

TESTIMONY

of

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**Oversight Hearing on Federal Recognition: The Political and Legal
Relationship Between Governments**

Introduction

Kwankomeluhemo! Nteluwensi Kelekpethakomakw. Ni, hnakay, Wenetko ok Lenape, aweniki Scheyichbi ok Lenapei Poutaxat. *[I greet you all. My name is Smiling-Thunderbear. I am Nanticoke and Lenape, the people of the water's edge and the Lenape round water (New Jersey and the Delaware Bay)].*

I am Pastor John Norwood, a councilman of the Nanticoke Lenni-Lenape Tribal Nation, which is one of the three historically and genealogically interrelated continuing communities of Nanticoke and Lenape people remaining in the area of the Delaware Bay. My tribe is united with the Lenape Indian Tribe of Delaware and the Nanticoke Indian Tribe in the “Confederation of Sovereign Nanticoke-Lenape Tribes.” I also serve as the co-chairman of the Task Force on Federal Acknowledgment of the National Congress of American Indians (NCAI), which is the nation’s oldest and largest national organization of American Indian and Alaska Native tribal governments. The Task Force was established to address the interests of all tribes, both federally recognized and non-federally recognized, on any recommended changes to policies, procedures, or strategic plans in the federal recognition process.

I thank Senator Akaka, the committee, and staff for the invitation to testify at this hearing. I am truly appreciative for the manner in which Senator Akaka has been a champion for not only Native Hawaiians but also for the critical issues confronting non-federally recognized American Indian Tribes.

Background on the Federal Acknowledgment of American Indian Tribes

Federal recognition is the acknowledgement of an American Indian Tribe by the federal government of the United States. It affirms a federal trust responsibility for a “government-to-government” relationship between the United States and the tribal government and establishes tribal eligibility for certain federal American Indian programs. Federal recognition is the correction of an error in the relationship between the United States and the tribal nation receiving the acknowledgement it was always due. Federal recognition does not *bestow* sovereignty, but acknowledges a tribe’s *inherent* sovereignty. Federal Indian Policy holds that American Indian Tribes have a sovereignty that predates the United States and is not bestowed by any federal action.

Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. ... Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather “inherent powers of a limited sovereignty which has never been extinguished.” ... The tribes began their relationship with the federal government with the sovereign powers of independent nations. (Newton 2005, 206)

Furthermore, while the trust responsibility is formally acknowledged by federal recognition, it exists even without such recognition. This fact was included in a 1977 congressional report citing the *Pasamaquoddy v. Morton* case:

Pasamaquoddy v. Morton presented an important decision regarding the executive branch use of the distinction “recognized” and “non-recognized”. The Department stipulated for the purpose of the case that the Passamaquoddy were an Indian tribe, but argued that it was not required as a trustee to prosecute the Passamaquoddy claim against the State of Maine, since the tribe was “unrecognized”. The Court rejected the [Department of Interior’s] position finding that that the United States has a trust obligation to the tribe. The case makes it clear that the executive branch cannot arbitrarily exclude Indian tribes from its trust relationship. (American Indian Policy Review Commission, 478)

While the action of the federal government does not make a tribe or bestow sovereignty, federal recognition extends access for inherently sovereign historic tribes and their citizens to certain rights, protections, benefits, and privileges reserved for federally recognized tribes.

An Indian Tribe is a political community whose origins pre-date the founding of the United States. When the United States opens government-to-government relations with a Tribe, that Tribe is said to be “recognized” or “acknowledged.” An “unrecognized” or “non-federally recognized” tribe is one with which the United States does not formally conduct government-to-government relations. Many non-federally recognized tribes are historically well documented and have been cited in government reports for over a century. Some non-federally recognized Tribes are acknowledged by the States. State recognition, however, does not entitle the Tribe to the full breadth of critical federal protections, services or benefits that flow from a formally acknowledged government-to-government relationship with the United States.

