the ineffective agency process to recognize tribes. The creation of an independent commission may

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188 Oversight Hearing on the Federal Acknowledgment Process Before the Senate Committee on Indian Affairs, 110th Cong. 4 (statement of R. Lee Fleming, Director of OFA).
189 Id.
190 S. REP. NO.108-403 (2004).
191 Id.

relieve reliance upon the AS-IA, who is overburdened with many responsibilities.[192] Petitioners may experience shorter waiting periods throughout the several stages in a recognition process administered by a fully-funded commission.[193] Similar to the expertise currently found in the OFA, individuals on the independent commission could produce well-reasoned and carefully-decided decisions, especially if the individuals possess knowledge in the areas of history, federal Indian law and policy, anthropology, and genealogy.[194] Former AS-IA Kevin Gover believes that the current OFA process requires too much research prior to approving a petition that could be reduced under an independent commission.[195] Gover "believe[s the regulations] call for an evaluation of the petition, the application of a standard of proof that is included in the regulations, and then move on."[196]

1. Bills Proposing Independent Bodies to Assist in the FAP

Two forms of independent bodies to assist in the FAP have been proposed: an independent commission and an advisory board. Under the Faleomavaega Bill, the FAP would be transferred from the BIA to an "Independent Commission on Indian Recognition."[197] The Faleomavaega Bill establishes an independent commission that would "review and act upon documented petitions submitted by Indian groups that apply for Federal recognition."[198] The commission would include three members appointed by

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[192] Id.
[193] Id.
[194] Id.
[195] Federal Acknowledgment Process Reform Act: Hearing on S.297 Before the Senate Comm. on Indian Affairs, 108th Cong. 64 (2004) (statement of Kevin Gover, former AS-IA).
[196] Id.
[197] H.R. 2837, 110th Cong. (2007).
[198] Id.

the President, with the "advice and consent of the Senate."[199] When making appointments, the President would consider recommendations from Indian groups and tribes, and also "individuals who have a background or who have demonstrated expertise and experience in Indian law or policy, anthropology, genealogy, or Native American history."[200] The Faleomavaega Bill outlines a process, including a timeline, for setting a preliminary and adjudicatory hearing after the submission of a petition to the commission.[201]

Senator Campbell proposed to create an "Independent Review and Advisory Board" to assist the AS-IA with decisions regarding evidentiary questions.[202] This board would serve in an advisory capacity to the AS-IA by conducting peer reviews of federal acknowledgment decisions.[203] The purpose of the board would be to "enhance the credibility of the acknowledgment process as perceived by Congress, petitioners, interested parties and the public."[204] The AS-IA would appoint the nine individuals to the board.[205] Three would have a doctoral degree in anthropology; three a doctoral degree in genealogy; two a juris doctorate degree; and one would qualify as an historian. Preference would be given to those individuals with a background in Native American policy or Native American history.[206]

In response to the idea of an advisory board, the BIA suggested that the roles and duties of an independent body should be clearly defined, which is fundamental to an

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[199] Id.
[200] Id.
[201] Id.
[202] S. 297, 108th Cong. § 6 (2003).
[203] Id.
[204] Id. § 6(a)(1)(C).
[205] Id. § 6(a)(2).
[206] Id.

effective recognition process. The BIA believed that the roles of an independent commission should be clearly defined.[207] This is essential so that the commission knows its duties, and it does not do duplicate research already involved in the process.[208] Timelines should also be outlined in order to have an effective independent body, and thus, a more effective process. Finally, the BIA suggested that a process should be established in the event there are disagreements between the OFA recommendations and the advisory board.[209]

In a hearing on the Campbell Bill in 2004, Former AS-IA Kevin Gover testified that he believed an independent commission is the best approach to resolving the federal recognition backlog if it is fully funded and able to begin work promptly.[210] Gover also suggested that individuals selected to serve on the commission should have backgrounds in different areas of expertise.[211]

2. Structuring a Successful Independent Commission

Congress should decide whether an independent commission separate from the BIA or an advisory commission within the BIA would be more efficient. A positive attribute of an independent commission would be the removal of any potential conflict of interest within the BIA in trying to balance its duties to already federally-recognized tribes and its duty to determine whether a tribal group's status should be affirmed. An independent commission would not compete with the BIA's other funding priorities. A

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[207] Federal Acknowledgment Process Reform Act: Hearing on S.297 Before the Senate Comm. on Indian Affairs, 108th Cong. 83 (2004) (BIA written responses to questions submitted by the Committee).
[208] Id.
[209] Id.
[210] Id. at 55 (statement of Kevin Gover, former AS-IA).
[211] Id. at 63.

potential risk of an independent commission is the possibility of reduced funding which can impact the efficiency of the commission, and the possibility that a commission may fail to review and act on all petitions within a specified time frame.