The Congress of the United States has primary jurisdiction over the interaction between the federal government and American Indian Tribes. However, as codified in the “Federally Recognized Indian Tribe List Act of 1994,” Public Law 103-454 of the 103rd Congress, the typical ways that American Indian Tribes become federally recognized are: 1) Through Congressional legislation; 2) Through the Bureau of Indian Affairs administrative process, conducted by the “Office of Federal Acknowledgement;” and, 3) By the ruling of a Federal Court. For roughly the past 35 years, federal recognition has usually either been through congressional action or through the administrative process.

The history of recognition is varied. Tribes that established treaties with the United States during the first 150 years of its history, were considered “recognized.” The process for some federally recognized tribes was simplified due to their enumeration on federal rolls after forced relocation onto reservations.

The earliest means by which the United States “recognized” a particular tribe was, of course, the making of a treaty with that tribe. This has been the usual method of establishing the “government to government” relationship which recognition

really entails. Many tribes, however, never entered into a treaty with the United States. These tribes were too peaceful to present a military threat, too small or isolated to be noticed, or simply possessed nothing that the United States and its citizens desired to have. Other groups simply refused to conclude a treaty with the United States. (Anderson and Kickingbird 1978, 1)

In 1901, the United States Supreme Court determined that a legitimate tribe: 1) is made up of members who are of common historic American Indian descent; 2) is united in affirming some form of leadership or government; 3) has historically inhabited a particular, though sometimes ill-defined, territory. Within the federal court system, the characteristics of independence of action, continuity of existence, a common leadership, and concert of action have been asserted as criteria for identifying whether a group of American Indians are a tribe/nation/band under federal common law.

The 1934 Indian Reorganization Act created a listing of tribes considered to be “under federal jurisdiction,” which eventually became known as “federally recognized tribes.” This list was incomplete. Many historic tribes were left off of the list and, while there have been some subsequent corrections, many who should have been on the list still remain unrecognized.

In the latter 1970’s, the Bureau of Indian Affairs administrative process was established to assist non-federally recognized American Indian Nations in petitioning for federal recognition. Part 83 of the Code of Federal Regulations denominated “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe” provides an administrative process requiring that a petitioner meet seven criteria: 1) A statement of facts establishing that it has been identified as an Indian entity on a substantially continuous basis since 1900; 2) Evidence that a predominate portion of the group is a distinct community and has existed as a community from historical times to the present; 3) Evidence that it has maintained political authority or influence over its members as an autonomous entity from historical times until the present; 4) A copy of its governing document including membership criteria or, if it does not have a formal governing document, a statement describing its membership criteria and governing procedures; 5) An official membership list, all available former lists, and evidence that its current members descend from a historic tribe or tribes that combined into a single autonomous political entity; 6) Evidence that it consists mainly of people who are not members of a federally recognized tribe; and, 7) A statement that it is not the subject of congressional legislation that has terminated or forbidden the federal trust relationship.

From Opportunity to Obstacle...

The administrative process was meant to be an objective method to correct the relationship between the United States and historically verifiable American Indian Nations without federal recognition. However, when reviewing petitions for federal recognition, the manner in which the seven criteria of the administrative process have been applied by the Office of Federal Acknowledgement has become increasingly unreasonable, overwhelmingly expensive, and unjustifiably unpredictable... so much so it is estimated that 72% of currently federally

recognized tribes could not successfully navigate the FAP as the criteria are applied today. The GAO has reported, along with other independent studies and congressional hearings, that the current methodology of the administrative process has become a cumbersome, expensive, and time consuming barrier to the recognition of deserving tribes. The process meant to aid legitimate tribes has become a burdensome obstacle to their recognition. Successful applications once were only a couple of hundred pages of material. Now, tens of thousands of pages of evidence are required, costing upwards of millions of dollars and taking up to thirty-five years of delays in making final acknowledgment determinations. After pouring such resources into an intergenerational effort, many worthy tribes are still unreasonably denied. Two of the most recent approvals of new recognition only occurred after the intervention of the federal courts. Confidence in the Federal Acknowledgment Process has eroded to the point of non-existence.