An advisory commission could also be helpful in ensuring that the OFA staff is not requiring petitioners to exceed the burden expressed in the FAP. If the advisory commission is under the BIA, this commission would also be subject to the budgetary priorities of the BIA, which means that it is likely that it would be underfunded and unable to provide the necessary review required to provide guidance to the AS-IA.

Congress should also decide whether an independent commission should be politically appointed as proposed in the Faleomavaega Bill.[212] If individuals are politically appointed, this may encourage "fresh eyes" to review claims. On the other hand, this may affect the use of precedent because new independent commissions may interpret the standards differently. Whether the positions are politically appointed or approved by the AS-IA, the qualifications of the individuals to fulfill their duties on the independent commission should be seriously considered in order to encourage the positive perception of the independent commission, the AS-IA, and the BIA.

Another consideration in creating an alternative body is to decide whether to include in-house counsel to work with the commission. The Campbell Bill required two of the nine individuals on the independent commission to possess a juris doctorate.[213] In-house counsel may work well in an advisory capacity to the independent commission because of a lawyer's ability to analyze and apply regulations and a lawyer's knowledge

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[212] Indian Tribal Federal Recognition Administrative Procedures Act, H.R. 2837, 110th Cong. (2007).

[213] Federal Acknowledgment Process Reform Act of 2003, S. 297 § 6(a)(2), 108th Cong. (2003).

of legal standards. In-house counsel may also be an excellent resource for advising petitioners about the evidence needed when preparing a petition.

An advisory board could work with the OFA to create a more efficient process. Conceivably, the OFA could work on administrative requirements, such as FOIA requests, requests by petitioners for reconsideration of recognition, and lawsuits filed by discontented parties.[214] An independent body's tasks could include: (1) reviewing the substance of a petitioner's claim, (2) providing all interested parties with information earlier in the process so that petitioners, third parties, or any interested party can be more informed and able to fully comply with the regulation's requirements for a petition or to comment on a petition, or (3) fulfilling all tasks in the regulatory process in a timely, efficient manner.

It is unclear whether an independent commission will be more effective in implementing regulations than the OFA, depending on the structure and duties of the OFA and the independent commission. An independent commission should speed up the process of reviewing petitions, and not create an entire new process that will, in the end, only slow down the current process.[215] Establishing incentives for the AS-IA and the independent commission to produce results within a given time period may "create a sense of urgency" in determining the status of petitions.[216] Further, adopting sunset provisions for each stage in the process can guide the regulatory body and the petitioners.

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[214] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49, 16 (Nov. 2001).
[215] Federal Acknowledgment Process Reform Act: Hearing on S.297 Before the Senate Comm. on Indian Affairs, 108th Cong. 49 (2004) (statement of Aurene Martin, Deputy Assistant Secretary for Indian Affairs).
[216] GAO, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, 16.

An independent commission could also provide more transparency to the process. Currently, there is no process for petitioners and their experts to question the methods or analysis of OFA's researchers. A process that provides for an independent commission could include hearings on the record in the vicinity of the petitioner and the cross-examination of experts.

III. RECOMMENDATIONS

Despite the recommendations of a congressional commission, the AIPRC, in 1977, and the introduction of numerous bills addressing the process by which tribes should be recognized, no legislation has been enacted to address the problems with the FAP and the impacts the process has on petitioning tribes. It is clear from past hearing testimony and GAO reports that the current process for recognizing tribes needs reform. The disagreement is the extent and structure of the reform. Any modification of the criteria or standard of proof under the FAP concerns the Department because the Department has a trust responsibility to the existing federally acknowledged tribes. The responsibility entails providing current government resources and services to the acknowledged tribes. If the standard for acknowledgment lessens and more tribes are recognized, funding allocations must be shared among more tribes. These funding decisions reveal an inherent conflict of interest in having the Department decide the fate of a petitioning tribe.

It is apparent from the existing budget and past funding allocations that the OFA is not a funding priority within the BIA. If the BIA, with the help of Congress, prioritized an adequate budget and resources necessary to address the backlog, perhaps an adequate solution could be developed to address the problems with the FAP. The

creation of a commission with independent judgment and decision making would be optimal; however, Congress would need to ensure funding for a commission and its activities. If funding for a commission is not guaranteed, the outcome may be worse than the existing process. Central to the success of eliminating the backlog is the administration prioritizing the federal acknowledgment process and Congress adequately funding the resources needed.