Tribes now enter the FAP with fewer rights than defendants in criminal proceedings. Criminal court defendants are at least presumed innocent until proven guilty. But, American Indian Tribes must prove their existence beyond any shadow of doubt. One such example is the experience of the Shinnocock Nation, which spent an estimated two million dollars to provide evidence required by the Office of Federal Acknowledgment (OFA) that the people of their community with the same surnames and in the same location, were the same people from one generation to the next generation. After this expense and effort they were then told by OFA that it should not have been necessary to do so. Another tribe was required to produce phone records to demonstrate the communication between tribal members. Such applications of the criteria are beyond what was originally in view when the FAP was initiated, and to require it of tribes today is discriminatory.

The NCAI Policy on Federal Recognition of Indian Tribes (Resolution # PHX-08-055) cites the inequities of the Federal Acknowledgment Process (FAP), claiming that it has “severely deteriorated since its beginning, with unreasonable decades-long delays in considering applications, irrational documentation requirements that defy historical and cultural realities, and [there are] legitimate questions about the fairness and integrity of the process” and that the FAP “has strayed from its original intentions, and has become a barrier to federal recognition, rather than a fair process for facilitating recognition of tribes who meet the criteria” and affirms that the NCAI “strongly supports federal recognition of all Indian tribes that have maintained tribal relations from historical times, their right to timely and fair consideration of their applications under the FAP process, and their right to seek alternative means for recognition of their status as Indian tribes.”

Historic coastal area tribes of the colonial era (including the eastern, western, and southern coastlines) remaining in or near their traditional homelands are most affected by the inequities and deficiencies of the Federal Acknowledgment Process (FAP), which no longer reflects the original intent of the acknowledgment process as a vehicle for the correction of the relationship between the federal government and non-federally recognized historic tribes. Among the many tribes considered non-federally recognized are those which had colonial era treaties, reservations, identified Indian towns, had been identified in studies done by arms of the federal government, had received services from the federal government, and had reason to have been considered

under federal jurisdiction at the time of the 1934 Indian Reorganization Act, but were not included in the Act due to apparent regional or racial biases of the era. These tribes tended to have been peaceful after the formation of the federal government, were not enumerated by the Department of War or placed on federal reservations. They became the “lost” and “overlooked” in Federal Indian Policy. Today, many of these tribes continue to languish in the political and legal limbo of being non-federally recognized... often due to the same biases that had resulted in them not being able to utilize the Indian Reorganization Act.

The reasons that are usually presented to withhold recognition from tribes are 1) that they are racially tainted with the blood of African tribes-men or 2) greed, for newly recognized tribes will share in the appropriations for services given to the Bureau of Indian Affairs. The names of justice, mercy, sanity, common sense, fiscal responsibility, and rationality can be presented just as easily on the side of those advocating recognition. (Anderson and Kickingbird 1978, 17)

The Modern Era of Denied Identity and De-facto Termination...

There is a new marginalization of non-federally recognized historically documented tribes through federal regulations that have begun to exclusively define “Indian” as a member of a federally recognized tribe. This policy is becoming pervasive and is influencing even non-governmental charitable organizations. Many scholarships designated for American Indians are now restricted to those who are citizens of federally recognized tribes. This is an increasing problem for many American Indians who are now treated as though they are not American Indian at all. It is the denial of indigenous identity through administrative reclassification. It is a form of tribal termination.

There are citizens of “non-federal” historically documentable tribes who attended federal Indian boarding schools and colleges, from the late 1800’s until as late as 2001, which they are now prohibited from attending. During the time of the initial involvement of these tribes at some of the federal Indian schools, a minimum of ¼ blood quantum was required; this was eventually changed to require membership in a federally recognized tribe receiving Bureau of Indian Education educational benefits, thus eliminating the attendance of those non-federal tribal citizens, which the BIA had long considered Indians and who had sent their family members away from home to attend federal boarding schools and colleges. (H.E.L.P. Haskell). There is the case of a Haskell graduate who wanted to return for additional study, but was denied because in the years since her graduation, the policy at her alma mater was changed from requiring ¼ blood quantum to membership in a federally recognized tribe. It is a travesty that proud non-federally recognized graduates of Haskell and other federally funded American Indian colleges cannot return for additional study or send their children or grandchildren to their alma mater.

Another example of redefining “American Indian” to mean a “citizen of a federally recognized tribe” is in the Department of Justice’s review of the regulations regarding the possession of Eagle feathers. In her November 30, 2011, letter to Deputy Assistant Attorney General Ethan Shenkman of the Environmental & Natural Resources Division and Tracy Toulou, Director

Office of Tribal Justice at the Department of Justice (DOJ), NCAI Executive Director Jacqueline Johnson Pata summed up the critical concern of NCAI in regard to the impact of narrowing the definition of “Indian” to exclude non-federally recognized indigenous people and issued a critique of the FAP:

NCAI believes that the DOJ should adopt a policy, consistent with the Morton Policy, which addresses tribal use of eagle feathers and other bird feathers and parts only if that policy is created and implemented in a manner that permits all Indigenous peoples in the United States to exercise their religious freedom and maintain their cultural practices. Barring that, NCAI fears that this policy could be more harmful than what currently stands...

...What DOJ is proposing is a significant narrowing of the scope of applicability, which alone makes the proposed policy much more restrictive than the Morton Policy and conflicts with legal and legislative precedent that supports a definition of “Indian” that is more expansive than federally recognized tribes, especially where issues of cultural protection and religious freedom are involved....

...DOJ’s current proposal to limit any new policy to members of federally recognized tribes seems to be based on the assumption that the U.S. Government’s process of federal acknowledgement is working as it should, when it is, in fact, a broken system that needs fixing. NCAI has several standing resolutions on the issue of federal recognition and has provided congressional testimony on the federal acknowledgement process and related issues numerous times. If there is one thing that these resolutions and testimony demonstrate, it is that the federal recognition process has severely deteriorated since its inception. The current system is fraught with unreasonable, decades-long delays in considering applications and irrational documentation requirements that defy historical and cultural realities. These problems raise legitimate questions about the fairness and integrity of the federal recognition process. If the DOJ moves forward with its policy as currently proposed, it would be making prosecutorial judgments about questions of religious freedom based on a wholly unreliable system of federal recognition for tribes...

Another concern that the NCAI Executive Director cites is the conflict between DOJ’s proposal and the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP):

Finally, the position that DOJ has taken on the applicability of its new policy to solely federally recognized tribal members is directly at odds with the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), which President Obama endorsed on December 16, 2011. Article 12 of the Declaration states that: “Indigenous peoples have the right to manifest, practi[c]e, develop and teach their spiritual and religious traditions, customs and ceremonies...[as well as] the right to the use and control of their ceremonial objects...” The Declaration applies to all Indigenous peoples within the United States; it is not limited by the bounds of the U.S. federal recognition process. NCAI believes that the formalization of this DOJ policy presents a unique opportunity for the Obama Administration to reaffirm its

commitment to implement the Declaration by ensuring that the policy protects all Indigenous peoples' rights to possess eagle—and other bird—feathers and parts for cultural and religious use, not just the rights of members of federally recognized tribes.

Astoundingly, DOJ's response regarding the applicability of the UN DRIP, circulated at the NCAI 2012 Mid-Year Conference in Lincoln Nebraska on June 18th, stated that:

...the "United States' existing recognition of, and relationship with, federally recognized tribes" is the "basis for the special legal and political relationship... pursuant to which the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs, including ... culture and religion."

Increasingly, "indigenous" and "American Indian" are being redefined as "federally recognized" based upon a history and process that is known to be hostile, unreasonable, unfair, racially biased, and demeaning to non-federally recognized historically documented tribes. It has become the position of the Executive Branch to also exclude non-federally recognized tribes from formal government consultation even over matters that directly impact them. This was such an issue that NCAI Resolution #PSP-09-008 "Resolution of the National Congress of American Indians on President Barack Obama's First Annual Meeting with Tribal Leaders: Reaffirmation of the Nation-to-Nation Relationship" calls on the United States to "Extend consultation and the Nation to Nation relationship to include state recognized tribes as supported by federal statutes" and also calls on the United States to "Recognize that our Indian tribes are the original Native American nations endowed with inherent natural rights to self-government, self-determination and territorial integrity."