In addition to the procedural recommendations, one substantive recommendation should be considered—changing the starting point for considering social and political community under 25 C.F.R. Part 83 (b) and (c). The Clinic recommends changing the current starting point from historical times to 1850 or the date in which the state it historically occupied was admitted to the union.

Assuming adequate funding is allocated to any revised process, the revised process can provide numerous benefits to Congress, petitioning tribes, the DOI, and the regions in which tribes are located. First, the research used to prepare and analyze a federal acknowledgment petition can serve as an historical resource for that tribe's state and region of the country. Second, providing recognition in a timely manner can bring much needed federal dollars, specifically in the areas of health and education, to impoverished regions of the country. Third, timely review of petitions can help increase the self-sufficiency of tribal people who bear the effects of past discriminatory policies. Fourth, revised procedures can provide more guidance and resources to the OFA, a peer review committee or an independent commission, and the AS-IA. Finally, with a timely, transparent, and well-funded process, Congress may receive fewer requests for

congressional recognition from petitioners and potential petitioners who are essentially stuck in the current process.

A summary of the recommendations follow.

A. Summary of Recommendations

- Appropriate funding for additional staff to assist with administrative needs. As evidenced in the fiscal years 2003 and 2004, the appropriation for additional staff to help with administrative needs allows the OFA researchers to be more efficient, but it is not sufficient.

- Appropriate sufficient funding to create region-specific research teams. Creating teams that are familiar with certain areas and allowing them to focus their time on those areas may increase the timeliness of the petitions.

- Appropriate funding for petitioning groups through the Department of Health and Human Services or some other forum. Providing funding to petitioners will ease the OFA's burden in reviewing the documentation because the petition will likely be more organized, fully analyzed, and more responsive to the criteria. Without assistance to the petitioners in preparing petitions, many petitioning groups will likely not have sufficient resources to complete the process.

- Create an independent body to either take over the FAP functions or assist in the FAP analysis. If a commission is created, the proposed legislation should specify an initial budget for the Commission. In order to determine the amount needed, it is recommended that the Committee request the Government Accountability Office to determine an estimate of startup costs.

- Clarify the burden of proof required of petitioners and direct the body analyzing the petitions to apply the appropriate burden of proof.

- Provide hearings on the record, allowing cross-examination of witnesses and experts.

- Create realistic timeframes for processing petitions.

- Revise the social and political requirements of 25 C.F.R. Part 83(b) and (c) from historical times to the present to 1850 or the year in which the petitioner's state was admitted to the Union

- Automatically provide petitioners copies of documents submitted in their cases without requiring a FOIA request.

- Provide petitioners copies of the FAIR database without requiring a FOIA request.

B. Additional Recommendations Regarding Task Force/Independent Commission/Peer Review Committee

Congress could decide to keep OFA while creating a commission, task force, or peer review committee to aid the OFA in the current backlog. As an alternative, OFA could serve in the area of technical assistance to a commission to ensure that petitioners are informed early in the process and to make sure that petitions are reviewable. Creating a commission that replicates the current practice, without adequate funding, however is not useful. The upside of creating a fully-funded independent commission, separate from the BIA, is that the commission will be ensured funding and not have to rely on the budget priorities of federally-recognized tribes.

- The creation of an independent commission/task force or peer review committee could provide a positive impact on the federal acknowledgement process; the commission could either be independent or serve as a peer review committee lessening the burden on OFA and increasing the efficiency of an acknowledgment process. Congress should determine where the commission, task force, or peer review committee should be located.

- Whether an independent commission is a "peer review" committee to the Assistant Secretary, or an entirely new entity replacing the Assistant Secretary's role in FAP, the duties of an independent commission should be clearly defined within a bill.

- An independent commission consisting of individuals with a variety of diverse backgrounds may produce decisions that are well-rounded and thoroughly reviewed.

- A politically-appointed independent commission may create positive changes in the process because new individuals will review petitions; however, reliable precedents should be taken into consideration.

- An internal deadline for each step in the process should be established, in order to ensure that decisions produced by the independent commission are timely and efficient.

- To ensure that decisions are timely and effective, incentives or goals of the independent commission, OFA, or Assistant Secretary should be established.

- Open lines of communication between the independent commission and petitioners should be created, either through a more transparent review process during the consideration of petitions or through review or adjudicatory hearings.

- Commission members should receive financial support, either travel reimbursement or funding for a fully functional commission.

- If the independent commission/task force is not created, the AS-IA, and Senate staff, with the aid of the GAO, should analyze an appropriation amount to fund additional resources for OFA. The detailed budget analysis should make a suggestion for the amount of additional staff needed within OFA and justification for the positions.

- Identify a time frame by which Congress would like the recognition process would end, and then implement sunset provisions throughout the stages of the process.