This increasing denial of identity equates to a process of administrative genocide, in which non-federally recognized tribal citizens are being systematically wiped from the political landscape. It is unconscionable that in the thirty five years since the American Indian Policy Review Commission Report of 1977, little has changed...

The results of "non-recognition" upon Indian communities and individuals have been devastating, and highly similar to the results of termination. The continued erosion of tribal lands with a complete loss thereof; the deterioration of, cohesive, effective tribal governments and social organizations; and the elimination of special federal services through the continued denial of such services which Indian communities in general appear to need desperately. Further, the Indians are uniformly perplexed by the current usage of "federal recognition" and cannot understand why the federal government has continually ignored their existence as Indians. Characteristically, Indians have reviewed their lack of recognition as Indians by the federal government in our disbelief and complete dismay and feel classification as non-federally recognized is both degrading and wholly unjustified. (American Indian Policy Review Commission 1977, 463)

A Call for Justice and the Application of Common Sense...

As stated earlier, I am Nanticoke-Lenape, of the people of “first contact.” My people were placed on colonial era reservations, had colonial era treaties, are cited in the historic record since the days of Captain John Smith and the Jamestown Colony. Since latter 1800’s, agencies acting as “arms of the federal government” listed and studied us and academics published scholarly works about us. My relatives attended federal Indian boarding schools. Our specific families have been listed in numerous government reports. Yet, I remain a citizen of a non-federally recognized tribe... increasingly marginalized in a political and legal climate that is hostile to the continuance of my tribe and the confederation of which it is a part.

Federal acknowledgment is a correction of an error in the relationship between the federal government and a historic tribe, improving the ability of the tribal government to assert its rights, protect and preserve its culture, defend its identity, promote its heritage, and provide for its tribal citizens. The lack of such acknowledgment for historically documented tribes is an injustice in need of swift correction. The relationship between American Indian Tribes and the federal government is under the jurisdiction of Congress. The FAP is broken and worthy tribes are languishing without federal status, creating increasing undue hardship for the indigenous communities across the country. We should not be forced to wait any longer for justice. Studies, discussions, and hearings should now give way to action, and the mere “tweaking” of the administrative process has proven to not be the answer.

It should not be presumed that distinguishing and recognizing historically documented tribes is a task beyond the capability of Congress or the Courts. The manner in which the administrative process is currently being applied has made the task overly complicated for both deserving tribes and for the government. Summed up, the criteria need only demonstrate that a tribe applying for federal acknowledgment is “a continuing community of interrelated descendants of a historic American Indian Tribe or tribes which has maintained tribal identity in some manner that can be documented from at least the 19th century or earlier.” It is not “rocket science” or “quantum physics.” Congress can take action, and has in the past. According to a 2003 Congressional Research Service Report from the Library of Congress, from 1973 to 2003, thirty-two (32) tribes received federal status by congressional action. Twenty-five (25) of those were regarding federal recognition with the remaining seven (7) being some other form of status change. Eighteen (18) of the twenty-five received a restoration of their recognition and the remaining seven (7) of the twenty-five which received federal recognition were tribes that never had any previous federal acknowledgement. Tribes that received recognition by congressional legislation between 1980 to 2003 were: Houlton Band of Maliseet Indians (1980); Kickapoo Traditional Tribe of Texas (1983); Mashantucket Pequot Tribe (1983); Aroostook Band of Micmac Indians of Maine (1991); Pokagon Band of Potawatomi Indians of Michigan (1994). Additionally, two tribes’ federal recognition was reaffirmed by federal legislation, the Little Traverse Bay Bands of Odawa Indians of Michigan (1994) and the Little River Band of Ottawa Indians of Michigan (1994).

The United States Congress and the United States courts, as a matter of justice, should assume responsibility for correcting the injustice done to historic non-federally recognized tribes. Congress and the Courts should no longer solely rely on the Office of Federal Acknowledgment to process applications. Instead Congress and the Courts should act in accordance with the expectations of the Federally Recognized Indian Tribe List Act of 1994, utilizing their authority and discretion to immediately acknowledge worthy tribes through legislative acts and court decisions and to provide methods for tribes to access all means to acknowledgment under the Federally Recognized Indian Tribe List Act of 1994. Access to such relief should be simplified for tribes. A tribe should be able to request a judgment from a federal court without having to be a defendant and the courts should act regardless of any pending application before the BIA... which has been recently used as reason for a federal court to defer to the FAP even though such inaction results in a breach of justice for most tribes. Also, action by Congress on acknowledgment should not be an insurmountable task fraught with political intrigue and only successful through expensive herculean lobbying efforts.

Congress should ensure that listing in government reports, reports of agencies used as arms of the government, or receiving of government services should be viewed as prior recognition so that a tribe must only show continuance from that period of historic federal identification or service, and that, as a matter of justice, tribes historically identified, but not included, in the Indian Reorganization Act of 1934 (IRA) should be immediately reviewed for acknowledgment due to the impact of regional and racial bias in the application of the IRA. Tribes cited in government records and studies between the 1880's and 1950's, or which were served through federal Indian schools, should only have to demonstrate continuous community from the period of the government citation or service. Those tribes which qualify under this criteria should receive immediate affirmation of recognition by Congressional legislation.

As a matter of justice, legislative and regulatory measures should immediately be taken by the United State Congress and the Executive Branch to ensure that the criteria for acknowledgment be applied as it was intended and that guidelines used to apply the criteria for the current review of applications for acknowledgment, and the burden of proof, be commensurate with what was utilized to acknowledge tribes prior to 1981. Congress can take immediate action to rectify this injustice and resolve or replace the onerous Federal Acknowledgment Process (FAP) including possibly removing the FAP from the Bureau of Indian Affairs, and if not, replacing the Office of Federal Acknowledgment management and staff at the Bureau of Indian Affairs to ensure a fresh look at the evidence and issues.

Regional considerations should be part of any review for acknowledgment. The history of the area, which may impact a tribe's ability to provide certain types of information or should influence how such information is reviewed, should have weight. Regional histories must be considered when evaluating a tribe for federal acknowledgement and, as a matter of justice, the Congress should commission a study of the regional realities that have impacted tribal histories, especially among coastal area tribes of the colonial era, which affect the manner in which tribes from a given region can meet the federal acknowledgment criteria and that the study be done in cooperation with such tribes to establish regional historical assumptions to be considered in evaluating applications for acknowledgment.

Being weak in a single criteria should not be reason enough for rejection, especially if there is overwhelming evidence meeting other criteria. Objectively reviewing documentation of the tribe's historic and continuing identity should not create the unreasonable evidentiary burden and bureaucratic backlog currently found in the FAP.

“Interested third parties,” should not be able to derail the federal acknowledgment of a deserving tribe. Currently, the comments and political influence of third parties have delayed and denied justice for many historic tribes. This must be prevented.

Conclusion...

The manner that Congress has abandoned historic tribes to an administrative process that is hostile to their very existence should weigh heavily on the national conscience. A cast system has been created and perpetuated in Indian Country by the federal government. Our past, our present, and our future is held hostage by the political and legal disregard of the federal government. My tribal confederation cannot protect the graves of our ancestors, we fight to protect and defend our culture and heritage, we struggle to access support for our elders and children's future.

Congress must act immediately and decisively, in the name of justice. Historically documented tribes identified in federal reports, that received federal services, or whose citizens attended federal boarding schools should be acknowledged by Congressional action. A simplified, fair, regionally sensitive, and objective process for acknowledgment should also be established under congressional direction with the guidance of tribal leaders and tribally endorsed historians and ethnologists representing the regions where non-federally recognized tribes are primarily clustered in the coastal regions of the east, south and west. The ability of tribes to petition the federal courts regarding federal acknowledgment should be provided.

The current degrading atmosphere of increasing denial of American Indian tribal identity and status for non-federally recognized tribes must be eradicated.

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